

September 29, 2010

Ian J. McSweeney
Direct Dial: (416) 862-6578
imcsweeney@osler.com

SENT BY COURIER

The Honourable Dwight Duncan
Minister of Finance, Chair of Management Board of Cabinet
7 Queen's Park Crescent
7th Floor
Frost Building South
Toronto, ON M7A 1Y7

Dear Mr. Duncan:

Reform of Pension Surplus Legislation

On September 14, 2010, Osler, Hoskin & Harcourt LLP made a submission on the proposals for pension reform announced on August 24, 2010. In this submission we included a request that the government clarify sections 79(3) and 79(3.1) of the *Pension Benefits Act* (Ontario) (the "PBA"), as amended by the *Pension Benefits Amendment Act, 2010* (the "Surplus Provisions"), based on our understanding of how the Financial Services Commission of Ontario ("FSCO") was proposing to interpret these sections. Recently, FSCO has published its interpretation of the Surplus Provisions on its website (see attached Q&As). We strongly disagree with FSCO's interpretation, but unless there is clarification by the government, FSCO's administration of the new wording will impose more onerous conditions on parties seeking to deal with surplus distribution on a full or partial plan wind up and will lead to more litigation. We do not believe that the government intended this result.

FSCO's Interpretation

In brief, FSCO has interpreted the Surplus Provisions as requiring that an applicant for a surplus withdrawal either:

- a) demonstrate that the pension plan provides for payment of surplus to the employer on the wind up of the plan and that 2/3rds of the members, the former members and the other persons entitled to payments from the plan have entered into a written agreement whereby they consent to the payment of surplus to the employer, or

- b) obtain the agreement of all (i.e., 100%) of the members, former members and other persons entitled to payments on the date of the wind up to the payment of surplus to the employer.

We strongly disagree that this is the correct interpretation of the Surplus Provisions based on the ordinary principles of statutory interpretation. We have met with FSCO policy and legal staff to see if they could be persuaded to change their position having regard to our very different legal analysis. We were advised, however, that FSCO's position is final, notwithstanding its inconsistency with stated government policy (including the August 24th Technical Backgrounder) and its negative impact on employers and members attempting to negotiate and implement surplus sharing arrangements.

Dealing first with (a) above (entitlement-based employer surplus withdrawal), FSCO's position appears to be based on its view that there is ambiguity in the wording of sections 79(3)(a) (full wind up) and 79(3.1)(a) (partial wind up) because section 8 of Regulation 909 (the "Surplus Regulation") is not expressly carved out of these new provisions. FSCO's position on these sections perpetuates the problem under the previous PBA wording which required the Superintendent to determine surplus entitlement in order to give effect to consent based surplus sharing arrangements. This is FSCO's position notwithstanding that this wording (in former 79(3)(b)) has been removed from the PBA.

Given FSCO's unwillingness to entertain reasonable alternative interpretations, an alternative solution to this problem must be found. That is, the Surplus Regulation should be amended to make it clear that it does not apply to these sections. We note that it would be open to FSCO to take a purposive approach to the new provisions and "read down" the consent provisions of the Surplus Regulation as applying only to the consent-based surplus sharing sections 79(3)(b) and 79(3.1)(b). We suspect that the government thought that this is the way it would be interpreted when they brought the new Surplus Provisions into force. Unfortunately, FSCO is not taking this approach.

With respect to (b) above (consent-based surplus sharing), even if there is ambiguity in the operation of the entitlement-based employer surplus withdrawal sections, there can, in our view, be no ambiguity in the meaning of sections 79(3)(b) and 79(3.1)(b). The language in these provisions tracks the language of the Surplus Regulation. In our opinion, the only reasonable interpretation is to import the two-thirds consent requirements of the Surplus Regulation into sections 79(3)(b) and 79(3.1)(b) of the PBA. Nevertheless, FSCO interprets sections 79(3)(b) and 79(3.1)(b) as requiring 100% member consent.

The effect of FSCO's position is to enshrine the law as it existed prior to the enactment of the Surplus Provisions in sections 79(3)(a) and 79(3.1)(a), and to impose the more onerous 100% member consent requirements as the "alternative" in sections 79(3)(b) and

79(3.1)(b). This is clearly not the intent of the reform legislation which was introduced to facilitate, not obstruct, surplus distributions on plan wind-up.

Frankly, we find FSCO's position surprising. At no time during all of the debates and discussions leading up to the introduction of Bill 236 was there any suggestion that the government's intent was to introduce more onerous surplus withdrawal provisions. Set out below are three quotes which we believe reflect the intention of the government to encourage consensual surplus sharing (emphasis added):

Surplus-sharing agreements

Currently, surplus cannot be paid out of a pension plan to an employer on the full or partial wind up of a pension plan unless the documents governing the pension plan permit the payment to the employer. The proposed amendments authorize the Superintendent to consent to the payment of surplus to the employer if the employer, the members, retired members and other beneficiaries have entered into a written surplus-sharing agreement that satisfies the prescribed requirements.

(Explanatory Notes to Bill 236)

Finally, the proposed amendments would enact the following additional measures:

The implementation of surplus-sharing agreements on full windup of a pension plan would be facilitated where written agreements reached by employers, members and pensioners comply with the existing prescribed rules. If such an agreement is reached, no review of historical plan documents such as plan texts and trust agreements would be required.

...

(Mr. Wayne Arthurs' Speech on the Second Reading of Bill 236)

Or third, legislation might mandate the distribution of surplus in accordance with a clear plan document or under a surplus-sharing agreement, subject to recourse to some dispute resolution process in the event of disagreement. Ontario stakeholders have become familiar with this third approach; they appear to favour it and it seems to work well, or at least it would if a more efficient dispute resolution process were available.

(Ontario Expert Commission Report)

These quotes make it clear that the government intended to facilitate surplus sharing and to distinguish entitlement-based employer surplus withdrawal from the alternative member consent-based process. FSCO has advised that it developed its position on a very literal reading of the Surplus Provisions, without regard to the government's intention. We believe that this approach is incorrect at law. To the extent there is any ambiguity in the statutory provisions, it is perfectly appropriate to consider extrinsic evidence of the government's intention in adopting the legislation. In addition, it is difficult to understand why FSCO, when faced with alternative interpretations, would choose the alternative that most strains the bounds of reasonableness, is contrary to the government's clearly stated intention, and is adverse to the interests of the pension stakeholders whose rights are most affected by the surplus sharing reforms.

Given FSCO's extraordinary position, it will be necessary to "fix" the legislation and the regulations so that the intention is crystal clear to the regulator. If the government does not do so, employers and members will both be disadvantaged after years of waiting for legislative relief.

We urge the government to address this problem as soon as possible. To assist, I would be pleased to meet with you or with Alex Mazer at your earliest convenience.

Yours very truly,

Ian J. McSweeney
IJM:sh

- c. Alex Mazer, *Director of Policy, Minister of Finance, Chair of Treasury Board and Chair of the Management Board of Cabinet*
Steve Orsini, *Associate Deputy Minister, Office of the Budget, Taxation and Pensions*
Bruce Macnaughton, *Ontario Ministry of Finance*
Philip Howell, *Superintendent of Financial Services for Ontario*