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**Re: Submission of the Multi-Employer Benefit Plan Counsel of regarding CAPSA's Proposed Agreement Respecting Multi-Jurisdictional Pension Plans (the "Proposed Agreement")**

We are pleased to make this submission regarding CAPSA's Proposed Agreement Respecting Multi-Jurisdictional Pension Plans (the "Proposed Agreement") on behalf of the Multi-Employer Benefit Plan Counsel of Canada ("MEBCO").

MEBCO was established in 1992 as a not-for-profit, federal non-share capital corporation, to represent the interests of Canadian multi-employer pension and benefit plans with provincial and federal governments regarding proposed or existing legislation and other policies affecting such plans.

MEBCO's volunteer Board of Directors is responsible for identifying issues that impact upon multi-employer plans and developing strategies to address those issues. They are elected from all professions and disciplines involved in multi-employer plans, including union and employer trustees, professional third-party administrators, non-profit and in-house administrators, actuaries, benefit consultants, lawyers, and chartered accountants.

MEBCO's membership currently includes \_\_\_ defined benefit, multi-employer pension plans, many of which have members in more than one Canadian jurisdiction. Multi-employer pension plans belonging to MEBCO have, on average, 400 participating employers each. They have, in total, more than \_\_\_\_\_ plan members. MEBCO represents multi-employer pension plans with assets totalling more than \_\_\_\_\_.

Prior to providing our comments on the Proposed Agreement, we believe it would be valuable briefly to provide some background regarding multi-employer defined benefit pension plans and, in particular, how they differ from single-employer pension plans. While single-employer pension plans are currently the dominant form of pension plan in Canada, the number of plan members covered in multi-employer pension plans is surprisingly close.

For example, according to the recent Report of Ontario's Expert Commission on Pensions, there are just over 6,000 single employer plans registered in that province, compared to just 127 multi-employer pension plans. However, membership overall is "almost evenly balanced between these two types of plans" with 55% of plan members belonging to single-employer pension plans and 45% belonging to multi-employer pension plans.

Multi-employer pension plans developed out of the collective bargaining process as a response to the problems of providing retirement benefits to unionized workers employed in industries typified by small companies and a mobile work force. Members of multi-employer pension plans work in industries as diverse as construction, manufacturing, food service, retail, hotel, restaurant, graphic communications, healthcare, education, garment manufacturing, security, textiles, transportation, and entertainment. A single, multi-employer pension plan may be national, regional, provincial, or local in coverage. Anywhere from two to more than 1,000 employers may contribute to one of these plans in accordance with the terms of their collective agreements. It is estimated that there are approximately 200 multi-employer pension plans in Canada with more than one million members.

A multi-employer pension plan is typically structured as a pension trust fund for purposes of s. 149(1)(0) of the *Income Tax Act*. The trustees, who may be appointed by both labour and management, or labour only, are appointed pursuant to a trust agreement and are responsible for the administration of the plan and its trust fund. Such plans may handle their administration in-house or hire a third-party administrator.

As noted above, trade unions normally represent members of multi-employer pension plans. In a classic multi-employer defined benefit pension plan, contributions are fixed by collective agreement and an employer's only obligation is to pay the required contributions and provide the information necessary to administer the plan. As employers cannot be forced to make contributions in excess of those required by their collective agreements, a defined benefit multi-employer pension plan is in reality a target benefit plan as accrued benefits may have to be reduced to alleviate a funding shortfall. Such benefit reductions are currently permitted in all provinces but Quebec.

Multi-employer defined benefit pension plans based on union-management negotiations are a cornerstone to the provision of retirement income in Canada. Unlike single employer plans, multi-employer pension plans are not being wound up, converted to (or replaced by) defined contribution plans, or subject to wind-up because of the insolvency of a single employer. They are also not the subject of disputes about contribution holidays or the ownership of any surplus as employers are required to continue to make contributions regardless of the funding level of the plan and all contributions are

ultimately used to pay benefits or pay administrative expenses. In his May 2007 comments to a Toronto pension conference, then Bank of Canada Governor David Dodge stated that multi-employer pension plans are an important method of providing retirement plan coverage and that efforts should be made to promote them.

### **The Proposed Agreement**

MEBCO's over-riding concern with respect to the Proposed Agreement is that it appears to have given insufficient consideration to the unique characteristics of defined benefit, multi-employer plans. MEBCO is concerned that, if it is enacted in its current form, the Proposed Agreement will create a number of problems for multi-jurisdictional, multi-employer plans and create inequities in the treatment of similarly-situated individuals who are members of the same pension plan.

In particular, we note that the Proposed Agreement uses solvency funding as key criteria for determining how a particular benefit will be treated. While we appreciate that doing so may be appropriate in the context of single-employer pension plans, we submit that whether or not a particular benefit must be funded on a solvency basis is not a valid way to differentiate between the treatment of different types of benefits in the context of multi-employer defined benefits plans.

In this regard, we note that Alberta, British Columbia, Ontario and Nova Scotia currently all have solvency funding moratoriums for eligible multi-employer defined benefit plans. Additionally, the reports of Alberta and British Columbia's Joint Expert Panel on Pension Standards, Ontario's Expert Commission on Pensions and the interim position paper of Nova Scotia's Pension Review Panel all recommend that such relief be made permanent.

### **Section 3 – Determination of the Major Authority**

For the most part, the pension legislation governing single-employer pension plans in all Canadian jurisdictions is very similar. As a result, should the Major Authority of a single employer plan change from one jurisdiction to another, the plan will be able to continue in the same basic form, although the funding requirements for the plan may change. The same cannot be said for multi-employer defined benefit plans.

As noted above, as contributions to multi-employer defined benefit plans are negotiated and fixed by the applicable collective agreements, in order to deal with a funding shortfall such plans must be able to reduce accrued benefits. However, such benefit reductions are not permitted by Quebec's *Supplemental Pension Plans Act* ("SPPA"). In fact, the SPPA contains no mechanism by which continuing employers may be required to make contributions in excess of those required by their collective agreements. The only time a Quebec employer may be required to make additional

payments to a multi-employer defined benefit plans is should it withdraw from the plan at a time at which it is underfunded.

All Canadian jurisdictions except Quebec recognize that the fixed employer contribution obligation to a multi-employer plan cannot be reconciled with an absolute ban on reductions to accrued benefits. Indeed, one of the requirements for a multi-employer plan registered in Ontario seeking to elect the solvency funding moratorium is that the plan provisions permit benefit reductions.

In short, it is simply not possible for a plan to remain viable if it has both fixed contributions and fixed benefits. Should a multi-employer defined benefit plan be required to change its jurisdiction of registration to Quebec, it will become non-viable immediately upon incurring any funding shortfall which cannot be eliminated utilizing the plan's contribution margin. We note that at least two multi-jurisdictional, multi-employer defined benefit plans registered in Ontario have specific provisions barring employees subject to the SPPA from participating.

The Proposed Agreement, as currently drafted, provides that a plan's Major Authority is the regulator of the jurisdiction with the plurality of that plan's active membership. MEBCO submits that it would be more appropriate for the Major Authority to be based upon the plurality of all plan members, not just active members. If the Proposed Agreement is implemented as currently drafted, an otherwise viable multi-employer plan with members in Quebec and other provinces risks becoming non-viable should its active membership decrease unevenly across jurisdictions as the plan matures.

Additionally, we note that in the report of Ontario's Expert Commission on Pensions, the Commissioner observed that in his consultations with various pensioner groups, one issue that frequently arose was the concern of such retirees that they were treated as being irrelevant to the operation of their pension plans. MEBCO submits that the Proposed Agreement, as currently drafted, will only exacerbate such feelings as it in fact makes retirees entirely irrelevant to the determination of which regulatory regime will apply to their pension plan.

MEBCO submits that the Proposed Agreement should be amended to provide that a multi-employer defined benefit pension plan's Major Authority is the regulator of the jurisdiction with the plurality of that plan's total membership.

We also submit that the determination of the Major Authority requires another review since, in the example included in the Commentary Guide, a simple indication that plurality is changing gives rise to the possibility of a change in Major Authority. However, the proposed method does not establish that the Major Authority be the one of the province where it is clearly demonstrated that there is plurality. MEBCO is

concerned that, since many of its members operate in industries, such as construction, where employment follows the economic cycle, plurality can change many times over the life of the pension plan. As noted earlier, because funding is to be determined by the Major Authority, this can create instability and uncertainty for the administrators and members of these plans. MEBCO therefore strongly urges that Section 5 be reconsidered in light of the particular qualities and features of multi-employer defined benefit pension plans and the members of such plans whose employment is much more transitory than is the employment of members of single employer pension plans.

Since the change in Major Authority has required, in practice, a restatement of pension plan documents to align with the new Major Authority's requirements, we suggest that this is an expensive proposition for most multi-employer pension plans. We therefore recommend that multi-employer pension plans be permitted to have a uniform document, such as a plan text, which does not need to be re-written when the Major Authority changes.

MEBCO also recommends that there be clear notice provisions and an appeal process set out in the regulations so that pension plan administrators have the opportunity to prepare for a change in Major Authority and to present information that may come to bear on such a change. In some jurisdictions there are important differences in filing requirements and, if a pension plan does not have adequate notice about a change, it could be immediately out of compliance with the new Major Authority.

It would also be important for the outgoing Major Authority to have resolved all issues it was dealing with in respect of the pension plan which is changing Major Authority. It would not be reasonable to have a pension plan left with unresolved questions, plan amendments etc. due to a change in Major Authority. If the Major Authority has ruled on funding issues to do with a pension plan, consideration should be given to allowing the administrators of such plans to rely on such ruling for a period of not less than five years so that such plans are not faced with new reviews of funding, benefits, etc. simply due to a change in Major Authority.

## **Section 6 – Applicable Legislation**

This section of the Proposed Agreement, as currently drafted, requires that a benefit, which is required to be funded on a solvency basis by a Minor Authority be so funded for members employed in the Minor Authority's jurisdiction, even if the Major Authority's legislation does not require such funding. While this provision may be workable in a single-employer plan, in which one corporate entity is ultimately responsible for providing all funds required to alleviate a funding shortfall, it will create inequitable treatment amongst members of classic multi-employer defined benefit plans in which

contributions are fixed by collective agreement and benefits may be reduced in order to deal with a funding shortfall.

At the very least, section would result in a multi-jurisdictional, multi-employer plan registered in a jurisdiction where solvency funding is not required having more than one transfer ratio depending upon the province of employment of the members. In fact, if the recommendations of Alberta and British Columbia's Joint Expert Panel on Pension Standards and Ontario's Expert Commission on Pensions become law, it is quite possible that a multi-employer pension plan could have three different transfer ratios - one for members in British Columbia or Alberta; one for other provinces which no longer require solvency funding, and a third for members in jurisdictions requiring solvency funding for multi-employer plans. MEBCO submits that, if section 6 of the Proposed Agreement is adopted, as currently drafted, it will create unnecessary complexity for multi-jurisdictional, multi-employer pension plans.

More importantly, it would also result in considerable inequity, as similarly-situated members of the same plan would be treated in a very different fashion. For example, suppose a multi-employer plan is registered in a province not requiring solvency funding and is 75% funded on a solvency basis. Contributions to that multi-employer plan are fixed by the applicable collective agreements. The plan receives \$40,000 a month in contributions, of which \$30,000 is required to cover normal costs. One-third of the plan's membership works in a province where any solvency shortfall must be eliminated within five years. The required special solvency payments are \$10,000 a month. If those special payments are made as required by the Proposed Agreement, that portion of the plan would be fully funded after five years.

As multi-employer plans have no mechanism to require employers to increase their contributions to fund the special payments, after five years the rest of the plan would still be only 75% funded on a solvency basis (assuming no other changes) since a disproportionate share of the plan's total contributions were allocated as special payments to the members of the plan employed in the jurisdiction requiring solvency funding. This is despite the fact that the contribution and benefit accrual rates are the same for all members regardless of the province of employment.

Additionally, if the plan were to be wound up, it is arguable that section 14 of the Proposed Agreement would mandate that all of the benefits of members employed in the jurisdiction requiring solvency funding would be allocated to those members before anything is allocated to other members since the proposed allocation system is based virtually entirely upon whether a particular benefit must be funded on a solvency basis. If the plan were to be wound up while less than fully funded, the members of the

jurisdiction not requiring solvency funding would have their benefits reduced while the benefits of the other members would be fully protected.

Of course, another possibility is that the plan would provide substantially lower future accruals for the same contribution rates to members in provinces that require solvency funding. However, doing so could result in members negotiating themselves out of the plan and those members ceasing to accrue pensions for their retirement.

This point will be revisited below during the discussion of the problems inherent in the Proposed Agreement's allocation of plan assets amongst jurisdictions upon a partial or full windup.

### **Section 13 - Plan with More than One Participating Employer**

While the title of this section of the Proposed Agreement may lead some to believe that it provides a complete code regarding the allocation of assets amongst jurisdictions for plans with more than one employer, that is not the case. The problem is that section 13 includes a number of specific criteria that must be met before a plan will fall within its application, including that the legislation of the Major Authority provide for this type of plan. We note that currently only plans registered in Alberta as multi-unit plans would be covered by section 13 and that such plans, pursuant to Alberta's legislation, are not classic multi-employer defined benefit plans but rather are plans in which the employers are ultimately responsible for making up any funding shortfall.

Additionally, we note that the criteria of section 13 virtually eliminate the pooling of risk amongst all plan members regardless of their individual employer and the pooling of expenses, both of which have long been considered some of the more attractive features of multi-employer defined benefit pension plans.

### **Section 14 - Allocation of Plan Assets Among Jurisdictions**

This section of the Proposed Agreement provides rules for the allocation of assets among jurisdictions following the windup or division of a multi-jurisdictional plan. Essentially, it details a priority of allocations amongst the various jurisdictions, with all the benefits in a particular priority level being allocated by jurisdiction prior to those in the next level of priority being allocated.

The first level of priority applies primarily to contributions to defined contribution plans and the interest payable on such contributions. The second level of priority is for what the Proposed Agreement calls "core liabilities". For active and deferred members, core liabilities are normal retirement benefits which the applicable legislation requires to be funded on a solvency basis and include death benefits and amounts which have yet to

be transferred pursuant to the portability option. For pensioners, core liabilities include pensions in pay.

The third level of priority includes amounts not included in the first two levels of priority which the applicable legislation requires to be funded on a solvency basis and includes consent benefits and subsidized early retirement benefits.

The fourth and final level of priority provides for the allocation of all the benefits which were not funded on a solvency basis.

As noted above, the fact that some jurisdictions do not currently require multi-employer plans to be funded on a solvency basis, or that there are jurisdictions expected not to require funding on a solvency basis in the future, has been totally overlooked by the drafters of the Proposed Agreement. As a result, the allocation of assets scheme in the Proposed Agreement fails to protect in any meaningful way the benefits of plan members whose benefits are not funded on a solvency basis. This makes the Proposed Agreement totally unworkable for classic multi-employer pension plans, if its Major Authority does not require that its benefits be funded on a solvency basis.

(Note: It is unclear whether for the purposes of the Proposed Agreement a benefit which the Trustees can elect not to fund on a solvency basis will be considered as one which is required to be funded if the Trustees make no such election.)

Consider the following scenario. If 50% plus one of the members of a multi-employer, defined benefit plan are employed in Ontario (where solvency funding of such plans is currently not required) and the rest are employed in Quebec, the Major Authority would be Ontario. If that plan were wound up while 90% funded on a solvency basis, pursuant to the allocation scheme contained in section 14, as currently drafted, 100% of the value of the Quebec members benefits (including all of their subsidized early retirement benefits) would be allocated to that jurisdiction before any benefits at all are allocated to the Ontario members.

As the plan was less than fully funded on the date of windup, there will have to be a benefit reduction. However, as the benefits of the Quebec members will be allocated to them prior to any reduction being required, the Ontario members will have their benefits reduced by 20%, twice the reduction they would otherwise have to suffer. This would be the case despite the fact that the contribution and benefit accrual rates are the same for all members of the plan regardless of their province of employment.

Unlike Ontario's pension regime, Quebec's SPPA provides that an employer withdrawing from a defined-contribution/defined-benefit plan must make up its portion of any funding shortfall at the time of its withdrawal. However, section 14, as currently

drafted, would result in the members who have access to this protection not having to make use of it while the members who do not have such protections having no protections at all. MEBCO submits that, if section 14 of the Proposed Agreement is implemented as currently drafted, it will create significant inequities in the treatment of similarly-situated individuals who are members of the same multi-employer, defined benefit pension plan.

MEBCO submits that, while section 14 may be appropriate for single-employer plans, a completely separate section should be added to the Proposed Agreement to deal with the allocation of assets between jurisdictions for multi-employer, defined benefit plans should they be fully, or partially, wound up.

We submit that, for such an allocation scheme, the rules of the pension plan being allocated (as opposed to only the Proposed Agreement) may provide for the allocation of assets on some other basis. In the event of a shortfall in funding for a multi-employer defined benefit plan, the origin of contributions should be a factor in determining allocation. For example, multi-employer defined benefit plans often provide past service benefits on the basis that they will be paid for over a 15-year period. If a bargaining unit participates in such a plan for 15 years or more, all of its past service will be paid for. Multi-employer, defined benefit plans should be permitted to provide that past service, which has been paid for, will be allocated to the jurisdiction of that bargaining unit before past service of a bargaining unit which was in the plan for only seven years, and is thus not paid for, is allocated. Accordingly, MEBCO submits that any allocation scheme for multi-employer, defined benefit plans should be flexible enough to permit the application of the rules of the pension plan to the allocation of its assets.

### **Conclusion**

MEBCO submits that the Proposed Agreement's reliance upon whether or not a particular benefit must be funded on a solvency basis as the determining factor for the priority of the allocation of such benefits amongst jurisdictions is inappropriate for multi-employer defined benefit plans, given the recent changes to the funding requirements of such plans. As noted above, Alberta, British Columbia, Ontario and Nova Scotia all now have solvency funding moratoriums for such plans. Given the recommendations of the various pension law review panels of those provinces, it appears very likely that relief from solvency funding will be made permanent in at least some of those provinces.

We note that Ontario's Expert Commission on Pensions is recommending that solvency funding relief be expanded to include some types of single-employer plans and the interim report of Nova Scotia's Pension Review Panel recommends the abolition of solvency funding for all plans. However, we will leave comment regarding the potential impact of the Proposed Agreement on such plans to groups more familiar with them.

The Proposed Agreement, as currently drafted, uses whether or not a particular benefit must be funded on a solvency basis as a way to delay the allocation of certain types of benefits (e.g. grow-in benefits, consent benefits) until other more substantive benefits are fully allocated. We submit that, rather than using solvency funding as a proxy for such determinations, the Proposed Agreement specifically identify which types of benefits have priority in allocations between jurisdictions and which do not.

By and large, the recent provincial review panel reports have recognised that multi-employer plans are substantially different from single employer plans, and have recommended different regulatory frameworks be established for the different types of plans. The Proposed Agreement does not do this. Rather, it follows the historic problematic path of trying to squeeze different types of plans into a single regulatory framework – the one for single employer plans. MEBCO strongly urges that the Proposed Agreement be redrafted with special provisions for multi-employer plans, and that MEBCO actively participate at the drafting stage to assure that the provisions are supportive of the successful continued operation of such plans.

All of which is respectfully submitted.