November 14, 2005

Re: Complaints from former employees and retirees of the Nackawic Mill

Further to my recent correspondence in this matter, please be advised that the Ombudsman's Office has completed its investigation into this matter and is pleased to forward to your attention its recommendations. Let me thank you first of all for your staff's diligent cooperation in facilitating our investigation. I have indicated from the outset that part of my concern has been to bring forward recommendations for consideration by your office, and through you to the Executive Council, in a timely fashion. My conversations with affected mill workers and pensioners in Nackawic over the past several days and in the previous months have convinced me that this matter is one which will be dealt with most effectively through early and decisive action, provided it is fair and offers equitable compensation, to the extent available, to all concerned. A brief consideration of only a few of the individual stories caught up in the Nackawic Mill closure will suffice to demonstrate the need for a speedy resolution to this matter.

Before relating a few of these stories I want to preface them with a word on methodology, on the Ombudsman's role in such highly sensitive public issues, on the confidential nature of our investigations, and the spirit in which they are formulated. As I have indicated to you previously, I have only embarked upon this investigation after careful consideration. When complaints were first addressed to my office, I felt it appropriate to remain supportive to complainants while the difficult process of finding a buyer for the Mill, the negotiations of pension liability issues with that new entity, and the pursuit of other remedies were carried out. In effect, it was difficult to take any kind of action with respect to complaints that were, in some measure, founded upon a fear of what may unfold. However, as events unfolded and the implications for pensioners and pension contributors became clearer and when new complaints were filed this fall from workers who had retired on the basis of pension plan amendments promised in 2001 that were never registered, it became clear that an investigation had to be undertaken.

Despite the many complex issues to which the wind-up of these pension plans give rise, I have been surprised and encouraged by the great commonality of thought and the willingness of all parties to strive for resolution through mutual compromise along the lines suggested in my recommendations below. In reaching these conclusions I have tried to be careful to consider the potential fall-out and impact of the recommended approaches on all affected. I have to this end communicated personally with each of the complainants who have filed individual complaints with my office. I have met with the Superintendent of Pensions and departmental officials in the department of Training and Employment Development. I have also discussed the file with officials of Morneau Sobeco, the administrator appointed by Pensions Branch to administer the wind-up of the plans, I have reviewed copious amounts of file material shared by all of these parties and have asked my staff to research and advise upon the applicable statutory duties and entitlements and the potential recourses for redress which the complainants may have and to compare our statutory regime with pension wind-up schemes existing in other

Canadian jurisdictions. Finally, I welcomed the recent opportunity to review these findings and recommendations with you.

Owing to the strict timelines which I have imposed upon this investigation, it has not been possible to fully canvas the many issues to which the complaints give rise. I have deliberately focused my efforts on a resolution for the affected workers. I was primarily concerned with the situation of complainants who have been depending on pension income for over three years now and have only belatedly learned that failure to register the applicable pension plan amendments may have jeopardized their future pension income. The investigation has confirmed me in the view that any resolution will have to take into account the interests of all affected, and that solutions which prioritize one legal claim at the expense of others will not be workable. Issues that fall outside of the scope of this investigation but which require further study have been the object of separate recommendations to that effect.

The advantage that the Ombudsman's Office has over other complaint resolution mechanisms is that it has all the investigatory powers necessary to do a thorough study of the issues but none of the administrative or judicial processes that weigh down other dispute resolution mechanisms. It can therefore get to the bottom of issues quickly and effectively. In other times, when a great number of citizens have been affected by a private sector event such as a mill closure or the collapse of a financial institution, the Ombudsman has conducted comprehensive investigation into such matters[1]. The Legislature may, through one of its committees, ask this office to investigate and make recommendations under section 13(2) of the Ombudsman Act, simply because our process promotes speed and efficiency. The other chief advantage of the Ombudsman's process is the private nature of its investigations. The Ombudsman's Act provides that the Ombudsman can make reports public, but at this stage I can see no advantage in fanning speculation around possible wind-up scenarios. I am forwarding these recommendations to your office in the hope that this early review and analysis of solutions available will assist in getting fair and timely results for affected mill workers, goals which I know your office and the Minister share. However, it should be clearly understood that after an appropriate period of time has passed for government to respond to our recommendations, individual complainants will be apprised of our recommendations.

The Context

Nackawic is a one industry town. Census data for 2001 reports a population of 1042 residents, which represented, even then, a 10% decrease from the 1996 census figures. The mill, which until recently operated as St-Anne Nackawic, has been the main employer in the region for several decades. Until September 14, 2004 the mill employed just over 400 workers. A further 270 former workers already on pension have seen their pension income jeopardized by the mill's closure. Roughly 50 other former employees have deferred pension entitlements which are also impacted by the closure.

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[1] See for instance the Ombudsman's 1991 public report into the collapse of the Principal Group of Companies.

A loss of this magnitude can be fatal to a community like Nackawic and can create economic hardship throughout the region. It therefore justifies the proactive and diligent steps which government has taken to ensure employment and the mill's continued operation in some other capacity. With a new employment base, the community can refocus and rebuild. Individuals affected may, in some cases, have a harder time recovering their economic security and refocusing their work and life plans. Many workers have not waited for a new buyer to be found. These employees, often the most highly skilled and professionally trained, have moved on to other more secure employment, in the region or in other parts of the country. Many others remain, depending temporarily on unemployment insurance which has now run out, or on other household income, which the family may not wish to risk losing in a relocation. In other cases obligations to other family members, a commitment to community, to land or a sense of place and belonging, take priority over the option of relocating. Most often the decision to stay is based on a more sanguine assessment of their life's work in terms of savings and investment in property compared to their remaining years in the work force and the risks inherent in starting over. Workers unemployed as a result of a mill closure in a town like Nackawic have many choices ahead of them in the broad labour market, many difficult choices.

The situation is further complicated by the multiplier effect that such a massive downturn in employment in the region brings with it. Individuals cannot rely on their extended families and traditional support networks as they might otherwise in a job loss situation, since those supports, be they employed or retired friends, siblings, children or parents, may have fallen on hard times as well. In this context, from both a community and an individual perspective all revenue sources in the region, particularly private pension schemes become critical. There is no doubt that Nackawic pensioners had a good and stable source of pension revenue that added to the economic stability of the region. A quick comparison of the average pension revenue to the median income for the region clearly underscores this fact[2].

However, almost as important as maintaining the flow of pension revenues is the early confirmation of whether the employer's pension plan must be wound-up and what impact the plan wind-up will have on future pension revenues. Individuals need confirmation of this essential information in order to make informed choices about how to get on with their lives. The last fourteen months have been a lengthy period of uncertainty and apprehension for affected mill workers and pensioners. Some have fared better than others. Many have experienced real hardship.

Individual Stories

[2] Statistics Canada reports the average earnings for the Town of Nackawick as $32,225.00 and the median income as $18,524.00, according to 2001 census data: in comparison Morneau Sobeco reports the average and median incomes of St.Anne-Nackawick pensioners as $18,000 and 21,000 for Hourly Plan pensioners with a $4,400 or $6,500 bridge respectively, and salaried Plan pensioners receive on average $25,000 in annual pension with a $5000 bridge whereas the median pension in this group is $24,000 and over half of them receive no bridging. By any measure mill pensioners are in the top half of earners in their town.

In my consultations with public officials and individual complainants I have heard many stories of individual hardship that have impressed upon me the need for early and effective resolution in this case, and indeed legislative reform in view of the long term. Three individual stories I will briefly set out here for illustrative purposes. These cases have been made anonymous in order to protect the privacy interests in play, although the stories may be well known and, in some cases, a matter of public record.

The first example details the impact of the plan wind-up on John Doe, a retired mill worker. John worked for 20 years at the mill before retiring in 2000 under a 1999 early retirement package. At retirement John earned a pension of $26,610, with bridging until age 65 in the amount of $8550. As a result of the plan's underfunding his pension income will be reduced by 13%, but he was advised this fall that if the distribution model is changed his reduction could be 22% or as high as 26%, in real terms a drop from $35,000 to $27,000 in annual pension income.

The second example relates the story of a couple Kevin and Sarah. Kevin is 58 years old and worked at the Mill for 32 years before taking advantage of an early retirement window in 2001. The early retirement incentive and pension income while attractive represented a significant reduction in salary. Kevin's wife Sarah had to help shore up the loss by taking a job locally at minimum wage, so that they could continue with their mortgage payments. Also following the Mill closure, Kevin and his wife lost the medical coverage they had through Kevin's former employer. They had to re-apply for private medical insurance, but owing to her condition as a diabetic, Sarah was refused. They must now pay themselves for her medical expenses. They know that these will increase in the months ahead. They are very fearful for their economic security now that Kevin's pension entitlement may be reduced by half and that he may be obliged to repay four years of "overpayments". Their retirement dreams have been frustrated and the last fourteen months have been a long period of anxiety and uncertainty that have taken a toll on their health and enjoyment of life.

The third and final example demonstrates quite tellingly how a single family can be dramatically impacted, not only by the Mill Closure, but indeed by the regulatory

framework in place in the province to deal with such cases. Ian and Donna have been married for many years. They were both employed at the Ste-Anne Nackawic Mill and were both members of the salaried plan. At the time of the closure on September 14, 2004 Ian had been employed with the Mill for almost 30 years and Donna for just over 18 years. Neither employee was 55 years of age. Neither was eligible for retirement. However they had accumulated, through employee and employer contributions over their years of employment, deferred pension entitlements worth over $200,000. As a result of the under-funded status of the plan and the regulations in place, they will be entitled upon wind-up, to under $10,000 each. They are mad, disillusioned and very fearful of their economic future and a rough road ahead.

Distribution scenarios

The fact is that as of September 14, 2004, date of the closure and the proposed effective date of wind-up of the employer managed pension plans, the plans were only 67% (Hourly Plan) and 74 % (Salaried Plan) funded. Morneau Sobeco, the publicly appointed administrator of the pension plans for the insolvent company reports that contributing factors to the significant under-funding are a) the current cost to purchase annuities from an insurance company, b) the general poor performance of the investment markets in 2001 and 2002, and c) improvements to the plan in 1999 and 2001 in the form of early retirement incentive programs (ERIPs). Given the significant extent of the under-funding, the method of distribution of existing assets has become a hotly contested issue.

In late September 2005, Morneau Sobeco, acting in its capacity as Administrator of the Pension Plans for Union and Non-Union Employees of St. Anne-Nackawic Pulp Company Ltd. and not in its personal capacity, forwarded to each plan member an individual statement outlining possible distribution scenarios. There are two pension plans being wound-up. One for Non-Union Salaried Employees of St. Anne-Nackawic Pulp Company Ltd. and one for Hourly paid and Clerical Union Employees of St. Anne Nackawic Pulp Company Ltd. Both plans were subject to plan amendments in 2001, but these amendments were only filed in the spring of 2004 and were not registered before the mill closed on September 14, 2004. It is helpful for discussion purposes to distinguish the plan members under each plan as pensioners or contributors. The contributors may have been active employees at the time of the closure or former employees with deferred vested pension entitlements and it is helpful to break this group further in to those over age 55 and those under age 55. The member count under each plan as of the date of the Mill closure can therefore be presented in a table[3] as follows:

St. Anne-Nackawic Member Counts as at September 14, 2004

	Hourly Plan	**Salaried Plan**	**Total**	**% of All Members**
Pensioners	172	98	270	37%
Actives over age 55	50	32	82	11%
Deferred Vested over age 55	17	11	28	4%
Totals for those over age 55	**239**	**141**	**380**	**52%**
Actives under age 55	257	62	319	44%
Deferred Vested under age 55	18	7	25	4%
Total for those under age 55	**275**	**69**	**344**	**48%**

[3] Please note that the figures include only New Brunswick members. Also, a few members are included in both the active and deferred count. This is because they retained a deferred entitlement as a result of an earlier period of employment with St. Anne, were subsequently re-employed by St. Anne and were active as at the wind-up date.

Pensioners and contributors to the plans received an outline of what they would have earned as of September 14, 2004 had the plan been fully funded. The statement then outlined three possible scenarios, the first one being the winding up based upon the Administrator's calculations of the current distribution model provided under Regulations to the *Pension Benefits Act*. Two other distribution scenarios under consideration by the Province were also outlined: a second calculation was based on the pro rata distribution of benefits accrued in the plan based upon the funded position of the plan; and the third alternative calculation was based upon a combination of the latter two: all members would receive a return of their contributions along with 50% of their residual entitlement and any remaining assets would be distributed based upon the priority schedule set out in the Regulations.

All figures provided were projections subject to variation at the time of wind-up based upon a number of factors. While the key variable identified was the distribution method, which the administrator clearly indicated would be determined by government[4], other variables identified to plan members included:

a) the amount of the pension claims recognized by the trustee in bankruptcy;
b) legal challenge to the validity of the early retirement window;
c) legal challenges under the *Human Rights Act*;
d) litigation by any members of the Plan;
e) ongoing discussions and possible legislative initiatives changing the distribution model;
f) the investment performance of the pension fund; and
g) member data corrections.

While several of these variables are unavoidable and can only be determined upon wind-up, it is very evident to everyone in the community that legal challenges premised upon an alleged lack of fairness in the legislated distribution model and upon an alleged maladministration of the *Pension Benefits Act* are now complicating and possibly delaying distribution of their pension funds. Related legal challenges by pensioners and employees over 55 eligible for pension and opposed to the claimants in the other legal challenges were filed in August and subsequently dropped as against the trustee in bankruptcy. Ultimately all these challenges place any wind-up on the basis of existing plans and existing regulations under a cloud of uncertainty, and this in a context where pension members can least afford financial insecurity.

Government must determine its course of action with careful consideration of the legal challenges mounted. It is not my purpose to review or assess these in detail here. Suffice it to say from my brief analysis below, I have concluded that the challenges are serious enough that they should be determined and resolved early, if necessary, through legislative action, as recent amendments to the Act appear allowed.

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[4] See question # 2 to the Frequently Asked Questions circulated with the Administrator's Memo to plan members of September 27, 2005 stating that the administrator is "awaiting a decision from the Government in respect of the asset distribution method to be applied in winding up the Plan."

The Applicable Law and the Legal Challenges

New Brunswick adopted pension benefits legislation in the late 1980s. The *Pension Benefits Act* was adopted to provide a means of securing private and public pension plans in the province, by requiring their registration and establishing an Office of Superintendent of Pensions with broad powers respecting approval of plans submitted for registration or amendment. Sections 7 and 11 of the Act require all pension plans to be registered and all amendments to be submitted for registration within 60 days of their adoption. Pension plan administrators are required to file annual returns with the Superintendent and administer the plans in accordance with the documents registered and approved by the Superintendent and in compliance with the Act and the regulations. No amendment to any pension plan can be effective until an application for registration is made[5]. The Act stipulates further that amendments will be void if the amendments purport to reduce the amount or commuted value of benefits accrued, or eliminate certain optional benefits for members without their consent[6]. Plan amendments which may impact on other members' benefits, rights or obligations must be notified to all such members and the Superintendent cannot register the amendments until 45 days have lapsed from the date of notification unless she is of the opinion that members will not be substantially affected, or in the case of a union plan, if the union representatives have approved the amendment[7].

The Act also has fairly detailed provisions dealing with the circumstance of insolvency. Section 52 of the Act stipulates that "[i]f the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an administrator of the plan." Section 61 of the Act then provides that in the event of bankruptcy or sale of the employer's business to a person who does not provide a pension plan, or other enumerated circumstances, the Superintendent of pensions may order the wind-up of the pension plan. In the present case, the Superintendent issued notice of the wind-up order on September 21, 2005.

Section 62 of the Act requires the administrator of a pension plan that is being wound-up to file a wind-up report with the Superintendent of Pensions which sets out, among other things, the "methods of allocating and distributing the assets of the pension plan and determining the priorities for payments of benefits". Once this report is filed, no payment can then be made from the pension fund (other than existing and approved pension benefits) until the Superintendent approves the wind-up report[8]. Interestingly, in dealing with the Superintendent's discretion in approving a wind-up report, subsection 62(5) of the Act provides that "The Superintendent may refuse to approve a wind-up report that

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[5] Subsection 11(4) , *Pension Benefits Act*, RSNB 1973, c. P-5.1

[6] id. See ss. 12 and 12.1

[7] id. s. 24.

[8] Section 62, *Pension Benefits Act*, RSNB 1973, c. P-5.1. Paragraph 49(2)b) of the Regulation further provides that the wind-up report must be filed within 6 months of the effective date of the wind-up. The Superintendent, pursuant to subsection 62(8) of the Act may then approve the wind-up report after the expiry of 30 days from the date of its receipt. In the present case the effective date of wind-up was established in September 2005 as being September 14, 2004, which made the administrator's compliance with the regulatory time-line for filing a moot point.

does not meet the requirements of this Act and the regulations, **or that, in the Superintendent's opinion, does not protect the interests of the members and former members of the pension plan**". This provision must be read in context with section 66 of the Act which provides that: "Upon wind-up of a pension plan in whole or in part, if insufficient funds are available to pay the pensions and benefits under the plan, the amount of the pension **may be reduced in accordance with the regulations**." (my emphasis)

The regulations under the *Pension Benefits Act* are also very detailed[9]. Section 50 of the Regulation provides that if upon wind-up a plan is under-funded, the funds available are to be allocated in priority: 1) to all members, by returning all employee contributions with interest; 2) to pensioners, by paying the commuted value of any pensions outstanding; 3) to those eligible for retirement as of the date of the wind-up, by paying the commuted value of their deferred pensions; and finally, 4) to all other persons entitled to a deferred pension. If the funds run out at step 2, 3, or 4, the payments made to members in that class only are to be paid on a pro-rata basis. All of the shortfall under this model falls to workers in the lowest categories of priority.

Against this regulatory backdrop, legal challenges have been threatened with respect to the non-registration of the 2001 plan amendments to both the union and non-union pension plans, and human rights complaints have been filed regarding the regulated priority established for wind-up of insolvent employer pension plans. An earlier law-suit by retirees and eligible employees over 55 seeking to prevent government from tampering with the regulatory framework was amended last August, to remove the Trustee in Bankruptcy, when it appeared to threaten the sale of the Mill.

On the registration front the legislation clearly places the onus on plan administrators to seek registration. However questions remain with respect to why it is that amendments were not registered between April 14, 2004, when they were filed, and September 15, 2004, when the company became insolvent. How it is that pensions were paid out on the basis of the unregistered plan amendments? Were annual filings submitted indicating such payments? What of the 2001 valuation reports showing a significant under-funding of the plan? Should this not have prompted some questions regarding the impact of successive early retirement windows and the employer's failure to contribute to the plan? How is it that fully one year later, these amendments are still not registered or declared void?

In all the circumstances, while the plan administrator clearly failed in its duty to its members, it is not clear that the Superintendent's office acted with due diligence and celerity when it became clear, or should have become clear, that the plan administrator had failed in its duty and that corrective measures were required to protect the interest of plan members who had in good faith accepted early retirement packages. What is amply clear is that the legislative safeguards that were put in place to protect pension beneficiaries failed the members of the St-Anne Nackawic plans, in this case. In a legal dispute the Superintendent of pensions may be able to throw off any responsibility on the

[9] New Brunswick Regulation 91-195

basis of the clear onus placed upon plan administrators under the Act. My own view, however, is that a trier of fact would take a sterner view of the standard of care required of a public official charged with the security of pension plans within the province. In any event these are difficult legal issues that could give rise to lengthy court proceedings that would create more delay and uncertainty at a time when plan members can least afford it.

Just as troubling as the threatened action by pensioners enrolled under the 2001 plan amendments, is the increasing debt which all pensioners continue to accrue based upon the current under-funded position of the plan. Pensions have continued to be paid out to all plan members based upon projections of a fully funded plan. The Superintendent has known that the plans were under-funded since as early as 2002 and following the company's insolvency appointed a public administrator for the plan. Yet fully one year later pensions have not been reduced to reflect the plans under-funded position and this creates a liability which affected pensioners are expected to reimburse once their pensions are actually reduced. This is a significant problem for pensioners and one which, in spite of the complexities of the case, the Province should, in my view, have taken decisive and prompt action to minimize and prevent, given its fiduciary responsibility as administrator of the insolvent company plans[10].

With respect to the human rights complaints they also raise complex issues arising from the application of the *Human Rights Code*. By placing deferred pension beneficiaries at the bottom of the priority list for payout in cases of insolvency, are the Regulations under the *Pension Benefits Act* systemically discriminating against younger workers? By proposing or approving a wind-up plan which leaves senior employees with 25 years of service and over $100,000 worth of deferred pension entitlements nothing but a return of their own meager contributions, while employees with much less seniority but who are over 55 years old collect full pensions, are the Administrator or the Superintendent of Pensions acting in breach of the *Human Rights Code*? I note in passing that the *Pension Benefits Act* contains its own supremacy clause[11], that the *Human Rights Code* does not allow for any bona fide qualification defense to a complaint of age discrimination in the service sector[12], but that in employment matters the prohibition on age discrimination does not apply to operation of the terms or conditions of any *bona fide* retirement or pension plan that have the effect of a minimum service requirement[13]. It seems the human rights complaints also raise difficult legal issues which could take months or years of hearings and appeals before they could be finally determined.

Government does have the option of sticking to the regulations as drafted, defending the conduct of its officials and meeting all challengers in court. My own assessment of the situation is that this course of action is fraught with legal risks, would lead to months of further uncertainty and delay for pensioners and deferred pension beneficiaries and would

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[10] Morneau Sobeco currently estimates the amount of overpayments that will have to be recovered from pensioners under both plans as $3.6 million and anticipates that most pensioners will have to pay these amounts back on 3 to 5 year payment plans, starting January 1, 2006.
[11] section 5, *Pension Benefits Act*, RSNB 1973, c. P-5.1
[12] See s. 5 *Human Rights Act*, RSNB 1973, c.H-11
[13] Ibid, paragraph 3(6)b)

not meet the public expectation that New Brunswickers have that government will do everything in its power to uphold the letter and the spirit of the *Pension Benefits Act*. Worse yet, it could quite conceivably be perceived by some as an attempt by government to shield its own shortsightedness and administrative errors at the expense of unemployed pensioners. The first option proposed to plan members by the administrator through individual correspondence earlier this fall therefore has very little to recommend it and, in my view, should not be entertained as a workable solution for either plan. I am confirmed in this view, by virtue of the fact that government has already enacted exceptional legislation expressly allowing it to proceed otherwise.

The 2004 legislative amendment – the opportunity

Following the mill closure, and in a bid to secure a buyer, the government adopted in December 2004 exceptional amendments to the *Pension Benefits Act* which give the executive broad ranging regulatory powers. The amendments effectively allow cabinet to retroactively subtract the St-Anne Nackawic Pension plans from the provisions of the *Pension Benefits Act* and determine the rights, obligations and entitlements of members to either plan through regulation. They also bar any legal action against government, or its agents, in respect of such a regulation. This provision ceases to have effect in June 2006.

While the amendments were adopted in respect of a prospective purchase which fell through early this year, the mill has subsequently been sold and the conditions of sale with respect to the former owner's pension plans have been addressed. Nonetheless, the existing regulatory framework does present government with an opportunity to resolve through legislative means, in an expedient and final fashion, the issues arising out of the pension debacle.

I hesitate to recommend recourse to this method owing to the autocratic aspect of the means used. I note that even when the legislation was introduced, in the immediate context of a strong prospect for the early sale of the mill, concerns were raised with respect to the sweeping manner in which legislative guarantees are put aside in favour of executive decision-making, in which vested pension rights could be affected, even retroactively, and the extent to which all of this may be shielded from review by the courts. I conclude on balance, however, that this is an exceptional case, where the ends may justify such means, provided certain conditions are respected. The executive should only proceed in this manner having first assured itself: 1) that no perception may arise that it is seeking, or may consequentially benefit, itself, from any statutory bar to action, and 2) that necessary legislative amendments inherent in the assumptions guiding the resolution of this pension plan wind-up will be introduced contemporaneously or in very short order.

In light of the foregoing I offer the following recommendations stemming from my investigation into the complaints of affected pensioners and mill-workers.

Recommendations

1. Timely resolution:

As previously indicated I am very concerned with the precarious financial situation that former mill employees now find themselves in, especially since employment insurance funding is exhausted. In September 2005 the plan administrator wrote to all plan members advising them that January 1, 2006 would be the date when pensions in pay will be reduced to reflect the under funded position of the plan. Recovery of pension overpayments made since September 14, 2004 would also commence as of that date. The reduction in payment cannot proceed without the Superintendent's approval and the overpayment cannot be calculated precisely without determining the distribution method.

Given the public commitment to have the uncertainty resolved by year's end, given that 16 months from the effective date of wind-up is already well in excess of the time-delays for wind-up contemplated in the legislation, given the importance of this decision to the economic security of the community and the individual mill workers and pensioners affected, timely resolution is the thrust of my first recommendation.

It is recommended that the Department of Training and Employment Development and the Executive take all measures required to ensure that the distribution method used in the wind-up of both St-Anne Nackawic Pension Plans is determined immediately so that all wind-up activities can proceed as planned by January 1, 2006 and as expeditiously as possible thereafter.

2. ***Full recognition of unregistered plan amendments***

As a result of this investigation and consultation with the Superintendent of Pensions and the independent publicly appointed administrator for the wind-up of these plans, I am satisfied that the 2001 plan amendments and the May 2004 amendments to the Hourly plan contemplated in a memorandum of agreement between the union and the employer, would have been registered had they been duly submitted for registration at the appropriate time. A number of employees who took advantage of the 2001 early retirement incentives have in fact been in receipt of these pensions for several years. While the fault for their non-registration lies in great part on the insolvent employer as plan administrator, I am not satisfied that the Superintendent of pension can be absolved of all responsibility. More diligent and proactive steps could have been taken in 2002, upon receipt of the 2001 valuation report, indicating the significant under-funding of the plan and the impact of the (unregistered) 2001 plan amendments on the funded position of the plans. At the very least more diligent and proactive steps could have been taken in April 2004 to register the 2001 plan amendments prior to the mill's closure five months later.

In any event the early retirement program retirees were blameless in this matter and should not be the ones held accountable for their employer's failure, as plan administrator, or the failure, if any, of the Office of the Superintendent of Pensions. While there is a cost to the plan, and barring any possible recovery from the bankrupt

employer or government, to other plan members, it would be inequitable to require the 2001 retirees to shoulder this cost individually.

It is recommended that the Department of Training and Employment Development and the Executive exercise the extraordinary regulation making power under section 100.1 of the Pension Benefits Act in order to direct the Superintendent of pensions to register the 2001 plan amendments as well as the terms agreed to in labour negotiations of May 2004, in respect of the Hourly plan.

3. Province to assume cost of overpayments to pensioners from effective wind-up date

As stated previously, the exercise of this extraordinary regulation making authority, subject as it is to a statutory bar to action or any other proceeding against the Province or its agents, should not be invoked in any way that could reasonably be perceived as the Province shielding itself from any liability to plan members or protecting discriminatory practices. It is an extraordinary measure which can only have been adopted for the purpose of achieving finality and closure for affected mill workers and pensioners. The two conditions precedent to this regulatory power, which I have framed above, are therefore the underpinning to this and my subsequent recommendations.

I have set out above my concerns with respect to the fiduciary obligation which the Superintendent of Pensions and the publicly appointed administrator owe plan members once plan assets are transferred to their care. I note that in establishing an effective wind-up date pursuant to the legislation, one year retroactively, public officials have effectively created that liability for their fiduciaries. I am not certain whether any other course of action was available to the Superintendent, but in the context of all the recommendations which I am forwarding, I find it unconscionable to ask existing pensioners to further underwrite the cost of the wind-up by having the plan claw back from them limited pension revenues which they have received and relied upon in good faith from public officials. My overall approach has been informed by a sense of equity and a fair apportionment of the loss due to the plans' under-funding. Should government accept all of these recommendations, all plan members will share in the distribution of assets more fairly, but this will come at considerable cost to existing pensioners. It is appropriate in the circumstances to take measures to ensure that the group of existing pensioners not be doubly penalized.

It is recommended that Government assume responsibility for the overpayments to pensioners and that the liabilities of all pensioners for such overpayments to the plan be paid from the Consolidated Revenue of the Province.

4. Pro rata distribution model

My central recommendation is that both plans be wound up on the basis of a pro-rata distribution model based on years of contributions as proposed to plan members in option 3 of the distribution scenarios provided to them by the Administrator earlier this fall. My reasons for this recommendation are several. Principally, I do so because my

consultations with all parties have amply convinced me that this is the one model to which nearly all plan members can rally themselves, however reluctantly. While I believe that this recommendation also must be one imposed from above, it will be preferable to proceed as much as possible through a mediated approach. The pro-rata distribution model requires compromise on all parts. It is however the model which is consistent with the wind-up process required by regulations in most every other Canadian jurisdiction. It is the only model which is not in any way age-based and is therefore least susceptible to any claim of discrimination. Finally, with a modest contribution from the province as recommended above, the impact on plan members, while not negligible, will, in most every case, be affordable in relation to their expected pension benefits. Finally, unlike all other models, which clearly create categories of winners and losers through the prioritized distribution of assets, this model, although under it everyone may be classed as losing something, has the great merit of ensuring that no one loses more than their neighbour. In this respect I find it by far to be the most equitable approach.

It is recommended that the Department of Training and Employment Development and the Executive exercise the extraordinary regulation making power under section 100.1 of the Pension Benefits Act in order to direct the Superintendent of Pensions and through her the appropriate Administrator to wind-up the 2001 Ste-Anne Nackawic Pension Plans on the basis of a pro-rata distribution model.

5. ***Harmonize PBA with Canadian pension legislation based on pro rata distribution model***

While I have not had the time necessary to make detailed recommendations with respect to legislative improvements, and while I offer only some first suggestions for further study and consideration in my recommendations below, there is one improvement to the regulations which I am prepared to advance at this stage and that is that the distribution model mandated in section 50 of the *General Regulation* under the *Pension Benefits Act* be abandoned in favour of harmonizing our legislation in New Brunswick with the pro-rata approach favoured in other provinces and recommended in this particular case. I would further recommend that the government's intention of doing so be announced contemporaneously with its direction in respect of the wind-up model to be used. This will greatly ease the acceptance by plan members of the approach recommended in this particular case. It is also clear to me on the basis of this investigation that the current model, whether discriminatory or not, simply does not work and is most likely to lead, in future cases, to contestation, litigation, resentment and in-fighting between plan members.

It is recommended that the Government Regulation providing for the exceptional wind-up procedures in respect of the St.Anne – Nackawic Pension Plans also provide for the repeal of section 50 of the Regulation and its replacement with a pro-rata distribution model thereby harmonizing the province's pensions' legislation with other Canadian jurisdictions in adopting this formula for wind-up of any other pension plans in the context of an insolvency.

6. ***Other legislative amendments***

At this time my key recommendation in respect of other legislative changes is that the legislature expend considerable effort in determining how, on the basis of the Ste-Anne Nackawic pension plans' experience, pension security and pension legislation and regulation in the province can be improved. Two areas of further inquiry that I would specifically highlight at this stage are: 1) to consider amendments creating a legislated mechanism to protect members in under-funded plans and further stabilize plans; and 2) consider legislative options re securing the privileged status of pension plan members to employer administered plans as creditors in the eventuality of an employer insolvency.

It is recommended that the Government, through the Legislative Assembly, create a task force to report to the legislature by December 2006 with recommendations on how to improve pension plan security and the regulation of private and public pension plans in the Province.

I trust that the foregoing recommendations will be helpful to your department and the executive in finding an early and equitable resolution to these difficult issues. I am of course prepared to discuss them in greater detail, if required, at your convenience.

I look forward to your early response within the next month.

Bernard Richard

Ombudsman