

FW_NB.rtf

From: Petsche, Nadine (TBS) []
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]; Kearney, Sean (TBS) [Sean.Kearney@ontario.ca]
CC: Pomykacz, Rob (MOF) [Robert.Pomykacz@ontario.ca]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]
Subject: FW: NB
Date: Friday, September 30, 2016 14:15:37

Len/Sean,

I think it would be useful (and most expeditious) to reach out to Murray Gold for his input on this item. It seems to me that the NB situation (shared risk, DC plans) is quite different than the situation in ON. Perhaps you can help? Thanks. Nadine

From: Sawosch, Mercedes (TBS)
Sent: September 30, 2016 2:10 PM
To: Veinot, Cindy (TBS); Petsche, Nadine (TBS)
Subject: FW: NB

Leaving this with you if possible? Pauline is frying other fish J

M

From: MacIntyre, Kyle (TBS)
Sent: September-30-16 2:05 PM
To: Veinot, Cindy (TBS); Petsche, Nadine (TBS); Fong, Pauline (TBS)
Cc: Laughton, Patrick (TBS); Sawosch, Mercedes (TBS)
Subject: Fwd: NB

?

Begin forwarded message:

From: "McLean, David (MOF)" <David.McLean@ontario.ca>
Date: September 30, 2016 at 2:01:21 PM EDT
To: "MacIntyre, Kyle (TBS)" <Kyle.MacIntyre@ontario.ca>
Subject: FW: NB

FYI

From: Killoch, Alex (MOF)
Sent: September 30, 2016 2:00 PM
To: McLean, David (MOF); Schuurman, Tim (MOF); Pomykacz, Rob (MOF)
Subject: RE: NB

Not sure that is entirely accurate. As the 2016 public accounts noted, they have deemed the asset to be nil for shared risk plans (which are not unlike jspp). It is true that NB was using DC accounting, but they seem to agree with AG now.

http://www2.gnb.ca/content/gnb/en/departments/finance/comptroller/content/public_accounts.html

Target Benefit Pension Plans are accounted for similar to the above plans except they are governed by an Agreement and Declaration of Trust which restricts access to the plan assets. On this basis, the Province records the value of the plan net assets as nil when these plans are in a net asset position. When these plans are in a net obligation position, the Province records a liability for its share. The plans accounted for using this method are: the Public Service Shared Risk Pension Plan, the New Brunswick Teachers' Pension Plan, the Shared Risk Plan for CUPE Employees of New Brunswick Hospitals, and the Shared Risk Plan for Certain Bargaining Employees of New Brunswick Hospitals.

From: McLean, David (MOF)
Sent: Friday, September 30, 2016 1:55 PM
To: Schuurman, Tim (MOF); Killoch, Alex (MOF)
Cc: Pearce, Christopher (MOF); Clarke-Darshanand, Jamille (MOF)
Subject: FW: NB

OPCD's response below. Short answer – different issue.

From: MacIntyre, Kyle (TBS)
Sent: September 30, 2016 1:48 PM
To: McLean, David (MOF)
Subject: Fwd: NB

Begin forwarded message:

From: "Fong, Pauline (TBS)" <Pauline.Fong@ontario.ca>
Date: September 30, 2016 at 1:46:57 PM EDT
To: "Veinot, Cindy (TBS)" <Cindy.Veinot@ontario.ca>, "Sawosch, Mercedes (TBS)" <Mercedes.Sawosch@ontario.ca>, "MacIntyre, Kyle (TBS)" <Kyle.MacIntyre@ontario.ca>, "Petsche, Nadine (TBS)" <Nadine.Petsche@ontario.ca>
Cc: "Laughton, Patrick (TBS)" <Patrick.Laughton@ontario.ca>
Subject: RE: NB

Cindy is correct. Previously NB reported their shared risk plan as defined contribution plan and this year they have accounted for their shared risk plans as a defined benefit plan. This issue is not similar to what Ontario is facing.

From: Veinot, Cindy (TBS)
Sent: September-30-16 1:37 PM
To: Sawosch, Mercedes (TBS); MacIntyre, Kyle (TBS); Petsche, Nadine (TBS)
Cc: Laughton, Patrick (TBS); Fong, Pauline (TBS)
Subject: RE: NB

My understanding is that NB changed their plan into a shared risk plan. Government accounted for it as a defined contribution plan and the auditor said it should be accounted for as a defined benefit plan. Looks like NB now agreed to account for the plan as a defined benefit plan.

Cindy

From: Sawosch, Mercedes (TBS)
Sent: September-30-16 1:36 PM
To: MacIntyre, Kyle (TBS); Veinot, Cindy (TBS); Petsche, Nadine (TBS)
Cc: Laughton, Patrick (TBS); Fong, Pauline (TBS)
Subject: RE: NB

Pauline is on it.

From: MacIntyre, Kyle (TBS)
Sent: September-30-16 1:35 PM
To: Veinot, Cindy (TBS); Petsche, Nadine (TBS)
Cc: Laughton, Patrick (TBS); Sawosch, Mercedes (TBS)
Subject: Fwd: NB

Can folks pls review ASAP?

Begin forwarded message:

From: "McLean, David (MOF)" <David.McLean@ontario.ca>
Date: September 30, 2016 at 1:33:05 PM EDT
To: "MacIntyre, Kyle (TBS)" <Kyle.MacIntyre@ontario.ca>
Subject: FW: NB

Hey Kyle - have you seen this? Wondering if OPCD should look into this? Our MO is looking for background on whether this is the same or similar situation we're in and what this could mean for us. Attached email has the tweet.

-----Original Message-----

From: Mendes, Elizabeth (MOF)
Sent: September 30, 2016 1:22 PM
To: McLean, David (MOF)
Subject: Fw: NB

Original Message

From: Ghiassi, Ali (MOF) <Ali.Ghiassi@ontario.ca>

Sent: Friday, September 30, 2016 1:20 PM

To: Ingram, Kelsey (MOF); Mendes, Elizabeth (MOF)

Subject: NB

On Twitter it says that the Auditor of New Brunswick has given their PA a clean audit based on pensions treatment. Eerily like us. Can we look into this asap? Want to know what media is saying. Liz need to know substance.

Ali Ghiassi
Chief of Staff
Minister of Finance
416.948.5409

Letter to Veinot re Surplus Rights in regards to Ontario and BC Plans - September 19 2016.pdf

From: [Murray Gold](#)
To: [Hatzis, Len \(TBS\)](#)
Subject: Letter to Veinot re Surplus Rights in regards to Ontario and BC Plans - September 19 2016
Date: September 20, 2016 3:50:51 PM
Attachments: [logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png](#)
[Letter to Veinot re Surplus Rights in regards to Ontario and BC Plans - September 19 2016.DOCX](#)

Please let me know of any questions or comments.



Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.pdf



Letter to Veinot re Surplus Rights in regards.pdf

September 20, 2016

Murray Gold
Direct Dial: 416-595-2085
Direct Fax: 416-204-2873
mgold@kmlaw.ca

Via E-mail

Cindy Veinot
Assistant Deputy Minister and Provincial Controller
Province of Ontario

Dear Ms. Veinot:

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

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

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

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

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

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

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

I. ONTARIO PLANS

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

The OTPP is governed by:

- (a) the *Teachers' Pension Act*, R.S.O. 1990, c.T.1 (the "TPA");
- (b) Plan text for the OTPP (the "Plan text");
- (c) an Agreement between Her Majesty the Queen in right of the Province of Ontario represented by the Minister of Education and Training (the "Minister") and The Ontario Teachers' Federation represented by its Executive (the "OTF"), dated July 15, 1991 (the "Partners' Agreement"), as amended; and
- (d) a Funding Management Policy, attached as Appendix "A" to the Partners Agreement.

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

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

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

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

The process governing the use of ongoing surpluses by the Partners is set out in the partners' Agreement. It anticipates that the OTPP Board will prepare an actuarial valuation of the OTPP every three years (section 73). The Partners are then required to bargain in good faith with respect to the disposition of any surpluses, or any adjustments to address Plan deficiencies (section 74). Section 77 of the Partners' Agreement anticipates that the Partners may appoint a mediator to assist them and sections 84 and 86 of the Partners' Agreement provide for the

appointment of a Board of Arbitration to make a final and binding order with respect to the utilization of an ongoing surplus disclosed by the actuarial valuation. A Board of Arbitration is empowered to change contribution rates and/or benefits under the Plan, or to keep an amount of surplus in reserve, but is subject to certain limits that are set out in section 92.

B. The OPSEU Pension Plan ("OPTrust")

The OPTrust is governed by:

- (a) a Sponsorship Agreement made as of April 18, 1994 between Her Majesty the Queen in right of the Province of Ontario as represented by the Chair of the Management Board of Cabinet ("Ontario") and the Ontario Public Service Employees' Union ("OPSEU") (the "Sponsorship Agreement");
- (b) an Agreement and Declaration of Trust of the Trust Fund dated October 25, 1994 (the "Trust Agreement"); and
- (c) OPTrust Plan text.

Section 56 of the Sponsorship Agreement addresses the use of actuarial gains disclosed under an actuarial valuation report prepared after March 31, 1997. Section 56(d) provides that once the 'Transferred Initial Unfunded Liability' of the OPTrust has been fully liquidated (we understand that it has been liquidated), then actuarial gains disclosed by a valuation of the OPTrust are divided into two equal pools, one of which "...shall be used for the benefit of Ontario, to be applied against any special payments required to be made by Ontario and thereafter to reduce Ontario's normal costs..." and the other pool is to be used by OPSEU for the benefit of Plan Members (section 56(c) of the Sponsorship Agreement). Section 56(d) also anticipates that OPSEU and Ontario may collectively bargain an allocation of gains that is different from 50/50.

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

II. BRITISH COLUMBIA PLANS

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

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

The MPP is governed by:

- (a) Municipal Pension Plan Joint Trust Agreement (consolidated), updated to September 30, 2015 (the "MPP Trust Agreement"); and
- (b) Municipal Pension Plan Rules effective April 1, 2000 (current to November 19, 2015).

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

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

The MPP Partners may also amend the MPP using ongoing surpluses in accordance with section 11.3 of the MPP Trust Agreement. This section permits the Partners to direct the Board of Trustees to amend the Plan rules and requires the Board of Trustees to comply with that direction so long as three conditions are met: (a) the Partners first receive and consider the advice of the Board respecting the proposed amendment, (b) the proposed amendment is compliant with the Trustees' fiduciary responsibilities and (c) the proposed amendment will not result in the Plan failing to be funded in accordance with the PBSA going concern funding requirements.

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

It should be noted that, during a Transitional Period, the use of actuarial gains in the MPP is prescribed by Appendix "B" to the MPP Joint Trust Agreement. During the Transitional Period, all gains must first be used to eliminate unfunded liabilities. Then, actuarial gains must be applied to both (a) reconfigure employer and member contribution rates and (b) make specified benefit improvements. Thereafter, 50% of any additional actuarial excesses must be used to fund a contribution rate stabilization reserve, and the balance of the actuarial excess must be transferred to the Inflation Adjustment Account to an aggregate total of \$1 billion. The contribution rate stabilization reserve is intended to be shared on an equal (50/50) basis between Plan members and employers in order to maintain or reduce future contribution rates. Until such time as the objectives identified for the Transitional Period are fulfilled, there is no discretion left to either the Partners or the Board of Trustees to utilize ongoing MPP surpluses and no ongoing surpluses are available for contribution reductions

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

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

In this regard, section 10.3(c) of the PSPP Joint Trust Agreement expressly provides the Board of Trustees¹ with the authority to apply ongoing surpluses (the term used in the PSPP Joint Trust Agreement is "surplus assets") in one or more of the following manners:

1. transfer all or portions of surplus assets to the reserve established within the Pension Fund for stabilising contribution rates;
2. transfer all or portion of the surplus assets to the Inflation Adjustment Account;
3. apply all or a portion of the surplus assets to an equal reduction or elimination of Employer and Plan Member contributions to the Basic Account for a period of time;
4. apply all or a portion of the surplus assets to fund changes to the PSPP's benefit provisions provided that any change to benefits does not result in contribution rate increases, does not create or increase an unfunded liability, is consistent with the Trustees' fiduciary obligations and does not conflict the requirement (in s. 13.5) that, upon the termination and wind-up of the PSPP any remaining assets are to be equally shared between the employees and the employers.

At the same time, as is the case for the MPP, the Partners have the authority, pursuant to s.11.3 of the PSPP Joint Trust Agreement, to direct the Board of Trustees to amend the PSPP Plan rules and change either or both of the PSPP's contribution rates or benefits so long as the Partners have received and considered the advice of the Board respecting both the cost and administrative impact of any proposed amendments, the amendment is not inconsistent with the Trustees' fiduciary responsibilities or any funding policy adopted by the board and the proposed amendment will not result in the PSPP failing to be funded in accordance with British Columbia's Pension Benefits Standards Act.

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

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

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

The TPP is governed by:

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

The Joint Trust Agreement contains provisions permitting both the Partners and the TPP Board of Trustees to amend the Plan rules using ongoing Plan surpluses (section 11 of the Joint Trust Agreement). These provisions are the equivalent of the MPP Joint Trust Agreement provisions regarding the same matters, as described above.

As well, Appendix "B" to the TPP Joint Trust Agreement adopts special funding rules for a "Transitional Period" during which the Board of Trustees is directed to use surpluses to achieve specified contribution and benefit improvement outcomes. As with the MPP, the Transitional Period is of indefinite duration, and only ends when the transitional objectives have been satisfied. During the transitional period, all ongoing surpluses are committed to the transitional objectives and no ongoing surpluses are available for contribution reductions.

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

The CPP is governed by:

- (c) the CPP Joint Trust Agreement made April 4, 2011; and
- (d) the CPP rules, effective June 22, 2012 (current to April 1, 2016).

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

The Partners have the authority (s.14(2) of the Joint trust Agreement) to direct the Board to amend the Plan rules, and the Plan Board is required to amend those rules, provided that the Partners "first receive and consider the advice of the Board respecting both the cost and the administrative impact of implementing the proposed amendment" and the proposed amendment is not inconsistent with applicable law or the Trustees' fiduciary responsibilities.

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

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

III. SUMMARY AND CONCLUSIONS

A. Ontario Plans

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

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

B. BC Plans

Ongoing Surpluses - All of the BC Plans follow the same pattern with respect to the authority to use ongoing surpluses. In the normal course, the Boards of Trustees of the BC Plans, unlike their Ontario counterparts, are permitted to utilize ongoing surpluses through the amendment of the Plan rules governing contributions and benefits, so long as the amendment of the Plan rules does not result in an increased contribution rate for employees or employers, does not create or increase an unfunded liability in the Plan and is otherwise compliant with applicable legislation and the Trustees' fiduciary obligations. At the same time, each of the BC Plans also permits the Plan Partners to utilize ongoing surpluses by directing the Board of Trustees to amend the Plan rules. The Partners may so direct the Board of Trustees after receiving advice from the Board with respect to the costs of any Plan amendment and the administrative implications of such an amendment, and so long as the proposed amendment is compliant with law and with the Trustees' fiduciary obligations.

Transitional Period - In addition, three of the four BC Plans we have reviewed (MPP, TPP and, for only two years, the PSPP) contain special rules governing the utilization of ongoing surpluses during a "Transitional Period". In these cases, the Transitional rules require that ongoing surpluses that emerge during the Transitional Period are to be used to restructure the employer contribution obligation and improve benefits. In the cases of the MPP and TPP, the Transitional Periods do not come to an end until all of the intended uses of ongoing surplus

during the Transitional Period have been fulfilled. We are not currently aware as to whether the Transitional Periods for the MPP and the TPP remain ongoing, or have terminated..

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

Yours truly,

KOSKIE MINSKY LLP

Murray Gold

MG:jn

Ontario Provincial Controller - Opinion Concerning Surplus Rights in regard to Ontario and BC Plans.pdf

From: [Jean Nikolov](#)
To: [Hatzis, Len \(TBS\)](#)
Cc: [Murray Gold](#)
Subject: Ontario Provincial Controller - Opinion Concerning Surplus Rights in regard to Ontario and BC Plans
Date: September 23, 2016 1:35:35 PM
Attachments: [logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png](#)
[Letter to Len Hatzis re Surplus Rights in regards to Ontario and BC Plans - September 23 2016 \(3\).PDF](#)

Mr. Hatzis,

Attached please find our correspondence dated September 23, 2016 with respect to the aforementioned matter. Should you have any questions or comment with respect to the attached correspondence, please do not hesitate to contact Murray Gold directly at: 416-595-2085 or at: mgold@kmlaw.ca.

Thank you.

Jean Nikolov



Jean Nikolov

Legal Assistant to Murray Gold

T: 416-595-2099 | E: jnikolov@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7_1.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

Letter to Len Hatzis re Surplus Rights in rega.PDF

September 23, 2016

Murray Gold
Direct Dial: 416-595-2085
Direct Fax: 416-204-2873
mgold@kmlaw.ca

Via E-mail – len.hatzis@ontario.ca

Len Hatzis
Deputy Director
Legal Services Branch | Treasury Board Secretariat
77 Wellesley Street West, 9th Floor
Toronto ON M7A 1N3

Dear Mr. Hatzis:

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

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

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

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

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

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

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

I. ONTARIO PLANS

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

The OTPP is governed by:

- (a) the *Teachers' Pension Act*, R.S.O. 1990, c.T.1 (the "TPA");
- (b) Plan text for the OTPP (the "Plan text");
- (c) an Agreement between Her Majesty the Queen in right of the Province of Ontario represented by the Minister of Education and Training (the "Minister") and The Ontario Teachers' Federation represented by its Executive (the "OTF"), dated July 15, 1991 (the "Partners' Agreement"), as amended; and
- (d) a Funding Management Policy, attached as Appendix "A" to the Partners Agreement.

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

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

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

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

The process governing the use of ongoing surpluses by the Partners is set out in the partners' Agreement. It anticipates that the OTPP Board will prepare an actuarial valuation of the OTPP every three years (section 73). The Partners are then required to bargain in good faith with respect to the disposition of any surpluses, or any adjustments to address Plan deficiencies (section 74). Section 77 of the Partners' Agreement anticipates that the Partners may appoint a mediator to assist them and sections 84 and 86 of the Partners' Agreement provide for the

appointment of a Board of Arbitration to make a final and binding order with respect to the utilization of an ongoing surplus disclosed by the actuarial valuation. A Board of Arbitration is empowered to change contribution rates and/or benefits under the Plan, or to keep an amount of surplus in reserve, but is subject to certain limits that are set out in section 92.

B. The OPSEU Pension Plan ("OPTrust")

The OPTrust is governed by:

- (a) a Sponsorship Agreement made as of April 18, 1994 between Her Majesty the Queen in right of the Province of Ontario as represented by the Chair of the Management Board of Cabinet ("Ontario") and the Ontario Public Service Employees' Union ("OPSEU") (the "Sponsorship Agreement");
- (b) an Agreement and Declaration of Trust of the Trust Fund dated October 25, 1994 (the "Trust Agreement"); and
- (c) OPTrust Plan text.

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

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

II. BRITISH COLUMBIA PLANS

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

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

The MPP is governed by:

- (a) Municipal Pension Plan Joint Trust Agreement (consolidated), updated to September 30, 2015 (the "MPP Trust Agreement"); and
- (b) Municipal Pension Plan Rules effective April 1, 2000 (current to November 19, 2015).

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

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

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

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

It should be noted that, during a Transitional Period, the use of actuarial gains in the MPP is prescribed by Appendix "B" to the MPP Joint Trust Agreement. During the Transitional Period, all gains must first be used to eliminate unfunded liabilities. Then, actuarial gains must be applied to both (a) reconfigure employer contribution rates and (b) make specified benefit improvements. Employer contribution rates are to be reconfigured by eliminating the 'doubling' feature of employer contribution rates applicable to employees in certain Plan membership categories once they reach either 45 or 50 years of age (depending on the employment category). The transitional provisions prescribe the new base rates for each of the 5 categories of members in the BC, but also stipulate that employer contribution rates for two of the five

categories will be increased beyond those base rates to reflect the differential current service cost for those two groups. The surplus implications of the reconfiguration of employer contribution rates are not predictable, and depend, at least in part, on the relationship between the 'base rates' under the transitional provisions and the actual rates being paid by employers at the time of the reconfiguration. Once the employer contribution rates are reconfigured and the specified benefit improvements are made, then 50% of any additional actuarial excesses must be used to fund a contribution rate stabilization reserve, and the balance of the actuarial excess must be transferred to the Inflation Adjustment Account to an aggregate total of \$1 billion. The contribution rate stabilization reserve is intended to be shared on an equal (50/50) basis between Plan members and employers in order to maintain or reduce future contribution rates. Until such time as the objectives identified for the Transitional Period are fulfilled, there is no discretion left to either the Partners or the Board of Trustees to utilize ongoing MPP surpluses.

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

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

In this regard, section 10.3(c) of the PSPP Joint Trust Agreement expressly provides the Board of Trustees¹ with the authority to apply ongoing surpluses (the term used in the PSPP Joint Trust Agreement is "surplus assets") in one or more of the following manners:

1. transfer all or portions of surplus assets to the reserve established within the Pension Fund for stabilising contribution rates;
2. transfer all or portion of the surplus assets to the Inflation Adjustment Account;
3. apply all or a portion of the surplus assets to an equal reduction or elimination of Employer and Plan Member contributions to the Basic Account for a period of time;
4. apply all or a portion of the surplus assets to fund changes to the PSPP's benefit provisions provided that any change to benefits does not result in contribution rate increases, does not create or increase an unfunded liability, is consistent with the Trustees' fiduciary obligations and does not conflict the requirement (in s. 13.5) that, upon the termination and wind-up of the PSPP any remaining assets are to be equally shared between the employees and the employers.

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

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

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

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

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

The TPP is governed by:

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

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

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

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

The CPP is governed by:

- (c) the CPP Joint Trust Agreement made April 4, 2011; and
- (d) the CPP rules, effective June 22, 2012 (current to April 1, 2016).

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

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

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

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

III. SUMMARY AND CONCLUSIONS

A. Ontario Plans

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

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

B. BC Plans

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

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

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

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

Yours truly,

KOSKIE MINSKY LLP

A handwritten signature in black ink, appearing to read "Murray Gold", is written over the text "KOSKIE MINSKY LLP".

Murray Gold

MG:jn

Pension Comparison.rtf

From: Murray Gold [mgold@kmlaw.ca]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
Subject: Pension Comparison
Date: Tuesday, September 20, 2016 19:59:45
Attachment 1: logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png
Attachment 2: Letter to Veinot re Surplus Rights in regards to Ontario and BC Plans - September 19 2016 (3).docx

Here is draft with more detail on the transitional periods, per our discussion.

<http://www.kmlaw.ca/> Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
[kmlaw.ca](http://www.kmlaw.ca)

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

Letter to Veinot re Surplus Rights in regards to Ontario and BC Plans - September 19 2016 (3).pdf

September 20, 2016

Murray Gold
Direct Dial: 416-595-2085
Direct Fax: 416-204-2873
mgold@kmlaw.ca

Via E-mail

Cindy Veinot
Assistant Deputy Minister and Provincial Controller
Province of Ontario

Dear Ms. Veinot:

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

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

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

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

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

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

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

I. ONTARIO PLANS

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

The OTPP is governed by:

- (a) the *Teachers' Pension Act*, R.S.O. 1990, c.T.1 (the "TPA");
- (b) Plan text for the OTPP (the "Plan text");
- (c) an Agreement between Her Majesty the Queen in right of the Province of Ontario represented by the Minister of Education and Training (the "Minister") and The Ontario Teachers' Federation represented by its Executive (the "OTF"), dated July 15, 1991 (the "Partners' Agreement"), as amended; and
- (d) a Funding Management Policy, attached as Appendix "A" to the Partners Agreement.

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

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

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

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

The process governing the use of ongoing surpluses by the Partners is set out in the partners' Agreement. It anticipates that the OTPP Board will prepare an actuarial valuation of the OTPP every three years (section 73). The Partners are then required to bargain in good faith with respect to the disposition of any surpluses, or any adjustments to address Plan deficiencies (section 74). Section 77 of the Partners' Agreement anticipates that the Partners may appoint a mediator to assist them and sections 84 and 86 of the Partners' Agreement provide for the

appointment of a Board of Arbitration to make a final and binding order with respect to the utilization of an ongoing surplus disclosed by the actuarial valuation. A Board of Arbitration is empowered to change contribution rates and/or benefits under the Plan, or to keep an amount of surplus in reserve, but is subject to certain limits that are set out in section 92.

B. The OPSEU Pension Plan ("OPTrust")

The OPTrust is governed by:

- (a) a Sponsorship Agreement made as of April 18, 1994 between Her Majesty the Queen in right of the Province of Ontario as represented by the Chair of the Management Board of Cabinet ("Ontario") and the Ontario Public Service Employees' Union ("OPSEU") (the "Sponsorship Agreement");
- (b) an Agreement and Declaration of Trust of the Trust Fund dated October 25, 1994 (the "Trust Agreement"); and
- (c) OPTrust Plan text.

Section 56 of the Sponsorship Agreement addresses the use of actuarial gains disclosed under an actuarial valuation report prepared after March 31, 1997. Section 56(d) provides that once the 'Transferred Initial Unfunded Liability' of the OPTrust has been fully liquidated (we understand that it has been liquidated), then actuarial gains disclosed by a valuation of the OPTrust are divided into two equal pools, one of which "...shall be used for the benefit of Ontario, to be applied against any special payments required to be made by Ontario and thereafter to reduce Ontario's normal costs..." and the other pool is to be used by OPSEU for the benefit of Plan Members (section 56(c) of the Sponsorship Agreement). Section 56(d) also anticipates that OPSEU and Ontario may collectively bargain an allocation of gains that is different from 50/50.

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

II. BRITISH COLUMBIA PLANS

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

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

The MPP is governed by:

- (a) Municipal Pension Plan Joint Trust Agreement (consolidated), updated to September 30, 2015 (the "MPP Trust Agreement"); and
- (b) Municipal Pension Plan Rules effective April 1, 2000 (current to November 19, 2015).

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

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

The MPP Partners may also amend the MPP using ongoing surpluses in accordance with section 11.3 of the MPP Trust Agreement. This section permits the Partners to direct the Board of Trustees to amend the Plan rules and requires the Board of Trustees to comply with that direction so long as three conditions are met: (a) the Partners first receive and consider the advice of the Board respecting the proposed amendment, (b) the proposed amendment is compliant with the Trustees' fiduciary responsibilities and (c) the proposed amendment will not result in the Plan failing to be funded in accordance with the PBSA going concern funding requirements.

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

It should be noted that, during a Transitional Period, the use of actuarial gains in the MPP is prescribed by Appendix "B" to the MPP Joint Trust Agreement. During the Transitional Period, all gains must first be used to eliminate unfunded liabilities. Then, actuarial gains must be applied to both (a) reconfigure employer contribution rates and (b) make specified benefit improvements. Employer contribution rates are to be reconfigured by eliminating the 'doubling' feature of employer contribution rates applicable to employees in certain Plan membership categories once they reach either 45 or 50 years of age (depending on the employment category). The transitional provisions prescribe the new base rates for each of the 5 categories of members in the BC, but also stipulate that employer contribution rates for two of the five categories will be increased beyond those base rates to reflect the differential current service cost for those two groups. The surplus implications of the reconfiguration of employer contribution rates are not predictable, and depend, at least in part, on the relationship between the 'base rates' under the transitional provisions and the actual rates being paid by employers at

the time of the reconfiguration. Once the employer contribution rates are reconfigured and the specified benefit improvements are made, then 50% of any additional actuarial excesses must be used to fund a contribution rate stabilization reserve, and the balance of the actuarial excess must be transferred to the Inflation Adjustment Account to an aggregate total of \$1 billion. The contribution rate stabilization reserve is intended to be shared on an equal (50/50) basis between Plan members and employers in order to maintain or reduce future contribution rates. Until such time as the objectives identified for the Transitional Period are fulfilled, there is no discretion left to either the Partners or the Board of Trustees to utilize ongoing MPP surpluses.

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

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

In this regard, section 10.3(c) of the PSPP Joint Trust Agreement expressly provides the Board of Trustees¹ with the authority to apply ongoing surpluses (the term used in the PSPP Joint Trust Agreement is "surplus assets") in one or more of the following manners:

1. transfer all or portions of surplus assets to the reserve established within the Pension Fund for stabilising contribution rates;
2. transfer all or portion of the surplus assets to the Inflation Adjustment Account;
3. apply all or a portion of the surplus assets to an equal reduction or elimination of Employer and Plan Member contributions to the Basic Account for a period of time;
4. apply all or a portion of the surplus assets to fund changes to the PSPP's benefit provisions provided that any change to benefits does not result in contribution rate increases, does not create or increase an unfunded liability, is consistent with the Trustees' fiduciary obligations and does not conflict the requirement (in s. 13.5) that, upon the termination and wind-up of the PSPP any remaining assets are to be equally shared between the employees and the employers.

At the same time, as is the case for the MPP, the Partners have the authority, pursuant to s.11.3 of the PSPP Joint Trust Agreement, to direct the Board of Trustees to amend the PSPP Plan rules and change either or both of the PSPP's contribution rates or benefits so long as the Partners have received and considered the advice of the Board respecting both the cost and administrative impact of any proposed amendments, the amendment is not inconsistent with the Trustees' fiduciary responsibilities or any funding policy adopted by the board and the proposed

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

amendment will not result in the PSPP failing to be funded in accordance with British Columbia's Pension Benefits Standards Act.

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

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

The TPP is governed by:

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

The Joint Trust Agreement contains provisions permitting both the Partners and the TPP Board of Trustees to amend the Plan rules using ongoing Plan surpluses (section 11 of the Joint Trust Agreement). These provisions are the equivalent of the MPP Joint Trust Agreement provisions regarding the same matters, as described above.

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

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

The CPP is governed by:

- (c) the CPP Joint Trust Agreement made April 4, 2011; and
- (d) the CPP rules, effective June 22, 2012 (current to April 1, 2016).

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

The Partners have the authority (s.14(2) of the Joint trust Agreement) to direct the Board to amend the Plan rules, and the Plan Board is required to amend those rules, provided that the Partners "first receive and consider the advice of the Board respecting both the cost and the

administrative impact of implementing the proposed amendment" and the proposed amendment is not inconsistent with applicable law or the Trustees' fiduciary responsibilities.

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

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

III. SUMMARY AND CONCLUSIONS

A. Ontario Plans

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

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

B. BC Plans

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

increase an unfunded liability in the Plan and is otherwise compliant with applicable legislation and the Trustees' fiduciary obligations. At the same time, each of the BC Plans also permits the Plan Partners to utilize ongoing surpluses by directing the Board of Trustees to amend the Plan rules. The Partners may so direct the Board of Trustees after receiving advice from the Board with respect to the costs of any Plan amendment and the administrative implications of such an amendment, and so long as the proposed amendment is compliant with law and with the Trustees' fiduciary obligations.

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

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

Yours truly,

KOSKIE MINSKY LLP

Murray Gold

MG:jn

Province of Ontario - Retention of Legal Services.rtf

From: Jean Nikolov [jnikolov@kmlaw.ca]
To: Kearney, Sean (TBS) [Sean.Kearney@ontario.ca]
CC: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]; Murray Gold [mgold@kmlaw.ca]
Subject: Province of Ontario - Retention of Legal Services
Date: Tuesday, September 20, 2016 11:11:50
Attachment 1: logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png
Attachment 2: Retainer Letter - September 19, 2016.PDF

Mr. Kearney,

Attached please find a signed copy of the above retention letter. Should you have any questions or comment with respect to the attached letter, please do not hesitate to contact Murray Gold directly at: 416-595-2085 or at: mgold@kmlaw.ca.

Thank you.

Jean Nikolov

<http://www.kmlaw.ca/> Jean Nikolov

Legal Assistant to Murray Gold

T: 416-595-2099 | E: jnikolov@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

[kmlaw.ca](http://www.kmlaw.ca)

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.pdf



Retainer Letter - September 19, 2016.PDF

**Ministry of the
Attorney General**

Legal Services Branch
Treasury Board Secretariat

Ferguson Block
77 Wellesley Street West, 9th Floor
Toronto ON M7A 1N3

Tel.: 416 327-6393
Fax.: 416 325-9404
E-mail: Len.Hatzis@ontario.ca

**Ministère du
Procureur général**

Direction des services juridiques
Secrétariat du Conseil du Trésor

Édifice Ferguson
77, rue Wellesley Ouest, 9^e étage
Toronto ON M7A 1N3

Tél.: 416 327-6393
Télé.: 416 325-9404
Courriel: Len.Hatzis@ontario.ca



SEP 20 2016

Sent by Courier

September 19, 2016

PRIVATE AND CONFIDENTIAL

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Attention: Murray Gold

Dear Mr. Gold:

**Re: Retention of Legal Services
to provide an analysis of frameworks of various pension plans**

This will confirm that your firm, Koskie Minsky LLP ("Koskie Minsky") has been retained to provide the Treasury Board Secretariat (TBS) on behalf of the Province of Ontario (Ontario) with a comparative legal/governance analysis of how the frameworks of various public pension plans (to include OTPP, OPSEU and four BC plans including municipal, teachers, college and public service) compare on the issue of authority of said pension boards and its plan partners to determine the utilization of plan surpluses and how the plans differ it regard to utilization of any surplus plan assets.

I confirm that this matter will be assigned to you, Mr. Murray Gold. You will be compensated at the rate of five hundred dollars (\$500.00) per hour. We ask that your firm not substitute legal counsel without our prior written approval. In addition to these fees, you will be reimbursed for reasonable disbursements on a cost basis and without mark-up. All disbursements other than routine expenses such as faxes, copies and long distance charges must be pre-approved. All disbursements must be supported by receipts.

We ask that bills be submitted to me on the first day of each quarter for services performed during the preceding quarter, unless directed otherwise. The maximum amount for the Retainer is fifty thousand dollars (\$50,000.00). **Please advise me when the billings are approaching sixty percent (60%) of this amount, which will be thirty thousand dollars (\$30,000.00).** In your firm's

statement of account, please identify each date the services were completed, by whom and the time spent. Disbursements and applicable taxes should be listed separately on the account. Note that the maximum amount for the Retainer is exclusive of disbursements and applicable taxes.

Our client, the Office of the Provincial Controller will be responsible for payment of your invoices after they have been submitted to my attention for approval. Our practice is for payments to be made to you on the basis of invoices rendered detailing the period covered, the nature of the services rendered and the number of hours worked by each counsel and law clerk. Please include a print-out of your firm's computerized dockets together with each billing.

I would also ask that you please separate the hours of work and the hourly rates, as well as the disbursements, so that the Government may maintain its public audit records.

The delivery of services must comply with all applicable requirements, specifications and standards for accessibility established by the Ministry in accordance with the *Accessibility for Ontarians and Disabilities Act*, 2005, S.O. 2005 c. 11 and any regulations made thereto.

Your firm's primary contact is Mr. Len Hatzis, who can be reached at (416) 327-6393 or len.hatzis@ontario.ca. It is anticipated that you will be performing this work in a supporting role and not regularly attending ministry meetings and briefings. However, you may be required to brief officials of the Ministry of the Attorney General or other impacted Ministries or stakeholders from time to time.

Please forward your accounts to me:

Sean Kearney
Legal Director
Legal Services Branch, Treasury Board Secretariat
77 Wellesley Street West
Ferguson Block, 9th Floor
Toronto, ON M7A 1N3

During the course of this retainer, should issues be identified which should be more properly addressed by Ministry counsel or involve legal and/or policy matters relating to constitutional or Charter issues or the Ontario Human Rights Code, your firm is instructed to stop the work being performed under this retainer. You will receive further instruction from Len Hatzis. We ask that no further work be undertaken until your firm has received this instruction.

Your firm declares, after taking all reasonable steps to investigate, that Koskie Minsky does not have any conflict of interest representing TBS under this retainer save and except for its retainer with the Ontario Teachers' Federation ("OTF") in regard to its role as sponsor of the Ontario Teachers' Pension Plan and also its retainer with the Board of Trustees of the OPTrust. Koskie Minsky and TBS

agree that Koskie Minsky has no conflict of interest in the performance of the work contemplated by the within retainer or in its ongoing representation of the OTF.

You agree that any copyright in any reports, opinion, agreements or materials prepared by you pursuant to this retainer will be the sole property of the Crown in right of Ontario and that you hereby assign such copyright to the provincial Crown. Further, you hereby waive all moral rights in favour of the Crown in right of Ontario.

You will not duplicate or copy any documentation provided by the Crown pursuant to this retainer except to the extent necessary to fulfill your obligations under this retainer.

You will promptly return to the Crown, upon expiry or termination of this retainer, all documentation which you received from the Crown pursuant to this retainer, provided that you may keep a copy of such part of the documentation as may be reasonably necessary to confirm the provision of the service in accordance with your professional obligations.

This retainer does not create an employer/employee relationship or any joint venture or partner relationship. You shall not hold yourself out as an agent, employee or partner of the Crown or make any statement or representation that may have such authority.

The solicitor-client relationship will terminate upon the end of this retainer. For the purpose of avoiding future conflicts of interest, you will not use confidential information gained through this retainer in respect of work for other clients involving claims against Her Majesty the Queen in right of Ontario.

The Ministry may terminate this retainer at any time, without fault and without liability, upon two (2) weeks' notice of termination in writing to you.

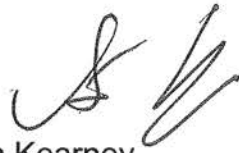
The Ministry shall not by termination waive any rights or remedies it may have in the law of equity at the date of termination. Termination shall not relieve you or your firm from warranties and other responsibilities relating to services performed and money paid up to and including the date of termination.

The retainer may be amended, altered or added to only by written agreement between the parties which agreement is supplemental to this retainer and thereafter forms part of this retainer.

The retainer and the rights, obligations and relations of the parties shall, unless otherwise specified, be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The parties do hereby attorn to the jurisdiction of the Courts of the Province of Ontario.

If your firm agrees with the terms and conditions set out in this retainer, please sign the acknowledgement below and return to me at your earliest convenience

Yours truly,



Sean Kearney
Legal Director

Cc Len Hatzis

ACCEPTANCE

Koskie Minsky LLP accepts the terms of this Retainer.

Per:  Date: Sept 20, 2016
Murray Gold

I have authority to bind the law firm.

RE_ Pension Asset Expert Advisory Panel (Expert Panel).rtf

From: Murray Gold [mgold@kmlaw.ca]
To: Veinot, Cindy (TBS) [Cindy.Veinot@ontario.ca]
CC: Tam, Nelson (TBS) [Nelson.Tam@ontario.ca]; Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]
Subject: RE: Pension Asset Expert Advisory Panel (Expert Panel)
Date: Thursday, November 17, 2016 13:29:36
Attachment 1: logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png

Thanks Cindy. I am looking forward to it as well.

Murray

<http://www.kmlaw.ca/> Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
[kmlaw.ca](http://www.kmlaw.ca)

From: Veinot, Cindy (TBS) [mailto:Cindy.Veinot@ontario.ca]
Sent: November-17-16 12:16 PM
To: Murray Gold
Cc: Tam, Nelson (TBS); Hatzis, Len (TBS); Kaufman, Paul (TBS)
Subject: RE: Pension Asset Expert Advisory Panel (Expert Panel)

Hi Murray – we've completed our review and look forward to seeing you at the Panel discussion tomorrow morning.

Regards,

Cindy

From: Murray Gold [<mailto:mgold@kmlaw.ca>]

Sent: November-17-16 8:28 AM
To: Veinot, Cindy (TBS)
Subject: Re: Pension Asset Expert Advisory Panel (Expert Panel)

416 509 2525

Murray Gold
Partner
T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
kmlaw.ca
Original Message
From: Veinot, Cindy (TBS)
Sent: Thursday, November 17, 2016 8:27 AM
To: Murray Gold
Subject: Re: Pension Asset Expert Advisory Panel (Expert Panel)

Hi Murray. Just tried you at the number below. Is there a number I can reach you at now?

Sent from my BlackBerry 10 smartphone on the Rogers network.
From: Murray Gold
Sent: Thursday, November 17, 2016 8:07 AM
To: Veinot, Cindy (TBS)
Subject: Fw: Pension Asset Expert Advisory Panel (Expert Panel)

Hi Cindy,

I was wondering how this is coming, and whether you have a moment for a call this morning?

Murray

Murray Gold
Partner
T: +1 416-595-2085 | F: +1 416-204-2873 | E:
mgold@kmlaw.ca<<mailto:mgold@kmlaw.ca>>
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

Original Message

From: Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>

Sent: Wednesday, November 16, 2016 2:19 PM

To: Murray Gold

Cc: Veinot, Cindy (TBS); Kaufman, Paul (TBS)

Subject: Re: Pension Asset Expert Advisory Panel (Expert Panel)

Thanks very much for this Murray.

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Murray Gold

Sent: Wednesday, November 16, 2016 2:13 PM

To: Hatzis, Len (TBS)

Cc: Veinot, Cindy (TBS); Kaufman, Paul (TBS)

Subject: Pension Asset Expert Advisory Panel (Expert Panel)

Hi Len,

You asked me on our call this morning for some additional information on my work for the Ontario Teachers Federation (OTF), as disclosed in my conflict of interest form with respect to the Expert Panel.

I have worked on a number of files for the OTF since the Ontario Teachers Pension Plan was formed as a jointly sponsored pension plan in 1990. For the most part, and especially in the last decade or so, the OTF and the Crown have had a similar view, as sponsors of the OTPP, concerning the Plan. OTF and the Crown have been of similar views for example, in regard to the OTPP's Funding Management Policy (FMP), while the OTPP Board has sometimes taken a different view of that agreement. In human rights litigation, another area in which I have worked for the OTF in regard to the OTPP, all of the Crown, the OTF and the OTPP Board have typically been named as co-defendants, and all three parties have historically cooperated and mounted similar or complementary defenses. In the most recent of these cases (2015), we worked with the Crown to amend the Teachers Pension Act with respect to the status of retired teachers who return to active employment. I have also given advice to the OTF about OTPP Plan terms and about other compliance issues. Future engagements by the OTF are unpredictable. They may of course include FMP issues, as they have in the past, which may, in turn, be affected by or affect pension accounting issues. Once again, however, there is every possibility that the OTF and the Crown will be aligned in their views of FMP changes, as they have been for the past many years.

The relationship between the OTF and the Crown has been, for a decade or more, quite collegial and cooperative, and we would expect (and want) it to continue in this way.

We discussed my OTF relationship at the time of the retainer to provide advice concerning the OTPP, the OPTrust and the BC Plans. At that time, we agreed that the engagement presented no conflict of interest.

In regard to the Expert Panel, I expect that its mandate is as a non-partisan expert board. This is not a client retainer, but is rather an expert inquiry into the way or ways forward within technical constraints. In principle, I don't believe that expert panel work engages conflict of interest considerations with OTF or other clients, precisely because it is expert and non-partisan.

I also assume that all non-public materials before the Expert Panel are strictly confidential. I would not disclose them to OTF or to any other client or person.

I hope this helps, but if you have additional questions, please don't hesitate to ask.

Regards,

Murray

 Original Message
From: Hatzis, Len (TBS)
Sent: Tuesday, November 15, 2016 6:50 PM
To: Murray Gold
Cc: Veinot, Cindy (TBS); Kaufman, Paul (TBS)
Subject:

Murray,

We've been working with our clients to prepare for the Pension Asset Panel's upcoming work and wanted to follow up with you on a disclosure that you made in the conflict of interest section of your application form. We were hoping to talk to you about the work with the OTF that you referred to in section 2 of your COI disclosure and how that might intersect with information that you could have access to as part of the panel. Would you have time to discuss this with myself and Cindy Veinot tomorrow?

Thanks
Sent from my BlackBerry 10 smartphone on the Rogers network.

Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E:

mgold@kmlaw.ca<mailto:mgold@kmlaw.ca>

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

RE Pension Comparison - question and timelines confirmation (attachment).pdf

From: [Dyczkowski, Marilyn \(TBS\)](#)
To: [Hatzis, Len \(TBS\)](#)
Cc: [Kearney, Sean \(TBS\)](#)
Subject: RE: Pension Comparison - question and timelines confirmation
Date: September 19, 2016 9:40:57 AM
Attachments: [Retainer Ltr Koskie Minsky re AG Public Accounts re analysis of 2 Ont pension plans frameworks Sept 19 2016.docx](#)

Attached is draft retainer. Please let me know if you are OK with it so that Sean may sign.

Thanks

Marilyn Dyczkowski
EA to the Legal Director
Ministry of the Attorney General | Legal Services Branch | Treasury Board Secretariat
9th Floor, 77 Wellesley Street West, Ferguson Block, Toronto, ON M7A 1N3
Phone: 416-326-8385 Fax: 416-325-9404

Please consider the environment before printing this e-mail.

This email contains privileged and confidential information intended only for the personal and confidential use of the recipient(s) named above. If the reader of this email is not an intended recipient, you have received this email in error and any review, dissemination, distribution or copying is strictly prohibited. If you have received this email in error, please notify the sender immediately by return email and permanently delete the copy you received. Thank you.

From: Hatzis, Len (TBS)
Sent: September 19, 2016 9:10 AM
To: Dyczkowski, Marilyn (TBS)
Subject: Re: Pension Comparison - question and timelines confirmation

OK - you need to put conflicts language in the retainer

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Dyczkowski, Marilyn (TBS)
Sent: Monday, September 19, 2016 9:08 AM
To: Hatzis, Len (TBS)
Subject: RE: Pension Comparison - question and timelines confirmation

Perfect – I will complete retainer – going with \$50,000 max and just Murray Gold doing the work. If you chat with him, please ask if anyone else in his firm assisting him on this matter.

Marilyn Dyczkowski
EA to the Legal Director
Ministry of the Attorney General | Legal Services Branch | Treasury Board Secretariat
9th Floor, 77 Wellesley Street West, Ferguson Block, Toronto, ON M7A 1N3
Phone: 416-326-8385 Fax: 416-325-9404

Please consider the environment before printing this e-mail.

This email contains privileged and confidential information intended only for the personal and confidential use of the recipient(s) named above. If the reader of this email is not an intended recipient, you have received this email in error and any review, dissemination, distribution or copying is strictly prohibited. If you have received this email in error, please notify the sender immediately by return email and permanently delete the copy you received. Thank you.

From: Hatzis, Len (TBS)
Sent: September 19, 2016 9:06 AM
To: Dyczkowski, Marilyn (TBS)
Subject: Fw: Pension Comparison - question and timelines confirmation

Murray retainer issues

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Murray Gold <mgold@kmlaw.ca>
Sent: Monday, September 19, 2016 9:03 AM
To: Hatzis, Len (TBS)
Subject: Re: Pension Comparison - question and timelines confirmation

Len,

500/hr is ok.

Do you have a retainer? We should be clear about conflicts. Something along these lines:

"Counsel works for the Ontario Teachers' Federation ("OTF") in regard to its role as sponsor of the Ontario Teachers' Pension Plan, and has worked for the Board of Trustees of the OPTrust. Counsel and the client agree that Counsel has no conflict of interest in the performance of the work or in Counsel's ongoing representation of the OTF."

Do you have a moment to talk? 416 509 2525.

Murray

Murray Gold
Partner
T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
kmlaw.ca
Original Message
From: Hatzis, Len (TBS)
Sent: Monday, September 19, 2016 8:36 AM
To: Murray Gold
Subject: Fw: Pension Comparison - question and timelines confirmation

Murray

Can you advise please re rates associated with this. Ministry of the Attorney General will not likely go above 500/hr but can you advise as to your thoughts on this. Thanks

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>

Sent: Friday, September 16, 2016 10:12 PM

To: Murray Gold; Veinot, Cindy (TBS); Petsche, Nadine (TBS); Kaufman, Paul (TBS)

Subject: Fw: Pension Comparison - question and timelines confirmation

Murray

Please see the additional comment from our client re the issues involved. Thank you

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Petsche, Nadine (TBS) <Nadine.Petsche@ontario.ca>

Sent: Friday, September 16, 2016 8:46 PM

To: Kaufman, Paul (TBS); Hatzis, Len (TBS)

Subject: RE: Pension Comparison - question and timelines confirmation

Paul/Len,

Not sure if it's feasible, but given the AG's focus on level of 'uncertainty' associated with the ability of the Province to benefit from the assets, if the analysis can also address how the plans differ in that regard as well, it would be very beneficial to our position.

N

From: Kaufman, Paul (TBS)

Sent: September 16, 2016 8:38 PM

To: Hatzis, Len (TBS); Murray Gold

Cc: Veinot, Cindy (TBS); Petsche, Nadine (TBS)

Subject: Pension Comparison - question and timelines confirmation

Hi Murray -

To confirm our discussion, you are going to provide a comparative legal/governance analysis of how the frameworks for the two Ontario pension plans we identified (OTPP and OPSEU) and the four BC plans we identified (municipal, teachers, college, public service) compare on the issue of the authority of the pension boards and the plan partners to determine the utilization of plan surpluses. Your preliminary thinking is that in Ontario this determination is left to the partners, while in BC either the boards or the partners can make this determination.

You expect that you can provide this analysis by Monday or Tuesday.

We've provided the relevant joint trust agreements for the plans noted above and you don't expect that you need further documentation from us to respond to this request, but you will let us know if any need arises.

Cindy, if the above is inconsistent with what you are looking for please advise.

Paul

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

Retainer Ltr Koskie Minsky re AG Public Accou.pdf

**Ministry of the
Attorney General**

Legal Services Branch
Treasury Board Secretariat

Ferguson Block
77 Wellesley Street West, 9th Floor
Toronto ON M7A 1N3

Tel.: 416 327-6393
Fax.: 416 325-9404
E-mail: Len.Hatzis@ontario.ca

**Ministère du
Procureur général**

Direction des services juridiques
Secrétariat du Conseil du Trésor

Édifice Ferguson
77, rue Wellesley Ouest, 9^e étage
Toronto ON M7A 1N3

Tél.: 416 327-6393
Télééc.: 416 325-9404
Courriel: Len.Hatzis@ontario.ca



Sent by Courier

September 19, 2016

PRIVATE AND CONFIDENTIAL

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Attention: Murray Gold

Dear Mr. Gold:

**Re: Retention of Legal Services
to provide an analysis of frameworks of various pension plans**

This will confirm that your firm, Koskie Minsky LLP ("Koskie Minsky") has been retained to provide the Treasury Board Secretariat (TBS) on behalf of the Province of Ontario (Ontario) with a comparative legal/governance analysis of how the frameworks of various public pension plans (to include OTPP, OPSEU and four BC plans including municipal, teachers, college and public service) compare on the issue of authority of said pension boards and its plan partners to determine the utilization of plan surpluses and how the plans differ it regard to utilization of any surplus plan assets..

I confirm that this matter will be assigned to you, Mr. Murray Gold. You will be compensated at the rate of five hundred dollars (\$500.00) per hour. We ask that your firm not substitute legal counsel without our prior written approval. In addition to these fees, you will be reimbursed for reasonable disbursements on a cost basis and without mark-up. All disbursements other than routine expenses such as faxes, copies and long distance charges must be pre-approved. All disbursements must be supported by receipts.

We ask that bills be submitted to me on the first day of each quarter for services performed during the preceding quarter, unless directed otherwise. The maximum amount for the Retainer is fifty thousand dollars (\$50,000.00). **Please advise me when the billings are approaching sixty percent (60%) of this amount, which will be thirty thousand dollars (\$30,000.00).** In your firm's

statement of account, please identify each date the services were completed, by whom and the time spent. Disbursements and applicable taxes should be listed separately on the account. Note that the maximum amount for the Retainer is exclusive of disbursements and applicable taxes.

Our client, the Office of the Provincial Controller will be responsible for payment of your invoices after they have been submitted to my attention for approval. Our practice is for payments to be made to you on the basis of invoices rendered detailing the period covered, the nature of the services rendered and the number of hours worked by each counsel and law clerk. Please include a print-out of your firm's computerized dockets together with each billing.

I would also ask that you please separate the hours of work and the hourly rates, as well as the disbursements, so that the Government may maintain its public audit records.

The delivery of services must comply with all applicable requirements, specifications and standards for accessibility established by the Ministry in accordance with the *Accessibility for Ontarians and Disabilities Act*, 2005, S.O. 2005 c. 11 and any regulations made thereto.

Your firm's primary contact is Mr. Len Hatzis, who can be reached at (416) 327-6393 or len.hatzis@ontario.ca. It is anticipated that you will be performing this work in a supporting role and not regularly attending ministry meetings and briefings. However, you may be required to brief officials of the Ministry of the Attorney General or other impacted Ministries or stakeholders from time to time.

Please forward your accounts to me:

Sean Kearney
Legal Director
Legal Services Branch, Treasury Board Secretariat
77 Wellesley Street West
Ferguson Block, 9th Floor
Toronto, ON M7A 1N3

During the course of this retainer, should issues be identified which should be more properly addressed by Ministry counsel or involve legal and/or policy matters relating to constitutional or Charter issues or the Ontario Human Rights Code, your firm is instructed to stop the work being performed under this retainer. You will receive further instruction from Len Hatzis. We ask that no further work be undertaken until your firm has received this instruction.

Your firm declares, after taking all reasonable steps to investigate, that Koskie Minsky does not have any conflict of interest representing TBS under this retainer save and except for its retainer with the Ontario Teachers' Federation ("OTF") in regard to its role as sponsor of the Ontario Teachers' Pension Plan and also its retainer with the Board of Trustees of the OPTrust. Koskie Minsky and TBS

agree that Koskie Minsky has no conflict of interest in the performance of the work contemplated by the within retainer or in its ongoing representation of the OTF.

You agree that any copyright in any reports, opinion, agreements or materials prepared by you pursuant to this retainer will be the sole property of the Crown in right of Ontario and that you hereby assign such copyright to the provincial Crown. Further, you hereby waive all moral rights in favour of the Crown in right of Ontario.

You will not duplicate or copy any documentation provided by the Crown pursuant to this retainer except to the extent necessary to fulfill your obligations under this retainer.

You will promptly return to the Crown, upon expiry or termination of this retainer, all documentation which you received from the Crown pursuant to this retainer, provided that you may keep a copy of such part of the documentation as may be reasonably necessary to confirm the provision of the service in accordance with your professional obligations.

This retainer does not create an employer/employee relationship or any joint venture or partner relationship. You shall not hold yourself out as an agent, employee or partner of the Crown or make any statement or representation that may have such authority.

The solicitor-client relationship will terminate upon the end of this retainer. For the purpose of avoiding future conflicts of interest, you will not use confidential information gained through this retainer in respect of work for other clients involving claims against Her Majesty the Queen in right of Ontario.

The Ministry may terminate this retainer at any time, without fault and without liability, upon two (2) weeks' notice of termination in writing to you.

The Ministry shall not by termination waive any rights or remedies it may have in the law of equity at the date of termination. Termination shall not relieve you or your firm from warranties and other responsibilities relating to services performed and money paid up to and including the date of termination.

The retainer may be amended, altered or added to only by written agreement between the parties which agreement is supplemental to this retainer and thereafter forms part of this retainer.

The retainer and the rights, obligations and relations of the parties shall, unless otherwise specified, be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The parties do hereby attorn to the jurisdiction of the Courts of the Province of Ontario.

If your firm agrees with the terms and conditions set out in this retainer, please sign the acknowledgement below and return to me at your earliest convenience

Yours truly,

Sean Kearney
Legal Director

Cc Len Hatzis

ACCEPTANCE

Koskie Minsky LLP accepts the terms of this Retainer.

Per: _____ Date: _____
Murray Gold

I have authority to bind the law firm.

Retainer Ltr Koskie Minsky re AG Public Accou_1.pdf

**Ministry of the
Attorney General**

Legal Services Branch
Treasury Board Secretariat

Ferguson Block
77 Wellesley Street West, 9th Floor
Toronto ON M7A 1N3

Tel.: 416 327-6393
Fax.: 416 325-9404
E-mail: Len.Hatzis@ontario.ca

**Ministère du
Procureur général**

Direction des services juridiques
Secrétariat du Conseil du Trésor

Édifice Ferguson
77, rue Wellesley Ouest, 9^e étage
Toronto ON M7A 1N3

Tél.: 416 327-6393
Télééc.: 416 325-9404
Courriel: Len.Hatzis@ontario.ca



Sent by Courier

September 19, 2016

PRIVATE AND CONFIDENTIAL

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Attention: Murray Gold

Dear Mr. Gold:

**Re: Retention of Legal Services
to provide an analysis of frameworks of various pension plans**

This will confirm that your firm, Koskie Minsky LLP ("Koskie Minsky") has been retained to provide the Treasury Board Secretariat (TBS) on behalf of the Province of Ontario (Ontario) with a comparative legal/governance analysis of how the frameworks of various public pension plans (to include OTPP, OPSEU and four BC plans including municipal, teachers, college and public service) compare on the issue of authority of said pension boards and its plan partners to determine the utilization of plan surpluses and how the plans differ it regard to utilization of any surplus plan assets..

I confirm that this matter will be assigned to you, Mr. Murray Gold. You will be compensated at the rate of five hundred dollars (\$500.00) per hour. We ask that your firm not substitute legal counsel without our prior written approval. In addition to these fees, you will be reimbursed for reasonable disbursements on a cost basis and without mark-up. All disbursements other than routine expenses such as faxes, copies and long distance charges must be pre-approved. All disbursements must be supported by receipts.

We ask that bills be submitted to me on the first day of each quarter for services performed during the preceding quarter, unless directed otherwise. The maximum amount for the Retainer is fifty thousand dollars (\$50,000.00). **Please advise me when the billings are approaching sixty percent (60%) of this amount, which will be thirty thousand dollars (\$30,000.00).** In your firm's

statement of account, please identify each date the services were completed, by whom and the time spent. Disbursements and applicable taxes should be listed separately on the account. Note that the maximum amount for the Retainer is exclusive of disbursements and applicable taxes.

Our client, the Office of the Provincial Controller will be responsible for payment of your invoices after they have been submitted to my attention for approval. Our practice is for payments to be made to you on the basis of invoices rendered detailing the period covered, the nature of the services rendered and the number of hours worked by each counsel and law clerk. Please include a print-out of your firm's computerized dockets together with each billing.

I would also ask that you please separate the hours of work and the hourly rates, as well as the disbursements, so that the Government may maintain its public audit records.

The delivery of services must comply with all applicable requirements, specifications and standards for accessibility established by the Ministry in accordance with the *Accessibility for Ontarians and Disabilities Act*, 2005, S.O. 2005 c. 11 and any regulations made thereto.

Your firm's primary contact is Mr. Len Hatzis, who can be reached at (416) 327-6393 or len.hatzis@ontario.ca. It is anticipated that you will be performing this work in a supporting role and not regularly attending ministry meetings and briefings. However, you may be required to brief officials of the Ministry of the Attorney General or other impacted Ministries or stakeholders from time to time.

Please forward your accounts to me:

Sean Kearney
Legal Director
Legal Services Branch, Treasury Board Secretariat
77 Wellesley Street West
Ferguson Block, 9th Floor
Toronto, ON M7A 1N3

During the course of this retainer, should issues be identified which should be more properly addressed by Ministry counsel or involve legal and/or policy matters relating to constitutional or Charter issues or the Ontario Human Rights Code, your firm is instructed to stop the work being performed under this retainer. You will receive further instruction from Len Hatzis. We ask that no further work be undertaken until your firm has received this instruction.

Your firm declares, after taking all reasonable steps to investigate, that Koskie Minsky does not have any conflict of interest representing TBS under this retainer save and except for its retainer with the Ontario Teachers' Federation ("OTF") in regard to its role as sponsor of the Ontario Teachers' Pension Plan and also its retainer with the Board of Trustees of the OPTrust. Koskie Minsky and TBS

agree that Koskie Minsky has no conflict of interest in the performance of the work contemplated by the within retainer or in its ongoing representation of the OTF.

You agree that any copyright in any reports, opinion, agreements or materials prepared by you pursuant to this retainer will be the sole property of the Crown in right of Ontario and that you hereby assign such copyright to the provincial Crown. Further, you hereby waive all moral rights in favour of the Crown in right of Ontario.

You will not duplicate or copy any documentation provided by the Crown pursuant to this retainer except to the extent necessary to fulfill your obligations under this retainer.

You will promptly return to the Crown, upon expiry or termination of this retainer, all documentation which you received from the Crown pursuant to this retainer, provided that you may keep a copy of such part of the documentation as may be reasonably necessary to confirm the provision of the service in accordance with your professional obligations.

This retainer does not create an employer/employee relationship or any joint venture or partner relationship. You shall not hold yourself out as an agent, employee or partner of the Crown or make any statement or representation that may have such authority.

The solicitor-client relationship will terminate upon the end of this retainer. For the purpose of avoiding future conflicts of interest, you will not use confidential information gained through this retainer in respect of work for other clients involving claims against Her Majesty the Queen in right of Ontario.

The Ministry may terminate this retainer at any time, without fault and without liability, upon two (2) weeks' notice of termination in writing to you.

The Ministry shall not by termination waive any rights or remedies it may have in the law of equity at the date of termination. Termination shall not relieve you or your firm from warranties and other responsibilities relating to services performed and money paid up to and including the date of termination.

The retainer may be amended, altered or added to only by written agreement between the parties which agreement is supplemental to this retainer and thereafter forms part of this retainer.

The retainer and the rights, obligations and relations of the parties shall, unless otherwise specified, be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The parties do hereby attorn to the jurisdiction of the Courts of the Province of Ontario.

If your firm agrees with the terms and conditions set out in this retainer, please sign the acknowledgement below and return to me at your earliest convenience

Yours truly,

Sean Kearney
Legal Director

Cc Len Hatzis

ACCEPTANCE

Koskie Minsky LLP accepts the terms of this Retainer.

Per: _____ Date: _____
Murray Gold

I have authority to bind the law firm.

RE_ Pension Comparison.rtf

From: Murray Gold [mgold@kmlaw.ca]
To: Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]
CC: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
Subject: RE: Pension Comparison
Date: Friday, September 23, 2016 13:16:08
Attachment 1: image001.png
Attachment 2: logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png

Paul,

My views:

- I don't know what a 'formal claim' is? Certainly, there is no legal action or proceeding that could constitute a legal 'claim' either in BC or Ontario, to my knowledge. We can't distinguish on this basis. Is there another sense of what a 'formal claim' may be? We can say that the constating documents provide procedures for the final and binding application of plan surpluses in Ontario, while in BC there is no such process – either the sponsors agree or they don't agree about surplus utilization, and if they don't there is no recourse to arbitration. At OTTP, there is of course the arbitration route. I have added reference to this.
- I have clarified that each of Ontario and OPSEU may utilize their pools of surplus in the OPTRust without the agreement of the other.
- The letter will be addressed to Len.

Murray

<http://www.kmlaw.ca/> Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

[kmlaw.ca](http://www.kmlaw.ca)

From: Kaufman, Paul (TBS) [mailto:Paul.Kaufman@ontario.ca]

Sent: September-22-16 2:33 PM

To: Murray Gold
Cc: Hatzis, Len (TBS)
Subject: RE: Pension Comparison

Murray, our client has had a chance to review the draft opinion that you provided. Could you please let us know if it is possible to reflect anything in the opinion on the following points:

- In BC's consolidated financial statements, they note in respect of the BC public sector pension plans that "The Province participates as a plan employer in each plan. Provisions of these plans stipulate that the province has no formal claim to any pension plan surplus or asset. The boards are fully responsible for the management of the plans, including investment of the assets and administration of the plans. The Pension Corporation provides benefit administrative services as an agent of the boards of trustees." Is it possible to reference a distinction in regard to the highlighted section – i.e. whether the agreements in respect of the BC plans and the Ontario plans differ in this regard, and if so what the implications would be in respect each province's expectation of receiving a benefit from a surplus in the respective plans?
- Does the discussion on page 3 of the opinion about the two equal pools under the OPTrust mean that the province has an unilateral right to use the funds in the pool that are to be used for the Province's benefit? If so it would be helpful if that ability could be clarified.
- Could the opinion be addressed to Len rather than to Cindy.

Paul

Paul Kaufman

Counsel

Ministry of the Attorney General | Legal Services Branch | Treasury Board Secretariat

9th Floor, 77 Wellesley Street West, Ferguson Block, Toronto, ON M7A 1N3

Phone: 416-327-7012 Fax: 416-325-9404

This email contains privileged and confidential information intended only for the personal and confidential use of the recipient(s) named above. If the reader of this email is not an intended recipient, you have received this email in error and any review, dissemination, distribution or copying is strictly prohibited. If you have received this email in error, please notify the sender immediately by return email and permanently delete the copy you received. Thank you.

From: Murray Gold <mgold@kmlaw.ca>

Sent: Tuesday, September 20, 2016 7:59 PM

To: Hatzis, Len (TBS)

Subject: Pension Comparison

Here is draft with more detail on the transitional periods, per our discussion.

<http://www.kmlaw.ca/>

Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
[kmlaw.ca](http://www.kmlaw.ca)

This e-mail message is privileged, confidential and subject to copyright. Any

unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

image001.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

image001.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.pdf

**KOSKIE
MINSKY**
JUSTICE MATTERS

Re_ Pension Comparison - question and timelines confirmation.rtf

From: Murray Gold [mgold@kmlaw.ca]
To: Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Veinot, Cindy (TBS) [Cindy.Veinot@ontario.ca]; Petsche, Nadine (TBS) [Nadine.Petsche@ontario.ca]
Subject: Re: Pension Comparison - question and timelines confirmation
Date: Friday, September 16, 2016 20:57:56

Hi Paul,

My preliminary thinking was based on a view of the BC Municipal Plan; I haven't yet looked at the other BC Plans. I expect they'll follow the BC pattern, but I cannot yet confirm that.

Murray

Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

Original Message

From: Kaufman, Paul (TBS)

Sent: Friday, September 16, 2016 8:38 PM

To: Hatzis, Len (TBS); Murray Gold

Cc: Veinot, Cindy (TBS); Petsche, Nadine (TBS)

Subject: Pension Comparison - question and timelines confirmation

Hi Murray -

To confirm our discussion, you are going to provide a comparative legal/governance analysis of how the frameworks for the two Ontario pension plans we identified (OTPP and OPSEU) and the four BC plans we identified (municipal, teachers, college, public service) compare on the issue of the authority of the pension boards and the plan partners to determine the utilization of plan surpluses. Your preliminary thinking is that in Ontario this determination is left to the partners, while in BC either the boards or the partners can make this determination.

You expect that you can provide this analysis by Monday or Tuesday.

We've provided the relevant joint trust agreements for the plans noted above and you don't expect that you need further documentation from us to respond to this request, but you will let us know if any need arises.

Cindy, if the above is inconsistent with what you are looking for please advise.

Paul

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

Re_ Pension Comparison - question and timelines confirmation.rtf

From: Murray Gold [mgold@kmlaw.ca]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
Subject: Re: Pension Comparison - question and timelines confirmation
Date: Tuesday, September 20, 2016 12:40:55

Draft today by 4:00 pm.

Murray Gold
Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
kmlaw.ca

Original Message

From: Hatzis, Len (TBS)
Sent: Tuesday, September 20, 2016 11:21 AM
To: Murray Gold
Subject: Re: Pension Comparison - question and timelines confirmation

Murray

Any update re: when I can expect a draft or final of this pls - thanks

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Murray Gold
Sent: Monday, September 19, 2016 9:10 AM
To: Hatzis, Len (TBS)
Subject: Re: Pension Comparison - question and timelines confirmation

Yes.

Murray Gold
Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E:
mgold@kmlaw.ca<<mailto:mgold@kmlaw.ca>>
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
kmlaw.ca

Original Message

From: Hatzis, Len (TBS)
Sent: Monday, September 19, 2016 9:10 AM
To: Murray Gold
Subject: Re: Pension Comparison - question and timelines confirmation

Can we chat at 930?

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Murray Gold

Sent: Monday, September 19, 2016 9:03 AM

To: Hatzis, Len (TBS)

Subject: Re: Pension Comparison - question and timelines confirmation

Len,

500/hr is ok.

Do you have a retainer? We should be clear about conflicts. Something along these lines:

"Counsel works for the Ontario Teachers' Federation ("OTF") in regard to its role as sponsor of the Ontario Teachers' Pension Plan, and has worked for the Board of Trustees of the OPTrust. Counsel and the client agree that Counsel has no conflict of interest in the performance of the work or in Counsel's ongoing representation of the OTF."

Do you have a moment to talk? 416 509 2525.

Murray

Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E:

mgold@kmlaw.ca<mailto:mgold@kmlaw.ca>

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

Original Message

From: Hatzis, Len (TBS)

Sent: Monday, September 19, 2016 8:36 AM

To: Murray Gold

Subject: Fw: Pension Comparison - question and timelines confirmation

Murray

Can you advise please re rates associated with this. Ministry of the Attorney General will not likely go above 500/hr but can you advise as to your thoughts on this. Thanks

Sent from my BlackBerry 10 smartphone on the Rogers network.
From: Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>
Sent: Friday, September 16, 2016 10:12 PM
To: Murray Gold; Veinot, Cindy (TBS); Petsche, Nadine (TBS); Kaufman, Paul (TBS)
Subject: Fw: Pension Comparison - question and timelines confirmation

Murray

Please see the additional comment from our client re the issues involved. Thank you
Sent from my BlackBerry 10 smartphone on the Rogers network.
From: Petsche, Nadine (TBS) <Nadine.Petsche@ontario.ca>
Sent: Friday, September 16, 2016 8:46 PM
To: Kaufman, Paul (TBS); Hatzis, Len (TBS)
Subject: RE: Pension Comparison - question and timelines confirmation

Paul/Len,

Not sure if it's feasible, but given the AG's focus on level of 'uncertainty' associated with the ability of the Province to benefit from the assets, if the analysis can also address how the plans differ in that regard as well, it would be very beneficial to our position.

N

From: Kaufman, Paul (TBS)
Sent: September 16, 2016 8:38 PM
To: Hatzis, Len (TBS); Murray Gold
Cc: Veinot, Cindy (TBS); Petsche, Nadine (TBS)
Subject: Pension Comparison - question and timelines confirmation

Hi Murray -

To confirm our discussion, you are going to provide a comparative legal/governance analysis of how the frameworks for the two Ontario pension plans we identified (OTPP and OPSEU) and the four BC plans we identified (municipal, teachers, college, public service) compare on the issue of the authority of the pension boards and the plan partners to determine the utilization of plan surpluses. Your preliminary thinking is that in Ontario this determination is left to the partners, while in BC either the boards or the partners can make this determination.

You expect that you can provide this analysis by Monday or Tuesday.

We've provided the relevant joint trust agreements for the plans noted above and you don't expect that you need further documentation from us to respond to this request, but you will let us know if any need arises.

Cindy, if the above is inconsistent with what you are looking for please advise.

Paul

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

Re_urgent request - teachers pension.rtf

From: Murray Gold [mgold@kmlaw.ca]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]
Subject: Re: urgent request - teachers pension
Date: Friday, September 16, 2016 19:54:08

Yes.

Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E: mgold@kmlaw.ca

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3
kmlaw.ca

Original Message

From: Hatzis, Len (TBS)

Sent: Friday, September 16, 2016 7:05 PM

To: Murray Gold

Cc: Kaufman, Paul (TBS)

Subject: Re: urgent request - teachers pension

Murray

Can we chat at 8 tonight pls:

Conference Call Info:

416-212-8011 or 1-866-602-5461

Participant pass code: 4944451#

Moderator PIN: 5672#

From: Murray Gold

Sent: Friday, September 16, 2016 6:02 PM

To: Hatzis, Len (TBS)

Cc: Kaufman, Paul (TBS)

Subject: Re: urgent request - teachers pension

I can talk briefly at about 8:00 pm tonite ot tomorrow - when is good for you?

Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E:

mgold@kmlaw.ca<mailto:mgold@kmlaw.ca>

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca

Original Message

From: Hatzis, Len (TBS)

Sent: Friday, September 16, 2016 5:56 PM

To: Murray Gold

Cc: Kaufman, Paul (TBS)

Subject: Re: urgent request - teachers pension

Murray

Paul will connect with you - we do need some work done - do you have a number we can reach you at. Paul can flip you the relevant documents as well

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Murray Gold

Sent: Friday, September 16, 2016 3:12 PM

To: Hatzis, Len (TBS)

Cc: Kaufman, Paul (TBS)

Subject: RE: urgent request - teachers pension

Len/Paul,

Did you want to proceed with anything here? I haven't heard anything today.

Murray

[cid:logo_d1ac01ba-f783-4248-82df-84549cb6f0b7.png]<http://www.kmlaw.ca/> Murray Gold

Partner

T: +1 416-595-2085 | F: +1 416-204-2873 | E:

mgold@kmlaw.ca<mailto:mgold@kmlaw.ca>

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Toronto, ON. M5H 3R3

kmlaw.ca<http://www.kmlaw.ca/>

From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]

Sent: September-15-16 5:27 PM
To: Murray Gold
Cc: Kaufman, Paul (TBS)
Subject: urgent request - teachers pension

Hi Murray
I work with Cindy V, provincial controller – can we chat about an urgent legal opinion request. Thank you

Len Hatzis
Deputy Director
Legal Services Branch | Treasury Board Secretariat
77 Wellesley Street West, 9th Floor, Toronto ON M7A 1N3
416.327.6393

This communication, including any attachments, is directed in confidence solely to the addressees listed herein, and may not otherwise be distributed, copied or used. This communication may also be subject to solicitor-client privilege, and all rights to that privilege are expressly claimed and not waived. If you have received this communication in error, please notify us by reply e-mail or by calling the telephone number above, and delete this communication, including any attachments, without making a copy. Thank you.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.
Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.
