



Bill 120, *Securing Pension Benefits Now and for the Future Act, 2010*

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Submitted to:

Pat Hoy, Chair
Standing Committee on Finance and
Economic Affairs

Submitted by:

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1. INTRODUCTION

On behalf of the Ontario Bar Association (“**OBA**”), we are pleased to provide you with comments on Bill 120, *Securing Pension Benefits Now and for the Future Act, 2010* (“**Bill 120**” or “**the bill**”)

Established in 1907, the OBA is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents 18,000 lawyers, justices, law professors, and law students. The OBA Pensions and Benefits Section has more than 300 members (“**Members**”) who serve as legal counsel to various stakeholders within the pension and benefits industry. These stakeholders include pension and benefit plan administrators, employers, plan members, pension and benefit consultants, investment managers, actuarial firms and other advisors. Our Members have, over the years, analyzed and provided assistance to the Ontario government on most legislative and policy initiatives in the pension field.

Given the wide variety of stakeholders that our Members represent, it is not possible for us to comment on the merits of all of the policy choices in the bill. We do, however, congratulate the government for engaging in much-needed reform in this area. We are confident that Bill 120 will improve the pension environment in Ontario and provide long-awaited clarity for our profession on important issues.

Below we have outlined improvements and clarifications designed to further the intent of the bill. We would be pleased to discuss any of our comments with the Committee or the Ministry of Finance, as you refine Bill 120.

2. COMMENTS

2.1 TYPES OF BENEFITS AND PENSION PLANS

Target Benefits

Unionized-Employer Plans with an Insignificant Number of Non-Union Plan Members

Section 39.2(1) of Bill 120 provides that the following statutory conditions must be satisfied for the pension benefits provided by a pension plan to be target benefits:

- (1) the benefits provided are not defined-contribution benefits;
- (2) the employer’s contribution obligation is limited to a fixed amount ***set out in one or more collective agreements***; and
- (3) the plan administrator is authorized to reduce a benefit, deferred pension, or accrued pension, and this authority is not restricted by the plan documents, collective agreement(s) or legislation.

The reference to the employer's obligation to contribute being limited to the fixed amount set out *in a collective agreement* suggests that "target benefits" will only be available in a unionized environment. However, even in a generally unionized work environment, many multi-employer pension plans ("MEPPs") that might otherwise satisfy the above-noted requirements include members who do not work under a collective agreement, such as union staff (the employer's obligation in respect of these employees would be set out in a contract or other agreement rather than the collective agreement). It is contrary to the bill's policy objectives to exclude a pension plan from the target-benefit regime simply on the basis that a small number of union staff who participate in the plan are not covered by a collective agreement. This may, however, be an unintended effect of the provision as currently drafted. A drafting clarification may be necessary.

2.2 FUNDING REQUIREMENTS

2.2.1 Solvency Exemption for Jointly Sponsored Pension Plans

Bill 120 proposes to amend the *Pension Benefits Act* (Ontario) ("PBA") to provide that jointly sponsored pension plans ("JSPPs") will only be permitted to cease requiring contributions to be made for solvency deficiencies *if that plan was in existence as of August 24, 2010*. While we understand there may be some public policy rationale for this retroactive temporal restriction, it may have the negative effect of disincentivizing private-sector employers who may otherwise consider a move to a JSPP model in the future. As the JSPP model promotes co-operation between employer and employees, they should be incentivized. In order to achieve this important policy goal, JSPPs created in the future should be able to benefit from the same solvency exemptions. This should be clearly provided for in the legislation.

2.2.2 Restriction on Amendments Authorizing Benefit Improvements

Section 14.01 of Bill 120 proposes to add a new type of void amendment. An amendment will be void if it reduces the plan's transfer ratio or going concern funded ratio below a prescribed level, and purports to increase: (a) the amount or commuted value of a pension benefit accrued in respect of a period of employment before the effective date of the amendment; (b) the amount or commuted value of a pension or deferred pension accrued under the plan; or (c) the amount or commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements.

The OBA seeks clarification in the legislation with respect to future benefit improvements. While the limitation clearly applies to amendments that improve past benefits, it is not clear how it applies, if at all, to amendments that improve future

benefits that are phased in over several years (will such improvements introduced as a result of the collective bargaining process, for example, be exempted as a “prescribed circumstance”?). The answer to this question should be explicit in the legislation.

It is also not clear whether this prohibition applies to plans that are permitted, by agreement, to reduce benefits to correct their funding ratio. It is the Members' view that such plans should be exempt from the proposed new requirements. The public-policy objective of maintaining funding ratios is achieved through the agreed-upon ability to reduce benefits and the new requirements would, therefore, constitute an unnecessary interference with the bargaining process.

The OBA is of the view that further consultation is necessary with respect to the “prescribed circumstances” to be included in the regulations.

2.2.3 Letters of Credit

Bill 120 contains provisions that will enable an employer to provide one or more letters of credit to the plan administrator in lieu of cash contributions towards a solvency deficiency. The requirement under section 55.2(8) that letters of credit be held in trust *by the administrator* is a divergence from comparable legislation at the federal level and in other jurisdictions, which require letters of credit to be held by the plan trustee. There may be unforeseen and unintended consequences of this uncharted course. Therefore, absent specific policy reasons for having the administrator of a plan hold the letter of credit, in order to avoid any unforeseen consequences, our Members favour the well-tested approach of requiring letters of credit to be held by the plan trustee.

Our Members are also concerned about any possibility of inadvertent tax consequences associated with the proposed structure. Specifically, reference is made in proposed section 55.2(9) to payment being made when the letter of credit is called “into the pension fund by the issuer of the letter of credit”. Would a deduction still be available to the employer in these circumstances? Our Members would like confirmation on this issue and the comfort of knowing that the Government has worked through the proposed structure with the Federal Department of Finance and the Canada Revenue Agency.

2.2.4 Surplus Entitlement

2.2.4.1 Surplus Withdrawals From Continuing Plans

Bill 120 makes a number of changes to the current surplus rules in the PBA and to the changes contained in Bill 236. Proposed new section 77.11(1) of the PBA provides that the surplus entitlement of employers and other persons will be governed by the plan

documents except as otherwise provided under the PBA and subject to the restrictions on payment set out in sections 78 and 79. Our Members strongly support the elimination of the requirement to establish legal entitlement to surplus where the employer and members have concluded a surplus-sharing agreement. In the interest of clarity, our Members believe that the intent of the new provisions can be further enhanced by replacing the words “in a manner described in section 77.11” in sections 79(3)(b) and 79(3.1)(b) with the words “under section 77.11”.

2.2.4.2 Arbitration on Wind Up

Bill 120 creates a binding arbitration process for determining surplus distribution in circumstances where a plan is being fully or partially wound up. The arbitration award prevails over historical and current plan and trust documentation.

While this arbitration is a potentially useful mechanism to address the payment of surplus, additional details are required.

Triggering Arbitration:

Given the broad range of people that the bill contemplates being able to trigger arbitration, it is necessary to include some parameters in order to avoid counterproductive interference with the progress of good faith negotiations. These legislative parameters should include:

- (a) A time requirement: no arbitration should be invoked until a reasonable and practical time period has elapsed after discharge or the pay out of basic benefits. In order to reflect realities, these time periods should be a minimum of one year in a unionized environment and two years in a non-union environment; and
- (b) Guidance to the Superintendent: The provisions should also be amended to guide the Superintendent in the exercise of his or her discretion to appoint an arbitrator. An arbitrator should not be appointed where the Superintendent is satisfied that good faith negotiations are continuing (despite the above time period having elapsed). The Superintendent should obviously be allowed the residual discretion to consider what is in the best interest of the members and employer when determining whether to appoint, or refuse to appoint, an arbitrator.

Factors to be Considered by the Arbitrator

It is also necessary to provide guidance to the Arbitrator in exercising his or her discretion to apportion the surplus. This could most effectively be done through regulation as further consultation is necessary. The bill should include a regulation-making authority to allow the government to enumerate factors to be considered by the Arbitrator.

2.3 OVERSIGHT AND ENFORCEMENT BY THE SUPERINTENDENT

Stay of Superintendent's Order to Prepare a New Report

Proposed section 87(6) of the PBA will, following proclamation, permit the Superintendent to order an administrator to prepare a new report, where the Superintendent is of the opinion that the assumptions or methods used in the preparation of a report are (a) inconsistent with accepted actuarial practice, or (b) inappropriate in the circumstances, even if consistent with accepted actuarial practice.

Section 40 of the bill proposes to amend section 88 of the PBA to provide that a person subject to an order under section 87(6) has thirty days to request a hearing before the Financial Services Tribunal ("**FST**"). Under proposed section 88(2) of the PBA, a hearing request does not stay the order. Bill 236 contained a similar provision with regard to the effect of a hearing request but contained an additional provision that the FST could stay the order. It is no longer clear whether the FST still has this capacity. Our Members support the power of the FST to grant a stay and recommend that Bill 120 be clarified in this respect.

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The OBA thanks the Committee for the opportunity to provide comments on Bill 120. We hope our comments will be of help in improving the private pension system for all Ontarians.