



April 1, 2010

OPSEU Pension Trust

Fiducie du régime de  
retraite du SEFPO

Mr. William Short, Clerk  
Standing Committee on Finance  
and Economic Affairs  
Room 1405  
Whitney Block Queen's Park  
Toronto ON M7A 1A2

Dear Mr. Short,

**Re: OPSEU Pension Trust Submission on Bill 236**

Please find enclosed comments from the OPSEU Pension Trust ("OPTrust") on *Bill 236, Pension Benefits Amendment Act, 2010*. OPTrust is pleased to see that the Ontario government proposes to act on a number of recommendations coming from the Expert Commission on Pensions. OPTrust welcomes this opportunity to provide its views on the Bill. In that regard, we would like to focus on our core concerns: transfer provisions, including the valuation of benefits and continuity of pension plan membership.

Bill 236 proposes to amend those provisions of Ontario's *Pension Benefits Act* ("PBA") that govern the transfer of groups of employees from one employer and one pension plan to another employer and another pension plan, where there has been a disposition of the underlying business (or a sale of assets from the original to the successor employer).

In general, the existing provisions of the PBA have been interpreted to permit the original and the successor employers to agree on a transfer of accrued pension benefits from the original pension plan to the successor pension plan, only if the successor pension plan provides benefits that are identical to those offered under the original plan. This "replication of benefits" requirement is being repealed by Bill 236. If Bill 236 is adopted, it will be possible for employers to transfer accrued service from one pension plan to another pension plan without replicating benefits.

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Bill 236 also addresses, in different sections, transfers that take place in conjunction with business dispositions before and after the effective date of Bill 236. In the case of going forward transfers, Bill 236 will require that the member's commuted value under the successor plan be not less than their commuted value under the predecessor plan; for historic transfers, no minimum actuarial transfer value is specified.

In general, these changes are intended to permit members to consolidate their service (past and future) in a single pension plan, which is a desirable outcome that will benefit the members. The inability to consolidate service has been a longstanding concern of OPSEU Pension Plan members previously divested.

### **Process for Implementing an Asset Transfer**

For both going forward and historic transfers, the transfer process contemplated by Bill 236 is one that will be initiated and controlled by the original and successor employers. The employers may (but are not required to) enter into an agreement governing the transfer of members between the original pension plan and the successor pension plan. If they do enter into such an agreement, it will have to comply with minimum terms that are set out in Bill 236 and that will be prescribed by Regulation. The agreement for going forward terms may also contain a provision allowing affected employees to elect whether or not to transfer; for historic transfers, such an election will be a mandatory element of any transfer agreement.

This process makes sense in the private sector, in which pension plans are typically sponsored by a single employer. In these cases, the plan sponsor and the plan administrator are one and the same (or closely related). Accordingly, the original employer may be expected to negotiate a transfer agreement that is protective of the original plan; otherwise, the original employer will be left with a deficiency to fund.

However, in the multi-employer pension plan ("MEPP") and jointly sponsored pension plan ("JSPP") sectors, the original and successor employers are not the same as or closely related to the administrators of the original and successor pension plans. Indeed, the interest of the original employer may diverge quite sharply from the interest of the original plan administrator (and the interests of other employers that participate in the original plan). For example, the original employer may have no particular interest in the funded status of the original plan (especially if the original employer will cease to participate in it as a result of the transfer). As well, the original and successor employers, if they

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participate in a MEPP or a JSPP, may have relatively little of their own pension expertise, and relatively little capacity to construct an asset transfer agreement.

Accordingly, once the employers have made the decision to allow a transfer, it may not be appropriate that the process for arranging for transfers of accrued pension liabilities, and corresponding transfers of pension assets, should work in the same manner for MEPPs and JSPPs, as it would work for single-employer plans. There also needs to be mechanism to ensure that the transfer values negotiated or prescribed do not have a materially negative impact on either plan.

### **Continuity of Plan Membership**

One of the important objectives of the transfer provisions of Bill 236 is to facilitate, as much as possible, the consolidation of an employee's pension entitlement in one pension plan. The shift away from the replication requirement will certainly lift a significant obstacle to such consolidations.

In the single-employer sector, where the employer is both the plan sponsor and the administrator, it makes sense to consolidate all past and future service in the successor employer's pension plan. Once the employee leaves the employment of the original employer, there is no connection between the employee and the original employer, and no reason for the employee to continue to look to the original employer and the original employer's pension plan for their pension.

However, in the MEPP and JSPP sectors, pension plans are largely independent of any participating employer. They are service organizations that provide different pension plans, with different benefits and different attributes. Some employees may prefer the benefits and attributes (i.e. early retirement benefits, higher or lower accrual rates, different indexation provisions), in the original plan over the attributes offered by the successor plan. In such a case, members would be better served with an option to consolidate past and future service in the original rather than the successor plan. Another consideration for members can be that maintaining their entitlements in the original pension plan would also maintain their eligibility for other benefits outside of the pension plan, such as the post-retirement health benefits available to members of the OPSEU Pension Plan and the Ontario Public Service Pension Plan. While this is not feasible in the private sector, it does make sense in the MEPP and JSPP sectors.

## **Policy Conclusions**

Accordingly, we respectfully make two design suggestions in regard to the transfer provisions of Bill 236:

After the employers have made the decision to allow the transfer, transfer agreements in the MEPP and JSPP sectors should be between the original and successor pension plans, because the plans have the requisite expertise to enter into such agreements, and because the plans will be mindful of the funding consequences for other employer and employee participants of any transfer affecting only certain members, and

Transfers among MEPPs or JSPPs could also offer the possibility of consolidating past and future service in the original as well in the successor pension plan.

## **Technical Issues**

We recognize that the transfer rules are heavily dependent upon Regulations that have yet to be promulgated. Regulations will govern important funding questions including the parameters on transfers where either the original or successor pension plan has a solvency deficiency or is underfunded on a going concern basis, and will also deal with the possibility that the original plan is in surplus. The treatment of these issues is important, and sensitive, and in our opinion ought to be different in the MEPP and JSPP sectors than in the private single employer sector.

Several technical issues may arise in applying sections 79.2 – 80.1 to MEPPs and JSPPs.

## **Going Forward Transfers**

1. Under section 80(5), the grow-in provisions that apply in conjunction with the sale of a business, are said not to apply where the "successor employer" assumes responsibility for the accrued pension benefits of the transferred members. In a MEPP or JSPP, it is the successor *plan* and not the successor *employer* that assumes this responsibility. Typically, the successor employer's obligations would not be determined with reference to the accrued pension benefits of the transferred members, but would rather be a function of the funding rules of the JSPP that have general application to all participating employers.

2. Among the statutory criteria for the Superintendent's consent to a transfer agreement required under section 80(13), is paragraph 3, which requires that the administrators of the two pension plans must agree upon the "valuation of the assets to be transferred". On a plain reading, this requirement may refer to two different things. In the event that specific investment assets – for example, pieces of real estate - are being transferred, paragraph 3 may require only that the two administrators agree on the value of the investment assets that are being transferred. Alternatively, paragraph 3 may require that the administrators of the two plans agree on the transfer value (i.e. the aggregate value of assets being transferred from the original to the successor plan in consideration of the transfer of liabilities). The word "valuation" is an unusual word to use in this context, and may suggest the prior interpretation.
3. Under paragraph 5 of section 80(13), there is a requirement to transfer surplus from the original to the successor pension plan if the original pension plan does have a surplus as of the effective date of the transfer of assets. Is this also meant to apply to MEPPs and JSPPs? Where the transfer agreement does include a provision permitting all affected members to elect to make a transfer, then the agreement may appear to be quite similar to a (one way) reciprocal transfer agreement. Under an RTA, it would not be normal to transfer any amounts of surplus.

### Historic Transfers

1. Under section 80.1, the original employer and the successor employer or such other persons as may be prescribed, are authorized to enter into a transfer agreement. If they do, then they must provide for employee elections to transfer - they cannot require employees to be transferred from one plan to another. However, there is no requirement in section 80.1 that any particular transfer value be used – unlike the case for going forward transactions, there is no requirement that the commuted value of a transferred member's entitlement in the successor plan be at least equal to the commuted value of their accrued benefits under the original plan. The only reference to a transfer value is in section 80.1(4)(a) which refers to the "value" of a member's accrued pension benefits under the original pension plan. Is it intended that the term "value" in this context be read as a reference to "commuted value"? Or, is a different type of transfer value - in the discretion of the parties to the transfer agreement- permissible?

Under section 80.1(4)(b), the transfer agreement is required to transfer "to the successor employer" the responsibility for providing pension benefits and other benefits under the original pension plan for all transferred members. This raises the same question as raised above concerning going forward transfers – generally, it is the successor *plan*, and not the successor *employer*, that would take on such a responsibility in the case of a MEPP or a JSPP.

Section 80.1(4)(d) requires that the original and successor employers establish, in the transfer agreement, "how the value of the assets to be transferred is determined." As is the case with regard to going forward transactions, we have some concern that the plan administrators are excluded from this process. Especially in the case of a MEPP or a JSPP, original and successor employers may not have the requisite interest or expertise to properly determine an appropriate asset transfer.

### **Transfers under Reciprocal Transfer Agreements ("RTAs")**

One approach to dealing with pension transfers in the context of current or historic dispositions of a business is through an RTA. OPTrust has been working with the Healthcare of Ontario Pension Plan ("HOOPP"), and the Financial Services Commission of Ontario ("FSCO"), on an RTA that would govern a particular historic transfer.

RTAs work well in these circumstances, if it is accepted that a voluntary transfer under an RTA is not affected by the replication of benefits requirement. To date, FSCO has agreed that, even under the current provisions of the PBA, the replication of benefit requirement is not applicable to transfers that are voluntary and made pursuant to an RTA, regardless of whether the underlying context is that of a sale of a business.

Under the RTA model, it is the predecessor and successor plans that drive the pension consolidation and asset transfer process. The predecessor and successor employers also play a necessary role, insofar as the collective agreements to which they are party also affect the options available to employees under these circumstances.

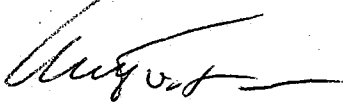
Finally, an RTA has the advantage of permitting, where the terms of the RTA and of any applicable collective agreements so provide, that members can consolidate their past and future pensionable service either in the predecessor or the successor pension plan.

Bill 236 proposes to require that RTAs be registered with the regulatory authorities, and comply with prescribed terms. We very much agree with

these changes, and suggest that the terms to be prescribed may assist in facilitating the development of RTAs among MEPPs and JSPPs to improve the options available to employees affected by sale of business transactions.

OPTrust looks forward to the publication of draft regulations under Bill 236 and hopes that there will be ongoing consultations with pension plan administrators. Along with other administrators, OPTrust is also looking forward to seeing draft regulations under Bill 133, as the simplification and standardization of administering pension plan benefits splitting on marriage breakdown is also a very important goal.

Yours truly,

A handwritten signature in black ink, appearing to read 'William Foster', with a long horizontal flourish extending to the right.

William Foster  
Chief Administrative Officer