Submission to the Standing Committee on Finance and Economic Affairs on Bill 120, An Act to amend the Pensions Benefit Act and the Pensions Benefits Amendments Act, 2010

Ontario Federation of Labour (OFL)

November 24, 2010

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Introduction

The Ontario Federation of Labour (OFL) is the central labour body in the Province of Ontario. Its affiliates represent over one million unionized employees in the Province. Trade unions have a long history of organizing for the well being of their members - the workers and employees of the Province and the residents of Ontario. A key component of well being includes economic and financial security in retirement. Unions have negotiated for pensions and security of retirement income in their collective bargaining and contracts. They have been successful in achieving employment-based pension coverage for their members and are also engaged in pension issues through collective bargaining, as trustees on pension plan boards, and in regulatory authorities on pension legislation and policy.

The OFL would like to take this opportunity to highlight for you some of our concerns regarding Bill 120, legislation that will affect our members and the citizens of Ontario at large. We would like to see the government incorporate some of the key recommendations of the Ontario Experts Commission on Pensions (OECP), in this legislation and the regulations that will follow.

Types of Benefits and Pension plans

Target benefit Multi-employer Plans (MEP)s have become an important part of the employment based pension world. While they have been buffeted by the financial crisis, as have all plans, the incidence of wind-up in the MEP sector has been very low and coverage levels have been maintained, or increased.

While we agree with the policy thrust that underlines the proposed reforms to MEPs, we do have concerns over some of the language used in describing their implementation. For example, we agree that jointly sponsored multi-employer target benefit plans should be exempt from solvency funding. On the other hand, the proposed legislation would apparently restrict eligibility for this exemption to MEPs all of whose members are employed in jurisdictions that also offer permanent solvency funding exemption. Unfortunately, no other jurisdiction in Canada is currently proposing permanent solvency relief for

MEPs. This means that any MEP with members in more than one jurisdiction (which is quite common) will not be able to secure solvency funding relief. This is not a desirable outcome, and is, in many ways, worse than the current provisions of the PBA, which provide temporary relief to all eligible MEPs whether they are multi-jurisdictional or not.

Target benefit plans are proposed to be subject to stricter disclosure requirements. These are welcome. MEPs have greatly improved their disclosure over the course of the past decade. On the other hand, it is also important that other pension arrangements – especially those sponsored by the insurance industry that may directly compete with MEPs, also be required to make a full disclosure as to their costs and risks. It would be tragic for the successful MEP sector of Ontario's pension industry to be subject to onerous disclosure and risk reporting, while inferior products offered by the financial services sector are not required to disclose their costs or the adequacy of the benefits that their products may deliver.

Changes are being recommended with regard to payment of commuted values. Commuted values will be paid out to terminating members of target benefit MEPs to a level that reflects the funded ratio of the plan. This is an appropriate change, but the OFL would recommend that since the commuted value amount is itself a solvency based amount, that the appropriate percentage of the commuted value to be paid out should reflect the plan's solvency funded ratio or its wind-up funded ratio rather than its going concern funded ratio.

Recommended amendments:

1. Extend solvency funding relief to MEPs with for profit and not-for-profit participating employers.
2. Provide that the appropriate percentage of the commuted value to be paid out to terminating members should reflect the plan's solvency funded ratio or its wind-up funded ratio rather than its going concern funded ratio.

Funding Requirements

Funding of jointly-sponsored pension plans: We support the OECP recommendation for different funding regimes for single-employer pension plans (SEPPs), multi-employer pension plans (MEPs) and jointly sponsored pension plans (JSPPs). In essence, the OECP ties funding to governance and

recommends that, where all parties are at the sponsorship and administration tables through joint sponsorship and governance, then the appropriate funding regime is a going concern regime. On the other hand, for single employer sponsored plans, the OECP recommends that solvency funding be retained, and, indeed, strengthened.

Funding of benefit improvements: With respect to the general applicable pension funding rules, we note that the government proposes to limit the ability to improve plan benefits, requiring that any improvement be funded more quickly than is now the case. It is essential that a balance between prudence and flexibility be maintained so that the legislation and regulations do not unduly restrict the ability of a plan to provide decent pension benefits to its members.

Contribution Holidays: Employment based pension plans would be in much better shape today if contribution holidays had been prohibited in early years. There are numerous cases where lengthy periods of contribution holidays have been followed by severe underfunding. Disclosure requirements for contribution holidays must be detailed and the obligation should include reporting of the extent, duration, and impacts of such holidays and should be fully and clearly reported to plan members on their member Annual Statement. In the absence of an outright prohibition on contribution holidays, it is crucial that members and retirees understand the long-term consequences of such holidays for their plans, and be given the authority to give, or withhold, their consent to them.

Recommended amendments:

1. Provide that for JSPPs the appropriate funding regime is on a going concern basis, while solvency funding be retained for SEPPs.
2. Delete provisions that limit the ability to improve plan benefits.
3. Place a prohibition, or a member consent requirement, on contribution holidays.

Entitlement to Surplus

Too many employers have been using surpluses without reporting this practice fully and effectively to plan members. Pension fund surpluses are assets of the pension plan and belong to the plan's members. Surpluses represent the deferred wages of the workers/contributors and should not be used to reduce

employer costs. If surplus is to be paid out on termination and from ongoing plans it should be done so in accordance with legal entitlement criteria.

Under the *Pension Benefits Act* ("PBA") and Bill 120 the Superintendent can consent to the payment of surplus to an employer, without any requirement that the employer share the surplus with members and retirees, where the documents that create and support a pension plan confer surplus entitlement upon the employer. This has been mitigated by the surplus sharing regulation, which will be replaced by the rules introduced in Bills 236 and 120.

However, Bill 120 does not contain a corresponding provision that would permit members and pensioners to seek an order that surplus be distributed exclusively to members and pensioners where members and pensioners have legal entitlement to plan surplus. The absence of such a provision is contrary to Recommendation 4-16 of the OECP. Moreover, failure to adopt a mechanism whereby members and pensioners can assert their rights to surplus while permitting the employer to do so is neither balanced nor fair.

Pension arrangements often have conflicting historic provisions regarding surplus entitlements. The OECP recognized the complexity and ambiguity inherent in any legal analysis of surplus entitlement and so recommended that exclusive employer or member/pensioner entitlements to surplus based on legal claims should only be permitted where the relevant documents provide for "clear" legal entitlements. However, neither Bill 236 nor Bill 120 reflect the relatively restricted circumstances under which surpluses should be paid exclusively to one side or the other based strictly on legal entitlement. In this regard, section 79(3)(b) (and the corresponding sections applying to partial wind-ups and surplus distributions from continuing plans) should be amended to provide as follows:

> "The pension plan **makes clear provision** for payment of surplus **exclusively** to the employer on the wind-up of the pension plan".

Section 89(6) of the PBA entitles a person who has participated in a surplus adjudication before the Superintendent to seek a hearing before the Financial Services Tribunal (the "Tribunal") to review the Superintendent's decision to consent or otherwise to a surplus payment to the employer. This means that the Tribunal retains a role in regard to surplus determinations even as an alternative regime (i.e. arbitration) is being created and notwithstanding that the Tribunal's decisions in regard to surplus may be appealed to the Divisional

Court pursuant to section 91 of the PBA. Consequently, all of the Superintendent, the Tribunal, arbitrators and the Courts will have one or other role in surplus determinations. In the OFL's view, this is overly complex and overly cumbersome. Surplus claims based on legal entitlement should simply be adjudicated by the Courts, without need for intermediate decisions from either Superintendent or the Tribunal. For practical purposes, significant surplus disputes will ultimately be adjudicated by the Courts, in any event, such that intervening decisions by the Superintendent and the Tribunal will simply be costly and cause unnecessary delay.

Under Bill 120's proposed rules, arbitration can be proposed by any one of several interested persons within a prescribed period after the wind-up date. However, unless an arbitrator is appointed pursuant to an agreement between the parties, it is in the Superintendent's discretion to actually appoint an arbitrator "if and when he or she considers it appropriate to do so" (section 77.12(7)). In the OFL's view, this is not satisfactory. Time generally works in favour of the employer – members, and especially pensioners, are often in need of extra funds, especially if their employments have been terminated in conjunction with a pension plan wind-up. The employer, on the other hand, is generally not pressured by time to reach a resolution of a surplus dispute. Accordingly, rules that permit time to run, and the process to languish, are contrary to the interests of plan members and pensioners, and will generally serve only to bring the administration of pension plans wind-up into disrepute. The legislation should stipulate strict time limits for:

(a) the Superintendent to determine whether or not to consent to a payment of surplus;

(b) a party to request arbitration;

(c) the parties to agree upon the identity of an arbitrator; and

(d) the appointment of an arbitrator by the Superintendent.

Note that if extra time is genuinely warranted, that the parties should be permitted to agree, amongst themselves, to extend time limits.

In cases of pension plan surplus disputes, costs should be borne from the pension plan surplus, as is the current practice. The legislation should make this practice clear; otherwise, arbitrators may revert to the more generally applicable rule that the parties bear their own costs. Access to surplus to

defray legal costs enables members to obtain legal representation in an effective way, so as to ensure that their interests are well represented.

We assume that arbitration will be the recourse of choice only where the Superintendent has declined to consent to a surplus payment to the employer (or to the members/pensioners, in accordance with the OFL's recommendation above), and, accordingly, only where surplus entitlement isn't clear. In these cases, it does not make sense to expect the arbitrator to allocate surplus on the basis of legal entitlement. In our view, the arbitrator should have a clear equitable mandate to order surplus payments, having regard to the purpose of the plan and the history of its funding.

Recommended amendments:

1. Create a mechanism whereby members and pensioners can assert their rights to surplus.

2. Amend section 79(3)(b) (and the corresponding sections applying to partial wind-ups and surplus distributions from continuing plans) to provide that "The pension plan **makes clear provision** for payment of surplus **exclusively** to the employer on the wind-up of the pension plan."

3. Provide that surplus claims based on legal entitlement be adjudicated by the Courts, without need for intermediate decisions from either Superintendent or the Tribunal.

4. Stipulate strict time limits for the Superintendent to determine whether or not to consent to a payment of surplus; for a party to request arbitration; for the parties to agree upon the identity of an arbitrator; and for the appointment of an arbitrator by the Superintendent.

5. Provide that, in cases of pension plan surplus disputes, costs be borne from the pension plan surplus.

Pension Benefits Guarantee Fund (PBGF)

Bill 120 does not address the issue raised by the OECP of improvements to the PBGF. The OECP recommended a study of the PBGF and alternatives to it and a further report on mechanisms to raise the level of PBGF coverage from $1000 to $2,500 per month. The coverage of $1000 a month has not changed in 25

years. While there have been increases to PBGF premiums, there is no provision in the Bill to increase the level of coverage.

The OECP also recommended that the PBGF be administered by an arm's length agency with enhanced capacity to identify and manage risk and to fix levies, albeit that final approval of PBGF premiums would remain with the government.

Bill 120 is also deficient in that it does not address the key recommendation of the OECP on the adoption of emergency indexation provisions. In the event of another surge in inflation, fixed pension benefits will be inadequate. At the same time, inflation may deliver high nominal returns to pension funds. Such returns should not be permitted to produce high surpluses at the expense of fixed income pensioners.

Recommended Amendments:

1. Raise the level of PBGF coverage from $1000 to $2,500 per month.
2. Establish an arm's length agency with enhanced capacity to identify and manage risk and to fix levies.
3. Establish emergency indexation provisions.

Regulatory Oversight

Key recommendations regarding new and updated regulatory structures include the creation of an Ontario Pensions Agency that would provide a low cost and efficient mechanism to receive, pool, administer, invest and disperse stranded pensions in an efficient manner.

Additionally, the current regulator, the Financial Services Commission of Ontario (FSCO), be replaced by a new and pension-specific regulator – the Ontario Pension Regulator. Similarly, the Financial Services Tribunal would be replaced with a pension specific body – the Ontario Pension Tribunal. The pension regulator's powers to act preemptively in the event of jeopardy to a plan would be enhanced.

Portability has long been recognized as a problem with defined benefit pensions. The commuted value approach to termination amounts can be problematic in some economic circumstances, as there is no projection of salary, and it is highly contingent on the level of interest rates. In the current

economic environment, commuted values are relatively high and the payment of full commuted values from underfunded pension plans presents the opposite problem – that of depleting the pension fund in favour of those who terminate membership.

The particular portability problem addressed by the OECP was to create a favourable destination for commuted value transfers. At this time, most commuted values are transferred to RRSPs held at financial institutions. This entails considerable expense and risk, and often yields sub-optimal results. Accordingly, the OECP recommended the establishment of the Ontario Pension Agency, which would receive commuted values and provide, in exchange, a target defined benefit.

In the longer term, the Ontario Pension Agency's mandate could be expanded, so that, for example, in the case of wind-ups, the Ontario pension agency could take over the administration and investment of terminated pension funds.

Recommended amendments:

1. Create an Ontario Pensions Agency.
2. Replace the Financial Services Commission of Ontario (FSCO), by a new and pension-specific regulator.
3. Replace the Financial Services Tribunal with a pension specific body.

Temporary Solvency Funding Relief

Although not a provision of Bill 120, we must comment on the August 24 proposals for temporary solvency relief for broader public sector pension plans. We find these proposals very problematic. While it has been announced that the new contemplated measure will apply to the university sector, we are very concerned that this model of "relief" will be extended across the entire Broader Public Sector. This initiative is particularly disappointing as the government had already initiated a reasonable temporary measure in 2009 which set out a form of solvency relief and was conditional on obtaining the consent of plan members. In our experience, this measure was working and plan members including those represented by trade unions agreed to provide the required consent to make the measure work.

Another key area of concern is the 'metrics' proposal for approving solvency relief and the provision of sustainability plans by the universities to the

Ministry. Apparently, the employers – universities in the first instance - would then be committed to implement these plans to reduce costs and plan liabilities. This proposal in effect means leveraging the solvency relief measure to effect changes to collective agreements or other contracts that might inhibit or proscribe the implementation of the cost-cutting plan. This is a serious infringement of the independent collective bargaining process for pensions and we consider this an unfair change that would favour employers at the expense of workers in this sector. It is also a departure from the government's prior position on such matters.

We believe that a through a judicious combination of targeted financial assistance to those university plans with the most serious problems, and a return to some variation of the 2009 solvency relief measure that has been a proven success, the pension promises within the plans of this sector can be secured without inflicting permanent harm on current and future retirees.

Thank you for this opportunity to present our submission to the committee.

Respectfully submitted,

ONTARIO FEDERATION OF LABOUR

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