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BY ELECTRONIC MAIL February 27, 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 Mr. Duncan:

Re: Ontario Expert Commission on Pensions' Final Report

We are pleased to have this opportunity to comment on the commendable work of the Ontario Expert Commission on Pensions (the Commission) and its final report, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (the Report). First and foremost, we would like to applaud the Commission for conducting such a thorough analysis of the highly important and complex pension issues facing Ontario. We found the Report to be an extremely well-written and thoughtful piece of work that markedly elevates the level of pension discourse in Ontario and across the country.

We were pleased with several recommendations contained in the Report, including the creation of Jointly Governed Target Benefit Pension Plans, the reversal of the *Monsanto* principle in regard to partial wind-up surplus, and the Commission's recognition of the need for a national pension dialogue. Here, however, we have respectfully chosen to focus our submission on the aspects of the Report which we view as posing the greatest concern to many of our clients and Ontario's pension system in general.

This submission represents the views of the Pension & Benefits Practice Group at Stikeman Elliott LLP (Toronto). We provide legal representation to a wide range of pension plan sponsors, administrators, and service providers, especially in the private sector. This submission, though, should not be construed as representing the views of any of our clients.

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ISSUES

A. Funding

While we agree in principle that new approaches to improve solvency funding and benefit security are necessary, we disagree with the Report's recommendation to deal with this by introducing even stricter funding rules for single-employer pension plans (SEPPs). The Report's proposed funding approach to require not only full funding, but an additional "security margin" of 5% of solvency liabilities would, in effect, create further solvency deficiencies for SEPPs. In our opinion, any approach that involves expanding the existing solvency funding burden, particularly given the current economic crisis, is a flawed approach. We note that such an approach has not been adopted or recommended in any other Canadian jurisdiction.

We respectfully submit that it is difficult to reconcile the Report's stated objective of encouraging the continued vitality of single-employer defined benefit plans with its recommendation that such plans be subject to much stricter funding rules than multi-employer plans or jointly-sponsored plans. While we appreciate that the Report was completed prior to the current market crisis, urgent consideration must be given to today's economic environment. As the majority of plans will experience a dramatic decrease in plan assets and a corresponding increase in solvency liabilities, we respectfully submit that this is not the time to implement stricter funding rules for SEPPs.

In our opinion, a more suitable approach would be one in line with that proposed by the Alberta/British Columbia Joint Expert Panel on Pension Standards (the Joint Expert Panel). The Joint Expert Panel rejected the idea of additional security margins or provisions for adverse deviations. Instead, it recommended a series of measures which could include, among other things: firmer standards for valuing liabilities; annual solvency valuations for plans with a solvency ratio of less than 110%; the use of letters of credit or assets in a pension security fund to fund deficiencies; allowing contribution holidays and surplus withdrawals only where funding adequacy has been demonstrated and there is no threat to the pension plan's financial well-being; and restricting contribution holidays and withdrawals where same would reduce surplus assets to less than 5% of the value of the pension plan's liabilities. We believe there would be merit to adopting some, though not necessarily all, of these measures in Ontario.

B. Indexation

We respectfully disagree with the Report's urging of the government to proclaim into effect the indexation provisions incorporated into Ontario's pension legislation in the late 1980s. While the Report recommends that the provisions' application be restricted to "inflation emergencies", such emergencies are not defined. In our opinion, mandatory indexation would be yet another potentially expensive burden on plan sponsors who are already struggling in order to maintain defined benefit plans.

C. Surplus Ownership

We believe the Report falls short for sponsors of SEPPs with respect to surplus ownership. The Report recommends that surplus be distributed in accordance with the plan documents, but where those documents are unclear, the sponsor may propose a surplus-sharing scheme to which a minimum percentage of the members or (in unionized contexts) their bargaining agent must agree. Where no agreement can be reached, the Report recommends that the matter be settled using a new dispute resolution procedure.

We recognize that this recommendation would effectively take us back to the days before *Kent v. TecSyn*, a 2000 decision of the Ontario Divisional Court which essentially required employers to demonstrate legal entitlement to surplus under the historical plan documents in order to even share such surplus. That would be an improvement over the current situation. But it would not cut the Gordian knot of surplus entitlement. In our opinion, clearer rules than those put forward in the Report must be established to remove any remaining uncertainty over surplus ownership.

We would encourage the government to consider adopting instead the innovative ideas put forward by the Joint Expert Panel in this regard, such as "ring-fencing". To address legacy surplus issues, the Joint Expert Panel recommends that plans be permitted to "ring-fence". "Ring-fencing" would allow for the isolation of the assets and frozen liabilities of an old plan, while keeping its trust conditions intact. Benefits would cease to accrue under the old plan; however, actuarial valuations would still be required to be filed, and deficits or surpluses could still occur. Benefits would continue to be paid out of the old funds until all liabilities were settled. A new wrap-around plan would be created in which future benefits would accrue. Further, there would be recognition by each plan of the other's service and benefits for eligibility and vesting. We would support the implementation of such an approach in Ontario.

D. Mergers and Asset Transfers

In our opinion, the Report offers little to ease the administrative burden or shorten the unduly lengthy timeframes often involved in regulatory processing of proposed pension plan mergers and asset transfers. The Report recommends that where a minimum percentage of the plan members or (in a unionized context) their bargaining agent agree in advance to such plan restructurings, the regulatory approval process would be somewhat expedited. Realistically, though, we think this expedited procedure would be of no use to sponsors who desire to effect pension asset transfers in the context of confidential corporate acquisitions or divestitures where, presumably, prior employee or union consent is not a feasible option.

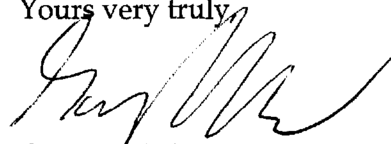
We suggest instead that mergers and asset transfers be subject only to a determination of the adequacy of benefit security in the merged plan and that issues of surplus entitlement be specifically ignored.

E. Institutional Overhaul

The Report's recommendations for an institutional overhaul of the pension regulation and adjudication system, such as the introduction of a new pension agency, a new independent pension regulator, a new pension tribunal and a "Pension Champion", certainly have merit in principle. However, their implementation would undoubtedly be lengthy, complicated and expensive. Further, one must question what immediate or ultimate effects these changes would have in terms of addressing the serious actuarial, economic, accounting and design problems facing defined benefit plans in Ontario. In our view, focusing efforts and resources on implementing some of the recommended substantive legislative changes, as well as genuine funding relief, would constitute the best place to begin any reform.

Once again, we would like to express our appreciation for the opportunity to make these submissions.

Yours very truly,



Gary Nachshen
Partner

GN/vh
cc: Bruce Pollock, *Stikeman Elliott*
Andrea Boctor, *Stikeman Elliott*
Angela Waite, *Stikeman Elliott*