



August 18, 2006

Mr. Gino Marandola  
Senior Manager, Operations  
Financial Services Commission of Ontario  
5160 Yonge Street  
4th Floor, Box 85  
Toronto, ON M2N 6L9

Dear Mr. Marandola:

The Executive of the Pension & Benefits Section of the Ontario Bar Association has reviewed the Financial Services Commission of Ontario's consultation paper entitled *Pension Sector Cost Recovery Proposal* and have prepared a submission for your review.

Attached is a copy of our submission. Thank you for your consideration. Please contact us if you have any questions.

Yours truly,

Mark Rowbotham  
Chair, Pension & Benefits  
Section  
Ontario Bar Association

Mitch Frazer  
Co-Chair, Advocacy and Government Relations  
Committee  
Pension & Benefits Section  
Ontario Bar Association

cc: Hon. Greg Sorbara, *Minister of Finance*

SECTIONS

- Aboriginal Law
- Administrative Law
- Alternate Dispute Resolution
- Business Law
- Canadian Corporate Counsel Association - Toronto Chapter
- Charity and Not-For-Profit
- Citizenship and Immigration
- Civil Litigation
- Constitutional & Civil Liberties
- Construction Law
- Criminal Justice
- Education Law
- Entertainment Media & Communications
- Environmental Law
- Family Law
- Feminist Legal Analysis
- Health Law
- Information & Technology
- Insolvency Law
- Insurance Law
- International Law
- Labour Relations
- Law Practice Management
- Municipal Law
- Natural Resources and Energy
- Pension and Benefits
- Privacy Law
- Public Sector Lawyers
- Real Property
- Sexual Orientation & Gender Identity
- Sole, Small Firm & General Practice
- Taxation Law
- Trusts & Estates
- Workers' Compensation
- Young Lawyers' Division



### SECTIONS

Aboriginal Law  
Administrative Law  
Alternate Dispute Resolution  
Business Law  
Canadian Corporate Counsel Association - Toronto Chapter  
Charity and Not-For-Profit  
Citizenship and Immigration  
Civil Litigation  
Constitutional & Civil Liberties  
Construction Law  
Criminal Justice  
Education Law  
Entertainment Media & Communications  
Environmental Law  
Family Law  
Feminist Legal Analysis  
Health Law  
Information & Technology  
Insolvency Law  
Insurance Law  
International Law  
Labour Relations  
Law Practice Management  
Municipal Law  
Natural Resources and Energy  
Pension and Benefits  
Privacy Law  
Public Sector Lawyers  
Real Property  
Sexual Orientation & Gender Identity  
Sole, Small Firm & General Practice  
Taxation Law  
Trusts & Estates  
Workers' Compensation  
Young Lawyers' Division

August 18, 2006

## PENSION SECTOR COST RECOVERY PROPOSAL

### Introduction

We are pleased to provide our submission on behalf of the Pension and Benefits Section of the Ontario Bar Association ("OBA"). The OBA has more than 16,000 members. Our Pension and Benefits Section has about 300 members ("Section Members") representing various stakeholders within the pension and benefits industry. These stakeholders include pension and benefit plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefits consultants, and investment managers and advisors.

In July 2006, the Financial Services Commission of Ontario ("FSCO") released a Pension Sector Cost Recovery Proposal (the "Proposal") which is intended to ensure that FSCO's expenditures for the pension sector are fully recovered and that excess fees are returned to pension plans. This would be accomplished by implementing an assessment adjustment assigning FSCO's pension sector shortfalls or surpluses on a pro rata basis to the base assessment.

We appreciate FSCO's efforts to increase the fairness of the fee structure. If pension sector fees generally exceed FSCO's pension sector expenses, the Proposal might be beneficial as it could result in overall reduced fees for pension plans.

Section Members, however, have expressed serious reservations regarding the Proposal. Many Section Members are unconvinced that the proposed changes to the existing fee structure would be of any significant benefit and are concerned that they will have a number of negative consequences for pension plan stakeholders. Specifically, these Section Members are critical of the following:

- the absence of information on FSCO's revenue and spending over the past several years;
- the potential for increased FSCO fees;
- the potential for reduced accountability; and
- the creation of a new administrative burden for plan sponsors.

Most Section Members believe that the Proposal should not be implemented. Alternatively, if FSCO does ultimately decide to implement the Proposal, we submit that the Proposal should be modified to address these concerns, which are described in greater detail below.

### **Lack of Information on FSCO's Revenue and Spending**

The Proposal states that FSCO pension sector shortfalls and surpluses are currently made up from or paid into the Ontario Government's Consolidated Revenue Fund ("CRF"), but provides no information regarding the quantum of past surpluses and shortfalls. We believe the Proposal should have included information about what FSCO's pension sector shortfalls or surpluses have been over the past several years. Such information would make it far easier to assess the relative costs and benefits of the Proposal and would help stakeholders predict the cost of future FSCO assessment adjustments.

Absent this information, it is very difficult for Section Members to form an opinion as to whether the Proposal is necessary or even adds any value, either to FSCO or to pension stakeholders. This leaves most Section Members generally reluctant to support changes to the current system that could have negative repercussions for stakeholders and no offsetting benefits. Given the relatively modest size of FSCO's budget compared to the size of the CRF, and assuming that surpluses and shortfalls generally even out over the long run, the annual reconciliation of FSCO's budget does not seem like a major burden for the CRF. In that case, some Section Members believe that the goal of the Proposal is not worth pursuing.

### **Potential for Increased Total FSCO Fees**

In the absence of specific information about past shortfalls or surpluses, some Section Members are concerned that Annual Information Return ("AIR") fees have been insufficient to cover FSCO's pension sector costs over the past several years. If this is the case, future adjustments would generally increase the cost of assessments, meaning that the Proposal will, in effect, result in a fee increase.

We do not believe it would be appropriate for a fee increase to be introduced in this manner. If the Proposal would result in a fee increase, we would prefer that FSCO clearly set out the necessity and amount of such an increase to allow for proper consultation. If AIR fees have, in fact, not matched FSCO's pension sector expenses over the past several years, we hope that FSCO would work with stakeholders to attempt to reduce costs or increase other forms of revenue to prevent fee increases rather than attempt to recoup FSCO expenses with assessment adjustments. If such consultation is impossible and FSCO pension sector expenses exceed AIR fee revenue, some Section Members have stated a preference that FSCO increase AIR fee amounts rather than introduce assessment adjustments. An increase in the flat fees, although obviously not ideal, would at least preserve cost certainty.

On the other hand, some Section Members expressed optimism that the Proposal could result in an overall cost decrease to pension funds as FSCO pension sector surpluses are returned. This would obviously be a positive result for all stakeholders, but if surpluses are

being regularly accrued by FSCO's pension sector, it might be preferable to consider reducing the base assessment amount.

### **Increase in Cost Uncertainty**

Most Section Members are concerned that the Proposal increases cost uncertainty by adjusting fee assessments based on variable FSCO pension sector expenses. Although it may be likely that these adjustments will not exceed ten percent of the base assessment, there is no guarantee that this will be the case. This uncertainty makes it riskier to maintain a pension plan and ultimately hurts all pension sector stakeholders. In the experience of Section Members, annual filing fees are a material factor that employers take into account in deciding between establishing a pension plan or a non-pension vehicle, such as a group registered retirement savings plan. Increasing the unpredictability of FSCO fees (or generally increasing these fees) may discourage employers from establishing pension plans. For this reason, we believe that the Proposal could have significant negative consequences for stakeholders and pension plan participation.

At the same time, we understand FSCO's interest in having pension sector revenues match pension sector expenses. If FSCO ultimately decides that this goal is important enough to outweigh concerns about cost certainty, we believe the Proposal could be modified to better balance FSCO's interest in matching revenues and expenses with stakeholders' interest in cost certainty. Introducing a cap on the value of the assessment adjustment, perhaps expressed as a percent of the base assessment, would increase cost certainty while still allowing FSCO to match its pension sector revenues and expenses. Several Section Members suggested that adjustments should be capped at ten percent of the base assessment. If FSCO's net pension sector cost varies by more than that amount, they believe FSCO should do a more fundamental reassessment of its programs, processes and base assessment fees, in conjunction with stakeholders.

### **Potential for Reduced Accountability**

Most Section Members are concerned that the Proposal would reduce the incentive of FSCO to minimize its expenses. Although FSCO is subject to government oversight and adheres to its cost recovery principles, the Proposal would make it easier for FSCO to deviate from its budget. Any cost increases would simply be met by assessment adjustments, whereas if adjustments were not possible, FSCO would be under far more pressure to reduce its expenses to avoid dipping into the CRF.

Additionally, many Section Members believe that the lack of transparency of the proposed assessment adjustment leaves FSCO insufficiently accountable. The Proposal suggests that FSCO would send each pension plan administrator an assessment that would include an adjustment based on the FSCO's net pension sector cost, but this proposed assessment does not seem to provide any indication of FSCO's revenues and expenses. As a result, it

would be very difficult for stakeholders to hold FSCO accountable for taking advantage of the adjustment process to unnecessarily increase its expenses.

To help alleviate this problem, some Section Members have suggested that FSCO should publish annual reports detailing revenues and expenditures. This would make the adjustment process more transparent by allowing stakeholders to understand the reasons for any adjustment, increasing FSCO's accountability. Given that the Proposal requires FSCO to calculate the net pension sector cost in order to determine any necessary adjustments, it should not be unduly burdensome for FSCO to provide a breakdown of FSCO's revenues and expenses along with assessment adjustments.

### **Creation of Additional Administrative Work for Plan Sponsors**

We believe FSCO should be mindful of the fact that the continuing steady decline of private sector pension plan coverage will have significant negative social consequences in the long term, as many Ontarians find themselves reaching the end of their working lives with insufficient income to retire. Many Section Members are concerned that the Proposal will add a new administrative burden for pension plans at a time when FSCO should be considering how to reduce administrative costs to help stem the tide of pension plan terminations and to reduce disincentives to establishing new pension plans. Since fees would no longer be remitted with the AIR, the Proposal would create new administrative work by requiring plan sponsors to make a second filing. We are also concerned that requiring pension plan administrators to pay assessments within 30 days, as set out in the Proposal, is unreasonable. In Section Members' experience, it can often take longer than 30 days to have payments approved and issued. Increasing pension plans' administrative burden in these ways has the potential to discourage employers from creating pension plans and negatively impacts existing pension plan administrators.

The Proposal also seems to require more administrative work for FSCO, as it would henceforth have to carry out a two-part assessment and calculate the value of the annual adjustment. This added administrative work would increase FSCO's pension sector costs, which would presumably be passed on to pension plans.

### **Summary**

Most Section Members are of the opinion that the potentially negative consequences of the Proposal to stakeholders outweigh any benefits that would result from the proposed changes to the FSCO pension sector fee structure. In general, we believe that the Proposal would benefit FSCO but will likely be detrimental to pension stakeholders. Most Section Members believe that FSCO's goal of annually matching pension sector revenues and expenses is not sufficiently important to justify the drawbacks of the Proposal. These

drawbacks include increased fees, increased cost uncertainty, reduced FSCO accountability and increased administrative burden.

To avoid these problems, most Section Members believe that the Proposal should not be implemented. Rather than focusing on changing the fee structure to allow for total pension sector cost recovery, these Section Members would prefer that FSCO work with stakeholders

to make changes to programs, regulations and processes to try to reduce overall regulatory and administrative costs. This would make future shortfalls more unlikely while decreasing pension plan operating costs and addressing concerns about cost uncertainty and accountability.

If FSCO does decide to implement the Proposal, we believe it should be modified to reflect stakeholder concerns. To lessen cost uncertainty, assessment adjustments should be capped as a percent of base assessments. As well, FSCO should embrace greater accountability by issuing annual reports detailing its revenues and expenses along with assessment adjustments. These changes would make the Proposal far less detrimental to pension stakeholders.