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September 16, 2005

Pension and Income Security Policy Branch
Ministry of Finance
5th Floor, Frost Building South
7 Queen's Park Crescent E.
Toronto, ON M7A 1Y7

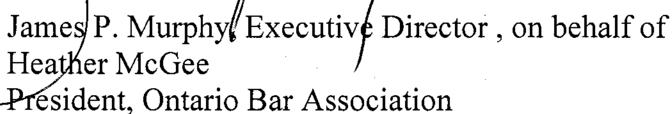
Dear Sirs/Mesdames:

During the week of September 12, 2005, the Executive Committee of the Ontario Bar Association (OBA) reviewed a submission by its Pension & Benefits Section regarding the consultation on the *Funding of Jointly-Sponsored Defined Benefit Pension Plans.*

After careful consideration of the merit and content of the submission, the Executive Committee endorsed the recommendations made by the Pension & Benefits Section.

Attached is a copy of the submission. Thank you for your consideration.

Yours truly,



James P. Murphy, Executive Director , on behalf of
Heather McGee
President, Ontario Bar Association

CC/ C. Mark Newton, Pension & Benefits Section Chair
Louise Greig, Pension& Benefits Section Member-At-Large

OBA • ABO

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Toronto, ON M7A 1Y7

Dear Sirs/Mesdames:

RE: Consultation on the Funding of Jointly-Sponsored Defined Benefit Pension Plans

We are writing to you on behalf of the Executive of the Pension and Benefits Section of the Ontario Bar Association (the "Executive") in response to the invitation to provide comments on the consultation paper entitled "The Funding of Jointly Sponsored Defined Benefit Pension Plans" released by the Ministry of Finance in August 2005 (the "Consultation Paper"). The OBA has more than 15,000 members and the Pension and Benefits Section has over 300 members who practise in the pension and benefits areas. Our members represent large and small employers, trade unions, pension plan administrators, custodians, investment counsel, executives, salaried and hourly employees and retirees. In particular many of our members represent administrators of, or employer or employee contributors to, jointly-sponsored plans as they are defined in the Consultation Paper.

This submission has been prepared by the Executive and reflects the views of a wide range of practitioners who work with the *Pension Benefits Act* (the "PBA") on a daily basis.

This submission represents a consensus view of the Executive, except where otherwise specifically noted.

Due to the limited time provided to make comments, it is very difficult for an organization such as the Ontario Bar Association to give the Consultation Paper any meaningful review. Nevertheless, the Executive has some initial comments of a preliminary nature. Set out below are initial comments from the Executive in relation to the 15 Specific Proposals and two Questions outlined in the Consultation Paper.

Proposal 1

Amend the PBA to provide the authority to define a new class of pension plans as "jointly-sponsored pension plans" in the Regulation.

The proposed definition of "Jointly-Sponsored Pension Plans" ("JSPs") will have to be carefully worded. In particular, with respect to the criterion that "plan members or the employers shall share responsibility for plan governance, plan administration, plan terms", certain public sector pension plans may not strictly comply with such criterion, thereby creating uncertainty as to whether such plans would meet the JSP definition (even though the intention may be that such plans are to benefit from the proposed "JSP provisions"). In particular, there are certain large public service pension plans wherein the Board members or directors are selected by the Government and the plan terms must be approved by the Government rather than dictated by plan members and the employers. Although it may be intended that there be "equal sharing" by plan members and the employers in the governance, administration and plan design of such plans, that may not be the case in the strict sense. Thus, we suggest that further consideration be given to revising this criterion if it is intended that such "anomalous" plans are to be included in the definition of JSPs. Clearly, such plans are subject to the same issues that the "JSP provisions" are aiming to resolve by virtue of the proposed changes to the PBA discussed in the Consultation Paper.

We also note that one of the proposed criteria for a JSP is that, in the event of a solvency deficiency or going concern unfunded liability, if sections 14(2) or 14(3) would otherwise apply, there be no reduction in accrued benefits. It is not clear why the option to reduce benefits should be taken away in order for a plan to qualify as a JSP.

In respect of the implementation of the new definition of JSPs, adding the definition into the PBA would in our view be too restrictive. Providing the definition in the Regulation would certainly add more flexibility. We also see an advantage to giving the power to an official (such as the Superintendent of Financial Services) to designate a pension plan to be a JSP as that would create certainty for the plan administrator, employers, sponsors, members and third parties as to whether a particular plan is in fact considered to be a JSP for purposes of the PBA.

Proposal 2

Amend the PBA and the Regulation to provide that the documents that create and support a jointly-sponsored pension plan shall provide that plan members are required to make special payments to amortize a going concern unfunded liability and solvency deficiency.

Proposal 2 appears to be reasonable. We note that the introduction to the Consultation Paper recognizes that section 75 of the PBA does not mention funding obligations by plan members. Any amendments to the PBA and the Regulations should also address the responsibility to make special payment to amortize wind-up deficiencies and deal with

what happens when one of the persons responsible for making special payment to amortize wind up deficiencies is unable to make such payments.

Proposal 3

Amend the PBA and the Regulation to include plan members in the list of persons who may be required to make contributions under a pension plan (including special payments to amortize a going concern unfunded liability and solvency deficiency) and if plan members are so required to make contributions, to ensure that pension plans set out that obligation.

Proposal 3 appears to be reasonable. We note that the introduction to the Consultation Paper recognizes that section 75 of the PBA does not mention funding obligations by plan members. Any amendments to the PBA and the Regulations should also address the responsibility to make special payments to amortize wind-up deficiencies and deal with what happens when one of the persons responsible for making special payment to amortize wind up deficiencies is unable to make such payments.

Proposal 4

Amend the Regulation under the PBA to permit both sponsors (plan members and employers) of jointly-sponsored defined benefit pension plans to finance a going concern unfunded liability by a level percentage of the projected pensionable earnings of the members of the pension plan on the date of the establishment of the payment schedule over a period not to exceed 15 years. This rate would be paid in the future by both existing members and new entrants.

It is not entirely clear what "the date of the establishment of the payment schedule" refers to. Is that the valuation date? It should be noted that in Proposal 5, it is the valuation date that is used. There should be consistent use of terminology.

Proposal 5

Amend the Regulation under the PBA to permit both sponsors (plan members and employers) of jointly-sponsored defined benefit pension plans to finance a solvency deficiency as a level percentage of projected pensionable earnings of the members of the pension plan on the valuation date over a period not to exceed five years. This rate would be paid in the future by both existing members and new entrants.

We have no comments.

Proposal 6

Amend the Regulation under the PBA to permit both sponsors (plan members and employers) of jointly-sponsored defined benefit pension plans to finance a going concern unfunded liability or solvency deficiency through special payments calculated as a level percentage of projected pensionable earnings (starting no later than 12

months after the valuation date), together with appropriate adjustments for interest, rather than paying the amount in arrears as a lump sum including interest.

We have no comments.

Proposal 7

Amend the Regulation under the PBA to expressly permit the use of actuarial cost methods in funding reports submitted to the Superintendent that are not based on benefit allocation methods. This right would be subject to the condition that the present value of the difference between the contributions determined under the method used by the plan and the normal cost as defined in the Regulation not be less than the present value of the remaining special payments for unfunded liabilities under the Regulation, subject to the application of any actuarial gains. The period over which the present values are calculated would be the longest amortization period of an unfunded liability and/or solvency deficiency.

This is primarily an actuarial issue. We have no comment.

Proposal 8

Amend the Regulation under to PBA to require that all pension plans that are valued using a method different from the benefit allocation method, must also calculate the "normal cost", "going concern unfunded liability" and "solvency deficiency" using a benefit allocation method in order to determine the minimum funding requirements as currently prescribed.

This is primarily an actuarial issue. We have no comment.

Proposal 9

Amend clause 19(6)(b) of the Regulation to remove the condition related to individual transfers and permit members to receive their full commuted value on termination of plan membership or employment if the sum of the value of all transfer deficiencies and excluded liabilities does not exceed 5% of the assets of the pension plan, provided that all other PBA requirements are met and repeal subsection 19(9) for all plans.

The existing provisions of subsections 19(6) and 19(9) of the PBA Regulation add undue complications to the administration of pension plans that have a transfer ratio of less than 1.0. Any limitation that is placed on the ability to transfer the commuted value of a pension benefit out of a pension plan must be easy to administer. At the same time, any such limitation must strike an appropriate balance between the interests of remaining members and terminating members.

A limit that takes into account a set percentage of plan assets would satisfy these requirements, provided the time at which the plan assets are to be valued is clear. We suggest that the limit be based on a market value of plan assets that is relatively "current" (e.g., within 60 days of the payment date) recognizing that it is not possible to obtain an

exact "current" valuation. In developing an appropriate limit, it would also be appropriate to take into account in some fashion the liabilities referred to in subsection 19(9) of the PBA Regulation. Consideration could also be given to providing that if the specified limit is not met, the transfer would still be permitted where the administrator determines that to permit the transfer would nonetheless be prudent, considering the plan's funded position and any other relevant factors. Ultimately, this is an issue in respect of which actuarial input will be needed.

Proposal 10

Amend section 34 of the PBA by adding "other prescribed person or entity" in addition to an employer in order to address circumstances in which the pension plan is jointly-sponsored and the documents which create and support the plan do not assign the responsibility to establish a separate pension plan to the employer.

We agree that Section 34 of the PBA should be amended to make it clear that it applies not only to employers, but also to any other person or persons who have responsibility for establishing or maintaining a plan. However, it is not clear why it is necessary for the description of such other persons to be "prescribed". The desired objective could be achieved by a generally worded modification to Section 34.

Proposal 11

Amend subsection 40(3) of the PBA to provide that where consent of the plan administrator is an eligibility requirement for entitlement to receive an ancillary benefit and a member has met all other eligibility requirements, the administrator is deemed to have given the consent to the member.

Plan members would not object to this proposal.

The reason put forward for this proposal is that there is no difference between eligibility for a particular ancillary benefit being dependent on an employer's consent and being dependent on the consent of the plan administrator. We note, however, that there is some difference between eligibility for a particular ancillary benefit being dependent on an employer's consent and being dependent on the consent of the plan administrator. Where the granting of consent is the responsibility of the plan administrator, the plan administrator is clearly, by virtue of the PBA, subject to "fiduciary" considerations in relation to the manner of granting such consent. On the other hand it is unclear whether the employer is subject to any fiduciary constraint under the PBA with respect to the actions it takes, although it is possible that in the circumstances of a particular case a fiduciary constraint may exist by virtue of the application of common law principles.

It is also not clear whether the proposal is to replace the word "employer" with "administrator" in s. 40(3) for consent benefits, or to merely add the administrator as a possible person who may consent, i.e. "where the consent of an employer **or administrator** is an eligibility requirement...". We have assumed that the latter is the case. If it is the former, then we may have additional comments.

We also note that it is not clear what impact such a change would have on the funding of a plan affected by such a change. If this proposal proceeds, we recommend that the effective date of any such change be deferred to give those responsible for amending the plan the ability to eliminate relevant ancillary benefits if they wish to do so.

Proposal 12

Exempt a plan administrator who acts both as administrator and trustee of the pension fund from the requirement of the Regulation to provide the pension fund trustee with a summary of contributions required to be made in the next fiscal year.

This amendment is desirable in cases where the notice is not employed for other purposes.

Proposal 13

Amend subsection 68(1) of the PBA to provide that a pension plan may be wound up in whole or in part by the person or entity which is assigned this responsibility in the documents which create and support the pension plan.

This proposal seems reasonable. We note, however, that consideration should be given to making a parallel amendment to section 10(1) of the PBA to specifically require the documents which create and support the pension plan to set out who has the responsibility for winding up the plan in whole or in part.

Proposal 14

Repeal sections 12.1 and 12.2 of the Teachers' Pension Act on the date on which the amendments to the PBA and the Regulation come into force.

We have no comment on this proposal.

Proposal 15

Amend the PBA to extend the deadline for filing actuarial valuations for inter-valuation reports with a valuation date between December 31, 2004 and June 30, 2005 until March 31, 2006 and apply the proposed amendments in this Consultation Paper to those valuations which are filed by the new deadline for jointly-sponsored defined benefit pension plans only. Specific details will be included in the legislation to be introduced this fall.

We have no comment on this proposal.

Question 1

Could subsections 19(4) and (5) of the Regulation under the PBA be amended in a manner which maintains the balance in interests between departing and remaining

members, simplifies the requirements for plan administrators and reduces the regulatory burden? Please be as specific as possible.

As currently drafted, Sections 19(4) and (5) of the PBA Regulation create considerable uncertainty as to when they come into operation. This creates a tension between complying with obligations under the PBA and the PBA Regulation relating to transfers of assets out of the Plan (e.g., complying with portability elections made by plan members under Section 42 of the PBA) and complying with obligations relating to restricting such asset transfers. Ultimately, this leads to inefficiency in plan administration and higher costs of administration of plans.

Nevertheless, we recognize that it is desirable that some limits be placed on asset transfers out of a pension plan in circumstances where the transfer ratio is less than 1.0. Please refer to our comments under Proposal 9 above as they apply equally in this context. We note also that if the test which is developed is simple to administer, the discretion of the Superintendent need not be added as a factor in the process.

Question 2

Are there any issues relating to jointly-sponsored defined benefit pension plans which have not been covered in this paper that need to be addressed?

(a) The application of the proposals to all JSPs. Does this expressly exclude MEPPs, and if not, when do rules applying to JSPs apply to MEPPs, and when do they not? This should be expressly set out in the amendments. Otherwise, there is the risk of creating similar problems to those which the amendments seek to remedy.

(b) Clarify whether the new options for funding JSPs are intended to be an "either/or" scheme of funding increases or benefit reductions, or both.

(c) Should the rights/obligations of a counterparty to a transaction with a JSP (for example, a swap or other derivative transaction) be different from those which exist for non-JSP plans?

(d) Could the new regime be an elective regime under which an employer (with the consent of all or a specified percentage of members and former members (i.e. deferred vesteds and retirees) and/or any applicable union) could elect that a pension plan which does not otherwise satisfy the JSP definition be treated as a JSP? If a consent approach was adopted it would be necessary to determine what level of consent was appropriate – in this regard we note that section 8 of the PBA Regulation addresses what is a required consent level in a different context. For employers facing serious deficits and who are considering drastic measures respecting the plan (for example, the plan's termination), the possibility of electing into the JSP regime could, in certain cases, be seen as a possible alternative. If any such consent mechanism was adopted we assume that FSCO would adopt policies directed at ensuring that any consent that was given was a fully informed consent.

(e) Some jointly sponsored defined benefit pension plans are administered by corporations made responsible by statute for the administration. The current s.8(1)(f) of the PBA states that a plan can be administered by:

"a board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan".

There is no reference to "corporation" in this provision, in contrast to section 54 (e) of the PBA Regulation which deals with who can be a trustee of a pension fund, namely:

"a board, agency, commission or corporation made responsible by an Act of the Legislature for the administration of the pension fund".

It is not clear whether this is an intended omission, but if not, then these provisions should be parallel and both should include the word "corporation". That is, section 8(1)(f) of the PBA should be amended to make it clear that a corporation can be a plan administrator if it is made responsible by an Act of the Legislature for the administration of the pension plan.

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If we can be of any further assistance, please do not hesitate to call me at 416-869-5486.

C. Mark Newton
Chair, Pensions and Benefits Section
Ontario Bar Association