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SUBMISSION

to

ALBERTA FINANCE

In Response to the

DISCUSSION PAPER

***EMPLOYEE BENEFIT PLANS AND THE INSURANCE ACT,
A NEW APPROACH***

1. INTRODUCTION

The Multi-Employer Benefit Plan Council of Canada (MEBCO) is pleased to have been given the opportunity to comment on the Alberta Finance Discussion Paper which proposes a new approach to employee benefit plans and the *Insurance Act*.

As will be outlined more fully below, MEBCO's mandate is to represent the interests of multi-employer benefit plans (MEBPs). Accordingly, the focus of our comments on this discussion paper will be primarily on those proposals that appropriately apply to MEBPs.

2. WHO WE ARE

MEBCO was established in 1992 to represent the interests of Canadian MEBPs with provincial and federal governments regarding proposed or existing legislation and policies affecting these plans. MEBCO is a federal no-share capital corporation, operating on a not-for-profit basis.

MEBCO represents all persons and disciplines involved in MEBPs, including union and employer Trustees, professional third party administrators, non-profit or "in-house" plan administrators and other professionals including actuaries, benefit consultants, lawyers, and chartered accountants. MEBCO is administered by a Board of Trustees consisting of representatives from each of these groups.

MEBCO currently has over 190 members in jurisdictions across Canada. MEBCO's members have responsibility for administering plans with a cumulative membership of over one million employees and the dependants of these employees across the country.

3. BACKGROUND TO MEBPs

Over the past quarter-century, labour and management have joined together to develop a response to the problems of delivering quality health services and retirement plans to workers and their families in industries typified by small companies and a mobile work force. A single MEBP may be national, provincial, regional, or local in coverage. Anywhere from two to over 1,000 employers may contribute to a single MEBP pursuant to as many collective agreements.

Collective agreements negotiated by one or more unions establish MEBPs and the contributions necessary to finance and provide benefits under these plans. MEBPs are “Trust Funds” and are generally administered by a joint board of Trustees, comprised of an equal number of Trustees appointed by the union(s) and the employers. These Trustees are responsible for receiving contributions from employers, paying certain benefits directly to members and their dependants, and entering into insurance contracts for the provision of other benefits. In the event that an employer is delinquent in making contributions, the Trustees pursue collection proceedings. MEBPs are also required to submit annually audited statements to the Canada Customs and Revenue Agency ("CCRA") under the *Income Tax Act* ("ITA"). In Ontario, these audited financial statements are also filed with the Ministry of Labour, which allows for their review by plan members.

Some of the more common forms of coverage provided by MEBPs include:

- ◆ Extended Health and Hospital Care;
- ◆ Drug Care;
- ◆ Dental Care;
- ◆ Vision Care Benefits;
- ◆ Short-term and Long-term Benefits;
- ◆ Life Insurance;
- ◆ Retirement Pension Benefits;
- ◆ Jury Duty; and
- ◆ Bereavement Leave.

MEBPs have stability built into their plans. First, Trustees, who have fiduciary obligations to the plan's members, administer MEPPs. By law, they are required to be prudent in the investment and management of the benefit funds and can be held liable if they fail to meet their obligations. Secondly, the plan is not dependent on a single employer. If one employer goes out of business, there are others there to continue to make contributions to the fund. Thirdly, there is a constant flow of members into and out of the plan. As members retire, or stop working in their particular industry, others take their place. Finally, because the contributions are subject to a collective agreement the plan is likely to exist indefinitely.

- *Employment Patterns*

A worker may be employed by a particular employer for only a day, a week, a month or a few months, to work on a specific project, and then move on to work on another contributing employer's project, and thereafter another, etc. Between jobs, he or she might be off work for a day, a week, a month or longer. A worker may work for several different employers over his or her working life, with periods of unemployment between jobs. Additionally, a worker may not be employed on a full-time continuous basis – and therefore deemed as part-time.

These plans provide continuous benefit coverage to workers as they change employment from one contributing employer to another. This portability or seamless coverage is essential for workers in mobile, seasonal industries. Additionally, most plans allow for the accumulation of revenues and “pay-direct” mechanisms to protect workers and their dependants during periods of unemployment not uncommon in many of the industries represented.

Without a central plan covering all of his or her work for multiple employers, and non-continuous employment, workers would not have ready access to the many necessary benefits provided by MEBPs. Frequent changes in employment would make

coverage by one employer impossible. Since most employers are small they simply are unable to maintain a separate benefit plan.

- ***Economic Advantages of MEBPs***

MEBPs significantly expand the benefit coverage throughout Canada. MEBPs have been made feasible by the economies of scale enjoyed by the bringing together of large numbers of employees of smaller employers. Financial savings for employee benefits occur in such areas as administration and benefit costs, which would not otherwise be available to individual employers, particularly small employers. Matters such as the design of these benefit plans are the responsibility of the Trustees. This eliminates the need for participating employers to maintain their own plan administration work force. Simply put, MEBPs can use the pool of collectively bargained contributions and the pool of covered workers and their families, to provide benefits directly. Not surprisingly, this has led to a proliferation of MEBPs from which members and their families have benefited greatly.

- ***Financing of MEBPs***

MEBPs are funded through the employees "negotiated wage package" with contributions based on hours worked. Workers covered by MEBPs are highly sensitive to increases in benefit costs since any increase would often translate directly into a lower take home pay.

- ***Multi-Employer Pension Plans ("MEPPs")***

A MEPP is a type of MEBP, which provides a pension for retirement. They provide a point of reference for the treatment and additional understanding of MEBPs.

MEPPs as well represent a significant source of benefit for employees. Data from Statistics Canada indicates that as of January 1, 2000, there were 380 MEPPs in Canada. The total

employee contributions with respect to these plans amounted to an annual \$394,782,000 while total employer contributions were \$1,733,082,000.¹

MEPPs provide one level of retirement savings upon which its members rely. While the provision of retirement benefits under these plans is important, the quantum of the benefits provided to a member is generally not large, as is the case with MEBPs. Therefore, workers who receive benefits from such plans also rely heavily on a floor of protection afforded by public pensions (CPP and OAS/GIS). MEBPs are also designed to integrate with the disability and death benefits of the CPP, EI, workers' compensation, and automobile insurance..

- ***MEPP Funding***

The pension fund of a MEPP constitutes a pool of deferred wages, which are invested over the working lifetime of the employees. Unlike most single employer pension plans ("SEPPs"), however, a MEPP is (as is the case with a MEBP) are generally dependent on collectively bargained contributions.

In the same manner that MEPPs are not guaranteed by employers or another third party in any way (excluding the government guarantee fund in Ontario) coverage provided by MEBPs are not guaranteed. It is unlikely, however, due to the structure of a MEBP that benefits would have to be reduced. Even then, in the case where a reduction might need to be considered, Trustees on the Board, at least 50% of whom are directly employee representatives, will act on behalf of the employees in determining the required action, such as reductions being deferred or recaptured as a result of future co-payments. Disability benefits in pay would, however, not generally be reduced. Similarly, it would be abnormal for a MEBP to reduced accrued benefits, rather it would restructure future benefit plan entitlements. MEBCO suggests that because of these factors, MEBPs are inherently more stable than single employer benefit plans.

¹ Statistics Canada. "Contributions to registered pension plans: Multi-employer plans." prepared by Statistics Canada in November 2001 using reference point of January 1, 2000

4. QUESTIONS FROM THE CONSULTATION PAPER

We have assessed the changes proposed in the discussion paper and offer responses to specific issues. Our responses should be considered together with the following general comments.

There is a trade-off between developing a set of benefit rules directed at preventing any infraction and a resulting increase in plan administrative costs associated with increased regulation.

Also of concern is the multi-jurisdictional regulation of benefit plans. Both federally and provincially regulated employers participate in MEBPs. To the extent that uniform legislation across jurisdictions can be attained, administrative complexity and thus the cost of plan administration is reduced. This suggests, therefore, that **Alberta should pursue an option that harmonizes its regulatory regime with other Canadian jurisdictions. It is, therefore important to consider that under the ITA, IT -85R2 clarifies that benefits do not have to be insured.**²

These following are direct responses to the 5 questions posed in the consultation paper which build on the description of MEBPs provided above.

i. Are employee benefit plans, by nature, insurance, or is insurance simply one way of providing those benefits?

Employee benefits are not insurance. They flow from the negotiated fixed contribution from which Trustees provide such benefits.

Insurance products are only one method of delivering employee benefits. However, a competent Board of Trustees need not seek to purchase insurance to provide long-term benefits, because such a method may not be cost effective and therefore would ultimately

² <http://www.cca-adrc.gc.ca/E/pub/tp/it85r2/it85r2-e.html>

be contrary to the Trustees' fiduciary responsibilities. Forcing insurance on a MEBP would result in taking away benefits that are likely to be successfully provided by a Board of Trustees.

ii. Should all employee benefit plans be treated the same, or should benefits be treated differently, depending on the nature of the benefit and the degree to which employees are at risk of losing benefit entitlements?

MEBPs are different from single employer benefit plans ("SEBPs") and their unique nature must be recognized. All benefits, including long term disability benefits, need not be insured just as health and dental benefits need not be insured. It is up to the Board of Trustees, who are responsible for translating collectively bargained contributions into a plan that will be viable for the long-term, to ensure the viability of the plan. We cannot comment on single employer plans.

The application of uniform rules for all benefit plans has traditionally had a negative impact on MEBPs. While the types of benefits of SEBPs and MEBPs may be similar, the risk of losing entitlement is substantially different. MEBPs provide benefits where such may not exist due to risk and cost. By their very structure and philosophy, MEBPs are a safeguard for employee benefits. As an example, the insolvency of an employer under a SEBP would have a direct impact on the plan. The insolvency of a single employer under a MEBP would have a minimal impact. The unique structure of the MEBP makes the insolvency inconsequential. A further example is termination of employment. In such a case, the benefits of a member of a MEBPs do not cease as a result of their termination of employment with a particular employer.

MEBCO would, therefore, ask that the application of rules toward MEBPs take these facts into account.

iii. If insurance coverage is not available, should employees be denied benefits?

We are not in a position to comment on the rights of individuals to coverage outside of negotiated benefits or those provided under the *Canada Health Act*. However, MEBPs

have been established for the purpose of ensuring the widest possible coverage to the greatest number of employees.

If Trustees are forced to seek insurance for the provision of these benefits, the benefits may become cost prohibitive and many employees will not have access to such benefits. In Canada, there is a very limited market for long-term insurance for MEBPs.

In MEBCO's viewpoint, MEBPs health and welfare benefits and similar programs are socially desirable. Legislation that compromises MEBPs will deny access to such benefits.

iv. Is the establishment of a separate entity with employee representation sufficient justification to exempt employee benefit plans offered by those entities from regulatory protection that would otherwise apply?

In the case of MEBPs, the existence of a Board of Trustees and the fiduciary responsibility demanded of Trustees of MEBPs provides acceptable protection for benefit administration and funding. Under common law fiduciary duties, the duty of care encompasses four distinct duties, which apply, inclusively, to employee benefit plans:³

- To act scrupulously for the benefit of the trust or the beneficiaries and never for himself or herself while carrying out his or her duties. (conflict of interest rule)
- To be active in carrying out those duties and perform them with complete integrity. (the standard of care rule)
- To carry out those duties personally as a result of the trust and confidence reposed in him or her. (the no delegation rule)
- To act impartially between the beneficiaries unless the trust instrument authorizes favoritism. (the even-handed rule)

³ Cowan v. Scargill, [1984] 2 All E.R. 750 (ch.D.).

Additionally, and as noted above, the Board of Trustees of a MEBP is required by law to submit an annually audited financial statement to the CCRA, whether all or any portion of the plan is insured. No such requirement exists for non-MEBPs.

No regulatory assurance is required beyond the requirement of a Board of Trustees' common law fiduciary duties. Every board has at least 50% or more representation by employees. These representatives will look after the interests of their members and the viability of the plan. To require insurance or other forms of regulatory assurance would simply add a layer of administration and cost that would comprise the level of benefits.

v. If the protection of certain employee benefits is considered an important policy goal, are there alternative ways of achieving it, other than through the application of the *Insurance Act*?

Yes, through a MEBP administered by a Board of Trustees acting pursuant to their fiduciary duties. The protection of employee benefits is paramount to the purpose of establishing MEBPs and to the responsibilities demanded of Trustees. Protection and the minimization of risk are built into the structure of MEBPs. The protection afforded by the MEBPs works. *So if its not broken – don't try to fix it.*

5. CONCLUSION

MEBPs are a unique labour and management response for meeting the needs of workers and their dependants. This role should not only be recognized by governments, but also should be preserved and indeed encouraged. Since it is generally understood that MEBPs are inherently more stable than SEBPs, the funding rules applicable to MEBPs may be made less restrictive than those for SEBPs and yet not compromise their ability to provide the promised benefits. MEBPs provide employers, who would perhaps not otherwise be able to provide benefits for their employees, with a greater opportunity to participate in benefit plans. MEBPs should be strongly encouraged.

In consideration of the options presented through this consultation paper, and without needing to go into detail, we cannot support **options one and two** - the *Status Quo* or *the Development of a new regulatory regime*. In either case, they would irreparably compromise access to the benefits that could otherwise be successfully provided by a MEBP Board of Trustees, if not outright eradicate those benefits. **Option three** – *Distinguishing between long-term and short-term benefits and developing a regulatory framework*, is simply unworkable and as noted by the consultation the effectiveness of the regulatory regime is questionable at best and the added costs would be prohibitive. It fails to address our concern while adding to them.

MEBCO believes that **the Government of Alberta should proceed with option four and remove current regulatory requirements for benefit plans as they apply to MEBPs**. As has been noted, this would bring Alberta's approach in line with that of other Canadian jurisdictions. And as stated repeatedly in our submission, **MEBPs currently provide a more-than-adequate level of employee benefit protection**.

We would be pleased to work with the Government of Alberta in transitioning to a new approach to employee benefits based on option number four.

Thank you very much for the opportunity to provide submissions with respect to the Act and employee benefit plans.