



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

**ONTARIO BAR ASSOCIATION
SUBMISSION
TO THE
ONTARIO EXPERT COMMISSION ON PENSIONS**

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Executive Summary

The following are the three key areas upon which the OBA submits the Expert Commission should focus:

1. The OBA submits that the *Pension Benefits Act* needs to be amended so as to encourage and promote the participation of Ontario workers, from both the public and private sectors, in defined benefit pension plans. The OBA submits there has been a significant reduction in the percentage of Ontario's private sector workforce that participates in defined benefit pension plans. This lack of accessibility to adequate retirement savings vehicles will undoubtedly influence the long-term viability of the Ontario economy should its aging workforce be forced to rely upon public resources due to the inadequacy of the current retirement savings regime. As detailed in the OBA submissions below, a good first step in this process would be for the report of the Expert Commission to recommend to the Minister of Finance that the policy mandate of the provincial regulator be restored so that it is once again empowered to encourage and promote participation in defined benefit pension plans.

2. The OBA submits that in order to achieve the goal of expansion of defined benefit coverage there are several areas of the current legislative regime that must be clarified to provide a level of certainty to stakeholders. Lack of clarity as to their responsibilities and obligations will only dissuade employers from offering or continuing to offer defined benefit pension plans to their employees. Uncertainty frequently leads to litigation, which is not only expensive but also injurious to labour-management relations. The OBA submission contains a number of suggestions concerning the *Pension Benefits Act*, including those dealing with funding, mergers and acquisitions, asset transfers, plan wind-ups, treatment of surplus, revamping of the Pension Benefits Guaranteed Fund, investment rules, specific legislation for multi employer pension plans and defined contribution plans, the treatment of plan expenses and liability of third party service providers. The OBA submits that these issues should not be left to the ad hoc interpretation of the Superintendent or the courts as reliance upon the discretion of adjudicators frequently increases uncertainty and fosters further litigation.

3. The OBA submits that pension plan funding is an area particularly in need of reform. The OBA submits that the Commission should consider new and creative ideas on how pensions should be funded, including, for example: the creation of superfunds (i.e., new pension models that permit private sector employers to take advantage of the economies of scale enjoyed by the large public sector plans when investing); the use of irrevocable letters of credit for solvency funding purposes; and the permanent elimination of solvency funding for multi-employer pension plans that qualify as Specified Ontario Multi-Employer Pension Plans. Consideration should also be given to the modernization of the current investment rules applicable to pension plans, including the elimination of quantitative limits and a focus on the prudent investor approach.



The OBA submission addresses certain questions set out in the Discussion Paper. The following is a summary of our key submissions in respect of each of the questions addressed in this document:

1.5 The OBA submits that legislative reform must be a priority in order to provide clear guidance for all stakeholders.

1.6 The OBA submits that there should be mechanisms in place for FSCO to provide greater guidance on matters of interpretation (such as advance rulings). In addition, the OBA submits that the body responsible for the regulation of pension plans should be a specialized body (similar to the former Pension Commission of Ontario).

1.7 The OBA submits that generally all pension plans should be subject to the same regulation. However, the OBA submits that it is appropriate to have different rules for MEPPs and defined contribution pension plans (preferably in a separate division of the PBA). For limited purposes, the OBA submits that it may be appropriate to differentiate public sector plans. The OBA submits that the approval of specimen plans would be useful.

1.8 The OBA recognizes that harmonization of Ontario's pension law with the law of other Canadian jurisdictions is ideal. However, there is no consensus among Members as to how much importance the Commission should attach to this issue.

3.3 The OBA submits that significant changes to the legislation are required in order to strengthen the role of occupational pension plans in Ontario.

3.4 The OBA supports those initiatives that will help strengthen the role of pension plans in the longer term. The OBA submits that legislative changes are required with respect to the treatment of MEPPs. In addition, the OBA submits that the PBA should be amended to allow for the superfund concept.

5.1 The OBA submits that the existing definitions of plan solvency are realistic and it is reasonable to require the calculation of a plan's funded position on both a solvency and going concern basis. However, as detailed further in Section 5.4, the OBA submits that the solvency funding rules should be modified.

5.2 Surplus is a contentious issue upon which the Members cannot reach consensus. Certain Members submit that as the case law has developed, asymmetry has become a significant issue for plan sponsors. In addition, these members submit that legislation is required to clarify this issue. Other Members submit that the case law produced clarity in this area and categorically reject the asymmetry argument. The OBA submits that the consequences of under funding should be more clearly stipulated.

5.4 The OBA submits that the regulator should be given broader (and discretionary) powers to address funding concerns. However, it is important that any such power and any pre-conditions for addressing such concerns be clearly articulated in the legislation.



5.5 The OBA submits that generally different funding rules should not apply to different kinds of plans or different kinds of employers. The OBA submits that it is appropriate to treat public sector pension plans, MEPPs and negotiated cost defined benefit plans differently. Such plans should be exempted from solvency funding rules. The OBA further submits that the moratorium on solvency funding for MEPPs that elect to be designated as SOMEPPs should be made permanent.

5.6 The OBA submits that relief should be provided against present solvency funding requirements. There is no consensus among Members as to whether the solvency period should be extended in the PBA. There is no consensus among Members as to whether “grow-in” benefits should be included in preparing solvency valuations. The OBA submits that letters of credit should be permissible for solvency funding purposes.

5.7 The OBA submits that the pension regulator should be given discretionary powers to address funding concerns. The criteria for the exercise of this discretion must be clearly articulated in the legislation.

5.8 The OBA submits that the provision in the legislation for the use of letters of credit for solvency funding purposes might assist employers in dealing with short term funding issues. In addition, the OBA submits that the pension regulator should be given broader discretion to deal with solvency concerns. Finally, there is no consensus among Members as to whether changes in the law that would permit an employer broader access to surplus would result in more generous funding of defined benefit pension plans.

6.1 The OBA submits that the funding limits in the *Income Tax Act*, especially the 10% limit, should be increased. The OBA submits that the Ontario government should urge the federal government to make the necessary changes to the *Income Tax Act*.

6.2 The OBA submits that the funding limits under the *Income Tax Act* should be increased allowing greater latitude for employers wishing to increase contributions. There is no consensus among Members as to whether a new type of single-employer pension plan, involving shared funding risk, and permitting the reduction of accrued benefits should be introduced.

6.3 The OBA submits that mandating the establishment of contingency reserves is not appropriate. Instead, the OBA submits that Ontario should urge the federal government to remove or amend the excess surplus rule under the *Income Tax Act*.

6.4 The OBA submits that additional investment restrictions are not appropriate. The OBA submits that a more appropriate investment model for pension plan investing may be one that is similar to the one recently implemented in the *Trustee Act*. The OBA submits that the quantitative restrictions on investments are not appropriate and instead the sole investment rule should be the prudent person approach.

7.1 The OBA submits that the levels of protection under the PBGF should be increased. There is no consensus among Members as to whether PBGF premiums should be increased. The OBA submits that PBGF premiums should continue to have two



elements: (1) employer-paid based on risk, and (2) industry-wide premium paid by all defined benefit plans that are covered by the PBGF.

7.2 The OBA notes that the PBGF is not adequate to meet foreseeable claims on it under the existing rules. There is no consensus among the Members as to whether the eligibility rules or funding rules for the PBGF should be changed.

7.3 and 7.5 The OBA submits that other alternatives to the PBGF should be employed to help protect members from the effects of plan under funding or the employer's insolvency. The OBA submits that other possible measures include use of letters of credit for solvency funding purposes, cessation of contribution holidays where solvency concerns arise, controls on investment and flexibility on amortization of solvency payments. There is no consensus among Members regarding other proposed measures, such as the elimination of grow-in benefits when a plan is terminated in a deficit position and the issue of surplus entitlement.

7.4 The OBA submits that the regulator should not have the power to adjust premiums paid to or benefits paid out of the PBGF. The OBA submits that FSCO, and in particular, the newly established PBGF management committee, should continue to oversee the management and administration of the PBGF.

8.2 The OBA submits that the same wind-up procedures should not apply in all cases – defined contribution pension plans and plans with a small number of members or liabilities should have simplified procedures. The OBA submits that the PBA should be amended to allow additional types of payments to be made from a wound up pension plan. The OBA submits that on a partial wind up the purchase of annuities should not be required. The OBA submits that the PBA should be amended to permit the immediate transfer of a portion of a member's pension benefits (where the plan is in a deficit situation) based on the funded position of the plan at the wind up date. The OBA submits that excessive employer contributions made after a wind up occurs should be explicitly recognized in the PBA as overpayments that can be refunded to the employer. The OBA submits that there needs to be a process in place to address the issue of missing members for both ongoing plans and plans carrying out a wind up. Members are unable to reach a consensus regarding "grow-in" benefits; however, they recognize this as an area of importance to be considered by the Commission.

8.3 The OBA submits that the pension regulator should have discretionary authority to order wind ups. The OBA further submits that the parameters under which the regulator exercises such discretion should be clearly set out, be reasonable, and reflect the policy and purposes of the PBA.

8.4 The OBA submits that the PBA should be amended to more specifically deal with plan mergers.

8.5 There are differing points of view among Members regarding the possible elimination of partial wind ups and the provision of grow-in benefits. We encourage the Commission to consider all points of view prior to developing its conclusions and recommendations regarding partial wind ups and grow-in.



8.6 The OBA submits that the rules in the PBA that apply to material changes in the circumstances of the sponsoring employer should be directed at facilitating the transfer of assets from one pension fund to another. This policy direction should be specified. The OBA notes that there is a related issue under subsection 80(8) of the PBA related to MEPPs. In this regard, the OBA submits that the mandatory acceptance of a subsection 80(8) transfer should be eliminated.

9.1 The OBA submits that the Commission should expedite the development and adoption of the Model Pension Law and revised Reciprocal Agreement.

9.2 The OBA submits that, in general, the law governing pension plan funding should be clarified and codified. This would provide more certainty to all stakeholders. There are differing views among Members as to what such funding rules should include.

9.3 The OBA submits that efforts should be made to ensure that plan sponsors and beneficiaries are better acquainted with their rights and obligations. A key step in this effort should be the clarification of the legislation. Another step is additional communication (additional FSCO policies, plain language guides, etc.).

9.4 Generally, there is no consensus on this issue. Some Members submit that there are problems with the current model of pension regulation in Ontario. These Members submit that part of the problem may be because FSCO's Pension Plans Branch functions are not sufficiently articulated by specific statutory language to guide it in the performance of its regulatory function. Members submit that the FSCO should be granted policy-making functions. Some Members submit that the FST should be eliminated or restructured.

9.5 There is no consensus on this issue. Some Members submit that FSCO needs to be provided with adequate resources such that it can provide comprehensive regulation of pensions. However, other Members submit that areas that could be reassigned from FSCO are trust issues and pension plan investing.

9.6 The OBA submits that FSCO and the Ministry of Finance should avail themselves of industry expertise more frequently than they currently do in order to gain the benefit of the input of outside expertise. The OBA submits that the PBA should be amended to clarify the issue of third party service provider liability. The OBA submits that it should be clear in the PBA that professional advisors should be able to provide their services without any uncertainty about that role. Some Members submit that there should be certainty in a lack of fiduciary duty. Some Members submit that FSCO's Pension Plans Branch ought to be part of setting of standards and involved in the disciplinary process of actuaries.



Introduction

We are pleased to provide our submission on behalf of the Ontario Bar Association (the “OBA”). Established in 1907, the OBA is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents more than 17,000 lawyers, justices, law professors, and law students. The OBA Pensions and Benefits Section has more than 280 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, pension and benefit consultants, investment managers, actuarial firms and other advisors.

In 2006, the Honourable Greg Sorbara, the Minister of Finance, appointed the Expert Commission on Pensions (the “Commission”) to “examine the legislation that governs the funding of defined benefit pension plans in Ontario, the rules relating to pension deficits and surpluses and other issues relating to the security, viability and sustainability of the pension system in Ontario”. The Commission released a discussion paper entitled “Reviewing Ontario’s Pension System: What are the Issues?” (the “Discussion Paper”) and invited written submissions. The OBA’s submission is in response to this paper and we have responded in this submission to certain specific questions from the Discussion Paper. Various questions posed in the Discussion Paper are not addressed in our submission, as the OBA has focussed on those questions that are legal in nature, as opposed to policy, social or economic. At the end of each Section, we have provided a brief summary of our comments on that question.

We have several introductory comments:

First, the OBA is very pleased that this initiative is underway. As you will see from the comments below, the OBA is of the view that legislative change is imperative in this area of the law. Several recent cases in the pension area illustrate some of the inadequacies in the current legislation. All Members are concerned about the future of defined benefit (“DB”) pension plans and wish to see such plans continue as a key form of retirement income for Ontarians. The OBA submits that legislative change is necessary in order to encourage existing DB plan sponsors to maintain their plans and to encourage other employers to implement such plans.

Second, the Members represent a diverse spectrum of organizations and employee groups plus those employed by the government, the broader public service and consulting firms. The submission attempts to present a consensus position where possible. However, given the nature of some of the issues, and the fact that the OBA represents members with differing interests, certain of our submissions present differing views (we have noted this where applicable). Where there is more than one position stated, the OBA should not be viewed as specifically supporting any particular position.

Third, there are several key areas that the OBA collectively submits are in need of legislative reform, specifically: pension funding, mergers and acquisitions, asset transfers, plan wind-ups, mechanisms for payment of missing member entitlements, treatment of surplus, revamping of the Pension Benefits Guaranteed Fund (“PBGF”), investment rules (especially the quantitative investment limits), specific legislation for



multi employer pension plans (“MEPPs”), specific legislation for defined contribution (“DC”) plans and plan administration (in particular, pension plan expenses and liability of third party service providers).

In addition, the OBA is of the view that the powers and mandate of the Financial Services Commission of Ontario (“FSCO”) need to be addressed. The OBA submits that the body regulating pension plans should be comprised only of individuals who have expertise in the area of pensions. Both FSCO and the Financial Services Tribunal (“FST”) should be specialized bodies. Furthermore, consideration should be given to giving the regulator the power to issue advance rulings (similar to those issued by the Canada Revenue Agency (the “CRA”)).

The following comments are made with reference to the questions set out in the Discussion Paper.

1.5 In light of recent court decisions, are appropriate legal rules in place to protect the interests of present and prospective pensioners, and of employers who sponsor plans?

The *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “PBA”) fails to address some significant pension issues such as the appropriateness of applying trust law principles to pensions. As stated by Justice Gillese in *Nolan v. Ontario (Superintendent of Financial Services)*, [2007] O.J. No. 3321 (“Kerry”), in the area of pension law, “... a number of significant questions remain to be decided.” Moreover, in some instances statutory interpretation by FSCO, the FST, the Divisional Court and the Ontario Court of Appeal has been inconsistent. This illustrates that the existing legal rules require clarification.

In Kerry, the main issues were plan expenses payable from the pension fund and the use of surplus assets to pay current service costs. The Superintendent of Financial Services (the “Superintendent”) investigated and took action on some member complaints from which a series of appeals followed. The FST rendered a decision that permitted payment of plan expenses from the fund and permitted the use of surplus assets to pay current service costs; however, the Divisional Court largely overturned that decision. The Court of Appeal overturned the decision of the Divisional Court largely re-instating the FST’s decision. Leave is currently being sought to the Supreme Court of Canada.

Inconsistency between the decision-making bodies makes the situation unclear to the various stakeholders and causes uncertainty regarding what can or cannot be done. For plan sponsors, who need to be able to predict costs, the uncertainty may lead them to terminate or refrain from sponsoring DB plans, and sometimes replace them with other capital accumulation-type plans or not replace them at all. This reaction may harm the interests of present and future pensioners, as a DB pension plan is preferable to other retirement savings vehicles for many employees. The PBA requires clarification so that plan sponsors have a better understanding of plan administration requirements, plan members can better understand their rights, less reliance is needed on FSCO, the FST and the courts, and FSCO, the FST and the courts are better able to provide consistent decisions.



In addition to the process issues discussed above, there are substantive problems with the rules that cause additional uncertainty and other difficulties for plan sponsors. For example, the Court of Appeal decision in *Kerry* still requires an analysis of the original plan documents in order to determine whether expenses can be charged to a plan. When many Canadian plans were established in the 1940s and 1950s, they were underfunded and the plan sponsor agreed to assume responsibility for plan expenses, not foreseeing that at some point in the future the plan might be in a surplus. The effect of the case law is that an employer in 2007 may be bound by the terms of a trust dating back to the mid-1950s requiring it to pay plan expenses from general revenues even when the plan is in a surplus position. Presumably, the result would be different if the plan had happened to be established through an insurance contract. The OBA believes that substantive rules, such as this one, which depend on common law principles, need to be revised to bring consistency and certainty into the operation of pension plans, whatever the ultimate legislative principles adopted.

In summary, the OBA submits that legislative reform must be a priority in order to provide clear guidance for all stakeholders.

1.6 Are appropriate oversight mechanisms available to ensure compliance with the legal rules?

Neither FSCO nor the FST, possess all of the powers and resources they need to ensure compliance with pension legislation.

The first problem with Ontario's current oversight mechanisms is that FSCO has not provided enough guidance to plan administrators on interpretive issues. For example, following the decision in *The Ontario Teachers' Pension Plan Board v. Superintendent of Financial Services et al.*, [2004] O.J. No. 331 ("Stairs"), some of the public pension plan administrators approached FSCO for guidance as to whether the Stairs decision could be applied to the division of post-retirement pension benefits in the event of a member's marriage breakdown. FSCO was unable to provide any direction.

The OBA submits that FSCO should be able to provide "advance rulings", analogous to those provided by the Ontario Securities Commission (the "OSC") or the CRA, which would be "advice" to plan sponsors and/or members to give guidance on FSCO's views as to how provisions of the PBA would be interpreted. However, the mechanism for providing advance rulings may be complicated by the fact that several parties may have interests. The OBA recognizes that any power to issue advance rulings would have to be structured in a way that would be helpful to the industry. For example, the OBA notes that at the time the proposal to merge FSCO with the OSC was being considered, the issue of giving FSCO the power to provide advance rulings was canvassed. FSCO's proposal was completely unworkable. For example, it was contemplated that to obtain an advance ruling on a transaction, all of the stakeholders (including the plan members) would have to be notified of the proposed transaction so that they could make submissions. Since the transactions that could potentially be the subject of advance rulings are generally highly confidential, no plan sponsor would ever seek an advance ruling.



Another option may be to consider giving FSCO discretionary powers that would give it more flexibility in applying certain rules, e.g., the funding rules (see the discussion below in section 5.4).

Some Members submit that a second problem with oversight mechanisms is the potential that FST decisions may be challenged and the courts might not afford the FST a high level of deference. The FST is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the “FSCO Act”) to replace the former Pension Services Commission (the “PCO”), which was a body that specialized exclusively in pensions that also had policy-making functions. The FST is responsible for adjudication in a variety of sectors, including co-operatives, credit unions, insurance, mortgage brokers, loans and trust, and pensions. In addition, the nature of the FST’s expertise is primarily adjudicative with no policy functions. Many have argued that involvement in policy development would be an important consideration in evaluating a tribunal’s expertise. The Supreme Court of Canada provided its view of the FST in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] S.C.J. No. 51 (“Monsanto”).

In *Monsanto*, the Superintendent refused to approve a partial wind up report for failing to provide for the distribution of surplus assets relating to the part of the pension plan being wound up. A majority of the FST ordered the Superintendent to approve the report, deciding that subsection 70(6) of the PBA provides no more than a right to participate in surplus distribution when, if ever, the plan fully wound up. The Superintendent successfully appealed to the Divisional Court and the Court of Appeal and the Supreme Court dismissed further appeals from the employer.

The issue at the Supreme Court was whether the FST properly interpreted subsection 70(6) of the PBA. Some view the Supreme Court’s decision as lowering the standard of deference towards the FST’s decision, by providing that the FST’s decision had to be not just reasonable, but correct. In writing for the Court, Justice Deschamps held that since subsection 91(1) of the PBA provides for a statutory right of appeal to the Divisional Court, “this suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review.” Justice Deschamps also discussed the fact that the FST “does not have specific expertise in this area” and that “there is no requirement that members necessarily have special expertise in the subject matter of pensions.” Justice Deschamps has highlighted the fact that there are members of the FST who do not have expertise in pensions. It is not clear whether the Supreme Court of Canada has lowered the standard of review. In the recent *Kerry* decision, the Ontario Court of Appeal determined that there are different standards of review applicable to the FST depending upon whether the FST is considering a question of law or a question of mixed fact and law. As mentioned above, appeal for leave to the Supreme Court of Canada has been sought in the *Kerry* case.

Some Members submit that the Commission should consider the level of deference afforded to the FST, in light of Justice Deschamps’ comments. In this regard, the Commission may wish to consider whether pension plans should have their own



specialized regulatory body (similar to the former PCO). It is the OBA's view that a specialized regulatory body for pensions would be preferable.

Other OBA Members submit that the FST should be eliminated, given the lack of deference provided to the FST and its lack of policy function. This would permit pension stakeholders who are dissatisfied with a Notice of Proposal from the Superintendent ready access to the courts where the issue will be ultimately decided in any case.

In summary, the OBA submits that there should be mechanisms in place for FSCO to provide greater guidance on matters of interpretation (such as advance rulings). In addition, the OBA submits that the body responsible for the regulation of pension plans should be a specialized body (similar to the former PCO).

1.7 Should different kinds of workers, employers and plans be subject to different regimes of regulation?

The OBA submits that in general different kinds of workers, employers and plans should not be subject to different regimes of regulation. However, the OBA submits that the following types of plans should be subject to different regimes of regulation:

(i) Single-employer vs. multi-employer pension plans

MEPPs require different rules than single employer plans due to their distinctiveness. There are different types of MEPPs; some are DB; some provide for a fixed contribution by the contributing employers and provide for a DB pension; and some are jointly sponsored. All of these have significant differences from single-employer pension plans and require more regulation in the PBA, preferably in a separate division within the PBA. To the extent that a new model of multiple employer pension plan is created (as suggested in Section 3.4), there should be a separate regime of regulation for such plans.

(ii) DB vs. DC pension plans

The PBA was drafted with the focus primarily on DB pension plans. Given the significant differences between DB and DC pension plans, concerning funding, sharing of risks and assumption of responsibilities, the rules respecting DC plans should be in a separate division in the PBA.

(iii) Specimen plans

In order to simplify the administration and regulation of pension plans, and to provide some encouragement and incentive for employers to establish pension plans, there is a need for specimen plans, both DB and DC. These plans should be subject to simplified regulation and reduced regulatory fees.



(iv) **Private vs. Public sector plans**

The PBA should distinguish, for some purposes, between private and public sector plans. For example, as discussed in more detail in Section 6.3, the OBA submits that different solvency funding requirements are appropriate for public sector plans. Recent amendments to the PBA involving jointly-sponsored plans suggest that there may be a trend towards treating public sector pension plans as a separate category of plan. Some Members are concerned that the trend toward differential treatment for public sector plans in the PBA may widen the gap, which already exists between pensions provided to public sector workers and those provided for private sector workers. Nonetheless, the OBA recognizes that the public sector plans may require different forms of regulation in certain areas (e.g., in the area of investments).

In summary, the OBA submits that generally all pension plans should be subject to the same regulation. However, the OBA submits that it is appropriate to have different rules for MEPPs and DC pension plans (preferably in a separate division of the PBA). For limited purposes, the OBA submits that it may be appropriate to differentiate public sector plans. The OBA submits that the approval of specimen plans would be useful.

1.8 How much importance should be attached to the harmonization with the law of other Canadian jurisdictions?

The OBA recognizes that in theory uniformity of pension legislation across the country is ideal. Certainly there are areas of pension law that are not contentious (these have been identified by the Canadian Association of Pension Supervisory Authorities (“CAPSA”)) where harmonization should be obtainable.

That being said, some Members submit that the primary focus of the Commission should be to propose a pension system that functions efficiently and is responsive to the 21st century economy and marketplace. In developing its proposals, the Commission needs to examine the pension systems of other Canadian provinces and other jurisdictions outside Canada, which it is currently undertaking. A review of other pension regimes should be done in order to generate ideas and to borrow the best principles and approaches from the other jurisdictions.

These Members submit that the harmonization of Ontario’s PBA with the legislation of other Canadian jurisdictions should not be one of the objectives supporting the Commission’s proposals. They submit that efforts to harmonize could unwittingly lead the Commission’s focus away from developing the best pension system for Ontarians. They submit that true harmonization of the pension regimes across Canada is not a practical objective, given the complexity of the subject matter, without there being a consensus among all the regulators to establish one national regime and a national regulator.

Other Members submit, as detailed in the OBA’s response to Question 9.1, that harmonization of Canada’s pension regimes is of critical importance given the



unnecessary costs, complications and lack of clarity which currently plagues the administration of multi-jurisdictional plans.

The OBA submits that, to the extent possible, any new features added to pension legislation across the country, such as letters of credit for funding purposes, should be uniform.

In summary, the OBA recognizes that harmonization of Ontario's pension law with the law of other Canadian jurisdictions is ideal. However, there is no consensus among Members as to how much importance the Commission should attach to this issue.

3.3 What can be done to strengthen the role of occupational pension plans in the short term? In the longer term?

The OBA submits that in order to strengthen the role of occupational pension plans in Ontario, among other things, legislative complexity must be limited or reduced. If the rights, obligations and liabilities of pension plan sponsors and plan members are clearly established in the legislation, pension plan sponsors will be more likely to continue to sponsor pension plans and other employers may take a more favourable view towards establishing new pension plans. A key objective is the level of predictability in the application and interpretation of the legislation. Vague language will only result in uncertainty and costly litigation, which acts as a disincentive for employers to provide occupational pension plans. There is an obvious trade-off between simplicity on the one hand and predictability on the other hand. In some areas, predictability is essential, such as asset transfers, plan mergers, wind-up, administration related to missing plan members, plan expenses and treatment of surplus. Other areas require simplicity. For example, as discussed in further detail in Section 6.4, we submit the quantitative limits set out in the investment rules are outdated and inappropriate. Instead, the PBA should adopt the prudent person standard as the sole investment standard.

This submission contains a number of specific recommendations for strengthening the role of occupational pension plans in both the short term and the long term.

In summary, the OBA submits that significant changes to the legislation are required in order to strengthen the role of occupational pension plans in Ontario.

3.4 What degree of latitude or encouragement should Ontario pension law and policy provide for plans other than conventional single-employer plans? Should it actively encourage the formation of larger, more sophisticated sectoral, multi-employer, jointly sponsored or cooperative plans? Should other experimental designs be accommodated under the Pension Benefits Act and, if so, subject to what conditions and controls?

The OBA submits that Ontario pension law and policy should be devoted to the goal of expanding private pension plan coverage in Canada, including the role of non-conventional single-employer plans and experimental designs. To accomplish this goal, the legislation must provide a clear framework in which these plans will operate and distinguish between conventional single-employer plans, MEPPs, and jointly sponsored



plans (“JSPs”). To the extent that roles and responsibilities of participating employers and plan members can be clarified and explained in the legislation, employers are more likely to sponsor or participate in a pension plan.

The existing legislative framework for MEPPs provides an example of how the regulation of pension plans other than single-employer plans could be improved. The OBA submits that, at a minimum, MEPPs should have different funding rules than single-employer plans. The focus for MEPPs should be on going concern funding, not solvency funding, as MEPPS are assumed to continue as a going concern. Furthermore, the funding framework for MEPPs must be clearly established in the legislation so that the real funding needs of the plan, and the responsibilities for any under funding, are clear to all parties. Recent developments involving the Participating Cooperatives Pension Plan of Ontario, the Canadian Commercial Workers Industry Pension Plan and the Canada Wide Industry Pension Plan have raised questions about joint and several liabilities, the duty to monitor trustees and the ability to reduce accrued benefits. In response to these recent developments, some members of the OBA submit that the legislation should clarify that an employer who participates in a MEPP is not jointly and severally liable with all other participating employers for the total liabilities of the MEPP and that the legislation should clearly articulate when accrued benefits can and cannot be reduced. Any lack of clarity on these key issues could act as a deterrent for employers who are considering joining a MEPP or cause participating employers to withdraw from MEPPs. However, the OBA notes that private sector MEPPs require sound governance and regulatory oversight as do all pension plans.

The OBA further believes that it may be necessary to create entirely new models for providing occupational pensions altogether (e.g., models that permit private sector employers to take advantage of the economies of scale by the large public sector plans when investing – the “superfund concept”) and to provide new incentives for private sector employers to strengthen the role of occupational pension plans in the longer term. The OBA recognizes that amendments to the PBA will be required in order to accommodate this type of model. The OBA urges the Commission to explore all available options and not be restricted to the current legislative regime as reflected in the PBA.

In summary, the OBA supports those initiatives that will help strengthen the role of pension plans in the longer term. The OBA submits that legislative changes are required with respect to the treatment of MEPPs. In addition, the OBA submits that the PBA should be amended to allow for the superfund concept, discussed above.

5.1 Are existing definitions of plan “solvency” realistic?

The Ontario regulations require the calculation of the plan solvency position when preparing reports on the establishment of a plan and at least every three years thereafter. As noted in our June 2006 paper on the CAPSA Proposed Funding Principles for a Model Pension Law, the requirement to calculate the solvency position as part of an actuarial valuation is reasonable. Solvency determinations can provide a better reflection of



funding security for a point in time determination. This, in turn, adds to the transparency of the system.

However, as will be more fully detailed below, the OBA submits that its views regarding the existing definition of plan solvency should not be interpreted as supporting the view that all types of DB pension plans ought to be funded on a solvency basis. As detailed below in Section 5.4, the OBA believes that if solvency funding is retained, among other things, the pension regulator should have flexibility in the application of the funding rules in order to reach creative solutions with employers that may be struggling financially.

In summary, the OBA submits that the existing definitions of plan solvency are realistic and it is reasonable to require the calculation of a plan's funded position on both a solvency and going concern basis. However, as detailed further in Section 5.4, the OBA submits that the solvency funding rules should be modified.

5.2 Are the consequences of over or under funding for employers, workers and pensioners, fair, clearly stipulated, well understood and appropriately enforced?

The OBA submits that the consequences of the over funding or under funding of pension plans for employers, workers and pensioners, are not fair, clearly stipulated, well understood or appropriately enforced.

Many employers that sponsor single employer plans view the treatment of funding surpluses and funding deficits as “asymmetric.” Since the employer is responsible for funding deficits through increased contributions, many employers believe that they should be able to access any surpluses that might develop. Many plan members, on the other hand, argue that they bear the risks of under funding upon the insolvency of an employer that cannot fulfill its pension promise and as a result, plan members should be entitled to the results of any over funding.

Members representing employers submit that the application of trust law to questions of surplus entitlement and contribution holidays, in part, because of uncertainties in the legislation, has led to varied and unpredictable results for employers, workers and pensioners. Litigation is too often the only option available to resolve questions regarding funding surpluses. As noted in the response to Question 5.8, these issues must be addressed in a more efficient and less costly manner than by the uncertainties of litigation. The pre-eminent case involving the application of trust law principles to pension trusts is the Supreme Court of Canada decision in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (“Schmidt”). There have been several cases since Schmidt that have applied trust principles to pension issues, including cases related to using the pension fund for payment of plan expenses (for example, *Markle v. Toronto (City)*), [2004] O.J. No. 3773 and cases dealing with mergers and acquisitions (for example, *Aegon Canada Inc. v. ING Canada Inc.* (2003), [2003] O.J. No. 448 (“Transamerica”)). However, there have also been cases in which the courts have determined that classic trust principles should not be applied to a pension trust (for example, *Buschau v. Rogers Communications Inc.*, [2006] SCC 28 (“Buschau”)). Some Members question whether the intention of pension plan sponsors in voluntarily establishing a pension plan was to create a classic trust, as recognized in the common



law, with respect to any surplus funds. At the time many pension plans were established, there was no consideration given to the fact that one day the pension fund may generate a surplus. These Members question whether there may be a need for recognition in the law for a special vehicle for pension plans that has trust characteristics (in order to ensure that the monies set aside to fund the pension plan are secure from creditors, etc.), but is basically contractual (i.e., the obligation of the plan sponsor is to provide the pension promise and any excess funds can be used as directed by the plan sponsor).

Members representing plan members submit that the rules regarding surplus entitlement and contribution holidays are far from uncertain. More than two decades of case law have produced a great deal of clarity regarding the legal principles applicable to the legal entitlement to surplus. These Members submit that experienced pension lawyers can readily advise their clients as to which party is legally entitled to surplus. Furthermore, these Members reject the underlying assumption of proponents of the “asymmetry argument” that pension plan members are only entitled to their DB pension. They note that the courts have repeatedly found that employees typically agree to lower wages, or less generous benefits, in exchange for the employer’s agreement to establish a pension trust in their favour. The rules surrounding surplus entitlement are based in the initial plan documentation, which was drafted at the time the promise was made. These Members submit that legislation that would permit employers to override their employees’ entitlement to surplus and thus allow the employers to revoke these promises to their employees would be akin to the state expropriating private property without paying compensation.

The OBA submits that the consequences of under funding should also be more clearly stipulated. As noted in our June 2006 paper on the CAPSA Proposed Funding Principles for a Model Pension Law, we submit that many funding issues could be addressed, at least in part, by the adoption of funding policies by pension plans, and by providing transparent communication about funding to members, member organizations, pension committees and advisory committees.

In summary, as indicated by the comments above, surplus is a contentious issue upon which the Members cannot reach consensus. Certain Members submit that as the case law has developed, asymmetry has become a significant issue for plan sponsors. In addition, these members submit that legislation is required to clarify this issue. Other Members submit that the case law produced clarity in this area and categorically reject the asymmetry argument. The OBA submits that the consequences of under funding should be more clearly stipulated.

5.4 Should the pension regulator have wider powers to address funding concerns? If so, should these be discretionary powers?

The current approach undertaken by most pension regulators in relation to funding concerns has been to offer one-off solutions (Algoma Steel, Stelco, Air Canada) or solutions restricted to a specific sector (universities and municipalities in New Brunswick and Quebec). The OBA submits that Ontario’s pension regulator should have wider powers to address funding concerns than are currently provided for in the legislation.



Providing the regulator with discretionary authority to fashion creative solutions that satisfy the needs of the various pension stakeholders would shift the focus away from the courts and provide more cost-effective and timely solutions. For example, FSCO could be given the discretion to amortize solvency special payments over a longer period of time in certain circumstances.

Legislative change itself can be a very slow and possibly ineffective tool to address a pension-funding crisis. Resort to the courts is too gradual and, in any event, the courts can only enforce existing laws. When the laws are inadequate to adapt to changing financial circumstances, judges face a difficult task. One potentially more effective solution would be to empower the regulator with discretionary authority to propose and implement constructive solutions that consider the concerns of all stakeholders. However, this solution would realistically only be appropriate if the other concerns about FSCO described herein are met.

While some plan sponsors may be able to resolve their plans' funding difficulties by extending the amortization period for funding deficiencies over a longer time period, in other cases the posting of an irrevocable letter of credit or some other financial arrangement might be more appropriate. The right of the regulator to fashion a remedy and the scope of the regulator's discretionary powers would have to be well articulated in the legislation, to avoid uncertainty that would lead to further litigation. The OBA further submits that it would also be of assistance to all stakeholders if the regulator were empowered to make advance rulings, as the CRA or the OSC do now.

In summary, the OBA submits that the regulator should be given broader (and discretionary) powers to address funding concerns. However, it is important that any such power and any pre-conditions for addressing such concerns be clearly articulated in the legislation.

5.5 Should different rules apply to different kinds of plans and different kinds of employers? If so, what distinctions would be appropriate and why?

The OBA submits that generally it is appropriate that all types of plan sponsors be treated in a uniform manner regarding plan funding rules, and that a consistent rather than haphazard or patchwork approach to solvency funding relief ought to be applied. To the extent that funding rules are also a way of enhancing member confidence in the security of their pension benefits, subject to our comments below, it is not appropriate to legislatively extend greater or lesser benefit security to members based on the industry in which they work or the nature of their employer.

Consequently, it is our general submission that there should not be different funding rules should not apply to different types of employers. Granting exemptions from funding rules based on the status of the employer, including but not limited to the financial status of the employer, would impair the goal of providing objective relief provisions that extend a degree of certainty to employers and encourage the preservation of DB plans across industrial sectors. (As indicated below, this is not to take away from our comments in section 5.4 that it would be desirable for the pension regulator to have wider powers to address the funding concerns for employers in financial difficulties.) This is



also not to detract from our comments in section 6.3 that the solvency funding rules should be aimed at private sector plans, as opposed to public sector plans.

That said, the OBA submits that it is appropriate to introduce different rules for different types of pension plans, notwithstanding the characteristics (including financial status) of the plan sponsor or any participating employers. In particular, we submit that negotiated cost defined benefit plans (“NCDBs”) and MEPPs in which the contribution obligations of the participating employers are limited to those required by the applicable collective agreements should be exempted from solvency funding rules altogether. NCDBs and MEPPs merit particular funding rules because such plans differ markedly in nature from traditional single-employer DB plans. Whereas solvency rules are aimed at ensuring that plan assets are sufficient to meet the expected cost of accrued obligations, these rules are inappropriate for plans in which employers’ contributions are limited to what is required by the applicable collective agreement. Furthermore, we submit that the risk of employer insolvency is mitigated for MEPPs by the participation of multiple unrelated employers, which limits the impact the insolvency of any particular employer will have on the plan.

The OBA further submits that the moratorium on solvency funding for MEPPs that elect to be designated as Specified Ontario Multi-Employer Pension Plans (“SOMEPPS”), pursuant to Ontario Regulation 489/07, which amended R.R.O. 1990, Reg. 909, ought to be made permanent given the significant negative impact ending the moratorium will have on plan members and the fact that benefit levels must be determined in accordance with the long term funding rules, not those which are temporary in nature.

For the same reason, the OBA submits that removing the obligation to fund on a solvency basis would also be appropriate for public sector pension plans, given the fact that such plans should be immune from the risk of plan termination due to the insolvency of the employer.

However, as indicated above, we submit that the need remains for broad-based relief which extends beyond exempting some types of plans from solvency funding and instead applies to plans in all sectors of the economy, particularly in view of the fact that the need for funding relief is more acute in the private sector, where the reduction in DB pension plan coverage has been most acute.

In summary, the OBA submits that generally different funding rules should not apply to different kinds of plans or different kinds of employers. The OBA submits that it is appropriate to treat public sector pension plans, MEPPs and NCDBs differently. Such plans should be exempted from solvency funding rules. The OBA further submits that the moratorium on solvency funding for MEPPs that elect to be designated as SOMEPPS should be made permanent.

5.6 Should relief be provided against present solvency funding requirements, and if so, to which types of pension plans, in which sectors, and under what conditions?

As indicated in Section 5.5 above, the OBA submits that solvency-funding relief in various forms should be broad-based and, in general, apply to all types of DB pension plans.



While we do not believe that there is a single magic bullet that would resolve all of the problems related to solvency funding, we believe there are a number of steps which alone or in concert would alleviate some of the current disincentives to the establishment, maintenance and funding of DB pension plans.

Some Members submit that a useful starting point would be the extension of the solvency amortization period. Such an extension could be for a period of 10 years. (The Commission could seek the assistance of the Canadian Institute of Actuaries in determining the appropriate amortization period.) There are several recent high-profile examples or instances in which individual employers have been granted various forms of funding relief, including the extension of the amortization period. These Members submit that this has proven to be an effective form of funding relief, and submit that it should be available to all plan sponsors, not merely those experiencing the most severe financial difficulty. These Members submit that an option would be to give the regulator the discretion to extend the solvency-funding period in certain instances (subject to the comments below).

Other Members submit that solvency amortization should not be extended beyond the current five years as doing so will result in significantly higher funding shortfalls in the future when plans are wound up due to the employer's insolvency. These greater shortfalls will increase the quantum of claims on the "PBGF" and create additional hardships for members who will experience greater loss of their benefits that are above the levels protected by the PBGF.

The OBA submits that the current *ad hoc* approach to funding relief does not address the systemic problems associated with plan funding issues, nor is it sufficiently transparent as to engender public confidence in the fairness and evenhandedness of the funding regime. As detailed in Section 5.4 above, the OBA submits that the regulator should be given wider powers to address funding concerns. The OBA submits that if the regulator is given such powers, the necessary preconditions for any funding relief must be clearly articulated so there is not an increased administrative complexity while failing to reduce uncertainty for plan sponsors, members, regulators and other stakeholders. If the preconditions for obtaining such relief are unclear or left entirely to the discretion of the regulator, further litigation will be the result.

The OBA submits that plan sponsors should be permitted to use irrevocable letters of credit as a supplement to, or in place of, the requirement to make annual solvency funding payments. While a detailed regime would need to be worked out to permit their use, we submit that reliance on irrevocable letters of credit would accomplish a number of goals, including providing flexibility to plan sponsors without any significant negative impact on the security of the promised pension benefits. Use of irrevocable letters of credit for such purposes would permit the market, in the form of independent financial institutions, rather than pension regulators, to determine whether a plan sponsor was a suitable candidate for this form of relief.

The OBA submits that resort to irrevocable letters of credit should not be linked to funding of the plan (e.g., available only where the plan is fully funded on a going concern



basis), as the letter of credit itself should provide sufficient security for solvency funding purposes. Some Members maintain that the use of letters of credit may also help to reduce the possibility of surpluses developing in what they regard as the current asymmetrical legal environment. Other Members, as detailed in the response to Question 5.2 reject the notion of “asymmetry” having any impact on plan funding.

Some Members submit that Ontario should follow the lead of Nova Scotia and no longer require that "grow-in" benefits be included in preparing solvency valuations, thereby reducing the burden on sponsors whose plans provide subsidized early retirement benefits. However, other Members maintain that the cost of grow-in benefits must be included in solvency valuations as such benefits are payable upon plan windup and to not require their funding would effectively eliminate a statutory benefit that is vitally important to plan members who lose the employment they have held for many years due to the closure of their employer's business.

The OBA submits that indexing should continue to be exempted from solvency valuations.

We submit as noted in Section 5.5, that NCDBs, MEPPs and public sector pension plans should be exempted from all solvency funding requirements, for the reasons provided in that section.

In summary, the OBA submits that relief should be provided against present solvency funding requirements. There is no consensus among OBA Members as to whether the solvency period should be extended in the PBA. There is no consensus among OBA Members as to whether “grow-in” benefits should be included in preparing solvency valuations. The OBA submits that irrevocable letters of credit should be permissible for solvency funding purposes.

5.7 Should the sponsoring employer's financial strength be taken into account in determining funding requirements? If so and to what extent?

Current pension funding rules call for triennial valuation reports and annual valuation reports when the funding of a pension plan falls below a certain level. Solvency valuations of course can be very volatile and the triennial valuation requirements and permitted asset smoothing considers this volatility.

As outlined in the OBA's June 2006 response to CAPSA's Proposed Funding Principles for a Model Pension Law, the OBA submits that funding requirements should “provide reasonable assurance that most of the time full pension benefits will be provided, and that for the rest of the time most of the benefit will be provided.”

The insolvency of an employer with an under funded plan can lead to plan wind-ups wherein the members' benefits are jeopardized. On the other hand, there are other constructive uses for corporate monies apart from the funding of pension plans to the theoretical optimum.



Further, regulatory intervention causing a requirement for additional funding before there is an actual insolvency can itself create the insolvency, as was the case with the Air Canada insolvency, or exacerbate insolvency, as was the case with the Stelco restructuring. Uncertainty as to the funding requirements, or precipitate action by the regulator, can have serious financial consequences to an employer including:

- a) increasing the sponsor's cost of capital;
- b) increasing the obstacles to raising capital;
- c) impacting the sponsoring company's ability to meet its debt obligations; and
- d) motivating the sponsor's lenders to impose constraints on the company's pension plan (e.g., eliminating benefit improvements or to call for the freezing or the wind up of the plan).

Moreover, it is far from clear how a company's credit-worthiness could be determined for the purposes of establishing the funding requirements of its pension plan. For public companies rated by credit rating agencies, there could be clear benchmarks. However, for other companies it is difficult to see how the regulator could be reliably alerted to the financial difficulties of a sponsoring employer in a timely manner.

While much of this is an area that may be outside of the OBA's expertise, based on the experience of its members in dealing with insolvency situations, the OBA submits that any regulatory intervention that imposes funding obligations upon the employer above those required by normal actuarial rules, based upon the suspected financial condition of the employer, should be considered very carefully. Regulators should be entitled to require annual valuations where the plan is under funded, as the legislation now provides. However, any further action including more frequent actuarial valuations and potential additional funding requirements should be in accordance with clearly defined and articulated criteria, and be implemented only after full discussion with the plan sponsor. The OBA submits that given the number of and diversity amongst employers it is unlikely that such criteria could be articulated and defined apart from circumstances in which formal insolvency proceedings have been initiated by the company or its creditors. In such circumstances, any additional funding requirements imposed by the regulator would be too late to increase the security of the benefits of plan members.

The OBA submits that the most practical solution is to give the pension regulator the flexibility to address on a one-off basis situation where an employer is in financial difficulty, as detailed in Section 5.4.

In summary, the OBA submits that (as discussed in Section 5.4 above) the pension regulator should be given discretionary powers to address funding concerns. The criteria for the exercise of this discretion must be clearly articulated in the legislation.



5.8 What types of measures might be made available to employers to enable them to deal with funding deficiencies that might seem likely to be short term?

As detailed in the response to question 6.1, the OBA submits that the funding restrictions imposed by the *Income Tax Act*, R.S.C. 1985 (5th supplement) c.1 (the “ITA”) should be relaxed to permit a higher level of funding for DB pension plans.

However, some Members maintain that even if the funding rules are relaxed employers will be reluctant to accumulate surpluses that would compensate for a temporary dip in the stock market or decreases in interest rates without having entitlement to use surplus. They submit that trust law may prevent employers from using surpluses. Examples of use by an employer might be contribution holidays, accessing surplus remaining after a plan wind up, funding benefit improvements or the payment of plan expenses. These Members are concerned if regulatory delay and legal uncertainty increase the costs of attempting to utilize surplus for those purposes by the employer. These Members submit that the risk of an employer not having access to surplus results in minimum funding. They further submit that the application of trust law to DB pension plans should be addressed in a more efficient and less costly manner than by the uncertainties of litigation. As discussed in more detail in Section 5.2, these Members submit that this is an area of pension law in need of legislation.

Other Members submit that there is simply no demonstrable correlation between an employer’s access to surplus and its willingness to fund its DB pension plans. These Members note that in *Schmidt* the Supreme Court of Canada considered and rejected the argument that employers will tend to fund their DB plans less generously if surplus is permitted to revert to plan members. Similarly, 10 years later in *Monsanto*, the Supreme Court of Canada labelled the argument that employers would abandon their DB plans altogether if surplus rules were not amended to treat them more favourably as “unpersuasive”.

The OBA submits that (as discussed in Section 5.6) the use of letters of credit for solvency funding purposes is appropriate. As well, as discussed in Section 5.4, the OBA recommends giving the pension regulator the power to modify the rules to enable an employer to get over short-term financial difficulties.

In summary, the OBA submits that, as discussed above, the provision in the legislation for the use of letters of credit for solvency funding purposes might assist employers in dealing with short term funding issues. In addition, the OBA submits, as discussed above, that the pension regulator should be given broader discretion to deal with solvency concerns. Finally, there is no consensus among Members as to whether changes in the law that would permit an employer broader access to surplus would result in more generous funding of DB pension plans.



6.1 Should Ontario urge the federal government to amend the Income Tax Act to allow plan sponsors to make extra contributions to the plan from time to time to keep it solvent over the long term?

Paragraph 147.2(2)(d) of the ITA allows contributions to continue to be made to a DB pension plan provided that the plan does not have an actuarial surplus that exceeds the greater of two times the employer's annual current service cost and 10% of the plan's actuarial liabilities in respect of the employer ("excess surplus"). In practice, the 10% limit is most relevant because it usually exceeds the amount that is twice the employer's annual current service cost. When a pension plan has an excess surplus, employer contributions must cease.

While this is not entirely the OBA's area of expertise, it is generally agreed amongst members of the OBA and other pension professionals that are intimately involved with the pension sector, that the 10% funding buffer permitted by the ITA is inadequate to ensure long-term pension benefit security. Actuarial surpluses can quickly turn into deficits as a result of lower-than-expected investment returns and reductions in interest rates. These and other factors can easily cause a pension plan's funded ratio to fluctuate by more than 10% in a single year. The 10% limit effectively prevents "rainy day" pension funding sufficient to protect pension benefit security.

In recognition that the funded ratio of a pension plan in which employers and employees share funding risk can be particularly volatile, the federal government amended the *Income Tax Regulations* in 2003 to permit contributions to be made to a jointly sponsored plan until a surplus of 25% of liabilities is reached. The OBA submits that it is time for the federal government to recognize that employer-sponsored plans also need a larger funding margin than the current 10% limit now provides. Our recommendations are as follows:

- The funding limits in the ITA, especially the 10% limit, should be increased to a measure that takes into account the funded-ratio fluctuations that a pension plan can be expected to experience over a long-term funding horizon. The limit chosen should be high enough to ensure that the surplus margin a plan is permitted to carry will be sufficient to ensure that in a time of economic downturn or poor investment performance, the plan will be fully funded. (The OBA submits that the Canadian Institute of Actuaries could be consulted to determine what limit is appropriate.)
- The Ontario government should take every action possible to encourage the federal government to increase the funding limits, especially the 10% surplus margin to a more reasonable level that reflects the real-world funding volatility associated with DB pension plans.

In summary, the OBA submits that the funding limits in the ITA, especially the 10% limit, should be increased. The OBA submits that the Ontario government should urge the federal government to make the necessary changes to the ITA.



6.2 Should plan sponsors be given greater latitude to increase contributions or reduce benefits under carefully specified conditions?

The OBA submits that plan sponsors should be permitted to contribute as required to ensure a pension plan has a surplus margin that can reasonably be expected to compensate for adverse investment performance, reductions in interest rates and other events that pose a risk to the security of pension benefits. No particular conditions for such additional funding should be specified: pension plan sponsors should be permitted to contribute any amount required to bring a pension plan's funded ratio up to the increased surplus margin advocated in Section 6.1 above.

Under the current PBA, prospective benefit reductions are permitted whereas reductions to accrued benefits are generally prohibited (exceptions apply for MEPPs and other plans in which the employer's only obligation is to make the contributions required by the applicable collective agreement). This distinction makes sense in that it recognizes that members explicitly take on a greater funding risk in some types of pension plans than in others.

The scheme of the PBA does not currently accommodate shared-risk arrangements in plans other than plans in which contribution rates are set by a collective agreement. Some Members submit that there is an opportunity to expand the range of plans that permit risk sharing to include a new type of single-employer pension plans, which would permit the reduction of accrued benefits. These Members submit that to the extent that the pension "deal" offered by an employer involves shared funding risk and there is adequate disclosure to members, benefit reductions could be permitted, whether they affect accrued or current service benefits. Other Members submit that, given the disparity between the bargaining power of employers and individual employees, permitting such a new type of pension plan would result in employees assuming an inordinate amount of risk. However, as indicated elsewhere in the submission, the OBA urges the Commission to explore all options in arriving at recommendations that will encourage the maintenance and establishment of occupational pension plans in Ontario.

The OBA submits that for plans that do not explicitly involve shared funding risk, reductions in accrued benefits should continue to be prohibited.

In summary, as discussed in Section 6.1, the OBA submits that the funding limits under the ITA should be increased allowing greater latitude for employers wishing to increase contributions. There is no consensus among Members as to whether a new type of single-employer pension plan, involving shared funding risk, and permitting the reduction of accrued benefits should be introduced.

6.3 Should public policy encourage some other approach to the possible loss of plan solvency, such as mandating the establishment of earmarked contingency reserves?

Ontario's pension solvency rules are designed to protect employees from private sector bankruptcies where pension plans are not adequately funded. However, they do not take into account the fundamental difference between private and public sector pension plans in that public sector pension plans are funded either directly or indirectly by the Ontario



government, and in all likelihood would not be allowed to become bankrupt. One size cannot fit all; public and private plans face vastly different risk factors. The greatest risk for public sector pension plans is intergenerational fairness whereby future plan members and taxpayers are left to pay the liabilities incurred by previous generations who did not allocate risks fairly between older and younger plan members. The greatest risk for private pension plans is corporate bankruptcy. As a result, solvency rules are paramount for private sector pension plans, but not so for public sector pension plans. Therefore, the question of alternative approaches to guard against possible loss of plan solvency should focus on private pension plans. In this regard, the OBA is in favour of any creative solutions that would encourage employers to establish and maintain DB plans, while at the same time ensuring security of benefits for members.

With respect to this particular approach, the purpose of mandating the establishment of a contingency reserve would appear to be to ensure appropriate funding for pensions plans while not requiring the employer to contribute the money to the pension fund. The proposal appears to be designed to avoid the problem created by the uncertainty in the application of the current legislation and, in particular, the application of trust law principles to pension plans. The OBA is concerned that mandating the establishment of earmarked contingency reserves would create a further disincentive for the plan sponsors to establish a DB plan, especially in a time of funding deficits.

Instead, for the reasons detailed in Section 6.1, the OBA recommends that Ontario urge the federal government to amend the ITA to remove or at least amend the excess surplus rule. This would allow plan sponsors to build a reserve when the investment climate is favourable and maintain any resulting surplus as a de facto contingency reserve without imposing an additional layer of regulation. However, as indicated elsewhere in the submission, some Members believe that this will not solve the problem unless the Ontario legislation is amended to bring certainty on the issue of the use of surplus by pension plans.

In summary, the OBA submits that mandating the establishment of contingency reserves is not appropriate. Instead, as discussed above, the OBA submits that Ontario should urge the federal government to remove or amend the excess surplus rule.

6.4 If a plan sponsor decides to pursue riskier investment strategies to deal with solvency concerns, should this decision be required to be taken according to some special procedures, or made subject to more intensive oversight?

First of all, the OBA assumes that the reference to “plan sponsor” is a reference to the plan sponsor in its role as administrator as the PBA gives responsibility for the investment of the plan’s assets to the administrator, not the employer. This distinction is important because for certain types of plans (e.g., public sector plans, MEPPS), the entity administering the plan is not the plan sponsor.

Second, the OBA is not certain what is meant by “riskier” investment strategies. Section 22 of the PBA requires pension plan administrators who are investing plan assets to exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person - the prudent person test. To comply with the



PBA, by definition, all investments must be “prudent”. The OBA submits, however, that what prudence requires in any given situation will differ. For example, certain types of investments that may be prudent for a large sophisticated public sector plan with a proven track record in investing (e.g., investment in derivative instruments) may not be prudent for a plan administrator with no investment expertise.

Third, as the last several years have shown, the capital markets are volatile – what may have been considered a safe investment (e.g., commercial paper) may become a risky investment as a result of changes in the capital markets and/or economy (e.g., the sub-prime mortgage crisis in the United States). The OBA questions whether it is appropriate for a regulator to identify particular investments as *per se* riskier than others are.

Fourth, the OBA questions whether the existing rules are very effective at achieving their goals. Canada is understood to be the only developed country that imposes an extensive overlay of quantitative limits on pension investment activity, rather than relying primarily on prudent person-type standards, to our knowledge. The existing quantitative limits, set out in the federal pension benefits standards legislation, adopted by reference in Ontario, are outdated and unduly restrictive – and in certain instances, they actually can force a plan administrator to make investment decisions that could be imprudent, but for the quantitative limit at issue itself. Over the recent past, many have called for the abolition of the quantitative limits and advocated instead for sole reliance on the prudent person investment standard – see, for example, the Pension Investment Association of Canada’s submission to CAPSA in August 2001, *Recommendations for Modifications to Pension Plan Investment Rules*.

The current regulations prohibit an excessive concentration of a plan’s investments in any one enterprise through the 10% rule and in any one piece of real property and or resource property through the 5/15/25% rules. However, these diversification rules do not require geographical or industry diversification. An administrator could comply with the 10% rule and still be over invested in a particular sector. The OBA further submits that a 30% “passive investment” rule to pension fund investing may no longer be appropriate.

In this volatile and complex investment environment, the OBA does not advocate an approach of imposing additional rules which may or may not be effective and which become obsolete over time. In fact, the OBA suggests that a more appropriate investment model for pension plan investing may be one that is similar to the one recently implemented in the *Trustee Act*, R.S.O. 1990, c.T.23. The *Trustee Act* imposes the prudent investor test on trustees and outlines the criteria that the trustees must consider in investing the trust assets, but does not impose quantitative limits. The *Trustee Act* also requires the trustees to implement a written investment strategy. The focus is on strong governance process rather than on specific items.

Whether or not the quantitative limits are eliminated, the OBA further submits that the focus of pension investment regulation should be on:

- educating administrators about the investment options available for pension plans and on governance, i.e., the process they need to follow in selecting and



monitoring investment vehicles for their plan (in this regard, the OBA notes that the Ontario regulator has not issued a single piece of guidance on investment matters since it archived all of its old policies when the federal rules were adopted);

- developing an investment model that will allow all pension plans to take advantage of the economies of scale, the investment expertise of, and the investment products/opportunities available to the large public sector plans;
- creating a regulatory environment which identifies the roles and responsibilities of the various parties involved in the investment process; and
- developing more effective monitoring mechanisms, with the goal of assisting plan sponsors that may be in difficulty to develop more effective investment practices.

With respect to the monitoring of investments, the Ontario regulator currently has three main tools: (1) the triennial or annual actuarial valuations, which disclose the plan's funded status; (2) the financial statements which administrators are required to file every June pursuant to section 76 of O. Reg. 909, which, among other things, identify the investments in the plan and the new Form 8 that plan administrators are required to file with their financial statements in which the administrator certifies that the plan is invested in accordance with its "statement of investment policies and procedures" (SIPP); and (3) the quantitative limits in the current federal investment rules. The OBA questions whether the Form 8 is an effective monitoring tool, as it is unlikely any plan administrator is going to answer a question such as, "Is the plan in compliance with the 10% rule?" in the negative. However, the OBA submits that the information in the filed actuarial reports and financial statements should be sufficient to enable a regulator to monitor the investment performance of pension funds and to identify and assist plans that are in difficulty.

The OBA submits that one of the problems with the current model is that currently FSCO does not have the investment expertise to use the information it already obtains as an adequate monitoring tool or to educate administrators on pension fund investing (as evidenced by the lack of any published policies on the subject). As indicated in Section 5.9, the OBA believes that either FSCO should be required to have recognized investment expertise on staff or the regulation of pension fund investing should be assigned to the OSC. As pension plans are voluntary, the thrust of any investment monitoring should be on helping administrators invest the plan assets more effectively, rather than on prosecuting plan administrators.

In summary, the OBA submits that additional investment restrictions are not appropriate. The OBA submits that a more appropriate investment model for pension plan investing may be one that is similar to the one recently implemented in the *Trustee Act*. The OBA submits that the quantitative restrictions on investments are not appropriate and instead the sole investment rule should be the prudent person approach.



7.1 Are the present rules concerning premiums, eligibility for protection and levels of protection appropriate? If not, how might these be changed in the longer term?

The Ontario PBGF is the only system of its kind among Canadian jurisdictions. Sections 82 through 86 of the PBA provide a scheme of limited protections of pension benefits for members of certain kinds of DB plans, in prescribed circumstances. Certain types of plans are not covered by the PBGF, specifically, plans which provide only DC benefits, MEPPs, “fixed contribution” DB plans (as recognized in subsection 14(3) of the PBA), designated plans, and certain public sector plans. Although the concept of a guarantee fund is important and laudable, given the restrictions on funding, coverage and availability, the OBA submits that the level of protection currently provided by the PBGF is limited. The PBGF cannot and should not be a 100% safety net, and so difficult choices have to be made about coverage.

As a general statement, the OBA recognizes that there is no way to adequately fund the PBGF that would be acceptable to employers, meet the expectations of members and also be fair to the vast majority of taxpayers who may have to pay for the PBGF shortfall (most of whom do not have a DB pension plan or any pension plan at all).

Premiums:

The PBGF is currently funded by premiums paid by employers who maintain eligible DB plans. Under subsection 37(1) of O.Reg. 909, an annual assessment is payable to the PBGF and is generally determined as follows:

- (a) a flat premium of \$1.00 per Ontario plan beneficiary; plus
- (b) an additional levy ranging from 0.5 to 1.5% of any solvency deficiency liabilities in the plan (related to the Ontario members) that would be covered by the PBGF in the event of a PBGF claim ((a) plus (b) are subject to a cap of \$100 multiplied by the number of Ontario plan beneficiaries); plus
- (c) an additional 2% levy applied on any solvency deficiency related to benefits excluded from solvency funding for Ontario members, but still covered by the PBGF (offset by any excess of assets over regular solvency liabilities).

The annual PBGF assessment is capped at a maximum of \$4 million per pension plan. PBGF assessments under \$25.00 do not need to be remitted. The PBGF assessment for a “qualifying plan” (i.e. plan assets above \$500 million and appropriate election made) is higher. The OBA notes note that the qualifying plan election is only available to grandfathered plans.

The effect of the levy structure is that the premium grows as the plan goes further into a solvency deficit (up to the \$4 million limit). In the absence of a solvency deficit, plan surplus can be used to pay the PBGF premium (subsection 7(4) of O. Reg. 909). Failure



to pay on time results in a 20% surcharge on amounts owing, plus interest at a rate of prime plus 3%.

The other source of revenue for the PBGF is investment income on its assets.

Proposal:

In the future (as it does now), the funding scheme for the PBGF should have two elements: (1) an employer-paid premium based on risk, and (2) an industry-wide premium that is paid by all DB pension plans that are covered by the PBGF.

Funding for the PBGF should continue to be made through employer-paid premiums that are intended to reflect the likelihood that a pension plan will be wound up with a solvency deficiency. The employer is liable under the PBA for funding, so should pay a risk-appropriate premium for PBGF. Some believe that if the PBGF is an “insurance” scheme, the users of the system ought to be charged a premium that better reflects the probability of its usage to fund benefits in circumstances of insolvency. This approach would entail the development of a measure of the employer’s probability of financial failure and has an element of fairness because the PBGF pays for benefits otherwise the responsibility of employers. This may involve an assessment of factors such as the employer’s credit rating, the economic health of the specific industry and the geographic location of the employer. However, others believe that the one-by-one assessment of the financial stability of employers may not be a viable approach due to the additional complexity that would be added to the PBGF scheme and the increased burden on regulatory resources.

Some believe the current premiums are too low. They would prefer if the regulator – or an independent industry evaluator - would consider annually whether the premium level is appropriate with reference to the number of plans insured, the value of benefits insured, and the value of benefits at risk at the time. Others believe that plan sponsors cannot bear any significant increases and while small adjustments may be necessary, such a review is not required on an annual basis. Consultation with industry prior to making any premium or benefit changes would be important.

Other possible changes to the PBGF:

- Presently all plans with a solvency ratio below 80% are treated the same way even though a plan with a solvency ratio of 70% poses less risks to the PBGF fund than one with a 50% ratio. PBGF assessment could be based on a sliding scale to include higher assessments for plans with lower solvency ratios. However, some Members note that the funding level of a pension plan changes over time so even a fully funded plan cannot be said to pose no risk to the PBGF.
- The ratio of the guaranteed benefit liabilities to solvency liabilities could be taken into account in determining the PBGF assessment since the larger the ratio the higher the impact to the PBGF.



- The arbitrary cap of \$100 per beneficiary could be removed or increased. The overall maximum PBGF assessment of \$4 million could also be eliminated or increased.

In addition, a second level of funding for the PBGF could be added that recognises the public importance and social value of secure pensions. Rather than top-up the PBGF in an *ad hoc* way by relying on injections of funds from the provincial government, it would be preferable for the PBGF to be more self-sustaining. Some believe that such sustainability would be possible if all DB plans (including those ineligible for PBGF benefits) were required to make an annual contribution to the PBGF based on size, and calculated as a percentage of assets. This point of view reflects the belief that the exemption of certain kinds of pension plans from the contribution obligation is unnecessary. All DB pension plans registered in the province ought to be required to contribute. When the government funds the PBGF in deficit situations by an injection of funds, the bearer of that burden is the Ontario taxpayer rather than the employers. That may not be appropriate, at least as a first choice funding mechanism. It would be preferable to put more of the burden on the industry players. Others strongly disagree and recommend that plans that do not benefit from PBGF coverage should not be required to pay PBGF premiums. They also point out that employers are taxpayers too and that better solutions to these problems can be found in ensuring that plans are not under funded in the first place, rather than by increasing the cost and complexity of the PBGF.

Eligibility for Protection:

Section 85 of the PBA sets out the payments that are not guaranteed by the PBGF. Eligibility is denied to members of DB plans that have been established for less than three years, and in respect of benefits that have been improved within three years prior to the wind up date. Eligibility is also denied to members of MEPPs, certain designated plans, and fixed contribution plans. There are also certain pension benefits and ancillary benefits under subsection 47(2) of O.Reg. 909 that are not guaranteed by the PBGF.

Under the current regime, plan members may make important decisions in respect of early retirement, only to find that the enhancements precipitating such decisions are not insured under the PBGF because of the timing of such amendments. Some Members submit that it would be more appropriate to have such limitations to coverage addressed at the time of the registration of plan amendments. They submit that if there are any concerns over the solvency of a plan at the time of an application for registration of an amendment, such enhancements could be refused or deferred, subject to the regulator's discretion.

Other OBA Members would not recommend allowing the regulator discretion to register an amendment if there are any concerns over the solvency of a plan at the time of an application for registration of such an amendment as it prohibits employers and employees from negotiating mutually agreed benefit levels. They also would not recommend allowing MEPPs and "fixed contribution" plans to be eligible for PBGF benefits as most of these plans allow for benefit reductions. Moreover, if the PBGF coverage were to be extended to MEPPs and "fixed contribution" plans, the application of the solvency funding rules to these plans would need to be clarified. In their view, other possible changes are as follows:



- Exclusion of benefit increases made three years prior to a wind up. This time frame should be extended to five years to reflect the PBA funding rules that only require funding of a benefit over a five-year period.
- Analogously, the three-year exclusion from the PBGF for newly created plans should be extended to five years.

Levels of Protection:

Once the eligibility criteria are met and the plan in question is unable to pay the full benefits promised, the PBGF tops up the payment to the level of the promised benefit, or a specified monthly maximum (whichever is less). The cap on benefit amounts has been in place since the inception of the PBGF. It has not kept pace with inflation and does not reflect the following realities:

- (a) The cost of living has increased significantly since the inception of the fund in 1980 and the maximum monthly retirement income, even when supplemented by CPP and OAS, would be regarded as insufficient by almost any standard.
- (b) Many (if not most) pension plans generate a much higher monthly benefit than the maximum guaranteed by the PBGF for members who have a full career of service in one plan.

In order to make a difference, the OBA submits that the level of PBGF benefits should be updated to reflect the realities of the current cost of living, and thereafter be adjusted annually to keep pace with inflation.

Currently a plan member who terminated pre-1988 having 10 years of service and having reached age 45, or having 10 years of plan membership, would receive his or her full deferred pension under the PBGF. An employee who terminates post-1987 will receive 20% of his or her benefits if age plus years of service equal 50, plus $2/3^{\text{rds}}$ of 1% for each additional month of age plus years of service (full coverage would be achieved if age plus years of service equal 60). Both these entitlements are subject to the above monthly maximum. Some Members submit that eliminating the pre-1988 and post-1987 distinction will simplify actuarial calculations.

In summary, the OBA submits that the levels of protection under the PBGF should be increased. There is no consensus among Members as to whether PBGF premiums should be increased. The OBA submits that PBGF premiums should continue to have two elements: (1) employer-paid based on risk, and (2) industry-wide premium paid by all DB plans that are covered by the PBGF.

7.2 Is the PBGF adequate to meet foreseeable claims on it under existing eligibility rules? If not, should the existing rules be changed? Should the PBGF be more appropriately funded?

The PBGF has proven to be inadequate to meet claims in the past, and given that its funding methodology has not changed, that inadequacy is likely to continue. Some



Members submit that the eligibility rules should not be hardened to make the PBGF even less accessible. Rather, these Members submit that the funding rules should be changed to make it more appropriately funded in such a way as to provide additional benefits to Ontario pension plan members.

Other Members submit that the PBGF is a quasi-social program that is not designed to be self-sustainable. They submit that mechanisms listed under Section 7.3 and 7.5 are much more appropriate and effective to address funding issues than augmenting PBGF assessments.

In summary, the OBA notes that the PBGF is not adequate to meet foreseeable claims on it under the existing rules. There is no consensus among the Members as to whether the eligibility rules or funding rules for the PBGF should be changed.

7.3;7.5 Is a guarantee fund, such as the PBGF, the most appropriate way to protect the interests of plan members and pensioners from the effects of plan underfunding or the employer's insolvency? If not, what are the alternatives? What connection should any of the above changes have to rules governing the funding of pension plans?

Questions 7.3 and 7.5 have been addressed together as the OBA submits that the principal alternative to the PBGF would be to change certain rules affecting the funding of pension plans. The PBGF is an appropriate fall back solution to protect interests of plan members and pensioners from some of the effects of plan under funding when an employer is insolvent. Proposed amendments and changes to the PBGF's current structure are addressed in Sections 7.1 and 7.2 of this submission.

However, a better balance must be drawn between the proactive protection of pension benefits through statutory provisions for employers to fund fully their plans and the reactive accumulation of sufficient PBGF resources to cover plan deficits. In addition to maintaining the PBGF and the existing solvency rules, the OBA submits that there should be other measures to protect the interests of plan members and pensioners from the effects of plan under funding. With these measures in place, claims on the PBGF will be diminished, rendering the PBGF more successful in paying out claims.

The following are some examples of such measures:

- Some Members submit that the single most effective way to have fully funded pension plans is to eliminate the existing requirement to distribute surplus on partial wind-ups, thus eliminating a major reason why employers are reluctant to put additional funds into a pension plan. Others believe that there may be more effective means to ensure full funding and that the elimination of mandatory surplus distribution on partial plan wind up does nothing to protect plan member interests;
- Recognize a limited use of irrevocable letters of credit as plan assets;
- End contribution holidays if there is a deterioration of the solvency position before the next filed valuation;



- Ensure a proper asset mix;
- Amend federal and provincial legislation to clearly provide that unpaid employer contributions for the period up to the date of plan wind up or bankruptcy have priority in all insolvency situations; and
- Some Members submit that if an employer is insolvent on plan wind-up, the PBA should only require “grow-in” benefits if there are sufficient assets in the plan to pay for them. Other Members submit that the time when plan members most need statutorily required grow-in benefits is when they have lost the jobs they have held for many years due to the closure of their employer’s business. These Members submit that it is illogical to deny such members their statutorily required grow-in benefits merely because their former employer is unable to fund them.

Symmetry

Some Members take the position that the ideal system is one that allocates risk among sponsors, employees, pensioners and the public purse sensibly and realistically. They express their concern that deficiencies in DB plans are the responsibility of the plan sponsor while surpluses must be shared or exclusively provided to plan members. Even though most sponsors can take contribution holidays when there is a funding surplus, some Members submit that the PBA’s requirement to share surplus (or potentially be required to give it away) on partial wind-ups is a significant problem. These Members take the position that the general result of the current situation is that a sponsor who is otherwise able to fund above the minimum will not choose to do so. Attempts to force employers to increase funding of pension plans without also removing the need to distribute surplus on partial plan wind-up will result in more employers refusing to provide DB pension coverage.

Other Members take the position that the current system is tilted in favour of employers, and fails to recognize that plan members pay for their pensions throughout their working lives by foregoing wages in favour of deferred compensation. They submit that the plan members are the ones bearing the ultimate risk of having no, or a seriously inadequate, pension in the event their plan is wound up in a deficit, and their employer is insolvent. It is not enough to “encourage” an employer to fund adequately a pension plan - the legislative scheme must require and enforce sufficient funding.

Letters of Credit

The OBA submits that irrevocable letters of credit, or similar guarantees, should be recognized as assets for valuation purposes (for solvency funding purposes only). Employers are often reluctant to contribute into pension plans if that results in trapped capital. A letter of credit can be an effective form of security, as payment to the pension plan from the issuing institution would be required in the event that the letter of credit is not renewed. A contribution by the sponsor would offset the amount to be paid under the letter of credit. Irrevocable letters of credit increase corporate funding flexibility without significantly reducing security of benefits for members.



Solvency & Contribution Holidays

In order to avoid a situation where an employer continues to take contribution holidays based on the last filed actuarial valuation where the plan's financial position has deteriorated since the filing of such valuation, the OBA submits that the regulators should have discretion to require financial updates when monitoring shows a solvency concern. Solvency concerns should be defined for these purposes by regulation and any requirement for a financial update should be designed to be simple and inexpensive for sponsors. If there is a deterioration of the solvency position causing a solvency concern before the next filed valuation, the contribution holiday should cease and contributions should resume.

Controls on Investment

Asset mix can create significant risk to a plan's financial health during a corporate insolvency. An unusually high level of equity exposure in an under funded plan with mature liabilities may be imprudent for a financially weak plan sponsor. The current regulatory system already imposes a fiduciary duty on investment decisions and theoretically should be an effective control. While investment decisions are particularly complex and difficult to regulate and control, it would also make sense for regulators to attempt to monitor better the asset mix of insolvent plans. However, as discussed in Section 9.5, investments and asset mix are not an area in which FSCO currently has sufficient expertise to monitor, in the view of some Members. Accordingly, if there were to be monitoring of asset mix of insolvent plans, some Members submit that the OSC may be a more suitable regulatory body. The OBA recognizes that, despite being able to say that there is a link between the financial health of a sponsor and tolerable investment risk, there is no universal way to define imprudent investment for regulatory purposes, as each situation is unique. For instance, a higher degree of asset and liability mismatch should be acceptable when an irrevocable letter of credit or similar guarantee is in place.

Solvency Valuations

There should also be the ability to accelerate the amortization schedule when the employer has the resources to do so, while permitting the employer to return to the original schedule at a time when resources may be more limited. This would encourage employers to provide greater funding to pension plans when they have the ability to do so.

Priorities on Insolvency

The OBA submits that legislation at all levels should clearly state that employer required contributions with respect to the period up to the date of bankruptcy (i.e., not just contributions that are already overdue) have priority in an insolvency situation. The recent unproclaimed amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), if reintroduced, provide a priority charge over the employer's assets in receivership or bankruptcy for unremitted employee pension contributions and for an



employer's normal cost contributions. The proposed amendment did not provide such a charge for special payments and pension deficits.

Any changes in the BIA or CCAA that could provide higher priority for pension plan claims during insolvency or restructuring situations would reduce deficiencies in pension plans on wind up and lower claims against the PBGF. These results would assist in providing a more stable and financially sound PBGF. Some Members submit that there may not be much that can or should be done to give the remaining pension deficit greater priority as any material improvement of the plan members' position in relation to secured creditors will affect the employer's ability to borrow, accelerating business failure or, as the case may be, preventing financial reorganization. They submit that such priorities can only be effectively addressed by the federal government. Some Members would like to see all governments work to protect the full value of pension benefits in the event of bankruptcy or insolvency.

Benefit Priorities

Some Members submit that grow-in benefits should not be provided when a pension plan is in a deficit partly because it arguably constitutes a direct transfer of plan assets from pensioners and younger members of the plan to members who are usually between 50 and 65 years of age. In Nova Scotia, grow-in benefits are only paid if the plan has sufficient assets to provide these enhanced benefits after funds have been identified to pay for all other benefits. However, other Members submit that comparing Ontario's grow-in benefit regime to Nova Scotia's is inappropriate, as there is no PBGF protection available to pension plan members in that province. These Members note that there is no transfer of assets from pensioners and younger members to those eligible for grow-in benefits as any transfer in Ontario in such circumstances will be from the PBGF.

In summary, the OBA submits that other alternatives to the PBGF should be employed to help protect members from the effects of plan under funding or the employer's insolvency. The OBA submits that other possible measures include use of letters of credit for solvency funding purposes, cessation of contribution holidays where solvency concerns arise, controls on investment and flexibility on amortization of solvency payments. There is no consensus among Members regarding other proposed measures, such as the elimination of grow-in benefits when a plan is terminated in a deficit position and the issue of surplus entitlement.

7.4 Should oversight of the PBGF continue to be assigned to Ontario's pension regulator or should it be moved to some other institution? What powers should the overseeing institution have to adjust premiums paid to and benefits paid from the plan?

The regulatory framework must appropriately reflect the fact that employers sponsor pension plans for the benefit of their employees while balancing the interests of employees. The OBA submits that a specialized regulator that deals exclusively with pension issues is best equipped to oversee the PBGF.



Within the Ontario government structure, FSCO has the most relevant regulatory and pension expertise to oversee the operations of the PBGF. The continuation of the newly established PBGF management committee, a committee constituted of senior management and professional staff of FSCO to oversee the management and administration of the PBGF with a specific focus on the management of assets, is a key step. Members from the pension industry should also be consulted by this committee.

The organization with oversight responsibility for the PBGF should have the role of ensuring that the operations at the PBGF are in accordance with the PBA, the PBA Regulations and the various FSCO policies in effect. The regulator should not have the power to adjust premiums paid to or benefits paid out of the PBGF. The oversight organization should be mandated to regularly report on the operations and the health of the PBGF, and to make projections of anticipated future premiums and payments from the PBGF. Based upon these projections, recommendations could be made to the government for possible regulation changes in premiums charged to plan sponsors. Consultation with industry prior to making any premium or benefit changes would be important.

There should be consultation on whether the PBGF should be changed to reflect risk factors such as the credit worthiness of the plan sponsor, the economic health of an industry and any other factor that might predict the likelihood of PBGF assistance.

In summary, the OBA submits that the regulator should not have the power to adjust premiums paid to or benefits paid out of the PBGF. The OBA submits that FSCO, and in particular, the newly established PBGF management committee, should continue to oversee the management and administration of the PBGF.

8.1 How should the PBA deal with plan mergers, splits and restructurings? How might such changes affect plan members? How might they affect plan funding?

The detailed submission in relation to plan mergers, splits and restructurings is set out in Sections 8.2 and 8.6. The submission also addresses the impact of any changes to plan members. Plan funding is a question that might best be addressed, not by the OBA, but by other professionals, such as members of the actuarial profession and the Canadian Institute of Actuaries.

8.2 Should the same wind up procedures apply to all kinds of pension plans, or do some require more intensive controls than others? Should wind up procedures be simplified?

The PBA's wind up procedures are complex and stringent. They generate considerable additional costs and paperwork in situations that do not appear to warrant it. The following are the submissions of Members on wind up procedures:

Distinctions between Groups

The same procedures should not apply to all wind-ups. DC plans and plans with a small number of members or liabilities should have simplified procedures. Consideration could



also be given to streamlining the process in the case of negotiated plans where the union represents the members' interests. Members are aware of situations where FSCO has allowed a "quasi" partial wind-up requiring only an amendment to the plan to provide grow-in benefits, full vesting and portability. If partial wind-ups are to be maintained (an issue discussed elsewhere in this submission), a simplified procedure, such as the "quasi" partial wind-up previously allowed by FSCO, is preferable to requiring the entire process for wind-ups. Where a wind-up actuarial report is required, the OBA submits that the PBA should allow an abbreviated version to be used in defined circumstances as is used in the case of DC plan wind-ups.

Payments before Approval

Subsection 70(3) of the PBA restricts payments from a wound up pension plan, before Superintendent approval of the wind-up report, to pensions already in pay and those payments that are prescribed or approved by the Superintendent.

The OBA submits that the PBA should be amended to provide for additional types of payments to be made from a wound up pension plan (before the Superintendent's approval), including the following:

- commencement of retirement pensions (i.e., post-wind-up retirees);
- periodic death benefits; and
- lump sum death benefits provided that, to the extent the most recent actuarial valuation shows a solvency deficit, the lump sums are topped up by contributions to the plan.

In all of these cases, where an entity has the legal obligation to fund fully the wind-up liabilities, it is the view of the OBA that the harm in delaying these payments outweighs the risk to the plan and wind-up members.

Purchase of Annuities

The OBA understands that FSCO's view of the Monsanto case, and the definitions of "partial wind up" and "wind up" in section 1 of the PBA, require the purchase of annuities for any member opting to receive his or her pension from the pension fund. Again, assuming that the concept of partial wind up continues, the OBA submits that the purchase of annuities on a partial wind up where the remainder of the plan is ongoing should not be required, and recommends that the PBA be amended accordingly. Like other non-wind-up members, those who do not opt to transfer benefits on partial wind up should retain their pension entitlements payable from the plan (as a deferred vested member) unless the plan sponsor chooses to purchase annuities on their behalf. Annuity purchases on partial wind-up may not be to the advantage of the partial wind up members. In cases where ad hoc increases are being granted to pensioners under a pension plan, generally these would not be provided to those who are receiving annuities from an insurance company.



Interest on Commuted Values

Subsection 24(12) of O. Reg. 909 provides that a commuted value which is to be transferred pursuant to an election under subsection 73(2) of the PBA accumulates interest at the same rate used to calculate the commuted value in the wind-up report. This requirement makes it difficult, if not virtually impossible, for plan sponsors to immunize assets against growing wind-up liabilities. As with the practice for wind-ups in other provinces, it would be preferable to allow acceptable actuarial practices to be used to recalculate commuted values. Without the ability to recognize changing interest rates, plan sponsors are left with investing the wind-up assets in money market type investments that typically yield earnings lower than the growth in the liabilities.

Commuted Value Transfers in Deficit Situations

Under paragraph 29(8)(b) of O. Reg. 909, commuted value transfers are limited where there is a deficit and not all benefits would be guaranteed under section 84 of the PBA. The transfers in this case would be limited to employee contributions (including additional voluntary contributions), if any. This limitation continues to apply until a report is filed under section 32 of O. Reg. 909 certifying that there is no further amount to be funded. However, pursuant to section 31 of O. Reg. 909, the employer is permitted to fund any deficit on wind-up during a period not exceeding five years from the wind up date. The OBA submits that the legislation should be amended to permit immediate transfer of a portion of the members' pension benefits, based on the funded position of the plan at the wind-up date with the remainder being transferred upon the filing of the section 32 report. This would be similar to the process that is permitted in an ongoing plan.

Overpayments

Contributions made by an employer after a wind up occurs and pursuant to an actuary's recommendation may turn out to be more than sufficient to satisfy wind-up liabilities. It is the view of the OBA that employers should be encouraged to contribute without the threat that excess contributions may be considered as surplus, which would be subject to the standard surplus distribution requirements. The recent Tribunal decision (No. P0224-2003-1, heard February 27, 2007) in the case between The Great Atlantic & Pacific Company of Canada, Limited and the Superintendent of Financial Services indicates that subsection 78(4) of the PBA will be available to refund excess assets as an overpayment. The Tribunal noted that the term "overpayment" was not defined in the legislation. In addition, the Tribunal held that an application under section 105 of the PBA for an extension of the requirement to apply for the refund of overpayment in the same year could be sought on a reasonability basis. To encourage employers to provide generous funding on wind up, the OBA submits that the PBA explicitly recognize this to be a situation in which an employer could send in a letter requesting refund of any overpayment. In addition, in recognition of the fact that liabilities may not be settled for several years, delaying the determination of the overpayment, any time limit for application of the overpayment refund should follow the satisfaction of the wind up liabilities.



Missing Members

A significant problem in carrying out a plan wind up is locating members. Despite plan administrators' best efforts, often members cannot be found. Plan administrators and sponsors wrestle with the time and cost necessary to go through various sources and services and, especially in full wind-ups, the need to keep the pension fund open for a prolonged period. The OBA submits that the process required of plan sponsors searching for missing members as well as the required timelines should be clearly delineated.

The OBA recommends that the Commission address this significant problem and, among the possible solutions, consider the following:

- There should be a depository for pension entitlements of wind up members, if they have not responded to the distribution of a wind up statement within a reasonable period. While other provinces make available public trustees for these situations, Ontario has no public means to address the lingering liabilities of members who cannot be located. In this regard, the OBA notes the passage of the *Unclaimed Intangible Property Act*, R.S.O. 1990, c. U.1, which, if it were to be proclaimed in force, would provide a source for unclaimed pension entitlements. If the *Unclaimed Intangible Property Act* is proclaimed in force, the PBA should be amended to provide that payment to a depository for pension entitlements under such statute would be considered a full discharge for the plan sponsor.
- Where the employer/plan sponsor is willing to do so, there should be acceptance of the employer's commitment to retain the liabilities for unlocated members' pension entitlements outside of the plan.

While annuity purchases are theoretically possible in these situations, insurers are often unwilling to take on these liabilities, except for some large annuity purchases.

Creating a depository for the pension entitlements of missing members would also be of assistance to administrators of ongoing pension plans who are unable to locate former members to pay them their minimal lump sum payments or advise them of their portability options. This is often an issue for MEPPs; such plans typically have break-in-service rules, which provide that plan membership continue for up to 24 months after the termination of employment. This results in no termination statement being issued until two years after the end of employment, by which time the former member may have moved without providing a forwarding address. As the quantum of the accrued benefits is often small, individuals who were members of a pension plan for short periods frequently forget about them and never come forward to claim their benefits.

In a DB pension plan, if a former member or beneficiary never comes forward to claim his or her benefit, those accrued benefits may eventually be used for the funding of benefits generally. However, there are administrative costs associated in keeping missing former members on the books. Permitting administrators to elect to pay the commuted value of accrued benefits of missing members to a depository would alleviate this expense. If the missing former member eventually contacts the pension plan seeking his or her benefits he or she would then be directed to the depository to obtain them.



Annual Information Returns

As is current practice, the OBA submits that the PBA should not require Annual Information Returns beyond the wind up date.

Different Provincial Rules

Compliance with the wind-up rules of other provinces is difficult to achieve. This problem is exacerbated by the requirement to certify compliance with provincial laws (see, for example, Declaration of Pension Plan Administrator, Superintendent's Checklist for Compliance on Plan Wind Up). The OBA submits that this situation should be clarified (unless the laws can be harmonized) to simplify wind-up administration and allow plan administrators to be able to confidently certify compliance.

Grow-In

“Grow-in” benefits under section 75 of the PBA present difficult issues upon which Members are unable to reach a consensus. Some Members note that grow-in benefits are currently available to only members in Ontario and Nova Scotia and submit they should be eliminated or only provided if the plan in question is able to fund them. Other Members submit that grow-in benefits are vitally important to members who lose long-held jobs due to the closure of their employer's business noting that the Court of Appeal found that grow-in benefits are evidence of the legislature's “special solicitude for employees effected by plant closures” (*Firestone Canada Inc. v. Ontario (Pension Commission)* 1 O.R. (3d) 122). However, the OBA recommends that the Commission consider the following issues:

- (a) Should the PBA, like its Nova Scotia counterpart, continue to provide special grow-in benefits on wind up? (Note that some Members support continued provision of grow-in benefits, while other Members submit that such benefits should not be provided, in line with other provinces)
- (b) Should 55 points continue to be used as the test for eligibility or another level of age and/or service?
- (c) Should the existing array of grow-in benefits (e.g., unreduced early retirement, reduced early retirement, bridging benefits, consent benefits) continue to be provided?

In summary, the OBA submits that the same wind-up procedures should not apply in all cases – DC pension plans and plans with a small number of members or liabilities should have simplified procedures. The OBA submits that the PBA should be amended to allow additional types of payments to be made from a wound up pension plan. The OBA submits that the purchase of annuities should not be required on a partial wind-up. The OBA submits that the PBA should be amended to permit the immediate transfer of a portion of a member's pension benefits (where the plan is in a deficit situation) based on the funded position of the plan at the wind-up date. The OBA submits that excessive employer contributions made after a wind-up occurs should be explicitly recognized in



the PBA as overpayments that can be refunded to the employer. The OBA submits that there needs to be a process in place to address the issue of missing members for both ongoing plans and plans carrying out a wind up. Members are unable to reach a consensus regarding “grow-in” benefits; however, they recognize this as an area of importance to be considered by the Commission.

8.3 Should the pension regulator retain discretion within certain parameters to order a wind-up when the viability of the plan is at stake because of corporate restructuring or threatened insolvency?

The OBA submits that in view of the public policy objectives of the PBA, it is appropriate for the PBA to continue to provide the pension regulator with discretionary authority to order wind-ups where the regulator determines, having regard to clear and reasonable parameters set out in the PBA or the regulations thereunder, that the security of plan members’ accrued benefits is seriously at risk. The purpose of the authority to wind up, or partially wind up, a plan whose sponsor is subject to economic turmoil, however, goes beyond simply protecting accrued benefits. There is also a recognition in the legislation that when a significant group of plan members lose their employment, it has pension consequences, which ought to be addressed. The ability of those members to earn deferred income to be accessed in retirement has been truncated mid-career, and the purpose of the grow-in protections is to counter that in some small way.

Some Members submit, however, that the current parameters set out in subsection 69(1) of the PBA for the exercise of the regulator’s authority to order a wind-up include subjective criteria and criteria that, even if met, do not, in and of themselves, clearly demonstrate that the overall viability of the plan or the security of members’ accrued benefits generally is seriously at risk. For example, a determination under paragraph 69(1)(d) that a “significant” number of members have ceased to be employed by an employer because of discontinuance or reorganization of the employer’s business is, at least in part, subjective. Moreover, the courts have indicated that in interpreting paragraph 69(1)(d) that the reference to a significant number of members is not primarily a relative test. Consequently, a plan with 10,000 members could be subject to a wind-up if 750 members ceased to be employed by the plan sponsor because of a business sale to an employer that did not provide a registered pension plan.

If the plan is fully funded and the plan sponsor is solvent it is doubtful that such event would have any negative impact on the security of the members’ accrued benefits. However, under current paragraph 69(1)(d) of the PBA, as interpreted by the courts the employer would be exposed to the risk of a partial wind-up being ordered, with its associated financial and human resources costs. This has potentially been further complicated by the recent decision of the FST: *Christina Marina and Karen Jones et. al v. Superintendent of Financial Services, Hydro One Inc., Power Workers’ Union and Society of Energy Professionals*, FST File No. P0257-2005, Decision No. P0257-2005-3. In determining whether a “significant” number of members had terminated employment, the FST found that not only could a sub-group of active plan members be the relevant base for comparative purposes, but that an even smaller sub-group including only the



active non-unionized plan members could be considered the relevant base for comparative purposes. The FST decision is being appealed.

Other Members submit that the reference to a “significant” number of members as the threshold for exercising discretion is appropriately subjective. They submit that the Superintendent ought to have some flexible guidance on whether a wind up or partial wind up should be triggered. They submit that the regulator holds the responsibility and the maximum tools for ensuring that the purposes of the Act are met, and must have the flexibility to determine whether the circumstances of a given case warrant the exercise.

Moreover, these Members submit the use of the word “significant” has at least two purposes. It recognizes first of all that a sizeable reduction in the workforce may well signal financial trouble. Whether financial trouble in fact exists would be a factor in determining whether to exercise the discretion. Secondly, because a wind up or partial wind up trigger grow-in and vesting rights, the use of the word “significant” also codifies the policy recognition that if a significant sized group of employees is terminated, they will receive those termination benefits.

The statutory and/or regulatory parameters that are ultimately established for the exercise of the regulator’s discretionary authority to order a wind-up should take into account relevant changes to the other provisions of the PBA relating to wind-ups. For example, if partial wind-ups are eliminated the change would have an impact on such parameters.

In summary, the OBA submits that the pension regulator should have discretionary authority to order wind-ups. The OBA further submits that the parameters under which the regulator exercises such discretion should be clearly set out, be reasonable, and reflect the policy and purposes of the Act.

8.4 Should the PBA be amended to more specifically deal with pension plan mergers?

The OBA submits that the PBA should be amended to more specifically deal with pension plan mergers and, where appropriate, to override existing case law that complicates mergers.

Pension plan mergers are dealt with in the PBA, but in a very limited way. In fact, the regulatory policy that has been developed by FSCO over the years is far more influential in determining the extent to which asset transfers will be permitted. With little to look to, in terms of legislative guidance or certainty, the parties involved in the merger of pension plans are often placed in a difficult position.

The lack of legislation addressing plan mergers was very clearly demonstrated in the months that followed the Ontario Court of Appeal decision in the Transamerica case. After that decision, FSCO questioned its ability to approve asset transfers and plan mergers, except in very narrow circumstances. FSCO’s response has been to implement further regulatory policy, creating new hurdles to asset transfers. This case illustrates the effects of vague legislative wording, leaving it to the courts to use general legal principles to determine the outcome, and placing plan sponsors and members in uncertainty. In the OBA’s view, this situation needs to be changed. Asset transfers often result from



transactions that see members move from one plan to another, and it is in the best interests of all stakeholders to see that the transfer of their liabilities, and assets to support them, is facilitated.

From a conceptual standpoint, the OBA recommends that the codification of asset transfers should be based on two distinct categories of asset transfer. The first category would address scenarios where the PBA would permit the merger, without the requirement for regulatory approval. At most, parties would simply report to the regulatory authorities that the merger has taken place. The second category of plan merger would be subject to regulatory approval, based on clearly defined statutory parameters governing the exercise of the regulator's discretion to approve or refuse the merger application. Foremost, the codification of asset transfers should avoid the application of general legal principles by the courts as in the *Transamerica* case. They should aim to protect members' accrued benefits and represent a complete codification of asset transfer requirements.

A significant asset transfer issue that needs to be addressed is the level or range of asset values that is appropriate to be transferred in order to satisfy the parties' interests. The OBA expects that the Commission will receive feedback on this issue, including feedback from the actuarial community. The 2005 decision of the Ontario Superior Court in *Burke v. Governor and Company of Adventurers of England Trading into Hudson's Bay*, [2005] O.J. No. 5434 has caused some uncertainty regarding this issue. This case provided that a pro-rata share of assets, including surplus, be transferred, as there was a reasonable expectation that these assets may be used to grant pensioner increases. The result was not consistent with FSCO policy. Again, the codification of asset transfer rules should avoid the need to have these determinations made by the courts except in very limited circumstances.

Another significant issue that has caused much of the uncertainty in asset transfers is the application of trust law principles to pension plans. As was highlighted in the recent Supreme Court of Canada decision in *Buschau*, there are instances in which the application of old common-law trust principles is not appropriate for modern day pension trusts. The OBA submits that the trust law problem could be overcome if the legislature sets out detailed legislative schemes in certain troublesome areas, such as plan mergers and asset transfers.

In summary, the OBA submits that the PBA should be amended to more specifically deal with plan mergers.

8.5 Should partial wind-ups in Ontario be eliminated entirely, as they have been in Quebec? If not, should Ontario adopt clearer or different rules concerning the distribution of plan surpluses and the preservation of "grow-in" rights in the event of partial wind-ups?

Partial wind ups trigger "grow-in" vesting of early-retirement benefits (in plans that provide such benefits) and distributions of surplus (from plans that have surplus). Although there are a number of events and circumstances that can lead to a partial wind up, a partial wind most typically occurs when a "significant" number of employees are



terminated in a downsizing or business reorganization. Due to regulatory discretion as to when a partial wind up will be ordered and because of uncertainty about what is a "significant" number of employees, it is sometimes difficult to predict when a partial wind up will be deemed to have occurred.

From the employer point of view, partial wind ups are difficult-to-predict, undesirable and costly events that delay settlement of benefits. From the member point of view, the provision of grow-in (for employees with 55 points) and the possibility of a surplus distribution makes partial wind ups attractive.

Not surprisingly, there are differences of opinion among OBA Members with respect to partial wind ups. Some Members believe they should simply be eliminated; other Members take the view that they should be eliminated and replaced by stronger vesting rules; still others believe that the current partial wind up regime should be maintained. In the following paragraphs, we summarize each point of view.

Position 1: Maintain Partial Wind Ups

Some Members take the view that partial wind up and grow-in rights should remain largely as they are now. These Members are concerned that elimination of partial wind-ups would be tied to the elimination of grow-in, resulting in failure to address and attenuate the negative effects of mid-career terminations and the resulting loss of irreplaceable final years of service. Severance-pay rights under the common law and employment-standards legislation do little or nothing to address the loss of pension benefits. These Members take the view that grow-in compensates for an exponential loss of pension value for mid- to late-career terminations; that grow-in benefits fairly spread the cost of the loss of irreplaceable income at senior levels among all plan members (including current and future). These Members suggest that continuing employees are not prejudiced by partial wind ups because they continue to have opportunity to continue to earn salary or wages and to accrue pension benefit. It is further suggested that any argument to the effect that that partial wind ups create a disincentive to fund fully pension plans a "red herring" because if a legal obligation to fund exists, it should be enforced.

Finally, and with respect to the distribution of surplus on partial wind up, these Members suggest that the state of the law following the Supreme Court of Canada's Monsanto ruling that required surplus to be distributed on partial windup is strikes an appropriate and equitable balance between on-going plan members, former members, and employers from the perspective of property rights and legitimate economic interests. These Members believe that individuals no longer participating and accruing benefits in a pension plan should benefit from surplus that would otherwise be used for benefit improvements, contribution holidays or distributed at a later date when the entire plan is wound up. They suggest that it is preferable not to tinker with wind up rights because if a member right were removed, balance would have to be re-established by granting some other right(s). Finally, Members who believe partial wind ups should be retained submit that to the extent that surplus on partial wind up is retained in a pension plan, there should be rules governing when surplus may be used for contribution holidays and benefit



enhancements, and how surplus should be allocated when there is a plan split, a plan merger or plan conversion.

Position 2: Eliminate Partial Wind Ups

Some Members take the position that partial wind ups should be eliminated in their entirety. They submit that partial wind ups are costly and unpredictable events that discourage the establishment of DB pension plans complicate pension plan administration and delay settlement of benefits to terminated employees. These Members submit that the current rules with respect to partial wind ups inject significant uncertainty in the administration of pension plans, the structuring of corporate transactions and in the conduct of business by plan sponsors. They also submit that partial wind up legislation interferes with collective bargaining arrangements. For example, in the recent case of *Atlantic Oil Workers Union, Local 1 v. Imperial Oil Ltd.*, [2006] NSCA 100, the plan sponsor had agreed to special severance packages for certain terminated employees. The Nova Scotia Court of Appeal determined that the employer was required to provide additional grow-in benefits, over and above what had already been provided under the negotiated. Although employees had executed releases with respect to all claims arising from termination of employment, the Court determined that the benefits received by them on the partial wind up were not covered by the release. In addition, the Court determined that there had been no unjust enrichment.

These Members believe that eliminating partial wind ups would remove major sources of concern that discourage employers from establishing or maintaining DB pension plans. They also submit that grow-in rules create an incentive for sponsors to fund to only to the minimum levels required by regulation because solvency funding of grow-in benefits that may not be provided results in surplus developing in the plan -- surplus that will likely have to be distributed to employees, in whole or in part, when a partial wind up occurs. These Members, who submit that the incentive to fund minimally jeopardizes pension benefit security, have strong preference for eliminating partial wind ups in preference to introducing new and complex rules governing partial wind ups.

Position 3: Eliminate Partial Wind Ups and Introduce New Vesting Rules

Some Members who believe partial wind ups should be eliminated submit that it is unnecessary and inappropriate to link partial wind ups to grow-in. These Members do acknowledge that employees who terminate in mid- or late-career are prejudiced by the loss of early retirement subsidies and that grow-in compensates them for this loss - albeit only partially. However, these Members submit that this does not make a case for maintaining partial wind ups; rather, it argues in favour of vesting early retirement rights for all employees who terminate, not just those fortunate enough to be included in a partial wind up -- i.e. give grow-in to everyone. It is submitted that a serious flaw of the current regime is that it arbitrarily creates winners and losers, and that this inequity can best be addressed by eliminating partial wind ups and providing grow-in to every terminating member.

These Members also submit that the requirement to distribute surplus on partial wind up post-Monsanto entirely fails to achieve equity as among plan members, former members,



and employers. These Members submit that under the current regime, there is no nexus between who gets surplus on partial wind up and who was a plan member when surplus developed. They further submit that partial wind up surplus distributions do not take into account intergenerational equity as among employees, or even intra-generational equity; partial wind ups result in windfall distributions for some employees at the expense of others. These Members submit that it is inequitable for employees affected by a partial wind up to receive grow-in benefits and a surplus distribution, whereas those who terminate or retire just before or after a partial wind up get neither. These Members also note that partial wind ups often result in significant delays (e.g. years) in settling benefits to terminated employees.

These Members take the view that to the extent that surplus should be distributed to terminating employees, it should be distributed to all – not just those affected by a partial wind up. It is acknowledged that such an approach would be impractical, would jeopardize the on-going funded position of pension plans, create an entirely new class of benefit entitlement and further discourage employers from establishing, maintaining and fully funding DB pension plans. Noting that partial wind ups in Quebec were replaced by immediate vesting, these Members submit that the PBA be should be amended to eliminate partial wind ups, surplus distributions and grow-in in its current form entirely and to introduce immediate vesting. Some Members also submit that the PBA should be further amended to introduce progressive vesting of early retirement benefits for all employees, not just those who have reached the 55-point "grow-in" milestone. These Members take the view that if immediate vesting of regular benefits and progressive vesting of early retirement benefits becomes mandatory, partial wind ups would no longer serve any useful purpose, and termination benefits could be settled to all employees much more expeditiously.

As is evident from the above, there are differing points of view among Members regarding the possible elimination of partial wind ups and the provision of grow-in benefits. We encourage the Commission to consider all points of view prior to developing its conclusions and recommendations regarding partial wind ups and grow-in.

8.6 What would be the best approach to protecting the ongoing rights of plan members and pensioners, in the event of a material change in the identity, structure or financial circumstances of a sponsoring employer?

The OBA recognizes that a plan member would prefer to receive one pension that takes into account all of the member's service. Accordingly, any model for the provision of pensions for Ontario residents that is adopted should be designated to facilitate portability of pension benefits on both an individual basis and in the context of transactions.

Among other things, the rules that apply to material changes in the circumstances of the sponsoring employer should be directed at facilitating the transfer of assets from one pension fund to another. The current rules do not promote the transfer of assets; rather they create barriers to asset transfers because of the uncertainty regarding the test that is applied to determine whether the rights of plan members are protected, long delays in obtaining approvals and the complexity of the process. The rules also need to define



what is meant by protecting the rights of plan members. For example, it is not clear under the current rules whether a plan member's interest in surplus is one of the rights that pension legislation is intended to protect.

In the OBA's view, the statute should clearly set the policy direction (e.g., promotion of asset transfers) and lay down some general guidelines for the regulator in administering the statute but should give the regulator flexibility to deal with the situations on a case-by-case basis, within the prescribed policy framework.

A related issue is what should happen in the case of a change in the identity of a plan's administrator as can arise when members of one MEPP become members of another MEPP due to a displacement application pursuant to section 62 of the *Labour Relations Act*, S.O. 1995, c. 1, Sched. A. Subsection 80(8) of the PBA currently requires that in such circumstances the administrator of the first plan must transfer "all the assets and liabilities" of the members who elect such a transfer to the administrator of the second plan. The administrator of the second plan is statutorily required to accept such transfers.

The OBA submits that the mandatory acceptance of a subsection 80(8) transfer is unnecessary and should be eliminated as such transfers are administratively difficult, time consuming and expensive given the inherent difficulties in determining what the value of pension benefits accrued in one plan will be in another pension plan which may have a different benefit structure entirely. The issue is further complicated by the fact that FSCO has yet to develop a policy regarding such transfers

The OBA submits that a decision to change unions is typically due to issues entirely unrelated to the pension plan. Furthermore, trustees of a MEPP, in their capacity as trustees and thus the plan's administrator, have no control over the representational issues that may give rise to a bargaining unit's decision to switch unions. As the fiduciary obligations MEPP trustees have to deferred members are no less than their fiduciary obligations to active members, it is submitted that former plan members who do not transfer their benefits to the new plan in no way endanger their accrued benefits by not doing so. However, the OBA submits that plan members who change unions due to a displacement application should continue to enjoy the portability options they currently enjoy pursuant to section 42 of the PBA.

With regard to the "financial circumstances of a sponsoring employer", presumably this refers to deteriorating financial circumstances as opposed to an employer that is experiencing no financial difficulties. To a certain extent, this part of the question can be best answered by commenting on employees and pensioners rights in the employment, labour or bankruptcy and insolvency legal environment, which may be beyond the scope of the Commission's mandate. The PBA contains some protection of benefits in the case of an insolvency or bankruptcy through the application of the PBGF. Commentary regarding the PBGF has already been provided in Section 7. The other protections under the PBA relating to liens and holding contributions in trust are problematic from a plan member and pensioner perspective due to the federal bankruptcy laws.



In summary, the OBA submits that the rules in the PBA that apply to material changes in the circumstances of the sponsoring employer should be directed at facilitating the transfer of assets from one pension fund to another. This policy direction should be specified. The OBA notes that there is a related issue under subsection 80(8) of the PBA related to MEPPs. In this regard, the OBA submits that the mandatory acceptance of a subsection 80(8) transfer should be eliminated.

9.1 Should Ontario be seeking to replace or reinforce existing inter-provincial arrangements that give it responsibility for pension plans with members outside the province?

The 1968 Memorandum of Reciprocal Agreement (the “Reciprocal Agreement”) allows the sponsor of a multi-jurisdictional pension plan to register the pension plan with the regulator of the province where the plurality of plan members is employed. However, the Reciprocal Agreement does not adequately address the variations in the benefits and entitlements of pension plan members of multi-jurisdictional pension plans under different pension legislation. This, in turn, makes the regulation and administration of multi-jurisdictional plans costly, complicated and unclear.

In recognition of the need for updating the Reciprocal Agreement, the Canadian Association of Pension Supervisory Authorities has been actively developing a revised Reciprocal Agreement, together with its efforts to advance its Proposed Funding Principles for a Model Pension Law (the “Model Pension Law”) for presentation to governments throughout Canada.

Rather than embarking on unilateral action to address issues where the Reciprocal Agreement is less effective than it should be, the OBA submits that the Commission should encourage Ontario to avoid actions that might be viewed as extra-territorial, and to expedite the development and adoption of the Model Pension Law and revised Reciprocal Agreement.

In summary, the OBA submits that the Commission should expedite the development and adoption of the Model Pension Law and revised Reciprocal Agreement.

9.2 Should an effort be made to clarify and codify the law governing pension plan funding in Ontario? If so, should the PBA be amended to encompass matters now dealt with by the general law?

The OBA submits that the law governing pension plan funding in Ontario should be clarified and codified. Lack of clarity and ongoing uncertainty regarding funding rules, and the rights and obligations of various stakeholders may serve as disincentives to the creation and maintenance of DB pension plans.

As noted in Section 5.2, above, some Members representing employers submit that the application of general trust law to funding issues is, in part, due to uncertainties in the PBA and questions regarding the applicability of general trust law principles to a pension trust. This uncertainty has led to varied and unpredictable results for employers, workers and pensioners. Litigation has too often been the result.



As noted in Section 5.8, issues such as contribution holidays (among other surplus issues) must be addressed in a more efficient and less costly manner than by the uncertainties of litigation. Members representing employers submit that the PBA should codify the Supreme Court of Canada's finding that an employer may take contribution holidays, unless the current plan text prohibits doing so. They further submit that a sponsor's ability to amend the plan to expand contribution holidays should be clearly supported by legislation. In their view, express legislative codification of these rules would provide welcome clarity. Another funding issue that requires codification in the PBA is the ability to use surplus funds in a converted DB plan to fund contributions in respect of the DC portion of the plan. This was an issue in the recent Kerry case, discussed above.

Members representing plan members also support the codification of funding rules but submit that the rules regarding contribution holidays are far from uncertain and that legislative reform in this particular area is unnecessary. In their view, more than two decades of case law have produced sufficient clarity regarding the applicable legal principles, which can be readily applied on a case-by-case basis. However, should the Commission decide to recommend codification of the contribution holiday rules, these Members submit that the amended legislation must require any plan sponsor taking a contribution holiday to provide FSCO with a valuation each year demonstrating that the plan retains sufficient surplus to justify the continuation of the contribution holiday. Such a requirement would prevent the recurrence of the scenario that arose in Air Canada where contribution holidays were permitted to continue even though the various plans were no longer in surplus. These Members further submit that the permissibility of using funds in a converted DB plan to fund an employers contributions to the DC portion of the plan is as of yet unresolved as the parties in Kerry are seeking leave to the Supreme Court of Canada. In their view, to amend the PBA now to permit such cross subsidization would result in the expropriation without compensation of assets that properly belong to the beneficiaries of the trust.

In summary, the OBA supports the codification of the pension funding rules; where the Members differ is what those rules ought to include. The OBA's recommendations regarding a number of funding issues are discussed elsewhere in this paper (see Section 5, in particular). These recommendations include permitting irrevocable letters of credit to meet solvency funding contribution requirements and possibly extending the amortization period for funding solvency deficiencies (Note: not all Members support the latter suggestion.)

The OBA emphasizes that codification of the funding rules does not require codification of the rules surrounding every aspect of the funding process. Where an existing professional method serves the best interests of all parties and is consistent with the purpose and scheme of the PBA, the Commission should refrain from recommending codification. For example, the actuarial assumptions used to prepare actuarial valuation reports are not now directly mandated by legislation or regulation, despite the key role such assumptions play in determining funding obligations. Despite their materiality to the overall calculation, the Commission should resist recommending the codification of actuarial assumptions. These issues should continue to be based on the professional practice standards of the Canadian Institute of Actuaries. Maintaining this approach will



subject actuaries to appropriate oversight and professional accountability, while providing necessary flexibility in the system.

In summary, the OBA submits that, in general, the law governing pension plan funding should be clarified and codified. This would provide more certainty to all stakeholders. There are differing views among Members as to what such funding rules should include.

9.3 Should an effort be made to ensure that pension plan sponsors and beneficiaries are better acquainted with their rights and obligations?

The OBA submits that efforts should be made to ensure that pension plan sponsors and beneficiaries are better acquainted with their rights and obligations. Clarity and greater understanding regarding these matters would be beneficial to all concerned. For plan sponsors, fully understanding their rights and obligations will improve compliance, prevent or reduce litigation, and strengthen the overall pension system in Ontario. Working to ensure that beneficiaries fully understand their rights and obligations will create a more transparent and accountable system and will reduce the likelihood of disputes.

There are two stages to ensuring that stakeholders are acquainted with their rights and obligations. The first stage is to ensure that stakeholder' rights and obligations are clearly expressed in the legislation, while the second stage is actually communicating that information to stakeholders. The first stage is addressed by many of the reform measures addressed elsewhere in this submission. The second stage involves ensuring that the PBA, its regulations and FSCO policy are clearly drafted. Additionally, OBA members submit that additional and more detailed policies would be of assistance as there are many areas in which FSCO has not published a policy (e.g. subsection 80(8) transfers). In addition, as discussed above, the provision by FSCO of "advice" similar to OSC and CRA advance rulings would be helpful.

Communication would also be improved by ensuring that amendments to the legislation and regulations are made in consultation with key affected stakeholders, including members of the pension bar and the public. The OBA submits that communication may also be improved if FSCO were to publish plain language guides to specific issues (e.g. a plan sponsor's funding obligations, the rights of plan members), emphasizing enhanced and preventative compliance and maintaining open lines of communication with practicing lawyers in the area. The OBA's Pensions and Benefits Law Section can play a key role concerning the latter.

In summary, the OBA submits that efforts should be made to ensure that plan sponsors and beneficiaries are better acquainted with their rights and obligations. A key step in this effort should be the clarification of the legislation. Another step is additional communication (additional FSCO policies, plain language guides, etc.).



9.4 Are the powers and staff resources of FSCO, the FST and the Superintendent of Financial Services adequate to perform the tasks presently assigned to them, and would the assignment of further responsibilities require additional powers and resources?

Some Members submit that there are problems with the current model, which may stem from the fact that that FSCO's Pension Plans Branch functions are not sufficiently articulated by specific statutory language to guide it in the performance of its regulatory functions. FSCO's situation can be considered in contrast to that of the Office of the Superintendent of Financial Institutions ("OSFI"). OSFI has made it clear that its concern is with ensuring the solvency of pension plans and its approach to various contentious issues (e.g., issues relating to surplus ownership) that arise is consistent with that objective. OSFI's approach to pension regulation is reflected most recently in its April 27, 2007 decision with respect to the Buschau matter, a case that was the subject of two British Columbia Court of Appeal decisions. In refusing a request by the members to terminate a prior plan, which would trigger the distribution of its surplus, Julie Dickson (now the Superintendent) had the following to say about OSFI's mandate:

“Private pension plans serve broad societal goals. Many individuals depend upon pension plans and their continuation for their future financial support. In respect of a DB pension plan, the terms of the plan set out the level of promised pension benefits to a class of employees eligible to join the plan.

“The PBSA requires that a plan meet the prescribed tests and standards for solvency. These requirements are primarily set out in section 9 of the Pension Benefits Standards Regulations, 1985 (“PBSR”). If there is an actuarial surplus, the prescribed tests and standards for solvency permit an employer to take a contribution holiday.

“The legislative scheme of the PBSA is primarily aimed at ensuring minimum standards for pension plans and presumes that the continued existence of a pension plan is a worthy goal. In respect of the solvency requirements, the PBSA provides for funding of a plan that is adequate to provide for the payment of promised pension benefits, but at any point in time, a plan could operate in a deficit position or with an actuarial surplus.

“OSFI's mandate also reflects these objectives. I have attached as an Appendix to this letter a copy of the mandate. One part of this mandate is particularly noteworthy. Paragraph 4(3)(b) of the *Office of the Superintendent of Financial Institutions Act* (“OSFI Act”) provides that in carrying out its objects, OSFI shall strive “to protect the rights and interests of members of pension plans, former members and any other persons who are entitled to pension benefits or refunds under pension plans. OSFI's supervision of pension plans in order to determine whether they meet the minimum funding and other three requirements of the PBSA, and OSFI's responsibility to take, or require plan administrators to take, corrective actions when necessary, are central to our mandate.”

Some Members submit that FSCO sometimes appears to be active rather than pro-active in dealing with new situations, e.g., flip flops in the case law. They submit that as court decisions are frequently reversed or "limited to their facts" by subsequent decisions, FSCO's reactive approach may create uncertainty in the industry, and possibly creates



further motivation for employers to consider winding up their DB plans. If legislation provided FSCO with more specific policy functions, and considered the context of the FST, there might be an increase in policy-making certainty. An example of uncertainty that resulted due to FSCO's policies was FSCO's reaction to the Transamerica case. The decision in Transamerica was initially interpreted by FSCO as preventing plan mergers in most situations. FSCO subsequently relaxed its position and the current "Transamerica Policy" is broad enough to permit many plan mergers albeit after taking into account extensive steps that further complicate plan administration. FSCO is continuing to assess merger applications based on its revised interpretation of trust principles, which has led to delays in the approval of mergers of six years or more. The OBA submits that a more policy-based approach such as that adopted by OSFI might have led to a different result in the Transamerica situation and eliminated or greatly reduced the delays in receiving regulatory approval for plan mergers.

Some Members submit that the lack of a consistent policy direction reflected in this and other FSCO initiatives may be attributable to the removal of the policy-making function of the predecessor PCO in the FSCO Act, and the failure to replace it with an alternative mandate. Like FSCO, OSFI also regulates a number of sectors, but because the OSFI Act gives each sector a specific mandate, those with responsibility for each sector are provided with the necessary guidance to regulate that sector. These Members therefore submit that the FSCO Act should be amended to give those involved in pension regulation a principle-based mandate to guide them in the regulation of the Ontario pension system.

The OBA recognizes that the Ontario system is more complex than that of OSFI because of the existence of the FST. As indicated in Section 1.5, some Members submit that the FST is not a very effective body because of the lack of deference paid to it by the courts. In this regard, the approach of the courts to FST decisions stands in marked contrast to the deference given to its predecessor, the PCO.

Some Members submit that before more powers are given to the FST, the FST must be restructured so that its decisions will be granted greater deference by the courts.

Other Members submit that the FST should be eliminated as it now represents only an additional obstacle to the courts where the issues in dispute will ultimately be determined.

The OBA submits that in order for FSCO's Pension Plans Branch to regulate the sector appropriately, it needs to be able to pay and retain the expertise it requires at the going rate or to hire experts at closer to private sector rates (similar to the OSC).

Generally, there is no consensus on this issue. Some Members submit that there are problems with the current model of pension regulation in Ontario. These Members submit that part of the problem may be because FSCO's Pension Plans Branch functions are not sufficiently articulated by specific statutory language to guide it in the performance of its regulatory function. Members submit that the FSCO should be granted policy-making functions. Some Members submit that the FST should be eliminated or restructured.



9.5 Should some of these tasks be reassigned to other bodies, such as the courts, or discontinued altogether?

Some Members believe that FSCO should be provided with the resources to provide comprehensive regulation of pensions and therefore should not need to reassign tasks to other bodies.

Other Members submit that there are two areas of responsibility currently assigned to FSCO and the FST that could potentially be assigned to another body.

First, these Members question whether FSCO should be deciding trust issues. This is an area in which the courts have found that FSCO has no special expertise and in which neither FSCO nor FST are accorded any deference. To the extent that disputes involving trust principles arise, these Members submit they should be dealt with in the courts. As well, the number of areas where trust law are important can be resolved through, for example, the codification of certain areas, such as plan mergers as discussed in Section 8.4.

The second area that could potentially be assigned to another body is the area of pension plan investing in some Members views. They submit that currently, FSCO does not have the expertise to monitor asset mix and investment practices. These Members submit that the monitoring of pension plan investments and the investment practices could be made the responsibility of the OSC, as that body has the necessary expertise with investment issues. However, some Members submit that one financial services regulator is the preferable option (i.e., the merger of FSCO and the OSC).

There is no consensus on this issue. Some Members submit that FSCO needs to be provided with adequate resources such that it can provide comprehensive regulation of pensions. However, other Members submit that areas that could be reassigned from FSCO are trust issues and pension plan investing.

9.6 What is an appropriate regulatory role for expert and professional bodies in the Ontario pension system?

There are two main ways in which expert and professional bodies play a role in Ontario's pension system. The first is through various consultative processes. FSCO has established advisory councils that from time to time are invited to provide confidential advice to FSCO staff on draft policies and other initiatives. Both FSCO and the Ministry of Finance also engage in *ad hoc* consultative sessions with members of the pension industry (or sectors thereof) on particular issues.

The OBA submits that both FSCO and the Ministry of Finance should avail themselves of industry expertise more frequently than they now do in order that they may gain the benefit of the input of the expertise of highly qualified individuals with broad-based expertise in the pension system, whether legal, actuarial, investment or otherwise.

The OBA submits that if the existing regulatory system is to be retained, the legislation ought to include a mechanism to ensure the regular flow of information to and from



expert and professional bodies to FSCO, to ensure that FSCO has available to it the expertise it needs in order to regulate the pension system effectively.

The second way in which certain expert and professional bodies play a regulatory role in the Ontario pension system is addressed under specific provisions of the PBA and the regulations thereunder. Currently, two professional bodies that have a regulatory mandate in the Ontario pension systems are the Canadian Institute of Chartered Accountants and the Canadian Institute of Actuaries. Both organizations are member-driven, with mandates to set educational and professional standards for their members and liaise with federal and provincial governments and agencies.

The Canadian Institute of Chartered Accountants' statutory role derives from the requirement in section 76 of O. Reg. 909 that the financial statements and auditor's report must be prepared in accordance with the principles and standards set out in the Handbook of the Canadian Institute of Chartered Accountants. It provides that the auditor's report be prepared in accordance with generally accepted auditing standards. Audited financial statements containing the prescribed information must be filed with FSCO by June 30 of each year and provide information about the financial position of the pension plan from an accounting perspective. Accountants are also permitted to prepare the reports and certificates for DC plans that an actuary must prepare for a DB plan (subsection 15(2) of O. Reg. 909). The Canadian Institute of Actuaries plays a major role in relation to DB pension plans. All actuarial valuation reports and certificates required by the PBA and the regulations must be prepared by a Fellow of the Canadian Institute of Actuaries using methods and actuarial assumptions that are consistent with accepted actuarial practice (sections 15(1) and 16 of O. Reg. 909). The commuted value of pensions for purposes of the portability provision in the PBA is required to be calculated in accordance with standards issued by the Canadian Institute of Actuaries (subsection 19(1) of O. Reg. 909).

Some Members have two main concerns with the existing system. The first is that given the critical role that actuaries play in the funding of pension plans, some Members submit that FSCO's Pension Plans Branch ought to be part of setting of standards and involved in the disciplinary process of actuaries. In those Members' views, it is insufficient from a regulatory perspective for FSCO's role to be limited to making submissions to the Canadian Institute of Actuaries on important pension issues (see, for example, the submission regarding concerns with actuarial reports made by Dina Palozzi to the President of the Canadian Institute of Actuaries dated January 11, 2001).

The second concern relates to the appropriate standard of care and allocation of risk of error applicable to professionals such as actuaries and accountants. There is a great deal of confusion about the standard of care that applies to third party service providers. Section 22 of the PBA provides that the "agent" of a plan administrator is subject to the same fiduciary standards as the plan administrator but does not define the term "agent". The scope of the concept of an "agent" was an issue in FSCO's recent prosecution of an actuary. The allegation was that the actuary had overstated the assets in the plan that resulted in a contribution holiday. Shortly thereafter, the company went bankrupt and the pension plan was wound up while significantly under funded. The court held that the actuary, but not the actuarial firm that employed him, was an agent when performing



statutory functions. In practice, there is still much debate and confusion over what service providers fall within the concept of “agent” under section 22, as highlighted in both this recent prosecution and in FSCO’s 2007 report on the examination of OMERS investment program.

The OBA submits that pension legislation ought to be clear on the nature of the legal obligations that apply to third party service providers in performing duties mandated by the PBA. Among other things, the legislation should reflect the fact that actuarial firms, not individual actuaries are typically the contractual party.

Underlying question 9.6 is a larger issue relating to the role of third party service providers in the pension industry generally. Accountants and actuaries frequently act in capacities other than those mandated by the PBA. For example, accountants frequently serve as investment and tax consultants or provide pension plan administration auditing services. Actuarial firms serve as consultants to plan sponsors and administrators on a whole range of issues, including funding policy, plan design, third party administration, pension plan restructurings, etc. Other third party service providers also play a role in the operation of Ontario-registered pension plans, (e.g., investment managers, trustees/custodians, insurance companies, third party administrators, lawyers). Some, but not all, of these expert service providers are regulated by other self-regulating bodies or legislative scheme (e.g., trustees/custodians, insurance companies, investment managers). The OBA's concern is with the confusion that exists around the standard of care that applies to the various service providers in their various capacities and the implications of this in the event of error. Most third party service providers attempt to limit their liability through a refusal to include any standard of care in their contract with employers/administrators or through limitation of liability and indemnification provisions.

It should be clear in the PBA that any decisions made within the minimum funding requirements, and any decisions made to contribute above the minimum on a solvency or going concern basis, are decisions of the contributing sponsor and not the plan administrator. Similarly, professional advisors, including lawyers and actuaries, should be able to provide their services without any uncertainty about that role. Some Members submit that there should be certainty in a lack of fiduciary duty. They submit that this is important because a fiduciary duty imposed on a contribution decision may be tantamount to an obligation to contribute as much as permitted, regardless of the impact of that funding on the supporting business. Employers, other plan administrators and advisors should not be placed in an untenable conflict.

The issue is one of risk allocation - who should bear the risk, the employer (or the members in the event there is no employer) or the third party service providers. The OBA submits that the PBA ought to be updated to clarify the issue of third party service provider liability, rather than leaving it to the courts to decide on a case-by-case basis according to the applicable principles of agency or trust law and the circumstances of each case.



The OBA notes that Quebec government recently amended the *Supplemental Pension Plans Act*, R.S.Q., c.R-15.1 to specifically address the role of service providers and in particular, to prevent service providers from excluding or limiting their liability. The OBA is not advocating the specific approach adopted by Quebec; but offers it as an example of a situation where this issue has been addressed in legislation.

The OBA submits that FSCO and the Ministry of Finance should avail themselves of industry expertise more frequently than they currently do in order to gain the benefit of the input of outside expertise. The OBA submits that the PBA should be amended to clarify the issue of third party service provider liability. The OBA submits that it should be clear in the PBA that professional advisors should be able to provide their services without any uncertainty about that role. Some Members submit that there should be certainty in a lack of fiduciary duty. Some Members submit that FSCO's Pension Plans Branch ought to be part of setting of standards and involved in the disciplinary process of actuaries.

All of which is respectfully submitted.

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