

February 27, 2009

SENT BY E-MAIL

The Honourable Dwight Duncan
Minister of Finance
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:

Comments on the Report of the Ontario Expert Commission on Pensions

We are lawyers from the Pensions & Benefits Department of Osler, Hoskin & Harcourt LLP. We provided a submission to the Ontario Expert Commission on Pensions (the "OECF") in October of 2007. Now that we have had an opportunity to review the OECF's Report, "A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules" (the "Report"), we are writing to provide our comments on it. In addition, we wanted to take this opportunity to share our concerns regarding the Ontario government's recent proposal on solvency funding relief, the most pressing concern currently facing pension plan sponsors.

We are providing our comments from the perspective of lawyers who give advice to pension plan sponsors and administrators from across Canada on the legal and regulatory aspects of pension plans and employee benefit plans, including: governance, fiduciary responsibilities, plan administration and compliance, pension fund investment, multi-employer plans, pension committees, public sector plans, plan wind-ups, surplus utilization strategies, and the negotiation and drafting of plan and trust documents.

I. ONTARIO SOLVENCY FUNDING RELIEF PROPOSALS

On December 16, 2008, the Ontario Ministry of Finance announced its intention to introduce defined benefit ("DB") plan funding relief measures in early 2009 (to be effective September 30, 2008). Since this announcement, the global economic crisis has worsened. Ontario employers and workers are being hit hard as declining revenues lead to financial uncertainty and job losses.

Many of our DB plan sponsor clients are telling us that they are facing critical planning choices between the need to finance their business operations and avoid layoffs, and complying with the current Ontario solvency funding rules. The clear consensus is that

the need for funding relief should be given the highest priority on the government's pension reform agenda. Indeed, many other Canadian jurisdictions have already adopted funding relief measures.¹

The December announcement was welcome news. However, to be effective, and to put Ontario plan sponsors on a more equal footing with sponsors in a number of other Canadian jurisdictions, we strongly urge the Ontario government to take quick action to finalize and implement solvency funding relief on a basis that does not require either member consent or letter of credit security. Either of these pre-conditions to any solvency funding relief measures are highly problematic, and fail to adequately recognize the significant logistical, employee relations and credit obstacles they entail.

For example, member consent, even the so-called "negative consent" options currently in place in some provinces, involve lengthy delays and uncertain outcomes at a time when speed and certainty are key to ensuring that employers are able to take advantage of the relief measures quickly, so that they achieve their desired result of helping employers, their workforces and their pension plans to survive this difficult economic cycle.

Also, as we discuss in more detail below, we are of the view that it should be made clear as a part of any solvency relief legislation (and indeed pension legislation generally) that the decision to take advantage of any funding relief (and any related filings) is one that a plan sponsor makes as employer (and not as plan administrator). In our view this is essential to enable employers to take advantage of the relief without fear that they could be subject to subsequent allegation that in making this decision they somehow failed to properly exercise their fiduciary obligations as plan administrator.

As such, we would recommend that the Ontario government act quickly to implement solvency funding relief, and not make such relief subject to obtaining member consent or a letter of credit.

II. SUMMARY OF OUR RESPONSE TO THE REPORT

As we noted in our original submission to the OECF, the key to ensuring the well-being of occupational pension plans is to provide incentives that encourage employers to continue to establish, participate in, improve and maintain such plans. To meet this goal, we are of the view that certain recommendations in the Report require clarification and/or

¹ For example, Alberta, Manitoba, Québec, and Newfoundland have already passed amendments to either their pension benefits legislation or regulations to deal with pension plan solvency funding relief.

revision. We have chosen to focus our comments on those recommendations which caused us greatest concern, and as such, our silence with respect to certain other recommendations should not be presumed to connote agreement.

We recognize that implementation of these proposed changes will take time as policy considerations will need to be weighed. Thus, we have set out our summary in order of priority so as to indicate those items which, in our view, are of key importance.

High Priority

After the Ontario government has addressed the current solvency funding crisis, as discussed above, we recommend that it make certain legislative and regulatory amendments, described in Appendix "A" hereto, that are primarily technical in nature and that could be made relatively easily by the Ontario government (i.e., while other changes are being considered), thus easing a number of significant plan administration issues in the short term. At the same time, we would urge the government to address the following issues which were raised in the Report:

- Ensure that all plans (regardless of governance structure) which can demonstrate benefit adjustment flexibility or that they are at low risk of defaulting on required contribution obligations be permitted funding flexibility (i.e., a requirement to fund on a going concern basis only). In other words, base funding flexibility on benefit flexibility and funding risk, not on plan design. Further, it should be clarified that such funding-related decisions made by a plan sponsor, are made in its capacity as employer and not administrator to avoid any potential conflict with administrative fiduciary duties.
- Clarify that DB plan transactions such as mergers and asset transfers will be permitted to proceed without trust law or historical plan term restrictions so that they can be concluded in an efficient and timely manner.
- Eliminate partial wind-ups and grow-in benefits altogether in favour of increased discretion on the part of the Superintendent of Financial Services (the "Superintendent") to require a plan valuation, and improvements to portability.
- Focus on creating an effective pension regulator with appropriate staffing, rather than creating a number of new agencies.

Other Report Recommendations

There were a number of other recommendations in the Report which, in our view, should not be followed. In particular, we would advocate the following:

- Do not mandate member and retiree involvement in plan administration, nor presume that joint governance structures produce better governed plans. Instead, adopt good governance guidelines (e.g., Canadian Association of Pension Supervisory Authorities (“CAPSA”) pension plan governance guidelines) as legislative or regulatory requirements, establish educational standards for plan fiduciaries, and promote plan transparency and disclosure to members/retirees.
- Do not institute provisions in the Ontario *Pension Benefits Act* (the “PBA”) requiring pension benefits to be inflation-adjusted in “inflation emergencies”.
- Do not provide the Superintendent with the discretion to order full wind-ups where 90% of the plan members have been terminated within a two-year period. Such wind-ups may be unjustified in the specific circumstances and may severely prejudice the rights of ongoing members. Rather, focus on improvements to portability.
- Any implementation of socially responsible investment strategies should be subject to first ensuring that all investment decisions are in the best financial interests of plan members, former members and other plan beneficiaries.

For ease of review, we have set out our response to the OECP’s recommendations in the same order that they appear in the Report. However, as we noted above, we have highlighted certain items that, in our view, should be considered of highest priority.

III. DISCUSSION

Chapter Four - Funding

Flexible Funding Rules

The Report recommends that funding rules be tailored based on the type of plan. Specifically, the Report suggests that multi-employer pension plans (“MEPPs”), jointly sponsored pension plans (“JSPPs”) and jointly governed target benefit pension plans (“JGTBPPs”) be afforded greater funding flexibility in that they should be funded on a

going concern basis only.² However, single employer pension plans (“SEPPs”), regardless of the risk profile of their sponsors, must continue to fund on both a going concern and a solvency basis.³ The OECF bases these recommendations, in part, on its view that SEPPs are more “vulnerable to fluctuations in the plan sponsor’s fortunes and to the risk of the sponsor becoming insolvent.”

While we support the application of different funding rules to different types of plans, particularly in the case of plans that are designed to adjust benefits to meet funding shortfalls, in our view such differences should be based on a plan’s risk characteristics as opposed to its governance structures. It is not accurate to simply assume that all SEPPs are at higher risk of default than MEPPs or JSPPs. There are certainly many SEPPs that are funded by sponsors which are at very low risk of failure, and contrastingly, there are many MEPPs made up of participating employers in industries subject to financial pressures (e.g., steel, auto industry) that, in turn, may cause them to significantly reduce benefits.

Our Recommendation: Rather than applying different funding rules based on the governance structure of the plan, we would recommend that the regulator be given the discretion to grant funding relief (e.g., the ability to fund on the basis of going concern valuations only) where a pension plan (regardless of governance structure) is designed to adjust benefit levels to funding availability or where the plan sponsor can demonstrate that it is at low risk of defaulting on its contribution obligations. In light of the current financial crisis, we are of the view that funding flexibility should be considered a high priority.

Inflation Emergencies

Most of the recommendations in the Funding chapter appear to be aimed at balancing plan members’ concerns that plans be sufficiently funded with plan sponsors’ needs for funding flexibility. One recommendation which does not appear to address either of these valid concerns, however, is the Report’s recommendation that the government proclaim in force a section of the PBA allowing it to require pensions to be inflation-adjusted (i.e., indexed) when there are “inflation emergencies”.⁴ It is not clear to us when such a provision would apply, as “inflation emergencies” are not defined in the Report. Even assuming that the proposed provision would be used in limited circumstances, we are of the view that such a requirement would be problematic for the following reasons:

² See Recommendations 4-8, 4-10, 4-11, and 4-12 of the OECF report.

³ See Recommendations 4-8 and 4-13 of the OECF report.

⁴ See Recommendation 4-21 of the Report.

- Indexation of pension benefits can be very expensive for a pension fund. It is not clear to us how a sudden (and probably unexpected) requirement to increase its pension benefits could work in a SEPP context. For example, it is difficult to see how a sponsor of a SEPP could meet a requirement to suddenly increase its pension payments in “emergency” circumstances of high inflation when a plan may already be underfunded.
- Unilaterally imposing a mandatory indexation requirement is inconsistent with a pension regime that is supposed to be voluntary and does not otherwise mandate benefit levels. Further, it does nothing to encourage plan sponsors to continue to maintain existing or to establish new DB plans.
- While retirees may receive the benefit of an increased pension, mandatory indexation would not necessarily benefit active plan members. Active members may in fact be required to increase contributions in order to help pay for overall plan cost increases relating to any such adjustments.
- The Report was delivered prior to the current economic environment, which involves a recessionary environment and a global financial crisis. In the current circumstances, concerns about indexation must take a back seat to issues about the funding of DB plans and pension coverage.

Our Recommendation: Do not proceed with the Report’s recommendation requiring inflation-adjusted pensions.

Employer vs. Administrator

While the OECF made certain recommendations for the tightening up of funding requirements,⁵ the Report was effectively silent regarding the capacity in which a plan sponsor acts when making funding-related decisions (i.e., is it as employer or as administrator?). If it is acting as administrator, there may be fiduciary-like obligations, which could require the plan sponsor to exceed the minimum standards for funding set out in the legislation.

The difficulty with such a lack of clarity and the possibility of dual roles was made clear in the Ontario Court of Appeal’s recent decision in *Slater*, where the Court found that directors of a corporation when making a decision related to the funding of the company pension plan, did so not as directors, but as agents of the company in its role as plan

⁵ For example, see Recommendation 4-2 of the Report.

administrator, and were therefore potentially subject to a fiduciary standard.⁶ This places an employer and its officers and directors in an almost impossible situation. Employers should be able to know with certainty that by complying with the funding requirements set out in the legislation they have fully complied with all such obligations (including any timing for the filing of valuation reports) and that any action or inaction made in respect of plan funding and filing of actuarial valuations cannot be collaterally attacked under the guise that the plan sponsor should have been acting as a fiduciary and subject to a fiduciary standard.

Our Recommendation: Amend the PBA to make it clear that when a plan sponsor is making funding-related decisions and filings, any action (or inaction) is done so in its capacity as employer, not administrator.

Chapter Five – Pension Plans in a Changing Economy

Asset Transfers and Plan Mergers

In our experience, pension plan mergers and asset transfers are utilized by companies for a number of reasons, including:

- a plan in surplus may be merged with a plan in deficit in order to use the surplus in one plan to offset the funding obligations with respect to the other;
- plans may be merged or assets transferred as a part of a corporate restructuring in order to achieve certain synergies and thereby reduce administrative costs; or
- assets may be transferred as a part of a sale of business in order to: (i) keep plan members “whole” by permitting future salary increases to apply to benefits accrued in the vendor’s pension plan; and (ii) permit the vendor to transfer liability for such benefits to the purchaser.

However, as a result of the *Transamerica* case, the ability to transfer assets between DB pension plan trusts – something which previously had been broadly accepted as permitted – was called into question.⁷ Consequently, the Financial Services Commission of Ontario

⁶ *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 65 C.C.P.B. 293 (Ont. C.A.) (also known as “Slater”).

⁷ In *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc.*, [2003] O.J. No. 4755 (“*Transamerica*”), the Ontario Court of Appeal found that there was an obligation to separately maintain the assets of the two predecessor plans in light of the terms of an undertaking given to the Ontario regulator and historical “exclusive benefit” language found in an earlier version of the trust associated with one of the predecessor plans. Such exclusivity language prevented the commingling of

(“FSCO”) imposed strict conditions on applications for the transfer of assets between pension plans, including mergers of pension plans operated by the same employer (e.g., requiring assessments of historical plan terms to determine whether a merger is permitted and whether the assets can be fully commingled). FSCO’s continuing assessment of merger applications based on its interpretation of restrictive trust law principles has, in our experience, led to significant and often unwarranted expense and delays (in some cases in excess of five years) in merger approvals. Thus, mergers of, and asset transfers between, DB plans funded through a trust are very difficult and take extremely long to complete.

The Report seemed to recognize the problematic nature of FSCO’s current process for approving plan mergers and asset transfers, and recommended that the regulator investigate and report on the causes of delays in its approval process.⁸ In terms of more specific solutions, the Report recommended that:

- Any surplus in a plan that is to be merged with another plan be allocated to the merged plan, provided that the members of the original plan are members of the new merged plan, and the merged plan remains fully funded (including the 5% security margin).⁹
- The regulator approve plan mergers in an expedited fashion where the union (if applicable) or two-thirds of the active members and retirees agrees to the transaction, or after the expiry of a 90 day notice period in the absence of such an agreement.¹⁰

The Report went on to suggest that plan mergers and asset transfers should then proceed subject to “no other legal impediments”.

While it appears that the Report’s intention was to provide for a more streamlined merger/asset transfer approval process without the need for any review of historic plan or trust terms, this intention needs clarification given the recommendations noted above. In addition, the Report did not (but should) consider transfers involving underfunded plans, particularly given the current economy.

assets to enable the assets of one predecessor plan to offset the liabilities of the other under the merged plan.

⁸ See Recommendation 5-1 of the Report.

⁹ See Recommendation 5-18 of the Report.

¹⁰ See Recommendation 5-19 of the Report.

The value of adding a member/retiree consent requirement to the pension plan mergers/asset transfer approval process is not clear to us. In our experience, it is very difficult to obtain the consent of members, former members and retirees, even in circumstances where they may have an incentive to co-operate (e.g., in order to share in a surplus distribution). The time it would take to track down and obtain consents required to meet the two-thirds threshold would, in the majority of cases, greatly exceed the 90 day notice period. Indeed, this process can evolve into a negotiation with members involving legal counsel and taking years to resolve. Even assuming that required member/retiree consents were obtainable, the connection between the proposed consent requirement and the expedited approval process is not readily apparent. Is the Report suggesting that compliance with such consent/notice requirements overrides FSCO's current requirement that a review of the historical plan terms be undertaken? As we noted above, the Report never clearly states this.

Our Recommendation: In order to ensure that plan sponsors are not discouraged and/or prevented from proceeding with plan mergers and asset transfers, we are of the view that the PBA needs to be amended to: (i) clearly set out the procedures which must be followed in order to complete a plan merger or asset transfer, thereby displacing the need to apply the principles of the *Transamerica* case and undertake reviews of historical plan and trust documents; or, in the alternative, (ii) specify that any application of trust law principles should only be done by the courts (which are equipped to interpret such principles) -- not the regulator.¹¹ We would suggest that the legislation specify that once the following requirements are met, the regulator shall approve a plan merger or asset transfer:

- Members must receive accrued pension benefits equal in value (but not necessarily identical) to the benefits they received prior to the asset transfer/plan merger.
- The affected plans (whether they be subject to a merger or an asset transfer) must be funded in accordance with the funding requirements of the PBA.
- Where there is to be an asset transfer from an underfunded plan, there will be a transfer of a pro rata amount.
- The plan text must be amended to reflect all of the changes resulting from the transaction (e.g., changed to reflect the new plan sponsor), and the plan

¹¹ The Supreme Court of Canada recognized in *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 that where the legislature has seen fit to address a particular issue (such as plan termination), classic common law trust principles should not be applied in such a way as to thwart the legislative intention.

administrator must provide notice of the amendment to members, former members and retirees in accordance with the notice requirements of the PBA.

Once the foregoing requirements have been met (and the transaction has been approved) there would be no restriction on the use of assets in the merged plan.

With clear procedures in place, FSCO will simply be required to interpret and enforce the legislation (and pension policy), rather than the common law, thereby speeding up the review process. Given that under the current regime, plan mergers and asset transfers involving DB plans are largely at a stand-still, in our view these changes should be considered a high priority.

Partial Wind-Ups and Grow-In Rights

The Report attempts to resolve the difficulties surrounding partial wind-ups by recommending the elimination of many of the plan consequences they currently trigger (e.g., eliminating current mandatory surplus distributions¹² and pension annuitizations,¹³ and requiring immediate vesting upon joining a plan¹⁴).¹⁵ The Report also recommends that grow-in rights¹⁶ no longer be triggered by a plan wind-up, but rather be expanded to include all members of SEPPs (but not MEPPs, JSPPs and JGTBPPs) whose employment is involuntarily terminated on an individual or group basis.¹⁷ However, the Report retained the concept of a partial wind-up by recommending that plan administrators still be required to file a partial wind up actuarial valuation when, in the case of SEPPs, at least 40% of the active members are terminated within a two year period or, in the case of

¹² As a result of the Supreme Court of Canada's decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 ("*Monsanto*"), a proportional share of surplus must be distributed to affected members when a DB pension plan is partially wound up. This requirement is problematic in that it does not recognize the fluid nature of pension plan surplus (i.e., volatile market conditions can make a "surplus" disappear almost overnight).

¹³ FSCO has interpreted *Monsanto* to require annuities to be purchased for members affected by a partial wind-up, rather than pay their benefits from the pension plan itself, potentially driving up the costs being borne by the pension fund and denying plan members any potential future ad hoc increases to pensions paid from the fund.

¹⁴ Currently, a plan member normally becomes "vested" (i.e., entitled to receive a pension) after two years, but the PBA provides for immediate vesting on a plan wind-up.

¹⁵ See Recommendations 5-11, 5-12 and 5-13 of the Report.

¹⁶ Grow-in rights entitle certain members of wound-up plans not only to the pension benefits that they have earned up to the wind-up date, but also to the early retirement benefits that they would have "grown into" had both the plan and their employment continued.

¹⁷ See Recommendations 5-8 and 5-9 of the Report.

MEPPs or JSPPs, there is a reduction of 40% of the plan's active members or of sponsors providing 40% of the contributions or the sponsoring union splits.¹⁸

While the recommendations eliminating mandatory surplus distributions and annuitizations, and clarifying when a partial wind-up is required¹⁹ are welcomed, the merits of continuing the partial wind-up concept by requiring plan sponsors to incur the cost of an additional actuarial valuation is not clear to us. Given that the Report is recommending that all of the current consequences relating to partial wind-ups be eliminated or made contingent upon other requirements, we are of the view that this obviates the need for partial wind-ups altogether. We note that the removal of partial wind-ups from pension legislation has already been implemented successfully in Québec (since January 1, 2001).

While the Report's recommendations regarding grow-in benefits may seem to be more fair than limiting such benefits only to members affected by a partial wind-up, it would continue to provide members with benefits that were not necessarily intended by the plan sponsor when designing the pension formula. As the Report recognizes, grow-in benefits "can be very costly", and therefore the expansion of such rights could create additional funding burdens on affected plans during tough economic times. It is important to recognize that grow-in only affects plans that already provide subsidized early retirement and other ancillary benefits, and that the Report's recommendation to grant universal grow-in rights will only affect these more generous plans. The likely result will be that mandatory universal grow-ins will operate as an incentive for sponsors to remove such ancillary benefits from their plans to limit this added cost.

Further, the policy rationale underlying a recommendation to expand grow-in rights is not clear to us. If the OECF is of the view that grow-in entitlements are beneficial, why expand the obligations of SEPP sponsors, while recommending that sponsors of jointly governed plans (i.e., MEPPs, JSPPs and JGTBPPs) need not provide grow-in benefits at all? Moreover, it is not apparent why employees who already enjoy the benefits of membership in a registered pension plan should receive even greater benefits on lay-off, when there are so many Ontario workers (mostly in the private sector) who do not have any pension coverage at all, let alone grow-in benefits. If the Ontario government is concerned about the financial well-being of laid-off workers, it should address this in the

¹⁸ See Recommendations 5-14 and 5-16 of the Report.

¹⁹ Currently, there is uncertainty as to when a partial plan wind-up may be ordered by the Superintendent, as the PBA does not clearly define such circumstances (e.g., pursuant to section 69(1)(d) of the PBA, the Superintendent may order a plan wind-up where a "significant" number of members of the pension plan cease to be employed by the employer, but there is no definition of what constitutes a "significant" number).

form of better benefits upon termination of employment for all (e.g., seek improvements to Employment Insurance).

Finally, in light of the recommendation of the Nova Scotia Pension Review Panel (the “NS Panel”) (being the only other jurisdiction in Canada that imposes grow-in rules similar to Ontario) that grow-in benefits be made voluntary at the discretion of the plan sponsor, we are of the view that the Ontario government should reconsider the continuation and recommended expansion of grow-in benefits. The elimination of grow-in benefits entirely would make Ontario consistent with almost every other jurisdiction in Canada and, thereby create a “level playing field” and promote harmonization (which would be helpful for administrators of multijurisdictional plans).²⁰

Our Recommendation: Eliminate partial wind-ups and grow-in rights in Ontario. Instead, provide the Superintendent with the discretion to seek a valuation to test a plan’s benefit security when a “significant” downsizing occurs (but do not make this an automatic requirement).²¹ In lieu of grow-in benefits provide better portability rights, as recommended in the Report.²² These changes should be considered a high priority.

Full Wind-Ups

The Report recommends that the Superintendent be provided with the discretion to order the full wind-up of a SEPP when 90% of the active members are terminated within a two year period.²³ While we recognize that 90% represents the vast majority of the plan members and that it is important to ensure that these members’ interests are adequately protected, in our view requiring the full wind-up of a plan that continues to have active members is severely prejudicial to the interests of such active members by forcing the cessation of future pension accruals. In addition, this discretion would put the Superintendent in the very difficult position of assessing the potentially competing interests of terminated and ongoing members in circumstances which may be completely unrelated to the traditional reasons for considering a plan wind-up under section 69 of the PBA. We believe that there are better methods for addressing ongoing member benefit security issues and ensuring that terminated members are afforded their proper entitlements (as discussed below).

²⁰ If the Nova Scotia government follows the NS Panel’s recommendation to eliminate grow-in benefits, Ontario would be consistent with *every* jurisdiction in Canada.

²¹ The Superintendent’s discretionary authority to require a valuation could be triggered under the circumstances suggested by the Report, as discussed above (e.g., termination of the employment of at least 40% of the active members within a two year period).

²² See Recommendations 5-4, 5-6 and 5-7 of the Report.

²³ See Recommendation 5-15 of the Report.

Our Recommendation: Do not proceed with the recommendation permitting the Superintendent to order the full wind-up of a SEPP when 90% of the active members are terminated within a two year period. Instead, we would suggest that, similar to partial wind-ups, consideration be given to providing the Superintendent with the discretion to test benefits through a valuation, and to improving the portability rights of terminated plan members. As we noted above, the Report made recommendations to facilitate individual and group transfers from one plan to another.

Chapter Seven - Regulation

The Report found that FSCO was “not operating as well as it should” and recommended a number of significant changes, including that FSCO be replaced by an all-new “Ontario Pension Regulator” with the power to provide advance rulings and make rules, and that a number of other new agencies including the “Pension Tribunal of Ontario”, the “Pension Champion” and the “Ontario Pension Agency” be created.²⁴ We agree with the OECF that the current regulator is not working well, as evidenced by its lack of clear, consistent policies and guidance for plan sponsors and administrators, and the significant delays in its approval of transactions such as pension plan mergers (as discussed above). However, we are not convinced that in order to improve the regulation of pension plans in Ontario, it is necessary (or at least a priority) to create a myriad of new agencies.

Rather, we are of the view that the government should focus on ensuring that Ontario has an effective regulator by creating the new Ontario Pension Regulator, as recommended in the Report. The Ontario Pension Agency and Pension Champion, while worthwhile recommendations, could probably be created by appointing a person or establishing a specific office at the new regulator. As for the Pension Tribunal of Ontario, we are of the view that certain (less extensive) changes to the current Financial Services Tribunal (“FST”), (as outlined below) would resolve most of the concerns.

In addition, as we noted above, at least some of FSCO’s difficulties stem from court decisions (e.g., the *Transamerica* case) requiring FSCO to interpret trust law in circumstances which, in our view, is often outside their expertise and resources. This is particularly apparent in situations where FSCO has difficulty applying the results of pension jurisprudence to policy positions and statutory interpretations. This often leads to FSCO taking overly-conservative positions on issues, causing delay and leading to results that may not be in the best interests of members or sponsors. Thus, amendments to the PBA which would clarify the applicable procedures for pension plan transactions, such as plan mergers and asset transfers, and thereby remove the interpretation of trust law from any future regulator, would also be helpful.

²⁴ See Recommendations 7-18, 7-19, 7-26, 7-27 and 10-5 of the Report.

Our Recommendation: We would suggest that the Ontario government create an independent regulator devoted exclusively to pensions, as suggested by the Report. This new regulator could include persons appointed to take on the Ontario Pension Agency and Pension Champion functions that were suggested in the Report.²⁵

With respect to the FST, the *Financial Services Commission of Ontario Act* should be amended to specify that a minimum number of members of the FST and all of the members of any panel hearing a pension matter have pension expertise, and that any decision of the FST be treated with deference by the courts (i.e., a privative clause should be included in the legislation).

As we noted above, the PBA should also be amended to provide specific principles/standards to guide FSCO (or the new pension regulator) in dealing with plan merger/asset transfer (as well as surplus, contribution holiday and plan administration expense) issues under the PBA, which would relieve the regulator from having to apply common law trust principles to such issues and having to interpret court decisions that often appear to be contradictory. Following such amendments, the regulator will simply be required to interpret and enforce the legislation (and pension policy), rather than the common law.

Given that the efficient regulation of pensions in Ontario requires an effective regulator, we are of the view that these recommendations should be considered a high priority.

Chapter Eight – Governance

Mandatory Member/Retiree Involvement

The Report makes numerous recommendations regarding increasing the involvement of active plan members and retirees in plan administration through the promotion of joint governance structures (and JGTBPPs in particular) and the requirement to establish pension advisory committees.²⁶ While expanding the available options for employers and employees in the structure and governance of DB plans may be beneficial to the overall pension system, we are of the view that such options should be voluntary (i.e., not mandated).

²⁵ With respect to the Ontario Pension Agency function in particular, we note that it would be very helpful to plan sponsors to have a procedure for payment to be made to some sort of public body in respect of unlocatable former plan members (i.e., deferred vested members) and spouses of former plan members.

²⁶ See Recommendations 8-2, 8-3, 8-24, 8-25 and 8-27 of the Report.

There is no compelling evidence that joint administration produces better results. For example, Québec has utilized a joint administration model (i.e., pension committees) for a number of years and there is no evidence that such a model has resulted in DB plans being more attractive to employers. In this regard, we note that under the Québec “pension committees model” most, if not all, governance functions are often delegated by the pension committee back to the employer. One may argue that, in fact, such a model has made DB plans less attractive – in our experience many employers have tried to contract out of joint administration and have found that they cannot.

We also note that other expert panels, such as the Alberta/British Columbia Joint Expert Panel on Pension Standards (“JEPPS”), did not suggest that one particular type of plan governance model was better than another²⁷, but instead advocated that CAPSA’s governance guidelines be adopted as a schedule to the legislation, and emphasized the importance of ensuring that those who exercise fiduciary responsibilities in relation to a pension plan have the requisite knowledge and skills to fulfill their obligations. For example, the JEPPS report recommended that plan fiduciaries should be required to obtain certification from suitable training programs within a specified period of time of their appointment, and if they fail to meet such requirements, they should be disqualified. The JEPPS report went on to specify that such educational programs should be instituted at the post-secondary level.²⁸ (While the OECP report also recognized the value of educating plan fiduciaries, the OECP seemed to place less emphasis on it, recommending that education be a task for the proposed “Pension Champion”, and subject to further consultation with stakeholders.)²⁹

We do, however, recognize the need to keep active plan members and retirees informed of decisions affecting their pension benefits and, as such, would favour requiring greater transparency and disclosure of plan documents (as was also suggested in the Report). We note that such an approach is consistent with the recommendations of the JEPPS and the NS Panel, which both emphasized the need for greater transparency.

Our Recommendation: Should the Ontario government wish to promote joint plan administration, we would recommend that these DB plan governance structures be made voluntary. With respect to JGTBPPs in particular, which in our view are a form of defined contribution (“DC”) plan, we would advocate further study of all forms of DC plans – a significant part of the Ontario pension system which was not addressed by the OECP. We are also of the view that the Ontario government should not mandate plan

²⁷ To the contrary, the JEPPS report recommended that plan sponsors and members be allowed the freedom and flexibility to define their own “pension deal”.

²⁸ See Recommendation 7.1.1 of the JEPPS report.

²⁹ See Recommendations 8-16 and 8-17 of the OECP report.

member/retiree involvement in plan administration (i.e., through mandatory advisory committees).

Rather, we agree with the JEPPS report that any reform of pension plan governance should focus on adopting governance guidelines (such as the CAPSA pension plan governance guidelines) as a part of the regulatory framework and establishing specific qualification standards and advanced educational programs for plan fiduciaries. In addition, we would suggest requiring greater transparency/disclosure along the lines recommended in the JEPPs and NS Panel reports. We note that the Report also includes numerous recommendations regarding improvements to disclosure requirements.³⁰

Socially Responsible Investing

The Report recommends that plan investment policies indicate whether any socially responsible investment practices are reflected in the plan's investment decisions.³¹ The Report makes this recommendation with very little discussion of the reasons underlying it or any supporting research, and as such the reason for including it was not clear to us.

In our view, when considering pension plan investments, the first priority should be ensuring that the assets are invested in a manner that best protects the benefits payable to active and retired plan members. This view is supported by the JEPPS report, which included a detailed review of what it termed "environmental, social and governance" ("ESG") factors, and whether they should be considered when formulating a pension plan's investment policy. The JEPPS report concluded that to focus on ESG factors to the exclusion of other factors affecting pension plan investments would not represent a positive change. As such, the JEPPS report recommended that ESG factors be considered when making plan investments only if it can be defended from a prudence and/or "financial best interests" perspective.

Our Recommendation: We would suggest that if the Ontario government is to establish any requirements related to socially responsible investing, it specify that any consideration of whether plan investments are "socially responsible" be made subject to first ensuring that any investment decisions are prudent and in the best financial interests of plan members, former members and other plan beneficiaries.

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³⁰ See Recommendations 8-22 of the Report.

³¹ See Recommendation 8-23 of the Report.

Given the long time that has passed since the last significant reform of Ontario's pension regime and the current financial crisis, we would urge the Ontario government to move quickly to address the current difficulties facing sponsors of Ontario pension plans – particularly those items which we have identified herein as being of high priority. Should you require any clarification of or further information on the concerns we have raised, please do not hesitate to contact Ian McSweeney at 416-862-6578, Douglas Rienzo at 416-862-5683 or Evan Howard at 416-862-4894.

Yours very truly,

Osler, Hoskin & Hercourt LLP

IMS/DR/EH/LV/js

APPENDIX “A” – AMENDMENTS TO THE PBA

Section(s)	Description of Provision(s)	Issue	Recommendation
Act s.1(1)	A partial wind-up is “the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan”.	This has been interpreted to require annuities to be purchased for members affected by a partial wind-up, so that their benefits are not payable from the pension plan itself.	Clarify that annuities need not be purchased for members affected by a partial wind-up.
Act s.1(4)	A pension plan is not a MEPP if the contributing employers are “affiliates” within the meaning of the Ontario <i>Business Corporations Act</i> (the “OBCA”).	This exception is too narrow. For organizations to be considered affiliates, one must be a subsidiary of the other or both must be subsidiaries of a third corporation or they must be “controlled” by the same person. More than 50% ownership is required for there to be control. This means that, for example, joint ventures cannot be considered affiliates for purposes of the PBA.	Remove reference to “affiliate” as defined in the OBCA. Draft definition of affiliate that takes into account purpose of the PBA (i.e., different corporate structures which may not be related for corporate purposes would be sufficiently related for purposes of participation in a pension plan).

OSLER

A -2

Section(s)	Description of Provision(s)	Issue	Recommendation
Act s. 26(1)	The Superintendent shall require notice to members of adverse amendments.	In <i>Kerry</i> , the Court held that the plan administrator had a duty to give notice of a potentially adverse amendment.	Clarify who is responsible for determining whether an amendment is adverse and notice is required; OR eliminate this provision, since following the notice the Superintendent has no power to refuse to register the amendment in any event (the regular PBA notice provisions should apply).
Act s.50	A pension plan may provide for the commutation of small benefits.	This exception permitting the commuted value of a pension to be paid out (rather than an actual pension) is too low.	Increase the amount which may be considered a "small benefit".
Act s.70(6)	Members affected by the partial wind-up of a plan have the same rights as they would have had on a full plan wind-up.	Pursuant to <i>Monsanto</i> , members are entitled to surplus distribution on a partial plan wind-up.	Clarify that this provision does not mean that partial wind-up members are entitled to a distribution of any surplus.
Act s.79(3)(b)	The Superintendent shall not consent to a surplus application unless the plan provides for payment of surplus to the employer.	Unlike many jurisdictions in Canada, employers must demonstrate entitlement to surplus even if they have a very high percentage of member consents.	Permit employers ability to withdraw surplus if they can demonstrate entitlement <i>or</i> they obtain the consent of two-thirds of members and two-thirds of former members (i.e., those still entitled to benefits).

OSLER

A -3

Section(s)	Description of Provision(s)	Issue	Recommendation
Act s.80	On a sale of business, members' employment is deemed not terminated.	Deemed continuation of employment prevents employees from exercising portability options.	Permit portability.
Reg. 79	Assets of all plans must be invested in accordance with the Federal Investment Rules.	Some of the Federal Investment Rules are no longer practical. For example, the 30% Rule (sections 11-14 of Schedule III) prohibits plans from investing in the securities of a corporation to which are attached more than 30% of the votes that may be cast to elect the directors of the corporation and the Look Through Rule (section 2 of Schedule III) requires plan administrators to take into account all of the plan's holdings (direct or indirect) in a particular company or group of companies for purposes of the 10% rule.	Create exemptions to specified Federal Investment Rules for Ontario pension plans which have a minimum amount of assets, as prescribed, and for broadly held pooled investment vehicles.

OSLER

A -4

Section(s)	Description of Provision(s)	Issue	Recommendation
New Provisions	<p>Add provisions:</p> <ul style="list-style-type: none">• permitting phased retirement (the Ministry of Finance has circulated draft amendments to the ITA permitting phased retirement);• providing a procedure for payment to be made to a public body in respect of unlocateable former plan members (i.e., deferred vested members) and spouses of former plan members;• permitting corrections of past mistakes which involve immaterial amounts (as prescribed) through lump sum payments; and• clearly providing that any employer payments in respect of a wound up plan that are in excess of those needed to fully discharge an unfunded deficiency identified in the wind-up report will be treated as an “over contribution” (not surplus) and can be returned to the employer.		