

MEBCO SUBMISSION RE QUÉBEC MULTI-EMPLOYER ISSUES

Tom Levy August 6, 2009

Hon. Sam Hamad
Minister of Employment and Social Solidarity
Government of Québec
425, rue Saint Amable
4th Floor
Québec, QC G1R 4Z1

Dear Minister Hamad:

MEBCO recently received information suggesting that Québec is considering issues related to the regulation of multi-employer defined benefit pension plans in accordance with the Supplemental Pension Plans Act (“SPPA”). Québec’s regulation of such plans, including those with members in multiple jurisdictions, differs in important ways from the regulation of such plans throughout the rest of Canada. While the Québec scheme is perhaps intended to provide superior protection to participants in such plans, it in fact results in some such plans affirmatively excluding employers in Québec from participating, which is clearly adverse to Québec workers. Further, where such plans already cover Québec workers, the SPPA is enormously disruptive to plan operations and will likely lead to significantly lower benefit accruals for Québec participants compared to accruals for workers in the rest of Canada. Therefore, MEBCO strongly urges substantial changes in the SPPA to conform with the regulatory environment in the rest of Canada.

This submission is intended to highlight some of the most problematic inconsistencies in order to help you fully understand the magnitude of the adverse impact of the current regime, including the harmful impact on Québec workers and employers. MEBCO would be pleased to work closely with the Ministry to craft detailed changes that would make this important and successful vehicle for providing retirement income attractive to Québec employers and workers.

MEBCO

MEBCO was established in 1992 to represent the interests of all types of Canadian multi-employer benefit plans, including multi-employer pension plans (“MEPPs”) and multi-employer health and welfare benefit plans (“MEBPs”). MEBCO is representative of all persons and disciplines involved in these plans, including union and employer trustees, professional third party administrators, non-profit or “in-house” plan administrators, attorneys, actuaries, consultants, investment management professionals and chartered accountants. MEBCO is administered by a Board of Directors consisting of representatives from each of these groups. MEBCO is representative of MEPPs that have, on average, 400 participating employers.

MEBCO members have responsibility for administering benefit plans with accumulative membership of workers and families of over one million persons in Canada.

MULTI-EMPLOYER PENSION PLANS (“MEPPs”)

Over the past decades, labour and management joined together to respond to the problems of delivering retirement benefits to workers and their families in industries typified by small companies and a mobile work force. Members of MEPPs work in industries as diverse as building and construction, food, service, retail, hotel and restaurant, graphic arts, garment manufacturing, security, textiles, transportation, and entertainment. A single MEPP may be national, regional, provincial, or local in coverage. Anywhere from two to over 1,000 employers may contribute to one of these plans under collective agreements.

MEPPs provide continuous benefits coverage to workers as they change employment from one contributing employer to another. This portability provides seamless pension coverage, and is essential for workers in mobile or seasonal industries such as construction and entertainment.

A MEPP is typically structured as a pension trust fund for purposes of s. 149(1)(0) of the *Income Tax Act* (the “ITA”). The trustees, appointed pursuant to a trust agreement, are usually responsible for the administration of the plan and the fund. A fund will either handle its own administration or hire a third party administrator.

Multi-employer defined benefit pension plans based on labour-management negotiations in the private sector are a cornerstone to the provision of retirement income in Canada.¹ Unlike single employer plans (SEPPs), these 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 not the subject of disputes about contribution holidays or surplus ownership. Further, the “defined benefit” is in reality a target benefit,² because contribution rates typically are fixed in collective agreements.

MEPPs are administered by a Board of Trustees comprised of at least 50% member representatives.³ All aspects of plan administration, investment of funds, etc. are the responsibility of the Trustees, not the participating employers.

“Traditional” MEPPs have fixed contribution rates that cannot be changed by the Trustees who administer these plans. Minimum funding requirements do not cause MEPPs’ contribution income to increase. The only way to remedy an apparent minimum funding violation is to reduce benefits. In most jurisdictions, the Trustees have the authority to make such benefit reductions, typically subject to approval by the regulator. Thus, these plans are more accurately described as having “target” benefits, with the members effectively bearing the risk.

¹ According to the report commissioned by the Ontario Expect Commission on Pensions entitled *Current Issues Concerning Multi-Employer Pension Plans in Ontario* by Elizabeth Shilton, there are over 400 MEPPs in Canada covering over 1.5 million participants.

² As will be discussed later, Québec is a notable exception to this principle.

³ There are a number of MEPPs, including some very large ones, where the Trustees are entirely drawn from member representatives, and there is no employer representation.

All assets in a MEPP belong solely to the participants – there are no issues of surplus ownership or funding of deficits

MEPPs are fundamentally different from SEPPs and therefore require a different legislative and regulatory framework.

ISSUES FOR DISCUSSION (DEFINED BENEFIT PLANS)

Target Benefits

As discussed above, in the event of adverse experience such as that recently experienced by almost all Canadian pension plans, MEPPs' trustees do not have the power to increase contributions, and therefore must respond by reducing benefits. The Régie des rentes de Québec ("RRQ") has taken the position that the SPPA prohibits such reductions with respect to accrued benefits earned in Québec. When the Court of Appeal of Québec ruled otherwise, the government, without consultation, modified Bill 68 to reverse the Court of Appeal's conclusion retroactively. In effect, the trustees of MEPPs are now required to comply with the SPPA's funding requirements, but have no viable way to do so, as they can neither increase contributions nor decrease accrued benefits. It is true that future accruals may be reduced. However, for many MEPPs the value of past accruals dwarfs the new accruals of current workers. If the entire consequences of a market decline must be absorbed by the new accruals, these future accruals will often be negligible, and in some cases even the elimination of future accruals altogether will be insufficient. We believe such one-sided treatment is inequitable, and it may be a breach of the trustees' fiduciary duty to force one subgroup of the participants to absorb the entire impact of a market decline, particularly when the cause of the need to cut benefits relates to past contributions, not future ones. Further, without significant new accruals, active workers will not agree to divert part of their compensation package to the pension plan, thus leading to the wind-up of the plan, to the detriment of everyone involved.

A recent actual situation is illustrative of the current difficulty. Simplified, a plan registered in Ontario with about half of the membership in Québec needed to reduce benefits about 10% across-the-board to meet provincial funding requirements. The trustees attempted to do that, but the RRQ's position was that no reductions could be made in accrued benefits earned in Québec. The Ontario regulator informed the trustees of the RRQ's position, but ordered the trustees not to further penalize the non-Québec members in order to comply with Québec's requirements. That leaves the trustees with no realistic options for complying with the applicable funding requirements and no way to treat all participants equitably. It may well be that the only option for the trustees will be to terminate the participation of all Québec employers – a solution that will deprive Québec workers of their expected pensions and potentially lead to protracted litigation, financed by fund assets that would otherwise be available for benefits.

In most of Canada, the trustees of a MEPP have the ability to use their fiduciary judgment to allocate benefit reductions, subject to review by the pension regulator. We ask for the same treatment in Québec.

Note that the largest multi-employer plan in Québec, the CCQ plan in the construction industry, converted some years ago to a defined contribution plan, which is a less effective way of providing retirement benefits to workers. As a result, new CCQ retirees in 2009 have faced benefit reductions from the market turmoil. It is not clear why such reductions should be permitted for participants in a government-sponsored MEPP but prohibited for other MEPPs. Further, employer contributions to the CCQ plan go to fund the defined benefit deficit, thus significantly impairing new benefit accruals for today's workers.

Solvency Funding

Solvency (wind-up) funding requirements are intended to improve benefit security for pension plan participants in the event of an actual plan wind-up. It should first be noted that wind-ups of MEPPs are extremely rare, because the insolvency of a single employer is typically not an important adverse event for a plan with many employers. Although, a significant number of Canadian MEPPs are registered in Ontario, to our knowledge there have been only three wind-ups of MEPPs in Ontario in the last 20 years. They occurred (a) where an industry – textiles – essentially moved out of Canada or (b) where the participants concluded that they were not interested in having a plan. Thus, the event to which solvency funding relates almost never happens.

Our understanding is that the CCQ pension plan is not subject to the SPPA's solvency funding requirements. Ontario, Nova Scotia, Alberta, and British Columbia all have moratoriums in place that permit the elimination of solvency funding requirements for MEPPs under their Pension Benefits Acts ("PBAs"), and the pension review commissions established in those provinces have essentially recommended that solvency funding be permanently eliminated from the PBAs for MEPPs. The reasoning behind this change is fairly straightforward.

In the single employer private sector environment, solvency funding requirements increase required employer contributions without increasing benefit obligations, thus improving the security of past benefit accruals. This improved security reduces the risks related to benefit reductions in the event of an actual plan wind-up.

For MEPPs, increased contributions are not available, because employer contributions are fixed in multi-year collective agreements. Therefore, solvency funding requirements compel lower benefits – the precise result that solvency funding is intended to prevent. Put another way, solvency funding for MEPPs takes the highly unlikely event that it is nominally supposed to prevent – benefit reductions in the unlikely event of plan wind-up – and turns it into a certainty.

The provinces that regulate most MEPPs in Canada currently permit solvency funding relief for MEPPs. We ask for the same provision in Québec.

Employer Liability

Outside of Québec, the pension contribution obligation of a MEPP employer may be limited to the rate negotiated in its collective agreement. It is typical for a MEPP to provide, in case of an employer terminating its participation, some method of evaluating that employer's history and, where actuarially necessary, reducing benefits solely for that employer's workers and retirees. If that were not possible, the remaining employers and employees would necessarily absorb the unfunded obligations related to the withdrawing employer's participation. That could lead to a "death spiral" for the plan – no healthy employer would want to remain in the plan if it might have to pay for the unfunded benefits of withdrawn employers, so there would be a rush to get out first.

The SPPA has a different procedure. An employer whose participation terminates for any reason (including lack of work in Québec, union decertification, plant shutdown, etc.) may be required to make an additional contribution to the plan to fund its share of the plan's unfunded benefits. In theory, that avoids the "death spiral" risk. In practice, however, it guarantees that no Québec employer who is not already participating in a MEPP will join, because its obligation is no longer limited to the amount it has agreed to pay at the bargaining table. Again, a provision of the SPPA that is designed to provide benefit security has the unintended effect of preventing Québec workers from having a pension plan altogether.

Outside of Québec, an employer's obligation to a MEPP may be clearly defined and limited, which makes negotiating participation in a MEPP an attractive option. We request the same treatment in Québec. Otherwise, this form of pension plan will continue to be unavailable to Québec workers except where employers were unknowingly "trapped" in the past by their belief that all their contractual limitations were enforceable.

Employer Approval of Amendments

Throughout the rest of Canada, employers sign a participation agreement when they join a MEPP that delegates all authority for plan administration and changes to the benefit structure to the trustees. They are willing to do so because their obligation is limited to a specific bargained contribution. Québec, on the other hand, requires every single participating employer to explicitly approve every amendment (except those required by law), presumably because the employer's obligation is not limited. The SPPA requirement is contradictory to most plans' trust agreements. More important, it essentially becomes an insurmountable obstacle to providing better pensions to workers in Québec.

One MEPP is currently in an absurd position with respect to this requirement. An employer has withdrawn, and its withdrawal liability is substantial. The position of the RRQ is that the employer's participation can only be terminated by a plan amendment, and that the withdrawn employer must consent to that amendment. If the withdrawn employer does not consent, its participation is not officially terminated, so it will argue that it cannot be compelled to pay its withdrawal liability. Obviously, it is hard to imagine an employer consenting to a plan amendment when the only effect of the amendment is to trigger a large obligation.

Outside Québec, the trustees have full authority to make plan changes. We request the same treatment in Québec.

Pension Committees and Annual Meetings

By law, at least 50% of the trustees of a MEPP must represent plan members. This is obviously substantially better in terms of plan control than a typical Québec pension committee where a majority of the membership is appointed by management. Therefore, we request elimination of the pension committee requirement for MEPPs.

The mandatory 50% minimum requirement of member representation also assures that member communications occur when, as, and if needed. Further, for multi-jurisdictional plans, a mandatory annual meeting in Québec has the practical impact of forcing the trustees to have many similar meetings elsewhere. With fixed negotiated contributions, administrative and operational expenses come from funds that would otherwise be available to provide better pension benefits. Thus, the trustees should be able to use their discretion with respect to incurring member meeting expenses, not compelled to hold such meetings.

Pre-Retirement Indexing and Immediate Vesting

Québec requires pension accruals in the province to vest immediately and, in case of pre-retirement terminations, for deferred vested benefits to be partially indexed during the deferral period. No other province currently has either requirement. This interferes with national uniformity for multi-jurisdictional plans. More important, because a MEPP's contributions are fixed in multi-year agreements, this often diverts money that would otherwise be used for retirement benefits to current income for those who have no significant connection to the industry that sponsors the MEPP.⁴ Of course, MEPPs already have better portability than other plans because movement among contributing employers does not mean a change in pension coverage. We request that MEPPs be subject to the same minimum benefit rules that prevail in the rest of Canada.

Suspension of Benefits

Outside of Québec, the trustees determine the rules with respect to those who nominally retire, but then return to work with a contributing employer. Most often, monthly pension payments are suspended, additional benefits are accrued, and payment of the retiree's pension is resumed, with the additional accruals, when work with a contributing employer ceases. In Québec, on the other hand, the retiree who returns to work must be given the option of continuing to collect a pension and not accruing further benefits. For a MEPP that has subsidized early retirement or a maximum number of years of service credit, this can add significantly to the plan's costs, thus potentially forcing the trustees to provide smaller pensions to Québec employees who work until

⁴ In many industries with MEPPs, early termination rates are significant. Because the accrued benefits for these terminating workers are small, the "small amount cash-out" rules apply and the distributions become taxable current income. This not only forces lower pensions for those who do stay, it also defeats the bargaining parties' determination that current wages are sufficient to defer a portion of total compensation to provide retirement benefits.

they are permanently retiring. Trustees generally believe it is inappropriate to allow “double-dipping” (receiving a pension and a paycheque at the same time) when it comes at the expense of the plan’s real objective – to allow people to retire with dignity on the highest possible pension after they are no longer working. We therefore request that Québec permit MEPPs to suspend pensions on the same basis in Québec as applies in the rest of Canada.

Summary

As indicated above, Québec’s pension laws and regulatory environment for MEPPs differ significantly from that in the rest of Canada. This generally has the effect of denying pension coverage to Québec workers who might otherwise have it available, it causes impossible situations for plan administration, and it will result in multi-jurisdictional plans where retiring Québec members get less than those in the rest of Canada because trustees and regulators elsewhere are not prepared to provide subsidies to Québec members at the expense of those elsewhere. We would very much like to work with you and your staff to extend a major success story throughout the rest of Canada to Québec.