KOSKIE MINSKY

JUSTICE MATTERS

September 23, 2016

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Len Hatzis
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Len

Dear Mr. Hatzis:

Re: Legal Opinion Concerning Surplus Rights in regard to the Ontario Teachers' Pension Plan, the OPSEU Pension Plan, the British Columbia Municipal Pension Plan, the British Columbia Public Service Pension Plan, the British Columbia Teachers' Pension Plan and the British Columbia Colleges Pension Plan
Our File No.: 162080

You have requested our legal opinion concerning the authorities of the sponsors and plan administrators of the above-captioned Plans with respect to ongoing surpluses in those plans.

In general, the sponsors of these pension arrangements are governments and sometimes other employer associations (the employer sponsor), and trade unions (the employee sponsor, or 'partner'). The 'plan administrators' of each Plan are either boards of trustees or, in the case of the OTPP, a board of directors. Plan administrators are independent entities that owe fiduciary obligations to the members of the Plan they administer.

The constating documents for each Plan set out the respective rights of the sponsors of each arrangement, and describe as well the powers of the fiduciary administrator of each Plan. In some cases, there is a clear differentiation between the powers of the sponsors and the powers of the plan administrators; in other cases, both the sponsors and the fiduciary administrator may have powers with respect to the same issue.

Below, we briefly review the relevant provisions of the constating documents for each of these Plan arrangements. Then, we summarize our opinions concerning the respective powers of the Plan sponsors and the fiduciary administrators in regard to surpluses arising under each arrangement.

This opinion is based on the documents referenced herein. In the event that there are any other constating documents with respect to any of the Plans described below, the conclusions expressed in this opinion may change and cannot be relied upon.

In general, the Plans' constating documents sometimes refer to "surplus", and other times to "actuarial gains" or "excess assets". The term "surplus" may refer either to an ongoing surplus, or to a surplus that is crystalized upon the termination and wind-up of a plan. For the purposes of this opinion, we treat these terms as being equivalent.

I. ONTARIO PLANS

A. *Ontario Teachers' Pension Plan ("OTPP")*

The OTPP is governed by:

(a) the *Teachers' Pension Act*, R.S.O. 1990, c.T.1 (the "TPA");

(b) Plan text for the OTPP (the "Plan text");

(c) an Agreement between Her Majesty the Queen in right of the Province of Ontario represented by the Minister of Education and Training (the "Minister") and The Ontario Teachers' Federation represented by its Executive (the "OTF"), dated July 15, 1991 (the "Partners' Agreement"), as amended; and

(d) a Funding Management Policy, attached as Appendix "A" to the Partners Agreement.

The TPA provides, at sections 5(1) and 5(1.1), that the Minister of Finance is required to pay from the Consolidated Revenue Fund contributions payable by the Minister of Education and provides that the total amount of such contributions "...shall not exceed the amount of contributions payable by or on behalf of active Plan members in respect of credited service for that year" (section 5(1.1)). The Plan text requires, at section 25, "that the Minister of Education contribute to the OTPP an amount equal to the required contributions made during the year before the preceding year by or on behalf of those members for whom the Minister is required to make employer contributions" (section 25(1)). Additional provisions of section 25 of the Plan text contain other provisions with respect to the Minister's obligation to make contributions to the OTPP.

The Partners' Agreement stipulates, at section 8 that the Partners are generally responsible for benefits and contribution rates:

> "8. The partners will be responsible for designing the plan structure, setting the benefits of the plan, developing new policy, deciding what the contribution rate will be, what the funding levels, margins and contingency reserves will be, making changes to the plan, this agreement or other plan documents, deciding whether or not to file a valuation more frequently than required by the *Pension Benefits Act,* appointing the Board, and defining the role of the Board."

By contrast, section 19 of the Partners Agreement sets out the responsibilities of the OTPP Board, and does not confer any authority on the OTPP Board to change benefits or contribution rates that are provided under the OTPP. This means that the OTPP Board has no authority to use ongoing surpluses either to improve benefits or reduce contributions. Only the partners to the OTPP have the authority to utilize ongoing surpluses.

The process governing the use of ongoing surpluses by th Partners is set out in the partners' Agreement. It anticipates that the OTPP Board will prepare an actuarial valuation of the OTPP every three years (section 73). The Partners are then required to bargain in good faith with respect to the disposition of any surpluses, or any adjustments to address Plan deficiencies (section 74). Section 77 of the Partners' Agreement anticipates that the Partners may appoint a mediator to assist them and sections 84 and 86 of the Partners' Agreement provide for the appointment of a Board of Arbitration to make a final and binding order with respect to the utilization of an ongoing surplus disclosed by the actuarial valuation. A Board of Arbitration is empowered to change contribution rates and/or benefits under the Plan, or to keep an amount of surplus in reserve, but is subject to certain limits that are set out in section 92.

B. The OPSEU Pension Plan ("OPTrust")

The OPTrust is governed by:

(a) a Sponsorship Agreement made as of April 18, 1994 between Her Majesty the Queen in right of the Province of Ontario as represented by the Chair of the Management Board of Cabinet ("Ontario") and the Ontario Public Service Employees' Union ("OPSEU") (the "Sponsorship Agreement");

(b) an Agreement and Declaration of Trust of the Trust Fund dated October 25, 1994 (the "Trust Agreement"); and

(c) OPTrust Plan text.

Section 56 of the Sponsorship Agreement addresses the use of actuarial gains disclosed under an actuarial valuation report prepared after March 31, 1997. Section 56(d) provides that once the 'Transferred Initial Unfunded Liability' of the OPTrust has been fully liquidated (we understand that it has been liquidated), then actuarial gains disclosed by a valuation of the OPTrust are divided into two equal pools, one of which "...shall be used for the benefit of Ontario, to be applied against any special payments required to be made by Ontario and thereafter to reduce Ontario's normal costs..." and the other pool is to be used by OPSEU for the benefit of Plan Members (section 56(c) of the Sponsorship Agreement). Section 56(d) also anticipates that OPSEU and Ontario may collectively bargain an allocation of gains that is different from 50/50. This means that each of Ontario and OPSEU may utilize their pools, subject to applicable legislation, without the agreement of the other party.

The Trust Agreement provides that only the Sponsors (Ontario and OPSEU) may amend the Plan (section 4.02), and further specifies that the plan administrator, i.e. the Board of Trustees of the OPTrust, "...shall have no power to amend either the Plan or this Agreement" (section 4.03). Accordingly, under the Sponsorship Agreement and Trust Agreement, the OPTrust plan administrator has no authority to utilize actuarial gains. Rather, that authority is conferred, by section 56 of the Sponsorship Agreement on the Sponsors, being Ontario and OPSEU. Moreover, the OPTrust Board of Trustees is not able to increase OPTrust benefits using ongoing surpluses, as only the Sponsors of the OPTrust are able to amend the Plan.

II. BRITISH COLUMBIA PLANS

In British Columbia, the Municipal Pension Plan, the Colleges Pension Plan, the Teachers' Pension Plan and the Public Sector Pension Plan were all converted from employer sponsorred pension plans to jointly sponsored plans in accordance with the *Public Sector Pension Plans Act*, S.B.C. 1999, c.44 (the PSPPA").

A. British Columbia Municipal Pension Plan (the "MPP")

The MPP is governed by:

(a) Municipal Pension Plan Joint Trust Agreement (consolidated), updated to September 30, 2015 (the "MPP Trust Agreement"); and

(b) Municipal Pension Plan Rules effective April 1, 2000 (current to November 19, 2015).

Under the MPP Trust Agreement, the following rules govern the Sponsors of the MPP and the Board of Trustees of that arrangement in regard to Plan surpluses:

The Board of Trustees may amend the MPP to utilize surpluses under section 11.5, provided that the conditions in 11.5(a) and (b) are met. These provisions permit the Board of Trustees to utilize Plan surpluses to improve Plan benefits for Plan members, provided that the surplus is sufficient to fund the benefit improvement "based on the open group of Plan Members and using a twenty-five year amortization schedule for the Plan actuarial excess to be used to fund the benefit improvement". Any benefit improvement made by the Board of Trustees cannot result in increased contribution rates nor can it create an unfunded liability. Any such improvement must also be consistent with the Trustees' fiduciary responsibilities. Within these parameters, however, the Board of Trustees of the MPP does have the authority to utilize Plan surpluses on an ongoing basis.

The MPP Partners may also amend the MPP using ongoing surpluses in accordance with section 11.3 of the MPP Trust Agreement. This section permits the Partners to direct the Board of Trustees to amend the Plan rules and requires the Board of Trustees to comply with that direction so long as three conditions are met: (a) the Partners first receive and consider the advice of the Board respecting the proposed amendment, (b) the proposed amendment is compliant with the Trustees' fiduciary responsibilities and (c) the proposed amendment will not result in the Plan failing to be funded in accordance with the PBSA going concern funding requirements. Significantly, the MPP constating documents contain no right of recourse to arbitration or other final and binding dispute resolution in the event that the MPP Partners cannot agree on surplus utilization. This contrasts with the OTPP Partners' Agreement, which does provide for third party determinations of differences arising between Partners with respect to surplus uses.

Accordingly, under the MPP, both the Partners and the plan administrator may utilize Plan surpluses by amending the Plan terms in regard to either or both of contribution rates and benefits.

It should be noted that, during a Transitional Period, the use of actuarial gains in the MPP is prescribed by Appendix "B" to the MPP Joint Trust Agreement. During the Transitional Period, all gains must first be used to eliminate unfunded liabilities. Then, actuarial gains must be applied to both (a) reconfigure employer contribution rates and (b) make specified benefit improvements. Employer contribution rates are to be reconfigured by eliminating the 'doubling' feature of employer contribution rates applicable to employees in certain Plan membership categories once they reach either 45 or 50 years of age (depending on the employment category). The transitional provisions prescribe the new base rates for each of the 5 categories of members in the BC, but also stipulate that employer contribution rates for two of the five categories will be increased beyond those base rates to reflect the differential current service cost for those two groups. The surplus implications of the reconfiguration of employer contribution rates are not predictable, and depend, at least in part, on the relationship between the 'base rates' under the transitional provisions and the actual rates being paid by employers at the time of the reconfiguration. Once the employer contribution rates are reconfigured and the specified benefit improvements are made, then 50% of any additional actuarial excesses must be used to fund a contribution rate stabilization reserve, and the balance of the actuarial excess must be transferred to the Inflation Adjustment Account to an aggregate total of $1 billion. The contribution rate stabilization reserve is intended to be shared on an equal (50/50) basis between Plan members and employers in order to maintain or reduce future contribution rates. Until such time as the objectives identified for the Transitional Period are fulfilled, there is no discretion left to either the Partners or the Board of Trustees to utilize ongoing MPP surpluses.

B. British Columbia Public Service Pension Plan ("PSPP")

The PSPP Joint Trust Agreement contains provisions regarding the authority of the Partners and the Board of Trustees to utilize ongoing surpluses that are equivalent to the provisions cited above with respect to the MPP. Accordingly, under the PSPP, both the Partners and the Board of Trustees have the authority, in the circumstances and subject to the conditions described in relation to the MPP, to utilize ongoing surpluses to reduce contributions or improve Plan Member benefits.

In this regard, section 10.3(c) of the PSPP Joint Trust Agreement expressly provides the Board of Trustees[1] with the authority to apply ongoing surpluses (the term used in the PSPP Joint Trust Agreement is "surplus assets") in one or more of the following manners:

1. transfer all or portions of surplus assets to the reserve established within the Pension Fund for stabilising contribution rates;

2. transfer all or portion of the surplus assets to the Inflation Adjustment Account;

3. apply all or a portion of the surplus assets to an equal reduction or elimination of Employer and Plan Member contributions to the Basic Account for a period of time;

4. apply all or a portion of the surplus assets to fund changes to the PSPP's benefit provisions provided that any change to benefits does not result in contribution rate increases, does not create or increase an unfunded liability, is consistent with the Trustees' fiduciary obligations and does not conflict the requirement (in s. 13.5) that, upon the termination and wind-up of the PSPP any remaining assets are to be equally shared between the employees and the employers.

At the same time, as is the case for the MPP, the Partners have the authority, pursuant to s.11.3 of the PSPP Joint Trust Agreement, to direct the Board of Trustees to amend the PSPP Plan rules and change either or both of the PSPP's contribution rates or benefits so long as the

[1] It is noteworthy that s. 14.2(c) of the PSPP Joint Trust Agreement stipulates that the Trustees are not acting in a fiduciary capacity when they make decisions that apply ongoing surpluses, and may take account of the financial and other interests of the party that appointed them.

Partners have received and considered the advice of the Board respecting both the cost and administrative impact of any proposed amendments, the amendment is not inconsistent with the Trustees' fiduciary responsibilities or any funding policy adopted by the board and the proposed amendment will not result in the PSPP failing to be funded in accordance with British Columbia's Pension Benefits Standards Act. Significantly, the PSPP constating documents contain no right of recourse to arbitration or other final and binding dispute resolution in the event that the MPP Partners cannot agree on surplus utilization. This contrasts with the OTPP Partners' Agreement, which does provide for third party determinations of differences arising between Partners with respect to surplus uses.

Section 15.4 of the PSPP Joint Trust Agreement provides that certain benefit improvements must be made using Plan surpluses that are identified in actuarial valuations dated March 31, 2001 and March 31, 2002. Unlike with respect to the MPP, the PSPP does not appear to have an indefinite 'Transitional Process' that commits all ongoing surpluses until the Transitional objectives are accomplished. Rather, the PSPP Trustees and Partners have had discretionary authority with respect to ongoing PSPP surpluses

C. ***British Columbia Teachers Pension Plan ("TPP")***

The TPP is governed by:

(a) a Joint Trust Agreement made as of April 2, 2001 between Her Majesty the Queen in right of the Province of British Columbia as represented by the Minister of Finance and Corporate Relations (the "Government") and the British Columbia Teachers' Federation ("BCTF");

(b) the TPP Rules.

The Joint Trust Agreement contains provisions permitting both the Partners and the TPP Board of Trustees to amend the Plan rules using ongoing Plan surpluses (section 11 of the Joint Trust Agreement). These provisions are the equivalent of the MPP Joint Trust Agreement provisions regarding the same matters, as described above. In particular, it is significant that the TPP constating documents contain no right of recourse to arbitration or other final and binding dispute resolution for either Partner in the event that the they cannot agree on surplus utilization. This contrasts with the OTPP Partners' Agreement, which does provide for third party determinations of differences arising between Partners with respect to surplus uses.

As well, Appendix "B" to the TPP Joint Trust Agreement adopts special funding rules for a "Transitional Period" during which the Board of Trustees is directed to use surpluses to achieve specified contribution and benefit improvement outcomes. The transitional objectives for the TPP are not the same as for the MPP, although they entail both contribution rate changes and benefit improvements. In the case of the TPP, however, the transitional provisions build in a 4% reduction in the employer contribution rate from its July 1, 2010 level. As with the MPP, the Transitional Period is of indefinite duration, and only ends when the transitional objectives have been satisfied. During the transitional period, all ongoing surpluses are committed to the transitional objectives and no ongoing surpluses are available for discretionary reductions in contributions or surplus withdrawals.

D. *British Columbia Colleges Pension Plan ("CPP")*

The CPP is governed by:

(c) the CPP Joint Trust Agreement made April 4, 2011; and

(d) the CPP rules, effective June 22, 2012 (current to April 1, 2016).

The CPP Joint Trust Agreement allocates powers and authorities with respect to ongoing surpluses in the same way as the other BC Plans.

The Partners have the authority (s.14(2) of the Joint trust Agreement) to direct the Board to amend the Plan rules, and the Plan Board is required to amend those rules, provided that the Partners "first receive and consider the advice of the Board respecting both the cost and the administrative impact of implementing the proposed amendment" and the proposed amendment is not inconsistent with applicable law or the Trustees' fiduciary responsibilities. Significantly, the CPP constating documents contain no right of recourse to arbitration or other final and binding dispute resolution in the event that the CPP Partners cannot agree on surplus utilization. This contrasts with the OTPP Partners' Agreement, which does provide for third party determinations of differences arising between Partners with respect to surplus uses

Pursuant to subsection 14(4) of the CPP Joint Trust Agreement, the Board of Trustees is also permitted to amend the Plan rules and to utilize Plan surpluses so long as there is no resulting increased in contribution rates, there is no creation of, or increase in, an unfunded liability and the proposed amendment is consistent with the Trustees' fiduciary responsibilities. As with the other BC Plans, the Board of Trustees must use a twenty-five year period for the amortization of the Plan surplus.

Unlike the MPP, TPP and PSPP, the CPP Joint Trust Agreement has no transitional provisions that direct the Board of Trustees as to the application of ongoing surpluses during a transitional period.

III. SUMMARY AND CONCLUSIONS

A. *Ontario Plans*

OTPP - The governance arrangements with respect to the OTPP provide that the Partners that sponsor that arrangement, being the Minister of Education and the OTF, may utilize ongoing surpluses as they believe appropriate, subject only to the Ontario *Pension Benefits Act*, R.S.O. 1990, c.P.8 (the "Ontario PBA"). The Board of Directors of the OTPP, being the OTPP administrator for purposes of the PBA, has no authority with respect to the use of Plan surpluses. The OTPP Partners' Agreement anticipates that the Partners will, on a triennial basis, review the results of a preliminary actuarial valuation and determine whether and how they wish to adjust Plan benefits or contribution rates in view of any existing funding deficiencies or ongoing surpluses. The Partners are obliged to bargain in good faith with each other with respect to the disposition of ongoing surpluses, and may have recourse to mediation and final and binding arbitration should they not reach an agreement on their own. An arbitration panel may apply ongoing surpluses to improve benefits or reduce contributions, subject to the limitations set out in section 92 of the Partners Agreement.

OPTrust - The OPTrust governing documents also stipulate that it is the Sponsors of the OPTrust, being the Province of Ontario and OPSEU, who have the authority to utilize ongoing Plan surpluses. OPTrust's Board of Trustees, being the OPTrust administrator for purposes of the Ontario PBA, has no authority to utilize ongoing Plan surpluses. Pursuant to section 56(c) of the OPTrust Sponsorship Agreement, ongoing surpluses are divided into two equal pools (although the equal division may be altered through collective bargaining), and each of Ontario and OPSEU may utilize those pools without the agreement of the other party. In other words, Ontario may unilaterally determine the disposition of its pool, and OPSEU may unilaterally determine the disposition of its pool, subject only to Ontario's PBA. Neither OPSEU nor Ontario requires the agreement of the other party in order to utilize its allocated amount of ongoing surplus.

B. BC Plans

Ongoing Surpluses - All of the BC Plans follow the same pattern with respect to the authority to use ongoing surpluses. In the normal course, the Boards of Trustees of the BC Plans, unlike their Ontario counterparts, are permitted to utilize ongoing surpluses through the amendment of the Plan rules governing contributions and benefits, so long as the amendment of the Plan rules does not result in an increased contribution rate for employees or employers, does not create or increase an unfunded liability in the Plan and is otherwise compliant with applicable legislation and the Trustees' fiduciary obligations.

At the same time, each of the BC Plans also permits the Plan Partners to utilize ongoing surpluses by directing the Board of Trustees to amend the Plan rules. The Partners may so direct the Board of Trustees after receiving advice from the Board with respect to the costs of any Plan amendment and the administrative implications of such an amendment, and so long as the proposed amendment is compliant with law and with the Trustees' fiduciary obligations. However, unlike for the OTPP, the BC Plans' constating documents provide neither Partner with a right of recourse to a third party for a final and binding determination concerning surplus utilization.

Transitional Period - In addition, three of the four BC Plans we have reviewed (MPP, TPP and, for only two years, the PSPP) contain special rules governing the utilization of ongoing surpluses during a "Transitional Period". In these cases, the Transitional rules require that ongoing surpluses that emerge during the Transitional Period are to be used to restructure the employer contribution obligation and improve benefits. In the cases of the MPP and TPP, the Transitional Periods do not come to an end until all of the intended uses of ongoing surplus during the Transitional Period have been fulfilled. We are not currently aware as to whether the Transitional Periods for the MPP and the TPP remain ongoing, or have terminated. Until such time as the objectives identified for the Transitional Periods are fulfilled, there is no discretion left to either the Partners or the Board of Trustees to utilize ongoing MPP surpluses.

We trust that these comments have been of assistance to you. Should you have any questions in regard to them, please do not hesitate to contact the undersigned.

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JUSTICE MATTERS

Yours truly,

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