

February 25, 2009

The Honourable Dwight Duncan
Minister of Finance
Attention: Comments on Report of the Expert
Commission on Pensions
c/o Pension and Income Security Policy Branch
5th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Dear Minister Duncan:

**Re: Response to the Report of the Expert Commission on Pensions (the “Report”)-
Joint Submission of the Nursing Homes and Related Industries Pension Plan (the
“NHRIPP”) and the Multi-Sector Pension Plan (the “MSPP”)**

On behalf of the Trustees of the above-noted pension plans, we thank you for the opportunity to provide feedback on the Report. The Trustees of the NHRIPP and MSPP provided a joint submission to the Commission which highlighted 12 primary areas of concern (the “Joint Submission”). A summary of the Trustees’ recommendations respecting these issues as submitted to the Commission is appended to this letter.

Overall, the Trustees view the recommendations of the Report in a positive light. However, they wish to take this opportunity to re-emphasize and elaborate on select issues flowing from the Joint Submission as well as from the Report.

1. Solvency Funding for MEPPs

The Report recognizes the distinctive character of multi-employer pension plans (MEPPs) in recommendations 4-8, 4-9 and 4-10 – positions which the Trustees of the NHRIPP and the MSPP endorse. The Report advocates that special legislation and regulations should be developed relating to all aspects of MEPP funding, regulation and governance. With respect to funding, the Report references the 2007 Specified Ontario Multi-employer Pension Plans (SOMEPP) regulation (Regulation 489/07) as a “realistic basis for designing a more complete and permanent exemption of MEPPs”.

As stated in the Joint Submission, the SOMEPP regulation provides a temporary reprieve from funding on a solvency basis effective until August 31, 2010. This reprieve, while welcome, has not dealt with the reality that MEPPs rarely fail. MEPPs are designed to accommodate entry and exit of sponsoring employers and free movement of employees between participating

employers. While single employer plans are susceptible to windup during economic downturns when the sponsoring employer experiences financial difficulty, the likelihood of a full MEPP windup is far less due to multiple sponsoring employers and, in some instances, cross sector employer representation. Consequently, a MEPP should be valued on a going concern basis as opposed to on a solvency basis. The Report embraces this view in Recommendation 4-10.

The Trustees of the NHRIPP and the MSPP remain concerned, however, that a rigid application of the eligibility criteria that a MEPP must satisfy to qualify as a SOMEPP as specified in section 6.0.2(1) of Regulation 909 may exclude MEPPs that should be funded on a going concern basis. If, during the course of developing permanent funding rules for SOMEPPs, the current eligibility criteria are adopted, the Trustees suggest that a provision be added which gives the regulator discretion to approve a MEPP as a SOMEPP in instances where not all of the SOMEPP eligibility criteria is satisfied.

There is precedent for the addition of a discretionary clause. Under the Income Tax Regulations, the Minister may designate a MEPP as a specified multi-employer plan (SMEPP). Under s. 8510(2)(b), the Minister has the discretion to accept an application from a MEPP and designate the MEPP as a SMEPP despite it not having satisfied all of the qualification conditions contained in s. 8510(3). If the SOMEPP criteria are used as a basis to determine MEPP solvency valuation requirements, the Trustees urge the addition of discretionary authority to register SOMEPPs on varied terms.

Recommendation: The Minister should be authorized to grant SOMEPP status to MEPPs that may not satisfy all of the criteria contained currently in s. 6.0.2(1) of Regulation 909.

2. Actuaries and other Service Providers as Fiduciaries

In their Joint Submission to the Commission, the Trustees of the NHRIPP and the MSPP outlined their concerns regarding the lack of clarity in policy and law respecting the extent of obligations owed by service providers retained by plan administrators. The Trustees highlighted certain contractual practices by service providers where there are attempts to limit or exempt the service provider from fiduciary obligations for services rendered. There are instances where a given service provider provides consultations in several, potentially conflicting areas. As well, there are conflicting decisions that have been rendered respecting the duty of care that may be imposed on an agent and its employees.

Recommendations 8-12 and 8-13 in the Report support undertaking consultations with stakeholders and representatives of the professional governing bodies to ensure that services are provided in a manner consistent with the good governance and proper regulation of pension plans. In particular, the Commission seeks clarification as to:

- which participants in the governance of pension plans are bound by fiduciary duties;

- the scope of such duties;
- whether such duties can be assigned to professional advisors and agents;
- whether advisors and agents are themselves bound by the same duties; and
- whether fiduciaries, their advisors and agents can enter into exculpatory contracts and indemnification agreements in order to limit their liability to the client or third persons.

These are fundamental issues that, properly defined, will help to ensure that there are sufficient checks and balances in the system. The Report recommends, and the Trustees strongly support, that the dialogue regarding these issues include not only the service providers, but also representatives of labour, plan trustees and other interested stakeholders. The Trustees wish to reiterate their recommendation set out in their Joint Submission on this issue to further reinforce the importance of this issue.

Recommendation: The Minister of Finance should propose amendments to the Pension Benefits Act (“PBA”) to explicitly provide that service providers (i.e. actuaries, administrators, auditors, custodians, investment managers, legal counsel, etc.) and the firms which may employ them owe fiduciary obligations to plan members.

Any consultations commenced to discuss service provider obligations should include labour and plan trustee representation.

3. Limiting Employer/Settlor Liability in MEPPs

Recent legislation in Quebec (Bill 68) effectively prohibits the reduction of benefits in a MEPP and imposes liability on employers who withdraw from a MEPP when the MEPP is underfunded. This legislative change will ensure that employers will not participate in Quebec-based MEPPs in the future, since they will no longer be able to cap their potential liability.

One of the key attractions for employers of MEPPs such as the NHRIPP or the MSPP is that they limit the obligations of employers to remitting the contributions required by the terms of their collective agreements and to providing the information necessary to administer the plan. Employers have chosen to participate in a MEPP with the understanding that they will not be held responsible for funding any solvency or going concern deficiency which may arise under the plan. They may choose to agree to increase plan contributions through the collective bargaining process, but they expect that they will not be compelled to make special payments. Section 14 of the PBA prohibits the adoption of amendments that reduce accrued benefits. However, it exempts MEPPs from this prohibition. This was done in tacit recognition that MEPPs are “target benefit” plans. The trustees of the plan set target benefit levels. But the trustees have no power to force an increase in contributions from participating employers to cover any funding deficits. In the event that the funding of a plan deteriorates, the PBA and its

regulations support a readjustment in benefit level as opposed to requiring participating employers to remit special payments to cover the unfunded liability.

Unfortunately, as recognised in the Report, MEPP provisions under the PBA are incomplete. This leaves open the possibility that the Financial Services Commission of Ontario (“FSCO”) will choose to apply other provisions of the PBA to MEPPs that were designed to apply to single employer plans (SEPPs). This is precisely what occurred when FSCO considered the windup report filed by the Trustees of the Co-operatives of Ontario Trusteed Revised Pension Plan, a MEPP. At the time of the plan termination, there were unfunded liabilities. The trustees adopted an amendment to reduce benefits to compensate for the funding shortfall. The plan expressly authorized benefit reductions in instances where an employer withdraws from the plan at a time when there is a funding deficiency. FSCO ruled that plan provision authorizing the benefit reduction and the section 14 exemption under the PBA did not apply. Instead, it imposed joint and several liability on the participating employers pursuant to section 75 of the PBA and issued compliance orders under section 87.

The Report strongly endorses MEPPs as a means of expanding pension coverage for working Ontarians but it does not adequately address employer liability issues. Employers may be reluctant to participate in MEPPs and thus expand pension coverage if there is uncertainty as to employer contribution liabilities. Consequently, the Trustees re-affirm their recommendations in the Joint Submission as follows:

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to explicitly provide that:

- (a) employers participating in a collectively-bargained MEPP (i.e. one in which contribution rates are set by collective agreement and which is administered by a Board of Trustees no fewer than half of whom are representatives of plan members) are only responsible for making the contributions required by their collective agreements and providing the information required to administer the plan;
- (b) employers participating in a collectively-bargained MEPP are not responsible for eliminating any funding deficit which may exist upon windup.
- (c) the settlors of the trust fund of a MEPP are not liable for the decisions or actions of the Trustees who actually administer that fund.

4. Mandatory Indexing

Recommendation 4-21 of the Report urges the government to proclaim in force the provisions of the PBA that allow it to require that pensions be inflation-adjusted in accordance with a formula to be prescribed. While the Report restricts the indexation recommendation to “inflation emergencies”, it fails to recognize within this recommendation that MEPPs, by virtue of their funding restrictions, are ill-suited to any mandatory indexation requirement.

The Trustees of the NHRIPP and the MSPP support, in principle, the concept of the mandatory indexing of pensions. However, indexing is simply not practical for MEPPs, such as the NHRIPP and the MSPP, which are unable to unilaterally increase the rate of contributions. By the same token, employers participating in such plans have no right to share in any surplus which may develop nor may they take contribution holidays. Should a surplus develop in a MEPP, the typical course of action to reduce that surplus would be an ad hoc benefit increase.

The Friedland Commission supported the above view when in its report it concluded that MEPPs have contribution levels rather than benefit levels set by negotiation. Given this reality, it recommended excluding MEPPs from its mandatory indexing proposal.

Recommendation: MEPPs for which contribution rates are set by collective agreements should be exempt from mandatory indexing. Instead, the trustees of such plans should be statutorily obligated to consider increasing the quantum of pensions in pay at the time other benefit increases are being considered.

5. Socially Responsible Investment (SRI)

In their Joint Submission to the Commission, the Trustees of the NHRIPP and the MSPP encouraged the Commission to enumerate expressly that trustees are permitted to consider non-financial criteria in relation to pension plan investments provided such considerations are made in the context of an overall investment strategy and the tests of prudence otherwise applicable to Trustees are satisfied. Further, the Trustees recommended disclosure of the consideration of non-financial criteria to members and beneficiaries.

The Report responded to the commentary of the Trustees and others on SRI by recommending that plan statements of investment policy should reveal whether, and if so, how, socially responsible investment practices are reflected in the plan's approach to investment decisions (Recommendation 8-23). While this addresses the disclosure aspects of the Trustees' recommendation, it does not deal with the core issue of permission to consider non-financial criteria in relation to pension plan investments.

Admittedly, the Report's recommendation follows the practice of numerous countries including Australia, Austria, Belgium, France, Germany, Italy, Sweden, and the United Kingdom. The evidence indicates that mandating SRI disclosure, in and of itself, provides an incentive for active consideration of SRI and embodiment of SRI in investment decisions. However, the reluctance of trustees to embrace SRI as a factor that is compliant with its duty to maximize fund returns may also justify the inclusion of a regulatory statement that embodying SRI factors together with financial investment selection criteria does not constitute a breach of fiduciary duty provided prudence standards in investment selection continue to be met.

Recommendation: PBA regulations should be amended to explicitly provide that pension plan Trustees are permitted to consider non-financial criteria in relation to pension plan investments

provided such considerations are made in the context of an overall pension investment strategy and the tests of prudence otherwise applicable to the Trustees are satisfied.

6. Broadening Pension Coverage

The participation rate of non-union workers in pension arrangements in Ontario is a lowly 28%. Even when factoring in public sector pension plan participation rates, the overall plan membership as a percentage of the workforce is 34.7 using 2005 statistics. Union plans have fared far better, but with union membership waning in some sectors, future union participation rates appear destined to decline. Our pension system was designed on the premise that there would be three viable pillars – OAS/CPP, voluntary employer-sponsored pension plans and voluntary individual deferred savings arrangements. Unfortunately, the latter two pillars are proving to be insufficient structured on a voluntary basis. There is now ample evidence that given freedom of choice, most individuals will not allocate sufficient income into retirement savings provision. Likewise, with the advent of unfettered “free” trade, employers have increasingly moved away from programs that guarantee pension provision, shifting either to defined contribution arrangements where the employee bears the investment and longevity risk or, with more profound implications, opting not to arrange or accommodate employee retirement savings in any form. With an aging population, this has the potential to drain public resources as elderly Ontario residents with inadequate pension income will increasingly look to the state for support.

The Government of Ontario has had alternative compulsory pension system recommendations placed before it in the past, but has chosen not to venture down that path. Both the Haley Commission and its predecessor endorsed a universal, mandatory employer-based pension system. However, neither Commission’s recommendations were implemented.

The current Commission interpreted its mandate to deal solely with voluntary pension plan arrangements. In so doing, it has recommended a potpourri of steps to improve and streamline the existing system while balancing the interests of the existing system participants. Many of those recommendations are beneficial to MEPPs. However, taken as a whole, the recommendations, while laudable, will not result in the increased participation rates necessary to address the pension benefit adequacy needs of the Ontario working population. There are reform models that have demonstrated success while allowing existing pension arrangements to continue that could readily be adapted to Ontario (Australia’s and Hong Kong’s reformed pension systems immediately come to mind as models that, with modification, could be made to work well in Ontario).

The Alberta/British Columbia Pension Review has gone beyond examining potential reform of the existing pension benefits standards legislation to address the low level of participation in pension arrangements and the declining deferred savings rates of its workforces. It has proposed the creation of a public pension plan that would supplement existing occupational pension plans. The basic elements of their proposal should also be considered in Ontario. Ideally, the creation

of a plan that operates across the three provinces would be a driving force toward a uniform, national supplemental pension program comprised of a mix of private plans (ours included) together with a default publicly run but privately funded plan. Ontario should carefully consider the ABC Report's recommendations on this issue. They include:

- Universal plan availability to any employer, employee or self-employed person at a reasonable cost, pooling pension risks and assets as well as investment expertise;
- Centralised but privately tendered administration and investment management;
- Automatic enrolment with an opt out for those who wish to maintain current plans; and
- Provision of annuities as a supplemental plan service.

The vast majority of recent pension reforms undertaken in other countries have had similar features with varying degrees of success depending on the structure implemented and the nuances of the local environment.

Recommendation: The Government of Ontario should consider endorsing the recommendations of the Alberta/British Columbia Pension Review with respect to the creation of a supplemental, private sector funded, mandatory occupational pension plan. Ideally, Alberta, British Columbia and Ontario should implement one fund on like terms designed to co-exist with existing occupational pension funds so that it complements and enhances the existing employment-based system.

7. Phased Retirement

The Trustees of the NHRIPP and the MSPP did not address the issue of phased retirement in their Joint Submission. Recommendation 5-10 proposes that the PBA should be amended to permit phased retirement and that there be further study of its application as part of the ongoing dialogue recommended in Chapter 10 of the Report.

Phased retirement may prove to be a valuable tool in balancing workforce needs with skills and experience requirements in the workplace. While the Trustees are supportive of the inclusion of phased retirement provisions in the PBA, they do not advocate that it be a mandatory requirement to be adopted by all plans. Because the source of funding for MEPPs is fixed, to the extent that phased retirement options may increase costs, it would have an adverse impact on the ability of MEPP trustees to meet current target benefit promises and could benefit members exercising phased retirement options to the detriment of other members.

Recommendation: If the Minister choose to amend the PBA to provide for a phased retirement option, the option should not be compulsory. Trustees should have the option to provide for phased retirement, but not the obligation.

8. Transparency, Accountability, Plan Administrator Education, and Good Governance

The Report provides a series of recommendations on the governance of pension plans. The Trustees spoke to one issue relevant to transparency in their Joint Submission by suggesting that the exemption for MEPPs from the notice requirement currently contained in section 26 of the PBA should be eliminated. While this is only one suggestion, the Trustees wish to voice general support for the series of Report recommendations that would cumulatively serve to improve the transparency, accountability and overall governance of pension plans.

The range of recommendations related to governance, transparency and accountability are sweeping and will require further consultation with stakeholders prior to development of supporting legislation. This includes dialogue related to:

- defining fiduciary duties and supporting codes of conduct;
- development of regulator's best practice codes;
- standard setting for educational programs for all participants in pension governance;
- establishing triennial requirements for the filing and dissemination of governance, funding and investment policies;
- expansion of information available to members and beneficiaries including online access to plan information through the regulator;
- ensuring that all pension plans have a formal mechanism to permit participation of members and beneficiaries in the monitoring of pension plan administration activities either through pension advisory committees, joint boards or other methods as elaborated upon in Recommendation 8-25 and 8-26.

The Report has voiced support for the MEPP concept as a possible means to growing pension participation in Ontario. The issues enunciated above will require detailed discussion from a variety of stakeholders. It is absolutely essential that trustees of MEPPs are included in this dialogue so that the laws, regulations, rules and procedures that will shape and support heightened pension fund governance efficacy are developed in a manner that makes sense in the MEPP context. Issues such as education requirements for lay members of boards must be developed based on the needs and structure of the particular boards and recognizing the peculiarities of the plan type and plan sponsorship. Consequently, the Trustees urge the Minister to be inclusive in the structuring of the dialogue on these fundamental issues.

Recommendation: MEPP trustees should be included in the consultations directed at refining the pension fund governance system so that the law, regulations, rules and policies developed

reflect the issues unique to MEPPs and foster best standards of transparency, accountability, skills attainment and overall MEPP plan governance.

LIST OF RECOMMENDATIONS

TO THE

EXPERT COMMISSION ON PENSIONS

FILED ON BEHALF OF THE

NURSING HOMES AND RELATED INDUSTRIES PENSION PLAN

1. Solvency Funding

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the Pension Benefits Act, R.S.O. 1990, c. P.8 and its regulations (the “PBA”) be amended to permanently relieve multi-employer pension plans, designated as SOMEPPs from any obligation to be funded on a solvency basis.

2. Statutory Limits on Employer Obligations

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to explicitly provide that:

(a) employers participating in a collectively-bargained multi-employer pension plan (i.e. one in which contribution rates are set by collective agreement and which is administered by a Board of Trustees no fewer than half of whom are representatives of plan members) are only responsible for making the contributions required by their collective agreements and providing the information required to administer the plan; and

(b) employers participating in a collectively-bargained, multi-employer pension plan are not responsible for eliminating any funding deficit which may exist upon windup.

3. Subsection 80(8) of the PBA

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to provide that, in the event of a change in bargaining agents in the circumstances described in section 80(8), the administrator of the second plan may decline such a transfer in the same way that pension plan administrators currently may decline to accept a transfer of benefits from another plan pursuant to section 42(a) of the PBA.

4. Actuaries and other Service Providers as Fiduciaries

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to explicitly provide that service providers (i.e. actuaries,

administrators, auditors, custodians, investment managers, legal counsel, etc.) and the firms which may employ them owe fiduciary obligations to plan members.

5. Multi-jurisdictional Issues

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that Ontario increase its efforts to work with all provinces to harmonize their pension legislation (while ensuring such harmonization does not result in a reduction of the entitlements of Ontario members) and to adopt a revised Reciprocal Agreement.

6. Statutory Limits on Settlor Obligations

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to explicitly state that the settlors of the trust fund of a multi-employer pension plan are not liable for the decisions or actions of the Trustees who actually administer that fund.

7. Enforcement

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to provide that should the administrator of a multi-employer pension plan provide FSCO with evidence that an employer has failed to make the required contributions and continues to do so despite an arbitrator's award directing it to do so, FSCO is required to initiate the prosecution of that employer for breaching section 99 of the PBA.

8. Funds Owing To Missing Former Members

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to permit the payment of the commuted value of accrued benefits owing to missing plan members, or their beneficiaries, to the Office of the Public Guardian and Trustee, or a similar body, upon the administrator demonstrating that reasonable efforts have been made to locate the missing member.

9. Recovery of Overpayments

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to explicitly provide that pension plans, which overpay a plan member due to fraud or a deliberate misrepresentation by the member, may apply to the Superintendent of Financial Services for permission to reduce the commuted value of that member's accrued benefits in order to recover the overpayment.

10. Mandatory Indexing

Recommendation: In the event that the report of the Expert Commission recommends the mandatory indexing of pensions to the Minister of Finance, multi-employer plans for which contribution rates are set by collective agreements should be exempted from such indexing.

Instead, the Trustees of such plans should be statutorily obligated to consider increasing the quantum of pensions in pay at the time other benefit increases are being considered.

11. Investments

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to explicitly provide that pension plan Trustees are permitted to consider non-financial criteria in relation to pension plan investments provided such considerations are made in the context of an overall pension investment strategy and the tests of prudence otherwise applicable to the Trustees are satisfied and to provide for the disclosure of the consideration of non-financial criteria to plan members and beneficiaries.

12. Disclosure of Amendments

Recommendation: The report of the Expert Commission should recommend to the Minister of Finance that the PBA be amended to eliminate the exemption for multi-employer plans from the notice requirements currently contained in section 26 of the PBA.

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