



## **Mergers and Acquisitions: Identifying and Addressing Pension and Benefit Legal Risks**

By

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**MERGERS AND ACQUISITIONS**

**IDENTIFYING AND ADDRESSING  
PENSION AND BENEFIT  
LEGAL RISKS**

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IDENTIFYING AND ADDRESSING  
PENSION AND BENEFIT LEGAL RISKS

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Legal Risks and Strategies

**1.0 Introduction**

Why are pension and benefit plans important factors to consider in mergers and acquisitions? For one, there are big dollars involved. Disposing of pension or benefit plans and their associated liabilities in the sale of a business, or acquiring new pension and benefit plans and associated liabilities in an acquisition or merger can have an immense impact on the corporate bottom line. Changes, positive or negative, to the pension and benefit plan offerings to affected employees in a merger and acquisition can have an immense impact on their morale and productivity. Companies need to know what they are getting into. Companies also need to recognize that mergers and acquisitions constitute a great opportunity to update their pension and benefit offerings to their own employees. When two companies come together in a merger, it sometimes takes years after the fact before the pension and benefit offerings are harmonized between the different groups of employees. Why aren't these issues considered beforehand? Would doing so make the deal more worthwhile? or at least less risky? This topic addresses some recent high profile pension and benefit stories involving mergers and acquisitions, then sets out ways that organizations can identify legal risks associated with pension and benefit plans and then how to address them with action before, during, and after the transaction.

As befits a broad topic being discussed in a relatively short period of time, this discussion will be quite high level and general. For this reason, we will not go extensively into the details of how the pension and benefit issues differ between stock and asset deals, nor into the details of how to handle the transfer or replacement of each of the different kinds of pension plans and

benefit plans. This is not to discount those details, but before such issues can be properly addressed, organizations and the people leading them have to be able to assess the issues as a whole, and their broader effects on the organization.

## **2.0 Recent High-Profile Pension and Benefit Stories**

Pension issues are increasingly having a major impact on mergers and acquisitions. The best examples recently have involved insolvent companies looking for deep-pocketed investors to take them out of bankruptcy protection.

### **2.1 Air Canada**

It is not an exaggeration to say that Air Canada's desire to be bailed out by Trinity Time Investments Limited was scuttled in large part by pension issues. Air Canada's defined benefit pension plans are in bad shape. A very close look at the airline's books showed that pension costs had to be addressed as part of any plan to bring the airline out of bankruptcy protection. Trinity Time Investments Limited was prepared to take on the challenge of investing in and restructuring the airline, provided they could agree with Air Canada's unions to a switch from defined benefit to defined contribution pensions. The unions balked and Trinity Time walked away. In the subsequent restructuring, led by Deutsche Bank, investors settled for less traumatic changes to the benefit terms of the company's pension plan but the significance of the eventual pension deal was truly unprecedented in other ways. The new team succeeded in getting the federal cabinet to pass regulations to the federal government's pension law to relax the funding rules applicable to Air Canada. Lobbying and negotiating for this pension law change was as much a 'make or break' aspect of the 2nd restructuring attempt as the proposed switch to defined contribution was to the first. This was a deal that put pension consultants and lawyers in the pilot's seat.

## 2.2 Stelco

Stelco is another case in point. Stelco is another insolvent employer, although by most accounts in significantly better shape than Air Canada was, judging by the fact that it is at least profitable. Nevertheless, underfunded pension plans probably were the ‘straw that broke the camel's back’, prompting the company to seek protection under the CCAA. By virtue of the pension issue, Stelco's unions were heavily involved in the negotiations undertaken by the company's management with prospective investors until the company finally decided to restructure on its own. One might speculate that an in-house restructuring may get more breaks from Ontario's Pension Benefits Guarantee Fund than a deep pocketed investor would, and that this may be why Stelco is heading in this direction.

In these two examples (Air Canada and Stelco), the major stakeholders; management, special board committees, potential investors, unions, non-unionized employee groups, retirees, regulators and governments were or are represented by pension lawyers. Pension lawyers are needed to work through the intricacies of the laws surrounding pension funds, trusts, pension standards legislation, income tax rules relating to pension plans, and pension regulatory rules and procedures.

Most mergers and acquisitions will not require such a high degree of pension lawyer involvement. However, pension involvement is more of a sliding scale than an ‘all or nothing’ proposition. The key players in mergers and acquisitions; the purchaser, vendor, special board committees, and trustees may be wise to have pension and benefit lawyers involved in even fairly routine transactions. The next illustration should help explain why.

## 2.3 Transamerica

The sale of NN Life Insurance Company by its parent ING Canada Inc. to Aegon Canada Inc. and its Transamerica Life Insurance unit must have been, by most accounts at the time, a

fairly straightforward business transaction. The company being acquired, NN Life, was itself the product of recent mergers between two life insurance companies within in the ING Group. Various ordinary course representations and warranties were given by ING to the purchaser about various aspects of the vendor's business. Aegon ended up suing ING for breach of these warranties and won (see *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc.* 2003, Ontario Court of Appeal).

In the context of merger or acquisition due diligence, there is rarely time nor are the documents made available for a purchaser's counsel to do a detailed audit of the history of the vendor's business. This is as true with the vendor's pension plan history as any other aspect of the business. Thus representations and warranties are crucial for purchasers. In this case the vendor, ING, represented that its pension plan had a surplus. The reality was that the vendor's pension plan was an incomplete merger of two previous pension plans, which for some purposes had been completed, and for other purposes had not. With respect to surplus the merger was incomplete, resulting in one part of the plan with a surplus and another part of the plan with a deficit. Consequently, the purchaser had to make pension contributions that it had understood at the time of the deal it would not have to make.

This battle could have been avoided if the vendor had maintained a better handle on its own pension and benefits arrangements and properly cleaned up its own predecessors' pension arrangements after its previous merger so that the sale to Aegon could be facilitated and representations and warranties could be given to the purchaser with confidence. The purchaser in this case probably did not have the opportunity, given the time involved in the typical due diligence process, to delve deeply enough into the history of the vendor's plans to discover the problems that it was eventually forced to sue over.

In most pension lawyers' experience, it is not the least bit uncommon for pension and benefit considerations to be ignored until the late stages of a purchase and sale transaction. It is

possible in this case, and it is certainly possible in most cases, to get pension and benefit counsel on both sides into the deal early to avoid problems like this arising.

### **3.0 Identifying Legal Risks**

There are numerous legal risks that can come to light in a transaction. By legal risks, we mean risks of committing to contractual and trust obligations that will cost more than if the contracts and trust commitments were better planned. We also mean risks of getting sued by employees or former employees for damages arising from pension and benefit plan changes made in the course of a transaction, or by another party to the transaction over errors or misstatements in the transaction agreements. We also mean taking on regulatory battles and administrative hassles that could be avoided. The bottom line with all these risks is that they cost money.

The nature of transferring employees to new employers brings employment transfer risks. Transferring, splitting, merging, discontinuing and creating pension plans creates pension risks; and likewise for post-retirement benefit plans and other non-pension benefit plans. The biggest focus has to be on pension risks because this is where the money is and this is where the issues are shrouded within an area of law and specialized expertise that is often not readily understood by the people making the deals.

#### **3.1 Employment Transfer Risks**

By employment transfer risks, we are referring to risks associated with transferring employees from one employer to another. In the case of a merger of two corporate entities or the purchase of a business through share purchase, there may not be an employment transfer at all. However, in a divestiture or in a purchase of assets, there is. The general rule in contract and employment law is that assigning an employment contract requires notice to the employee. Unilaterally changing the terms of the contract – which includes salary and work

conditions and work location, but which also includes the terms of pension coverage, employment benefit coverage, and post-retirement benefit coverage, constitutes breach of contract (or in employment law parlance, wrongful dismissal). If a breach of contract occurs, damages (or in employment law parlance, severance pay) may be payable to the affected individual. To avoid problems on the employment law front, most mergers and acquisitions are structured in a manner that ensures employees will receive the same or substantially similar pension, employment benefit and post-retirement benefit coverage after the transaction as before. So, the main employment transfer risk faced by the parties to a transaction is avoiding wrongful dismissal while at the same time transferring employees in bulk to a new employer without advance notice. If the employment is transferred on the same terms, the new employer assumes the old contracts by novation.

Generally speaking, employers go through the motions of writing offer letters to employees, and taking continued work from the employees as constituting an acceptance.

Another important concept is 'mitigation of damages'. If an employee is wrongfully dismissed, he or she is expected to do what he or she can to mitigate losses. As long as the new employer is offering a job that is not outright beneath the employee, he or she should accept it in order to minimize lost income due to being out of work. However, the employer may not know for some time whether the employee will sue for an alleged difference in value between the old and the new.

We should note at this point that labour standards codes render this problem mostly moot in respect of unionized employees, as legislation deems collective agreements to be transferred from a vendor to the purchaser seamlessly by operation of law. Nevertheless there may be other labour relations challenges that have to be addressed. Those would be beyond the scope of this topic.

### 3.2 Pension and Employee Benefit Plan Risks - Generally

We have noted that some mergers and acquisitions are premised on the idea that employees will receive the same or similar pension and benefits coverage after the transaction as they did before. However, it is important to note that this is not always possible. Indeed, in some cases, such as in the Air Canada situation noted earlier, the problems associated with the pension *status quo* are a major part of the reason why a transaction is taking place. Minor variations in pension and benefits between vendor and purchaser are frequently desired, particularly where employees are being transferred from an employer with a defined benefit pension culture to employers with a defined contribution pension culture, or vice versa. One might also see this issue where companies are divesting portions of their operations that are too small to support an expensive defined benefit pension plan on their own, such as the one the larger whole could and did support. These cases are troublesome because while the principle of providing employees with the same pension and benefits coverage after the transaction as before allows parties to avoid many of the troubles of getting employee groups involved in the executing of the transaction, even minor variations of pension and coverage can telescope the issues.

We have worked on a number of management buyout transactions recently where the management team personally discusses the post-transaction pension and benefit situation with every single affected employee and convinces them to accept the changes being proposed. This can work well for a small group, particularly in cases where human resources are the key business asset. However, in many other cases, this is not feasible due to the numbers of employees involved and restrictions of time and resources.

When involved in the drafting of the pension and benefit language in asset purchase or sale agreements, we frequently battle over the terms in the agreement that describe whether the purchaser will provide “the same”, “similar”, “substantially similar”, “comparable”, or “no less

favourable” coverage than the vendor's pension and benefits plans. There are a myriad of other terms that can be used in this circumstance to describe benefit offerings that are equivalent or superior financially, yet different in form. The object from the vendor's perspective is to ensure that the purchaser is taking on a similar enough obligation that no employee can sue the vendor for wrongful dismissal based on an alleged unilateral change of pension or benefit coverage. At first principles, any deviation from ‘the same’ pension and benefit coverage could give rise to a claim, although in practice it is recognized that something more is required. However, it remains unclear at what point the risk becomes unbearable. Clearly, for this purpose, a small change to pensions or benefits by itself might not constitute a sufficient claim for wrongful dismissal, but if combined with other changes in salary or bonus structure, working conditions or other aspects of the employment relationship, could give rise to a claim.

When acting for vendors, if we are unsuccessful in obtaining the purchaser's agreement to take on a sufficiently similar pension and benefits package, which is often the case in the circumstances described earlier; different corporate cultures, the purchaser being too small to support the full benefit package, etc., the vendor seeks indemnities from the purchaser to protect the vendor in the event of such a claim.

When we act for a purchaser, we try to secure as much flexibility for the purchaser as possible to decide the pension and benefit package they want to offer, with as few indemnities to the vendor as possible, while at the same time trying to look out for the transferred employees so that they will accept the new employer more readily.

### 3.3 Pension and Employee Benefit Risks – Specific Risks

Specific pension and benefit issues arise in each separate set of circumstances, but some generalizations can be made.

### *Identifying the Type of Deal*

The bulk of the pension and benefit risks to be identified are pension risks. The first thing to be determined is to identify the type of transaction involved. The risks assumed by the vendor and purchaser will vary greatly depending on whether the pension plans involved in the transaction are defined benefit plans or defined contribution plans. Generally speaking, defined contribution plans will involve less trouble than defined benefit plans. However, in both cases there are regulatory issues to be considered, plan amendments in many cases, as well as significant communication issues as between management and employees.

Without going into a great many details, the types of transactions, from a pension point of view, are, in order of complexity and risk, (1), transferring pension plans in whole, (2), transferring pension assets from a vendor's pension plan to a purchaser's pension plan, and (3), setting up a clean break whereby employees transfer from one pension plan to another without a transfer of assets.

### *Transferring Pension Plans*

Complexity and risk is naturally highest with the first type – transferring pension plans in whole. However, this will probably be the most popular amongst employees and require the least amount of explanatory communication with them. The risks taken on by a purchaser by assuming a vendor's pension plan include funding risks, plan history risks and regulatory risks. By funding risks we mean the uncertainty surrounding how much the assets and liabilities of the plan really are. At the best of times, actuarial assets and actuarial liabilities are educated estimates by professional mathematicians known as actuaries. So much in these valuations depends on factors outside of the control of both vendor and purchaser – such as investment returns, interest rates and plan experience. The last factor can often be estimated fairly accurately in the normal course because patterns emerge based on the profile of plan membership. However, when a transaction occurs different scenarios can play themselves

out. After a transaction, some employees leave of their own accord and others leave at the plan sponsor's request. Either way, departures will have significant impact on funding. Salaries are also often adjusted – upwards or downwards following a transaction as people are shifted into new positions, or at least the terms of their positions are reset. Accordingly, the funding situation for a plan may differ greatly, and a prospective purchaser may not know what it is getting into solely by reviewing the plan's previous experience. For the vendor, the risk of transferring a pension plan to a purchaser is generally less. However it should be noted that in theory at least, if the purchaser goes bankrupt while the transferred pension plan is in an under funded position, the employees may have recourse against the vendor for benefits earned prior to the deal. No indemnity set out in a transaction agreement may relieve the purchaser of that risk because an indemnity from a bankrupt company is worthless.

Transferring a pension plan from one company to another also has plan history risks. A purchaser is taking on a plan that may have been administered poorly in the past, and if so, could give rise to lawsuits or regulatory actions. Frequently, when such issues arise, they come to light many years after the facts giving rise to them. This may be long after the transaction and the expiry of any indemnities contained in the transaction agreements. Changes in the law subsequent to the transaction may also give rise to claims relating to actions that occurred prior to the transaction. While to some degree, no amount of transaction due diligence can completely save a purchaser from risks of this sort, a great deal can be learned and risks avoided if sufficient efforts in due diligence are undertaken.

In addition to the funding and plan history risks, it is important to note that pension plans are highly regulated, and any transfer of a pension plan from one employer to another is necessarily going to involve regulatory filings and amendments. The process of adopting a vendor's plan can easily take 6 months to complete, but if parties aren't cooperating, could take longer.

### *DB Asset Transfer / New DB Plan*

The next type of pension transfer involves a vendor's plan transferring assets to a purchaser's plan (the purchaser's plan could be either a new plan or an existing plan). In this case, many of the same funding risks are present. In fact in some cases it is arguable that the risks are higher because the actuarial experience of the group being transferred has probably never been tracked on a separate basis before. Nevertheless, many of the plan history risks are eliminated by the fact that the purchaser is not assuming the vendor's plan or its terms. If the vendor's plan has been administered incorrectly in the past, this probably will not affect the purchaser, unless it affects the valuation of the assets being transferred. However, regulatory issues will be significant in a transfer of assets. Regulatory consent to transfer assets from one plan to another is required. In addition, since it is likely that the plan terms of the vendor's and purchaser's plans are not identical, amendments to the purchaser's plan will be required, thus requiring additional regulatory filings and approvals. The other drawback to transferring pension assets is that there is a significant communication challenge involved. Employees must be advised of the change to their pension rights in full detail.

Like in the first scenario, the vendor could still be liable for benefits earned prior to the transaction in the unlikely event the purchaser goes bankrupt while the purchaser's plan is underfunded. A more common, though usually less dire risk to the vendor is that it will likely remain in charge of the transferred employees' pensions for months, or even a year or more after the transaction while the purchaser sorts out the plan into which the assets will be transferred. This is administratively burdensome and bears at least a theoretical risk of regulatory action declaring the vendor's plan a multi-employer plan – which bears different types of scrutiny and administrative rules – during this interim period. If a lengthy interim period is likely, the parties should normalize the arrangement in the purchase and sale agreement, seek regulatory exemptions from multi-employer plan status, and set out compensation and penalty clauses to help move the process along.

### *Clean Break Approach*

The “clean break” approach has much to be said for it from the simplicity point of view. In this type of transfer, the purchaser enrolls transferred employees in its pension plan and then starts their service accruing from the date of the transfer. No recognition is given to service with the vendor, except for eligibility and vesting purposes, and the employees retain their entitlement to whatever pensions they earned with the vendor separately from their new pensions earned with the purchaser. In the “clean break” approach, there is a significant communication challenge for the purchaser, since employees have to have their new pension rights explained from the start. Part of the communication challenge falls on the vendor, that remains responsible for the employees’ pensions earned up to the time of the transfer. In most cases, the “clean break” approach will be unpopular both with the vendor and the employees, particularly if the plan is a defined benefit plan. Vendors that retain defined benefit pension liabilities following a clean break transaction will continue to be responsible for large numbers of former employees’ pensions long after they cease to have any relationship with those individuals for other purposes. Employees may not appreciate having two disjointed pensions. In the case of defined benefit plans, purchasers may have to set up a complex benefit formula (often called a wrap) that ensures that the clean break does not deprive members of any benefits they otherwise would have earned. Accordingly, while legal risk in a clean break is lower, there are still some fairly significant management challenges.

### *Defined Contribution Transfers*

Defined contribution plans can be dealt with in the same three ways as defined benefit plans, but are mercifully less complex or prone to legal risk. Nevertheless there are amendments and registration issues, as well as communication challenges, that if handled incorrectly, can give rise to legal risk.

### *Post Retirement Benefit Risks*

In any transaction in which the vendor sponsors post-retirement benefits, there are significant risks involved to both purchaser and vendor. In addition to the vendor's responsibility to provide full disclosure of the nature of the promises and expectations for post-retirement benefits, the vendor will in some cases be asked to pay the purchaser to assume liabilities, whether directly or through an adjustment to the purchase price. Despite this, the purchaser may not retain all of the promised benefits into the future. The law is still unclear as to whether post-retirement benefit entitlements are earned and owing (i.e., accrued) over time or whether they vest only when the individual actually retires. Generally, the law seems to be tilting towards the latter, but will be affected by the manner in which the post-retirement benefit promise has been communicated to employees. The rights of existing retirees may also vary depending on the nature of communications. If communications make it clear that post-retirement benefits are discretionary, even benefits for existing retirees may be subject to an employer's right to repeal or revise. Frequently though, communications are not that clear, and thus the purchaser is left in a situation whereby the value of post-retirement benefits being assumed (which can have a material impact on purchase price and the value of the business being assumed) rests on a legal interpretation of what was promised to employees and retirees. In addition to this, actuarial valuation of post-retirement benefits is arguably a less exact science than actuarial valuation of pensions. All of these risks can be very difficult to properly assess in the course of a fast-paced transaction.

### *Non-Pension Benefit Risks*

Non-pension benefit plans will cause significant troubles in a transaction far less frequently. However, issues can arise on occasion. In particular, a purchaser should always be wary in adopting benefit contracts that it does not understand. In long-term disability plans, and to a lesser extent life insurance plans, the experience of the transferred group of employees can

have a significant impact on the cost of coverage and in some cases, may be such that underwriting is unavailable. However, most of the risks are cost based, rather than being legal risks. In some cases a new employer entering into a new contract to provide such benefits to employees will be shocked to find that its premiums are significantly higher than those of the vendor. The premiums for the group in question may have been cross-subsidized by other groups within the vendor's organization, or alternatively the experience may have deteriorated since the last time premiums were set. This, combined with increasing costs for insurance and drug coverage generally, can lead to unpleasant cost surprises for purchasers.

#### **4.0 Addressing Legal Risks**

Having demonstrated that the decisions surrounding pensions and employee benefits can have profound financial impacts on the feasibility of a deal, that failure to properly consider pension and benefit representations and warranties can lead to expensive and long-term litigation, and that the state of mind of affected employees is dramatically impacted upon by the pension and benefit terms of the deal, the question that follows is how these legal risks can be addressed, and preferably, minimized or avoided?

In this section, we address transaction due diligence, representations and warranties, and post-transaction governance of pension and benefit plans.

##### **4.1 Due Diligence**

Unfortunately, in many transactions, due diligence opportunities are limited.

##### *Acting for a Vendor*

Since pension and benefit plans are complex yet are rarely 'top of mind' when deals are being considered, it is frequently the case that the vendor's management do not have as much knowledge of their own plans (and particularly the history of their own plans), as their

outside legal, actuarial and benefit plan consultants. This means that when due diligence data rooms are assembled, incomplete pension benefit plan material is provided. Even within organizations where pension and benefits knowledge and document retention are good, the detailed knowledge and retention of documents is frequently held in people who may not be involved in putting the materials together.

Generally, when people in the vendor organization know that their organization or a portion is for sale, the documentation provided is slightly better than in cases where people in the vendor organization are not aware that a transaction is pending. In the latter case, senior management should take particular steps to ensure that individuals are in place who can assemble the required documents and answer the material questions about their pension and benefit plans, even if those individuals are outside advisors to the company. This may be difficult but could be crucial, particularly in trying to effect a sale to a prospective purchaser whose team is attuned to the importance of pension and benefit issues. In the former case, where a business unit or an entire organization knows it is for sale, there is no excuse for not taking the time to assemble the materials and knowledge that a purchaser's due diligence team needs. Pension advisors frequently maintain detailed files on their clients' pension and benefit plans - sometimes organized in precisely the way that they should be presented in a due diligence data room. Accordingly, this is not an impossible task.

When we act for a vendor, we try to line up and make contact with the key people in the vendor's organization (and their advisors) with knowledge of the vendor's plans, and undertake the exercise of assembling material (and descriptions of unwritten benefit promises) to a standard that purchaser's counsel would expect. This exercise is frequently a valuable one for the vendor even in the abstract, as it allows the vendor to see, and audit, the whole of their benefit package. We also try to anticipate and discuss terms and conditions of the sale that relate to pension and benefits that may require negotiation, and quick decision making, as the deal progresses.

## *Acting for a Purchaser*

When we act for a purchaser doing due diligence in respect of a possible acquisition, we look at the pension and benefit plans and associated correspondence disclosed in the vendor's data room and almost universally find deficiencies in the document disclosure. This leads us to communicate with the vendor's counsel, management and other consultants. It is frequently not possible to complete this due diligence due to the need to explain needs and get cooperation from these various parties. This is particularly so when vendors do not have their own pension counsel to work with us. Sometimes we are able to obtain important information on a target organization through regulatory searches, but most pension documents filed with regulatory authorities are not accessible. Non-pension benefit documents are virtually never available publicly.

Our goal in conducting due diligence for a purchaser is threefold.

First, we want to be able to advise the purchaser of what they are getting into. Will they have to establish new pension plans or adopt the vendor's pension plans? Will they have to duplicate employee benefit coverage by assuming contracts with insurance companies different from the ones the purchaser already deals with? Are they acquiring a workforce whose remuneration is structured profoundly differently, ie. is it a defined benefit culture, defined contribution culture, an incentive bonus culture, or some combination of these?

Secondly, we want to assess the financial risks. Is the purchaser taking on underfunded pension plans that it will have to pump money into? If it is acquiring pension plans that have surpluses, are those surpluses accessible? What impact on the purchase price will these factors have? The funding issues need to be analysed separately and thoroughly by the purchaser's consultants.

Thirdly, we want to assess the pension litigation risks. Is the vendor currently engaged in pension or benefits-related litigation? Or are its plans and practices such that litigation is likely? These issues are particularly important today due to the recent growth in class actions, for which pension claims are a significant growth industry for the plaintiff bar.

Despite these objectives, we are frequently left spending much of our time during the due diligence process trying to track down documents, with the result that we are not able to complete the due diligence process by the time the deal is signed. Frequently, our due diligence reports show that the biggest risks are the unknown – i.e., the documents that have not been disclosed despite our attempts to get them.

We attach as Appendix A some further comments on what should be disclosed, reviewed and considered in the course of pension and benefit due diligence.

#### 4.2 Representations and Warranties

This leads us to a discussion of representations and warranties. As discussed previously, representations and warranties on the pension and benefit offerings of a vendor constitute a crucial protection to the purchaser of the transaction and a crucial risk to a vendor that is not fully organized in understanding its own plans. Typically, the types of representations and warranties that a vendor will give and a purchaser will look for are ones that relate to the pension plans of the vendor being fully funded, if they require funding; properly registered, if they are required to be registered; disclosed, to the extent they are written down; or explained, to the extent that they are unwritten. Typical language requires the vendor to indicate that all pension and benefit plans, as defined in the agreement (a definition that is usually very broad, so as to include everything from complex registered pension plans to informal policies on days off for personal matters, reimbursements for meals or books or cab rides) [See Appendix B] have been disclosed and described to the purchaser, and that no pension and benefit plans other than those disclosed and described are offered. It is our

experience that in almost every case certain pension and benefit plans are missed, although usually they are minor benefit plans such as company Costco memberships or working late dinner policies. In the odd case they are unwritten supplemental pension promises, unwritten bonus promises, unwritten change of control promises, or post-retirement benefit promises. Each of these latter forms can have immense financial impact on the purchaser if they were not disclosed as part of the transaction.

The risk to the vendor in not fully disclosing some of its plans in the due diligence process is thus exacerbated by then making representations that all documents have been provided.

In addition to the catch-all representation that all pension and benefit plans have been disclosed, we would normally expect to see representations whereby the vendor specifically affirms that there are no supplemental benefit plans, change of control agreements, or post-retirement benefit commitments, other than those specifically disclosed and described. Vendors should also be making representations concerning their knowledge of facts that could give rise to litigation, in addition to litigation that is already taking place. They should disclose any knowledge of pension regulatory problems and they should be describing in a number of different ways all the details to their knowledge and to the knowledge of their advisors concerning the state of funding for their pension plans and other benefit plans that require funding. The risk to the vendor of misrepresenting the facts (presumably unintentionally) is that the vendor could be liable on breach of warranty, as in the Transamerica case. The way to avoid this is obvious – get pension and benefits documents together early and line up the staff and advisors with knowledge of these areas to help ensure that the representations and warranties are true and complete.

We attach in Appendix C a list of representations and warranties extracted from a recent asset purchase agreement. We find that lists of representations and warranties such as this frequently appear in transaction agreements, even in cases where there is no doubt that the

vendor has no defined benefit registered pension plans, thus showing that no pension and benefit expertise is being brought to bear to the question of drafting the representations and warranties, with reliance instead being given to precedent representations and warranties which may not be suitable. Instead, language such as is found in Appendix C should be considered a starting point for drafting, rather than an all-purpose precedent.

The extent of pension and benefit representations and warranties such as is set out in Appendix C underscores the fact that each and every one of these statements needs to be capable of being relied upon by the purchaser and may be sued upon if they are breached. As we have discussed, the precedent exists in the Transamerica case for these representations and warranties to end up being material, and not idle matters.

#### 4.3 Pension and Benefit Transfer Terms

Somewhere in the asset or share purchase agreement there should be a section dealing with pension and benefit transition. In many cases, these provisions are found in and integrate with employment transition sections. Either way, this is where the parties spell out what is to be done. Some key elements are:

##### *Pension and Benefit Terms of Employment*

- standard of equivalence for transferred employees' pensions and benefits – i.e., 'substantially similar', 'comparable', 'no less valuable in the aggregate';
- will the purchaser indemnify the vendor against wrongful dismissal?
- will the purchaser indemnify the vendor against claims for service periods prior to transaction?

## *Pension Transition*

- whether the purchaser is taking over any pension plans. Alternatively, if the purchaser is allowing employees to join the purchaser's plan, details of how this will be done. If so, will assets be transferred? If DB assets are transferred, on what actuarial basis will the assets be determined (details will require actuarial input, and may be set out in a separate agreement, or in a schedule/appendix to the agreement);
- legislative and legal requirements – certain business transfer rules in provincial pension legislation must be reflected in agreements, and asset transfers, new plan registrations and plan transfers are subject to regulatory filings [see Appendices D and E for provisions in BC and Ontario pension legislation];
- interim measures – if there is to be a pension transfer of kind, completion of it will in practice not happen until well after the closing, owing to regulatory issues. Will employees continue to participate in the vendor's plans in the interim?
- how employees' service and earnings will be measured before and after the transition;
- multi-employer plan issues – will the purchaser be required to seek participating employer status in a multi-employer pension or benefit plan?
- settling disputes over pension valuations – in cases where the defined benefit pension plans are transferred, or assets transferred from one plan to another, we would expect to see actuaries involved from both sides;
- surplus/unfunded liability issues – if a transferred plan has a surplus or unfunded liability, how will the parties agree on the appropriate measure of it, and how will they share it – how much is a surplus worth (owing to whether it can be withdrawn or used

for contribution holidays)? – this may impact purchase price, or funds may be transferred outside of the purchase price after deal is closed;

### *Other Benefit Plans*

- how will post-retirement benefit plans be dealt with? Will the purchaser honour the obligations? If so, will the vendor pay money to have the purchaser assume the liability, knowing that the current state of the law is probably that there is no obligation to honour post-retirement benefit commitments if not clearly spelled out as binding?
- how will non-pension benefit liabilities be handled? In particular, at what stage in the claims process will responsibility shift?
  - claims made, but not yet paid
  - claims pending, but not yet made

In order to be able to set these points out in the agreement, each must be understood and considered by both vendor and purchaser, and will generally need to be customized to a significant degree. As with previous discussions of the importance of early involvement in due diligence and drafting representations and warranties, the same applies to drafting the transition provision.

#### 4.4 Post-Transaction Governance

This leads us to the last aspect of the topic we are commenting on, namely post-transaction governance. Despite all the effort that goes into the pension and benefit aspects of a merger or acquisition, or at least *should* go into the pension and benefit aspects of a merger or acquisition, a substantial portion of a pension and benefits law practice comes from post-transaction pension and benefits governance. The immediate aftermath of a merger or

acquisition is an artificially-consolidated enterprise, in the case of a merger and acquisition; or an orphaned business unit in the case of a small spinoff or management buyout.

In some cases where organizations have grown through many acquisitions, and management has never slowed down long enough to consolidate different units into a single human resources culture, we can see a wide range of inconsistent or contradictory pension and benefit programs in a business - some employees in defined benefit plans, others in defined contribution plans, still others with no pensions at all. It is not uncommon for the pension actuaries and benefit consultants serving such an organization to be from different firms, each continuing to service the plans that they helped to create under a previous owner of the business unit. While this is not fatal to a successful business, logic suggests that it must impede and complicate the task of team fostering within the organization, not to mention adding to cost.

It is not always necessary for an organization to impose a single company-wide pension plan. Even though it may create deficiencies in the short run, in many businesses it makes sense to sit back and look at the different business units in the company as units that could conceivably be reorganized, restructured, sold, or augmented with further investment in the future. In that case, maintaining units as stand alone as possible in order to enable possible divestitures down the road is desirable.

The point we are making is that there is no right or wrong business strategy in how to structure pension and benefit offerings across an organization. What is necessary, however, is a strategy of some sort. Our experience is that within a year of most mergers and acquisitions, our more organized clients return to us and to their other advisors to start closing or merging pension plans, looking for new consultants with new ideas in order to establish a “third way” for a newly merged organization reflecting the best of both merging cultures, or in the case of a spunoff entity, to create a new pension and benefit structure from scratch. Some of our clients are still in the process of implementing their post-transaction

pension and benefits objectives several years after the transaction occurred. Steps are slowed down by regulatory concerns (particularly if plan mergers or extensive plan amendments are involved), employee consultation in some cases, and economic conditions. Nevertheless, it is a fact of this area in business that it can take time to do the things that ought to be done. Because of this, it is important to allow as much time and devote as much resources to the pension and benefits aspects of executing a transaction as can be afforded in the circumstances. As noted, our experience is that the transaction is just the start of a process of integrating or disintegrating pension and benefit programs that may continue for several years, but if the intention and direction is given to the topic early, many efficiencies and cost savings can be created down the road.

Since pension and benefit plans form part of contractual employment relationships and involve numerous third party contracts with trustees, insurance companies, investment managers and consultants, a role for pension and benefits legal counsel remains important in the post-transaction governance stage. Nevertheless, while pension and benefits legal counsel will interpret the law and the pension and benefit terms of ongoing plans, most organizations also need to rely heavily on consultants in order to provide market-appropriate pension and benefit terms to their employees and to implement and communicate pension and benefit policies.

## APPENDIX A

### DUE DILIGENCE PROCEDURE

The vendor should assemble and disclose, and the purchaser should obtain and review documents describing each pension plan and benefit plan sponsored by the vendor, irrespective of whether the plan is registered, unregistered, funded or unfunded, insured or uninsured, etc. In the case of plans that are promised but not fully documented, descriptions should be obtained. In the case of the more complex pension and benefit plans, such as registered pension plans, a list of documents to be disclosed and reviewed consists of significantly more than a single pension plan text, since complex pension and benefit plans involve third party contracts with trustees, administrators, investment advisors and so on, as well as being subject to legislation and requires other documents to be prepared.

#### Registered Pension Plans

The following list is a list of documents that should be disclosed in respect of a registered pension plan:

- (a) Pension plan text. The currently registered plan text and amendments to it.
- (b) Historical pension plan text and amendments.
- (c) Evidence that the plan and amendments have been filed with the relevant regulatory authorities and accepted for registration (i.e., regulatory correspondence).
- (d) Funding documents (i.e., trust agreements or insurance contracts).
- (e) Actuarial valuations for defined benefit plans, including most recent and previous reports.

- (f) Annual information returns for pension plans, including the most recent and preceding returns.
- (g) The plan's statement of investment policies and procedures (SIP&P).
- (h) Financial statements and audit reports on the pension plan (including the most recent and previous statements).
- (i) Investment management agreements (or if there are no written agreements, descriptions instead).
- (j) Material correspondence with plan advisors, including lawyers and actuaries (in some cases correspondence with lawyers may be privileged, but in the case of a merger or acquisition, efforts should be made to disclose/view such documents anyway, particularly if the topic of the correspondence relates to matters that may reasonably be of interest to the purchaser).
- (k) Employee communications, including plan booklets.
- (l) Applicable collective agreements and employment contracts.
- (m) Any documents detailing contentious matters whether active litigation, other dispute resolution mechanisms or possible claims.
- (n) Other material documents that may relate to the pension plan. This may include reports and proposals from advisors, board resolutions, pension committee minutes and other documents.

### Non-Pension Benefit Plans

The vendor should assemble and disclose, and the purchaser should obtain and review each non-pension benefit plan. By 'non-pension employee benefit plans', we mean employee

extended health plans, including drug plans, dental plans, life insurance plans, disability plans (including long term disability and short term disability plans), or other insurance plans or insurance-like plans (that may be self-insured), education savings plans and other company policies or plans, including reimbursement plans, club membership plans, preferred provider plans and similar plans, policies or practices of some measurable value to employees. By ‘non-pension benefit plans’ we also mean to include benefits of the above types that are provided to retired employees (also known as post-retirement benefits, or PRBs). The following documents should appear in a data room and should be sought by a purchaser:

- (a) Plan texts.
- (b) Contracts and insurance policies, including amendments.
- (c) Historical documents, including historical policies and administration contracts.
- (d) Underwriting agreements or third party administration agreements with insurers.
- (e) Actuarial valuations of benefit costs (including in particular, of post-retirement benefits), and other funding information, such as claims and premium statistics.
- (f) Description of the administrative practices regarding the plan, and who is responsible for them.
- (g) Board or committee resolutions concerning the plans.
- (h) Correspondence with regulatory authorities (if any), advisors, including lawyers, actuaries and benefit consultants and accountants (in some cases correspondence with lawyers may be privileged, but such privileged material should be disclosed if they relate to matters that are of interest to a purchaser of the business).

## Executive Compensation Plans

Executive compensation levels have expanded greatly in the past decade. Even where the number of executives is small, the financial impact of their compensation can be quite high. Sophistication of their benefit packages is also such that one frequently finds change of control related guarantees involving accelerated bonus arrangements, vesting arrangements or early retirement options. These can be very material considerations in a transaction, and as such efforts should be taken to conduct specific due diligence of these plans. The vendor should provide in respect of each separate executive compensation plan full details of what is offered, even if the terms are contained in letters to the executive rather than in formal plan documents.

By ‘executive compensation plans’ we mean to include bonus plans, deferred compensation plans, incentive compensation plans, stock option plans, stock purchase plans, stock appreciation plans, phantom stock plans, other kinds of savings or profit sharing plans, severance or termination pay plans, separate executive pension plans, including individual pension plans, separate supplemental pension plans and change of control plans or anything similar. The purchaser should be seeking to review the following:

- (a) The plan and any amendments (or if unwritten, written summary).
- (b) A description of the current administrative policies and conduct for the delivery of executive benefits, and who is responsible and knowledgeable of them.
- (c) All financial information relating to the funding or costing of the plans, including actuarial reports where available.
- (d) Board of directors resolutions and minutes (if available in respect of the plan).
- (e) All employee communications and letters in respect of the plan.

- (f) Material correspondence with plan advisors and regulatory authorities (if applicable).
- (g) Documents detailing any litigation or threatened litigation in respect of the plan.

## APPENDIX B

### SAMPLE “BENEFIT PLAN” DEFINITION

“*Benefit Plan*” shall mean any pension, retirement, deferred compensation, profit-sharing, RRSP, savings, disability, medical, dental, health, life (including, without limitation, any individual life insurance policy under which any employee of the Corporation or a subsidiary of the Corporation is the named insured and as to which the Corporation or a subsidiary of the Corporation makes premium payments, whether or not the Corporation or a subsidiary of the Corporation is the owner, beneficiary or both of such policy), death benefit, group insurance, stock option, stock purchase, bonus, incentive, vacation pay, severance pay, or other employee benefit plan, trust, arrangement, contract, agreement, policy or commitment (including any arrangement to provide pension benefits in excess of the maximum amounts which are allowed under the *Income Tax Act* to be provided through a registered pension plan), whether or not any of the foregoing is funded or insured and whether written or oral, formal or informal, which is intended to provide or does in fact provide benefits to any or all employees or former employees of the Corporation or a subsidiary of the Corporation, and (i) to which the Corporation or a subsidiary of the Corporation is a party or by which the Corporation or a subsidiary of the Corporation (or any of the rights, properties or assets of the Corporation or a subsidiary of the Corporation) is bound, or (ii) with respect to which the Corporation or a subsidiary of the Corporation has any liability or potential liability (whether or not the Corporation or such subsidiary of the Corporation still maintains such plan, trust, arrangement, contract, agreement, policy or commitment).

## APPENDIX C

### SAMPLE PENSION AND BENEFIT REPRESENTATIONS AND WARRANTIES

The vendor represents and warrants to the purchaser that:

- (a) Copies of the following documents, to the extent applicable with respect of each of the Benefit Plans, have been made available or delivered to the purchaser:
  - (i) all current and historical plan documents, trust agreements, insurance contracts, employee brochures, statements of investment policies and procedures, and related documentation (including any amendments thereto) prepared for that Benefit Plan;
  - (i) in the case of an unwritten Benefit Plan, a written description of its terms and beneficiaries;
  - (ii) if the Benefit Plan requires actuarial valuation, the most recent three (3) actuarial valuations prepared for it and satisfactory evidence that the contributions recommended in it will be deductible under the *Income Tax Act*;
  - (iii) if the Benefit Plan is funded, the three most recent accountings of the Benefit Plan's assets and liabilities;
  - (iv) if the Benefit Plan is required to be registered with any regulatory authority, evidence of that registration and all recent correspondence with such regulatory authority, and
  - (v) material correspondence between the vendor and any actuaries, benefit consultants or other advisors or agents relating to the establishment, administration, funding, winding-up of or amendments to the Benefit Plan.

- (b) Since the date of each of the documents described in sections ●, no amendments have been made to any of the Benefit Plans and no events have occurred which would materially affect the information contained therein.
- (c) All Benefit Plans are listed on Schedule ●, and except as disclosed on Schedule ● therewith:
- (i) the Benefit Plans that are registered pension plans are registered under and are in compliance with any federal and provincial Applicable Law and all reports, returns and filings required to be made thereunder have been made;
  - (ii) the Benefit Plans that are registered pension plans have been administered and invested in accordance with their terms and the provisions of any Applicable Law;
  - (iii) each of the Benefit Plans that is a defined benefit registered pension plan has been funded on both an ongoing and termination basis in accordance with its terms and based on actuarial methods and assumptions determined in accordance with generally accepted actuarial principles set out in actuarial reports that in turn comply with Applicable Law (collectively, the “Actuarial Reports”);
  - (iv) since the date of each Actuarial Report, the vendor has made, granted or committed to make or grant any benefit improvements to which members of the Benefit Plans are or may become entitled, which are not reflected in the Actuarial Reports;
  - (v) to the knowledge of the vendor, after due inquiry, there have been no withdrawals of surplus or contribution holidays or payments of administrative

expenses from the Benefit Plans, except as permitted by Applicable Law and the terms of the Benefit Plans;

- (vi) there are no pending claims by any employee covered under the Benefit Plans or by any other Person, which allege a breach of fiduciary duties or violation of any Applicable Law or which may result in liability to the vendor and to the knowledge of the vendor, there is no basis for such a claim;
- (vii) there are no outstanding violations or defaults under the Benefit Plans nor any actions, suits, claims, trials, demands, investigations, arbitration proceedings or other proceedings pending or, to the knowledge of the vendor, after due inquiry, threatened with respect to any of the Benefit Plans which, individually or in the aggregate, could have a material adverse effect on any of the vendor;
- (viii) no promise or commitment to increase benefits under the Benefit Plans has been made except as required by Applicable Law or pursuant to a collective agreement;
- (ix) no event has occurred which would entitle any person to terminate Benefit Plan, adversely affect the tax status, or revoke the registration with any regulatory authority (if registered);
- (x) no step has been taken, no event has occurred and no condition or circumstance exists that has resulted in or could reasonably be expected to result in any Benefit Plan being ordered or required to be terminated or wound up in whole or in part or having its registration under Applicable Laws refused or revoked, or being placed under the administration of any trustee or receiver or regulatory authority or being required to pay any material taxes, fees, penalties or levies under Applicable Laws;

- (xi) no insurance policy or other contract or agreement affecting any Benefit Plan requires or permits a retroactive increase in premiums or payments due thereunder;
  - (xii) all employer and employee contributions in respect of a Benefit Plan which are required by its terms or Applicable Law to be made have been made and remitted in a timely manner to the Benefit Plan's fundholder;
- (d) Except as set forth in Schedule ● the execution and performance of the transactions contemplated by this Agreement will not (either alone or upon the occurrence of any additional or subsequent transaction) constitute an event under any Benefit Plan or individual agreement with an employee or former employee that will or may result in any payment (whether of severance or otherwise) or in the acceleration, vesting or increase in benefits with respect to an employee or former employee.

## APPENDIX D

### **BRITISH COLUMBIA *PENSION BENEFITS STANDARDS ACT* – M & A PROVISIONS**

#### **Effect of disposal of business**

**58** (1) Despite section 48(2), if

- (a) an employer, in this section called the “predecessor employer”, disposes of all or part of the employer’s business or undertaking or all or part of the employer’s assets,
- (b) an employee of the predecessor employer becomes an employee of the person acquiring the business, undertaking or assets, in this section called the “successor employer”, and
- (c) the successor employer does not assume responsibility for the accrued benefits of the predecessor employer’s plan,

the employee continues to be entitled to benefits under the predecessor employer’s plan in respect of employment in British Columbia or in a designated province with-out further accrual of benefits.

(2) For the purposes of determining

- (a) the length of employment with respect to any eligibility condition of the successor employer’s plan for the purposes of section 25,
- (b) whether a pension vests in a member under a plan of either employer, or
- (c) whether the commuted value of a pension under a plan of either employer is locked in under section 30,

the employee's employment and plan membership with both employers must be taken into account on the basis that the change in employers does not in itself cause a break in employment and that plan membership includes periods of membership in the plans of both employers, irrespective of whether or not the successor employer has assumed responsibility for the accrued benefits of the predecessor employer's plan and despite the change in employer.

(3) If

- (a) a transaction described in subsection (1) takes place,
- (b) the employee of the predecessor employer becomes a member of a pension plan of the successor employer, and
- (c) the predecessor employer wishes to terminate and wind up the plan to the extent that the plan relates to that employee and notifies the superintendent to that effect,

the predecessor employer's plan is terminated to the extent that the plan relates to that employee.

(4) The employee referred to in subsection (3) is not entitled to a lump sum payment representing the commuted value of the employee's pension under the predecessor employer's plan, and the commuted value must be transferred in accordance with the conditions specified in section 33(1), (2) and (2.1).

(5) A termination under subsection (3) takes effect when

- (a) the remedies under sections 20 and 21 have been exhausted, or

(b) the time limit for making an objection under section 20 or appealing under section 21, has expired without the objection or appeal having been made.

(6) If

(a) a transaction described in subsection (1) takes place,

(b) the predecessor employer does not terminate and wind up the plan to the extent that the plan relates to that employee, and

(c) the employee would have been vested had the employee terminated membership,

the employee is entitled to transfer the commuted value of the pension in the manner and to the extent prescribed in relation to section 33(1), (2) and (2.1).

## APPENDIX E

### ONTARIO *PENSION BENEFITS ACT* - M & A PROVISIONS

#### SALES, TRANSFERS AND NEW PLANS

##### **Continuation of benefits under successor employer**

80(1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

- (a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;
- (b) is entitled to credit in the pension plan of the successor employer for the period of membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and
- (c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

##### **Exception**

(2) Clause (1)(a) does not apply if the successor employer assumes responsibility for the accrued pension benefits of the employer's pension plan and the pension plan of the successor

employer shall be deemed to be a continuation of the employer's plan with respect to any benefits or assets transferred.

### **Employment deemed not terminated**

(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

### **Transfer on sale**

(4) Where a transaction described in subsection (1) occurs and the successor employer assumes responsibility in whole or in part for the pension benefits provided under the employer's pension plan, no transfer of assets shall be made from the employer's pension fund to the pension fund of the plan provided by the successor employer without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

### **Consent by Superintendent**

(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the employer's pension plan or that does not meet the prescribed requirements and qualifications.

### **Order for return**

(6) The Superintendent by order may require the transferee to return to the pension fund, with interest, assets transferred without the prior consent required by subsection (4).

### **Enforcement**

(7) Subject to section 89 (hearing and appeal), an order for return of assets under subsection (6), exclusive of the reasons therefor, may be filed in the Ontario Court (General Division) and is thereupon enforceable as an order of that court.

### **Multi-employer pension plan**

(8) Where a group of members of a multi-employer pension plan are represented by a trade union and in accordance with section 57 of the *Labour Relations Act* the trade union ceases to represent the members and they become represented by a different trade union certified as their bargaining agent and become members of a different pension plan, the administrator of the first pension plan shall transfer to the administrator of the new pension plan all the assets and liabilities respecting those members who have elected under section 42 to transfer their entitlement to the new pension plan and the administrator of the new pension plan shall accept the transfer as assets and liabilities of the new plan.

### **Idem**

(9) Where a group of members of a multi-employer pension plan are represented by a trade union and in accordance with section 57 of the *Labour Relations Act* the trade union ceases to represent the members and they become represented by a different trade union certified as their bargaining agent and become members of a different pension plan and the members are not entitled to make an election under section 42, the administrator of the old pension plan shall transfer to the administrator of the new pension plan all assets and liabilities of the pension plan attributable to such members determined as prescribed and the administrator of the new pension plan shall accept them as assets and liabilities, determined as prescribed, of the new plan.

### **Application of subs. (8, 9)**

(10) Subsections (8) and (9) do not apply where there is a reciprocal agreement respecting the pension plans.

### **Definition**

(11) In this section, “successor employer” means the person who acquires the business or the assets of the employer.

### **Adoption of new pension plan**

81(1) Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original pension plan, the original pension plan shall be deemed not to be wound up and the new pension plan shall be deemed to be a continuation of the original pension plan.

### **Continuation of benefits**

(2) The benefits under the original pension plan in respect of employment before the establishment of the new pension plan shall be deemed to be benefits under the new pension plan.

### **Application of subs. (2)**

(3) Subsection (2) applies whether or not the assets and liabilities of the original pension plan are consolidated with those of the new pension plan.

### **Transfer of assets**

(4) No transfer of assets shall be made from the pension fund of the original pension plan to the pension fund of the new pension plan without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

### **Consent by Superintendent**

(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan or that does not meet the prescribed requirements and qualifications.

### **Order**

(6) The Superintendent by order may require the transferee to return to the pension fund assets, with interest calculated in the prescribed manner, transferred without the prior consent of the Superintendent or transferred contrary to a prescribed term or condition.

**Enforcement**

(7) Subject to section 89 (hearing and appeal), an order for return of assets under subsection (6), exclusive of the reasons, therefor, may be filed in the Ontario Court (General Division) and is thereupon enforceable as an order of that court.

**Fund to fund**

(8) No transfer of assets shall be made from one pension fund to another pension fund in circumstances where subsections (1) to (7) do not apply or where section 42 or 80 does not apply, without the prior consent of the Superintendent or contrary to the prescribed terms and conditions and for the purpose, subsections (5) to (7) apply with necessary modifications.

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