The Canadian Bar Association program:

Pension and Employee Benefits in Mergers and Acquisitions

Negotiating the Agreement - Part I: Representations

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Table of Contents

Introduction..3

Questions a seller should consider..3

Selected issues of importance in representations:

Funded status 4

Pension plan mergers...5

Charging expenses and using surplus for contribution holidays 9

Partial wind-ups 11

MEPPs (multi-employer pension plans)...12

Survival periods 15

Conclusion 15

Appendix A: reps and warranties drafted from a **buyer's** perspective................16

Appendix B: reps and warranties drafted from a **seller's** perspective.................25

Introduction

Consider the following representation in a sale agreement:

> "The Employee Benefit Plans have been administered in compliance with applicable laws".

What could be complicated or risky about such a reasonable statement? Plenty. There are several areas of pension law where significant claims could be made against plan sponsors for common practices such as charging expenses to pension funds, taking contribution holidays and merging plans. Limitation periods for such claims could be long or non-existent. Buyers may find themselves defending such claims years after acquiring a business with a pension plan.

This paper will describe issues that should be considered by sellers and buyers in negotiating representations relating to pension and benefit plans.

Questions a seller should consider before making a representation that benefit plans are "in compliance"

Key questions a seller should ask itself before negotiating representations:

- Is the pension plan a defined benefit plan (as opposed to a defined contribution plan)? Has it ever been a defined benefit plan in the past?
- Have any expenses of administering the pension plan (including investment fees) ever been charged to pension fund assets?
- Have any contribution holidays been taken?
- Have surplus assets in the defined benefit component of the pension plan been used for contribution obligations in the defined contribution component of the pension plan?
- Have there been any transfers into the pension plan, or is the plan the product of a merger of two or more plans?

If the answer to any of these questions is either “yes” or “I don’t know”, the seller should get expert advice regarding the pension representations in the sale agreement. This paper will explain why.

Selected issues of importance in representations:

Funded status

The representation as to funded status should be straightforward and simple.

If the business does not have a defined benefit pension plan, there is no need for any representation as to funded status. The buyer will seek a representation that (a) contributions have been made, or (b) the plan as a whole has been administered in accordance with applicable laws (which includes the obligation to make contributions).

Where there is a defined benefit pension plan, existence of surplus or deficit can be a significant business issue in the negotiations. Bargaining about price adjustments to address surpluses and deficits will not be addressed in this paper. There should be no contentious negotiations about the wording of the representation. It is a non-negotiable question of fact as to whether a pension plan has a surplus or deficit.

From a seller’s perspective, the two key issues are:

(1) the representation as to the funded status should be clearly tied to, and limited to, the actuarial valuation report most recently filed with the pension regulator; the seller should not make any general or vague representation about funding; and

(2) it is not a breach of pension law for a pension plan to have a deficit; a pension plan may be underfunded even thought the plan sponsor has made all contributions as required by law.

A purchaser would seek a representation that "there are no unfunded liabilities in respect of the pension plan." If there is a deficit, however, the seller should propose an accurate representation disclosing that deficit, such as:

> "The funded status of the Pension Plan as at December 31, 2007 is set out in an actuarial valuation report prepared by Watson Wyatt Worldwide dated May, 2008."
>
> - or –
>
> "As at December 31, 2007, the Pension Plan has a deficit of $1,234,567 on a going concern basis, and a deficit of $7,654,321 on a solvency basis, both as determined and set out in the valuation report prepared by Watson Wyatt Worldwide dated May, 2008."

There is no room for debate on such straightforward disclosure in such representations.

Pension plan mergers

Buyers who know about the legal risks of combining two or more pension plans into a single pension plan, or transferring pension benefits from one plan into another plan, will seek representations such as the following:

> "All mergers of Benefit Plans with registered pension plans, and transfers of assets to or from other registered pension plans to or from any of the Benefit Plans, have been made in accordance with the terms of the respective Benefit Plan, applicable funding agreement and applicable laws."
>
> - or –
>
> "The Pension Plan has not been subject to any mergers, nor has it been subject to any transfers of assets to or from the Pension Plan."

These are dangerous representations for sellers. Many sellers will not know if their pension plans have been subject to prior mergers or transfers. Also, it is common for mergers to have taken place years ago, when there was little knowledge about possible legal attacks that can

be made on such transactions due to trust law concerns that have been played out in Canadian courts in recent years.

The following is a description of three recent cases that illustrate the need for great care in making, or seeking, representations regarding pension plan mergers and asset transfers.

The *Aegon Canada Inc. v. ING Canada Inc.* case[1] was the first significant Canadian case that drew attention to the risks of plan mergers. It was a lawsuit based on a breach of a pension representation.

In 1969 the Halifax Life Insurance Company of Canada ("Halifax Life") established a pension plan for its employees. The pension plan was funded by a trust agreement that gave Halifax Life employees the right to any surplus. The terms of the trust prohibited amendments that would allow any part of the capital or income to be used for anything other than the exclusive benefit of Halifax Life employees. Halifax Life later merged with the NN Life Insurance Company of Canada ("NN Life"). Due to restrictions imposed by the trust, NN Life gave the Pension Commission of Ontario (the predecessor to the Financial Services Commission of Ontario) an undertaking that it would administer the assets of the Halifax Life pension plan separately from the assets of the NN Life plan. While fulfilling the undertaking and administering the funds separately, NN Life nonetheless treated the two plans as a single entity when calculating its funding obligations. Since the Halifax Life plan had a surplus that more than offset the NN Life plan deficit, the two plans together had an overall surplus. NN Life took contribution holidays from both plans on the basis of this combined surplus.

Aegon Canada Inc. ("Aegon") bought the shares of NN Life from ING Canada Inc. ("ING") in 2000. In a corporate shuffle following the sale, NN Life amalgamated with the Transamerica Life Insurance Company of Canada. One of the representations that ING made in the purchase agreement was that the NN Life pension plan had a surplus. It did not disclose the deficit of the NN Life portion of the plan. Aegon had planned to use the surplus to take contribution holidays. By this time, however, the deficit of the NN Life plan was such that Halifax Life assets would soon have to be used to fund the benefits of NN Life employees. Since the terms of the Halifax Life trust did not allow this, Aegon could not use the surplus to

[1] [2002] 48 E.T.R. (2d) 170 (Ont. S.C.J.), aff'd (2003), 38 C.C.P.B. 1 (Ont. C.A.) [*Transamerica*].

subsidize the NN Life deficit and so could not take contribution holidays. **Aegon sued ING for breaching its representation that the pension plan had a surplus.**

The lower court found in favour of Aegon. NN Life was not entitled to combine the plans when determining the value of the surplus because the terms of the Halifax Life pension plan trust prevented the assets from being used to pay the benefits of NN Life employees. ING therefore misrepresented the value of the pension surplus. Furthermore, the Court held that the NN Life's contribution holidays prior to the sale were improper. The Ontario Court of Appeal agreed with the trial decision, dismissing the appeal and confirming that that the terms of the Halifax Life pension plan trust prevented the surplus of the Halifax Life pension plan from ever being used for the benefit of non-Halifax Life employees.

The decision in *Baxter v. Ontario* (Superintendent of Financial Services) provided some welcome news for plan sponsors regarding the legitimacy of prior plan mergers.[2] The National Steel Car Corporation Limited Pension Plan ("Original Plan") was established in 1952. It covered both salaried and hourly employees, and expressly permitted plan mergers. In 1965, the Original Plan was split into a plan for salaried employees (Salaried Plan) and a plan for hourly employees (Hourly Plan). The Salaried Plan was subsequently amended in 1972 to provide that any surplus was to revert to National Steel Car Limited (NSC). In 1994, the funding structure of both plans was changed to a pension trust.

In 2000, NSC announced that it intended to merge the Salaried Plan, which was in surplus, with the Hourly Plan, which was in deficit. After NSC obtained the Superintendent's consent to this asset transfer, members of the Salaried Plan applied to the Financial Services Tribunal for a review of the decision. The Tribunal upheld FSCO's consent and the members appealed to the Ontario Divisional Court. Their argument was that the merger did not protect their benefits because the Salaried Plan surplus might be used to enable NSC to take contribution holidays despite the Hourly Plan's deficit. The Salaried Plan beneficiaries argued that their plan was subject to a trust prior to the amendment in 1994 and that the 1972 amendment permitting the reversion of surplus was invalid as a result. Finally, the beneficiaries of the Salaried Plan argued that Transamerica was binding on the Court.

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[2] *Baxter v. Ontario (Superintendent of Financial Services*) (2004),192 O.A.C. 293 [*Baxter*].

The Court clearly distinguished Transamerica on its facts because the plan in this case expressly permitted mergers, unlike the Transamerica plan. This is significant because it seemingly limits the scope of the Transamerica decision and suggests that a plan merger is not ruled out where one plan is in deficit and the other in surplus.

The decision in *Lennon v. Ontario* (Superintendent of Financial Services) also limits the application of Transamerica.[3] As a consequence of the amalgamation of Reliance Electric Limited and Rockwell Automation Canada Inc. ("Rockwell"), Rockwell applied to the Superintendent to merge the Pension Plan for the Salaried and Management Employees of Reliance Electric Limited (Reliance Plan) and the Revised Retirement Plan for Employees of the Allen-Bradley Division of Rockwell International of Canada (Allen-Bradley Plan) to form the Pension Plan for Employees of Rockwell Automation Canada Inc. (Rockwell Plan), and transfer the assets from the pension fund for the Reliance Plan to the pension fund for the Rockwell Plan. At the time of the merger and asset transfer, both the Reliance Plan and the Allen-Bradley Plan were in surplus positions.

The Superintendent consented to the transfer of assets under the Ontario pension benefits legislation. However, the members of the Reliance Plan requested a hearing before the Financial Services Tribunal (FST) regarding the Superintendent's consent to the transfer of assets from the Reliance Plan to the Allen-Bradley Plan.

The FST considered whether the Reliance Plan was established pursuant to a trust and whether the Reliance Plan permitted mergers. The FST held that the Reliance Plan was subject to a trust. The FST also held that the trust document was to be read together with the pension plan text to determine whether there were any impediments to asset transfer or plan merger. The FST determined that plan mergers were implicitly permissible due to the broad amending powers reserved by the plan sponsor and in light of the fact that the Reliance Plan was not closed to new members or new participating employers. The FST distinguished *Lennon* from *Transamerica* on the grounds that: (i) the plan at issue in *Transamerica* was in surplus, whereas the other merging plan was in deficit; (ii) the plan at issue in *Transamerica* was closed to new members; (iii) the plan at issue in *Transamerica* required that its assets be kept separate and apart from those of the

[3] *Lennon v. Ontario (Superintendent of Financial Services)* (2006), FST Decision No. P0051-1999-1, aff'd [2007] O.J. No. 4228 (Div. Ct.) [Lennon].

other merging plan; and (iv) the permissibility of the merger was not directly at issue in *Transamerica*.

The members of the Reliance Plan appealed the decision of the FST to the Divisional Court on the basis that the FST erred in refusing to set aside the Superintendent's consent to the transfer of assets. The Divisional Court dismissed the appeal, holding that the decision of the FST was reasonable. It concluded that the merger and use of the actuarial surplus from the Reliance Plan to fund contribution holidays for the merged Rockwell Plan was not a revocation of trust because: (i) nothing in the original Reliance Plan text precluded a merger with another plan; (ii) subsection 7(3) of the PBA Regulation expressly permits the use of actuarial surplus to fund contribution holidays; (iii) neither the Reliance Plan nor the Rockwell Plan was closed to new members; (iv) Rockwell was entitled to take contribution holidays with respect to new members; and (v) neither the Reliance Plan documents nor the Rockwell Plan documents prohibited the use of trust funds to fund obligations relating to new beneficiaries of the plan.

These three recent cases (*Transamerica*, *Baxter* and *Lennon*) illustrate that in the absence of a legal opinion, a seller is taking a risk by giving a buyer a representation that past mergers were carried out in accordance with applicable laws and the relevant plan documents and trust agreements. A seller who knows that prior mergers have occurred, would be well advised to give a representation that they were carried out in accordance with applicable laws, to the best of the knowledge of the seller, without having made any inquiry and without having obtained a legal opinion in respect of the mergers. A buyer who receives such a limited representation should attempt to assess, during negotiations, how likely it is that past mergers could be attacked by a regulator, unions or former employees, and if so, how much money might be at risk. That risk should be factored into the purchase as a whole.

Charging expenses and using surplus for contribution holidays

It is common for plan sponsors to charge expenses to pension funds, and to use surplus assets for employer contributions. Even though these are common practices, it is possible that they are not permitted under the historical trust terms of the relevant pension plans. The following two cases illustrate the risks of a seller giving a representation that a pension plan has been administered in accordance with applicable laws, where the seller administers a defined

benefit pension plan funded through a trust, and has a history of charging plan expenses, and/or taking contribution holidays.

In *Kerry (Canada) Inc. v. DCA Employees Pension Committee*, the company paid administrative expenses from the pension fund and also took contribution holidays after taking into account the actuarial surplus of the plan. In 2000, the plan was amended to add a defined contribution component for new hires and existing members who opted to convert their past service entitlements to the defined contribution plan, with the company intending to use defined benefit plan funds for its contributions to the new plan.

In March 2006, the Ontario Divisional Court ruled that Kerry (Canada) Inc. was not allowed to pay administrative expenses out of the pension fund because the historical plan documents and trust agreement did not contain language allowing the company to do so. The Divisional Court also ruled that the company could not use the surplus in the defined benefit plan to fund its defined contribution plan contributions because the amendment created two pension funds; the defined contribution members had no connection to the defined benefit plan and could not be legitimately given a beneficial interest in the funds from the defined benefit component.

The Court of Appeal,[4] however, ruled that the Divisional Court erred in finding that the company was not allowed to pay expenses from the fund. The Court of Appeal found that there was no statutory requirement that the company pay the expenses, and that the language of the plan documentation did not prohibit the payment of expenses from the fund, except those paid to trustees. The Court of Appeal also found that the cross-subsidization—the use of surplus funds in the defined benefit plan to fund contributions on the defined contribution side—was permissible.

The Supreme Court of Canada granted leave to appeal in the *Kerry* case; the appeal was heard on November 18, 2008.

In *Burke v. Hudson's Bay Company,*[5] the Hudson's Bay Company ("The Bay") sponsored a defined benefit pension plan. The plan's fund was subject to a trust. The original

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[4] (2007), 86 O.R. (3d) 1.
[5] [2008] O.J. No. 1945.

plan limited members' entitlement on the plan's termination to the present value of their defined benefits.

The plan's text was amended in 1980 to give The Bay entitlement to surplus. The original trust agreement required The Bay to pay management expenses and prohibited amendments that allowed the fund to be used for purposes other than those specified in the plan. In 1971 and 1984, amendments to the trust agreement authorized the payment of all administrative expenses from the fund. The 1984 amendment also limited the use of the fund to purposes for the members' exclusive benefit. Until 1984, pension booklets stated that The Bay was paying all plan expenses. The booklets contained two disclaimers: (i) that they were a summary, referring employees to the plan documentation and (ii) that The Bay could modify the plan in any way.

Since 1982, the fund had been in a surplus position. Some employees believed the surplus would be used to improved their pension and benefits. However, The Bay used it to take contribution holidays and pay plan expenses. The court affirmed that the ability to pay plan expenses from the fund turns on the plan documentation and that silence does not oblige the sponsor to pay.

Burke strengthens *Kerry*, providing that where the plan text is silent but the trust agreement requires that the sponsor pay plan expenses, an amendment to the plan text permitting the payment of plan expenses from the fund is valid. But the fact remains that each situation depends on the wording of the particular pension plan documentation, and a decision at the Supreme Court of Canada is expected in the *Kerry* saga. It would be unwise for a seller to make a representation regarding the charging of plan expenses, and/or the use of surplus to take contribution holidays, without weighing the risks of such a representation.

Partial wind-ups

Buyers should seek assurances that there is no chance that a partial termination of the pension plan could be required by a regulator to be carried out "retroactively" (i.e. as at a past date, prior to the sale of the business). This is because in 2004 the Supreme Court of Canada in a

case referred to as *"Monsanto"*[6], ruled that pension plan administrators of Ontario plans are required to distribute out of the pension plan, any surplus assets that are allocable to the partially-terminated portion of the plan. Due to the "Monsanto" risk, buyers seek representations such as:

> "No event has occurred and no condition or circumstance exists in respect of which any pension regulator could require a partial termination of the Pension Plan."

The "Monsanto" requirement to distribute surplus on the partial wind-up of a pension plan does not apply to all Canadian jurisdictions; for example, it does not apply to Quebec or federally-regulated pension plans.

This issue is *not* addressed by a representation that the pension plan has been administered in accordance with applicable laws. A seller could give such a representation, but still be selling a business with a pension plan that has a risk of an outstanding partial wind-up. There is no legal obligation to carry out a partial termination of a pension plan in Ontario. It may be the case that in 2004, for example, there was a downsizing at the business that triggered the termination of 20% of the members of the pension plan. The Ontario Superintendent of Financial Services has the authority, in 2008, to order that the pension plan be partially terminated as at the 2004 downsizing date, at present. The Superintendent will make such an order if there was surplus in the pension plan as at 2004, and it was not distributed from the pension plan at that time. Buyers want to know if there is any possibility of such a situation arising.

If the seller is being pressured in negotiations to give the buyer a representation that there is no risk of a partial termination being ordered, the seller should consider whether there have been any events in the past that fall under the partial wind-up rules. It may not be a difficult task to determine this; it is possible for a seller to review its own annual regulatory filings for its pension plan, to see if membership in the plan dropped significantly in any period. In particular, a seller should consider (a) whether there has been a corporate reorganization or downsizing that resulted in a drop in membership in the pension plan of 10% or more in any 18-month period, or (b) whether there has been a sale of part of its business where members of its pension plan terminated employment, and did not join a registered pension plan of the buyer at that time. If

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[6] Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), 3 S.C.R. 152

the answer is yes to either of those questions, then the seller knows that it is risky to provide the representation. In those two circumstances, the Ontario pension regulator has the legal authority to order a partial termination of the pension plan. Practically speaking, the regulator will not do so unless there was surplus in the plan as at the effective date of the potential partial termination.

Multi-employer pension plans

In the past three years, significant and surprising litigation in the world of multi-employer pension plans, or "MEPPs", has illustrated how important it is for sellers and buyers to take care in considering representations regarding pensions.

Buyers should insist on a representation that the company does not participate, and has never participated, in a MEPP. If the seller cannot give such a representation because the company has in fact participated, or does participate in a MEPP, then the buyer should seek a representation that the obligations regarding the MEPP are limited to simply making contributions.

It was commonly thought, and is still widely believed, that the obligation of an employer who participates in a MEPP (and who does not have employees in Quebec participating in the MEPP) is merely to make fixed contributions to the MEPP; participating employers do not expect to be liable for deficits. Ontario pension legislation allows benefits in a MEPP to be reduced on termination of the plan, if there is a deficit. A MEPP is administered by a board of trustees, and has several unrelated employers participating in it. The usual reason an employer participates in a MEPP is that it is required by its collective agreement with its union to do so. Contribution obligations are set out in the collective agreement. The participating employers typically have no involvement in running the MEPP. (Note, however, that some MEPPs call for the board of trustees to include employer-appointed representatives, as well as union representatives).

The first issue that should be addressed by a seller whose company participates in a MEPP, is whether there is a broad representation in the sale agreement that "all benefit plans have been administered in accordance with applicable laws". That may initially appear to be a reasonable representation for a buyer to request; however, it is *not* reasonable to expect a seller

to provide such a representation regarding a MEPP. The seller should ensure that the definition of "benefits plans" refers only to plans that are administered by the seller (or target company). A seller should never represent that a MEPP is compliant with applicable laws. The most a seller could say is that to its knowledge, without having conducted inquiries, there are no claims or possible claims in respect of the MEPP.

The second issue that arises in negotiation of MEPP representations relates to the possible extent of the participating employer's liability in connection with the MEPP. In recent litigation regarding two Ontario MEPPs (the *Participating Co-Ops Pension Plan* and the *Canadian Commercial Workers Industry Pension Plan*), claims were made against participating employers for the deficit in the plans. It is common for participating employers to be unaware of the terms of the text or funding agreement regarding the MEPP. It is possible that duties arise under those documents, or under common law obligations, that require the participating employer to take some role in monitoring the administration of the MEPP. If the participating employer has never reviewed such documents, it is risky for the seller to make a broad representation that the employer's legal obligations are limited to making contributions.

An acceptable allocation of risk between the seller and buyer might be set out in a representation such as:

> "The only multi-employer pension plan that the Company participates in is the XYZ plan. The Company has no obligations in respect of the XYZ plan other than the obligation to make contributions to the XYZ plan as described in the Collective Agreement."

The risk for a seller in making such a representation is that the second sentence may not be true. The only way for a seller to be sure about its obligations is to review the relevant documentation and get expert advice. There is rarely enough time in negotiations of sales to do so, especially since it usually takes weeks to collect funding and participation documentation regarding MEPPs.

The Canadian Commercial Workers Industry Pension Plan ("CCWIPP") is a MEPP that has a large deficit. It is the subject of ongoing litigation regarding allegations of mismanagement of investments. CCWIPP is Canada's largest private-sector MEPP, and it is not uncommon for

small employers to be unaware of the risks of participation in CCWIPP. There is currently a campaign by several unions whose members are in CCWIPP, to obtain additional contributions from participating employers to be contributed to a "Stabilization Fund" to address the underfunding of CCWIPP. It is important for sellers who participate in CCWIPP to be aware of these unique issues regarding CCWIPP, when making representations about the status of benefit plans.

Survival periods

The survival period of pension and benefit representations is usually negotiated to be in the range of two to five years following the closing. The ideal representation from a buyer's perspective is an unlimited representation, since it is possible that claims that arise regarding the pension plan are not subject to limitation periods.

If a buyer who acquires a defined benefit pension plan (particularly one funded through a trust) is not successful in obtaining a long survival period, such a buyer should consider asking its consultant or lawyer to review the history of the plan's past mergers, contribution holidays and charging of expenses, shortly after closing, in order to determine if there are any possible claims that could be made under the representation.

Conclusion

The recent pension litigation regarding plan mergers, charging expenses to plan assets, contribution holidays and multi-employer pension plans demonstrates that the world of possible pension claims is complicated and unsettled. It is therefore very important for buyers and sellers to focus on the pension and benefit representations. Possible language for representations in this area is set out in Appendix A (buyer's perspective) and Appendix B (seller's perspective). Negotiation of the survival period for pension representations may be more important than the wording of the actual representations, since it can take many years for pension claims to arise.

Schedule A

SHARE PURCHASE AGREEMENT REPRESENTATIONS AND WARRANTIES (DRAFTED FROM THE BUYER'S PERSPECTIVE)

DEFINITIONS:

"Affiliate" means any company that is an affiliate of the Company as defined under the *Securities Act* (Ontario);

"Benefit Plans" means all plans, arrangements, agreements, programs, policies, practices or undertakings, whether oral or written, formal or informal, funded or unfunded, insured or uninsured, registered or unregistered to which the Company or any of the Subsidiaries is a party to or bound by or in which the Employees participate in or under which the Company or any of the Subsidiaries has, or will have, any liability or contingent liability under or, pursuant to which payments are made, or benefits are provided to, or an entitlement to payments or benefits may arise with respect to any of its Employees or former employees, directors or officers, individuals working on contract with the Company or any of the Subsidiaries or other individuals providing services to any of them of a kind normally provided by employees (or any spouses, dependants, survivors or beneficiaries of any such persons), relating to retirement savings, pensions, bonuses, profit sharing, deferred compensation, incentive compensation, life or accident insurance, hospitalization, health, medical or dental treatment or expenses, disability, unemployment insurance benefits, employee loans, vacation pay, severance or termination pay or other benefit plan;

"Claims" means all losses, assessments, actions, causes of action, orders, prosecutions, suits, damages, expenses, liabilities (whether accrued, actual, contingent, latent or otherwise), claims and demands of whatever nature or kind, including all legal fees and costs on a solicitor and client basis;

"Collective Agreements" means collective agreements and related documents including benefit agreements, letters of understanding, letters of intent and other written communications with

bargaining agents or trade unions by which the Company or any of the Subsidiaries is bound or which impose any obligations upon the Company or any of the Subsidiaries or set out the understanding of the parties with respect to the meaning of any provisions of such collective agreements;

"Company" means ■, a corporation incorporated under the laws of the Province of ■;

"Consultant" means one whose relationship to the Company or any of its Subsidiaries (other than as a shareholder and director) is that of independent contractor. The individual is not an employee, agent, partner or joint venturer of the Company or any of its Subsidiaries;

"Contracts" means any contract, agreement, commitment or other binding arrangement;

"Employees" means those individuals employed or retained by the Company or any of the Subsidiaries on a full-time, part-time or temporary basis, including those employees on disability leave, parental leave or other absence;

"Governmental Authority" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal, dispute settlement panel or body or other law, rule or regulation-making entity:

(a) having or purporting to have jurisdiction on behalf of any nation, province, state or other geographic or political subdivision thereof; or

(b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power;

"Laws" means applicable laws (including common law), statutes, by-laws, rules, regulations, orders, ordinances, protocols, codes, guidelines, treaties, policies, notices, directions, decrees and judicial, arbitral, administrative, ministerial or departmental judgements, awards or other requirements of any Governmental Authority;

"Pension Plans" means all Benefit Plans relating to retirement or retirement savings including pension plans, pensions or supplemental pensions "registered retirement savings plans" (as defined in the *Income Tax Act* (Canada)), "registered pension plans" (as defined in the *Income*

Tax Act (Canada)) and “retirement compensation arrangements” (as defined in the *Income Tax Act* (Canada));

“Person” means any individual, sole proprietorship, partnership, firm, entity, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, Governmental Authority, and where the context requires any of the foregoing when they are acting as trustee, executor, administrator or other legal representative;

“Union Plans” means Benefit Plans which are, or are required to be, established and maintained pursuant to a Collective Agreement and which are not maintained or administered by the Company, any of the Subsidiaries or any of their Affiliates.

[4.36 Pension and Other Benefit Plans]

(a) Schedule ■ sets forth a complete list of the Benefit Plans.

(b) Current, correct and complete copies of all written Benefit Plans as amended to date or, where oral, written summaries of the terms thereof, have been delivered or made available to the Purchaser together with current and complete copies of all documents (including, where indicated herein, historical documents) relating to the Benefit Plans, as amended, including, as applicable,

(i) all trust agreements and funding agreements;

(ii) all insurance contracts and policies, investment management agreements, statements of investment policies and procedures, subscription and participation agreements, benefit administration contracts, and any financial administration contracts;

(iii) all legal opinions, Consultants’ reports and significant correspondence relating to the administration or funding of any Benefit Plan or the use of the funds held under such Benefit Plans;

(iv) all booklets, summaries, manuals and communications of a general nature distributed or made available to any Employees or former employees concerning any Benefit Plans;

(v) where the Benefit Plan is, or is required to be, registered under any Laws, a copy of the most recent letter(s) received from applicable Governmental Authorities confirming registration of such Benefit Plan and any applicable amendments to such Benefit Plan;

(vi) all financial and accounting statements and reports for each of the last **[six]** years together with the **[four]** most recent quarterly investment reports;

(vii) the **[three]** most recent actuarial reports (whether or not such actuarial reports were filed with a Governmental Authority);

(viii) all reports, statements, including audited financial statements, annual information returns or other returns, filed with, and significant correspondence with any Governmental Authority in the last **[six]** years;

(ix) all reports, statements, valuations, returns and correspondence for each of the last **[three]** years which effect premiums, contributions, refunds, deficits or reserves under any of any Benefit Plan; and

(x) a list of the class and number of those individuals who are entitled to participate in, or to receive benefits from, each of the Benefit Plans.

(c) Each Benefit Plan is, and has been, established, registered, qualified, administered, funded, and invested, in compliance with the terms of such Benefit Plan including the terms of any documents in respect of, such Benefit Plan, all Laws, the Collective Agreements, and any agreements, written or oral between the Company, one of its Subsidiaries or both, as the case may be, and any other party, as applicable. Neither the Company nor any of the Subsidiaries has received, in the last **[six]** years, any notice from any Person questioning or

challenging such compliance (other than in respect of any claim related solely to that Person), and none of the Company or any of the Subsidiaries has any knowledge of any such notice, whether written or otherwise, from any Person questioning or challenging such compliance beyond the last **[six]** years.

(d) All Benefit Plans are currently in compliance in all material respects with Canadian Association of Pension Supervisory Authorities *Pension Plan Governance Guidelines*, and with respect to any Benefit Plan that is a capital accumulation plan, the plan is currently also in compliance in all material respects with Canadian Association of Pension Supervisory Authorities *Guidelines for Capital Accumulation Plans*.

(e) The Company and the Subsidiaries have complied with all of their obligations in respect of the Benefit Plans. Neither the Company nor any of the Subsidiaries have knowledge of any default or violation by any other Person in relation to obligations under any Benefit Plan.

(f) No member of the Company or any of its Subsidiaries, or any administrator or fiduciary in respect of one or more of the Benefit Plans or any agent of any of the foregoing has been in breach of any fiduciary obligation with respect to the administration of the Benefit Plans or have engaged in any transaction or have acted or failed to act in a manner which would subject such person to any liability for breach of fiduciary duty under the Laws.

(g) Except as disclosed, the Company and the Subsidiaries have no formal plan and have made no promise or commitment, whether legally binding or not, to create any additional Benefit Plan or to improve or change the benefits provided under any Benefit Plan.

(h) Except as expressly provided under this Agreement or as set out in Schedule ■, neither the entering into of this Agreement, nor the completion of the transaction contemplated herein will (either alone or in conjunction with any additional or subsequent events) constitute an event under any Benefit Plan that will or may

result in any payment (whether severance pay or otherwise), acceleration of payment or vesting of benefits, forgiveness of indebtedness, acceleration or increase in funding obligations, vesting, distribution, restriction of funds, increase or acceleration in benefits or obligation to fund benefits with respect to any Employee of the Company or any of its Subsidiaries.

(i) All employer and employee payments, contributions or premiums required to be remitted, paid to or in respect of each Benefit Plan have been paid or remitted in a timely fashion in accordance with its terms and all Laws. No taxes, penalties or fees are owing or exigible under or in relation to any Benefit Plan and there are no liabilities or contingent liabilities in respect of any Person, benefit or compensation plan that has been discontinued.

(j) There is no investigation by a Governmental Authority, or Claim (other than routine claims for payment of benefits) pending or threatened involving any Benefit Plan or their assets, and no facts exist which could reasonably be expected to give rise to any such investigation or Claim (other than routine claims for benefits).

(k) No event has occurred and no condition or circumstance exists that has resulted or, could reasonably result in any Benefit Plan: (i) being ordered or required to be terminated or wound-up in whole or in part; (ii) have its registration under any applicable Law refused or revoked, (iii) being placed under the administration of any trustee or any regulatory authority; (iv) being required to pay any material taxed or penalties under any applicable Laws; or which could otherwise reasonably be expected to adversely affect the tax status of any such plan.

(l) There are no unfunded liabilities in respect of any Pension Plan including going concern unfunded liabilities, solvency deficiencies, wind-up deficiencies, unpaid special payment or experience deficiency, whether due or not.

(m) All liabilities of the Company and each of its Subsidiaries (whether accrued, absolute, contingent or otherwise) related to the Benefit Plans have been fully and

accurately accrued and disclosed, and reported in accordance with Canadian GAAP in the financial statements of the Company or any of its Subsidiaries. No changes have occurred or are expected to occur to any of the Benefit Plans which would materially affect the most recent financial statement prepared in respect of the applicable Benefit Plan and required to be provided pursuant to this Agreement. All vacation pay, bonuses and commission relating to the business of the Company and any of its Subsidiaries and its Employees are accurately reflected in all respects and have been accrued in the Books and Records of the Company or any of its Subsidiaries.

(n) All mergers of Benefit Plans with registered pension plans, withdrawals of funds from Benefit Plans, transfers of assets to or from other registered pension plans to or from any of the Benefit Plans, contribution holidays in respect of any Benefit Plans, distributions including payments of fees and expenses have been made from the assets of the Benefit Plans and conversions of Benefit Plans from defined benefit to defined contribution have been in accordance with the terms of the respective Benefit Plan, applicable funding agreement and applicable Laws. Any withdrawals or transfers of assets from any Benefit Plan which were not made with the consent of any applicable member of the Benefit Plan, have been made in accordance with the valid terms of such Benefit Plan, applicable Collective Agreements and all Laws and occurred with the consent of any applicable Governmental Authority (where required).

(o) There are no actions, suits, claims, trials, demands, investigations, arbitrations or other proceedings pending or, to the knowledge of the Vendor, threatened with respect to the Benefit Plans against the Company, any of its Subsidiaries, the funding agent, the insurers or the fund of such Benefit Plans, other than claims for benefits in the ordinary course. No order has been made or notice given pursuant to any applicable Law requiring (or proposing to require) the Company or any of its Subsidiaries to take (or refrain from taking) any action in respect of any Benefit Plan.

(p) There are no entities other than the Company or its Subsidiaries participating in any Benefit Plan.

(q) All Employee data necessary to administer each Benefit Plan is in the possession of the Company or the Subsidiaries and is in a form which is sufficient for the proper administration of the Benefit Plan in accordance with its terms and all Laws and to the knowledge of the Vendor such data is complete and correct.

(r) None of the Benefit Plans, other than the Pension Plans, provide benefits beyond retirement or other termination of service to Employees or former employees or to the beneficiaries or dependants of such employees.

(s) No Benefit Plan provides benefits to any individual who is not an Employee, officer or director of the Company or any of its Subsidiaries, or the dependents or other beneficiaries of any such Employee, officer or director.

(t) The Company and its Subsidiaries do not sponsor, administer or contribute to a multi-employer plan **[or the obligations of the Company and its Subsidiaries to any of the Benefit Plans that are multi-employer plans are restricted to providing information and making contributions and are set out completely and accurately in the Collective Agreements listed in Schedule ■. None of the officers or directors of the Company and its Subsidiaries are currently, or to their knowledge will be, subject to any action or claim resulting in personal liability with respect to any multi-employer plan]**.

(u) Nothing has been done or omitted to be done by the Company or any of its Subsidiaries which could make any policy or insurance contract void or voidable. None of the Benefit Plans, or any insurance contact relating thereto, require or permit a retroactive increase in premiums or payments due under, or require additional premiums or payments on termination of the Benefit Plan, or any insurance contact relating thereto. The level of insurance reserves under each insured Benefit Plan is reasonable and sufficient to provide for all incurred but unreported claims.

(v) The Company and the Subsidiaries' sole obligation to or in respect of any Union Plans is to make monetary contributions to the Union Plans in the amounts and in the manner set forth in the Collective Agreements disclosed to the Purchaser under this Agreement.

Schedule B

REPRESENTATIONS AND WARRANTIES
(DRAFTED FROM THE SELLER'S PERSPECTIVE)

Schedule * lists all of the employee benefit plans administered by the Seller. To the best of the knowledge of the Seller, such employee benefit plans have been administered in material compliance with applicable laws.