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AMAPCEO

THE ASSOCIATION OF
MANAGEMENT, ADMINISTRATIVE AND
PROFESSIONAL CROWN EMPLOYEES
OF ONTARIO

February 23, 2009.

The Honourable Dwight Duncan
Minister of Finance
Review of 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

Subject: AMAPCEO Comments on the Report of the Expert Commission on Pensions

Dear Minister,

It is our pleasure to provide you with comments and feedback on *A Fine Balance*, the final report of the Ontario Expert Commission on Pensions (the Commission). Before getting into the substance of our comments, we would like to relay to your Ministry our appreciation for establishing the Commission. Even prior to the present economic crisis, Ontario's defined benefit pension plans were facing significant difficulties. To the extent that these difficulties may be mitigated by way of amendments to the *Pension Benefits Act (PBA)*, the Commission's report is a strong step in the right direction. For that report – and for all of the effort that went into it – we would like to thank Commissioner Arthurs, his advisory panel, and the staff of the Commission.

We are also grateful to your predecessor, former Minister Greg Sorbara, for the decision to create the Commission, and to you for the systematic way you have undertaken to review the Commission's recommendations.

In response to the Commission's report, AMAPCEO would like to make clear its broad support for the Commission's findings. In Part A of our response, we would like to comment in some detail on what we view as our organization's key pension issue: split pensions emerging from instances of divestment. In Part B, we conclude with comments on a number of other recommendations that were made by the Commission.

Introduction: AMAPCEO and Who We Represent

As you know, AMAPCEO is the largest bargaining agent representing professional employees in the Ontario Public Service. We currently represent approximately 11,000 public servants, most of whom work directly for the Government of Ontario in every ministry and in a number of agencies, boards and commissions. Our members work in over 130 communities in every part of Ontario and in ten cities outside Canada. We also represent employees in three bargaining units outside the OPS in the Office of



the Provincial Advocate for Children and Youth; the Ontario Agency for Health Protection and Promotion; and the Mental Health Centre Penetanguishene. Our members include: policy and financial analysts, senior economists, auditors, arbitrators, mediators, program supervisors, child and youth advocates, clinical co-ordinators, chaplains, scientists and many others.

Part A: Split Pensions Emerging from Divestments

Split pensions occur when an employee is divested to a new employer which has membership in a different defined benefit pension plan than did the former employer. The divested employee is – unless the legislation is overridden – forced by section 80 of the *PBA* to maintain membership in two pension plans: with their former employer's plan accounting for their prior service, and their new employer's plan covering their service going forward. Owing to the manner in which pension benefits are calculated, for many, this split causes a significant loss in retirement income.

The fundamental problem posed by section 80 of the *PBA* is that the Superintendent interprets it as prohibiting a transfer of pension assets from one public sector employer to another, unless the plans "mirror" one another, i.e., unless they are exact replicas of each other. Essentially, this means no asset transfer can be made on a divestment since, although public sector plans are all very similar, there are minor differences between them (for example, in terms of death benefits). The consequence of this application of the *PBA*, is that the pensions of affected employees are split between two pension plans.

We believe that the application of section 80 to divestments in the public sector is particularly unreasonable. This is the case owing to the large number of reciprocal transfer agreements (RTAs) between public sector pension plans. These RTAs are specifically designed to permit pension assets to be transferred between plans which are covered by the agreements, thereby facilitating the – extremely common – movement of employees around the broader public sector. To be clear: when employees freely choose to take a new position with another employer within the broader public sector, they may transfer their pension assets from plan to plan with ease. It is only when employees are transferred by way of divestment that they are prohibited from utilizing the provisions of the RTAs.

These pernicious effects of section 80 were noted by the Commission's final report:

Problems associated with asset transfers have given rise to significant controversies in the public and broader public sectors. During the late 1990s, the provincial government "divested," or transferred, some 10,000 employees from one agency or level of government to another or to the private sector. Very few of these employees benefited from asset transfers. Indeed, some of them continued to do the same job in the same place, but were told that their future pension accruals would be in a different plan. These individuals will receive pension benefits that are lower than they would have been if all of their service credits and associated pension assets had been transferred to their new plan. Unfortunately, as noted, then- and still-prevailing rules preclude asset transfers if even relatively minor differences exist between the new and old plans.¹

Juxtaposing the ease with which RTAs in the public sector operate in instances of a single employee voluntarily changing employers and the difficulties involved in group transfers of pension assets, the Commission concluded:

¹ Ontario, Expert Commission on Pensions, *A Fine Balance: Safe Pensions – Affordable Plans – Fair Rules*, (Toronto, Queen's Printer for Ontario, 2008) at 93.

Why individuals should receive more favourable treatment than groups is by no means clear. If – as many stakeholders propose – aggregate value transfers should be allowed for group transfers, despite some differences between the two plans, the rights and preferences of individual members can be protected by simply allowing them to opt out of the group transfer and remain in the old plan.

I believe that the present regulatory impediments to group transfers are inappropriate, and should be changed.²

This position informs the following recommendation from the Commission:

Recommendation 5-4 — When individual or group transfers from one plan to another are contemplated, the importing plan should provide a detailed statement of the benefits to be provided. Each transferee should be given four options:

1. as a default option, to accept the asset transfer and begin future accruals in the importing plan, provided it offers benefits of comparable aggregate value to those provided under the exporting plan;
2. to remain as a deferred member of the exporting plan;
3. to transfer the value of the first pension to the Ontario Pension Agency; or
4. to transfer the value to a locked-in account.

If active plan members are represented by a union or similar organization, it may accept one option on behalf of all members, or allow each member to exercise one or more of the options provided.

The value of benefits provided by an “importing” plan should be deemed to be “comparable” to those provided by an “exporting” plan for purposes of the default option, if (a) approved by the Superintendent as approximating the aggregate collective value of such benefits, notwithstanding differences in the nature, value or terms of individual benefits, or (b) agreed to by a union representing active plan members affected by the transfer.³

Noting that Recommendation 5-4 would work on a go-forward basis, the Commission’s final report went on to assert “that greater efforts must be made to address the residual effects of divestments in the public sector during the 1990s.”⁴ To this end, the Commission offered the following recommendation:

Recommendation 5-5 — The government should promptly address the pension arrangements for groups of public service employees affected by past divestments and transfers, whether by allowing these groups to use the group asset transfer process proposed in Recommendation 5-4, or by other means, including negotiations with their representatives.⁵

² *Ibid.* at 92.

³ *Ibid.* at 92-93.

⁴ *Ibid.* at 93.

⁵ *Ibid.* at 94.

The Commission stressed that “[n]egotiations conducted in good faith among the affected ministries, plans, unions and workers seem to be the most sensible way to resolve these issues. And since difficulties compound with the passing years, the time for negotiations is now.”⁶

AMAPCEO wholeheartedly agrees with the two recommendations cited above.

Unfortunately, the Ministry of Government Services (MGS) would appear to be less enthused with these recommendations. MGS, as you know, serves as the corporate employer for the Ontario Public Service (OPS). With that role comes responsibility for overseeing divestments of OPS staff to various agencies, other levels of government, etc.

In their capacity as the corporate employer for the OPS, MGS made a submission to the Commission stating its views on a variety of issues, including pension fund asset transfers. Therein, MGS made it clear that it is cognizant of the value which defined benefit pension represents for employees, stating that:

“Pensions in the OPS, as mentioned earlier, are a vital component of the OPS’s total compensation offer to employees. More specifically, defined benefit plans in the OPS are worthwhile since they are one of the most effective means to retain skilled and knowledgeable employees. The decline in defined benefit plans in other sectors has given the OPS a competitive advantage for employees who value this deferred compensation benefit with its ancillary benefits (e.g., early retirement options).”⁷

MGS flags the security of pension benefits as a key concern:

“MGS concurs with the principles developed by the Ministry of Finance to guide the Commission’s work. Of special note are the principles that highlight:

- The need to safeguard the security of pension benefits”⁸

Further, MGS is well aware of the negative effects that a split pension holds for divested employees. Stated MGS in its submission of the Ontario Expert Commission on Pensions:

“A situation where an employee has two pensions, rather than a single, consolidated pension, is often more problematic in a defined benefit plan than under other pension plans (e.g., defined contribution and Group Registered Retirement Savings Plans) since the pensions are often based on a percentage of salary and service. The affected member is often left with a stranded pension that does not recognize salary growth with the new employer. As well, in the case of OPS pension plans, the pension is only adjusted based on the Canadian Consumer Price Index (CPI) (Note: many defined benefit plans outside of the public sector do not have automatic indexing of pensions). For OPS pension benefits, this stranded pension that does not recognize salary growth often results in a lower amount of pension benefit overall, specifically in situations where salary growth is above changes in CPI.”⁹

⁶ *Ibid.*

⁷ *Ontario Ministry of Government and Consumer Services (MGCS) Submission to the Expert Commission on Pensions*, Fall 2007, at 6, online: <<http://www.pensionreview.on.ca/english/submissions/MGCS.pdf>> [MGCS Submission].

⁸ *Ibid.* at 3.

⁹ *Ibid.* at 15.

The specific problems faced by employees affected by divestments were noted by MGS:

“The absence of choice at the individual employee level to transfer or not to transfer assets frequently disadvantages some employees and needs more flexibility to provide affected employees with options on how to deal with their pensions upon a transfer of employment.”¹⁰

Thus, MGS clearly acknowledges that split pensions are a serious problem for its divested employees. We are pleased that, in this, they agree with both AMAPCEO as well as the Commission.

Indeed, MGS’s acknowledgement of the pension difficulties employees face upon divestment is occasionally accompanied by action, as MGS details in its submission to the Ontario Expert Commission on Pensions:

“MGS from time to time has addressed the pension transfer issues that it has encountered through a variety of legislative and financial measures. Some measures include:

- Enacting legislation to permit the transfer of assets without replication requirements;
- Grandparenting pension plan membership for specific groups of affected employees; and
- Instituting wrap-around top-up plans to address the differences between receiving two pensions and a single consolidated pension.”¹¹

AMAPCEO members have been able to avail themselves of these sorts of measures from MGS on selected occasions. For example, see the Corporation Tax Administration Redesign Project (CTAR) which resulted in a number of Ministry of Finance employees being divested to employment with the Canada Revenue Agency. The pension asset transfer difficulties were, in that case, resolved by Schedule M to the *Budget Measures and Interim Appropriation Act, 2008*.¹² This served to amend the *Ministry of Revenue Act* so as to override the *PBA*’s prohibitions on pension asset transfers in cases of divestment.¹³

In providing AMAPCEO members affected by the CTAR divestment with the opportunity to transfer their accrued pension benefits, MGS appears to have engaged in a review of, as MGS put it in their submission to the Commission, “the merits of each divestment situation.”¹⁴ Indeed, the *Ministry of Revenue Act* was amended to read:

s. 6.1 (3) This section governs the transfer of assets from the Public Service Pension Plan (Ontario) and from the OPSEU Pension Plan (Ontario) to the Public Service Superannuation Plan (Canada) in respect of eligible former employees in the Ministry who become employees of the Canada Revenue Agency in connection with the transfer of the administration of certain Ontario corporate tax statutes from the Ministry to the Agency beginning in April 2008.¹⁵

Thus, the legislation makes clear that the ability of members to elect to transfer accrued pension benefits was made applicable only to those affected by the CTAR divestment.

¹⁰ *Ibid.* at 10.

¹¹ *Ibid.* at 14.

¹² Bill 44, *Budget Measures and Interim Appropriation Act, 2008*, 1st Sess., 39th Leg., Ontario, 2008, Schedule M.

¹³ R.S.O. 1990, c. M.33, s. 6.1.

¹⁴ *MGCS Submission*, *supra* note 7 at 14.

¹⁵ *Ibid.*, s. 6.1(3).

A similar legislative change to that performed in the CTAR divestment may be seen in Schedule 32 to the *Budget Measures and Interim Appropriation Act, 2007*.¹⁶ There, the *Police Services Act (PSA)* was amended to allow transfers between pension plans on divestment in the policing sector by overriding certain sections of the *PBA*.¹⁷

The override afforded to divested police officers stands in marked contrast to the override afforded AMAPCEO members in the CTAR transfer in that the amendments to the *PSA* apply to **all divestments** in the policing sector. To say the least, this would not appear to represent a review of “the merits of each divestment situation.”¹⁸

AMAPCEO is curious as to why this sort of double-standard exists. Why is a case-by-case review required in the instance of a divestment of AMAPCEO members, while such reviews are apparently unnecessary in the policing sector? That this is a curious situation is not lost on others, including police officers. For instance, the Police Association of Ontario (PAO) – whose members in the OPP, of course, belong to the Public Service Pension Plan and were covered by the provisions of the *PSA* – stated in their submission to the Commission that “[w]e note that other non-police employee groups have been negatively impacted in the same manner [as police officers, prior to the amendments to the *PSA*] by divestment. We hope that the police model may serve as an example for others to follow.”¹⁹

The Mental Health Centre Penetanguishene Divestment and Pensions

The hope expressed by the PAO is shared by AMAPCEO and, judging by its recommendations, the Commission. Unfortunately, MGS – despite its acknowledgement of the pension difficulties divested employees face – does not appear to harbour similar aspirations regarding the elimination of barriers to pension asset transfers.

Even in light of the recommendations from the Commission, MGS appears to be intent upon continuing a course of capricious management of OPS employees’ pensions upon divestment. As an example, we refer to a current divestment of AMAPCEO members. The divestment of the Mental Health Centre Penetanguishene (MHCP) from the Ministry of Health and Long-Term Care (MOHLTC) to an independent corporation is a striking example of the type of nonchalant decision-making which causes undue harm to the ultimate value of individuals’ pensions.

By way of background, MHCP is the tenth (and last) psychiatric hospital to be divested from the OPS. On March 20, 2008 MGS disclosed tentative plans to divest MHCP, subject to a public consultation process regarding hospital governance in the Midland-Penetanguishene area. On May 16, 2008 the Supervisor’s report was released, which recommended that MHCP be divested to the Catholic Board of the then Penetanguishene General Hospital (PGH). On August 13, 2008, MGS notified AMAPCEO that the MHCP will be divested to a corporation under the PGH Board and that successor rights would be deemed to apply to this divestment. AMAPCEO was further informed that the planned transfer date was to be

¹⁶ Bill 187, *Budget Measures and Interim Appropriation Act, 2007*, 2nd Sess., 38th Leg., Ontario, 2008, Schedule 32.

¹⁷ R.S.O. 1990, c. P.15, ss. 131.1-131.5.

¹⁸ *MGCS Submission*, *supra* note 7 at 14.

¹⁹ Police Association of Ontario, *Presentation to the Ontario Expert Commission on Pensions*, October 17, 2007, at online: < <http://pensionreview.on.ca/english/submissions/PAO.pdf> > at 7.

December 15, 2008 and that the name of the Mental Health Centre Penetanguishene was to remain unchanged.

Thus, we have before us a typical divestment situation, in which the type of work, place of work, and the name of the workplace were unchanged. Owing to the application of successor rights, the terms and conditions of employment for the AMAPCEO represented employees will also not be altered due to the divestment.

The pension arrangements of the affected members are, however, changing.

The AMAPCEO members affected by the MHCP divestment were, up to the point of divestment, members of the Public Service Pension Plan (PSPP). Upon the divestment, however, these members became enrolled (without their consent and against their wishes) in the Hospitals of Ontario Pension Plan (HOOPP). This transfer was implemented via a Human Resources Agreement (HRA) signed between MOHLTC and the successor employer.

As the corporate employer for the OPS, MGS was in a position of oversight on the HRA in question. Put simply, the terms and conditions of the HRA, as pertaining to pension matters, were controlled by MGS. This was confirmed by the Deputy Minister of MOHLTC in correspondence with AMAPCEO.²⁰ Accordingly, AMAPCEO's concerns on pension matters were put to the Deputy Minister of MGS.

In his correspondence with AMAPCEO, the Deputy Minister of MGS made it clear that, in spite of his Ministry's public acknowledgement (in their submission to the Commission) of the difficulties faced by those who are forbidden from transferring their pension assets on divestments, MGS was not willing to do anything to help our divested members avoid the financial harm this divestment was causing them. The Deputy Minister made it clear that, in spite of aiding our members in other divestment situations by overriding the *PBA*, MGS was, in this case, unwilling to help; in spite of legislation eliminating the difficulties of a split pension for divested police officers, MGS was unwilling to view AMAPCEO members as worthy of the same protections.

The Deputy Minister of MGS did suggest, however, that we write to you in order to underline our very real concerns with this inequity, and to help draw your attention towards the Commission's full agreement with our position. Finally, the Deputy Minister offered to "consider the feasibility" of implementing any amendments to the *PBA* that the Legislature chooses to make.²¹

Moving Forward: Amending the PBA

Given the forgoing description of how pension assets are dealt with upon divestments, we believe that it is clearly time for the Government to amend the *PBA*. We believe that the government should adopt the Commission's Recommendation 5-4.

AMAPCEO believes that Recommendation 5-4 adequately addresses the concerns of divested public servants. Importantly, the Recommendation, as written, provides the option for divested employees to

²⁰ Letter from Ron Sapsford, Deputy Minister, Ministry of Health and Long-Term Care, to Gary Gannage, President, AMAPCEO (29 October 2008).

²¹ Letter from Ron McKerlie, Deputy Minister, Ministry of Government Services, to Gary Gannage, President, AMAPCEO (23 December 2008).

either transfer their pensions, or to remain as deferred members of their existing plan. The adoption of this Recommendation would be a great step towards the goal of enhancing the security of individuals' pension income by assuring workers that they no longer face the risk of significant pension losses stemming from a divestment.

Regarding the Commission's Recommendation 5-5, which pertains to redressing the pension losses emerging from prior divestments, AMAPCEO is quite willing to discuss this, whether such discussions emanate from legislative change or from a simple initiative on the part of the employer.

Given the content and form of Recommendations 5-4 and 5-5, it is clear that the Commission sees pension difficulties owing to divestments as an important matter for the Government to remedy. AMAPCEO concurs with the Commission, and stresses that this is a most vital concern for our membership. It is an issue that arises with each divestment, causing in every case anxiety for employees, and causing, in many cases, significant financial loss.

The Commission's Recommendations on this matter, as well as the very real difficulties that the current legislative framework causes for divested employees, make MGS's decision-making on these matters all the more troubling. While MGS, as noted above, quite willingly acknowledges the insecurity the current legislative framework creates, it has only been spurred to action to rectify these losses on selected occasions.

We believe that this is just not good enough.

Simply put, the Commission, employees, and the employer all recognize there is a problem. Surely this indicates that it is time for legislative change to end the problem of split pensions in divestment situations.

Part B: Support for Other Recommendations

Although the issue of split pensions discussed in Part A was the principal focus of our original submission to the Commission, we were very pleased to see a number of other proposals emerge from the work of the Commission. We would like to indicate our support, in particular, for the following specific Recommendations:

- **Establishing a Pension "Champion".** Recommendations 9-1 and 10-5 proposing a new government agency that would assume responsibility for collecting and disseminating reliable information about the pension system, for thinking creatively about new pension strategies and policies and for working with stakeholders to improve the pension system.
- **Expanding pension coverage.** Recommendations 9-2 through 9-5 proposing measures to facilitate the development of large pension plans, encourage co-operation among small and medium size plans, promote target benefit plans that might be affordable for those without coverage and investigate other options (expansion of CPP or creating a comparable provincial plan) to enhance pension coverage.
- **Improving the pension policy development process.** Recommendations 10-1 through 10-7 proposing a new Pension Community Advisory Council, periodic review of pension legislation and consistency among Canadian jurisdictions.
- **Fixing pension funding rules.** Recommendations 4-24 and 4-25 proposing ways to encourage participation by workers and employers in Defined Benefit pension plans.

- **Regulation and governance.** Proposals in Section 7 of the Commission's report recommending that the *PBA* become the exclusive source of law governing the pension system; that standards governing the conduct of pension professionals and other participants in the pension system are appropriate and in the public interest; that a new Ontario Pension Regulator replace the Financial Services Commission of Ontario as the pension regulator; that the Pension Tribunal of Ontario replace the Financial Services Tribunal; and that the regulator should become more responsive to inquiries and complaints.
- **Transparency of pension plan decision-making.** Proposals in Section 8 of the Commission's report stressing the need for pension plans to improve the process, quality and transparency of their own decision-making and to facilitate greater participation in plan governance by active and retired plan members.

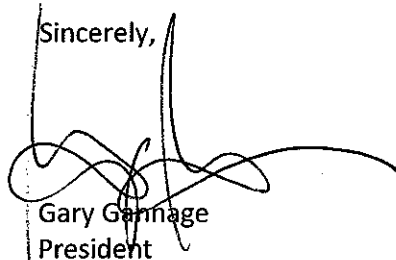
Finally, we would like to conclude with an endorsement of the Commission's two proposals concerning consideration of the report and implementation of its recommendations:

- The government should determine as rapidly as possible whether and to what extent it wishes to implement the recommendations in the report and should identify those to which it wishes to give priority. We agree with the Commission's stated view that priority should be given to putting in place appropriate agencies and officials to carry the work of the Commission forward (Recommendation 10-8), but also believe the government can and should proceed immediately with the amendments to the *PBA* regarding split pensions, discussed in Part A of our response.
- The government should take care to ensure that arguments in favour of phased implementation of the recommendations and transitional measures are not used to unnecessarily delay or otherwise obstruct appropriate reforms (Recommendation 10-9).

Once again, let me say that AMAPCEO is grateful for the opportunity to comment on the recommendations of the Commission and we wish you and your officials all the best as you take up the implementation of this important work.

Please do not hesitate to contact me if you need any clarification or if you wish to discuss any of these matters further.

Sincerely,



Gary Gannage
President