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March 2, 2018

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Our Matter Number: 1188751

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SENT BY EMAIL

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Attn: Louise Greig

Dear Sirs/Mesdames:

OPTrust Select - Governance Issues

You have asked us to consider whether permitting new employers inside or outside of the broader public sector and their non-unionized employees or employees represented by a trade union other than Ontario Public Service Employees' Union ("**OPSEU**") to participate in a new component of the OPSEU Pension Plan (the "**Plan**"), referred to as "OPTrust Select", as further described below, raises any governance or compliance issues under the *Pension Benefits Act* (Ontario) ("**PBA**") or any of the documents that constitute and support the Plan. In particular, you have asked whether opening up OPTrust Select to such employers/members would jeopardize the Plan's status as a jointly sponsored pension plan ("**JSPP**") or would require opening the Plan's governance model up to participation by sponsors other than OPSEU and Ontario.

You have also specifically asked the following questions (i) Does OPTrust Select pose any risks in relation to the requirements for joint governance and decision-making among contributing employers/members in light of the fact that only one employer purportedly exists for the purposes of the Plan; and (ii) could the OPTrust Select proposal jeopardize the status of the Plan under the PBA as a JSPP even in the context of the OPSEU Act (defined below), which stipulates that the Plan is not a multi-employer pension plan and prevails over the PBA?

The Plan and Fund are governed by the Sponsorship Agreement (defined below), the Trust Agreement (defined below), the Plan, the OPSEU Act (defined below), the PBA, the *Income Tax Act* (Canada) as well as any collective agreement between the parties and any rules and regulations made pursuant to these documents.[1] For purposes of this opinion, we have reviewed the Sponsorship Agreement, the Trust Agreement, the Plan,[2] (together, the "**Plan Documents**") the OPSEU Act and the PBA (together, the "**Governing Legislation**"). We have not, at this stage, reviewed any collective agreement or other rules and regulations and have assumed, for purposes of this opinion, that nothing contained in such documents would impact our conclusions herein.

Summary of Conclusions

We are of the opinion that the Plan's current governance structure and the Plan's JSPP status—both currently and with the addition of OPTrust Select—are strongly supported under the Plan Documents and the existing JSPP provisions of the PBA based on the principles of normal statutory interpretation.

While the risks of challenge to the Plan's governance structure and JSPP status increase somewhat with the addition of other employer and employee groups under a separate benefit provision like OPTrust Select, we are of the view that OPTrust and the Sponsors would have very strong arguments that the governance structure under the Plan cannot be changed and complies with the JSPP provisions based on either of the two approaches outlined below. These approaches could be applied as alternative defences to any challenge. Overall, we are of the view that the risk of a successful challenge is low under either approach.

Approach 1: No Representation of Interests of Other Constituencies by Ontario and OPSEU

- Under the first approach, we would argue that Ontario and OPSEU are not required to represent the interests of any constituency but their own (i.e. Ontario as sole employer and OPSEU as representative of OPSEU member interests).

- This approach could be supported with reference to the existing provisions of the Sponsorship Agreement and the provisions of the OPSEU Act, which provide that the OPSEU Act and the Sponsorship Agreement prevail over PBA. Specifically, to the extent that the JSPP provisions could be read to require representation in the joint governance of parties other than Ontario and OPSEU, there is a strong argument that this would be a conflict with the intent expressed in the OPSEU Act

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1 Sponsorship Agreement, s. 7.

2 We have reviewed the December 2017 consolidation of the Plan that you provided to us. While it is an unofficial consolidation, we are relying on your advice that it accurately reflects all amendments to the Plan to date.

and the Sponsorship Agreement that the Plan be considered a single employer pension plan.

- In the event of such conflict, the OPSEU Act and Sponsorship Agreement should prevail over a reading of the PBA requirements regarding joint governance that would require representation of other employer and member interests by Ontario and OPSEU. In other words, under this approach, we would argue that, in order not to conflict with the OPSEU Act/Sponsorship Agreement, the JSPP provisions must be read to only require Ontario and OPSEU member interests to be represented under the governance structure of the Plan as it relates to Plan amendments and Trustee appointments.

Approach 2: Representation of Other Constituencies by Ontario and OPSEU

- Under the second approach, we would argue that, by virtue of the governance structure set out in the Plan Documents, and based on a narrow interpretation of representation to mean only that the representatives replace the groups they represent in making decisions, Ontario and OPSEU are *de facto* representatives of other constituencies within the Plan. That is, Ontario is representative of employers; and OPSEU is representative of all Plan members, not just members that are represented by OPSEU as a union.

- In addition to making arguments regarding how the terms "represent" and "representative" are to be defined, we would argue that the manner in which Ontario and OPSEU are to "represent" other constituencies is circumscribed by the provisions of the Plan Documents. In this case, the Plan Documents set out a very clear governance structure, which does not provide for direct or proportional representation rights to participating employers or members *or* rights to be consulted *or* requirements for Ontario or OPSEU to take specific interests (or interests of other constituencies) into account.

- We note, however, that, if Ontario and OPSEU concede that they are representatives of other employers and Plan members, then a trier of fact could find that some additional duty to represented parties exists, despite the clear terms of the Plan Documents. Practically, if such a finding were to be made, then such duties would apply to the existing constituencies within the Plan and may be consistent with what Ontario and OPSEU already do in exercising their powers under the Sponsorship Agreement and Trust Agreement.

- Further, the risks of a successful challenge to the manner in which Ontario and OPSEU represent the various constituencies would be significantly mitigated with (1) clear disclosure regarding the governance structure to both participating employers and members; (2) possibly, clarification in the Sponsorship Agreement that Ontario and OPSEU are the joint decision makers for purposes of s. 3.1(1)3 and 4 of the PBA Regulation (defined below); and (3) adding a mechanism for participating employer/member input such as an advisory committee, which would have the ability to provide input without having any decision-making authority.

Facts and Assumptions

1. Overview

The Plan was established pursuant to a Sponsorship Agreement dated April 18, 1994 (the "**Sponsorship Agreement**"),[3] between OPSEU and Ontario (the "**Sponsors**") and implemented through the *Ontario Public Service Employees' Union Pension Act, 1994* (Ontario) ("**OPSEU Act**").

As required under the Sponsorship Agreement, the Sponsors established the Plan effective January 1, 1993 and, together with the initial trustees of the OPSEU Pension Plan Trust Fund, entered into an Agreement and Declaration of Trust, dated October 25, 1994 (the "**Trust Agreement**").[4] In general terms, the Trust Agreement provides that a board of trustees (referred to as the "**Trustees**", the "**Board of Trustees**" or "**OPTrust**" herein) will administer the Plan and manage the Plan fund (the "**Fund**").

2. OPTrust Select

The Sponsors are currently considering amending the Plan to add a new schedule of benefits, referred to as "OPTrust Select". We understand that OPTrust Select will be a new benefit provision of the Plan that is available on a non-mandatory basis to employers who are not currently participating employers in the Plan ("**New Employers**") and their employees. Discussions regarding the precise terms of OPTrust Select are currently underway and the terms of OPTrust Select are still subject to change based on decisions made by a Technical Working Group comprising representatives of Ontario, OPSEU and OPTrust.

OPTrust Select will form part of the Plan. However, OPTrust Select will provide defined benefits to members who participate in this component of the Plan ("**Select Members**")

3 We note that the Sponsorship Agreement was subsequently amended. While we have reviewed the amendments, they are not material to the discussion here and we refer to the original terms contained in the Sponsorship Agreement in this letter.

4 We note that the Trust Agreement was subsequently amended. While we have reviewed the amendments, they are not material to the discussion here and we refer to the original terms contained in the Trust Agreement in this letter.

that differ from the benefits provided under the current provisions of the Plan (the "**Original Provision**"). In general terms, benefits provided under OPTrust Select will be less costly (and less generous) than benefits under the Original Provision.

The Original Provision provides for a member contribution rate of 9.4% up to the year's maximum pensionable earnings as prescribed by the *Canada Pension Plan* ("**YMPE**") and a contribution rate of 11% over YMPE, effective from January 1, 2012.[5] Employers match these contributions.[6] The Plan's benefit formula is based on 2% of average annual salary (based on the best 60 consecutive months) multiplied by a member's years of credit in the Plan, subject to a reduction to reflect CPP integration as specified under section 10.9 of the Plan.[7]

In turn, OPTrust Select will require member contributions of 3% of pensionable pay, which are to be matched by the employer.[8] The OPTrust Select pension will accrue for each calendar year in the amount of 0.6% of annualized pensionable pay in such calendar year, multiplied by the OPTrust Select credit accrued in that calendar year.[9]

It is anticipated that any New Employer who wishes to have its employees participate in OPTrust Select would enter into a participation agreement with OPTrust (each, a "**Participation Agreement**"). It is intended that New Employers and Select Members would be subject to the existing governance rights and structure currently in place under the Plan, as further described below. A template Participation Agreement provided to us (which is the form implemented under the Framework Agreement) provides as follows regarding Plan governance and JSPP status:

> **B. Representations**
>
> ...
>
> 3. The Employer accepts, represents and warrants as the case may be that:
>
> ...

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5 Plan, s. 4.2(2)(iii).

6 Plan, s. 4.6.

7 Plan, s. 10.9.

8 Draft terms of OPTrust Select provision ("**OPTrust Select Draft**"), s. A4(1).

9 OPTrust Select Draft, s. A9(4).

b. The Employer has had an opportunity to review the content of the Plan Documents, and understands its obligation as set out therein, and further understands that the Plan is a Jointly Sponsored Pension Plan within the meaning of the PBA.

...

G. Sponsors' Representation of Employers and Members

16. The parties agree that,

a. the Sponsors have rights as set out in the Sponsorship Agreement including the right to determine terms and conditions of the Plan, any amendments to the Plan, and any allocation of costs of the Plan;

b. the Sponsors have the sole authority in connection with all matters relating to the appointment of the Trustees; and

c. nothing herein shall give the Employer, Employees, former Employees or anyone claiming through any of them any right or obligation in connection with the appointment of Trustees or the interpretation or administration of the Plan by the Trustees.

We have assumed that similar provisions would be contained in any Participation Agreement in respect of OPTrust Select.

3. Governance Structure under the Plan Documents

Under the Plan Documents, the Trustees are responsible for the administration of the Plan and the investment (management) of the Fund[10] and the Sponsors are responsible for appointing and removing the Trustees and amending the Plan, Trust Agreement and Sponsorship Agreement, as more fully described below.[11]

a. Amendment of the Plan

The Plan Documents provide for the following, among other things, in respect of the amendment of the Plan:

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[10] Sponsorship Agreement, s. 4; Trust Agreement, s. 3.02.

[11] Sponsorship Agreement, s. 20; Trust Agreement, s. 10.01; Plan, s. 18.1.

- The Sponsors may amend the Plan, Trust Agreement or Sponsorship Agreement;[12]
- No agreement or amendment shall remove Sponsor rights to appoint Trustees or to provide for the administration of the Plan and Fund other than by an equal number of Trustees appointed by Ontario and Trustees appointed by OPSEU with each Trustee having equal voting privileges;[13]
- No agreement of any other employer, trade union or person is required to make amendments;[14]
- Collective bargaining agents other than OPSEU that represent members of the Plan may collectively bargain, with those members' employers, with respect to the following types of benefit improvements for those members, provided that the full cost of such improvements is paid for by the members and the employer covered by the improvement:

  (a) early retirement benefits;

  (b) pensions payable to surviving spouses; and

  (c) disability benefits.

  The Sponsors agree to amend the Plan as necessary to provide for such benefit improvements and contribution increases provided that the Trustees are satisfied, on the basis of the Plan actuary's advice, that the benefit improvement is properly funded.[15]

b. Appointment of Trustees and Composition of Board of Trustees

The Sponsorship Agreement and Trust Agreement provide for the following in respect of the appointment and composition of the Board of Trustees:

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12 Sponsorship Agreement, s. 20, Trust Agreement, s. 10.01.

13 Sponsorship Agreement, s. 20; Trust Agreement, s. 10.01.

14 Sponsorship Agreement, s. 20; Trust Agreement, s. 10.02.

15 Sponsorship Agreement, s. 21.

- The Board of Trustees shall be comprised of 10 Trustees with 5 appointed by Ontario and 5 by OPSEU;[16]

- Any resolution of the Trustees shall require a vote of the majority of the Trustees present, provided that at least one Trustee appointed by Ontario and one Trustee appointed by OPSEU have supported the resolution.[17]

4. Membership/Participation Requirements under Plan Documents

Although the decisions related to Plan amendments and Trustee appointments clearly reside with Ontario and OPSEU under the terms of the Plan Documents, the Sponsorship Agreement, the Plan text and the OPSEU Act all contemplate and allow for a broader group of employers and employees to participate in the Plan, if OPSEU and Ontario permit. The OPSEU Act provides as follows in this regard:

> **Establishment of OPSEU Plan**
>
> 4 (1) A pension plan separate from the PSP Plan shall be established for members of the PSP Plan who are employees in a bargaining unit represented by OPSEU ***and such other persons who are named in the Sponsorship Agreement as being members of the OPSEU Plan.***
>
> ...
>
> 9. Every employer who employs a member of the OPSEU Plan shall participate in, and be bound by, the OPSEU Plan.[18]
>
> [Emphasis added.]

The Sponsorship Agreement, in turn, sets out the following:

- As of January 1, 1993, membership in the Plan is required for various specified public sector and broader public sector employees represented by OPSEU and certain other unions;[19]

- The Sponsors agree to discuss in good faith the future membership of the Plan and the acquisition of bargaining rights to discuss whether employees of

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[16] Sponsorship Agreement, s. 25; Trust Agreement 5.02.

[17] Sponsorship Agreement, s. 32; Trust Agreement, s. 5.11.

[18] OPSEU Act, s. 4.1 and 9.

[19] Sponsorship Agreement, s. 39.

> employers who are not Ontario Crown agencies, boards or commissions should become members of the Plan and, if so, the terms of such membership.[20]

In addition, the Sponsorship Agreement, in section 62(b)(u) contemplates an exemption from the PBA to provide that employees of the "OPSEU Fund" (i.e. of OPTrust) may be members of the Plan. The OPSEU Act does, in fact, provide that employees of OPTrust may become members of the Plan (at s. 5). OPTrust is not controlled by Ontario since Ontario does not appoint more than 50% of the Trustees and is therefore not an affiliate of Ontario. We understand that other employers who are not affiliated with Ontario currently participate in the Plan, including the Ontario Teachers' Pension Plan Board ("**OTPP**") and Transfield).

While a majority of Plan members are currently represented by OPSEU, another union also represents members of the Plan and some members are unrepresented by unions (e.g. employees of OPTrust). Historically, various other unions have represented Plan members in addition to OPSEU.

We note that the Plan provisions do not preclude employers with employees who are represented by bargaining agents other than OPSEU from participating in the Plan. Section 3.7 of the Plan specifically contemplates participation by employers of employees represented by CUPE, ATU and OLBEU. The Plan can also always be amended pursuant to s. 18.1 of the Plan and the terms of the Sponsorship Agreement.[21]

5. Governing Legislation – OPSEU Act

The relationship between the OPSEU Act, the Sponsorship Agreement and the PBA, all of which govern the Plan, is complex and is rooted in a historical agreement between Ontario and OPSEU that is reflected in the Sponsorship Agreement.

The original terms of the Sponsorship Agreement, which contemplated the enactment of the OPSEU Act, provided as follows in respect of the interaction between the Plan Documents and the PBA:

[20] Sponsorship Agreement, s. 40.

[21] On December 18, 2012 and January 25, 2013, the Sponsors entered into letters of agreement providing, among other things, for the expansion of membership in the Plan. The terms of these letters were ultimately reflected in a Framework Agreement for OPT Plan Expansion and Membership Continuity between Ontario and OPSEU, dated April 30, 2013 (the "**Framework Agreement**"). The Framework Agreement, which ultimately resulted in amendments to the Plan, is an example of how the Sponsors have continued to deal with the expansion of membership in the Plan.

9. OPSEU and Ontario agree that the Plan and the Fund shall be subject to all of the provisions of the PBA, except for those identified in Section K, below.

10. OPSEU and Ontario agree:

(a) that the Plan and Fund shall not be exempt from any statutory provision, except those provisions as described in section K; and

(b) that the Plan and Fund shall not be made subject to any statutory provision that does not apply generally to pension plans in Ontario except those provisions as described in section K,

except with the consent of OPSEU.

...

K. IMPLEMENTING LEGISLATION

62. To give effect to the terms of this Agreement, Ontario will make its best efforts to implement by legislation, regulation or order in council as follows:

(a) Transitional Matters

...

(e) to provide for the registration of the OPSEU Plan by the Superintendent of Pensions;

...

(b) Exemptions of the OPSEU Plan from the PBA and Other Statutory Matters:

...

(q) to require those Ontario Crown agencies, boards and commissions who employ members of OPSEU to be participating employers of the OPSEU Plan as defined in the Trust Agreement;

(r) ***to provide for the status of the OPSEU Plan as described in paragraphs 2 and 8***, above;

...

[Emphasis added.]

Importantly, the Sponsorship Agreement signals an intention that exemptions be provided in respect of status of the OPSEU Plan as described in paragraphs 2 and 8 of the Sponsorship Agreement. Only paragraph 2 of the Sponsorship Agreement is relevant to our analysis and provides:[22]

> 2. Ontario and OPSEU agree to establish the Plan and the Fund in accordance with the terms described herein. The Plan shall be a single employer pension plan.
>
> [Emphasis added.]

The OPSEU Act, which came into effect in 1994 following the effective date of the Sponsorship Agreement,[23] does in fact provide for exemptions from the PBA, as required by the Sponsorship Agreement. The exemptions are set out in broad terms in the OPSEU Act, as follows:

> **Application of Act**
>
> 3(1) This Act applies despite any other Act, regulation, pension plan or agreement, including any sectoral framework, local agreement or non-bargaining unit plan under the Social Contract Act, 1993.
>
> **Pension Benefits Act**
>
> (2) ***For greater certainty, in the event of a conflict between this Act and the Pension Benefits Act, this Act prevails.***
>
> ...
>
> **Establishment of OPSEU Plan**
>
> 4 (1) A pension plan separate from the PSP Plan shall be established for members of the PSP Plan who are employees in a bargaining unit represented by OPSEU and such other persons who are named in the Sponsorship Agreement as being members of the OPSEU Plan.
>
> ...
>
> **Sponsorship Agreement**
>
> (3) The OPSEU Plan shall be established in accordance with this Act and the Sponsorship Agreement between the Crown and OPSEU dated

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[22] Paragraph 8 sets out that OPTrust shall not be a Crown agency.

[23] The OPSEU Act came into force on the day it received Royal Assent, June 23, 1994.

April 18, 1994 and tabled in the Legislative Assembly as a sessional document.

Same

(3.1) ***The Sponsorship Agreement prevails over the Pension Benefits Act and the regulations made under that Act and, except for this Act, every other Act and regulation governing the use of an actuarial gain or the liquidation of an actuarial loss.***

...

Amendment

(4) ***Any amendment to the Sponsorship Agreement shall comply with the Pension Benefits Act and the regulations made under that Act.***

...

Type of plan

(6) The OPSEU Plan is not a multi-employer pension plan as defined in the Pension Benefits Act.

...

11...

Compliance with Pension Benefits Act

(2) ***The OPSEU Plan shall be deemed to comply with the Pension Benefits Act and the regulations made under that Act so long as it complies with this Act and the Sponsorship Agreement.***

[Emphasis added.]

6. Governing Legislation – JSPP Status under PBA

The Plan is also governed by the PBA and is currently considered a JSPP for purposes of the PBA. JSPP provisions did not exist at the time that the Plan was established, but were introduced into the PBA in 2006 (with retroactive effect to December 31, 2004).[24]

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[24] The relevant PBA provisions in s. 1(1) and (2) were proclaimed into force on April 30, 2006, but were deemed to come into force on December 31, 2004 under the *Budget Measures Act, 2005 (No. 2)* (Ontario) (Bill 18). Section 3.1 of the PBA Regulation (defined below) was also deemed to have come into force on December 31, 2004 (under O. Reg. 116/06). Section 3.2 of the PBA Regulation (defined below) came into force on June 1, 2011 (under O. Reg. 177/11).

a. Benefits of JSPP Status

JSPP status currently provides a number of benefits, including exemptions from solvency funding[25] and payment of Pension Benefits Guarantee Fund ("**PBGF**") assessments, though we note that OPTrust is independently exempt from PBGF assessments pursuant to s. 47(1)10 Regulation 909 under the PBA (the "**PBA Regulation**") and does not rely on its JSPP status for that exemption.[26] The PBA and PBA Regulation, through the conditions applicable to JSPPs (as outlined below), among other provisions, also effectively require that members and employers are jointly responsible for funding deficits within the plan and permit accrued benefits to be reduced on wind up.

b. Requirements for JSPP Status

Under the PBA, a JSPP is defined as follows:

> "jointly sponsored pension plan" means a pension plan described in subsection (2) and includes such other pension plans as may be prescribed
>
> ...
>
> (2) For the purposes of this Act, a pension plan is a jointly sponsored pension plan if it has the following characteristics:
>
> 1. It provides defined benefits.
>
> 2. The defined benefits are contributory benefits.
>
> 3. Members of the pension plan are required, by virtue of the documents that create and support the plan, to make contributions in respect of any going concern unfunded liability and solvency deficiency of the plan.
>
> 4. The plan satisfies such additional criteria as may be prescribed.

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[25] Note that, while section 1.3.1(3) of the PBA Regulation does not expressly refer to the exempt plans as JSPPs, section 1.3.1(4) of the PBA Regulation provides "If a pension plan listed in subsection (3) ceases to be a jointly sponsored pension plan, subsection (3) does not apply to any solvency deficiency of the pension plan as of a valuation date that falls on or after the date on which the pension plan ceased to be a jointly sponsored pension plan."

[26] See section 1.3.1(3) of the PBA Regulation regarding the solvency exemption and the discussion in note 24 below. Section 47(2.1) 3 of the PBA Regulation exempts JSPPs generally from PBGF assessments. The PBA Regulation also provides for the following exemptions that are specific to the Plan: an exemption from section 69 (wind-up) of the PBA (pursuant to s. 47.3 of the PBA Regulation); and an exemption from certain rules regarding preparation of valuations (pursuant to s. 47.7.1 of the PBA Regulation).

Since the Plan is not "prescribed" to be a JSPP, the criteria set out in subsection (2) and the additional prescribed criteria must be considered. The additional prescribed criteria are set out in the Regulation 909 under the PBA (the "**PBA Regulation**") as follows:

> 3.1 (1) For the purposes of paragraph 4 of subsection 1 (2) of the Act, a pension plan must, by virtue of the documents that create and support the plan, satisfy the following additional criteria in order to be a jointly sponsored pension plan:
>
> 1. The total amount of contributions payable by members of the pension plan in respect of a year, excluding any additional voluntary contributions and voluntary contributions for past service as described in subsection 39 (5) of the Act, cannot exceed the total amount of contributions payable to the pension plan in respect of the year by the employer or by the person or entity required to make contributions on behalf of the employer, as the case may be.
>
> 2. The pension plan does not permit a reduction in the amount of or the commuted value of a pension benefit, a pension, a deferred pension or an ancillary benefit in the circumstances described in subsection 14 (2) or (3) of the Act, except in the circumstances of a wind up.
>
> **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.***
>
> 5. The level of a member's pension benefits, other than ancillary benefits, and the amount of a member's contributions are directly related to the member's pensionable earnings.
>
> **(2)** ***The documents that create and support a jointly sponsored pension plan must set out the methods by which the decisions referred to in paragraphs 3 and 4 of subsection (1) are to be made.***
>
> 3.2 (1) The administrator of a jointly sponsored pension plan shall file a statement that certifies that the pension plan satisfies the criteria to be a

> jointly sponsored pension plan, certifies the date on which it became such a pension plan, and describes how the pension plan satisfies the criteria to be a jointly sponsored pension plan.
>
> (2) The statement must be filed no later than the date on which the first report under section 3, 13 or 14 is filed or submitted after the pension plan becomes a jointly sponsored pension plan.
>
> (3) Despite subsection (2), if the pension plan is a jointly sponsored pension plan on June 1, 2011, the statement must be filed no later than the date on which the first report under section 3, 13 or 14 is filed or submitted after June 1, 2011.
>
> [Emphasis added.]

c. *Application of JSPP Requirements to the Plan*

OPTrust filed a letter, dated September 6, 2011, certifying that the Plan satisfies the criteria to be a JSPP as required under section 3.2 of the PBA Regulation and this statement has been accepted by the Superintendent of Financial Services (the "**Superintendent**"). Specifically, the letter stated that the Plan "is a jointly-sponsored pension plan (JSPP) and has been so since its establishment under a Sponsorship Agreement between the Government of Ontario (representing the employers participating in the Plan) and the Ontario Public Service Employees' Union (OPSEU - representing the members of the Plan), dated April 18, 1994. The Government of Ontario and OPSEU are the joint Sponsors of the Plan."

Based on the OPTrust Select Draft, assuming adopted in substantially the same form as has been provided to us, and based on our discussions with you regarding the funding of the Plan (specifically to the effect that both Select Members and other members of the Plan will be responsible for contributing to the funding of deficits in the Plan on a pro rata basis), the Plan should continue to meet the requirements in s. 1(2)1-3 of the PBA and 3.1(1)1, 2 and 5 of the PBA Regulation. As such, the only issue under consideration is whether the Plan will continue to satisfy the requirements of s. 3.1(1)3 and 4 and 3.1(2) of the PBA Regulation following the introduction of OPTrust Select and the potential participation of New Employers and their employees in the Plan.

<u>Analysis</u>

1. Under the Principles of Normal Statutory Interpretation, the Governance Structure under the Plan Documents Complies with the JSPP Requirements Under the PBA Regulation

a. Conditions for JSPP Status

As set out in the Facts, two of the conditions that must be met in order to obtain and retain JSPP status are that *the members or any representatives of the members* and *the employers or any persons who represent the employers* must be jointly responsible for making all decisions:

- about the terms and conditions of the pension plan and any amendments to the pension plan; and
- regarding the appointment of the administrator (or persons as members of certain boards or bodies that administer the plan).

The relevant paragraphs of section 3.1(1) of the PBA Regulation provide as follows in this regard:

> 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.[27]

[27] Section 8(1)(b) of the PBA refers to a committee composed of one or more representatives of the employer or employer and the members; section 8(1)(b) refers to a committee composed of representatives of the members; section 8(1)(e) applies to board of trustees of MEPPs and requires that at least half of the board members be representatives of the members; section 8(1)(f) refers to boards established pursuant to legislation; and section 8(1)(h) refers to any other person as may be prescribed.

b. How the Plan Documents Meet the JSPP Conditions

The Plan Documents do provide for the joint decision making set out under section 3.1(1)3 and 4 as required by section 3.1(2) of the PBA Regulation. They do so by designating Ontario (as employer) and OPSEU (as bargaining agent and representative of certain employees of Ontario) as joint decision makers regarding plan amendment and appointment of Trustees (as administrator).[28] It is important to recognize that this is so despite the fact that there are currently other employers in the Plan who are not affiliated with Ontario (e.g. OPTrust itself, OTPP and Transfield) and members who are not represented by OPSEU, either because they are represented by another union or not represented by a bargaining agent at all.

In our view, the existing provisions of the Sponsorship Agreement and Trust Agreement should be sufficient to meet the requirement that employers or any representatives of employers and members or any representatives of members are jointly responsible for decision making on Plan amendments and administrator appointment. In other words, it is sufficient to have a single employer responsible for the decision making on the "employer" side and a union or another body that is representative of at least one group of members be responsible for decision making on the "member" side (as long as this is clearly set out in the documents that create and support the JSPP, in accordance with s. 3.1(2) of the PBA Regulation).

c. Support for the Interpretation that the Plan Meets the JSPP Conditions

The support for this interpretation lies in the fact that the PBA Regulation is not prescriptive regarding a process for selecting representatives or the type of representation that is required to meet the conditions for being a JSPP. Nor does it expressly require equal (or proportionate) representation of all members and employers or a direct voice (input) in decision making for all constituencies. Nor does it apply any specific duties to representatives. Further, there is no case law on the interpretation of the JSPP provisions regarding amendment and administrator appointment that would suggest that specific requirements would be applied to determine whether representation is appropriate or to impose duties on representatives. Rather, the PBA Regulation requires that the manner in which amendments and administrator appointments are jointly made simply be set out in the applicable plan documents, which as we have noted the Sponsors have done in the Sponsorship Agreement and Trust Agreement, as well as in s. 18.1 of the Plan.

While case law in other contexts where representation is required (e.g. class actions where plaintiffs act as representatives of a broader group or in the union context), does not easily

[28] See Plan, s. 18.1; Sponsorship Agreement, s. 4, 20, 25 and 32; Trust Agreement, s. 5.02 and 5.11, and Art. 10.

translate into the context of the representation regarding Plan amendments or administrator appointment for a JSPP, the general definitions of "represent" referenced in the case law suggest that the terms can be interpreted to support a variety of representation models. The legal dictionaries define the term "represent" as "to stand in another's place, to speak with authority on behalf of another... to appear on one's behalf"[29] or "someone who stands for or acts on behalf of another".[30] The term "represent" is defined in the Canadian Oxford Dictionary as "fill the place of; be a substitute or deputy for; be entitled to act or speak for...".[31] Thus, in both legal dictionaries and the Oxford Dictionary, "represent" and "representative" are used broadly to refer to anyone who acts on another's behalf. In the recent *Barreau du Quebec c. Quebec (Procureure Generale)* case,[32] the court cites a textbook: ... "[...] Cornu gives the following definition of "représenter" ("represent"): "To replace a person in the exercise of the person's rights" (G. Cornu, ed., Vocabulaire juridique (10th ed. 2014), at p. 905)." Within this meaning of representation, Ontario and OPSEU clearly do replace employers and members in the exercise of rights that members and employers might otherwise have (by virtue of the JSPP provisions of the PBA) to participate in decisions regarding Plan amendment and Trustee appointment.[33]

In the case of the Plan and based on this meaning of "represent", we would argue that the terms "represent" or "representative" should be limited to describing decision making where one or more entities makes decisions on behalf of an "employer" or "employers" (and thereby replaces/binds such employers) and another entity or group makes decisions on behalf of members (and thereby replaces/binds members), without importing additional duties or process beyond what is described in the particular plan or the plan's supporting documents.

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29 *Gifis, Steven H., Barron's Law Dictionary, 6th ed. (New York: Barron's Educational Series, Inc.) 2010.*

30 *Ganer, Bryan A., Black's Law Dictionary,* 10th ed. *(St. Paul, Minn: Thomson West), 2014.*

31 *Barber, Katherine, Canadian Oxford Dictionary, 2nd ed. (Don Mills, ON: Oxford University Press) 2004.*

32 2017 SCC 56. Note that the *Barreau* case, in general, applies in a different context and its holding is not directly applicable. We rely on it for purposes of the definition of representation cited and for the fact that different meanings may be given to the term depending on context.

33 It is to be noted that in the context of labour relations, a trade union that has been certified as bargaining agent of the employees of an employer in a bargaining unit can be said to "represent" such employees. However, it should be noted that sections 3.1(1)3 and 4 of the PBA Regulation each refer to "any representatives of the members". As the PBA contains a number of references to "a trade union that represents members", it is implicit that the JSPP requirement for member representation does not require a trade union to represent members.

2. *Risk of Challenge*

a. *Low Risk of Challenge by Regulator or Employers/Members Under Current Plan*

Given that the clear governance structure providing for Ontario/OPSEU decision making regarding Plan amendment and Trustee appointment set out in the Plan and the fact that the Plan is a recognized JSPP (i.e. the Plan has been accepted as a JSPP by both the regulator and the legislature in that the Plan has been designated under the PBA Regulation as a JSPP that is exempt from solvency funding), we would not expect the Superintendent to take issue with this approach.[34] We also understand that several other JSPPs, including OTPP, HOOPP and OMERS, have governance structures which provide direct representation for only some of the employers/unions that participate in the respective plans, which provides further support for the position that a broader view of representation is not required. Further, because active member interests and employer interests are relatively aligned under current Plan terms (given a single benefit provision), it is unlikely (though not impossible) that current employers/members would challenge the nature of the governance structure and/or whether Ontario and OPSEU are *in fact* representative of all employers/members.

b. *Considerations Related to Risks of Challenge by New Employers and Plan Members*

The question under consideration is whether the risk of challenge changes with the introduction of OPTrust Select, particularly to the extent that New Employers without the same connection to Ontario and OPSEU may join the Plan, and given that OPTrust Select will have a different benefit structure. The different benefit structure has the potential to (though it will not necessarily) give rise to potential conflicts between member or employer groups—e.g. when it comes to determining issues of funding and potential cross-subsidization or issues related to reduction of benefits where a deficit exists under the Plan. Although the example of cross-subsidization in respect of funding would relate to Trustee decision making rather than Sponsor decision making, it could indirectly come into play if participating employers or members are dissatisfied with the decisions of the Trustees and wish to have input into Trustee selection.

In our view, it is conceivable that the participation of New Employers and their employees in OPTrust Select could give rise to potential questions regarding or, in an extreme case,

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[34] Note, however, that the requirement to certify JSPP status likely shifts the onus onto OPTrust to ascertain that it meets the criteria and so certify rather than on the regulator to investigate and confirm.

challenges to the current governance structure or the Plan's JSPP status in the following ways:

- **Considerations of New Employers before joining:** New Employers and/or their employees could seek a "seat at the table" when it comes to amending OPTrust Select or choosing Trustees at the time that they are considering participating in OPTrust Select. If they are dissatisfied with the governance rights that they are offered, they could choose not to participate in the Plan (or could later withdraw from the Plan). This is not, strictly speaking, a legal issue and would not constitute a legal challenge to OPTrust's JSPP status. However, OPTrust may wish to consider whether it and the Sponsors would be open to providing some mechanism or window into Plan governance for New Employers to make participation in the Plan more attractive. We consider possible governance arrangements that fall short of decision making by participating employers below.

- **New Employers who choose participate in the Plan:** If New Employers choose to participate in OPTrust Select, they would be bound by a Participation Agreement, in addition to the terms of the Plan. While the Participation Agreement we reviewed is clear about the governance structure under the Plan and that New Employers are not entitled to any governance rights, it is possible that New Employers could nonetheless challenge OPTrust's governance structure and seek to participate in decision making regarding Trustee Selection and/or Plan amendment.

- **Plan members:** Select Members (and/or current members of the Plan for whom OPSEU is not the bargaining agent) could also challenge the governance structure/JSPP status.

We have considered the risks of challenges by employers and members and two alternatives for response. Overall, as discussed in detail below, we are of the view that both alternative responses strongly support the position that (1) the terms of the Plan Documents do not require or permit the governance structure to be opened up to other parties; and (2) they are currently in full compliance with the JSPP requirements (and will continue to be after the implementation of OPTrust Select). In our view, based on this analysis, the Sponsors do not need to take action to reflect governance rights for other parties or seek to amend legislation or regulations to avoid doing so – though they may wish to take certain actions as described under the second approach set out below.

c. *Low Risk of Challenge to Governance Structure or JSPP Status by Employers*

i. *Features of OPTrust Select and Plan Governance that Make Challenge by New Employers Unlikely*

When considering potential challenges by New Employers, it is important to keep in mind that there are a number of features of OPTrust Select and the Plan governance structure that are likely to make the practical likelihood of a challenge by an employer very low. These features are as follows:

1. **Participation Not Mandatory:** Participation in OPTrust Select is not mandatory and participating employers will be permitted to withdraw.[35] As such, in the absence of a decision or set of circumstances that prejudices a participating employer directly and that cannot be adequately resolved solely by an employer withdrawing, a challenge to the governance structure is unlikely to be made.

2. **Participation Agreement Clear That No Governance Rights:** New Employers will participate in OPTrust Select pursuant to a Participation Agreement that is anticipated to make the governance arrangements under the Plan clear, per the sample provided to us. In other words, New Employers will be coming into the arrangement with "their eyes open", i.e. fully aware of governance arrangements and with no legitimate expectation of acquiring additional governance rights. This contractual agreement would be a first line of protection to any challenges by employers, though it is not necessarily a complete response since employers could argue that, to the extent the Participation Agreement is inconsistent with the PBA, the PBA should govern.

3. **Trustees Administer Plan and Must Act with Even Hand**: Administrative decision making is not within the hands of the Sponsors, but within the hands of the Trustees. Decision making by the Trustees must be impartial. In other words, decision making by a plan administrator is not dependent on "allegiance" to a sponsor, even where the sponsor has appointment rights. Once Trustees are appointed, they owe duties to all members and must act with an even hand.[36] While we are aware of one case where direct appointment rights were provided to a group

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[35] See OPTrust Select Draft, s. A1(1) and related definitions re participation pursuant to a Participation Agreement; and s. A4(5) re withdrawal.

[36] For a discussion of the duty of evenhandedness and its application to pension plan administrators/trustees, see *Bathgate v. NHL Pension Society* (1994), 16 O.R. (3d) 761, leave to appeal to S.C.C. refused, at paragraph 51). See also *Burke v. Hudson's Bay Co.*, (2008) 67 C.C.P.B. 1 (Ont. C.A.), affirmed by the S.C.C. in 2010 SCC 34, at para. 59 ("Burke"); and *Neville v. Wynne*, 2005 BCSC 483.

of retirees in respect of trustee appointment to a board of trustees, such rights were granted in circumstances where retiree rights were directly negatively affected in an application to vary a trust and retirees had no voice in respect of such changes under the proposal while other constituencies did.[37] That case is distinct from the circumstances of OPTrust where the terms of the Sponsorship Agreement and Trust Agreement would restrict such representation as discussed in the next section. In other cases where parties have attempted to obtain direct representation rights on boards of trustees of pension plans, courts have been generally disinclined to provide such rights absent a clear indication that trustees would not follow the direction of the court or act in accordance with their duties.[38]

4. **Removal of Trustee Appointment from Ontario/OPSEU Not Permitted (Would Be Breach of Trust):** As outlined in the Facts, the current governance structure—specifically, the Trustee appointment rights of Ontario and OPSEU and the amendment rights—are clearly set out in the Trust Agreement and Sponsorship Agreement. A change to these governance rights would require an amendment to both the Sponsorship Agreement and Trust Agreement. However, each of these documents provides that it cannot be amended to provide for the administration of the Plan and the Fund other than by an equal number of Trustees appointed by Ontario and Trustees appointed by OPSEU with each Trustee having equal voting privileges or to remove the right of the Sponsors to appoint Trustees. In other words, it would be a breach of trust and therefore impermissible to provide for direct appointment rights by any other person.

5. **Rights to Amend the Plan Clearly Provided Only To Ontario/OPSEU:** The Trust Agreement and Sponsorship Agreement also provide that the Sponsors may amend the Trust Agreement, the Sponsorship Agreement, the Plan text and any other Plan documents adopted by them without the agreement of any other employer, trade union or person. Provision is made for the Sponsors to make amendments where certain other unions bargain for benefit improvements. While amendment of the amendment right is not restricted, the nature of the right itself very clearly indicates that the amendment right lies with the Sponsors (not any other body) and no agreement of another person is required to make such amendment. In summary, given the clear governance rights set out in the Trust Agreement and the restrictions on amendment, a legal challenge of the governance structure by a New

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37 *Winnipeg (City) v Winnipeg (City) Employee Benefits Program*, 2002 MBQB 158 ("***Winnipeg***").

38 See, in particular, *Manitoba Health Organizations Inc. v. Bryon* 1998 CarswellMan 172 (Man. Court of Queen's Bench) ("***Byron***") where the court rejected a union's request for appointment rights in respect of a seat on the board of trustees of a pension plan.

Employer is very unlikely to yield a change to the terms of the Trust Agreement or Sponsorship Agreement.

ii. Limited Avenues of Challenge Available to New Employers

In light of the limitations in the Trust Agreement and Sponsorship Agreement on amendment of the current governance structure, the New Employer's only option would be to either (1) argue that the Plan is not compliant with the JSPP conditions, which could lead to a finding that the Plan is not eligible for JSPP status; or (2) argue that Ontario is required to represent its interests (in a broader sense than what we have suggested above) and has not adequately done so. We are of the view that (1) would be an unlikely approach as it could lead to the Plan losing its JSPP status if the New Employer's arguments are successful, thereby increasing the New Employer's own liability due to a change in the PBA requirements with which the Plan must comply (e.g. solvency funding requirements). Possibility (2) could potentially lead to the same outcome, though there is some potential for an order to be made requiring Ontario to take specific actions to ensure representation of other employers' interest (short of actual changes being made to the governance structure under the Trust Agreement). As discussed below, we are of the view that there are strong arguments that the current structure is compliant with the JSPP conditions and does not require specific consideration of other employers' interests by Ontario.

Overall, we are of the view that the risk of a New Employer challenging the governance structure or to the JSPP status of the plan by a New Employer is very low because of the considerations outlined above.

d. Slightly Higher Risk of Challenge to Governance Structure or JSPP Status by Members

i. Differences Between Considerations Applicable to Members vs Employers

In general, there is more potential for a challenge of the governance structure/JSPP status by members rather than employers. While the considerations set out in sections 3 (duty of Trustees to act impartially), 4 (limits on changes to Plan's governance structure in Trust Agreement) and 5 (clear Sponsor amendment rights) apply equally to potential challenges by members, members are more vulnerable than employers in that they may not have the opportunity to opt into the Plan (e.g. where their participation is mandatory if their employer opts in), are not bound by the employer's Participation Agreement and/or may not understand all of the implications of JSPP status and their lack of rights in governance, although we expect that the latter would be significantly mitigated by disclosure in this regard (and/or union representation of their interests, if any). In addition, while we would expect that member interests would be aligned with preserving JSPP status in most cases, member interests may not always be aligned with preserving JSPP status, e.g. in the case of potential reduction of benefits on wind-up—though, notably, the case of wind-up being on the horizon is an extreme and unlikely circumstance.

ii. Avenues of Challenge Open to Members

We would still not expect a challenge from members unless a particular issue arose which prejudiced a specific group of members and caused them to call into question decision making in respect of Plan amendments or Trustee appointments. As set out in the section above, members could (1) argue that the Plan is not compliant with the JSPP conditions, which could lead to a finding that the Plan is not eligible for JSPP status; or (2) argue that OPSEU is required to represent their interests (in a broader sense than what we have set out above) and has not adequately done so.

As set out above, it is unlikely that members could successfully argue for their own Trustee appointment rights under the Plan (as occurred in the *Winnipeg* case) because of the restrictions in the Trust Agreement on the appointment of Trustees other than by OPSEU or Ontario. As such, it is likely that the "representation" issue will be one of whether OPSEU is required to take into account the concerns of member constituencies other than the OPSEU members that it represents and, if so, if it has properly done so.

iii. Risk of Challenge by Members Exists under Current Plan Terms

As noted above, the potential for member challenge exists under the current Plan terms but may not be as evident because there is less potential for member interests to diverge given the single benefit formula under the current Plan terms. That said, the issue in the *Winnipeg* case arose where retiree interests diverged from active member interests under the same provision.

3. Two Possible Responses to a Challenge by Employers or Members

We see two alternative responses to any challenge, whether by members or employers. Whether one or the other approach is most appropriate depends, in part, on the perspective of, and facts within the knowledge of, the Sponsors. We have set out each of the approaches below.

a. *Approach 1: No Representation of Interests of Other Constituencies by Ontario and OPSEU*

i. Basis of Argument to Challenge JSPP Status/Governance

In order to be successful in challenging compliance with the JSPP provisions on the basis of section 3.1(1)3 or 4 of the PBA Regulation, members or employers would have to successfully argue that the sections require a specific consideration of the interests of such members or employers by their representative and are not satisfied where the plan documents and governance structure only provides for the direct representation of some constituencies without a requirement to consider other interests, as is arguably the case of the Plan. While this requirement is not necessarily evident on the face of the provision, a court could be moved by "fairness" concerns raised by members (as in the *Winnipeg* case) or an argument could be made that a purposive reading of the PBA, one of the central tenets of which is protection of member interests,[39] requires the provisions to be read to provide representation rights in a broader sense than that outlined above to all member and employer constituencies. In other words, members or employers would have to argue that "represent" and "representative" in the context of the JSPP provisions means something more than simply replacing someone in exercising their rights or acting in the place of someone else.

ii. Argument that Ontario and OPSEU Only Represent Their Own Interests

One approach is to take the position that Ontario and OPSEU are not representative of other employer/member *interests* if a broader meaning is ascribed to what it means to be a representative for purposes of the PBA Regulation. Under this approach, Ontario and OPSEU would argue that they are each entitled to represent their own interest or the interest of their constituency (in the case of OPSEU, which would represent members on behalf of whom it bargains) and that this is specifically permitted by the OPSEU Act and Sponsorship Agreement, which prevail over the PBA. This approach effectively seeks to fit what the Sponsors do into a narrow definition of what it means to represent another party (i.e. to replace them in decision making or bind them, but not to represent their interests per se).

iii. General Approach to Conflict Between PBA and OPSEU Act/Sponsorship Agreement

While the PBA prevails over most legislation in the event of a conflict,[40] the OPSEU Act contains several provisions which indicate that it and the Sponsorship Agreement are to prevail over the PBA in the event of conflict between the PBA and the OPSEU Act or

39 See, for example, the Court of Appeal's decision in *GenCorp Canada Inc. v Ontario (Superintendent Pension)* (1998), 158 DLR (4th) 497, wherein the Court stated: "[T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans..."; cited *Monsanto Canada Inc. v Ontario (Superintendent of Financial Services)* 2004 SCC 54, which also recognized that the legislation was a complex scheme, balancing member and employer interests.

40 PBA, s. 114.

Sponsorship Agreement; and that the Plan shall be deemed to comply with the PBA if it complies with the OPSEU Act and the Sponsorship Agreement.[41]

Based on the ordinary principles of statutory interpretation and the case law, in order to conclude that the governance provisions of the Sponsorship Agreement prevail over the JSPP "representation" requirements (if those are to be given a broad meaning), (1) a genuine conflict between the OSPEU Act (and/or Sponsorship Agreement) and the PBA must be found to exist[42] and (2) the OPSEU Act or Sponsorship Agreement must prevail in respect of the specific conflict in question.[43] Our discussion below outlines how the conflict would arise in the case of the JSPP provisions, which are not mandatory and which OPTrust has sought to have apply even though neither the Plan itself nor the Sponsorship Agreement specifically require JSPP status.[44]

iv. Sponsorship Agreement and OPSEU Act Reflect Intent to Preserve Single Employer Plan Status and Plan Governance Structure and to Override PBA in That Regard

Under section 62(b) of the Sponsorship Agreement, certain exemptions from the PBA are contemplated, including an exemption that will protect the status of the Plan that is outlined in the Sponsorship Agreement. Specifically, section 62(b) provides for a PBA exemption

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41 OPSEU Act, s. 3(2), 4(3.1) and 11(2).

42 *Sullivan, Ruth, Sullivan on the Construction of Statutes, 6th ed (Markham, ON: Lexis Nexis (Canada) 2014 ("**Sullivan**").*

43 In *OPSEU v Ontario* [1995] O.J. No. 3927 (Gen. Div.) the court considered the interaction of the OPSEU Act and the PBA. While it was not dealing with the issue at hand or the override provisions of the OPSEU Act specifically, its comments are relevant. In that case, the court read the OPSEU Act override of the PBA to be operative only where the Sponsorship Agreement evidenced an intent by Ontario and OPSEU that it should do so—specifically, the court had reference to section 62(b) of the Sponsorship Agreement regarding the exemptions to the PBA that the parties intended to be put into place. The court found that exemptions from the PBA beyond those specifically contemplated required the consent of OPSEU (in addition to legislative action by Ontario) in accordance with section 10 of the Sponsorship Agreement.

44 To further reduce the risk of challenge, the PBA Regulation could prescribe the Plan as a JSPP pursuant to the JSPP definition in s. 1(1) of the PBA or specifically exempt the Plan from s. 3.1(1)3 and 4 of the PBA Regulation. The exemption could also be made under the OPSEU Act. While we considered whether the same result could be achieved through an amendment to the Sponsorship Agreement, since it is stated to prevail over the PBA in section 4(3.1) of the OPSEU Act, we are of the view that it could not (to the extent that it seeks to override a PBA provision) because any amendment of the Sponsorship Agreement must comply with the PBA (per section 4(4) of the OPSEU Act). In other words, if there was any question about whether the amendment conflicts with the PBA, it is likely that the court would find the PBA to prevail and therefore the amendment would not serve its purpose. In any event, we are of the view that such additional protections are not strictly necessary in the circumstances of the Plan.

"... to provide for the status of the OPSEU Plan as described in paragraphs 2 ... [of the Sponsorship Agreement]." Paragraph 2 of the Sponsorship Agreement provides:

> 2. Ontario and OPSEU agree to establish the Plan and the Fund in accordance with the terms described herein. The Plan shall be a single employer pension plan.

In addition to the statement that the Plan is a single employer pension plan in paragraph 2, the terms on which the Plan is established, include the following features of the governance structure:

- The Board of Trustees shall be comprised of 10 Trustees with 5 appointed by Ontario and 5 by OPSEU;

- Any resolution of Trustees shall require a vote of the majority of the Trustees present, provided that at least one Trustee appointed by Ontario and one Trustee appointed by OPSEU have supported the resolution;

- The Sponsors may amend the Plan, Trust Agreement or Sponsorship Agreement;

- No agreement or amendment to the Plan, Trust Agreement or Sponsorship Agreement may remove Sponsor rights to appoint trustees or to provide for administration of Plan and Fund other than by an equal number of Trustees appointed by Ontario and Trustees appointed by OPSEU with each Trustee having equal voting privileges—in fact to do so would amount to a breach of trust; and

- No agreement of any other employer, trade union or person is required to make amendment.[45]

This governance structure was put into place even though employers other than Ontario and employees other than those represented by OPSEU were part of the Plan (e.g. OPTrust) even at inception. The only rights provided to other employers and unions were that they could request certain Plan amendments based on collective bargaining that Ontario and OPSEU would implement, provided funding requirements were satisfied.[46] Further, at the time the Plan was established and its governance structure put into place, the Plan

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[45] Sponsorship Agreement, s. 20, 25 and 32; Trust Agreement, s. 5.02 and 5.11 and Art. 10.

[46] Sponsorship Agreement, s. 21; Trust Agreement, s. 10.02.

contemplated that membership could be expanded to employers who are not Ontario Crown agencies, boards and commissions.[47]

v. To the Extent Governance Structure under Plan Conflicts with Broad Reading of Representation under JSPP Provisions, Sponsorship Agreement Prevails

In our view, the reference to paragraph 2 of the Sponsorship Agreement in the section detailing exemptions from the PBA clearly indicates an intention to (1) protect the governance structure contained in the Sponsorship Agreement and (2) establish a single employer pension plan, i.e. a Plan where the employer is considered to be Ontario (or potentially Ontario and its affiliates) and the employees/members are those of Ontario (or Ontario and its affiliates) represented by OPSEU.

To the extent that the JSPP provisions could be read to require representation in the joint governance of the Plan by parties other than Ontario and OPSEU (in a broader sense than the interpretation of representation we have put forward above), then we are of the view that this would contradict what is permitted by the OPSEU Act and Sponsorship Agreement and therefore would conflict with the provisions of the OPSEU Act and the Sponsorship Agreement that require the Plan to be considered a single employer pension plan with the governance structure specified in the Sponsorship Agreement. The courts have recognized that contradiction between two provisions is enough to bring them into conflict, even though the conflict between the provisions is not complete.[48]

In the circumstances, the OPSEU Act and Sponsorship Agreement should prevail over the PBA requirements regarding joint governance (pursuant to section 3(2) and 4(3.1) of the OPSEU Act) and the clear intent in the Sponsorship Agreement that the Plan's status and governance structure be protected.[49] Alternatively, the provisions in the PBA regulations

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[47] See Sponsorship Agreement, s. 40.

[48] *Sullivan*, paras 11.30 - 11.34; see, in particular, *Lévis (City) v. Fraternité des policiers de Lévis Inc.* 2007 SCC 14.

[49] In the normal course, a legislative provision, such as the PBA override provisions in the OPSEU Act, that provides that a piece of legislation prevails over another piece of legislation resolves the issue of conflict (see *Sullivan*, paras. 11.42-11.46). While there may be some question of whether a legislature can effectively provide for a statute to prevail over future legislation (as in the case of the JSPP provisions, which followed the enactment of the OPSEU Act and the Sponsorship Agreement), the approach to the interpretation of conflict is highly contextual. Under all the circumstances of this case, we are of the view that a court would likely try to find a way to read the legislative provisions to give effect to the intent of the Sponsorship Agreement, whether by creating an implied exception for the Plan under the JSPP rules or by reading down the JSPP provisions to extend only to Ontario as employer (and potentially its affiliates) and OPSEU as representative of OPSEU members, as noted in the analysis.

should be "read down" to give a more restrictive interpretation of "representation" in order to avoid the conflict.[50] Courts have used both techniques in the event of conflict or potential conflict.

On this reading of the interaction between the PBA, the OPSEU Act and the Sponsorship Agreement, the fact that Ontario and OPSEU make joint decisions under the Plan regarding Plan amendment and Trustee appointment is sufficient to satisfy the conditions set out in s. 3.1(1)3 and 4 as those provisions would, under this interpretation, not require Ontario or OPSEU to represent the interests of any constituency other than their own. Other employers and members who are employees of other employers (particularly those unaffiliated with Ontario) would not be recognized as having joint representation rights if the Plan is considered a single employer pension plan. In other words, these sections of the PBA Regulation should be "read down" to apply to the Plan as if Ontario and OPSEU were the only relevant parties or the governance structure in the Sponsorship Agreement should be interpreted to prevail over any interpretation of the JSPP provisions that requires something more.

Importantly, as with the first approach, this interpretation also supports not just the structure that would be in place when OPTrust Select comes into effect, but the current governance structure, given that currently the Plan has both employers other than Ontario participating (including non-affiliated employers) and members who are represented by other unions or not represented by unions at all.

b. *Approach 2: Representation of Other Constituencies by Ontario and OPSEU*

i. Argument that Ontario and OPSEU Are Representatives, but in Limited Sense

An alternative approach is for Ontario and OPSEU to acknowledge that they are representatives (i.e. that Ontario is representative of employers; and OPSEU is representative of all Plan members, not just members that are represented by OPSEU as a union) in a limited sense, which could be done as an alternative argument to Approach 1. The appeal of this approach is that it may be somewhat more reflective of prior statements regarding the Plan (e.g. in the letter to the regulator certifying JSPP status), though we would argue that even statements such as those in the letter certifying JSPP status should be interpreted with regard to the single employer structure set out under Approach 1, if Approach 1 is applied.

Under Approach 2, similar to Approach 1, we would argue that the manner in which Ontario and OPSEU are to "represent" other constituencies is circumscribed by the

50 See *Sullivan*, paras. 11.38 - 11.41.

provisions of the Plan Documents. In this case, the Plan Documents set out a very clear governance structure, which does not provide for direct or proportional representation rights to participating employers or members or rights to be consulted or requirements for Ontario or OPSEU to take specific interests (or interests of other constituencies) into account. In fact, the Sponsorship Agreement and Trust Agreement are very clear that Trustee Appointment rights cannot be changed without breaching the trust. They also provide that the Sponsors do not need the agreement of any other person to amend the Plan. The only window the Plan Documents provide for other participating employers/members into decision making is the acknowledgement that other unions may bargain with their employers for certain additional benefits and that Ontario and OPSEU would amend the Plan in that regard, subject to confirmation that funding requirements would be met. This argument would supplement our argument above that the PBA does not require anything more of representatives for purposes of the JSPP provisions. To the extent that more is required, similar arguments to those used under Approach 1 could be made to argue that the OPSEU Act and Sponsorship Agreement should prevent a broader reading of representation (i.e. the two approaches could be used in combination).

ii. Risks of Conceding Representation

We note, however, that, if Ontario and OPSEU concede that they are representatives of other employers and Plan members, then a trier of fact could find that some additional duty to represented parties exists, despite the clear terms of the Plan Documents. Practically speaking, if such a finding were to be made, then such duties would exist in respect of the existing constituencies within the Plan (which as we have outlined already include non-affiliated employers and members who are not represented by OPSEU as bargaining agent). Further, there may be nothing inconsistent between the duties that may ultimately be outlined and what Ontario and OPSEU already do in exercising their powers under the Sponsorship Agreement and Trust Agreement. For example, we would not expect Ontario or OPSEU to take deliberate action to prejudice a participating employer or group of members or to not consider relevant facts in making decisions.

iii. Additional Actions to Mitigate Risks

Further, under this approach, the risks of successful complaint by members and employers regarding that OPSEU or Ontario have not adequately represented them would be significantly mitigated through

- **Disclosure:** Clear disclosure regarding the governance structure to both participating employers and members. For example, it is clear in the sample Participation Agreement with employers and should be clear in communications to potential members that only Ontario and OPSEU are entitled to make decisions about Plan amendments and appointment of Trustees and that the decisions of

Ontario and OPSEU in this regard will bind all participating employers and members of the Plan;

- **Potential Amendment to Sponsorship Agreement:** While not strictly necessary, clarification in the Sponsorship Agreement that Ontario and OPSEU are the joint decision makers for purposes of the s. 3.1(1)3 and 4 of the PBA. The wording of any such amendment should be carefully considered so as not to foreclose the arguments that are available under Approach 1 above, which could be reserved as an alternative argument; and

- **Mechanism for Other Employer/Member Input:** Adding some mechanism for participating employer/member input, such as an advisory committee. An advisory committee could be kept informed about Plan changes and would have the ability to provide input without having any decision-making authority. The added benefit of an advisory committee would be that it could make participation in OPTrust Select more attractive to New Employers and could give OPTrust and the Sponsors insight into any issues among participating employers and members at an early stage. Other mechanisms may be available as well – e.g., a formalized process for seeking plan amendments by other constituencies.

Conclusion

In summary, we are of the opinion that the Plan's current governance structure and the Plan's JSPP status—both currently and with the addition of OPTrust Select—are strongly supported based on either of the approaches outlined above such that the risk of a successful challenge is low.

Yours very truly,

Paul W. Litner

Anna Zalewski

PWL:AZ