



November 8, 2016

The Hon. Charles Sousa
Minister of Finance
Ministry of Finance
7th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Dear Minister Sousa:

Re: Final Report of the Expert Panel - Review of the Mandates of the FSCO, FST and DICO (the "Review")

The Ontario Bar Association Pensions and Benefits Law section understands that the Ministry of Finance ("the Ministry") is considering next steps relating to the Final Report of the Expert Panel ("Panel") following the Review.

As Section Chair, I would like to provide you with additional comments from our members on the findings in the Review, which we believe should be taken into account in further decisions. We appreciate the opportunity to make these comments and look forward to assisting the Ministry on any future decisions relating to this issue.

The Ontario Bar Association

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,500 lawyers, judges, law professors and students. The Pensions and Benefits Law Section represents approximately 300 lawyers who serve as legal counsel to virtually every stakeholder in the pension. Our members have analyzed and provided assistance to the Ontario government over the years on virtually every legislative and policy initiative in the pension field, including the FSCO Mandate Consultation Paper and the Panel's Preliminary Position Paper

Final Report of the Expert Panel

We have reviewed the Final Report of the Expert Panel with interest, having provided the Panel with a detailed submission as part of its consultation process, and having met with the Panel on a

more informal basis to discuss the Panel's work. Overall, we were happy to see that the issues raised and suggestions given in our submission were largely accepted by the Panel in its final report. We strongly encourage the Ministry to implement the Panel's recommendations.

In particular, we'd like to emphasize our agreement with the Panel that "these recommendations should not be treated as a series of stand-alone recommendations to be implemented piecemeal". In our view, the objectives and benefits of the recommendations will not be achieved if the recommendations are not implemented properly. As noted in Final Report, "governance, accountability and structural recommendations should be adopted first, with the rest of the changes to follow once the proposed agencies have been established".

The two areas where we respectfully differ with the Panel are with respect to the Financial Services Tribunal and the granting of rule-making authority coupled with the consequence of fines in the pension sector.

In the case of the Financial Services Tribunal, we remain of the opinion that the needs of the pension sector would be best suited by the creation of an independent and expert pensions-specific tribunal to maintain the respect and confidence of the pension industry.

In the case of rule-making authority coupled with the consequence of fines, we agree that the proper and prudent administration of pension plans is in all Ontarians' best interest. In this regard, given that a large part of the administration of pension plans rests firmly in the unwritten fiduciary standards of common law, the OBA appreciates the Panel's recommendation that rule-making authority be principles based. That said, rules are by their nature prescriptive, and rule-making authority in the pension sector risks turning the flexible, principles-based fiduciary standard into a narrower, "tick box" approach. Moreover, the potential for fines in failing to follow these prescriptive rules is also problematic. The OBA's view continues to be that fines are a serious consequence. This is reflected in the current *Pension Benefits Act*, under which fines are levied only after successful conviction. In contrast, permitting the new Financial Services Regulatory Authority ("FSRA") to levy fines for the breach of FSRA-developed rules may not afford plan administrators and other stakeholders with the same procedural protections. In many cases, including for multi-employer pension plans under which employer contributions are fixed, such fines could be borne by the pension fund, and thus, by plan members as a whole. Should the government accept the Panel's recommendations in this regard, we urge clear parameters and limits on rule-making authority and fines in the pension sector.

Conclusion

Once again, the OBA appreciates the opportunity to comment on these matters. We encourage the government to carefully consider the Review, and implement its recommendations subject to

our comments above. As always, we would be pleased to work with you directly should you have any questions or comments about the above.

Yours truly,

A handwritten signature in blue ink, appearing to be 'Gareth Gibbins', written in a cursive style.

Gareth Gibbins, Chair
OBA Pension and Benefits Law Section Executive