The Voice of the Legal Profession

Pension Regulations

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Table of Contents

Introduction 2

The OBA 2

Timing 2

- (a) Consultation Period 2
- (b) Implementation 3

Extension of Grow-in Benefits and Related Amendments 3

- (a) Timing for opt out 3
- (b) Notice to Trade Unions 4

Extension of Grow-in Rights 4

- (a) Termination of Employment 5
- (b) 60 Day Period 5
- (c) Asset Transfers 6
- (d) Temporary Lay-Offs 7
- (e) Definite Term Contracts 7
- (f) Construction Worker Exclusion 7

Strengthening and Modernizing Ontario's Employment Pension System 8

Conclusion 8

Introduction

On behalf of the Ontario Bar Association (**"OBA"**), we are pleased to provide you with comments on the draft regulations (collectively, the **"Draft Regulations"**) that propose changes to the general Regulation 909 under the Ontario *Pension Benefits Act* (the **"PBA Regulations"**).

The OBA

Established in 1907, the OBA is a branch of the Canadian Bar Association. It is the largest legal advocacy organization in Ontario representing more than 17,500 lawyers, judges, law professors, and law students. In addition to providing education for its members, the OBA provides advice to government and other policy makers – both in the interest of the profession and in the interest of the public.

The OBA Pensions and Benefits Section represents approximately 300 lawyers (**"Members"**) who serve as legal counsel to virtually every stakeholder in the pension and benefits industry. These stakeholders include pension and benefit plan administrators, employers, plan members, pension and benefit consultants, investment managers, actuarial firms and other advisors. Our Members have, over the years, analyzed and provided assistance to the Ontario government on most legislative and policy initiatives in the pension field.

Below we have outlined those improvements and clarifications identified by our Members. All section references contained below are to sections of the *Pension Benefits Act* ("**PBA**") or to sections being amended or added to the PBA Regulations. We would be pleased to discuss any of our comments with the Ministry of Finance, as you refine the Draft Regulations.

Timing

(a) Consultation Period

While the consultation timelines outlined in the Ontario Regulatory Policy may be sufficient for many regulatory changes, the breadth and detail of the Draft Regulations require an extended consultation period. The June 1 deadline in this case does not provide stakeholders with sufficient time to analyze and comment on the effect of the many changes. This is a particular problem for plan administrators who are in charge

of operationalizing the changes and plan members who, if they are even aware of the proposed regulations, must determine the effect of the many changes on their future. We would strongly recommend extending the consultation period in order to ensure that the government receives the best advice possible on the feasibility of, and support for, the regulatory changes and has sufficient time to consider the analyses and comments from stakeholders. It should be noted that if the consultation period is extended, it may result in lack of certainty and confusion unless there is proper notification to stakeholders about such an extension.

In particular, we have substantive concerns as to the regulations relating to grow-in. A possibility might be to delay those regulations, which we believe should be carefully reconsidered, but not the remainder of the regulations.

(b) Implementation

A number of our Members are concerned by the tight timeline for implementation and express concern that if all of the Draft Regulations will be effective on July 1, 2012, it is unlikely that pension plan administrators will be able to comply. Again, it would be highly desirable to extend the effective implementation date to an additional 60 days after the final regulations have been filed. This extension should be broadly publicized to avoid confusion.

Extension of Grow-in Benefits and Related Amendments

(a) Timing for opt out

The PBA was previously amended to permit employers and members (or their respective representatives) of jointly sponsored pension plans **("JSPPs")** and the administrators of multi- employer pension plans **("MEPPs")** to opt out of providing grow-in rights to their plan members.

The Draft Regulations set out details regarding the mechanics of the opt-out election process and also provide that the effective date of the election cannot be earlier than the date on which the election is filed (subsection 30.2(4)). If the Draft Regulations outlining the opt-out mechanism come into effect at the same time as the new grow-in rules themselves, there could be a gap between the effective date of the new grow-in rules and the date an election is filed under the mechanisms outlined in the Draft Regulations. Such a gap could have an unintended impact on plans that have intended

to opt out of the new grow-in benefit provisions from inception and never intended to be subject to the new grow-in provisions. This is especially true if there are triggering events in that gap period such that rights actually vest after the law comes into effect but before the opt-out election is filed.

There needs to be a mechanism for opting out before the new grow-in rules come into force so that the opt out can be effective the instant the new rules would otherwise apply. MEPP and JSPP administrators will need to file an election before the effective date of the Draft Regulations to avoid any issues and the sector should be provided with information on how to do so.

(b) Notice to Trade Unions

The Draft Regulations provide that the administrator of the pension plan must give notice of the aforementioned election (and the effective date of the election) to each trade union that represents members (paragraph 3 of subsection 30.2(6)). The disclosure of relevant information is an important principle. However, providing notice of the election to every single trade union that represents a member is not appropriate for large MEPPs and JSPPs. Such plans may have a large number of trade unions that represent members, all of which may not be known to the administrator. We suggest that the Draft Regulations be revised such that the notice would be provided to each trade union that represents members and that is a party to a collective agreement filed as a document that creates and supports the pension plan. We suggest that an advertisement in a publication circulated in the jurisdictions of the members of the plan as approved by the Superintendent be an acceptable form of notice, in addition to the notice to trade unions that are known to the administrator.

Extension of Grow-in Rights

The provisions relating to the extension of grow-in rights raise a number of potential problems. A common thread through most of our comments is the concern that an employee may not be aware of his or her rights to grow-in benefits, which could significantly affect an employment decision. Unions can be expected to protect unionized employees, but not all non-unionized employees can be expected to retain counsel in many of these situations.

(a) Termination of Employment

One technical and implementation problem lies with the concept of "termination of employment".

Up to now, grow-in has been a benefit given upon a wind up or partial wind up of a pension plan involving a group termination. Wind up and partial wind up situations were either defined or ascertainable. There are clear legislative and regulatory requirements as to benefits in these circumstances and as to the information that must be given to plan members. After July 1, 2012, however, grow-in will be a benefit given in respect of individual terminations. Our Members are concerned that the employees who are, or may be, eligible for grow-in benefits may not be provided with sufficient information to enable such employees to negotiate with the employer in individual-termination or in asset sale and purchase situations.

In individual terminations, we can foresee disputes between terminated plan members and employers/administrators:

i) as to whether the termination is voluntary or involuntary; or

ii) as to whether there has been constructive dismissal.

In such situations, plan members who are eligible for grow-in under the new rules may not appreciate the substantial new benefit of a termination being considered involuntary, including constructive dismissal. Conversely, employers will have more reason to characterize terminations as "for cause", based on wilful misconduct, disobedience or wilful neglect of duty in order to minimize the impact on the pension plan. It would clearly be prejudicial to the employee's chances of future employment to have a termination so characterized.

(b) 60 Day Period

In paragraph 1 of subsection 30.1(1), the Draft Regulation provides that an employee who resigns "not more than 60 days before the termination date specified in a written notice of termination of employment given to him or her" is eligible for grow-in benefits. We are concerned that the 60-day-period referenced in this paragraph provides neither fairness to the member nor certainty to the employer or the plan administrator. Once an employee receives notice of termination of employment, the employee, whether or not receiving working notice or salary continuance, should not be put in the position of choosing between grow-in and uncertain job prospects in the future and alternative

employment available earlier Moreover, in some cases an employer will encourage a departing employee to actively seek re-employment by committing to pay a portion of the remaining salary continuation payments upon receipt of notice from the employee that he/she has obtained new employment. The 60 day window could reduce the effectiveness of such mitigation arrangements, which are beneficial to both the employer and the employee.

We understand that the intended purpose of the 60 day window is to encourage employees terminated in connection with a plant shutdown or the winding down of a business to continue to actively report to work during a period of working notice of termination. We submit that working notice provides that incentive, without prejudice to grow-in benefits.

Accordingly, we suggest that grow-in benefits be made available to an employee who meets the 55 points requirement by the date of termination specified in the notice of termination.

(c) Asset Transfers

The rights and implications of entitlement to grow-in benefits in an asset sale and purchase situation need to be clarified. New paragraph 74(1)2 of the PBA provides that an activating event for grow in benefits is "the employer's termination of the member's employment". Where there is a sale of a business effected by an asset sale/purchase there is usually not a termination by the employer of the employment of these transferred employees, although in some cases, the agreement may require a termination of employment by the seller. The employment relationships/contracts of the employees who accept employment with the buyer are essentially assigned to the buyer and there is a novation (a new agreement between the buyer and employees).

In any case, under the *Employment Standards Act* (Ontario), there is a deemed continuation of employment (section 9) in these circumstances.

Accordingly, notwithstanding subsection 80(3) of the current PBA and the yet unproclaimed revisions to section 80, if an employee ceases employment with a seller as part of the sale of a business effected by an asset sale/purchase transaction and commences employment with a purchaser, whether or not the purchaser offers a pension plan it would not appear to be a termination as contemplated by the new rules.

If it is intended that grow-in be given to employees who are transferred to the purchaser in a purchase and sale of assets where the purchaser does not provide a pension plan, this should be clarified. In addition, the policy should be considered.

Moreover, if the employment of transferring employees is deemed, for purposes of the PBA, not to be terminated where the purchaser provides a pension plan, there is a risk that grow-in benefits under the seller's pension plan could be triggered at a later date when the employee is terminated by the buyer, in accordance with the principles in the *Gencorp* decision.

(d) Temporary Lay-Offs

Paragraph 3 of subsection 30.1(2) provides that an employee on temporary lay-off is not eligible for grow-in benefits. However, employees who are on lay-off are often aware that their continued employment is at considerable risk. Accordingly, such employees should and do seek alternative employment. Yet these employees are precluded from grow-in if they seek, and obtain, alternative employment after receipt of a notice of temporary lay-off before termination is deemed to have taken place under the Employment Standards Act by virtue of the length of the lay-off period. Some of our members are of the view that once an employee receives a notice of lay-off, the employee should be free to resign from their employment without jeopardizing their grow-in rights. Other members do not share this view and do not support the further expansion of grow-in benefits.

(e) Definite Term Contracts

Subsection 30.1(2), paragraph 1, provides that employees, who are hired for a definite term or for the completion of a specific task, are entirely exempted from the grow-in rules. Some of our Members are concerned that a significant part of the contingent workforce is employed, and re-employed, on successive term contracts, or to complete specific projects. These individuals' employment may continue for many years, through many renewals of many term contracts. This is only likely to create another incentive for employers to structure employment arrangements as definite term employment relationships to avoid grow-in liabilities.

(f) Construction Worker Exclusion

Paragraph 2 of subsection 30.1(2) provides an exclusion for all construction industry employees. It is unclear why this group of workers is excluded from grow-in benefits. If they are members of a MEPP, the MEPP may elect not to provide grow-in. The

exclusion is inequitable for those in the industry who have long term employment relationships with a single employer.

Strengthening and Modernizing Ontario's Employment Pension System

We note the regulations for the asset transfer provisions remain outstanding. We wish to commend the government on the progress that it has made to date towards modernizing Ontario's employment pension system. An important next step in this process will be to introduce the new regulations for asset transfers and divestments, and new regulations permitting target benefit plans.

Conclusion

The OBA thanks the Ministry of Finance for the opportunity to provide comments on the Draft Regulations. We hope our comments will be of help to the Ministry in improving the private pension system for all Ontarians.