



Regulatory Reform for Target Benefit Multi-Employer Pension Plans

Submitted to: Ministry of Finance

Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to comment on the Regulatory Reform for Target Benefit Multi-Employer Pension Plans consultation paper (the “Consultation Paper”).

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 with dozens of legislative and policy initiatives each year - in the interest of the public, the profession and the administration of justice.

This submission was formulated by members from our Pension and Benefits Law Section. The Section represents over 100 lawyers who would count as clients individuals from a wide range of backgrounds whose rights and interests are engaged in this consultation.

Overview

The Consultation Paper demonstrates that while target benefit pension plans (“TBPs”) are complex, this plan design offers the potential for great flexibility, increased pension coverage for workers, and, in certain circumstances, a better balancing of risk between employers and employees than the traditional defined benefit and defined contribution plan designs. In this light, we encourage the government to form policies that continue the establishment of TBPs.

In our comments, we have followed the sequence of topics and questions set out in the Consultation Paper. Rather than addressing each question specifically, however, our approach has been to make general comments on each of the topics under consideration. Where our members have differing view, these have been identified.

Introduction

The OBA’s view is that the key principles to be considered in developing a regulatory framework for the TBPs are:

- Strengthening pension coverage through a viable and sustainable framework that is attractive to both employers and employees;
- Maintaining a balance between benefit adequacy and benefit security; and



- Allowing for flexible governance structures in difference TPBs that recognizes the differing roles of the plan sponsor(s) and the board of trustees or plan administrators.

1. Funding

As our members are lawyers, and not actuaries, our comments on funding are limited to our views on funding principles overall. We believe that in developing funding rules, consideration should be given to the fact that TBPs are intended to be long-term arrangements that operate indefinitely and are permanently exempt from solvency funding rules.

2. Governance

The OBA has a range of views on governance of TBPs.

Some of our members take the view that members of boards of trustees would, as administrators of the TBP, be acting in a fiduciary capacity and, as a result, would be required to adhere to the standard of care set out in the *Pension Benefits Act*¹ and to discharge their administrative responsibilities prudently and with a view to the best interests of all members (including current, former, and retired members), and future plan members. They believe there should be flexibility to put in place a board of trustees with sufficient knowledge and expertise, if so desired, without the requirement for member “representation.” In a unionized context, it would remain open for plan sponsors to agree that certain boards be comprised of plan members and/or retirees without this being a legislative requirement. In addition, or alternatively, there should be flexibility to accommodate governance structures in which independent board members may be appointed.

Others of our members support the continued requirement that at least ½ of the board of trustees be representative of plan members, as it is the members who are taking the risk with respect to their ultimate benefits and contribution rates. All members of the board should have the option to include “representatives” of former members and retired members on the board.

Written Policies

Our members hold the view that governance policies are appropriate for all pension plans, and that in the case of a TBP the governance policy should be comprehensive and encompass the entire governance structure – including the role of the various participants – at both the sponsor and administrator level. We believe all participants in the governance process should be required to undergo training on all aspects of the operation of the TBP.

With respect to funding policies, some of our members support the requirement for a funding policy to be established by the plan sponsor, and for such funding policy to form part of the main

¹ R.S.O. 1990, c. P.8.



plan design document. Such a funding policy would set out contribution rates (including, if applicable, maximum and minimum contribution corridors), and would be prescriptive in that it sets out the acceptable use(s) of a funding excess and procedures to be taken where there is a funding deficit – including “triggers” requiring action be taken up to and including reduction of benefits. These members are of the view that any such requirements relating to the use of funding excess or procedures to be taken where there is a funding deficit should be sensitive to intergenerational equity issues.

Others of our members do not see the need for such a funding policy, particularly in scenarios where contribution levels are fixed by contract. These members do not consider it desirable to have rules (either in regulation or funding policy) that set forth when and how to reduce benefits. Such a prescriptive approach would undermine the board of trustees’ flexibility to adapt to evolving circumstances in a manner consistent with their fiduciary duties and will potentially create inequities. Rather, in their view, the board of trustees should be able to exercise its fiduciary obligations to make decisions about benefit reductions and restorations after considering all relevant factors and the unique circumstances of the plan. It would unduly constrain the administration of TBPs and create inequities if there were a prescribed set of rules to be applied in all circumstances.

3. Disclosure of Information

The OBA agrees in general that the suggested additional information disclosure to new members and information requirements for annual, termination, retirement and death statements set out in the Consultation Paper would provide useful information to members in addition to the existing requirements. With respect to the timing of communication, we believe notice of any changes to benefits or contribution levels – triggered by the funded status of the plan or otherwise – should be provided to members.

The OBA further recommends that statements provided on termination, retirement or death should also include a notification that benefits are not guaranteed and may be subject to reduction in the event of future funding shortfalls, and, in respect of termination statements in particular, that the “termination value” members will be entitled to receive in the event that they elect to exercise portability are based upon the funded status of the plan (or as otherwise determined under TBP legislation). On wind up, the statement should indicate how the plan’s surplus, if any, will be distributed.

4. Regulatory Oversight

The OBA is of the view that the Superintendent’s current authority to order the wind up of a plan under the *Pension Benefits Act* is sufficient to provide for orders to wind up a TBP. Recent amendments to the *Pension Benefits Act* (that are not yet in force) will allow the Superintendent to appoint an administrator in prescribed circumstances. When drafting the regulations that will



prescribe such circumstances in which the regulator may replace the administrator, the Ministry should ensure that the prescribed circumstances are compatible with the TBP regime. The circumstances in which the regulator may order the administrator to prepare a new valuation report should be consistent with the circumstances under which the regulator may currently order the preparation of a new report.

In the event that the legislation requires the funding policy to contain prescriptive requirements relating to contribution rates (including, if applicable, minimum and maximum contribution corridors), and/or relating to the use of funding excess or procedures to be taken where there is a funding deficit, the funding policy should be filed and the regulator should have the authority to enforce the terms of the funding policies of a TBP to the same extent that it can enforce the terms of the plan terms or any other filed documents creating and establishing a registered pension plan. Filing the funding policy may not be required, however, if the legislation does not require that the TBP maintain a funding policy or for the funding policy to contain such prescriptive parameters.

5. Issues for Multi-Jurisdictional Target Benefit MEPPs

In developing legislation governing multi-employer target benefit plans, legislators must take into consideration that there are minimum standards, as well as legislation governing TBPs in other provinces, that may not allow the administration of a multi-jurisdictional TBP pursuant to Ontario's rules alone. Our preliminary concern is that it would be difficult for a TBP to operate on a multi-jurisdictional basis unless the regulatory authorities agree that the TBP will be governed by the rules of the registration jurisdiction. In the OBA's view, an agreement between the provinces similar to the Canadian Association of Pension Supervisory Authorities multi-jurisdictional agreement (currently signed by Ontario and Quebec) would be needed.

6. Transition

Once a new framework for regulating Target Benefit MEPPs is enacted, transitional measures needed for MEPPs and Specified Ontario Multi-Employer Pension Plans ("SOMEPPs") would have to include, at a minimum, the completion of a full bargaining cycle (often three years) to allow negotiation of contributions, followed by a period of preparation. For MEPPs, the PBA and regulations would have to be amended to provide for clear definitions to differentiate between MEPPs and Target Benefit MEPPs, or to allow the MEPP to elect to become a SOMEPP.

7. Broader Target Benefit Issues

Feasibility of Non-Collectively Bargained Target Benefit MEPPs and Target Benefit Single Employer Pension Plans

There is a strong view among a group of OBA members that collective bargaining is key to the health and success of MEPPs, and Target Benefit MEPPs should be restricted to the unionized



sector. The ability to bargain increased contributions, to act as a 'check' at the sponsor level, and to have a democratically selected and accountable body that is responsible for making suitable member-side appointments to the board of trustees, are all important to providing a high level of benefit security.

Another group of members is of a similarly strong view that the TBP rules should provide flexibility in plan design for sponsors and employees, to allow for the establishment of a TBP where there is no collective bargaining or where a Single Employer Pension Plan ("SEPP") sponsor wishes to convert to a TBP design. Some of these members feel that challenges to plan governance in these cases can be addressed through representation of non-collectively bargained employees on the administrative body, through a mechanism that allows them to appoint their own representative(s). The number and proportion of representation can be determined at the sponsor level (i.e. as part of the plan design). As fiduciaries, the appointed individuals will owe fiduciary obligations to current and future plan members. An alternative is to have an independent fiduciary acting as administrator, who would have to be held to a statutory fiduciary standard of care. Others feel that since the administrator is already a fiduciary and held to a statutory standard of care which requires representing the best interests of plan beneficiaries, as is currently the case with SEPPs generally, it is not necessary to have an administrative structure where various classes of members are represented in order to facilitate a SEPP TBP structure.

Conclusion

Once again, the OBA appreciates the opportunity to comment on the Consultation Paper. We welcome the opportunity to assist you and would be pleased to meet with you to discuss our submission and any questions with you further.