



Expert Panel Review of the Mandates of the Financial
Services Commission of Ontario (FSCO), Financial
Services Tribunal (FST) & the Deposit Insurance
Corporation of Ontario (DICO)

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Submitted by: The Ontario Bar
Association, Pensions & Benefits Law
Section



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide comments to the Expert Advisory Panel (“the Expert Panel”) appointed by the Minister of Finance to review the mandates of the Financial Services Commission of Ontario (“FSCO”), the Financial Services Tribunal (“FST”) and the Deposit Insurance Corporation of Ontario.

The OBA

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. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was formulated by members of our Pension and Benefits Law Section (the “Section”). The Section represents approximately 300 lawyers who serve as legal counsel to virtually every stakeholder in the pension and benefits industry, including pension and benefit plan administrators, employers, plan members, pension and benefit consultants, investment managers, actuarial firms and other stakeholders who regularly appear before the courts and tribunals, including the FST. 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.

Overview

For the purposes of this submission, we do not propose to review the historical underpinnings and development of the FSCO and FST, but rather to focus on key elements that lawyers practicing in the field have identified as critical improvements that the Expert Panel should consider as part of the mandate review.

At the outset, the Section acknowledges the efforts that FSCO has made to consult with pension industry stakeholders, to adopt risk based regulation and its efforts to modernize service delivery. FSCO has also been very responsive in providing updates, policies and FAQs following various legislative and regulatory changes, within its limited mandate.



The Section's view is that two overarching themes are critical to the mandate review with respect to FSCO and the FST.

First, it is essential to ensure that FSCO/FST, or any administrative entity charged with pension regulator and adjudicator responsibilities, is supported with a comprehensive and purposive public interest mandate, which supports the need to provide member protection and the need to promote the security, viability, growth and sustainability of the pension system in Ontario.

Second, it is essential to ensure that within whichever such administrative entity, the necessary expertise and resources are available to facilitate the roles of rule-making, regulation, and adjudication in the complex and highly specialized field of pensions. We would also recommend that the entity be given the latitude to exercise discretion to respond to emerging plan developments, the resources to foster in-house expertise and rule-making authority.

In keeping with the above two imperatives, the Section's view is that the roles would best be carried out by an independent pension-specific regulatory body (herein called the "Independent Pension Regulator" or "IPR"), which would have a strong mandate, rulemaking authority, and necessary expertise - including appropriate recognition of the role of actuaries, and an understanding of the pension industry. In this respect we concur with the recommendations of the Expert Commission on Pensions in 2008. It is essential that the adjudicative tribunal also have that expertise in order that it be given deference by the pension industry and higher courts.

The remainder of this submission discusses these points in further detail, along with a recommendation that legislation as to defined contribution plans and other tax-deferred capital accumulation plans requires development beyond the current Canadian Association of Pension Supervisory Authorities ("CAPSA") Guidelines.

Specific Comments

1. Stated Principles as Part of a New Mandate

If the Government of Ontario wishes to increase the financial security of residents of Ontario, the Section's view is that it should encourage the growth of pension coverage in Ontario.

The promotion and expansion of private pension coverage was part of the former Pension Commission of Ontario's mandate, but this mandate was removed in the creation of FSCO. FSCO's current mandate is to provide regulatory services that protect the public interest and enhance public confidence in Ontario's regulated financial sectors through registration, licensing, monitoring and enforcement.



The Section believes that the current shift of focus under FSCO towards regulation and enforcement will discourage the creation of new pension plans, and encourage the abandonment of existing plans to the detriment of Ontario workers and the economy as a whole. A principles-based approach to regulation, which is focused on outcomes, will provide greater flexibility to deal with new circumstances, new challenges and new products while providing member protection and an effective and efficient means of regulating pension plans.

There have been a number of instances where we believe a balanced mandate and consultation would have better served the public interest. In the absence of such mandate, there are times when FSCO's position has not accorded with the views of the pension industry, such as with the asset transfer rules of section 80 of the *Pension Benefits Act* ("PBA"), or with that of the courts, such as with the *Heringer* decision on the application of interest to family law payments.¹

We strongly encourage the Expert Panel to advance a balanced public interest approach to the promotion and growth of pension coverage in the IPR's mandate. In our view, the IPR's public interest responsibility would be best served by including a purpose statement in the mandate, which would empower them to consider broader stakeholder interests in addition to consumers. We would also recommend that there be latitude under the mandate to exercise discretion to respond to emerging plan developments, the resources to foster in-house expertise and rule-making authority.

Finally, we recommend that the IPR's mandate dictate that it play a more active role in the drafting of pension legislation to ensure the regulator's interpretation is consistent with the legislature's intent. While FSCO's current mandate requires it to make recommendations to the Minister of Finance about its regulated sectors, we recommend that (a) there be a closer working relationship between the IPR and the Ministry of Finance in creating new pension legislation and (b) the IPR be given rule making power, with appropriate checks and balances.

2. The Need for Expertise Generally

A strong pension regulator is critical to the success of Ontario's pension system. It is particularly important that the IPR be provided resources and staffing with expertise in pensions drawn from both the private and public sectors sufficient to ensure leadership in the field of pension regulation as well as appropriate service levels.

While the Section strongly believes that the majority of pension-related expertise should reside with a new, independent, pension-specific regulatory body, in order to provide optimal regulation

¹ *Heringer v. Heringer*, 2014 ONSC 7291.



in the most efficient means possible, we recognize that there may be instances where a matter falls within the general authority of two separate regulators.

The Section's view is that the approach to be taken should ensure that issues are being addressed by the regulator with the right expertise. For example, in the case of a defined contribution pension plan that would fall solely within the purview of the IPR, the individual pooled investment funds offered to members would have certain product licensing requirements that would best be addressed by the Ontario Securities Commission ("OSC"), which has expertise in such matters.

In order for this approach to be successful, however, to the extent that several agencies have an interest in a single regulatory matter, one agency should have the lead in managing the problem with clear procedures for consulting with other interested agencies. Likewise, information processing and support operations should be shared by all regulators to eliminate overhead, and plan sponsors and financial institutions should not have to report identical information to different agencies.

To be clear, the Section does not support the merger of pension and securities regulations into the OSC. Pension regulation requires a close collaboration of lawyers and actuaries, both in the administration of regulation and the adjudicative tribunal. The skill set and experience and qualification of the staff, and the time frames in the pension and securities industry, do not lend themselves to a merger of cultures.

3. Rule Making Authority

The Section believes that the IPR should be empowered with a rule making authority and the ability to issue binding advance rulings. While this is a significant undertaking, we believe that structural change in pension regulation is vitally important. Indeed, should such powers be granted, the new regulator, if staffed appropriately, would have the authority to respond to specific stakeholders' needs and provide assistance where the general principles of the PBA were being met. For example, in the area of solvency funding, the new regulator could be given some discretionary authority to allow for longer funding periods in certain circumstances provided the regulator is satisfied that pensions would be protected (this could involve employee/union consent in some form).

While the OSC rule-making model provides a clear roadmap to the development of a similar pension rule-making authority, the Section cautions the Expert Panel from adopting the OSC approach without careful consideration and necessary modification. Indeed, the potential impact of rule-making for pension plans would be fundamentally different from the impact of rule-making under securities legislation. Rule-making by the OSC is generally limited to matters relating to registration of publicly traded securities, disclosure of information and business conduct of



securities professionals. In contrast, the possible scope of rule-making for pension plans would extend to more substantive areas of public policy involving financial entitlements, obligations and property rights of the various parties with an interest in a pension plan.

However, we also note that a number of provisions of the PBA are highly controversial, including some that are or have been before the courts, such as distribution of surplus from pension plans and the taking of “contribution holidays”. Such provisions should be excluded from the rule-making process either formally or informally, at least until such time as the procedures for rule-making have developed and stakeholders are comfortable with this process. Similarly, a number of provisions of the PBA are related to other areas of law, such as family law. We recommend that these provisions not be subject to rule-making.

The Section specifically supports rule-making authority for administrative matters such matters:

- time periods for filing;
- registration requirements;
- records that must be kept by plan administrators;
- notices;
- content of forms; and
- contents of required reports and financial statements.

Advisory committees in the IPRB should be explicitly empowered to provide input to any rule-making process by identifying areas where new rules should be developed and assessing the priority of any such new rules. The advisory committees should also be required to comment on a draft rule before submission to the regulator and publication as a proposed rule.

As with the rule-making power of the OSC, the Minister must have ultimate oversight.

4. Regulation of Capital Accumulation Plans

There is a need for meaningful, enforceable regulatory oversight and protection of consumers who are members of employer-sponsored “capital accumulation plans”, including defined contribution registered pension plans. In the private sector, employers who offer such plans have complete control. Employers select the provider, select the investment funds to be offered, negotiate the fees that will be paid by the members of the plans, and give the provider unlimited authority to communicate directly with the members about the investments.

Ontario pension benefits legislation has a broad requirement that employers adhere to a fiduciary standard of conduct in providing defined contribution registered pension plans. The legislation has no specific standards of conduct that employers and providers must adhere to in providing such plans, however. This was recognized and addressed by the Canadian Association of Pension



Supervisory Authorities (“CAPSA”) and the Joint Forum of Financial Market Regulators in 2004 when they released voluntary guidelines regarding regulators’ “expectations” as to how such plans should be established and monitored. Following the release of the 2004 “CAP Guidelines”, several additional guidelines have been published by CAPSA in an effort to encourage stakeholders to adhere to certain standards of conduct with respect to capital accumulation plans.

In our view, a stand-alone pension regulatory body with rule-making authority is needed to enumerate, and enforce, basic standards of conduct in the provision of defined contribution pension plans. In particular, disclosure as to fees and charges, and forecasting investment returns and income on retirement can be misleading and the implications not understood by members of plans, or for that matter, employers. These aspects of retirement savings need to be more closely regulated.

Moreover, because the purpose of defined contribution registered pension plans is to provide retirement income, the investments in such plans are required to be more closely regulated (more prudent) than in non-retirement savings vehicles. Finally, there is increasing attention that needs to be paid to the de-accumulation phase of retirement savings, and this would seem to be more appropriately a task for a pension regulator with expertise in the various kinds of retirement products.

Rule-making authority will empower a pension regulator to (a) enumerate specific conduct in the provision of defined contribution registered pension plans, which does not exist in current pension legislation and regulations, and (b) enforce the provisions of the CAPSA and CAP Guidelines that currently do not have the force of law, in a flexible and practical manner. In addition, the mandate of the pension regulator should address the reality that defined contribution registered pension plans hold billions of dollars of employees’ retirement savings; more attention and resources should be allocated to this important area of pension regulation.

5. Expertise Needed in a Dispute Resolution Function

The current FST was constituted under the *Financial Services Commission of Ontario Act, 1997*, and generally hears appeals made from orders of the Superintendent, or other matters arising from the operation of the PBA. It is the successor to the prior Pension Commission of Ontario, which was a specialized tribunal dealing only with pension matters.

The FST is composed of nine to 15 members, including a chair and two vice-chairs. The members of the FST are lawyers, actuaries or other professionals in sectors related to FSCO’s broad mandate. However, there is no assurance that members with pension expertise will be assigned to hear matters at the FST. Members are appointed part time, and most maintain a practice in their original fields.



A major criticism of the FST has been, generally, that it does not have enough specialized expertise in pension matters to accord its decisions sufficient deference. This relative lack of pension expertise has led to a number of jurisdictional challenges by parties wishing to obtain access to the courts at first instance. The Supreme Court of Canada in *Monsanto Inc. v. Ontario (Superintendent of Financial Services)* reflected these concerns, when Deschamps, J., writing for the court, pointed to Subsection 91(1) of the PBA (which provides for a right of appeal to the Divisional Court) as justifying a lower standard of review.² Furthermore, she noted that the FST does not have "specific expertise" in the area and that there is no requirement that the members have "special expertise" in pensions.³

The Section strongly endorses the creation of a new, independent and expert tribunal to provide effective adjudication and to maintain the respect and confidence of the pension industry. Such a tribunal would possess the power to dispose of all cases before it, be they orders of the Superintendent or ancillary questions, such as the meaning and effect of plan documents.

The Section recommends that the tribunal also have an array of remedial powers to make any order required to secure compliance with the PBA. Generally, we envision that pension decisions of the new tribunal would be final and binding, with appeal to the Divisional Court available only if there is a denial of natural justice – i.e. a misinterpretation of the applicable law so serious as to amount to a jurisdictional error or a violation of constitutional rights. The inclusion of a strong privative clause in the PBA would further build upon these basic fundamentals and help ensure that deference is provided to the tribunal on any appeal.

Conclusion

The OBA appreciates the opportunity to provide comments to the Expert Advisory Panel on its mandate review of FSCO and the FST, and we look forward to the opportunity to participate in further consultation and discussion as the review proceeds.

² *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para. 7.

³ *Ibid.* at para. 11.