

February 27, 2009

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 Mr. Duncan,

RE: Comments on Report of the Expert Commission on Pensions

Please find enclosed comments made by the OPSEU Pension Trust ("OPTrust") in response to the Ministry of Finance's calls for input on the Report of the Ontario Expert Commission on Pensions ("OECF").

We believe that Commissioner Harry Arthurs has delivered a number of important and far-reaching recommendations. We hope that the Report itself marks an important turning point for pension reform in Ontario. Clearly, modifications to pension legislation in Ontario are long overdue. It is our hope that through this process the answers will be found to many of the pressing questions that have been asked over the preceding decades concerning how to improve pension administration and expand coverage for Ontarians.

We feel that the scope of the OECF report lays out important future steps and that the Commissioner has outlined many noteworthy recommendations. We are not certain how many of these will eventually be adopted. Practically speaking, we understand that it may be difficult to implement all 142 recommendations provided in the report. Consequently, we feel that there are a number of recommendations that should be prioritized and implemented first.

We have identified those recommendations that we believe would be most beneficial to the pension industry in Ontario and have attached brief commentary as to why we support each one – or how we believe that particular recommendation can be strengthened.

For a more in-depth look into our broader positions on the OECP report, we encourage you to review our initial submission to the Expert Commission which contains 29 comprehensive recommendations and fixes.

We welcome the opportunity of being provided a chance to provide input about the OECP report. We trust that our comments will be useful and will be of benefit in this consultation.

Arthurs Report:

Recommendation 10-3 – PBA and Regulations should allow for the introduction of new types of pension plans, to enable rapid regulatory responses to significant changes in the social and economic environment, and to safeguard the interests of sponsors and plan members.

Significant changes in pension law should be accomplished through regulation-making.

Except in emergencies, the process of regulation-making should provide for timely notice to and comment by stakeholders and other interested parties, and for advice by the proposed Pension Community Advisory Council.

OPTrust position:

We believe that this recommendation is important because it formed the central theme of the Expert Panel and its subsequent report recommendations. It echoes much of what we said in our recommendation and goes to the heart of the expanded coverage issue. We also noticed that many other submissions to the OECP also cited this as an important theme.

We feel that the ability to receive public input and advice about regulation-making is also vital. It provides stakeholders with a direct channel on policy formulation and gives the decision-makers the ability to identify and act upon key issues on a more timely basis.

This will also hopefully provide for a more stable and balanced regulatory framework which will assist plan administrators in the execution of their duties. Overall, we feel that this is the direction that should be taken and support this recommendation

Arthurs Report:

Recommendations 7-9 and 7-10, 7-18 to 7-25 — The current regulator, the Financial Services Commission of Ontario (FSCO), should be replaced by a new Ontario Pension Regulator — an agency with powers of self-management comparable to those of the Ontario Securities Commission.

The Superintendent of Pensions should be the chief executive of the Regulator and, with four part-time commissioners, should be responsible for its operations.

The Regulator should have greatly enhanced powers to regulate the pension system and a budget sufficient to ensure that it has the personnel and resources necessary for the purpose.

It should improve its data collection, analytical and risk-management capacities, and be given power to make rules and to issue policy statements, opinion letters and advance rulings.

OPTrust position:

OPTrust feels that a stronger regulatory body with corresponding effective powers is necessary for improving pension regulation in the province. It is also important that the roles of the four commissioners be well-defined – the division of powers and areas of expertise must be balanced properly for this arrangement to work optimally. One of the recurring criticisms of FSCO over the past number of years has been that as it is currently structured, the Superintendent has been delegated a large degree of power as mandated in that position, yet the complementary organizational structure and delegated authority is not in place. Perhaps a more dynamic organizational structure resting under four additional commissioners would address this issue.

Though we agree with the OSC self-management approach, it is also important that the issue of funding be clarified. We believe that there should be some government funding for this new body so as to make it directly accountable to the public. Though a user-pay system could provide the lion's share of funding, it is vital that there be some public funds to ensure a greater degree of accountability and transparency. Any organization that is working in the interest of the public should remain accountable to its constituency and thus also be at least partially supported using public funds. In short, we feel that it is important to strike the right balance with respect to funding this new regulatory body.

Arthurs Report:

Recommendation 7-17 — The PBA should include a “purpose clause” that will provide guidance to its interpretation and implementation.

That clause should include reference to the need to maintain a balance among stakeholder interests, to keep pensions both secure and affordable, to both protect and promote the pension system, and to encourage innovation within the system.

OPTrust position:

This move would coincide with the creation of a more robust regulatory body. We feel that it is important that one of the “purposes” should include the promotion of more pension plans and coverage for Ontarians. We feel that under the current system the championing of the pension system is no longer a priority. This recommendation would provide positive change.

As we originally indicated in our submission to the OECP, we feel that FSCO (or as suggested in the OECP report, the new regulatory body) should take up the original Pension Commission of Ontario (“PCO”) mandate as stipulated in the 1987 version of the *Pension Benefits Act* (“PBA”) to encourage the establishment, extension and improvement of pension plans throughout Ontario. It should also have the appropriate resources to fulfill this mandate. A purpose clause provides the essential “mission statement” which is currently lacking in existing pension law and the entire regulatory framework.

Arthurs Report:

Recommendation 9-2 — Pension policy and legislation ought to facilitate the growth and operation of large-scale pension plans or to enable and encourage cooperation among small- and medium-sized plans.

Recommendation 9-3 — Legislation and regulations should be enacted to enable and promote large commingled target benefit plans that might provide affordable pension coverage to Ontarians who do not presently have pensions or for whom the costs of obtaining a pension are unnecessarily high.

OPTrust position:

This would lead to enhanced pension coverage and provide more Ontarians with retirement income options that they may currently be lacking. The commingling of target benefit plans is thinking outside of the box and applies a creative solution to an actual problem. We feel that this model may be more effective than attempting to foster the creation of new SEPPs.

The creation of larger pension plans such as multi-employer plans is important because research shows they typically have higher returns, pay lower fees on their investments and manage risk better to provide more stable funding for workers. By creating the right framework which would foster a greater degree of pension coverage, the Government could take certain strides at ensuring that the existing coverage gap would be addressed.

In addition, the province might also look at supporting specialized pension rules to accommodate the unique structure of multi-employer plans. A multi-employer pension plan can minimize the upheaval when an industry is changing by making it easier for employees to switch jobs. This is particularly relevant in today's uncertain economic climate.

Arthurs Report:

Recommendation 7-1 — So far as possible, substantive rules intended to define the rights and responsibilities of participants in the pension system should be set out in the PBA or rules and regulations made pursuant to it. If feasible as a matter of statutory drafting, the Act should convey the intention of the legislature that the Act should be treated as the exclusive source of pension law.

OPTrust position:

We believe that this will provide more clarity in the regulation of pension plans. It will help ease existing vagueness in provincial pension legislation which is often open to varying degrees of interpretation.

We also agree with making the *PBA* the exclusive source of pension law. This would assist administrators and stakeholders who will then see the “new” *PBA* as the primary pension law and will hopefully then ease the existing patchwork framework under which pension plans currently operate in Ontario. The consolidation of applicable law and making the *PBA* the central legislation is something that has been called for some time now. We feel that there is too much overlap with numerous laws and their applicability, which often leads to

considerable confusion for both administrators and stakeholders and opens up long-standing questions concerning interpretation. Legislative clarity would certainly be a step in the right direction.

Arthurs Report:

Recommendation 7-2 — As a medium-term project, the PBA and regulations should be re-drafted so as to clearly articulate both (a) general principles applicable to all types of pension plans, and (b) comprehensive codes applicable to specific plan types.

OPTrust position:

This recommendation dovetails with comments we have made on previous pages of this submission. In effect, we believe that this type of regulation is more pragmatic as it applies broader principles to all pension plans but uses more specific regulations based on plan type. It also provides a certain degree of regulatory flexibility by using general principles to guide and administer pension plans, but at the same time, uses codes and specific rules for distinctive types of plans. This ensures that there is still a strict degree of regulation with specified plans – allowing those that require a higher degree of observation and monitoring to have just that.

As currently drafted, the *PBA* is often difficult to understand and interpret. Some of the existing wording in the *Act* is somewhat vague, and though written primarily as a rules-based document, it does not explicitly spell out what those rules are. This vagueness should be eliminated. We feel that this recommendation is an effective solution as it provides both greater synergy with other applicable acts, and also makes it easier to delineate the operational framework for all plan administrators.

Arthurs Report:

Recommendation 7-3 — Revisions to the PBA should be drafted to provide both rules-based and principles-based approaches, as appropriate. In particular, minimum standards with respect to benefits should generally be rules-based; some aspects of investment, plan governance and innovation are more appropriately regulated by a principles-based approach; and funding requirements should likely involve a mixture of the two.

OPTrust position:

As outlined in the preceding commentary, each respective approach has its own strengths and weaknesses. We agree with the Commissioner's suggestion that a blend of the two types of regulation is the optimal solution. We feel that this would be useful in establishing the funding rules, governance framework and allowing for more effective administration of pension plans at large. Utilizing two forms of regulation is also worthy as it recognizes that each plan is unique in how it operates, but still may share many similarities with other plans. This provides plan administrators and FSCO (or its proposed eventual successor) with a degree of regulatory flexibility.

However, we also believe that more consultation and industry input is required in order to ensure that the proper balance is achieved.

Arthurs Report:

Recommendation 7-16 — The regulator should improve its internal and external data collection and reporting activities and implement a program of rigorous self-evaluation that will contribute to the identification of possible improvements in its regulatory functions. It should make the results of this self-evaluation publicly available. The regulator should be given the human and material resources necessary to pursue this approach.

OPTrust position:

This recommendation would benefit all stakeholders. We have cited self-evaluation and transparency of reporting in several other previous submissions to FSCO. We feel that this is critical in order to gauge operational success and also make improvements to the regulatory process along the way. Pension regulation cannot be conducted in an unchanging context. It is important to recognize that through time not only do the pension industry and plan administrators change; but also regulatory bodies and their approaches to how the industry runs must also change.

Accountability is critical for any regulatory body and they must also adhere to a higher standard when it comes to how they execute their duties and the services it provides. Self-assessment is therefore a favoured approach.

Again, we must reinforce the importance of ensuring that the funding question must be resolved at an early stage. One of our greatest concerns is that the “good plans” may be harmed in place of the “not so good” administrators. In a user-pay system it is accepted that all those administrators involved must pay their annual fees and assessments. However, it is also important to remember if a complaint is lodged against a particular plan administrator it is that respective entity that will be asked to pay for the costs of individual hearings or proceedings. In this respect, a “pay-as-you-go” system is acceptable, however, there must also be some public money accorded to the start-up and continuing costs so as to keep the system and regulatory body itself continuously accountable.

Arthurs Report:

Recommendations 7-26 to 7-31 — The Financial Services Tribunal (FST) should be replaced by a new body, the Pension Tribunal of Ontario. The Tribunal would have exclusive and ultimate jurisdiction over all matters arising out of or incidental to the PBA, including plenary power to hear and decide specified matters at first instance, and to hear and decide all appeals from orders made by the Superintendent.

It should have the power to make any order required to secure compliance with the Act, including the power to impose administrative fines for non-compliance. Orders of the Tribunal should be registered in and enforceable as orders of the Ontario Court of Justice. Decisions of the Tribunal should be final and binding, subject only to appeal to the Divisional Court in the event of a denial of natural justice, jurisdictional error or violation of the constitutional rights of a party.

OPTrust position:

Though a more robust tribunal is advantageous, there is a concern that with no avenue for recourse or direct appeal this mechanism could become rather heavy-handed. Our primary concern is that as currently proposed, the appeal process can only take place outside of the parameters of the proposed PTO. We feel that there should be at least one level of appeal built in to this system, whereby if a decision is appealed then an “appeals committee” could review the decision and deliver its findings as a “final step” utilizing the internal appeal process. The appeals committee can be directed to review decisions within a short time frame in order that the process can be concluded in a reasonable length of time.

This would do two things: In the case of a denied appeal, it would reinforce the original decision of the PTO. In the event of a successful appeal, it would allow the appellant an avenue to have the original decision reviewed.

We feel that it is very important that there only be this one level of appeal within this system. The courts and natural justice are the other avenues that will always be available to anyone willing to use them. However, if the entire point of this recommendation is to make the pension tribunal system a more effective mechanism, then it is integral that an internal appeals process be built in.

We also have some concerns about the actual design of the PTO and the possible resource issues which may hinder its successful operation. A design which envisions fewer tribunal members does not necessarily mean fewer cases will be heard as the Report seems to indicate. Any further steps taken in re-designing the pension tribunal should take into account the actual numbers of members required to sit on the PTO. This is an opportune moment to introduce change but we believe that we should get it right the first time.

Further consideration should also be given to the level of expertise of PTO members. The Commissioner makes mention of this in his report and we wish to reinforce his intentions. We also believe that there should be complete transparency with the decision-making process so that all stakeholders are aware of the basis and impact of each ruling. In addition to announcing the decisions of each case, we believe that where feasible, the full details should also be posted along with any policy impacts. If the PTO is to fully serve in its function as an effective tribunal then this would be the best way to operate.

Arthurs Report:

Recommendation 7-15 — The PBA should grant the Superintendent power to:

- hold hearings, require the production of documents and the giving of testimony, receive and rely on valuations and reports submitted in the regular course of his or her oversight functions, and order the preparation of and rely upon special valuations and reports;*
- make interim orders with effect for not more than 30 days - unless extended by the proposed Pension Tribunal of Ontario - on the basis of written documents, valuations, reports and submissions, where necessary to preserve the assets of a pension plan; and make any final order necessary to secure compliance with the Act or with regulations and rules made pursuant to the Act.*

The Superintendent should provide all affected parties with as full a right to be heard as is feasible given the urgency of the situation. Orders of the Superintendent should be enforceable by the Pension Tribunal of Ontario. All decisions and orders of the Superintendent should be subject to appeal to the Tribunal.

OPTrust position:

It is our position that the ability to order special valuations and reports – particularly in today’s sensitive economic climate – could lead to serious solvency problems for some plans. While we applaud the ability to appeal any decision to the PTO, we feel that much of what is being conceptualized in the report amounts to significant discretionary powers being provided to the Superintendent. Our concern is that some of these powers may in fact be excessive.

We understand and support the need for a more dynamic role for the Superintendent, however, we are also cognizant of the economic climate that we are operating in now and the unique circumstances that we are facing. Any discretionary powers should be delineated by some form of guidelines which provide clear direction as to what the Superintendent can do and under what circumstances. Providing increased authority is a necessity, but we believe that there should also be some flexibility as to when that authority must be tempered. Once again, further dialogue is required on what limits of that authority are to be mandated.

We also feel that effective sanctions must be put in place in order to ensure administrator compliance and to prevent any possible transgressor from shirking their fiduciary and administrative obligation. In other words, make sure that the “bite” matches the “bark” with respect to enforcement. Though sanctions and punitive measures are already in place under the *PBA*, they may not have always been enforced in the past. Penalties and consequences must be made explicitly clear to all administrators (and stakeholders) – but more importantly, they must also be enforced and shown to be enforced to all concerned.

<i>Arthurs Report:</i>

Recommendations 5-2, 5-4, 5-6 and 5-7

The province should establish an Ontario Pension Agency to receive, pool, administer, invest and disburse pension funds left stranded when plan members

leave a plan, when the plan is wound up or when former plan members cannot be found or cannot find the plan to which they formerly belonged.

OPTrust position:

Our main concern is that the projected Ontario Pension Agency (“OPA”) will take on a mandate of its own given what is being proposed in this recommendation. While this may prove to be an effective vehicle for eliminating “orphaned” benefits, it may also remove practical benefit protections that were provided in the original pension plan arrangement. This is a serious concern. In cases where members have little choice due to wind up or plan failure this agency can prove quite useful. However, further thought should be given to the utility of allowing it to become a general asset administrator or pension plan by default.

There are also pressing communication and education issues that would exist on both sides (the original plan and the OPA) as to the role and functionality of this agency. The rules under which this agency will operate must be clearly articulated and spelled out. Pension plan members need to be fully informed and provided with sufficiently clear information detailing everything at stake so that they can make an informed decision if their benefit is transferred to the OPA by choice or by obligation. When assets are knowingly transferred to the OPA from another pension plan it must be made abundantly clear to affected members that they are making a conscious choice – and in many cases, one that is irrevocable.

We can foresee the likelihood of individuals claiming a lack of relevant or timely information and thereby arguing that their decision was a poor one due to this fact. We feel that there should be more dialogue surrounding the scope of the OPA, otherwise it could lead to significant confusion amongst stakeholders.

OTHER COMMENTS:

We would like to close off our submission with a number of closing comments.

Overall, we feel that this report is positive and we applaud the efforts of the Commissioner and his attempts at encouraging the government to act in an expeditious way (Recommendations 10-8 and 10-9). We trust that steps will be taken in fairly short order to ensure that none of this critical momentum is lost.

We also feel that the Commissioner has provided a balanced approach on the issue of asymmetry and applaud his measured perspectives in that realm.

While we also support the idea of introducing Jointly Governed Target Benefit Pension Plans (“JGTBPPs”) to enhance coverage, we feel that in its current conceptualization it has been cast in a somewhat narrow prism. While the presence of a union or employee association would be beneficial for this design to work, it need not be the main rationale for the creation of such a plan. Perhaps further discussion should centre around how the JGTBPP could function in a number of workplace settings – and not exclusively within a unionized workplace. We feel that the JGTBPP idea is a sound one, but feel that the report may be shortchanging this concept by limiting its coverage base.

In conclusion, we feel that the OECP Report is a step in the right direction. Many of the recommendations have merit and would ultimately lead to a more dynamic and inclusive pension system in the province of Ontario. However, we also believe that a number of the recommendations need some adaptation in order that the right balance is struck. We are faced with a unique opportunity to bring about positive change. We are hopeful that this opportunity will be seized upon to the fullest possible extent. We trust that our comments have been helpful, and would be pleased to provide further input if it is required at some stage in the future.

Sincerely yours,

Heather Gavin
Chief Administrative Officer and Plan Manager