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February 28, 2018

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Karen Golden, Senior Counsel
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Ministry of the Attorney General
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Dear Ms. Golden and Ms. Matos:

Re: OPTrust Select Governance Issues

You have asked for our legal opinion about the proposal to permit new employers within Ontario's broader public sector and not-for-profit sector and their unionized and non-unionized employees to join the Ontario Public Service Employees' Union Pension Plan (the "Plan") under a distinct benefit provision referred to as OPTrust Select. You have provided us with the draft legal opinion prepared by Paul Litner and Anna Zalewski dated February 20, 2018 prepared for OPTrust (the "Osler Opinion") and asked us to consider the jointly-sponsored pension plan ("JSPP") governance implications from the perspective of the Ontario Government ("Ontario").

The Osler Opinion provides a comprehensive background and analysis of the issues from the perspective of the OPTrust. We have not repeated this background here but rely upon it heavily for our analysis. Unless otherwise noted, we have adopted the definitions from the Osler Opinion in this letter.

Summary of Conclusions

In our view, the Sponsorship Agreement and the *Ontario Public Service Employees' Union Act, 1994*[1] (the "OPSEU Act") do not relieve either sponsor of the consequences

[1] S.O. 1994, c. 17, s. 143, Sched.

of having representative status under the JSPP provisions of the Ontario *Pension Benefits Act*[2] (the "PBA").

The risk of a finding that the Plan does not comply with the JSPP requirements if the obligations flowing from representative status are alleged to have been improperly exercised is low, but the consequences of such a finding would be significant both reputationally and legally for the sponsors and for OPTrust. In our view, strategies to address this risk and satisfy the representative status of the sponsors may include some combination of the following:

- acknowledge Ontario's responsibility to OPTrust Select employers in governance documentation and the participation agreement and revise the Sponsorship Agreement to the extent it can be interpreted to preclude the sponsors from taking into account these interests,

- provide clear disclosure to, and receive acknowledgment by, OPTrust Select employers regarding their restricted role in Plan governance in the participation agreement (this could be done on the OPTrust Select member side also by the relevant union or as part of enrolment for non-represented individuals),

- develop a decision-making framework under which the OPTrust Select employers and other non-sponsor employers would be consulted or have a "voice" in all or certain sponsor decisions affecting OPTrust Select, or

- establish an OPTrust Select employer advisory committee.

These measures are consistent with the Plan's JSPP structure and would maximize the sponsors' ability to defend a challenge to the Plan's status as such, limit the potential for OPTrust Select employer or member complaints, and provide certainty on the degree of "representation" provided by the sponsors to OPTrust constituents. These measures may also make the Plan more attractive to new employers.

Key Facts and Assumptions

The background to the establishment of the Plan, the Sponsorship Agreement, Trust Agreement and the OPSEU Act (collectively referred to as the "Governing Documentation") is important to this analysis and is comprehensively set out in the Osler Opinion. For the purposes of our analysis, the following are the key facts and assumptions on which we rely:

[2] R.S.O. 1990, c. P. 8.

1. The Plan is a JSPP and the sponsors wish to maintain its JSPP status. The current JSPP provisions of the PBA were not in effect at the time the Plan was created. A clear statutory framework was established through the OPSEU Act and the PBA to allow the Plan to operate on a jointly-sponsored basis commencing in 1995. The JSPP provisions were enacted in 2006 and were followed by a certification requirement in 2011. The OPTrust certified that the Plan was operated in compliance with the JSPP governance requirements.

2. The Plan currently includes the participation of unaffiliated employers, including the OPTrust which has been a participating employer since the Plan's inception. The purpose of the "single employer pension plan" characterization in the OPSEU Act and Sponsorship Agreement should be interpreted in that context.

3. The Plan was originally designed to have the same benefit provisions as the Public Sector Pension Plan applicable to OPSEU-represented employees. The Plan documentation insofar as it negates a role for other employers in the governance of the Plan should be interpreted in that context.

4. Adding OPTrust Select as a new and separate benefit and contribution schedule for non-affiliated employers and their employees in which Ontario does not participate as an employer is a novel undertaking in a JSPP.

JSPP Requirements

The main governance-related requirements that must be satisfied for a pension plan to be considered a JSPP are found in subsection 3.1(1) of the PBA Regulation:

> 3. The employers or any persons or entities who make contributions on behalf of the employers or represent the employers and the members of the pension plan or any representatives of the members are jointly responsible for making all decisions about the terms and conditions of the pension plan and any amendments to the pension plan.
>
> 4. The employers or any persons or entities who make contributions on behalf of the employers or represent the employers and the members of the pension plan or any representatives of the members are jointly responsible for making all decisions regarding,
>
> i. the appointment of the administrator of the plan, or

ii. the appointment or selection of persons as members of any body or entity referred to in clause 8 (1) (b), (c), (e), (f) or (h) of the Act that is the administrator of the plan.[3]

Notably, a pension plan is not required to meet the JSPP requirements if it is not intended to be governed by the PBA's JSPP provisions. However, it is necessary to meet the PBA's JSPP requirements in order to retain the special rights and benefits enjoyed by JSPPs under the PBA.[4]

Analysis

Conflict Between the Pension Benefits Act and the OPSEU Act & Sponsorship Agreement

As noted in the Osler Opinion, the starting point of our analysis is whether there is a conflict between the OPSEU Act and the Sponsorship Agreement on the one hand, and the PBA on the other. In *Thibodeau v. Air Canada* ("*Thibodeau*"), the Supreme Court of Canada (the "Supreme Court") was tasked with resolving whether a claim for damages under certain federal legislation was in conflict with the terms of an international convention that limited the liability of international air carriers and which formed part of Canadian law under other federal legislation.[5] In addressing the issue, the Supreme Court commented on the approach to potential conflicts between statutes from the same legislature:

> The legal framework that governs this question is not complicated. First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that <u>even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results</u>. This

[3] R.R.O. 1990, Reg. 909: General.

[4] The JSPP-specific and JSPP-related provisions based on the current PBA are summarized in the Osler Opinion. The key provisions are the exemption from solvency funding and the requirement for members and employers to share the obligation to fund going concern unfunded liabilities. There are also exemptions from PBGF assessments consistent with Plan members not having PBGF coverage on the wind up of the Plan, and protection from Superintendent-initiated wind ups that have been granted in respect of the Plan that are not reliant on its JSPP status. In addition, the Ministry of Finance recently released a consultation paper regarding changes to Ontario's funding regime. Our reading of the consultation paper is that the Ministry of Finance intends to extend relief from solvency funding to all plans regardless of their status unless the solvency funded ratio is less than 85%. In addition, the consultation paper indicated that named JSPPs will be granted an exception from the obligation to include a PfAD funding cushion in the calculation of current service costs and going concern special payments.

[5] 2014 SCC 67 (CanLII).

> presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other. [emphasis added]

Based on the *Thibodeau* decision, in our view, the JSPP governance requirements, including the representation requirements set out in subsection 3.1(1) of the PBA Regulation, co-exist with the requirements of the OPSEU Act and the Sponsorship Agreement unless there is a direct conflict.

The first potential conflict identified in the Osler Opinion to ground the argument that Ontario is not required to represent any interests other than its own is that the Plan is deemed not to be a multi-employer pension plan (in subsection 4(6) of the OPSEU Act) and to be a single-employer pension plan (in section 2 of the Sponsorship Agreement). Without this provision and given that OPTrust employees have participated in the Plan since its inception, the Plan would have been permitted to reduce accrued benefits as a multi-employer pension plan and would have been required to meet certain representational requirements on its board of trustees. In our view, the characterization of the Plan as a single-employer pension plan can be interpreted as protection for accrued benefit rights and the trustee appointment rights agreed upon, rather than as an authorization for Ontario to act on its own accord without consideration of the interests of other participating employers. In our view, there is no conflict between the Plan being deemed not to be a multi-employer pension plan and the JSPP requirement that employers be represented in the governance structure of the Plan.

The Osler Opinion also reviews the Board of Trustees appointment rights contained in section 25 of the Sponsorship Agreement, including the respective rights of Ontario and OPSEU to each appoint five (5) trustees and the protection of these rights of appointment from amendment (set out in section 20 of the Sponsorship Agreement and section 10.01(e) of the Trust Agreement). Notably, section 11 of the Sponsorship Agreement also provides that each of Ontario and OPSEU may designate one or more persons to act in its place under the Sponsorship Agreement:

> Ontario may designate one or more persons to act in Ontario's place under this agreement. OPSEU may designate one or more person to act in its place under this agreement.

In our opinion, taking the above context into account, there is no direct conflict between the PBA JSPP governance requirement that employers be represented in decisions regarding the appointment of trustees and the exclusive rights of Ontario and OPSEU to appoint trustees pursuant to the Sponsorship Agreement and Trust Agreement. The

Governing Documentation can and would, in our view, be read harmoniously with the PBA JSPP governance requirements that must be met in order for the Plan to remain a JSPP for PBA purposes.

The Osler Opinion also references sections 20 and 21 of the Sponsorship Agreement. Section 20 allows Ontario and OPSEU to make amendments to the Sponsorship Agreement, Trust Agreement, Plan or Plan documentation without the agreement of other employers, trade unions or persons subject to the certain restrictions on the types of amendments that are permissible.[6] Section 21 allows for collective bargaining by bargaining agents other than OPSEU for certain types of benefit improvements subject to funding requirements being met. In our view, the creation of a separate benefits schedule, OPTrust Select, in which Ontario will not participate as an employer was not contemplated by the Sponsorship Agreement. There is nothing in the OPSEU Act precluding the sponsors from representing the interests of the OPTrust Select employers and non-OPSEU represented members or even amending the Sponsorship Agreement to provide for input from employers or non-OPSEU members into decisions made about the Plan or the appointment of trustees.

In our view, there is no direct conflict between the OPSEU Act and the Sponsorship Agreement and the PBA JSPP governance requirements. To meet the requirements set out in paragraphs 3 and 4 of subsection 3.1(1) of the PBA Regulation which allow the Plan to retain JSPP status, Ontario and OPSEU would need to acknowledge that they represent the interests of OPTrust Select employers and non-OPSEU members at the sponsorship table and in their appointment of trustees. In our opinion, it is permissible for Ontario to represent unaffiliated employers in OPTrust Select and for OPSEU to represent all OPTrust Select members (whether represented by OPSEU, by another trade union or unrepresented for labour relations purposes) and for the Plan to retain its status as a JSPP without contravening the Governing Documentation and the JSPP governance requirements in the PBA Regulation.

As the Osler Opinion makes clear, the Plan currently has unaffiliated participating employers and non-OPSEU represented members who do not have explicit governance rights. Other Ontario JSPPs also have participating employers and groups of members without direct responsibility for making decisions under the governance structure for those plans. In our view, representation is currently implicit in the existing Plan structure and in that of other JSPPs where there is a single benefit formula and corresponding funding requirements for all employers and members. What is different with OPTrust Select is that it is a new, separate benefit schedule under which Ontario is

[6] These restrictions include that amendments cannot: be inconsistent with the purposes of the Trust Fund, use the Trust Fund for purposes other than benefits for members, authorize any funds to be returned to any participating employer, eliminate audit and information rights of the two sponsors, allow administration other than by an equal number of trustees appointed by each of Ontario and OPSEU; or remove the right of the sponsors to appoint the trustees.

not a participating employer and therefore would not be impacted by any changes to benefits or contributions. In this case, Ontario does not necessarily have any commonality of interest with the OPTrust Select employers. Based on our review of other JSPPs' governance structures, we are not aware of any JSPP with more than one benefit schedule where the members and employers who participate in that schedule do not have some form of representation rights.

Representation Rights

For the reasons set out above, in our view, the sponsors must "represent" OPTrust Select employers and members to have a strong argument that the Plan retains its JSPP status under the PBA. Despite the fact that the Governing Documentation precludes direct involvement in Plan governance either for sponsor decisions or for the appointment of trustees, OPSEU and Ontario would, in fact, represent the new constituents. We agree that the PBA JSPP governance rules do not prescribe any particular form of joint decision-making and instead leave that to the stakeholders to determine. While one could take the position that having representation status does not require the sponsors to act in the interests of the OPTrust Select employers and members, our opinion is that the requirement to represent OPTrust Select employers and members would be interpreted more broadly. Similarly, an acknowledgement of the requirement to represent their interests will likely be expected by OPTrust Select employers as a condition of joining OPTrust Select.

(i) Scope of the Requirement to Represent

We agree with the Osler Opinion that the meaning of "represent" is contextual and varies across circumstances.

In Ontario, the sponsors of the large JSPPs are employer/employers' groups and one or more union(s)/employee groups. Funding of deficits and the use of surpluses in these JSPPs is effectively negotiated between the employer(s) and union(s), similar to a labour negotiation. Within this context, in our view, labour relations jurisprudence is instructive in determining the what it means to represent employers and members.

In the labour law context, the scope of a union's duty of representation is a complex issue that has been considered in a variety of adjudicative settings. An in-depth examination of the exact content of the scope of representation in the labour law context is beyond the current analysis. However, the following statement by the Supreme Court is instructive:

> In the Canadian labour relations system, a union's duty of representation is one of the corollaries of the function of representation … in respect of the bargaining unit and the employees who make up that unit. The union owes a duty of

diligent and competent representation to the bargaining unit as a whole.[7] The duty of representation is best understood as "an obligation of means"[8] whereby the interests of employees are pursued within the labour relations context of the workplace [emphasis added].[9]

Pension minimum standards legislation is also instructive to considering the meaning of representation in the JSPP context insofar as it contemplates the appointment of "representatives" in various circumstances. New pension advisory committee ("PAC") provisions were recently introduced under the PBA.[10] The legislated purpose of the PAC is to (a) monitor the administration of the pension plan; (b) to make recommendations to the administrator respecting the administration of the pension plan; and (c) to promote awareness and understanding of the pension plan. The PBA provides that each class of members and retired members are entitled to appoint representatives to the PAC. In this context, it is reasonable to infer that the purpose of representatives is to advocate for, or to "give a voice to", the interests of the respective groups.

The federal *Pension Benefits Standards Act, 1985* includes provisions which set out a process whereby employers and representatives can negotiate a workout arrangement in cases where pension funding obligations jeopardize the financial viability of the employer.[11] That process treats pension plans' unionized active members, non-unionized active members and beneficiaries as distinct groups with separate commonalities of interest. The legislation requires that non-unionized active members and beneficiaries are to be represented by court-appointed representatives who have the exclusive authority to negotiate on their behalf. Courts are required by regulation to appoint only those individuals who are "capable of fairly and adequately representing the interests of the persons that they represent" and who do "not have an interest that is in conflict with the interests of the persons represented."[12]

In analysing the meaning of representation under the PBA JSPP governance rules, we also considered whether the duty of good faith owed by pension plan sponsors to plan beneficiaries would impose any additional duties on Ontario or OPSEU. The caselaw suggests that a sponsor's duty of good faith prohibits the sponsor from acting in an underhanded manner or for an improper or collateral purpose when making decisions

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[7] *Tremblay v. Syndicat des employées et employés professionnels-les et de bureau, section locale 57*, 2002 SCC 44 (CanLII), at para. 20.

[8] *Ibid*.

[9] *Fischer v. Pemberton* 1969 CanLII 726 (BC SC).

[10] *Supra* note 2, s. 24.

[11] R.S.C., 1985, c. 32 (2nd Supp.), ss. 29.01 to 29.3.

[12] *Pension Benefits Standards Regulations, 1985*, SOR/87-19, s. 10.7.

under a pension plan that impact plan beneficiaries.[13] We raise this for completeness although, in our view, the caselaw on this issue does not provide meaningful guidance on the meaning or scope of the sponsors' representative status under a JSPP.

Winnipeg (City) v. All Members of the City of Winnipeg Employee Benefits Program provides a helpful explanation in the pension context on the meaning of representation and why it is important.[14] One of the issues considered in that case was whether a group of retirees should be given a position on the Board of Trustees. In that case, the retirees were found to have made "a strong case for direct representation on the Board simply by virtue of the fact that they have a separate and distinct position which deserves a voice and requires protection."[15] The trial judge explained:

> I do not overlook that the retirees are not represented under the current Program and that it is the variation of that Program, not the basic Plan itself, which is the subject of this application. So, in one sense with respect to governance, the retirees would be no worse off than they are under the present Program. Be that as it may, the retirees should be represented on the Board and what makes the difference now is that under the new Plan not only would they have no representation but they would have no guarantee. The loss of the guarantee makes it even more important that they be represented so that they will have an opportunity to promote and influence decisions designed to protect and strengthen the financial viability of the pension fund.[16] [emphasis added].

Having regard to the above, in our view, a court or decision maker would be unlikely to construe the PBA JSPP representation requirements narrowly. Rather, representation would most likely be viewed as a requirement to (1) act competently and (2) take constituents' interests into account.[17]

(ii) Form of Representation

Representation can come in many forms. In our view, the more significant risks of challenge by OPTrust Select participants are for decisions made by the sponsors - for example, a decision to increase contributions to fund the OPTrust Select benefits rather than decisions made by OPTrust in its fiduciary capacity.

From the employer perspective, the risk of challenge by OPTrust Select employers can be categorized based on whether the challenges are to decisions made by the sponsors

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[13] See *Lloyd v. Imperial Oil Limited*, 2008 ABQB 379 (CanLII).

[14] 2002 MBQB 158 (CanLII).

[15] *Ibid* at para. 79.

[16] *Ibid* at para. 83.

to amend the Plan terms, such as contribution increases, or if they are trustee decisions which are indirectly subject to challenge based on the sponsors' appointment of the trustees.

Under the proposed Plan amendments for OPTrust Select, decisions to grant inflation adjustments are made by OPTrust under section A10. Decisions to grant adjustments to career average earnings may be made by OPTrust under section A11. These decisions will therefore not made by the sponsors, but instead would be made by OPTrust, acting as a fiduciary in the best interests of all members of the Plan. We have assumed that criteria to grant these improvements would be reflected in the Plan's funding policy and such improvements could not be granted without adequate funding reserves.[18] These decisions could impact active, former and retired members but they would not directly impact employers unless these improvement results in increased funding requirements in the future.

A. Sponsor Decisions

A sponsor decision to amend the Plan terms may attract a challenge from the participating employers members of OPTrust Select, or both, if the result is a contribution increase or a benefit improvement that is not fully funded such that a future contribution increase becomes more likely. A sponsor decision to reduce future benefit accruals could also potentially attract a challenge from OPTrust Select employers or members. A range of possible alternatives may help mitigate the risk of challenge to Ontario's sponsor decisions by OPTrust Select employers:

- provide OPTrust Select employers with a "seat at the table" for all sponsor decisions affecting OPTrust Select,
- provide OPTrust Select employers the right to have a non-voting representative attend sponsor meetings to discuss OPTrust Select amendments,
- establish an OPTrust Select employer committee with the right to vote on material amendments to the OPTrust Select contribution rate to inform the position of Ontario in sponsorship discussions with OPSEU,
- require Ontario to consult with OPTrust Select employers prior to making a sponsor decision affecting OPTrust Select,

[18] These assumptions would provide some degree of protection to OPTrust Select employers and OPTrust Select active members that such improvements are less likely to result in higher future contributions or reduction to the OPTrust Select basic benefit formula for future service.

- establish an OPTrust Select employer advisory committee, or
- include in the participation agreement, a statement that Ontario is appointed as the OPTrust Select employer's representative, decisions of the sponsor are final and do not require any consultation with OPTrust Select employers.

Since not all sponsor decisions are likely to require the same level of involvement, one option would be to adopt a decision-making framework that ensures the level of engagement is commensurate with the magnitude of the change under consideration. For example, a small contribution increase in a single year may be a decision that could be taken without any consultation with OPTrust Select employers, but three years of successive contribution increases may require meaningful consultation.

The risk of challenge, dissatisfaction, and claims of unfairness goes up exponentially where there is no voice for those who are affected. Accordingly, we recommend against pure reliance on the participation agreement.

Similar measures could be introduced by OPSEU on the member side of the sponsor equation.

B. Trustee Appointments

The risk of a challenge to a trustee appointment made by Ontario as the representative of an OPTrust Select employer is likely low given the requirement of all trustees to act in the best interests of all members of the Plan and the degree of separation between an appointment decision and decisions made by the trustees in administration of the Plan. However, as noted above, the sponsors will wish to consider their level of involvement by setting general criteria to provide guidance to OPTrust in making decisions regarding inflation-related pay adjustments and inflation adjustments under proposed sections A10 and A11 of OPTrust Select.

Risk of Challenges

We agree generally that the Superintendent of Financial Services is unlikely to challenge the JSPP status of the Plan on his own volition. Challenges could arise in the context of OPTrust Select employers or members being dissatisfied with decisions taken by the sponsors, for example contribution increases or future benefit decreases, or possibly decisions of OPTrust regarding funding-dependent benefits such as adjustments to pay in the benefit formula or indexation of pensions.

While participation in the OPTrust Select is voluntary and employers will be permitted to withdraw, an employer withdrawal liability is set out in the draft OPTrust Select provisions and is proposed to be applied to an exiting employer to the extent the Plan is underfunded at the time of exit. While the context is different, the *Northern Employee Benefits Services v. Rae-Edzo Community Services Authority and Tli-Cho Community Services Agency* decision is an example of civil litigation related to the imposition of an employer withdrawal liability.[19] As a result, it is foreseeable that employer withdrawal liabilities under OPTrust Select may be challenged on the basis that the employer was not adequately represented by Ontario which in turn risks a challenge to the governance requirements.

In addition, whenever a contribution increase or benefit reduction is imposed as a result of an unfunded liability, a direct challenge by an OPTrust Select member to the status of the Plan as a JSPP is readily foreseeable. If the Plan is determined not to be a JSPP under the PBA, an argument could be made by Plan members that they are no longer obliged to contribute to the funding of going concern unfunded liabilities and that obligation would shift solely to the employers participating in the Plan. The fact the Sponsorship Agreement contemplates that deficits be "shared" and funded through joint and equal contribution increases, independent of the Plan's status as a JSPP, would be a persuasive counter-argument to any such claim. However, this is not a full answer to the governance issues raised by the introduction of OPTrust Select.[20]

Loss of JSPP status for the Plan is a significant issue, both legally, financially, reputationally and on a precedent basis (discussed below) for Ontario. Absent a regulatory change to confirm the status of the Plan as a JSPP, our recommendation is that both sponsors expressly acknowledge and act in accordance with their status as representatives of OPTrust Select employers and members.

Evaluation of OPTrust Select By Employers

When an employer considers joining OPTrust Select to provide pension benefits to its employees, whether as a result of a proposal by the collective bargaining agent in the course of negotiations or otherwise, the employer will need to consider the risks associated with participating in OPTrust Select. Unlike a typical industry multi-employer pension plan which limits employers' contributions to a set amount that is the subject of collective bargaining, OPTrust Select contains no such guarantee. Unlike a typical single-employer pension plan sponsored by the employer, the employer does not have

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[19] 2012 NWTSC 61 (CanLII).

[20] The OPSEU Act and Sponsorship Agreement preserve the shared deficit funding requirements if there is a successful challenge to the Plan's JSPP status with regard to the employers and members referenced in the OPSEU Act. However, there are other attributes of JSPP status (such as the anticipated exception from funding a PfAD) which we understand the sponsors wish to preserve. Moving away from the PBA contribution requirements for JSPP member contributions to liquidate unfunded liabilities adds risk as compared with the status quo and underscores the limitations of the definition of "employer" in the OPSEU Act which arguably would provide a new unaffiliated OPTrust Select employer and its employees with a defence that they are subject to neither the OPSEU Act nor the PBA funding requirements.

the right to itself bargain the benefit terms or influence the administration of the pension plan.

While OPTrust Select does allow for employer withdrawals, subject to payment of any withdrawal liability, the employer will be constrained in choosing to withdraw from OPTrust Select, either by the terms of a collective agreements or out of a desire to avoid disruption for its employees. As noted in the Osler Opinion, employers in OPTrust Select are likely to request some form of governance involvement in OPTrust Select to protect themselves and plan members from the risk of escalating contribution costs. As explained above, this could take a variety of forms but in our opinion, it will be difficult for new employers to conclude their due diligence on a decision to join OPTrust Select solely on the promise that Ontario represents them in its role as the employer Plan sponsor and without providing them "voice" in the decisions that affect their contribution requirements. In our experience, employers look for cost certainty and therefore at minimum, they will be looking for an advisory committee to be established for consultation on sponsor decisions affecting OPTrust Select, including, for example, the right to vote on contribution increases.

Dilution of JSPP Governance Requirements

Shared decision-making requirements that bind all employers and members are the key to the granting of JSPP status under the PBA. The shared decision making is the basis for the special PBA provisions applicable to JSPPs since both the employer and member stakeholders have input into the pension plan terms and its administration. One additional consideration for Ontario (particularly, the Ministry of Finance) is whether the Government would be prepared in any way to be seen to be diluting the representation requirements for JSPPs for its own plan given the potential for this to set a precedent for other JSPPs.

Conclusion

In summary, our opinion is that the Plan's governance structure ought to take into account and acknowledge, though governance improvements, a basic requirement for Ontario and OPSEU to each take into account the unique interests of OPTrust Select stakeholders. As you know, my partners Terra Klinck and Lisa Mills have also been involved in reviewing this issue. Please feel free to contact any of us to discuss this advice.

Yours very truly,

Elizabeth M. Brown
EMB/