

**KOSKIE MINSKY LLP SUBMISSION TO
ONTARIO EXPERT COMMISSION ON PENSIONS**

October 15, 2007

A. INTRODUCTION

These submissions are made on behalf of the law firm Koskie Minsky LLP (“KM”). They represent the views of the firm, and of the KM pension department in particular, and not necessarily of any individual in the firm, nor of our clients.

KM makes submissions in connection with the following sections of the Commission’s February, 2007 Discussion Paper:

- The nature of administrative hearings and decision-making under the *Pension Benefits Act* (“PBA”) before the Superintendent and the Financial Services Tribunal (Sections 9.4 – 9.6); and
- The respective rights and responsibilities when an employer becomes insolvent or bankrupt at a time when its pension plan is underfunded (Sections 7 and 8.6).

Koskie Minsky LLP

KM’s pension and benefits department numbers 15 lawyers whose practices are devoted primarily to pensions and benefits issues. As well, a number of KM’s remaining lawyers in the labour relations and civil litigation departments deal regularly with pension matters.

The partners of the KM pension department are as follows:

Murray Gold¹
Andrew Hatnay
Ari Kaplan
Michael Mazzuca
Susan Philpott
Mark Zigler

For over 25 years, KM has been Ontario’s largest law firm dedicated to representing plan member interests and advising multi-employer pension plans (MEPPs). KM regularly represents plan member interests before the courts, the Superintendent and the FST (and before that, the Pension Commission of Ontario), in disputes arising out of the PBA and in insolvency-related proceedings. Its lawyers have been counsel in a number of Ontario’s leading appellate pension cases including, in the past five years alone, *Monsanto*, *Kerry*, *Aegon*, *Stairs*, *General Chemical* and *Re Ivaco*, and, prior to then, *Collins*, *Bathgate*, *Stelco*, and *Imperial Oil*, among others.

¹ Murray Gold took no part in these submissions.

B. ADMINISTRATIVE DECISION-MAKING AT FSCO (Sections 9.4 – 9.6)

The purpose of this submission is to express concerns from the point of view of plan members when dealing with the Superintendent and with the Financial Services Tribunal as decision makers.

Access to Justice for Plan Members

Members and pensioners are often at a resource disadvantage relative to employers and administrators in terms of being able to make effective submissions to the regulator. Members not surprisingly often find themselves at the opposite end of the policy spectrum and legal arguments advanced by most of the institutional interests in the pension field. They therefore need access to meaningful representation to express their views.

Certainly, employers who provide pension plans and the coterie of advisors whom they utilize, be they actuaries, consultants, lawyers, auditors and others, often represent the opposing side of the policy and legal spectrum. While unionized plan members may have some recourse to legal, financial and other assistance in dealing with employers in such a technically complicated field, not all unions have adequate resources to properly represent the members in these situations. Further, large numbers of plan members are not represented by unions, including employees of non-unionized employers and pensioners and deferred vested members where the union does not represent their interests. Even in instances where unions support the interests of these “former members”, the fact remains that they are no longer dues-paying member and, as such, have no formal right to union representation or legal representation unless they retain the services of counsel at their own expense.

In such circumstances, the litigation playing field is very much “asymmetrical”. Sometimes, the Superintendent will support the members’ cause and when this occurs, members will be partially assisted. As stated by the PCO:

In this application, the Plan members are unrepresented. ... If we do not hear from the Superintendent on these types of questions which are extremely complex, complicated and legal, how will both sides be argued? How could we be confident that we were able to make a proper determination?²

However, it is often not the case that the Superintendent will be supporting unrepresented plan members at any given hearing. Even where the Superintendent and members are on the same side of a legal argument, courts have recognized the need for an independent employee voice. As the Divisional Court stated in *Monsanto* in granting plan members standing in the Superintendent’s appeal:

It is my view that counsel for the applicants would be of assistance to the panel hearing the appeal. He will bring the employee perspective and viewpoint to the issues facing the panel of judges. If the order is refused,

² *Otis Canada Inc., Re* (1994), 12 C.C.P.B. 117 (PCO) at 124.

the panel would be denied the assistance of counsel presenting the employees' side of the issues facing the court³.

Yet standing is often inadequate where plan members are unrepresented by counsel. In *Kerry*, the Tribunal acknowledged the difficulty which members faced before it when they were unrepresented by counsel:

In assessing the Committee's conduct in the course of the proceeding - one of the main factors to which the Applicant has directed our attention - we have given some weight to the fact that the Committee was not represented by counsel and that its representative, a Committee member, was not familiar with all of the procedural niceties of participation in a proceeding of this kind⁴.

The material barrier to access to justice for plan members before the Superintendent or Tribunal is an economic one. Any system of dealing with valid member complaints and adjudication must be sensitive to these concerns. Sometimes, members acting collectively can raise the resources to obtain legal and actuarial advice. But even then, it is difficult for pensioners or non-unionized plan members to “organize” and, moreover, to raise sufficient funds to mount a legal challenge to a position advanced by their well-funded employer or former employer.

Recommendation: The best way to address the unevenness in litigation resources as between employers and employees is to amend the PBA and/or the FSCO Act to permit costs of litigation under the PBA to be paid for out of the pension fund, and requiring that the Tribunal (or other adjudicative body) exercise such discretion in appropriate cases.

The *FSCO Act* currently permits the Tribunal to make an award of costs as follows:

24. (1) The Tribunal may order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding.

The Ontario Court of Appeal in *Kerry* held that Section 24 of the *FSCO Act* does not permit costs to be ordered paid out of the pension fund:

In the instant case, the Tribunal could not order that costs be paid from the Fund because the Fund was not a party to the proceeding. The fact that *Kerry* is the administrator of the Plan does not make the Fund a party in the proceedings.⁵

Ironically, Section 24 was enacted in response to the lack of jurisdiction in the Pension Commission of Ontario to make orders for costs to plan members from the pension fund. The PCO in *TIE/Communications Canada Inc. Pension Plan, Re* expressed regret for not being able to award the members their costs from the fund:

³ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2000] O.J. No. 3368 (Ont. Div. Ct.).

⁴ *Kerry (Canada) Inc. and Superintendent of Financial Services*, FST Decision No. P0191-2002 (re Disposition of Request for Costs) (April 28, 2004) (FST)

⁵ *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1 at para 192.

Issue 5: Can the Commission order that the legal fees of the former Employees, in an amount not to exceed \$15,000, be funded out of the surplus in the Plan?

The power to award costs must be expressly conferred. No such authority has been conferred upon us by the legislation. It is with regret that we make this ruling as we are sympathetic to the fact that without such funding it is difficult for plan members to challenge applications such as these⁶.

Even more ironically, the current legal regime permits the Divisional Court on appeal from a Tribunal decision to award members their costs of the appeal and of the Tribunal hearing out of the pension fund⁷. It is wholly inconsistent with good administrative law and practice that the courts have the authority to award costs before the Tribunal out of the pension fund, but the Tribunal itself does not vis-à-vis its own hearing.

Even on the express authority given to the Tribunal in s.24, the Tribunal has **not once in its history** ever exercised its authority to make an award of costs in a pension case. The Tribunal's practice direction on costs is so restrictive that it limits the Tribunal's discretion to instances of party "misconduct" before it will make a costs award. This is bad administrative practice that reduces effective access to justice for plan members and encourages employer litigants to be stoic on procedural matters⁸.

Decision Making at the Superintendent Level

In our experience, decision-making at the Superintendent level is often hindered by lack of time and resources. Further, as the Superintendent often sees himself primarily in the role of regulator and "neutral", it is difficult for the Superintendent to take on an "advocacy role". Further, to the extent that the Superintendent is a "decision maker" where there is an adversarial dispute between plan members and an employer (for example), the Superintendent seems to work very slowly and has no formal hearing process to deal with disputes.

We believe that a helpful first step would be to formalize such a process and to clarify the role of the Superintendent either as an "advocate" or a "decision maker".

⁶ *TIE/Communications Canada Inc. Pension Plan, Re* (1994), 7 C.C.P.B. 120 (PCO) (Gillese, Chair) at p. 128. In the subsequent PCO decision in *Gary Maynard and Superintendent of Pensions and McDonnell Douglas Canada Ltd*, the PCO panel confirmed the intent of s.24 was to address the inequity of the rule in *TIE* vis-à-vis plan members not being able to have their costs funded: "The Act has now been amended with respect to hearings before the Financial Services Tribunal to award costs. This change to the Act would appear to be in response to the conclusion in the *TIE* decision that the authority to award costs was lacking." (*Gary Maynard and Superintendent of Pensions and McDonnell Douglas Canada Ltd*. (XDEC-44) (PCO Decision dated May 19, 1999) (Moore, Chair; Bush, Collins, Vice-Chairs)).

⁷ *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2004), 236 D.L.R. (4th) 514 (Ont. C.A.) at para. 133, affirming *Stairs v. Ontario Teacher's Pension Plan Board* [2003] O.J. No. 605 (Div. Ct.).

⁸ In *London Life Insurance Co. v. Ontario (Superintendent of Financial Services)* (2001), 30 C.C.P.B. 228 (Ont. FST), the Tribunal chastised the employer's conduct, calling its refusal to disclose relevant documentation to the members to be "a very serious issue for the Tribunal". Even though, the Tribunal refused to award costs against the employer in favour of the members, even though such an award was supported by the Superintendent.

Decision Making at the Financial Services Tribunal

Perhaps the greatest disappointment in terms of the members' perspective is the quality of decision-making of the Financial Services Tribunal. This disappointment is of a relative nature, as compared to its predecessor, the PCO. Decisions of the PCO brought with them unprecedented levels of deference from the Divisional Court, despite the broad statutory right of appeal; so much so that during the 1990s not one substantive decision of the PCO was overturned by the courts on appeal. The Tribunal has not earned the same level of deference as its predecessor. Between 2000 – when the Tribunal rendered its first final decision, and 2006, approximately the same number of Tribunal decisions that have been reversed on appeal have been upheld. The result is that adjudications by the Tribunal do not enjoy the predictability of outcome for the litigants as did decisions of the PCO between 1990 and 1999. To add to the diminished predictability in Tribunal decision-making, even among those decisions that were upheld in whole or part by the Divisional Court, at least two of those involved split decisions of the Tribunal panels⁹. In another case, the court determined that no deference ought to be accorded to the Tribunal's interpretation of the PBA, even as it upheld the result¹⁰. Among those Tribunal decisions overturned on appeal, the courts have been somewhat critical in their reasons, having impugned the Tribunal for “narrowly” interpreting the PBA¹¹, “reading out” words in the legislation¹², “disregarding” the regulations¹³, and removing “all meaning” from an otherwise “straightforward” statutory scheme.¹⁴

In another Tribunal decision (which was not appealed, for lack of plan beneficiary resources), the Tribunal cites a definition that appears nowhere in the legislation¹⁵.

In another Tribunal decision¹⁶, the Tribunal gave such poor reasons (which were sought to be applied in another Court proceeding) that the Court of Appeal in that other proceeding went out of its way to impugn the Tribunal's reasons¹⁷.

⁹ *Dustbane Enterprises Limited v. Ontario (Superintendent of Financial Services)* (2001), 27 C.C.P.B. 1 (Ont. FST), aff'd [2002] O.J. No. 2943 (Div. Ct.); and *Baxter v. Superintendent of Financial Services* (2002), 33 C.C.P.B. 43 (Ont. FST), aff'd in part (2004), 43 C.C.P.B. 1 (Ont. Div. Ct.).

¹⁰ *BICC Cables Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 26 C.C.P.B. 179 (Ont. FST), aff'd (2001), 27 C.C.P.B. 201 (Ont. Div. Ct.).

¹¹ *Baxter*, above at para. 20.

¹² *Monsanto*, above at para. 29.

¹³ *Ibid.* at para. 35.

¹⁴ *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2002), 33 C.C.P.B. 255 at paras. 35 and 40 (Ont. Div. Ct.).

¹⁵ *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services) (sub nom. Re Jane Kalbfleisch-Wilson)* (2003), 37 C.C.P.B. 262 (Ont. FST). At para. 13 of the decision, the Tribunal defines a “deferred benefit” as “a pension benefit that is deferred until the normal retirement date; see section 1 of the Act”. No such definition exists in the PBA.

¹⁶ *Baxter v. Ontario (Superintendent of Financial Services)* (2002), 33 C.C.P.B. 43 (Ont. FST).

Even in *Kerry*, the Court of Appeal determined that the Tribunal was incorrect in determining that the defined contribution conversion amendment was not an adverse amendment¹⁸, and was unreasonable in holding that adequate notice of the conversion was transmitted to plan members¹⁹. Although ultimately upholding the Tribunal's result on the defined contribution conversion issue, the Court of Appeal stated that it's "reasoning differs from that of the Tribunal"²⁰. On the plan expenses issue, the Tribunal wrote a 17 page decision with not one single case citation.

There are clearly sufficient grounds supporting the Supreme Court's view in *Monsanto* that the Tribunal should be reviewed on a correctness standard of review. In our experience, the Tribunal has not proven to be an effective adjudicator. Too many of its members are part-timers. Too many members historically have been "industry insiders" who have perceived conflicts of interest on cases or adjudicate cases where they may not have a direct conflict but are involved in situations where their impartiality may be questioned because of their "day jobs". For example, a partner in a law firm that represents employers should not be a member of the Tribunal as such a person should not be hearing cases where the issues may affect their other clients' interests. Even where there is no direct conflict, it is a trite matter of administrative law that justice must not only be done, it must be "seen to be done". Members can have little confidence in tribunals where many of the members come from legal or actuarial firms who are adjudicating cases against employers or others who represent the client base of the decision makers. This is particularly telling when one considers the Chairs of the Tribunal; the current chair and past chairs were partners of large firms that represent employers at the same time. While it is possible to have members of the Tribunal from law firms that represent employees or trade unions, our firm finds that such a position invites conflicts of interest and therefore members of our firm have routinely declined invitations to join the Tribunal. It is difficult to maintain a level of public confidence within such a structure.

Ideally, a neutral tribunal would be composed of "neutrals" or at least use the tripartite model of the Ontario Labour Relations Board and have one member representing the union, employee or consumer interest, one member representing "employer interests" and a neutral. Regrettably this has not been the experience, nor is it enshrined in the *Financial Services Commission Act* or the *Pension Benefits Act*.

Further, the volume of cases does not justify a full time tribunal such as the Ontario Labour Relations Board where one can have a group of "neutral adjudicators" with expertise in the area.

¹⁷ See *Aegon Canada Inc. v. ING Canada Inc.* (2003), 38 C.C.P.B. 1 (Ont. C.A.). After giving no fewer than four reasons to distinguish the case at bar from *Baxter*, the Court of Appeal concluded: "In any event, to the extent that the reasoning [of the Tribunal] in *Baxter* is inconsistent with that of the application judge in the case at bar, I have no hesitation in saying that I prefer that of the application judge" (at para. 12). Presumably, the Divisional Court in *Baxter* was equally as uncomfortable with the Tribunal's decision as, although it upheld the result, it did not once lend its support to the reasons: see *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 43 C.C.P.B. 1 at paras. 63-74 (Ont. Div. Ct.).

¹⁸ At para. 144.

¹⁹ At para. 150.

²⁰ At para. 113.

As was noted by the Supreme Court of Canada in *Monsanto*, the FST is a multi-disciplinary tribunal that must also adjudicate cases involving mortgage brokers, insurance industry cases and other matters. Expertise is not guaranteed on any panel, and if expertise can only be attained at the price of bringing on adjudicators with potential conflicts of interest, then such expertise does not provide for a fair hearing. Finally, many FST members who have “pension law” experience, may not have adjudicative experience in terms of properly handling hearings, evidentiary issues, or writing decisions. As part-timers, one can hardly expect that they would have much training in this area.

It is perhaps for these reasons that the Tribunal is accorded very little deference on matters of law or statutory interpretation (as seen by the Supreme Court of Canada decision in the *Monsanto* case), and it would not be appropriate to grant further legislative deference or a privative clause. In many instances judges of our courts have as much necessary knowledge to properly adjudicate disputes and certainly no biases that would be evident in the current make up of the FST.

As the ideal solution of a tripartite tribunal chaired by neutrals may not be an economically viable solution, our firm wishes to propose a couple of alternative solutions.

Recommendation: We believe that the best solution to adjudicating pension disputes under the PBA is to transfer these disputes to the Ontario Labour Relations Board, in the same manner that that Board deals with disputes under the *Employment Standards Act* and other employment-related statutes. Vice-chairs of the Board could become familiar with pension issues or one or two vice-chairs could be appointed with some knowledge in the area so that the necessary expertise is present. As pensions are all employment related (without an employment relationship there can be no pension covered under the *Pension Benefits Act*), the OLRB is the appropriate tribunal to deal with the matter. Indeed it might be appropriate to move all the pension regulation from the Ministry of Finance to the Ministry of Labour to properly reflect the employment-nature of pension plans. However, unlike in the adjudication of labour disputes, we do not believe that a strong privative clause should apply in pension cases but that the current appeal to the Courts should remain.

The alternative to the OLRB would be to have the Courts decide these issues as matters of first instance or on appeal from the Superintendent, as is the model in Nova Scotia. While this may cut against the grain of several decades of administrative law history in Canada, the fact remains that public confidence in the judicial system is much higher than public confidence in the current system for adjudicating pension disputes and there is no reason why judges, with proper expert evidence before them, cannot properly decide these cases. In our experience there is no great cost saving in putting matters before a tribunal as opposed to a court given the legal and procedural complexities of pension matters.

C. EMPLOYER INSOLVENCY OR BANKRUPTCY (Sections 7 and 8.6)

The following submission pertains to the situation of an underfunded pension plan in the case of the employer’s insolvency or bankruptcy.

The federal insolvency statutes (the *Bankruptcy and Insolvency Act*, “BIA” and the *Companies Creditors’ Arrangement Act* “CCAA”) contain no protections for pensioners of underfunded

pension plans of an insolvent or bankrupt employer. Pursuant to section 136 of the BIA, such pensioners form part of the mass of unsecured creditors. The law is not even clear that claims by such pensioners based on the preferred claim in section 136 for unpaid wages (up to a maximum of \$2000) would apply to give pensioners a preferred claim ahead of other unsecured creditors.

Numerous attempts by the federal Parliament to amend federal bankruptcy laws to provide some enhanced priority to pensioners of an insolvent employer have failed, most recently with the demise of Bill C-55 and Bill C-62.

The PBA currently contains three devices to assist members of an underfunded pension plan whose employer is insolvent: a) the Pension Benefits Guarantee Fund ("PBGF"), b) the deemed trust for unpaid employer contributions in s. 57(3), and c) the plan administrator's lien and charge for unpaid employer contributions in s. 57(5). Related to a) is the Superintendent's lien and charge that arises for amounts paid to a plan from the PBGF. Further, the Superintendent has a right to subrogation to claim amounts payable to a pension plan from an insolvent estate to offset the amount paid from the PBGF.

a) The PBGF: the PBGF should continue as a mechanism to pay an amount to an underfunded pension plan of an insolvent employer. The payment has direct benefit to increase a pension benefit (albeit to a certain point) that would otherwise be reduced in a wind up as a result of the insolvency or bankruptcy of the employer. Experience has shown that in numerous cases the PBGF payment provided a much-needed benefit to members of an underfunded pension plan when no other forms of recovery are available.

However, the PBGF is not an insured vehicle and instead exists as an account funded by premiums charged to all Ontario pension plans. At any point there are only a finite amount of funds in the PBGF to cover claims. In the case of a major insolvency where the deficiency in the pension plan(s) is substantial, the amount of the potential PBGF claim can far exceed the amount of funds in the PBGF and threaten to render the PBGF itself insolvent. Although under the PBA there is the ability for the PBGF to borrow money from the Ontario Consolidated Revenue Fund to cover such claims, what has instead occurred is that this situation motivates the Superintendent to become an active participant in insolvency proceedings in order to protect the integrity of the PBGF. Examples include the insolvency proceedings of *Algoma* and *Stelco*. The Superintendent also became involved in cases where the PBGF's solvency was not at risk such as *St. Mary's Paper* and *Ivaco*, again representing the interests of the PBGF.

The current situation generates a conflict of interest for the Superintendent. On the one hand the Superintendent is charged with administering the PBA, the purpose of which is to protect the pension of Ontarians. On the other hand, it has an interest in protecting the PBGF and reducing its exposure to claims as much as possible and to recover funds itself in insolvency proceeding. The possibility of the PBGF seeking a loan from the Consolidated Revenue Fund introduces an element of politics to dealing with a pension deficit (e.g., should the Ontario government loan funds to the PBGF to increase the pensions of a certain group of plan members?). All of these conditions introduce added uncertainty into the insolvency process which places stress on the plan members for the duration of the process and can delay the resolution of the pension plan in the insolvency. Moreover, other creditors may complain that the uncertainty surrounding the Superintendent's involvement and, as the pension regulator, its ability to "change the rules" mid-insolvency creates difficulties and delay in negotiating agreements with all creditors.

Recommendation: The PBGF needs to be managed differently. One way could be that it is managed as an insurance scheme capable of paying any potential claim, has no need for a loan from the government and cannot be rendered insolvent by a large claim, thus eliminating the motivation for the Superintendent to protect the PBGF's integrity with a potential conflict of interest with plan members. Alternatively the Ontario government should unconditionally guarantee to provide a loan to the PBGF if required and thereby eliminate any resort to political or other considerations. The payment itself should simply be an administrative payment unconnected to political forces. The PBGF should pay a prescribed amount to an underfunded plan pursuant to established procedure. The use of discretionary government "loans" to back up the PBGF should be replaced by a clear guarantee from the province.

b) The deemed trust: Section 57 of the PBA contains two devices, the purpose of which is to protect members of an insolvent pension plan: the deemed trust and the administrator's lien and charge. Provincial deemed trusts are not unique to the PBA and exist in variety of provincial statutes. The deemed trust in the PBA purports to deem unpaid employer contributions as being held in trust by the employer as payments to the plan. Although the section does not mention bankruptcy or insolvency, presumably, the section was intended to operate such that those amounts would rank as a "super-priority" in insolvency and that such funds would be paid first to the pension plan ahead of all other creditors. Despite its purpose, the PBA deemed trust has not been effective. The problems with the deemed trust are generally two-fold: negative court decisions and poor legislative drafting in the PBA.

Based on a series of cases from the Supreme Court of Canada, the deemed trust has been rendered inapplicable in a bankruptcy (e.g. *Henfrey Samson Bellair, Husky Oil*) on the basis that the provincial deemed trust impermissibly re-orders the scheme of distribution in the BIA, which is a federal statute. In short, in a bankruptcy, the deemed trust is useless.

The law is less clear in a non-bankruptcy insolvency such as a CCAA proceeding or a receivership. The courts have not given effect to the deemed trust in such situations, even though the above-noted cases were confined to formal bankruptcies in the BIA. In *Re Ivaco*, a CCAA, the Court of Appeal recently upheld the decision of the CCAA judge (Farley, J.) and refused a motion by the Superintendent to give effect to the deemed trust. The court stated that since *Ivaco* was a "spent" CCAA and akin to a bankruptcy, the deemed trust should not apply. The Court also pointed to defects in the legislative drafting, saying that even if the deemed trust was effective, there is nothing in the PBA actually directing the payment to the pension plan. The Supreme Court of Canada granted leave to appeal, however, due a recent settlement, the appeal is unlikely to be heard. In *Re General Chemical*, a bankruptcy, the Court of Appeal seemed to backtrack somewhat saying in *obiter* that the deemed trust was effective in a non-bankruptcy. In this way, the two Court of Appeal decisions are not consistent.

Recommendation: The PBA should be amended to provide an unambiguous procedure for the application of the deemed trust, that it is valid in a non-bankruptcy situation and to provide for a mechanism to direct the payment to a pension plan. The PBA should also contain a priority clause stating that the deemed trust has priority over all other security claims of other creditors. The Ontario *Personal Property Security Act* ("PPSA") should also be amended accordingly.

c) The plan administrator's lien and charge: Related to the deemed trust but nevertheless distinct is the plan administrator's lien and charge. The phrase "lien and charge" essentially

means that the person who has the lien is a secured creditor and ranks ahead of unsecured creditors. The lien was put into the PBA as a supplement to the deemed trust when the Ontario legislature had concerns over the enforceability of the deemed trust in a bankruptcy. Those concerns were justified, as explained above.

The lien first appeared in the PBA as the “plan members’ lien”. In the Ontario case of *Abraham v. Coopers & Lybrand*, the court held that the plan members’ lien gave the members secured creditor status. That was a good result and in that case, on a motion by the Union, the plan members benefited by receiving payments from the estate ahead of other creditors. Unfortunately, the success did not continue. The PBA was amended in 1986 to change the “plan members’ lien” to a lien in favour of the administrator or the trust company. Later, the PBA was amended again to make the lien in favour of the plan administrator only. In the recent case of *Re General Chemical*, the Court of Appeal held that the administrator’s lien did not bestow secured creditor status on the administrator because, based on the definition of secured creditor in the BIA, the administrator is not a “person” who is owed the debt – it is the pension plan that is owed the debt. As such, the lien and charge fails. Leave to appeal to the Supreme Court of Canada is being sought.

Recommendation: Like the deemed trust, the PBA should be amended to provide an unambiguous procedure for the application of the lien and charge, to make clear that it is valid in both bankruptcy and non-bankruptcy situation and to provide for a mechanism to direct the payment to a pension plan. If the Court of Appeal’s decision in *General Chemical* stands, then the PBA should be amended to restore the remedy as the plan members’ lien and/or the trust company’s lien. The PBA should also be amended to contain a priority clause stating that the lien and charge has priority over all other security claims and the PPSA should also be amended accordingly.