



IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990,
c. P.8, as amended (the “*PBA*”)

AND IN THE MATTER OF a Proposal of the Superintendent of
Financial Services to Refuse to Consent to a Transfer of Assets
under section 81 of the *PBA* from the IBM Retirement Plan,
Registration No. 0342030 (“IBM Plan”) to the Lenovo (Canada) Inc.
Defined Benefit Pension Plan, Registration No. 1153840 (“Lenovo
Plan”).

TO: **IBM Canada Limited**
2220 Wakley road
Ottawa, ON K1G 5L2

Attention: **Ms. Jennifer Gilmor,**
Pension Programs Manager

NOTICE OF PROPOSAL

I PROPOSE TO REFUSE TO CONSENT to a transfer of assets
effective April 30, 2005, from the IBM Plan to the Lenovo Plan under section 81 of
the *PBA*.

REASONS:

1. IBM Canada Limited (“IBM”) is the Employer and Administrator of the IBM Plan. Lenovo (Canada) Inc. (“Lenovo”) is the Employer and Administrator of the Lenovo Plan.
2. On April 25, 2008, IBM filed with the Superintendent of Financial Services (the “Superintendent”) an application for consent to a transfer of assets from the IBM Plan to the Lenovo Plan effective April 30, 2005 (the “Application”). The details of the proposed transfer were set out in an IBM Canada Limited – IBM Retirement Plan Actuarial Valuation and Partial Transfer of Assets Report as at April 30, 2005 (“Asset Transfer Report”).
3. On May 28, 2009, the Superintendent’s staff wrote to IBM identifying a number of issues that needed to be addressed before the Application could be approved. One of the issues that had to be addressed resulted from the Ontario Court of Appeal’s decision in *Aegon Canada Inc. and*

Transamerica Life Canada v. ING Canada Inc.[2003] O.J. No. 4755 (“*Transamerica*”). On July 8, 2004, the Supreme Court of Canada dismissed ING Canada Inc.’s application for leave to appeal. Therefore, the Court of Appeal’s decision is now final.

4. *Transamerica* is a case about an asset transfer from a pension plan that was subject to a trust and in a surplus position, to a pension plan that was not subject to a trust and in a deficit position. After the transfer, the actuarial surplus that derived from the trust plan was used to fund the employer’s obligations under the non-trust plan. The Court of Appeal for Ontario held that the terms of the trust were not altered by the transfer of assets and the use of actuarial surplus to fund the non trust plan was “cross-subsidization” that was not permitted by the terms of the trust. The Court ruled that the terms of the trust prevented the use of the assets in the trust for any purpose other than for the benefit of the trust’s beneficiaries. As a result of the decision, IBM must demonstrate to the Superintendent that the historic plan and funding documents authorize the transfer. FSCO has prepared a “Trust Issues on Pension Plan Asset Transfer” Checklist (“Checklist”) to assist applicants in this process. The Checklist provides an exemption from providing the historical plan and trust analysis if the asset transfer is made to a “spin off” plan and certain conditions are met.

5. In its Application IBM checked off “yes” under paragraph 4 of the Checklist indicating that the terms of the Lenovo Plan are “not materially different” from IBM Plan. However, the Application does not meet the requirement of paragraph 4 of the Checklist because the Lenovo Plan is funded by a group annuity and is not governed by a trust agreement. As such, IBM has not demonstrated to the Superintendent that the terms of both plans are “not materially different”. It is the onus of the party submitting the documents to show how they meet the exemptions set out in the Checklist. Therefore, IBM is not exempt from providing a historical plan and trust analysis and documentation.

6. In a letter dated May 28, 2009 letter the Superintendent’s staff advised IBM that the plan funding documents submitted in respect of the Asset Transfer do not qualify for the exemption from providing a detailed historical analysis of the plans. The letter also provided IBM with other options in order to satisfy the Checklist criteria. IBM was asked to respond by August 1, 2009.

7. On August 31, 2009 the Superintendent’s staff received a letter from Nicole Barnes, Director of Global Benefits at Lenovo. She advised FSCO that the present membership of the Lenovo Plan is comprised solely of those members of the IBM Plan whose liabilities and assets are the subject of the transfer application. Further, Lenovo advised that while not funded through a trust, the group annuity policy funding of the Lenovo Plan provides the same protection to members of their benefits are provided under the IBM Plan. No further details were provided to substantiate that the protection is the same.

8. On November 19, 2009 the Superintendent’s staff wrote back to Ms. Barnes and advised that the Superintendent continues to take the position that they do not qualify for the exemption in paragraph 4 of the Checklist.

9. IBM was given until December 19, 2009 to respond to the November 19, 2009 letter. No response was received from either IBM or Lenovo. In the letter dated November 19, 2009 the Superintendent's staff advised IBM that in the event these issues were not addressed they will be making a recommendation to the Superintendent based on the materials submitted to date.

10. Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the "Tribunal") pursuant to section 89(6) of the *Act*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Proposal is served on you.**¹

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto ON M2N 6L9

Attention: The Registrar

FOR FURTHER INFORMATION, contact the Registrar of the Tribunal by phone at 416- 226-7752, toll free at 1-800-668-0128, ext. 7752, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE PROPOSAL AS DESCRIBED IN THIS NOTICE.

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NOTE - Pursuant to section 112 of the *Act* any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the seventh day after the date of mailing.

DATED at Toronto, Ontario, this **15th** day of **April, 2010**

K. David Gordon
Deputy Superintendent, Pensions

CC: Nicole Barnes
Lenovo
1009 Think Place, B1, 4Q5
Morrisville, NC 27560