Submission to the Ontario Expert Commission on Pensions

by the

Ontario Federation of Labour

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INTRODUCTION

The Ontario Federation of Labour (OFL) is pleased to have this opportunity to present its views to the Ontario Expert Commission on Pensions.

By way of introduction, the OFL is the largest provincial federation of labour in Canada. We operate under a charter from the Canadian Labour Congress (CLC). Today, the OFL represents over 700,000 workers belonging to 1,500 affiliated local unions in Ontario.

Every two years, the OFL holds a policy convention to which all affiliated local unions and labour councils can send elected delegates. It is these delegates who are responsible for determining through their votes the future policies of the OFL. It is also at such conventions that the OFL's full-time officers are elected: its president, secretary-treasurer and executive vice-president.

The OFL also has an executive board, which consists of 33 vice-presidents chosen form the OFL's leading affiliated unions. To ensure equality in representation the executive board also includes vice-president positions for aboriginal persons; lesbian, gay, bisexual and trans-gendered persons; persons with disabilities; racially visible persons and young persons. This executive board is an important feature of the OFL's structure, as its members contribute the advice and opinions of different provincial regions, occupations and social perspectives.

Another activity of the executive board's members is to chair the OFL's numerous standing committees which discuss issues and develop policy responses which are then approved by convention delegates. The standing committees, whose membership is composed of representatives from the OFL's affiliates, concern themselves with just about any issue which affects the welfare of working people. Key issues of these standing committees include, but are not limited to, education, labour relations, strike co-ordination, occupational health and safety, solidarity and pride, workers' compensation, women's issues, pensions, labour adjustment and youth services.

After a committee and the executive board has completed its policy discussion and submitted its recommendation on an issue, the officers and the board of the OFL delegate it to one or more of the ten departments within the organization for further action. It is at this time in the process when policy is translated into an actual campaign, media reports, rallies, demonstrations, educational forums and submissions to the provincial government, or as in this case concerning pensions, to an established Commission.

1. Defending Defined Benefit Plans

The OFL and the labour movement in general support the principle and objective that all workers should be able to look forward to an economically secure and dignified retirement. As is widely recognized, the Canada Pension Plan (CPP) and Old Age Security plan (OAS) form a crucial foundation for decent retirement for Ontario workers. Yet, the levels of income replacement they offer do not set as their objective, the provision of a retirement income that is sufficient for retirement with dignity.

The Canada Pension Plan is designed to only replace earnings up to a certain maximum level (originally the "average industrial wage") that is significantly less than the earnings-based Social Security pensions in the U.S. (for example) and many other countries. Within that low-level wage replacement target, the plan is only providing a replacement of 25% of earnings, and only on a career-average basis. This means that for many workers, the CPP benefit will provide an income far less than one-quarter of the average industrial wage. For women and others facing discrimination and structural disadvantages in the labour market, plan benefit levels are distinctly inadequate.

Nonetheless, the strength of the public plans lies in the security of what they do promise – they are defined benefit type pension plans that are highly valued in large measure because they are not simply savings and investment schemes. Yet as noted, the benefits that they promise are, if not significantly supplemented by another pension, leave too many workers at or near the poverty line for their retirement years. Clearly, this is not good enough.

At the same time, less than 40% of today's workers have access to a secure, defined benefit pension plan at their workplace (i.e. "workplace plans"). To make matters worse, many employers that continue to offer defined benefit (DB) plans have threatened to discontinue them, downgrade their benefits, or convert them to insecure defined contribution (DC) type arrangements.

In our view, it is in the interest of all working people who want a secure retirement income to support defined benefit pension plans. At the same time we are aware that most employers dislike programs that involve additional costs. This seems to hold whether one is talking about bankruptcy law reform, caps on pension administration or supporting DB plans versus DC plans (or, worse yet, non-pension RRSPs). The arguments vary of course, but they often come down to the allegation that pro-employee reforms and pension security are "unrealistic," or would result in "economic chaos," or are just plain and simple "too expensive."

According to a number of supposed "pension experts," DB plans are unaffordable for employers. Yet the *Globe and Mail* recently explained in an extended article that executives typically insist on handsome, gold-plated

individual DB pension for themselves[1]. The same can be said for many high-ranking public officials. In our view, if DB plans are good enough for Canada's employer elite, they are good enough for workers who make employer success possible.

More to the point, large DB plans are pensions with predictable and secure retirement benefits and today constitute the best retirement income top-up to the public pensions people have. They are much better than DC plans or RRSPs where workers are required to make investment decisions and face the risk of ending up with a mediocre pension if they retire "at the wrong time". Moreover, the growing trend of leaving workers fully "invested" during their retirement years, and dependent upon market returns, leaves them insecure – which is the opposite of retirement with dignity.

Therefore, in our view, the discussion about pension costs should be reframed as: how can we ensure that DB plans are properly funded, well governed, and available to many more workers?

"High-value" CEOs and public officials are offered attractive benefits by employers in order to keep them. After over two decades of wage and benefit restraint and the growth of more and more low paid non-standard or precarious employment, working people want the same treatment. Decent pensions today ensure worker retention tomorrow and help maintain seniors above the poverty line.

Employers and their organized representatives continue to complain about high costs, but the evidence suggests there is more than enough wealth for decent pensions. Although Statistics Canada points out that employer contributions to DB plans dramatically increased between 2001-2003, the so-called "funding crisis" for DB plans has considerably improved in recent years[2]. A recent study by the corporate consultant firm, Watson Wyatt, holds that assets in Canadian pension funds exceeded liabilities by March 2007[3].

Where large corporations have succeeded in shutting down their DB pension plans most were only able to do so as the employees were not represented by a trade union.

In short, the apocalyptic predictions of the "pension experts" have proven false. What needs further discussion is how the funding shortfalls happened in the first place and how to ensure it is not repeated?

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[1] Janet McFarland, "The Richest Pensions Turn the Clock Forward", *Globe and Mail,* May 14, 2007

[2] Statistics Canada, "Trusteed Pension Funds: Income, Expenditures and Assets", *Canada's Retirement Income Programs,* 2006

[3] Grant Surridge, "Pensions: Funding Levels out of Crisis", *Financial Post,* July 10, 2007

Just lamenting the high costs of DB pensions today is not sufficient. We need good planning to pay for them and safeguards in place so that investment gains in good times are protected. This is particularly timely as the value of pension funds is again on the upswing. *Benefits Canada* reported that the value of all Canadian pensions surpassed the $1 trillion mark.[4]

The rate of return on pension investments in Canada has also increased, reaching 9% in 2004-05 according to the Statistics Canada article above. In addition corporate profits have reached record levels as a percentage of GDP[5]. So, while recognizing that there are exceptions, the general picture is one of a massive corporate financial surplus with more than enough funds to finance DB plans for workers' retirement security.

It is a time for pension promises to be honoured, not broken or swept aside. Employer arguments about the "excessive cost" of DB plans should be recognized as an opportunistic move to cut costs (and in the private sector, boost profitability). We must not base our economic success on strategies that hinge on cuts (and risk transfers) to workers' pensions. DB plans should be encouraged and strengthened. Funding surpluses need to be managed wisely such that when there are slumps in the stock market, pension plans remain viable.

Recommendation:

> *The OFL proposes that the Commission should reiterate the established consensus regarding the security of, and preference for, secure defined benefit type pension plans.*

2. Coverage of Defined Pension Plans

The pension and investment industry often cite the fact that DB plans in Ontario and Canada are in decline. The Association of Canadian Pension Management (ACPM), which represents over 700 pension plan sponsors and managers, says that during the period from 1992 to 2003, the percentage of the workforce in Canada covered by DB plans, declined from 44% to 34%[6]. True, but the point is that the coverage of all types of pension plans has declined as a percentage of the workforce. Although there has never been a period of time in which the majority of Ontario or Canadian workers have been

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[4] Caroline Cakebread, "Top 40 Money Managers Report: Trillion Dollar Baby", *Benefits Canada,* April 2006.

[5] Statistics Canada, "Recent Trends in Corporate Finance", *Canadian Economic Observer,* April 2006

[6] Association of Canadian Pension Management, *Back from the Brink: Securing the Future of Defined Benefit Pension Plans*, August 2005

members of a workplace pension plan, the gradual slide in coverage is of increasing concern.

Much of this decline in coverage of DB and other pension plans has been due to factors such as massive government restructuring leading to the shrinkage of public sector employment of 10% in 10 years. This restructuring involved the offloading of programs and services, outright cuts and privatization. In 1992 there were 3.1 million public service employees. By 2002 this number had shrunk to 2.8 million in spite of population growth and increased demand.

What the pension industry usually omits from its discourse is that within this general decline of coverage, DB plans have grown as a proportion of all pensions – from 67.7% in 1992 to 76.7% in 2004. The actual number of workers covered by DB plans also grew by close to 11%. Nonetheless, while the number of workers covered increased, the proportion of coverage dropped from 94% in 1992 to 87% in 2004[7].

This drop is also due to the dramatic growth of non-standard or precarious work. This includes part-time, casual, contract employment and self employment. These areas of work have grown while full-time permanent employment has fallen to 63% of the workforce[8]. It is estimated that only 15% of precarious workers enjoy workplace pension coverage.

To emphasize, the essence of the above discussion suggests that the real crisis is not so much the gradual decline of DB plans, ***but rather the declining coverage of workplace pensions in general***. This is particularly the case for new members of the Ontario workforce. Currently, Multi-Employer or Jointly-Sponsored plans are the vehicles of growth in defined benefit coverage.

If the downward trend in coverage is allowed to continue as it has for over two decades, more and more workers in Ontario will be without workplace pensions making public pension system their only option. We are aware that the Expert Commission's focus is primarily on workplace pensions, but the public pension system cannot be ignored. Indeed, it should be promoted. The CPP/QPP, OAS and Guaranteed Income Supplement (GIS) public plans account for over half the income for more than two-thirds of Canadian seniors. In our view, this reality points to the crucial need for a broad-based, public discussion on how best to ensure that all working people in Ontario and Canada have financial security in retirement and the vital role of the public pension system in ensuring this security.

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[7] Statistics Canada, Perspectives on Labour and Income, January 2006, cited in National Union of Public and General Employees, *No Pension Panic: The Real Pensions Crisis: It's all about coverage – not funding,* November 2006

[8] Vosko, Leah. *Precarious Employment* (Montreal-Kingston: McGill-Queen's University Press, 2006)

Recommendation:

> *The OFL proposes that the Commission recommend feasible approaches for expanding workplace DB plan coverage and/or ways in which to initiate a broad-based debate on the necessary expansion of the public pension system such that all Ontarians/Canadians have financial security in retirement.*

3. Opposition to Privatization and Contracting Out

Pension plan promises are funded to a significant degree by investment earnings generated from the investment of employer and plan member contributions. The labour movement has always affirmed the importance of ensuring that pension fund investment decisions are taken in a manner that respects the fiduciary principles of trust property but also respects our core values and principles.

One of the particularly perverse developments in recent years of the "evolution" of pension fund investment has been the increasing role played by large pension funds in financing the privatization of public sector infrastructure and other assets.

In Ontario, this has taken various forms. Pension funds have been invested in projects such as toll highways, toll bridge, tunnel construction and hospital construction and management. Many of these projects are structured and labelled as "Public-Private Partnerships" (P3s), though recently the negative publicity associated with this term has led P3 advocates to search out new labels. (See, for example, "Big pension funds hope for new infrastructure opportunities," *Globe and Mail*, November 24, 2006)

The OFL and many of our trade union affiliates have argued strenuously that P3s are terrible public policy. In a major policy paper called "Public-Private Partnerships and the Transformation of Government," the OFL outlined a comprehensive critique of these projects. We pointed out:

> *Governments have the lowest cost of borrowing in our economy. It will always cost the government less to borrow any given amount of money than it would cost a private corporation. So what is actually going on with P3s is that government pays a private corporation to go out and borrow on the government's behalf, at a cost of borrowing that is substantially higher than the government's own direct borrowing cost[9].*

[9] *Public-Private Partnerships and the Transformation of Government*, 2005 OFL Convention Policy Paper

The result, consistently, is that P3 projects generate much higher costs than if the same projects were pursued on a traditional public sector model.

In that same paper, we pointed out the need to "stop the use of pension plan money for P3s."

We feel strongly that P3s are not only bad public policy and a waste of taxpayer's money, but they also represent a key dimension of the attack on unionized, public sector jobs and the benefits that accrue to such jobs – **including pensions**. The Commission's discussion paper poses several questions relating directly to this issue, such as:

> *Why has coverage by defined benefit plans decreased? (p. 8)*
>
> *What is the impact of privatization…on defined benefit plans? (p. 12)*
>
> *What effect might changes in the investment strategies of pension plans, and in the rules governing investment strategies, have on capital markets in Ontario? (p. 15)*

These are important questions, and taken together, merit a serious investigation. We hope that the Commission's research program will address these questions in detail. What we submit here is that the Government of Ontario has contributed significantly to the recent loss of good, unionized, and public sector employment by pursuing various forms of privatization and P3s. Frustratingly, several of the pension funds of our own members have been channelled into these investments.

In recent years, the growth in the number of pension funds that are administered by Joint Boards of Trustees, with union-appointed trustees, has generated a serious debate regarding various pension investment practices, including investment in privatization. While we believe that the legal concept of "fiduciary duty" clearly permits consideration of plan members' interests in many dimensions (not just their financial interest in positive investment returns), there remains ambiguity and debate regarding the legal scope for pension trustees to 'rein in' our most aggressive money managers.

This discussion raises the issue of Socially Responsible Investment (SRI). While the OFL recognizes that investment returns are fundamental to any investment program, we also believe that there is more to pension benefits than investment returns. One of the historic goals of the labour movement has been to counteract and address the fundamental inequalities that run through our society and economy. SRI is an approach to investment strategy that integrates financial, ethical and environmental concerns.

As a first step, governments should clarify, through legislation and regulation, that social, ethical and environmental considerations are a valid part of the investment process and do not violate fiduciary duties. In our opinion, all pension plan managers should be required to disclose, if and how, environmental, labour, ethical, environmental and social considerations are taken into account when investment decisions are made.

Recommendation:

> *The OFL proposes that the Commission directly address the corrosive effects of privatization and P3s on pension plan coverage in Ontario. Further, it is important that the Commission call for the clarification of statutory and common trust law as it applies to pension investment in order that decisions by pension fund trustees to expressly avoid investments in P3s and other forms of privatization that threaten unionized, public sector employment (and the pension coverage that such employment generally provides) are clearly permitted.*
>
> *Further, the OFL proposes that language be added to the PBA, making it legitimate for pension trustees to consider social, ethical and environmental principles.*

4. Indexation

In discussing the need for indexing of private defined benefit pension plans, it is valuable to recall that it is indexed public pensions that have lifted many, but not all, senior Canadians out of poverty. In large part this is due to the major expansion of public pension benefits in Canada in the 1960s. The new system – the federal OAS and GIS and the federal/provincial CPP – has made a huge difference in seniors' standard of living.

Nonetheless, the incomes of older Canadians remain substantially below the incomes of younger age groups. This is particularly the case for older single women and older immigrants. Women constitute the majority of all seniors subsisting on public pensions and make up a disproportionate share of persons in Canada living on low incomes. We do not believe that in growing old one must grow poor.

Public pensions are irreplaceable. They provide universality of coverage, portability (you maintain your benefits even if you switch jobs), full indexing (pension levels keep up with inflation), they are the most secure (current premium rates of 9.9% will ensure CPP financial stability) and the most efficient (having low administration costs that no private system can even approximate).

Private defined benefit plans have not kept up with the changes in public plans. Current statistics indicate that just over half of all pension plan members covered by private defined benefit plans have no inflation protection and this rises to an astounding 83% among private sector plan members. Without indexing, inflation will continue to erode retiree pension benefits. Inflation can have a significant impact on pensions, even in times of low inflation, plunging retirees further down the income ladder, if not into poverty. For example, the pension of a member who retired in 1994 would have seen inflation erode the real value of their pension by about 20%. A member who retired in 1984 would have had the real value of their pension reduced by more than 44%.

These losses of value occurred despite the double digit investment returns of the mid 1990s. During this time many plans were in a surplus position allowing employers to enjoy contribution holidays. The result, once again, was for retired workers and their surviving spouses to shoulder the cost of inflation while low inflation and high investment returns allowed employers to reduce pension contributions.

To be clear, we are not claiming that inflation itself creates or diminishes wealth; it merely redistributes it. In the pension system it is not difficult to identify the losers in this redistribution; it is the retirees, their dependents and their spouses. The loss is in the real purchasing power of their pension benefits.

Recommendation:

> *The Ontario Federation of Labour strongly believes that full indexing should be mandatory under the Ontario Pension Benefits Act (PBA) and urges the Commission to so recommend. Indeed, the PBA already contains a provision to provide indexing protection, but successive Ontario governments have never introduced the regulation required to enact it.*

5. Surplus Ownership and Contribution Holidays

The view that actuarial funding surpluses belong to pension plan members has long been and remains a cornerstone of the labour movement's perspective on the pension system. As such, the continuing ambiguities regarding the proper allocation and authority over fund surpluses are a source of serious frustration.

We are also well aware that powerful voices representing large employers and the pension industry view this Commission and review as an opportunity to claim that, in order to "save" defined benefit pension plans, employers must be

provided with a greater financial incentive to maintain them, and that more employer claim on fund surpluses will serve as that incentive.

Clearly, the OFL rejects this view. In fact, our perspective holds that the faith of plan members in the integrity and fairness of the system is even more important than the "financial incentives" seen by employers to maintain their plans. Moreover, we are well aware that recent history suggests that the funding deficiencies revealed in many recent valuations are in significant measure a reflection of the cost of past employer contribution holidays. For example, in 2005, the Shareholder Association for Research and Education (SHARE) published a report showing that employer contribution holidays, taken from going-concern surpluses, were a significant factor in the emergence of today's deficiencies.

Of the 42 significantly underfunded (i.e. going-concern funded ratio of 80 to 89.9%) or extremely underfunded (i.e. going-concern funded ratio of 70 to 79.9%) pension plans in the study, *45% would have completely eliminated their current actuarial deficit if contribution holidays had not been taken*[10].

Moreover, in 2004 the federal Office of the Superintendent of Financial Institutions (OSFI) reported that it had found a number of its (federal sector) employers continuing to take contribution holidays *even though they knew that their plan was no longer fully funded*[11].

Clearly, plan members in Ontario would have a similar history, and they need much greater protection against this threat.

Recommendation:

> *The OFL proposes that the Pension Benefits Act be amended to provide that there be no contribution holidays unless there is a surplus margin of at least 10%. Second, any use of surplus, whether improvement or contribution holiday, should be subject to the approval of all bargaining agents (if any) and/or an appropriate majority vote of affected plan members.*

6. Disclosure and Informed Consent

The experience of our affiliate unions on pensions cuts across all sectors and types of pension plans. It strongly suggests that there is a continuing absence

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[10] "*Taking a Holiday: The Impact of Employer Contribution Holidays on the Funding of Defined Benefit Pension Plans*", Research Report, SHARE, February 9, 2005, pp. 5-6 http://share.ca/en/node/499

[11] OSFI Annual Report, 2003-2004, p. 29

of full and effective disclosure of plan information to plan members. While the existing statutory disclosure requirements were a very positive step, there remain many employer-administrators who resist providing documentation to plan members, including that documentation that they are required to distribute.

One of the problems with the existing disclosure rules is that employers continue to interpret them very narrowly. In Ontario, while the list of documents required to disclose to plan members is sufficient, it needs only be "made available at the employer's premises". When employers refuse even this request, the plan member is forced to obtain the documentation from the Financial Services Commission offices (FSCO), at extra expense.

Further, in cases where pension plan members are not members of trade unions, there is often no advocate in place for them to demand the effective disclosure of plan information that the PBA requires. Even where trade unions exist, it remains very easy for employers to ignore disclosure requirements, and leave plan members uninformed as to the financial status of the plan, and the various decisions that are taken regarding its management and administration.

One very straightforward and essentially cost-free means of addressing this problem would be to expand the list of information that must be provided to all plan members in their "Annual Statement". Currently, the only requirement is for that statement to show the level of the member's accrued benefits including the value of their contributions, as well as the funded position of the plan.

The OFL believes that reporting the funded position of the plan is not enough. Dozens of Ontario employer-administrators have been taking contribution holidays with pension fund surpluses without properly and effectively reporting this to plan members in their annual statements. Yet, the Annual Information Returns (AIRs) that they are required to submit to FSCO always report the value of any surpluses utilized to meet "employer current service cost" – i.e., to take a partial or full contribution holiday. We see no reason whatsoever that this same information provided in AIRs could not also be required to be added to the members' annual statements in the interest of disclosure and transparency.

Recommendation:

> *The OFL proposes that the Commission recommends the current disclosure requirements of the PBA be expanded to require copies of the documents that must be disclosed to plan members be provided to all plan members so requesting in a timely fashion. The concept of providing a copy for "inspection" on the employer's premises should be discontinued. Further, we propose that the content requirements for the members' annual statement be expanded to*

include the same annual disclosure of surplus applications to meet employer current service cost as is currently required for the Annual Information Returns.

7. Pension Plan Governance and Regulation

The OFL has long been an advocate for overcoming the built-in power imbalance between employers and plan members through structural changes to the governance and decision-making processes that guide pension plan administration. In particular, we have advocated arrangements that facilitate (where viable) collective bargaining over pensions (i.e. including improved disclosure rules and conflict of interest guidelines for plan agents), as well as improvements in plan member representation such as full Joint Trusteeship.

With respect to Joint Trusteeship, it is with some satisfaction that we are able to report that in the growing number of cases where various types of Joint Trust have been established, we have seen significant improvements in governance and administration. Not only have plan members' interests been more directly brought to bear at the level of fiduciary decision-making, but other improvements have flowed as well, such as greater disclosure, communication, and overall "accessibility".

Despite these successes, many pension plans remain entirely under the purview and control of employers. As many labour advocates have repeatedly pointed out, this places employer-administrators in an untenable conflict of interest, where individuals are forced to juggle their fiduciary (and practical) obligations to shareholders or funding agencies and their fiduciary obligations to the members of the pension plan. Even a cursory examination of pension case law illustrates that where this juggle takes place, it is all too often the pension plan members that take the back seat.

For this reason, the OFL continues to advocate improvements in governance that will enhance the position and rights of pension plan members. We consider the stronger governance obligations of the Québec pension system to be a model that the Government of Ontario should consider seriously. Where one or more trade unions represent a majority of plan members and are seeking joint control of their members' pension plan, we see no reason why the Ontario pension legislation should not require the establishment of a Joint Trust.

Indeed, the current PBA already specifies that multi-employer plans must have a minimum of 50% member representation on their boards. We view the sound logic supporting this provision to be equally applicable to single employer plans.

We also see a key role in the governance of pension plans being played by the provincial regulator – the Financial Services Commission (FSCO). While FSCO and its predecessor, the Pension Commission of Ontario, have often taken the employer side in key disputes, there have also been important exceptions. For example, in the recent hotly-contested Monsanto case, the Commission held its position in support of plan members' rights even in the face of a highly organized and well-funded campaign from employers.

The OFL would argue that FSCO must have the capacity and resources to operate independently of the employer (and government) players in the pension industry. We would observe that some of the previous mandates and capacities of the disbanded PCO were lost when that body was dismantled, including a research and policy development role. We are hopeful that this Commission will review this experience and make specific recommendations as to the mandate and resources currently assigned to the pension section of FSCO.

Recommendation:

> *The OFL proposes that the Commission explicitly recognize the important regulatory and enforcement role played by trade unions within the existing framework of pension plan governance. For example, where trade unions represent plan members and elect to establish a Joint Trust, we feel that the pension legislation should make such governance improvements mandatory. This will necessitate a program of trustee education and provisions to protect members trustees with respect to the whistle blowing requirement discussed in Section 10 of this submission. Even in the absence of trade union representation, we would recommend expanding the scope for plan member representation on pension committees (alongside the improvements to disclosure and communication advocated elsewhere in this submission). Finally, we propose that the role and mandate of the pension regulator be fully reviewed, and that the Commission ensure FSCO is provided the resources and mandate to fulfill its obligations.*

8. Vesting and Other Minimum Standards

Working people in Ontario are changing their jobs more frequently today than in years gone by. Yet, despite such changes in employment patterns, it has been almost 20 years since Ontario's law on pension vesting has been modified.

In 1987, the *Pension Benefits Act (PBA)* was amended to require that pensions become an employee entitlement, which is vested, after two years of service. This was a big step forward. It meant that an employee who terminates employment after two years or who retires has a right to a "locked-in"

entitlement. If a pension plan member terminates employment prior to becoming vested, the employee only receives back their contributions plus interest. Given recent changes in work patterns, there is no reason not to follow the example of the province of Quebec and establish immediate vesting and "locking-in" of entitlement.

Unlocking of Pension Entitlements: We recognize that there have also been moves in several jurisdictions, including Ontario, toward "unlocking" of pension entitlements. The OFL remains opposed to these moves. We recall that one of the key principles underpinning the pension system is that pensions are for retirement – not for the many other important but non-retirement related financial needs that arise in our lives.

Extension of Mandatory Coverage of DB Plans to Part-time Employees: In workplaces where a pension plan is provided, it should be available and required for all employees in the workplace including part-time workers. Although difficult for most workers, the accumulation of sufficient income for retirement tends to be even more challenging for part-time employees, whose connection with the labour force tends to be more sporadic and characterized by gaps when there is no employment at all. From a public policy perspective, it makes good sense to encourage the participation of part-timers in workplace plans by requiring that they join after a certain period of time in employment. In Manitoba, for example, it is mandatory for part-time employees to join a workplace plan after two years of employment.

Recommendation:

> *The OFL believes that the PBA should be amended to require immediate vesting when an employee joins a pension plan. Immediate vesting is already the law in the province of Quebec. In support of the same principle of "locking in" entitlements, we are opposed to moves to unlock or otherwise weaken the vesting system in Ontario. In recognition of the growing percentage of the "non-pension covered" workforce that is precariously employed and part-time, we also recommend that pension plan participation be made compulsory for part-time workers where it is compulsory for full-time workers.*

9. Solvency Funding

The OFL was one of the many voices that worked hard to advocate and win the more secure pension funding requirements now in place in the *Pension Benefits Act.* In previous eras, the employer's failure to fully or properly fund and secure the pension promises that they were making frequently resulted in disaster for pension plan members.

In many cases, the under-funding of pension plans was only revealed when an employer went bankrupt or shut down a plan for some other reason, and the members discovered that the pension they had been counting on was to be reduced by 30%, 40%, or more. The requirement to ensure plans are funded on the "solvency" or wind-up measure has significantly reduced the incidence of such serious problems.

In the past several years, an unusual combination of relatively low rates of return (2001-2002) and historically low long-term interest rates pushed many plans into funding deficiencies, particularly on the solvency measure that follows prescribed long-term interest rates. The fact that many employers continued to take contribution holidays well into this period only magnified the problem many plans faced. The result has been a requirement to fund solvency deficiencies over the short five-year period. Once again, employers have used this new cost as a rationale to attack defined benefit plan concept or its benefit levels and provisions.

In general, we view the "solutions" many employers and industry organizations have advanced to address these funding challenges as proposals that will undermine the existing security and quality of pension coverage for plan members. Their proposals are generally put forward on the premise that an "asymmetry" exists between the risks and responsibilities of plan administrators (employers) and plan members, and that their support for defined benefit plans is contingent on "fixing" this asymmetry. The following is a list of the most prominent among these proposed measures:

- greater employer access to fund surpluses;
- tax assistance for funding "contingency reserves" or "trust accounts" that can be refunded to the employer more easily than from existing pension plans;
- "Letters of Credit" to be used as an alternative to real funding to make special payments;
- an extension of the current required amortization period for solvency deficiencies from five years to ten (or more);

All of these types of proposals are geared to lowering employer actual contributions and/or increasing employer access to fund surplus. Rather than improving funding security, such measures are certain to undermine it, and shift the already problematic balance of power further to the advantage of employer-administrators at the expense of plan members. As far as we are concerned, these proposals are a step backward in the struggle for pension security and the rights of pension plan members.

In addition to any proposals for greater employer access to fund surpluses, we also take particular issue with the proposals for funding deficiencies – or any

other pension obligations – with non-marketable Letters of Credit. Recognizing that such instruments are now being permitted in other jurisdictions, we consider this a step in the wrong direction. In our view, such Letters are very likely to provide "relief" (i.e. reduce obligations) for credit-worthy employers that do not need it, and offer nothing to those that do. Such models – while perhaps desirable from an employer-administrator perspective - will add no security to the pension system.

The OFL certainly does recognize the reality that many Ontario pension plans have faced solvency deficiencies in recent years. However, we have observed that the impacts of these deficiencies have been greatly exaggerated. In fact, we note in particular that according to a recent analysis by industry consultancy Watson Wyatt, average funding ratios moved from 86% at the beginning of 2006 to 102% at the end of the second quarter of 2007[12]. Their study notes that such ratios are now at their highest levels in five years.

There is also evidence that the so-called "pension crisis" was and continues to be overblown by various employers and other industry players simply wanting to escape pension costs (or recover them through future contribution holidays). A comprehensive August 2007 study by DBRS suggests that the public perception of a serious pension funding problem in North American pension plans is, in fact, "a myth". Their conclusion, following an extensive review of the recent financial history of 536 North American plans, is that 70% of plans are well-funded. Further, looking forward from mid-2007

> *… DBRS believes that the funded status of plans is likely to continue to improve in 2007, leading to an increased number of fully funded plans. With few exceptions, pension funding deficiencies are becoming less of an issue[13].*

Such reports are a reminder that fundamental and permanent changes to a regulatory regime made in haste or on the basis of situations that may well prove temporary are ill-advised.

We would also underline the important role that trade unions have frequently played in various negotiations to resolve solvency funding problems. In the case of the Air Canada insolvency, for example, several trade unions worked with both the employer and the regulator (in that case, OSFI) to reach a viable agreement that included (among other things) an extension of the payment amortization period from five to ten years. Just as that negotiated agreement did not require permanent changes to the solvency funding framework of the

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[12] Watson Wyatt, "*2007 Continues to Look Good For Pensions*", Press Release, July 9, 2007

[13] DBRS, "*Pension Plans: The Myth of a Pension Problem*", Industry Study, August 2007, p. 6

federal sector pension legislation, so we do not believe dramatic changes are required for Ontario.

Such examples also illustrate the important role that trade unions can and do play as representatives of plan members' interests within the regulatory framework. As active monitors and enforcers of the rules, trade unions make significant ongoing contributions to the protection of pension plan members' rights. We would argue that any changes to the solvency funding framework suggested by the Commission should recognize and, in fact, facilitate and further develop this role.

Recommendation:

> The OFL proposes that the Commission recognize and support the fundamental security provided by the existing funding framework, and consider mechanisms to require that any proposals to extend or otherwise reduce the solvency funding obligations be subject to the approval of plan member trade unions (if any) or a two-thirds majority vote of plan members where no trade union exists. The OFL is opposed to any proposals that will allow administrators to replace real special payment (deficiency) funding with alternatives such as Letters of Credit. Finally, we urge the Commission to recommend that the regulatory framework be amended such that the role of trade unions in situations of funding difficulties be enhanced and facilitated.

10. Achieving Clarity and Certainty regarding Liability and Whistle Blowing Obligation for Agents of Pension Plan Administrators

The many trade unions affiliated to the OFL have active collective bargaining relationships with employers that are also the legal "Administrators" of their pension plan under the terms of the *PBA*. Pension plan administrators in Ontario, and in all other jurisdictions in the country, are bound to act in accordance with a statutory fiduciary standard of care. In Ontario, the standard of care is set out in Section 22 of the *PBA* wherein administrators are prohibited from permitting their interests to conflict in administering the pension fund. In administering the pension plan and in the administration and investment of the pension fund the administrator is permitted, where it is reasonable and prudent in the circumstances to do so, to delegate to an agent, who is bound by the same obligations.

The question then arises is: Who is an agent? Despite the above provision, there is ambiguity as to the breadth of application of these sections. In particular, there is an array of service providers who perform work for pension plan administrators, yet there are no clear rules to say what characteristics constitute them as agents for the purposes of the *PBA*. Whether an actuary, a

custodian, an auditor or an investment manager is an agent of the plan Administrator is a question that has been raised at various times in a number of court actions, yet there is still no clear answer.

Accordingly, it will be useful and appropriate to establish rules in the *PBA* to provide guidance. The following service providers should be identified explicitly as agents when they provide pension plan services, and explicitly subject to the provisions of section 22:

- actuary
- custodian
- benefits administrator
- lawyers
- accountant
- auditor
- investment manager
- investment consultant

The Bill 30 changes to the Quebec *Supplemental Pension Plans Act* ("SPPA") achieve some clarity on this issue by stating in section 153 that service providers who exercise a discretionary power belonging to the pension committee (the statutory plan administrator) or delegates of the pension committee assume the same obligations and responsibility the pension committee would have assumed if it had exercised the delegated powers. This approach is helpful. However, in our view it does not go far enough. It would be preferable that the agents of a pension plan be listed in the *Act*.

This may have the additional benefit of ensuring that service providers do not accept conflicting engagements from sponsors and administrators involving the same plan.

Once it is established that a service provider has fiduciary obligations to the beneficiaries of the pension plan, it is important the contracts between service providers and Administrators are consistent with that. One area in which this issue has arisen for plan Administrators over the past few years is in the negotiation of such contracts, and the desire of service providers to contractually limit their liability for damage they cause in providing service to a pension plan.

Such limitations are simply unacceptable from a plan Administrator's perspective, for a fiduciary, or frankly any service provider who has integrity. In any event, if such service providers are agents for PBA purposes, such limitation clauses may well be unenforceable given the statutory standard of care.

In these circumstances, the OFL supports the approach taken by the Quebec Legislature in its Bill 30 changes to the *Supplemental Pension Plans Act*, which is to prohibit such provisions – render them null and void – if they are "abusive". There have been no cases testing the application of this section of the *SPPA*, so it is impossible to say what the effect has been or what will be considered "abusive", but in the context of existing fiduciary obligations, efforts to avoid liability especially if presented in a "take it or leave it" way, should be considered abusive.

At a minimum, the inclusion of a provision like section 154.4 of the *SPPA* shines a bright light on the issue, and will alert plan Administrators to take particular care. The OFL advocates adoption of similar provisions in the Ontario *PBA* but the prohibition on such clauses should be absolute and unqualified so as to avoid any uncertainty.

The third feature of the new *SPPA* which the OFL advocates for inclusion in the Ontario *PBA* is the whistle blower provision. The *SPPA* now extends to all delegates, representatives and service providers the obligation of reporting to the pension committee any situation "that might adversely affect the financial interests of the pension fund and that requires correction". Prior to Bill 30, this requirement was applicable only to the accountant. The *Act* also requires that the pension committee take immediate corrective action when notified, failing which a copy of the report by the delegate must be sent to the Régie des Rentes du Québec (the Quebec regulator).

Recommendation:

> *The OFL recommends that Ontario follow the Quebec model on the fiduciary responsibility of plan agents, and amend the PBA such that all agents of a pension plan be listed and named as fiduciaries under the Act. Second, we also recommend that the Act prohibit contractual limitations on the liability of service providers. Third, the OFL proposes that comprehensive whistle blower protection be provided in the PBA.*

11. Portability and Protection of Accrued Benefits.

The OFL has consistently championed the concept that pensions should be financially secure, "locked-in" (for retirement), and portable. This security and portability is especially important for the value of defined benefit plans, since the lack of full portability is sometimes used as an argument against the DB concept.

A locked-in deferred pension automatically vests on completion of the qualification periods required under the pension plan or the *PBA*, whichever is shorter. However, it is the termination of employment prior to retirement age that triggers the portability right, such as the right to transfer the lump sum commuted value of the deferred pension earned to the date of termination out of the pension fund and into another retirement vehicle. With increased labour mobility, the right to take one's pension on a move from one employer to another is critical. These transfer rights are set out in section 42 of the *Act* and perhaps the most important of those is the right to transfer the commuted value of one's deferred pension to the pension fund of another plan (if the administrator of that other plan agrees to accept the payment).

There is, however, a significant missing element in the existing portability scheme whose absence leaves plan members vulnerable. The *Act* does not protect the **value** of the accrued pension – that is, once an individual stops participation in a plan, future salary growth becomes disconnected from that accrued benefit. That is, unlike individuals who spend their careers in one plan and become entitled to a benefit which recognizes their salary growth for their full period of service, individuals who move around lose that value because there is no requirement that an individual be permitted to connect his or her periods of service.

In addition, in situations of pension entitlement transfers, we are troubled by the lack of obligation on Administrators of "importing" plans to permit a transfer in at the request of the member. That is, although a terminated employee can transfer pension benefits out of the plan of the former employer and into a locked in vehicle of choice, a transfer to the plan of the new employer can only be done with the agreement of the new employer or plan administrator to accept a transfer in. There is no obligation on them to do so, and there should be. Without such a right, members lose the value of having one consolidated pension, and the value of their future salary growth – their accrued pension stays stagnant as it will typically be frozen at their salary at termination.

The corollary is the lack of a protection of the value of the accrued pension through mandatory indexation or some other "wrap-around" benefit in sales of business. Situations in which the impact of this issue is most egregious are where there is a sale or a divestment which affects a group of pension plan members. For example, in the sale of part of a business where the employees are transferred to the pension plan of the new employer, their participation in the first plan is stopped and service frozen, and they commence participation in the new plan. The only protection provided in the *PBA* is to ensure that their period of service is deemed continuous for purposes of qualifying for benefits in both plans, but not for purposes of credit or application of future salary growth. So employees, who through no will or fault of their own, lose or

transfer their employment, are subject to real degradation of their retirement income.

Another example is one which occurs in the public sphere. Employers, such as broader public sector agencies, may be covered by municipal legislation which requires their employees to participate, for example, in OMERS, and then in connection with a divestment or revision to that statutory scheme, become privately regulated and subject to participation in HOOPP. Pensions in OMERS would be frozen and new accruals would occur in HOOPP. Portability options would not be triggered because section 80 deems there to be no termination. The resulting disparity in the value of the two pieces of pension, as compared to the total pension if all service had been in one plan, can be quite devastating. This situation is particularly unfair given that the employment for the affected individuals did not change at all, only the mandatory pension plan connected with their employment did because of the alteration of the statutory scheme.

The sufficiency of income among the province's (and the country's) retired population is a serious public policy issue. To be an effective component of the solution, the Legislature should intervene through the PBA where possible to ensure that pensions for working people properly reflect their input in the workforce. One way to do that is to require indexation of deferred pensions so that they continue to grow even though there are no longer any accruals. Alternatively, termination-triggered protection for future salary growth which either requires the predecessor plan to ultimately provide a pension which takes the final salary into account (the pension would have to be left in the plan) or requires importing plan sponsors to accept transfers in of accrued pensions on a basis that preserves the accrued years of service should be mandated.

Recommendation:

> *The OFL recommends that the PBA be amended such that the value of the accrued pension, once an individual stops participation in a plan, is protected through the mandatory extension of any indexation provided to those pensions that have been deferred. Second, the OFL recommends that the Commission initiate a discussion on how to make the transfer option more practical and viable in private sector plans. In plans that currently allow reciprocal transfers there needs to be a consideration of ways to ensure transferring members do not loose pension value.*

12. Pension Benefit Guarantee Fund

The Ontario Pension Benefit Guarantee Fund (PBGF) is the only system of its kind among Canadian jurisdictions. Sections 82 through 86 of the PBA provide

a scheme of limited protections of pension benefits for members of certain kinds of defined benefit plans in prescribed circumstances. Neither MEPPs nor "fixed contribution" defined benefit plans are covered. Although the concept of a guarantee fund is important and laudable, given the restrictions on funding, coverage and availability, the level of protection provided by the PBGF is inadequate.

The PBGF is currently funded by premiums paid by employers who maintain eligible defined benefit plans. Under section 37(1) of O.Reg 909, an annual assessment is payable to the PBGF. It is composed of a flat premium of $1.00 per Ontario plan beneficiary plus additional levees.

The effect of the levy structure is that the premium grows as the plan goes further into a solvency deficit. In the absence of a solvency deficit, plan surplus can be used to pay the PBGF premium. Failure to pay on time results in a 20% surcharge on amounts owing, plus interest at a rate of prime plus 3%.

The PBGF was intended to be self-financing by way of contributions from plan sponsors. As it stands, the fund is currently in a deficit position. This can be attributed in large part to the dramatic losses the fund suffered as a result of large claims from Massey Ferguson in the 1990s and Algoma Steel in 2001. As a result of these two claims, the fund required government bail outs to the tune of over $200 and $500 million, respectively, and the interest costs of the loans has been absorbing premium income. Given the current under-funded situation of several DB plans in Ontario, the potential liabilities which could be claimed against the fund are greater than the assets contained in the fund. Financial statements indicate that the provincial government provided the fund with a $330 million interest free loan payable at $33 million per year over 11 years. As such, it is expected that premiums will have to be increased just to maintain solvency in the fund.

In the future, the funding scheme for the PBGF should have two elements: an employer-paid premium based on risk and an industry-wide premium which is paid by covered DB plans.

It continues to be appropriate to have an employer-paid premium calculated on a per capita basis and with reference to the likelihood that a pension plan will be wound up in a deficit. The company in such a case is ultimately liable under the PBA for funding, and should be charged an escalating premium to have the safeguard of the PBGF available to it. If the PBGF is to truly be an "insurance" scheme, the users of the system ought to be charged a premium which reflects the reality of its usage to pay benefits in circumstances of insolvency. This has an element of fairness because the fund pays for benefits that employers would otherwise be responsible for.

However, the current level of premium is too low and should be increased, and should be subject to an annual adjustment. The level of premiums paid by plans currently is not onerous in the least, and increasing them – even significantly – will not cause hardship. That is, the regulator – or an independent industry evaluator – should consider annually whether the level is appropriate with reference to the number of plans insured, the value of benefits insured, and the value of benefits at risk at the time.

Once the eligibility criteria are met and the plan in question is unable to pay the full benefits promised, the PBGF tops up the payment to the level of the promised benefit, or $1,000 per month, whichever is less. The $1,000 cap on benefit amounts has been in place since the inception of the fund. It has not kept pace with inflation at all and does not reflect the following realities:

a. The cost of living has increased significantly since the inception of the fund in 1980 and a retirement income of $1,000 per month, even when supplemented by CPP and OAS, would be regarded as insufficient by almost any standard;

b. Many (if not most) pension plans generate a much higher monthly benefit than $1,000 per month.

So, while a $1,000 coverage limit may have been adequate when the fund was created, it is simply inadequate today. As a comparison, the coverage limit of the PBGF in the US is approaching $50,000, while the PBGF is capped at $12,000. At $12,000 per year, the fund is simply not meeting the pension expectations of plan members.

In order to make a difference, the level of PBGF benefits must be updated to reflect the realities of the current cost of living and, thereafter, be adjusted annually to keep pace with inflation if the fund is to provide a sufficient level of security to plan members. A more adequate and realistic level of benefits would be $2,750 per month, or $33,000 per year.

The PBGF has proven to be inadequate to meet claims in the past, and given that its funding methodology has not changed, that inadequacy is likely to continue. The eligibility rules should not be hardened to make the PBGF even less accessible though. Rather, the funding rules should be changed to make it more appropriately funded – to fund it in such a way as to provide real benefits to Ontario workers.

Recommendation:

The OFL is a strong defender of the security provided by the PBGF. However, the failure to index the coverage it provides has become a

serious weakness, and we recommend that the amount of the PBGF benefit level be raised to $2,750 per month.

OFL RECOMMENDATIONS

We conclude this submission with a comprehensive list of the recommendations contained at the conclusion of each issue outlined:

1. The OFL proposes that the Commission should reiterate the established consensus regarding the security of, and preference for, secure, defined benefit type pension plans.

2. The OFL proposes that the Commission recommend feasible approaches for expanding workplace DB plan coverage and/or ways in which to initiate a broad-based debate on the necessary expansion of the public pension system such that all Ontarians/Canadians have financial security in retirement.

3. The OFL proposes that the Commission directly address the corrosive effects of privatization and P3s on pension plan coverage in Ontario. Further, it is important that the Commission call for the clarification of statutory and common trust law as it applies to pension investment in order that decisions by pension fund trustees to expressly avoid investments in P3s and other forms of privatization that threaten unionized, public sector employment (and the pension coverage that such employment generally provides) are clearly permitted.

   Further, the OFL proposes that language be added to the PBA, making it legitimate for pension trustees to consider social, ethical and environmental principles.

4. The Ontario Federation of Labour strongly believes that full indexing should be mandatory under the Ontario Pension Benefits Act (PBA) and urges the Commission to so recommend. Indeed, the PBA already contains a provision to provide indexing protection, but successive Ontario governments have never introduced the regulation required to enact it.

5. The OFL proposed that the Pension Benefits Act be amended to provide that there be no contribution holidays unless there is a surplus margin of a least 10%. Second, any use of surplus, whether improvement or contribution holiday, should be subject to the approval of all bargaining agents (if any) and/or an appropriate majority vote of affected plan members.

6. The OFL proposes that Commission recommend that the current disclosure requirements of the PBA be expanded to require that copies of the documents that must be disclosed to plan members be provided to all plan members so requesting in a timely fashion. The concept of providing a copy for "inspection" on the employer's premises should be discontinued. Further, we propose that the content requirements for the members' annual statement be expanded to include the same annual disclosure of surplus applications to meet employer current service cost as is currently required for the Annual Information Returns.

7. The OFL proposes that the Commission explicitly recognize the important regulatory and enforcement role played by trade unions within the existing framework of pension plan governance. For example, where trade unions represent plan members and elect to establish a Joint Trust, we feel that the pension legislation should make such governance improvements mandatory. This will necessitate a program of trustee education and provisions to protect members trustees with respect to the whistle blowing requirement discussed in Section 10 of this submission. Even in the absence of trade union representation, we would recommend expanding the scope for plan member representation on pension committees (alongside the improvements to disclosure and communication advocated elsewhere in this submission). Finally, we propose that the role and mandate of the pension regulator be fully reviewed, and that the Commission ensure that the Financial Services Commission (FSCO) is provided the resources and mandate to fulfill its obligations.

8. The OFL believes that the PBA should be amended to require immediate vesting when an employee joins a pension plan. Immediate vesting is already the law in the province of Quebec. In support of the same principle of "locking in" entitlements, we are opposed to moves to unlock or otherwise weaken the vesting system in Ontario. In recognition of the growing percentage of the "non-pension covered" workforce that is precariously employed and part-time, we also recommend that pension plan participation be made compulsory for part-time workers where it is compulsory for full-time workers.

9. The OFL proposes that the Commission recognize and support the fundamental security provided by the existing funding framework, and consider mechanisms to require that any proposals to extend or otherwise reduce the solvency funding obligations be subject to the approval of plan member trade unions (if any) or a two-thirds majority vote of plan members where no trade union exists. The OFL is opposed to any proposals that will allow administrators to replace real special payment (deficiency) funding with alternatives such as Letters of Credit. Finally, we urge the Commission to recommend that the regulatory

framework be amended such that the role of trade unions in situations of funding difficulties be enhanced and facilitated.

10. The OFL recommends that Ontario follow the Québec model on the fiduciary responsibility of plan agents, and amend the PBA such that all agents of a pension plan be listed and named as fiduciaries under the Act. Second, we also recommend that the Act prohibit contractual limitations on the liability of service providers. Third, the OFL proposes that comprehensive whistle blower protection be provided in the PBA.

11. The OFL recommends that the PBA be amended such that the value of the accrued pension, once an individual stops participation in a plan, is protected through the mandatory extension of any indexation provided to those pensions that have been deferred. Second, the OFL recommends that the Commission initiate a discussion on how to make the transfer option more practical and viable in private sector plans. In plans that currently allow reciprocal transfers there needs to be a consideration of ways to ensure transferring members do not loose pension value.

12. The OFL is a strong defender of the security provided by the Pension Benefit Guarantee Fund (PBGF). However, the failure to index the coverage it provides has become a serious weakness, and we recommend that the amount of the PBGF benefit level be raised to $2,750 per month.

Respectfully submitted by,

THE ONTARIO FEDERATION OF LABOUR

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