

Osler opinion re_ OTPP surplus.rtf

From: Rienzo, Douglas [DRienzo@osler.com]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]
CC: Steele, Jana [JSteele@osler.com]; Marin, Jon [jomarin@osler.com]
Subject: Osler opinion re: OTPP surplus
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Attachment 1: image001.gif
Attachment 2: image002.gif
Attachment 3: image003.jpg
Attachment 4: Opinion dated September 20, 2016.pdf

Len, Paul:

Please find enclosed our opinion in final form. We would be pleased to discuss it with you at your convenience.

Doug Rienzo

Douglas Rienzo
Partner, Pensions & Benefits

Chair, Diversity Committee

416.862.5683

DIRECT

416.862.6666

FACSIMILE

drienzo@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

<http://www.osler.com/>

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Jana Steele
Direct Dial: 416.862.6625
jsteele@osler.com

Douglas Rienzo
Direct Dial: 416.862.5683
drienzo@osler.com

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

Paul Kaufman
Counsel, Treasury Board Secretariat Legal Services
Ferguson Block
77 Wellesley Street West
9th Floor
Toronto, ON M7A 1N3

Dear Sirs:

Accounting Treatment of Surplus in the Ontario Teachers' Pension Plan

I. BACKGROUND

We understand the pertinent background facts to be the following:

1. The Ontario Teachers' Pension Plan (the "**OTPP**") is a jointly-sponsored defined benefit pension plan established under the *Teachers' Pension Act* (Ontario) and is, subject to certain exceptions, required to comply with the *Pension Benefits Act* (Ontario) as well as the *Income Tax Act* (Canada).
2. The sponsors of the OTPP are the Province of Ontario (the "**Province**") and the Ontario Teachers' Federation (the "**OTF**") (collectively, the "**Sponsors**").

3. We understand that as at March 31, 2016 the Province's Statement of Financial Position (the "**Public Accounts**") includes a pension asset totalling \$10.6 billion (the "**Pension Asset**") related in part to an accounting surplus under the OTPP.¹
4. The Office of the Auditor General has indicated that because the Province does not have the legally enforceable right to unilaterally access the assets of the plan, and in the absence of that right, because the Province does not have an agreement in place with the OTF as of March 31, 2016 with respect to how the surplus would be utilized such that it would provide a benefit to the Province, the Pension Asset as presented in the Public Accounts should be removed.²

You asked us to consider the processes pursuant to which the Province may utilize surplus assets in the OTPP in accordance with the Plan Documentation (as defined below), and to identify any considerations that might inform the expectations of the Province as a Sponsor regarding the basis upon which decisions will be made relating to surplus utilization. We are not providing an opinion on the proper application of the accounting standards to the present situation, as that is an issue for the accountants to address.

II. SCOPE OF OPINION

For the purposes of our opinion, we considered the following documentation (collectively, the "**Plan Documentation**"):

1. The Ontario Teachers' Pension Plan (the "**OTPP**" or "**plan**");
2. The Agreement between Her Majesty the Queen in right of the Province of Ontario represented by the Minister of Education and Training and The Ontario Teachers' Federation represented by its Executive (the "**Partners' Agreement**");
3. The Funding Management Policy (the "**FMP**"), which forms Appendix "A" to the Partners' Agreement; and
4. The Term Sheet agreed to by the Sponsors dated March 13, 2013 (the "**2013 Term Sheet**") describing the implications of the Freeze Period (as defined below) on the FMP.

¹ See letter from Bonnie Lysyk (Auditor General) to Greg Orenszak (Deputy Minister, Treasury Board) and Scott Thompson (Deputy Minister, Ministry of Finance), dated September 13, 2016. Part of the surplus relates to another pension plan; we understand that \$10.1 billion relates to the OTPP.

² *Ibid.*

We have also considered the following legislation/regulations:

1. The *Teachers' Pension Act* (Ontario) (the “**Teachers' Act**”); and
2. The *Pension Benefits Act* (Ontario) (the “**PBA**”) and the regulations thereunder (the “**PBR**”).

As per your instructions, we have not evaluated the ability of the Province to benefit from the *withdrawal* of surplus assets from the OTPP (although certain provisions of the FMP cited herein relate to both the withdrawal and other utilization of surplus). Rather, this opinion identifies the processes pursuant to which the Province may receive a financial benefit through the *utilization* of OTPP surplus (e.g., as a result of either a temporary reduction in the Province's contribution obligations (a contribution holiday) or through changes to the contribution formula that reduce the Province's contribution obligations).

We note that the concept of an *accounting* surplus is distinct from surplus identified in a funding valuation prepared in respect of the OTPP (a “**Funding Valuation**”). Where surplus has been identified in a Funding Valuation, the Plan Documentation provides the Sponsors with certain avenues pursuant to which the Funding Valuation surplus can be utilized. Any reference to “surplus” in this opinion, unless expressly stated otherwise, relates to the surplus identified by the actuary for the OTPP in a Funding Valuation and not to the accounting surplus identified in the Public Accounts. We understand that pursuant to the applicable accounting standards, the recognition of part or all of the accounting surplus on the Public Accounts depends on the ability of the Province to benefit from any surplus in the pension fund over the life of plan.

This opinion does not purport to draw any conclusions, express or implied, about the application of the accounting standards to the present circumstances; rather, it is solely intended to provide the Province with information concerning the legal framework governing the utilization of surplus under the OTPP so as to allow the Province's accountants to determine whether a related Pension Asset should appear on the Public Accounts.

III. SUMMARY OF OUR CONCLUSIONS

A brief summary of our material conclusions is set forth below (all capitalized terms are defined herein):

1. Paragraph 10(1)3 of the Teachers' Act provides that the Minister of Education and the executive of the OTF may enter into an agreement that provides for certain matters, including: “3. The sharing of entitlement to gains or surplus under the plan and of liability for deficiencies in the pension fund by the Minister, the employers who contribute under the plan and the active plan members”. This is a

fundamental legislative pronouncement that the Province and the members of the plan are meant to “share” both upside (surplus) and downside (deficit) under the plan. Although it is not an express statement of 50/50 sharing, it would presumably inform the expectations of the Sponsors regarding how any surpluses are to be utilized. We note that the Sponsors have in fact entered into such an agreement, in the form of the Partners’ Agreement (to which is appended the FMP).

2. The Plan Documentation (specifically the FMP) and applicable legislation allow for the Sponsors to utilize surplus in a variety of ways, depending on the funded status of the OTPP. These surplus utilization options include the following avenues through which the Province may receive a financial benefit through the utilization of surplus (the three “zones” describe different levels of surplus, a greater amount of surplus being required in order for the next “zone” to come into play):
 - a. In the Restoration Zone, a Restoration Contribution Reduction may be approved once certain other requisite conditions have been met.
 - b. In the Temporary Improvement Zone, surplus may be utilized to provide a temporary contribution reduction (i.e., a contribution holiday), either as a stand-alone measure or in combination with other surplus utilization options (i.e., benefit improvements or surplus withdrawal).
 - c. In the Permanent Improvement Zone, surplus may be utilized to permanently reduce the current contribution obligations of the employers and the members, either as a stand-alone measure or in combination with changes to benefits.

Notwithstanding the foregoing, under the FMP the Sponsors have the discretion to, by mutual agreement, utilize surplus in any other manner.

3. Any enforceable legal right to obtain some value from any surplus pursuant to the Partners’ Agreement (and FMP appended thereto) would be grounded in the law of contract. As the relevant provisions of the FMP require the Sponsors to agree upon the manner in which surplus is to be utilized, neither Sponsor has a legally enforceable right to unilaterally utilize surplus in the OTPP. As such, the provisions in the FMP that contemplate the ability for the Province to receive a financial benefit through the utilization of surplus would not, in and of themselves, give rise to a legally enforceable right. What the Province does have, however, is a right to negotiate with the OTF the use of surplus that may arise under the plan, at least in the context of an actuarial valuation that discloses surplus and that is to be filed with the regulators.

4. Notwithstanding the foregoing, the Plan Documentation and applicable legislation give rise to the following considerations which may shape the Sponsors' expectation as to the basis upon which surplus will be utilized (and potentially lead to an expectation of equal sharing of the benefit of any surplus, at least over time):
 - a. The Teachers' Act prohibits the total amount of the contributions payable by the Province (and other participating employers) to exceed the amount of contributions paid by or on behalf of active members in respect of credited service for the year (subject to certain exceptions for payment of a solvency deficiency and where there are insufficient cash and liquid assets in the fund).³ In practice, this has resulted in 50/50 sharing of the regular contribution costs between the participating employers (including the Province) and plan members since the OTPP became jointly sponsored.⁴
 - b. The history of surplus utilization after the OTPP became a jointly-sponsored plan and prior to the date that the FMP was established demonstrates a past practice of the Sponsors equally sharing (in the aggregate) the financial benefits of surplus utilization, although surplus was not shared equally each time. Since the time the FMP was established, the OTPP has not reached the requisite level of surplus such that the Sponsors could negotiate its utilization under the Temporary Improvement Zone or Permanent Improvement Zone.
 - c. The inability for either party to unilaterally require surplus to be utilized in a particular manner (subject to the OTF Call Right), and the requirement to negotiate and agree (or in the absence of agreement, arbitrate) presents the Sponsors with an equal opportunity to benefit from surplus utilization.
 - d. One could argue that the obligation to bargain in "good faith" found in the Partners' Agreement may include the obligation to take into account the

³ Teachers' Act, subsections 5(1.1), (3) and (7).

⁴ We note that for the period from January 1, 2008 to December 31, 2008, the employee contribution rate was slightly lower than the employer contribution rate for earnings both above and below the Year's Maximum Pensionable Earnings ("YMPE") (9.6%/11.2% versus 10.4%/12%, respectively). It is our understanding that member contribution rates in 2008 were partially subsidized by the OTF with a credit reserve from the 1998 to 2001 pension negotiations, which accounts for this difference. See, Ontario Teachers' Pension Plan: "How Contribution Rates Have Evolved" available at: <https://www.otpp.com/documents/10179/20940/-/5e471c2b-23f1-44e6-b5c1-d22e3e50dbc3/How+Contribution+Rates+Have+Evolved.pdf>

“sharing” principles described elsewhere in this opinion, given that the OTPP is a jointly-sponsored plan.

We note that it is our understanding that it is certainly the Province’s expectation that the benefit of any surplus under the plan will in fact be shared equally between the Province and the members, over time.

5. In the event that the Sponsors cannot agree upon how surplus is to be utilized in the Restoration Zone, the Temporary Improvement Zone or the Permanent Improvement Zone, the matter can be submitted to an arbitration board of three arbitrators. Arbitration provisions are generally procedural in nature and therefore do not provide a strong foundation upon which to base parties’ reasonable expectations about their substantive rights under an agreement. To resolve a dispute, the arbitration board would engage in an exercise in interpretation of the operative substantive provisions of the relevant governing documents, including any applicable statutory provisions. However, the arbitral award must meet certain mandatory conditions set forth in the Partners’ Agreement. Among other things, the arbitral award is required to ensure that the contributions of the Minister and those employers who are required to contribute are equal to the contributions of members (section 92(c) of the Partners’ Agreement).

As part of the arbitration board’s interpretation exercise of the relevant governing documents, in the event of ambiguity in the written terms of the documents, evidence of the parties’ post-agreement practices can be admitted as an aid to interpreting the agreement. Past practices may illustrate the parties’ intentions at the time of the agreement. These considerations of past practices would be in conjunction with any explicit mandatory considerations set out in the governing document, e.g. prevailing economic conditions and the overall state of the provincial economy under section 91 of the Partners’ Agreement. The past practices which the arbitrator may consider would include those described herein: the long history of 50/50 member/employer contributions to the plan, and the equal sharing of surpluses prior to 2003 (from 2003 onwards the plan was mostly in deficit, with surpluses used to restore foregone escalated adjustments for members).

IV. FRAMEWORK IN THE PLAN DOCUMENTATION FOR SURPLUS UTILIZATION BY THE SPONSORS

1. Joint Sponsorship Plan Design and Cost Sharing

The OTPP qualifies as a “jointly sponsored pension plan” (“JSPP”) under the PBA, which has three material implications relevant to the present analysis:

1. Plan Governance – Under a JSPP, the employers (or any persons or entities who make contributions on behalf of the employers or represent the employers) and the members of the pension plan (or any representatives of the members) are jointly responsible for making all decisions about the terms and conditions of the pension plan and any amendments to the pension plan.⁵
2. Funding – The OTPP (and certain other prescribed JSPPs) are exempt from solvency funding requirements under the PBR.⁶
3. Cost Sharing – In a defined benefit pension plan which does not qualify as a JSPP, the employer is solely responsible for funding any going concern unfunded liability or solvency deficiency. Given that the OTPP qualifies as a JSPP, however, the PBA permits members to be required to make contributions in respect of any going concern unfunded liability or solvency deficiency.⁷

With respect to the cost-sharing principle referred to in #3 above, the Teachers' Act contains limitations on the contributions that the Province (and other participating employers) may make under the OTPP:

5(1.1) The total amount of the contributions payable by the Minister of Education and the employers who contribute under the pension plan in respect of any year shall not exceed the amount of contributions payable by or on behalf of active plan members in respect of credited service for that year.

Despite this general principle, under the Teachers' Act the Province is required to make additional contributions to the OTPP fund in the event that there are insufficient assets to make required payments out of the fund in any particular year.⁸ The Province is also permitted to make additional contributions in respect of a solvency deficiency⁹ (although, as noted above, solvency funding is not required under the OTPP). Notwithstanding that subsection 5(1.1) of the OTPP provides a *cap* on the Province's normal cost contribution obligation, rather than requiring 50/50 cost sharing, we understand that in practice there has been 50/50 cost sharing of the normal contribution cost under the OTPP since the OTPP became jointly sponsored (and for the majority of periods of time since the

⁵ PBR, subsection 3.1(1).

⁶ PBR, subsection 1.3.1(3).

⁷ See PBA, subsection 1(2) and subsection 55(4).

⁸ Teachers' Act, subsection 5(3).

⁹ Teachers' Act, subsection 5(7).

inception of the plan in 1917).¹⁰ The plan text itself also provides for equal contributions, at the basic level (see sections 25(1) and 26(1)).

Currently, the Sponsors are also required to mutually agree upon how any plan deficits are to be addressed.¹¹ While not binding upon the Sponsors, the FMP indicates that deficits may be addressed through increases to the contribution rates, lowering the amount of indexation and/or other decreases in benefits.

Joint governance and cost sharing form two of the core features of the OTPP. Consistent with the equal sharing of risk permitted under the JSPP plan design, there is a requirement for decisions relating to plan design and plan amendments to be made jointly by the Sponsors. In this regard, the FMP requires the Sponsors to negotiate and agree upon decisions relating to surplus utilization. Accordingly, the Sponsors can be said to have equal *opportunity* to benefit from surplus utilization through the negotiation process.

2. Provisions in the Legislation and Plan Documentation Relating to the Utilization of Surplus

(a) Pension Benefits Act

While they do address surplus withdrawals (which are not addressed in this opinion), the PBA and PBR do not otherwise mandate any particular use of ongoing surplus that may arise in a pension plan, e.g. for benefit improvements or contribution holidays. One must therefore look to the Teachers' Act, and to the Partners' Agreement and FMP in order to determine how ongoing surplus is dealt with under the OTPP.

(b) Teachers' Pension Act (Ontario)

Paragraph 10(1)3 of the Teachers' Act provides that the Minister of Education and the executive of the OTF may enter into an agreement (i.e., the Partners' Agreement) that provides for certain matters, including: "3. The sharing of entitlement to gains or surplus under the plan and of liability for deficiencies in the pension fund by the Minister, the employers who contribute under the plan and the active plan members". This is a

¹⁰ See, Ontario Teachers' Pension Plan: "How Contribution Rates Have Evolved" available at: <https://www.otpp.com/documents/10179/20940/-/5e471c2b-23f1-44e6-b5c1-d22e3e50dbc3/How+Contribution+Rates+Have+Evolved.pdf> As noted above, for the period from January 1, 2008 to December 31, 2008 the employee contribution rate was slightly lower than the employer contribution rate for earnings both above and below the YMPE (9.6%/11.2% versus 10.4%/12%, respectively). It is our understanding that member contribution rates in 2008 were partially subsidized by the OTF with a credit reserve from the 1998 to 2001 pension negotiations, which accounts for this difference.

¹¹ See, for example, Section 3.09 and 3.11 of the FMP.

fundamental legislative pronouncement that the Province and the members of the plan are meant to “share” both upside (surplus) and downside (deficit) under the plan. Although it is not an express statement of 50/50 sharing, it would presumably inform the expectations of the Sponsors regarding how any surpluses are to be utilized.

(c) Partners’ Agreement and FMP

While the Partners’ Agreement itself does not address the utilization of surplus, the notion that the Sponsors have “agreed to establish a partnership” for the purposes of designing and administering the OTPP and managing the OTPP fund¹² is reinforced throughout the Partners’ Agreement. For example, Section 4 of the Partners’ Agreement provides that “[t]he partnership established by this agreement is intended to govern all aspects of the plan and the fund...” Similarly, Section 8 of the Partners’ Agreement notes that the partners are jointly 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”. The expectations of the Sponsors regarding how surpluses are to be utilized are presumably informed by the commitment noted above for the partnership established “to govern all aspects of the plan and the fund”.

The procedures pursuant to which surplus may be withdrawn or utilized from the OTPP are identified in the FMP (which forms Appendix “A” to the Partners’ Agreement).

We understand that the FMP was first established in March 2003, as a supplement to the Partners’ Agreement, to provide a guidance framework to the Sponsors for decision-making when the OTPP has a funding surplus or shortfall. Prior to the creation of the FMP, the OTPP was considered fully funded (and surplus could be utilized, including through permanent benefit improvements) where assets equalled at least 100% of liabilities. The FMP is intentionally conservative through prioritizing the preservation of assets until a sufficient surplus “cushion” has been built to justify the utilization of surplus for contribution reductions or benefit improvements.

The FMP contemplates five “funding zones”, each defined by a range. These funding zones provide the Sponsors with guidance as to when, based upon the funding level of the plan, it may be appropriate to (amongst other things) increase or decrease benefits, raise or lower contribution rates or conserve assets. The Sponsors always have the discretion, however, to agree to pursue a course of action that is not expressly provided for in the

¹² Partners’ Agreement, section 1.

FMP. As will be discussed below, the ultimate discretion of the Sponsors is reflected throughout various provisions of the FMP.¹³

In the context of plan surpluses, three funding zones are of relevance, each of which is discussed below in greater detail.

(i) Restoration Zone

Article III of the FMP (Funding Zone – Restoration) (the “**Restoration Zone**”) is the “fully funded” zone where assets equal at least the liabilities, determined on the basis set out in the FMP. It is our understanding that the OTTP is currently in the Restoration Zone.

In the Restoration Zone, benefits cannot be improved and contributions cannot be reduced until certain actions are taken to restore past benefit reductions or past contribution increases. In this regard, Section 3.06 of the FMP provides the following:

Section 3.06 *Application of Restoration Basis Excess*: For purposes of clarity, excesses identified pursuant to Section 3.05 shall be applied in the following order, provided that the partners reserve the right to reconsider such application having regard to the contribution rate and benefits then in effect, prevailing economic circumstances and other relevant factors:

(a) *Bring Escalated Adjustments to 50% for Post-2013 Service*: to provide escalated adjustments up to 50% of the CPI adjustment in respect of service accrued after 2013 for the period covered by the valuation, and assumed thereafter at the same rate;

(b) *Bring Escalated Adjustments to 100%*: to provide escalated adjustments up to 100% of the CPI adjustment for the period covered by the valuation, and assumed thereafter at the same rate;

(c) *Restore Escalated Adjustments for Post-2013 Years*: to provide escalated adjustments to increase, to the extent possible, the current accumulated adjustment ratio for each year after 2013, to the current accumulated adjustment ratio for the period from 2010 to 2013, beginning with the first year in which current escalated adjustments were less than 50% of the run-rate escalated adjustments;

(d) *Restore Escalated Adjustments for Post-2009 Years*: to provide escalated adjustments to increase, to the extent possible, the current

¹³ See, for example, the opening words of Section 3.06 of the FMP, which section provides for various uses of surplus: “... provided that the partners reserve the right to reconsider such application having regard to the contribution rate and benefits then in effect, prevailing economic circumstances and other relevant factors”. See also Section 4.05 and 5.05.

accumulated adjustment ratio for each year after 2009 to the run-rate accumulated adjustment ratio, beginning with the first year in which current escalated adjustments were less than run-rate escalated adjustments;

(e) Provide Benefit Increases or Contribution Rate Reductions: to provide the following:

- (i) an increase in benefits, where the present value of current benefits is less than the present value of run-rate benefits,
- (ii) a reduction in contribution rates, where the present value of current contributions exceeds the present value of basic contributions, or
- (iii) a combination of (i) and (ii).

In summary, the Restoration Zone allows for surplus to be utilized to “restore” foregone indexation (Sections 3.06(a)-(d))¹⁴ and then to either increase benefits to the “run-rate benefit” level (i.e., the long-term target level) or to lower contributions to the basic target rate (or a combination of these two options) (Section 3.06(e)). While the FMP contemplates that the actions will typically be taken sequentially (i.e., starting with Section 3.06(a) and ending with the actions in Section 3.06(e)), the Sponsors are required to first agree to the actions taken under Section 3.06 and have the discretion to apply the actions in a different order or to take different action (or to take no action to utilize the surplus).¹⁵

As noted, under Section 3.06(e), surplus can be utilized to reduce contribution rates “where the present value of current contributions exceed the present value of basic contributions” (the “**Restoration Contribution Reduction**”). We understand that in 2001 the Sponsors agreed to a 1.1% increase to both member/employer contributions (phased in over a three year period) to address a funding deficit in the OTPP and that the Restoration Contribution Reduction under Section 3.06(e) would permit these additional contributions to be eliminated, thus restoring contributions to the “basic” level.

The 2013 Term Sheet sets out an agreement between the Sponsors that is in effect from December 31, 2012 to December 30, 2017 (the “**Freeze Period**”), the terms of which are reflected in the FMP. Under Section 3.08 of the FMP, there are certain limits (relating to

¹⁴ This is achieved by first increasing go-forward indexing to 50% for the post-2013 service period, then to 100% on all post-2009 service periods and next, by restoring current pension amounts to a certain prescribed level starting with the years where indexing was less than 50% until all years of partial indexation are restored to the same level and then by restoring indexation to 100% for all service periods.

¹⁵ As noted above, pursuant to Section 3.06 of the FMP, “the partners reserve the right to reconsider such application having regard to the contribution rate and benefits then in effect, prevailing economic circumstances and other relevant factors...”

the funded status of the OTPP) on the ability to make escalated adjustments or to improve benefits pursuant to Section 3.06 during the Freeze Period.

As noted below, no action can be taken under the Temporary Improvement Zone (as defined below) or the Permanent Improvement Zone (as defined below) until all restorative actions under Section 3.06 of the FMP have been provided for (subject to the general discretion of the Sponsors to deviate from the guidelines set out in the FMP).

(ii) Temporary Improvement Zone

Article IV of the FMP (Funding Zone – Temporary Improvements) (the “**Temporary Improvement Zone**”) was added to the FMP in March 2015 and allows for: (i) temporary contribution decreases (a contribution holiday), (ii) surplus distribution, and/or (iii) benefit improvements, provided in each case that the plan’s funding level reaches thresholds set out in the FMP.

We understand that in this zone the plan is considered well-funded and able to afford temporary changes, so long as they do not increase the long-term cost of the OTPP. Surplus cannot be utilized under the Temporary Improvement Zone until the Sponsors have provided for all of the changes specified in Section 3.06 of the Restoration Zone (again, subject to the general discretion of the Sponsors to deviate from the guidelines set out in the FMP).¹⁶

In all cases the Sponsors’ prior agreement is required in order for there to be a temporary contribution decrease, a surplus distribution or a benefit improvement.¹⁷ Where the Sponsors agree to a change that would result in surplus being distributed or utilized for a temporary benefit improvement, the Sponsors are required to enter into a written agreement “governing the manner in which the contributions by the Minister and employers may be adjusted to offset any surplus distribution or temporary improvement of benefits that is reflected in the value of the liabilities.”¹⁸ We understand that this provision is a recognition of the partnership of the Province and the OTF, and requires the Sponsors to enter into an agreement addressing the possible value to be obtained by the Province where there is a decision to provide value to the members (but the provision is not a guarantee that such value will in fact be provided to the Province).

We note that, as a temporary measure, the OTF has “first call” rights on 100% of the surplus disclosed in valuation report with a valuation date after December 30, 2017, up to

¹⁶ FMP, section 4.03

¹⁷ FMP, section 4.05.

¹⁸ FMP, section 4.06

certain amounts as set out in the FMP (the “**OTF Call Right**”).¹⁹ The 2013 Term Sheet indicates that “[t]his is a one-time arrangement intended to compensate Plan members for absorbing 100% (rather than 50%) of funding shortfalls arising in the government initiated Freeze Period.” In other words, this one-time opportunity to benefit from surplus utilization is directly linked to the asymmetrical assumption of risk by OTPP plan participants during the Freeze Period. In light of the Freeze Period and the OTF Call Right, it is our understanding that no actions under the Temporary Improvement Zone will be permitted until the Freeze Period has ended and the OTF Call Right in Article VI of the FMP has been satisfied.²⁰

To summarize, the OTF has a contractual right to the future utilization of surplus, up to the value of the OTF Call Right. OTF cannot utilize any surplus available in the OTPP under this negotiated right until the Freeze Period has ended (on December 30, 2017) and a valuation after such date identifies the existence of surplus available for utilization. In light of this negotiated right, surplus cannot be utilized under the Temporary Improvement Zone or the Permanent Improvement Zone (e.g., to cause a temporary or permanent reduction to contributions) until the OTF Call Right has first been satisfied. Once the OTF Call Right has been satisfied, the *status quo* under the FMP will be restored (i.e., the agreement of the parties will be required for any utilization of surplus). In other words, the OTF Call Right reflects a “one-time” agreement and is expressly “without prejudice or precedent for any future situation”.²¹ It is our understanding that the quantum of the OTF Call Right is not presently expected to be material.

(iii) Permanent Improvement Zone

Where the surplus reaches certain levels as set out in the FMP, Article V of the FMP (Funding Zone – Permanent Improvements) (the “**Permanent Improvement Zone**”) will apply. We understand that in the Permanent Improvement Zone adequate funding security is considered to exist to support permanent changes (either an improvement in benefits or a reduction in contributions).

Under the FMP framework, these changes can be introduced only once the Sponsors have already provided for the changes specified in Section 3.06 (i.e., no further action to restore benefits remains to be taken under the Restoration Zone), subject to the general discretion of the Sponsors to deviate from the guidelines set out in the FMP.²²

¹⁹ FMP, section 6.03.

²⁰ See FMP, subsection 1.05(f) and sections 4.05 and 4.09.

²¹ 2013 Term Sheet, paragraph 11(d).

²² FMP, section 5.03.

The Sponsors are required to mutually agree to any change made in the Permanent Improvement Zone. As in the Temporary Improvement Zone, where the Sponsors have agreed to a change which would result in an improvement to member benefits, the Sponsors would be required to enter into a written agreement “governing the manner in which the contributions by the Minister and employers may be adjusted to offset any change in current benefits that is reflected in the value of the liabilities.”²³

In light of the Freeze Period and the OTF Call Right, it is our understanding that no actions under the Permanent Improvement Zone will be permitted until the Freeze Period has ended and the OTF Call Right in Article VI of the FMP has been satisfied.²⁴

3. History of Surplus Utilization

The history of OTPP surplus utilization from the time the OTPP became a jointly-sponsored pension plan²⁵ to the date that the FMP was established (in March 2003) demonstrates a past practice of the Sponsors equally sharing (in the aggregate) the benefits of surplus utilization:

Valuation Date	Surplus/(Deficit)	OTF	Ontario Government	Surplus Remaining
1990	\$(7.8 billion) unfunded liability	Increased contributions by 1% to 8.9%	Agreed to make a series of special payments to eliminate the unfunded liability and match increased contributions	Special payments considered an asset bringing the plan to a \$0 surplus
1993	\$1.5 billion	\$325 million to offset social contract days	Eliminated special payments for \$1.2 billion saving	\$0
1996	\$0.7 billion	\$0.6 billion for benefit improvements and RCA contributions	N/A	\$0.1 billion
1998	\$6.8 billion	\$2.2 billion for benefit improvements	\$4.6 billion to reduce the value of remaining special payments	\$0

²³ FMP, section 5.05(b).

²⁴ See FMP, sections 5.05 and 5.08.

²⁵ The Partners’ Agreement is dated July 15, 1991.

1999	\$3.5 billion	N/A	\$3.5 billion to reduce the value of remaining special payments	\$0
2001	\$6.8 billion	\$6.2 billion for benefit improvements	N/A	\$0.6 billion
2002	\$1.9 billion	Sponsors agreed not to make any changes to benefits or contributions		\$1.9 billion
Total		\$9.3 Billion	\$9.3 Billion	

* Source: Ontario Teachers' Pension Plan Board "Report on Funding" (April 2002)

Although surplus utilization prior to 2003 may not have been 50/50 each time, from 1990 to 2002 the aggregate value obtained by each of the Sponsors was equal. In certain instances where the Province received a disproportionate share of the financial benefits from surplus utilization, a commitment was made to the OTF that they would receive future surplus available for utilization. In 1998, \$6.8 billion in surplus was utilized to cause a \$2.2 billion benefit improvement and to provide the Province with a \$4.6 billion reduction in the value of special payments owed by the Province. As part of this negotiation, the OTF and the Province agreed to allow future surplus to be utilized to eliminate the Province's remaining special payments (which resulted in \$3.5 billion surplus being utilized in 1999 to reduce the value of the Province's remaining special payments) and a commitment was made for the next \$6.2 billion in surplus to be available to OTF for benefit improvements (such surplus being utilized for benefit improvements in 2001).²⁶

As noted above, the FMP was introduced in March 2003 to provide a guidance framework to the Sponsors when the OTPP has a funding surplus or shortfall. It is our understanding that there have been at least 2 material amendments to the FMP framework since its introduction. Below is a summary of the key funding decisions since the introduction of the FMP:

Year	Valuation Status and Key Decisions
2003	\$1.5 billion surplus; no changes to benefits or contribution levels. Funding Management Policy adopted by plan sponsors.
2005	A preliminary \$6.1 billion shortfall was resolved, leaving plan with a \$0.1 billion surplus. Shortfall resolved with special contribution rate increases, totalling 3.1% of base earnings by

²⁶ See Ontario Teachers' Pension Plan, "Key Funding Decisions Since 1990", available at: <https://www.otpp.com/documents/10179/765840/-/d4e2fea5-624d-420f-af15-e2daf9bc2711/Key+Funding+Decisions.pdf>

	2009 for teachers, the Ontario government and other employers. OTF used the \$76 million contingency reserve set aside in 2001 to reduce contribution rate increases for members in 2008.
2008	A preliminary \$12.7 billion shortfall was resolved with the introduction of conditional inflation protection for pension benefits earned after 2009 and an increase in the basic contribution rate for members and the government to 9% from 8%. Employers agree to make special payments equal to any annual pension increases retirees forgo to a maximum of 50% missed inflation.
2009	A preliminary \$2.5 billion shortfall was resolved primarily by assuming a slightly higher long-term rate of return on investments: yield on real-return bonds plus 1.5%, versus real-return bonds plus 1.4%. Other minor changes made to assumptions to reflect recent plan experience.
2011	A preliminary \$17.2 billion shortfall was resolved with a 1.1% contribution rate increase (phased in over three years), slightly smaller annual cost-of-living increases for teachers who retired after 2009, and recognition of current contribution rate as the permanent base rate.
2012	\$9.6 billion preliminary shortfall adjusted to reflect changes in mortality assumptions and impact of two-year freeze on teachers' salaries. 2012 shortfall resolved by making inflation protection for pension credit earned after 2013 fully conditional on plan's funded status and providing slightly smaller pension increases, beginning in 2014, for members who retired after 2009. These changes enabled the plan to assume a slightly higher discount rate. The changes left the plan with a \$200 million surplus at Jan. 1, 2012.
2014	\$5.1 billion preliminary funding surplus used to boost pensions of members who retired after 2009 to the level they would have been at if full inflation protection had been provided each year since they retired. The surplus funds were also used to raise conditional inflation protection to 60% of the increase in the cost of living for the portion of retirees' pensions earned after 2009. Both changes are effective with January 2015 pension payments.
2015	Some of the \$6.8 billion preliminary funding surplus was used to boost pensions of members who retired after 2009 to the level they would have been at if full inflation protection had been provided on January 1, 2015. The surplus funds were also used to raise conditional inflation protection for pension credit earned after 2009 to 70% from 60% of the increase in the cost of living. Both changes were effective January 2016. In addition, some surplus funds were reserved to help facilitate stability in contribution and benefit levels should a future funding valuation show a decline in assets or increase in pension costs.

* Source: Ontario Teachers' Pension Plan, "Key Funding Decisions Since 1990"

In September 2016, the Sponsors announced that a portion of the \$13.2 billion in funding surplus would be utilized to restore inflation increases, with the remaining surplus funds

to be reserved “to help facilitate stability in contribution and benefit levels should a future funding valuation show a decline in assets or increase in pension costs”.²⁷

In summary, surplus has been utilized three times since the FMP was introduced – in each of 2014, 2015 and 2016 escalated adjustments were provided to increase the pensions of members who had retired after 2009. As noted above, the OTPP is currently in the Restoration Zone which, pursuant to Section 3.06, prioritizes the utilization of surplus to “restore” foregone indexation before any other actions are taken with respect to surplus. In other words, since the FMP was established the OTPP has not reached a level of surplus under the FMP which would allow for the Sponsors to enter into an agreement regarding its utilization under the Temporary Improvement Zone or the Permanent Improvement Zone.

It is also notable that, consistent with the 50/50 cost sharing principle under the plan, there is recent precedent for the Sponsors agreeing to equally share in the cost of funding a plan deficit (as with the case of surplus utilization, the Sponsors are required to mutually agree upon how to address any funding deficit in the OTPP). Specifically, the preliminary \$17.2 billion shortfall identified in 2011 was resolved through a 1.1% increase to the contribution rate for both the participating employers and plan members (phased in over a three-year period).

Given the historical use of surplus under joint sponsorship of the OTPP prior to the adoption of the FMP, and the fact that over that time the Sponsors shared equally in surpluses, it may be that the Sponsors will expect to also share future surpluses on an equal basis, at least over time (we understand that it is certainly the Province’s expectation that this will happen). In any event, based on the Plan Documentation, both parties will have an equal opportunity to benefit from surplus utilization through the negotiation process.

V. LEGAL RIGHT OF THE PROVINCE TO UNILATERALLY UTILIZE SURPLUS

As discussed in Part IV of this opinion, the Plan Documentation allows for the Sponsors to agree to utilize surplus in a variety of circumstances, depending on the funded status of the OTPP. These surplus utilization options include the following avenues through which the Province may potentially receive a financial benefit through the utilization of surplus:

²⁷ Ontario Teachers’ Pension Plan, “Funding News”, available at: <https://www.otpp.com/corporate/plan-funding/funding-updates>. We assume that a written agreement was reached by the Sponsors in this regard; however, we have not been provided with a copy of such agreement.

1. In the Restoration Zone, a Restoration Contribution Reduction may be agreed upon, once certain other requisite conditions have been met.
2. In the Temporary Improvement Zone, surplus may be utilized to provide a temporary contribution reduction (a contribution holiday), either as a stand-alone measure or in combination with other surplus utilization options (i.e., benefit improvements or surplus withdrawal).
3. In the Permanent Improvement Zone, surplus may be utilized to permanently reduce the current contribution obligations of the employers and the members, either as a stand-alone measure or in combination with changes to benefits.

Notwithstanding the foregoing, as noted above, the Sponsors have the discretion to, by mutual agreement, utilize surplus in any other manner agreed upon. (For example, Section 5.05 which relates to the Permanent Improvement Zone provides that “the partners may apply all or part of the [surplus] to change current benefits, current contributions, or both”, subject to certain conditions.)

Any enforceable legal right of the Province to utilize surplus pursuant to the Partners’ Agreement (and FMP appended thereto) would be grounded in the law of contract, the Partners’ Agreement and the appended FMP being a contract between the Sponsors. A contract is an agreement “...which gives rise to an obligation that may be enforced in the courts.”²⁸ It is our view that the relevant provisions in the Partners’ Agreement²⁹ that contemplate the ability for the Province to receive a financial benefit through the utilization of surplus do not, by themselves, give rise to a legally enforceable right to unilaterally dictate the use of surplus. Such a legally enforceable right would only arise by agreement between the Sponsors, either through negotiations or mediation, or if an order were issued by a board of arbitration as contemplated by the dispute resolution mechanisms found in the Partners’ Agreement (see Section VI of this Opinion for further discussion of the impact of binding arbitration on the Sponsors’ legal rights).

In this regard, the FMP can be thought of as being similar to an “agreement to agree,” which does not create an enforceable legal interest in relation to the utilization of surplus.³⁰ What the Province does have, however, is a right to negotiate with the OTF the

²⁸ CED – Contracts – I Basis of Contract – 1 – Contract Defined.

²⁹ Article III, Section 3.06; Article IV, Section 4.05; and Article V, Section 5.05.

³⁰ For a statement of the principle that an “agreement to agree” is not an enforceable legal interest, see, for example: *Simpson v. Canada (Attorney General)*, 2011 ONSC 5637 at para. 60 citing *Ward v. Ward*, 2011 ONCA 178 and *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734 (Ont CA). See also G. H. L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell

use of surplus that may arise under the plan, at least in the context of an actuarial valuation that discloses surplus and that is to be filed with the regulators.

In addition, when a valuation is prepared to be filed and the Sponsors have to discuss the treatment of a surplus disclosed in the valuation, section 74 of the Partners' Agreement requires the Sponsors "to bargain in good faith and make every reasonable effort to reach an agreement on the changes, if any, that will be made to the plan". One might therefore argue that that obligation of good faith may include the obligation to take into account the "sharing" principles described elsewhere in this opinion, given that the OTPP is a jointly-sponsored plan.

As will be discussed below, where the Sponsors are unable to agree upon the utilization of surplus pursuant to the negotiation/mediation processes set forth in the Partners' Agreement, there is an ability for the Sponsors to submit the matter to arbitration. The issuance of an order by an appointed board of arbitration regarding the use of surplus funds under the OTPP would create a legally enforceable right, as the submission to the board of arbitration would constitute a proceeding under the *Arbitrations Act* – as specified in paragraph 87 of the Partners' Agreement – that is enforceable by a court.³¹

VI. IMPACT OF BINDING ARBITRATION ON THE SPONSORS' LEGAL RIGHTS

Section 8.01 of the FMP provides the following:

Section 8.01 Unless the partners mutually agree to the contrary, they shall follow the procedures described in paragraphs 74 to 100 when determining the plan changes arising from Section 3.07.

We first note that the mediation/arbitration process would not be triggered unless there is an actuarial valuation to be filed with the regulators that requires the Sponsors to agree on how any surplus or deficit is to be addressed. If a valuation is prepared in a year when no filing is required (filings generally only being required every three years), and the Sponsors do not agree to file the valuation, then the Sponsors do not necessarily have to address funding and benefit issues and therefore no negotiations may occur.

The processes in paragraphs 74 to 100 of the Partners' Agreement that are referred to in Section 8.01 of the FMP provide, amongst other things, for the following:

Publishing, 2011) at 23 where the author states "There cannot be a contract to enter into a contract. Nor can there be a contract to negotiate, i.e., an agreement to agree."

³¹ Section 50(1) of the *Arbitration Act, 1991*, SO 1991, c 17 states "A person who is entitled to enforcement of an award made in Ontario or elsewhere in Canada may make an application to the court to that effect."

- The Sponsors are required to meet to bargain in good faith and make every reasonable effort to reach an agreement on the changes, if any, that will be made to the plan (section 74);
- The parties may at any point appoint a mediator by agreement of the parties or by a method to which they agree at that time (section 77);
- If the parties agree, the mediator may be appointed as a mediator/arbitrator in which case the appointee will decide on the process and time frame for conducting mediation/arbitration (section 80);
- Within 30 days of appointment, the mediator will prepare a confidential report setting out his or her views on the positions of the two partners and containing a recommendation (section 82);
- If the partners do not accept the report within 14 days of its being delivered to them it will be destroyed and an arbitration board will be appointed (section 84);
- This agreement together with a referral to a board of arbitration constitutes a submission under the *Arbitration Act, 1991*³² (section 87);
- The board of arbitration in making an award will consider prevailing economic conditions and the overall state of the provincial economy (section 91);
- The award made by the board of arbitration, must comply with certain prescribed requirements, including to “provide that the contributions of the Minister and those employers who are required to contribute are equal to the contributions of members” (section 92(c));
- The Board will prepare a final valuation of the plan which implements all of the changes to the plan which have been awarded or agreed to by the partners (section 94);
- The Sponsors may agree to change the procedure described in this agreement, either for one round of negotiations or for all future negotiations; and
- Pursuant to Section 8.02 of the FMP, certain limitations on amendments set out in the FMP also apply to an award made by a board of arbitration (generally, these limitations are intended to ensure that the plan is adequately funded after providing for the utilization of surplus).

³² SO 1991, c. 17 (the “*Arbitration Act*”).

The Partners' Agreement and the FMP contain no general arbitration clause governing all disputes relating to the agreement, although Section 14 of the Partners' Agreement provides for the possibility of voluntary arbitration. We are not aware of any instance where the arbitration provisions have been invoked by the parties since the FMP was established. It is not immediately clear whether disputes relating to the utilization of surplus under Article IV of the FMP (i.e., the Temporary Improvement Zone) and under Article V of the FMP (i.e., the Permanent Improvement Zone) would be subject to arbitration.³³ It is our understanding from discussions with OTPP's internal legal counsel, however, that the arbitration provisions in the FMP would be expected to apply to disputes relating to the utilization of surplus under each of these provisions.

Where a matter has been submitted to arbitration, case law has established that the agreement between the parties that is being arbitrated is the fundamental source of subject matters that come within the arbitration board's jurisdiction.³⁴ The parties are free to design their own procedures, including setting the scope of the arbitration board's jurisdiction and specifying the potential outcomes of the arbitration (subject to certain default appeal rights and mandatory grounds to set aside an award under the *Arbitration Act*). The arbitration board is empowered to make binding decisions because of the arbitration agreement, including any limitations on that authority. Canadian courts have traditionally granted deference to arbitration awards.

Arbitration provisions are generally procedural in nature and therefore do not provide a strong foundation upon which to base parties' reasonable expectations about their substantive rights under an agreement. To resolve a dispute, the arbitration board would engage in an exercise in interpretation of the operative substantive provisions of the relevant governing documents, including any applicable statutory provisions. However, as noted above, under section 92 of the Partners' Agreement, the arbitral award must meet certain mandatory conditions. Among other things, the arbitral award is required to provide that the contributions of the Minister and those employers who are required to contribute are equal to the contributions of members (section 92(c) of the Partners'

³³ On the one hand, Section 8.01 of the FMP provides for the procedures in the Partners' Agreement relating to arbitration to apply "when determining the plan changes arising from Section 3.07". This may suggest that only disputes relating to the utilization of surplus under Article III (i.e., the Restoration Zone) can be arbitrated. On the other hand, Section 8.03 of the FMP provides that "Subject to the 2013 Term Sheet, nothing in Article II to Article IX affects the timing of the triennial negotiation, mediation and arbitration process referred to in paragraph 72 to 100", which may suggest that any agreement relating to the utilization of surplus, including under Article IV or Article V of the FMP, may be subject to arbitration (when a valuation is to be filed the parties have to agree on how any surplus – including surplus in the Temporary Improvement Zone and Permanent Improvement Zone, if any – will be used).

³⁴ See for example: *Desputeaux v. Éditions Chouette* (1987) Inc., [2003] 1 SCR 178, para. 22.

Agreement). The arbitration board does not have discretion to ignore this mandatory provision, although the provision would need to be given effect within the context of the relevant documents and applicable statutes, interpreted as a whole, and other relevant factors, such as past conduct of the parties. As part of the arbitration board's interpretation exercise of the relevant governing documents, in the event of ambiguity in the written terms of the documents, evidence of the parties' post-agreement practices can be admitted as an aid to interpreting the agreement. Past practices may illustrate the parties' intentions at the time of the agreement. These considerations of past practices would be in conjunction with any explicit mandatory considerations set out in the governing document, e.g. prevailing economic conditions and the overall state of the provincial economy under section 91 of the Partners' Agreement. The past practices which the arbitrator may consider would include those described above: the long history of 50/50 member/employer contributions to the plan, and the equal sharing of surpluses prior to 2003 (from 2003 onwards the plan was mostly in deficit, with surpluses used to restore foregone escalated adjustments for members).

Yours truly,

A handwritten signature in dark ink, reading "Osler, Hoskin & Harcourt LLP". The signature is written in a cursive, flowing style.

Osler, Hoskin & Harcourt LLP
JS/DR/JM:jm

RE_OTPP FMP questions.rtf

From: Rienzo, Douglas [DRienzo@osler.com]
To: Jeff Davis [Jeff_Davis@otpp.com]
CC: Barbara Zvan [Barbara_Zvan@otpp.com]; Marin, Jon [jomarin@osler.com]; Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]
Subject: RE: OTTP FMP questions
Date: Sunday, September 18, 2016 14:02:45
Attachment 1: image001.gif
Attachment 2: image002.gif
Attachment 3: image003.jpg

Jeff, we do have one quick question:

As you know there is a mediation/arbitration process contemplated under the Funding Management Policy. It seems to be triggered when decisions have to be made under Article III of the FMP ("Restoration Zone"), but it's not clear that it could apply to any negotiations between the parties regarding surplus utilization under Article IV (temporary improvements) or Article V (Permanent Improvements). Do you know if it was intended for mediation/arbitration to apply to those portions of the FMP?

Also, has there ever been a mediation or arbitration under the FMP?

Doug Rienzo

Douglas Rienzo
Partner, Pensions & Benefits

Chair, Diversity Committee

416.862.5683

DIRECT

416.862.6666

FACSIMILE

drienzo@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

<http://www.osler.com/>

From: Jeff Davis [mailto:Jeff_Davis@otpp.com]
Sent: Sunday, September 18, 2016 9:22 AM
To: Steele, Jana <JSteele@osler.com>
Cc: Barbara Zvan <Barbara_Zvan@otpp.com>; Marin, Jon <jomarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>; Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>; Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>
Subject: Re: OTPP FMP questions

Jana -

Let me know you'd like to discuss any of the legal aspects.

Sent from my iPad

On Sep 17, 2016, at 2:25 PM, Steele, Jana <JSteele@osler.com> wrote:

Thanks Barb. And thanks again for your time today. Jana.

Sent from my iPhone

On Sep 17, 2016, at 2:16 PM, Barbara Zvan <Barbara_Zvan@otpp.com> wrote:

Hi all

Please find attached. BZ

FMP history – this is the document we use for board orientation

FMP Coles Notes – we created this summary in 2015 with a group from the Sponsors and their consulting actuaries and plan actuary

OTPP JSPP agreement – this was the term sheet sent to us. You can see only a small component was added to the FMP. In fact, we spent a lot of time speaking about this, how to incorporate. Given the term nature and low likelihood other benefit reductions would have to be put in place other than CIP, we only insert the small section in 3.08.

Report of Funding – this was a publication in 2002 sent to all plan members, the back page outlines the funds spent in during the “surplus” time of the late 1990s and early 2000s. You can see it was spent evenly so much so that a remaining amount of \$76M (need to 2x check that, but of that order) which is relatively small amount was documented in the Partners’ Agreement to be spent by the OTF at a future date. The \$76M was the amount remaining after round to 0.45% for the CPP offset (vs using something with 6 decimal points). This was “spent” when contributions were later increased via specials, the Teachers had a slightly lower contribution rate for 1st (maybe 2) to offset for this \$76M.

Barbara Zvan, FSA, FCIA, CERA

SVP, Strategy & Risk, Chief Investment Risk Officer

barbara_zvan@otpp.com

Direct 416-730-6364

Assistant: Karen Titus, 416-228-3172, karen_titus@otpp.com

<http://www.otpp.com>

<image001.gif>

Ontario Teachers' Pension Plan

5650 Yonge Street, Toronto, Ontario M2M 4H5, Canada

<[image002.png](#)>

<[image003.png](#)><[image004.png](#)><[image005.png](#)><[image006.png](#)>

From: Steele, Jana [<mailto:JSteele@osler.com>]

Sent: Saturday, September 17, 2016 12:01 PM

To: Barbara Zvan <Barbara_Zvan@otpp.com>

Cc: Marin, Jon <jmarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>; Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>; Kaufman, Paul (TBS)

<Paul.Kaufman@ontario.ca>

Subject: Re: OTPP FMP questions

Call in details for 1 pm

416-343-4295

ID: 7801041

Sent from my iPhone

On Sep 17, 2016, at 11:57 AM, Barbara Zvan <Barbara_Zvan@otpp.com> wrote:

Sure -. Just in the middle of taking my daughter between her activities. Can I call you around 1?

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Steele, Jana

Sent: Saturday, September 17, 2016 11:20 AM

To: Barbara Zvan

Cc: Marin, Jon; Rienzo, Douglas; 'Hatzis, Len (TBS)'; Kaufman, Paul (TBS)

Subject: OTPP FMP questions

Hi Barb:

We were just speaking with Jim Leech regarding the FMP. We are working with the Province of Ontario regarding the accounting issue.

Would you have some time for a call today?

Best regards,

Jana Steele

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<FMP history - updated September 29 by MC new format.pdf>

<FMP Coles Notes.pdf>

<OTPP JSPP Afreement final March 2013.pdf>

<Report on Funding.pdf>

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image001.pdf

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image002.pdf

osler.com

image003.pdf



RE_ URGENT_ Statement of Facts and Assumptions Sept 19.docx.rtf

From: Rienzo, Douglas [DRienzo@osler.com]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Marin, Jon [jomarin@osler.com]; Steele, Jana [JSteele@osler.com]
Subject: RE: URGENT: Statement of Facts and Assumptions Sept 19.docx
Date: Monday, September 19, 2016 14:05:08

Sorry - working on it now - couldn't get to it while I was working on the Osler opinion - stay tuned....

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

From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]
Sent: Monday, September 19, 2016 2:04 PM
To: Steele, Jana <JSteele@osler.com>; Marin, Jon <jomarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>
Cc: Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>
Subject: Re: URGENT: Statement of Facts and Assumptions Sept 19.docx

Hi

Our folks need final comments Asap. Sorry for the time pressures

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Hatzis, Len (TBS)
Sent: Monday, September 19, 2016 1:07 PM
To: Steele, Jana; Marin, Jon; Rienzo, Douglas
Cc: Kaufman, Paul (TBS)
Subject: RE: URGENT: Statement of Facts and Assumptions Sept 19.docx

Thanks - do you have ETA for your review? Much appreciated.

From: Steele, Jana [mailto:JSteele@osler.com]
Sent: September 19, 2016 12:00 PM
To: Hatzis, Len (TBS); Marin, Jon; Rienzo, Douglas
Cc: Kaufman, Paul (TBS)
Subject: RE: URGENT: Statement of Facts and Assumptions Sept 19.docx

Thanks Len. We will review and let you know. Jana

From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]
Sent: Monday, September 19, 2016 11:59 AM
To: Steele, Jana <JSteele@osler.com<mailto:JSteele@osler.com>>; Marin, Jon <jomarin@osler.com<mailto:jomarin@osler.com>>; Rienzo, Douglas <DRienzo@osler.com<mailto:DRienzo@osler.com>>
Cc: Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca<mailto:Paul.Kaufman@ontario.ca>>
Subject: FW: URGENT: Statement of Facts and Assumptions Sept 19.docx
Importance: High

Jana et al

I know that you have been engaged with Deloitte on these issues, but here are their draft statement of facts that would be folded into their opinion. We think it would be very useful if you could advise if there are inaccuracies in this - it isn't that long. At first blush, Paul and I made a couple of comments as noted in the attached.

From: Petsche, Nadine (TBS)
Sent: September 19, 2016 11:42 AM
To: Hatzis, Len (TBS); Kaufman, Paul (TBS)
Subject: URGENT: Statement of Facts and Assumptions Sept 19.docx
Importance: High

Len/Paul,
Please advise of any issues. The item has been under review by EDU and ISPPD since 10am, but just checking to see if there are any issues that you see? Please feel free to suggest edits to wording.

From: Colley, Matthew (CA - Toronto) [mailto:mcolley@deloitte.ca]
Sent: September 19, 2016 9:59 AM
To: Petsche, Nadine (TBS); Veinot, Cindy (TBS)
Subject: Statement of Facts and Assumptions Sept 19.docx

Hi - Please find attached the statement of facts and assumptions. There are a couple of comments in this document where we would like OPCD to review the wording before sending onto the AG.

Thanks

Matt

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RE_ URGENT_ Statement of Facts and Assumptions Sept 19.docx.rtf

From: Rienzo, Douglas [DRienzo@osler.com]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]; Marin, Jon [jomarin@osler.com]
Subject: RE: URGENT: Statement of Facts and Assumptions Sept 19.docx
Date: Monday, September 19, 2016 14:29:13
Attachment 1: image001.gif
Attachment 2: image002.gif
Attachment 3: image003.jpg
Attachment 4: Statement of Facts and Assumptions Sept 19 (3).docx

Len:

Comments attached.

Doug

Douglas Rienzo
Partner, Pensions & Benefits

Chair, Diversity Committee

416.862.5683

DIRECT

416.862.6666

FACSIMILE

drienzo@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

<http://www.osler.com/>

From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]
Sent: Monday, September 19, 2016 11:59 AM
To: Steele, Jana <JSteele@osler.com>; Marin, Jon <jomarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>
Cc: Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>
Subject: FW: URGENT: Statement of Facts and Assumptions Sept 19.docx
Importance: High

Jana et al

I know that you have been engaged with Deloitte on these issues, but here are their draft statement of facts that would be folded into their opinion. We think it would be very useful if you could advise if there are inaccuracies in this – it isn't that long. At first blush, Paul and I made a couple of comments as noted in the attached.

From: Petsche, Nadine (TBS)
Sent: September 19, 2016 11:42 AM
To: Hatzis, Len (TBS); Kaufman, Paul (TBS)
Subject: URGENT: Statement of Facts and Assumptions Sept 19.docx
Importance: High

Len/Paul,

Please advise of any issues. The item has been under review by EDU and ISPPD since 10am, but just checking to see if there are any issues that you see? Please feel free to suggest edits to wording.n

From: Colley, Matthew (CA - Toronto) [<mailto:mcolley@deloitte.ca>]
Sent: September 19, 2016 9:59 AM
To: Petsche, Nadine (TBS); Veinot, Cindy (TBS)
Subject: Statement of Facts and Assumptions Sept 19.docx

Hi – Please find attached the statement of facts and assumptions. There are a couple of comments in this document where we would like OPCD to review the wording before sending onto the AG.

Thanks

Matt

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Statement of Facts and Assumptions Sept 19 (3).pdf

Statement of Facts and Assumptions

The (Ontario Teachers') pension plan is jointly sponsored by the Ontario government, through the Minister of Education, and the executive of the Ontario Teachers' Federation (OTF). The OTF represents teachers, while the government represents employers.

OTF and the government are equally responsible for ensuring the pension plan has enough money to meet its long-term pension obligations. In addition, they appoint experienced, professional experts to the pension plan's Board.

Through a six-member Partners' Committee, the sponsors jointly:

- Set benefit levels
- Establish the contribution rate paid by working teachers (which is matched by the Ontario government and other designated employers)
- Decide how to address funding shortfalls or use surplus funds when they arise

(Source: OTPP.com)

The governing and other documents that are relevant to an accounting analysis are as follows:

- Teacher's Pension Act (TPA)
- Partners Agreement
- Financial Funding Management Policy (FMP)

The following facts and assumptions have been accepted without verification or further analysis:

- The plan meets the definition of a joint benefit plan under S. 3250 of the Public Sector Handbook and is appropriately accounted for as such.
- The actuarial and other assumptions that factored into the valuation used for accounting purposes are appropriate and meet the requirements of S. 3250.

Relevant Extracts from the TPA

Section 5 (1.1) of the TPA states that the total amount of contributions payable by the Minister of Education and the employers who contribute under the pension plan in respect of any year shall not exceed the amount of contributions payable by or on behalf of active plan members in respect of credited service for that year. The only instance where contributions would not be equal would include the government's payments in connection with forgone inflation adjustments and the additional contributions related to the 2008 filing agreement (1.1%) which is often referred to as "share the pain" payments) (Section 5 (8)).

Section 10 of the TPA provides that the Minister of Education and the executive of The Ontario Teachers' Federation (OTF) may enter into an agreement that provides for, among other things, the joint management of the Plan and the sharing of entitlement to gains or surplus under the plan and of liability for deficiencies in the pension fund.

Pursuant to Section 10 of the TPA, the Minister of Education and the OTF (collectively the Partners) have entered into an agreement for the management of the Plan (Partners Agreement), to which is appended a Funding Management Policy (FMP) that is deemed to form part of the agreement.¹ The FMP provides for the funding of the Plan and how deficits and surpluses will be addressed.

Actuarial Valuation of the OTPP for accounting and funding purposes

¹ Partners Agreement, section 110.

Commented [HL1]: Is this accurate – nothing in the TPA says we represent employers.

Commented [RD2R1]: Agree.

Commented [RD3]: Not sure what this means; it would be more helpful to quote directly from the TPA or other sources (it seems to be more of a conclusion than a statement of fact)

Commented [RD4]: I believe there is matching in practice but I don't think it is mandated

Commented [RD5]: Not verified by us either

Commented [RD6]: Not sure they can say these are the only ways contributions would not be equal; and note that 5(1.1) does not technically say they must be equal.

Commented [RD7]: It provides a framework, but is by no means 100% prescriptive. Also the partners can deviate from the FMP by agreement.

The following is a **summary** of the components of the plan and the Province's calculation of its share of the plan as of March 31, 2016.

Commented [RD8]: We have not checked these figures.

(all figures in \$B)	Total plan	50% Share of the plan
Market related value of assets	157.0	78.5
Value of obligation	116.4	58.2
Surplus (deficit)	40.6	20.3
Unamortized (gains) losses	(18.0)	(9.0)
Adjustment for March 31, 2016	(1.8)	(0.9)
Asset (liability) position	20.8	10.4
Specific Government adjustment		(0.3)
Final asset (liability) position on balance sheet		10.1

According to the OTTP website, the most recent funding valuation reported a preliminary funding surplus of \$13.2 billion on March 31, 2016.

Relevant Extracts from the Partners' Agreement

The Partnership Agreement is between the Province of Ontario and the OTF that sets out the formal relationship between the Province and the OTF in sponsoring the OTTP. Paragraph 8 of the Partnership Agreement states that 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 OTTP Board, and defining the role of the Board.

The Partner's agreement requires that when changes to the plan are **required** that the Partners negotiate how those changes are made in good faith (Paragraph ~~75~~⁷⁴)

Commented [RD9]: Note that this provision relates to changes flowing from a valuation that is to be filed with the regulators.

Paragraph 75 of the Partner's agreement requires the Partners to advise the Board of OTTP of what changes affecting benefits and contribution rates they are proposing so that the Board can provide cost estimates and comments on the administrative impact of the changes to both partners as soon as possible.

If the partners cannot agree on the changes required to the plan, a mediator is appointed to assist the Partners in coming up with an agreement. The mediator is responsible for submitting a report to the partners on his or her views on the positions of the partners and provide a recommendation to the Partners. If the partners do not accept the mediator's report, the arbitration process will begin and an arbitration board will be appointed. The board will consist of 3 people, with each partner selecting one representative and two appointees will select the final member who is an umpire. Paragraph 94 of the Partners Agreement indicates that the report created by the arbitration board will be implemented. Paragraph 92 sets some parameters for the **mediation**, including part (c), which sets out that the contributions from the Minister and employers be equal to those of the members.

Commented [HL10]: Inaccurate: This applies to arbitration NOT mediation

In addition to the clauses identified above, the Partnership agreement has an appendix called the Funding Management Policy which sets out the Partners' responsibilities in making funding decisions and surplus allocation regarding the plan.

Relevant Extracts from the FMP

The FMP is an appendix to the partnership partners' agreement that speaks to how the plan should be funded by both parties. The protocol for the use of surplus under the OTPP is detailed in the Funding Management Policy ("FMP") adopted by the Ontario Government and Ontario Teachers Federation as sponsors of the OTPP.

Commented [RD11]: I'd say it's broader than that; e.g. also deals with surplus utilization.

The FMP sets out a complex series of considerations surrounding funding management and the use of any excess of assets over liabilities. The FMP sets out a number of "funding zones", depending on the level of funding in the plan. The following three are most relevant to addressing surpluses:

- i) Restoration zone (Article 3 of the FMP) allows for surplus to be utilized to "restore" foregone indexation and then to either increase benefits to the "run-rate benefit" level (i.e., the long-term target level) or to lower contributions to the basic target rate (or a combination of these two options) (Section 3.06(e)).
- ii) Temporary improvement zone (Article 4 of the FMP) is the zone where contributions can be temporarily reduced, a surplus distribution can be made on a temporary basis and/or benefits can be temporarily improved (as long as it does not create a long term cost). Section 4.05 of the FMP provides that in such a scenario, the parties may reduce current contributions, provide temporary surplus distributions or provide a temporary benefit improvement.
- iii) Permanent improvement zone is where the plan is essentially fully funded and the funding security desired to support permanent changes. Article V (Permanent Improvements) of the FMP provides for permanent actions that can be taken when Plan assets exceed current liabilities by more than 10% of current liabilities. Section 5.05 provides for actions that can be taken in respect of the amount that assets exceed current liabilities plus the 10% margin noted previously. Such actions can include changes to current benefits, current contributions, or both.

Commented [RD12]: 3.06(e) is not quite so prescriptive; e.g. it only speaks of "a reduction in contribution rates" but doesn't expressly say only down to the basic rate.

The ability to reduce contributions or increase benefits through the temporary or permanent improvement zone are subject to ensuring that the requirements of 3.06 in the restoration zone are met. Article VIII of the FMP sets out that the parties must agree to any changes arising out of FMP decisions. Should they be unable to agree the mediation process set out in the Partners Agreement, the arbitration process outlined in the Partners Agreement will be followed.

Commented [RD13]: Is that correct, or is it only the amount in excess of the 10% cushion?

It is our understanding that the plan is currently in the Restoration Zone. We understand that contributions to the OTPP currently include a 1.1% special contribution on all earnings and that the Restoration Contribution Reduction under Section 3.06(e) would permit this special contribution to be eliminated.

Commented [RD14]: For a filing valuation, this is true – the parties must agree or go to mediation/arbitration. Arguably for any valuation that isn't being filed, either party can decide not to negotiate any changes and it would end there (that is our understanding).

History of Surplus

The FMP was not established until 2003. The following is a summary of the history of how surpluses we treated before the FMP and post the FMP. The following is a summary of deficits over the year.

Commented [Deloitte15]: Can this be confirmed as to whether the parties need to agree in order to reduce this contribution? Our understanding is that both parties do need to agree.

Commented [RD16R15]: We also interpret the FMP as requiring agreement to eliminate this special contribution.

Commented [RD17]: We didn't check this; we assume it was simply copied from the source.

Valuation Date	Surplus/(Deficit)	OTF	Ontario Government	Surplus Remaining
1990	\$(7.8 billion) unfunded liability	Increased contributions by 1% to 8.9%	Agreed to make a series of special payments to eliminate the unfunded liability and match increased contributions	Special payments considered an asset bringing the plan to a \$0 surplus
1993	\$1.5 billion	\$325 million to offset social contract days	Eliminated special payments for \$1.2 billion saving	\$0
1996	\$0.7 billion	\$0.6 billion for benefit improvements and RCA contributions	N/A	\$0.1 billion
1998	\$6.8 billion	\$2.2 billion for benefit	\$4.6 billion to reduce the value of remaining special	\$0

		improvements	payments	
1999	\$3.5 billion	N/A	\$3.5 billion to reduce the value of remaining special payments	\$0
2001	\$6.8 billion	\$6.2 billion for benefit improvements	N/A	\$0.6 billion
2002	\$1.9 billion	Sponsors agreed not to make any changes to benefits or contributions		\$1.9 billion
Total		\$9.3 Billion	\$9.3 Billion	

* Source: Ontario Teachers' Pension Plan Board "Report on Funding" (April 2002)

Year	Valuation Status and Key Decisions
2003	\$1.5 billion surplus; no changes to benefits or contribution levels. Funding Management Policy adopted by plan sponsors.
2005	A preliminary \$6.1 billion shortfall was resolved, leaving plan with a \$0.1 billion surplus. Shortfall resolved with special contribution rate increases, totalling 3.1% of base earnings by 2009 for teachers, the Ontario government and other employers. OTF used the \$76 million contingency reserve set aside in 2001 to reduce contribution rate increases for members in 2008.
2008	A preliminary \$12.7 billion shortfall was resolved with the introduction of conditional inflation protection for pension benefits earned after 2009 and an increase in the basic contribution rate for members and the government to 9% from 8%. Employers agree to make special payments equal to any annual pension increases retirees forgo to a maximum of 50% missed inflation.
2009	A preliminary \$2.5 billion shortfall was resolved primarily by assuming a slightly higher long-term rate of return on investments: yield on real-return bonds plus 1.5%, versus real-return bonds plus 1.4%. Other minor changes made to assumptions to reflect recent plan experience.
2011	A preliminary \$17.2 billion shortfall was resolved with a 1.1% contribution rate increase (phased in over three years), slightly smaller annual cost-of-living increases for teachers who retired after 2009, and recognition of current contribution rate as the permanent base rate.
2012	\$9.6 billion preliminary shortfall adjusted to reflect changes in mortality assumptions and impact of two-year freeze on teachers' salaries. 2012 shortfall resolved by making inflation protection for pension credit earned after 2013 fully conditional on plan's funded status and providing slightly smaller pension increases, beginning in 2014, for members who retired after 2009. These changes enabled the plan to assume a slightly higher discount rate. The changes left the plan with a \$200 million surplus at Jan. 1, 2012.
2014	\$5.1 billion preliminary funding surplus used to boost pensions of members who retired after 2009 to the level they would have been at if full inflation protection had been provided each year since they retired. The surplus funds were also used to raise conditional inflation protection to 60% of the increase in the cost of living for the portion of retirees' pensions earned after 2009. Both changes are effective with January 2015 pension payments.

2015 Some of the \$6.8 billion preliminary funding surplus was used to boost pensions of members who retired after 2009 to the level they would have been at if full inflation protection had been provided on January 1, 2015. The surplus funds were also used to raise conditional inflation protection for pension credit earned after 2009 to 70% from 60% of the increase in the cost of living. Both changes were effective January 2016. In addition, some surplus funds were reserved to help facilitate stability in contribution and benefit levels should a future funding valuation show a decline in assets or increase in pension costs.

2016 Some of the \$13.2 billion funding surplus will be used to raise conditional inflation protection for pension credit earned after 2009 to 90% from 70% of the increase in the cost of living. Some funds will also be reserved to increase the stability in contribution and benefit levels, should future valuations show a decline in asset value or an increase in pension costs.

* Source: Ontario Teachers' Pension Plan, "Key Funding Decisions Since 1990" adapted for September 14, 2016 announcement.

Impact of Restoring Inflation Indexation

As noted above, a preliminary \$12.7 billion plan shortfall in 2008 was resolved with the introduction of conditional inflation protection for pension benefits earned after 2009 and an increase in the basic contribution rate for members and the government to 9% from 8%. Employers agreed to make special payments equal to any annual pension increases retirees forgo to a maximum of 50% missed inflation. In other words, employers and members shared in the outcome since the members would forego some benefits and the employers would also bear the cost to the extent of 50% of the missed inflation. These additional payments are often referred to as the "share the pain" payments. Despite the fact that the inflation protection was reduced, the cost of this protection has been fully reflected in the measurement of the accrued benefit obligation associated with the plan on the grounds that either the benefits would be restored and provided to pensioners or the "share the pain" payments would continue.

As also noted in the table above, plan surpluses arising in 2014-2016 are being used to restore some of the inflation protection that was reduced in 2008. This restoration of inflation protection is fully contemplated in the FMP under Section 3 describing the Restoration Zone. The direct impact of this action is that a portion of the "share the pain" payments that would otherwise be required have been eliminated. The estimated value of this reduction in contributions is \$4.3 billion related to the 2016 action (\$1.85 billion for 2015, and XX for 2014).

Commented [DK(-T18): OPCD to make sure you agree with how I've worded this.

Commented [DK(-T19): Amount outstanding

Commented [RD20]: We didn't verify this; we assume it all comes from the information cited above.

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From: Rienzo, Douglas [DRienzo@osler.com]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]; Marin, Jon [jomarin@osler.com]
Subject: RE: URGENT: Statement of Facts and Assumptions Sept 19.docx
Date: Monday, September 19, 2016 15:21:18
Attachment 1: image001.gif
Attachment 2: image002.gif
Attachment 3: image003.jpg

You're welcome, Len.

From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]
Sent: Monday, September 19, 2016 3:11 PM
To: Rienzo, Douglas <DRienzo@osler.com>
Cc: Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>; Steele, Jana <JSteele@osler.com>; Marin, Jon <jomarin@osler.com>
Subject: RE: URGENT: Statement of Facts and Assumptions Sept 19.docx

Thanks for turning this around so quickly.

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Sent: September 19, 2016 2:29 PM
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Comments attached.

Doug

Douglas Rienzo

Partner, Pensions & Benefits

Chair, Diversity Committee

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Matt

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CC: Marin, Jon [jomarin@osler.com]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]
Subject: RE: opinion
Date: Monday, September 19, 2016 15:22:06

Still aiming for end of day, Len. We'll keep you posted and get it to you asap. It's under internal review now.

From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]
Sent: Monday, September 19, 2016 3:15 PM
To: Rienzo, Douglas <DRienzo@osler.com>
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Subject: opinion

Hi

Any update on delivery of draft opinion . thanks

Len Hatzis

Deputy Director

Legal Services Branch | Treasury Board Secretariat

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

416.327.6393

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Subject: RE: opinion
Date: Monday, September 19, 2016 19:05:44
Attachment 1: image001.gif
Attachment 2: image002.gif
Attachment 3: image003.jpg
Attachment 4: Draft Osler Opinion re OTTP surplus.pdf

Len:

Please find enclosed the draft opinion. Please let us know if you have any comments or questions; subject to your comments we can prepare it in final form. Please note that due to time restrictions we are still reviewing it internally, so there may be some minor changes to be made before finalizing.

Doug

Douglas Rienzo
Partner, Pensions & Benefits

Chair, Diversity Committee

416.862.5683

DIRECT

416.862.6666

FACSIMILE

drienzo@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
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<http://www.osler.com/>

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Draft Osler Opinion re OTPP surplus.pdf

Toronto

Montréal

Calgary

Ottawa

Vancouver

New York

September 19, 2016

Jana Steele
Direct Dial: 416.862.6625
jsteele@osler.com

Douglas Rienzo
Direct Dial: 416.862.5683
drienzo@osler.com

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

Paul Kaufman
Counsel, Treasury Board Secretariat Legal Services
Ferguson Block
77 Wellesley Street West
9th Floor
Toronto, ON M7A 1N3

Dear Sirs:

Accounting Treatment of Surplus in the Ontario Teachers' Pension Plan

I. BACKGROUND

We understand the pertinent background facts to be the following:

1. The Ontario Teachers' Pension Plan (the **"OTPP"**) is a jointly-sponsored defined benefit pension plan established under the *Teachers' Pension Act* (Ontario) and is, subject to certain exceptions, required to comply with the *Pension Benefits Act* (Ontario) as well as the *Income Tax Act* (Canada).
2. The sponsors of the OTPP are the Province of Ontario (the **"Province"**) and the Ontario Teachers' Federation (the **"OTF"**) (collectively, the **"Sponsors"**).

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3. We understand that as at March 31, 2016 the Province's Statement of Financial Position (the "**Public Accounts**") includes a pension asset totalling \$10.6 billion (the "**Pension Asset**") related in part to an accounting surplus under the OTPP.¹
4. The Office of the Auditor General of Ontario has expressed concerns with the Province's inclusion of the Pension Asset in the Public Accounts, for reasons including that in its view the Province does not have a legally enforceable right to withdraw the Pension Asset.²

You asked us to consider the processes pursuant to which the Province may utilize surplus assets in the OTPP in accordance with the Plan Documentation (as defined below), and to identify any considerations that might inform the expectations of the Province as a Sponsor regarding the basis upon which decisions will be made relating to surplus utilization. We are not providing an opinion on the proper application of the accounting standards to the present situation, as that is an issue for the accountants to address.

II. SCOPE OF OPINION

For the purposes of our opinion, we considered the following documentation (collectively, the "**Plan Documentation**"):

1. The Ontario Teachers' Pension Plan (the "**OTPP**" or "**plan**");
2. The Agreement between Her Majesty the Queen in right of the Province of Ontario represented by the Minister of Education and Training and The Ontario Teachers' Federation represented by its Executive (the "**Partners' Agreement**");
3. The Funding Management Policy (the "**FMP**"), which forms Appendix "A" to the Partners' Agreement; and
4. The Term Sheet agreed to by the Sponsors dated March 13, 2013 (the "**2013 Term Sheet**") describing the implications of the Freeze Period (as defined below) on the FMP.

We have also considered the following legislation/regulations:

¹ See letter from Bonnie Lysyk (Auditor General) to Greg Orencsak (Deputy Minister, Treasury Board) and Scott Thompson (Deputy Minister, Ministry of Finance), dated September 13, 2016. Part of the surplus relates to another pension plan; we understand that \$10.1 billion relates to the OTPP.

² *Ibid.*

1. The *Teachers' Pension Act* (Ontario) (the “**Teachers' Act**”); and
2. The *Pension Benefits Act* (Ontario) (the “**PBA**”) and the regulations thereunder (the “**PBR**”).

As per your instructions, we have not evaluated the ability of the Province to benefit from the *withdrawal* of surplus assets from the OTPP (although certain provisions of the FMP cited herein relate to both the withdrawal and other utilization of surplus). Rather, this opinion identifies the processes pursuant to which the Province may receive a financial benefit through the *utilization* of OTPP surplus (e.g., as a result of either a temporary reduction in the Province's contribution obligations (a contribution holiday) or through changes to the contribution formula that reduce the Province's contribution obligations).

We note that the concept of an *accounting* surplus is distinct from surplus identified in a funding valuation prepared in respect of the OTPP (a “**Funding Valuation**”). Where surplus has been identified in a Funding Valuation, the Plan Documentation provides the Sponsors with certain avenues pursuant to which the Funding Valuation surplus can be utilized. Any reference to “surplus” in this opinion, unless expressly stated otherwise, relates to the surplus identified by the actuary for the OTPP in a Funding Valuation and not to the accounting surplus identified in the Public Accounts. We understand that pursuant to the applicable accounting standards, the recognition of part or all of the accounting surplus on the Public Accounts depends on the ability of the Province to benefit from any surplus in the pension fund over the life of plan.

This opinion does not purport to draw any conclusions, express or implied, about the application of the accounting standards to the present circumstances; rather, it is solely intended to provide the Province with information concerning the legal framework governing the utilization of surplus under the OTPP so as to allow the Province's accountants to determine whether a related Pension Asset should appear on the Public Accounts.

III. SUMMARY OF OUR CONCLUSIONS

A brief summary of our material conclusions is set forth below (all capitalized terms are defined herein):

1. Paragraph 10(1)3 of the Teachers' Act provides that the Minister of Education and the executive of the OTF may enter into an agreement (i.e., the Partners' Agreement) that provides for certain matters, including: “3. The sharing of entitlement to gains or surplus under the plan and of liability for deficiencies in the pension fund by the Minister, the employers who contribute under the plan and the active plan members”. This is a fundamental legislative pronouncement that the Province and the members of the plan are meant to “share” both upside

(surplus) and downside (deficit) under the plan. Although it is not an express statement of 50/50 sharing, it would presumably inform the expectations of the Sponsors regarding how any surpluses are to be utilized.

2. The Plan Documentation (specifically the FMP) and applicable legislation allow for the Sponsors to utilize surplus in a variety of ways, depending on the funded status of the OTPP. These surplus utilization options include the following avenues through which the Province may receive a financial benefit through the utilization of surplus (the three “zones” describe different levels of surplus, a greater amount of surplus being required in order for the next “zone” to come into play):
 - a. In the Restoration Zone, a Restoration Contribution Reduction may be approved once certain other requisite conditions have been met.
 - b. In the Temporary Improvement Zone, surplus may be utilized to provide a temporary contribution reduction (i.e., a contribution holiday), either as a stand-alone measure or in combination with other surplus utilization options (i.e., benefit improvements or surplus withdrawal).
 - c. In the Permanent Improvement Zone, surplus may be utilized to permanently reduce the current contribution obligations of the employers and the members, either as a stand-alone measure or in combination with changes to benefits.

Notwithstanding the foregoing, under the FMP the Sponsors have the discretion to, by mutual agreement, utilize surplus in any other manner.

3. Any enforceable legal right to obtain some value from any surplus pursuant to the Partners’ Agreement (and FMP appended thereto) would be grounded in the law of contract. As the relevant provisions of the FMP require the Sponsors to agree upon the manner in which surplus is to be utilized, neither Sponsor has a legally enforceable right to unilaterally utilize surplus in the OTPP. As such, the provisions in the FMP that contemplate the ability for the Province to receive a financial benefit through the utilization of surplus would not, in and of themselves, give rise to a legally enforceable right.
4. Notwithstanding the foregoing, the Plan Documentation and applicable legislation give rise to the following considerations which may shape the Sponsors’ expectation as to the basis upon which surplus will be utilized (and potentially lead to an expectation of equal sharing of the benefit of any surplus, at least over time):

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- a. The Teachers' Act prohibits the total amount of the contributions payable by the Province (and other participating employers) to exceed the amount of contributions paid by or on behalf of active members in respect of credited service for the year (subject to certain exceptions for payment of a solvency deficiency and where there are insufficient cash and liquid assets in the fund).³ In practice, this has typically resulted in 50/50 sharing of the regular contribution costs between the participating employers (including the Province) and plan members.
- b. The history of surplus utilization after the OTPP became a jointly-sponsored plan and prior to the date that the FMP was established demonstrates a past practice of the Sponsors equally sharing (in the aggregate) the financial benefits of surplus utilization, although surplus was not shared equally each time. Since the time the FMP was established, the OTPP has not reached the requisite level of surplus such that the Sponsors could negotiate its utilization under the Temporary Improvement Zone or Permanent Improvement Zone.
- c. The inability for either party to unilaterally require surplus to be utilized in a particular manner (subject to the OTF Call Right), and the requirement to negotiate and agree (or in the absence of agreement, arbitrate) presents the Sponsors with an equal opportunity to benefit from surplus utilization.
- d. One could argue that the obligation to bargain in "good faith" found in the Partners' Agreement may include the obligation to take into account the "sharing" principles described elsewhere in this opinion, given that the OTPP is a jointly-sponsored plan.
5. In the event that the Sponsors cannot agree upon how surplus is to be utilized in the Restoration Zone, the Temporary Improvement Zone or the Permanent Improvement Zone, the matter can be submitted to an arbitration board of three arbitrators. Arbitration provisions are generally procedural in nature and therefore do not provide a strong foundation upon which to base parties' reasonable expectations about their substantive rights under an agreement. To resolve a dispute, the arbitration board would engage in an exercise in interpretation of the operative substantive provisions of the relevant governing documents, including any applicable statutory provisions. However, the arbitral award must meet certain mandatory conditions set forth in the Partners' Agreement. Among other things, the arbitral award is required to ensure that the contributions of the Minister and those employers who are required to contribute

³ Teachers' Act, subsections 5(1.1), (3) and (7).

are equal to the contributions of members (section 92(c) of the Partners' Agreement).

IV. FRAMEWORK IN THE PLAN DOCUMENTATION FOR SURPLUS UTILIZATION BY THE SPONSORS

1. Joint Sponsorship Plan Design and Cost Sharing

The OTPP qualifies as a “jointly sponsored pension plan” (“**JSPP**”) under the PBA, which has three material implications relevant to the present analysis:

1. Plan Governance – Under a JSPP, the employers (or any persons or entities who make contributions on behalf of the employers or represent the employers) and the members of the pension plan (or any representatives of the members) are jointly responsible for making all decisions about the terms and conditions of the pension plan and any amendments to the pension plan.⁴
2. Funding – The OTPP (and certain other prescribed JSPPs) are exempt from solvency funding requirements under the PBR.⁵
3. Cost Sharing – In a defined benefit pension plan which does not qualify as a JSPP, the employer is solely responsible for funding any going concern unfunded liability or solvency deficiency. Given that the OTPP qualifies as a JSPP, however, the PBA permits members to be required to make contributions in respect of any going concern unfunded liability or solvency deficiency.⁶

With respect to the cost-sharing principle referred to in #3 above, the Teachers' Act contains limitations on the contributions that the Province (and other participating employers) may make under the OTPP:

5(1.1) The total amount of the contributions payable by the Minister of Education and the employers who contribute under the pension plan in respect of any year shall not exceed the amount of contributions payable by or on behalf of active plan members in respect of credited service for that year.

Despite this general principle, under the Teachers' Act the Province is required to make additional contributions to the OTPP fund in the event that there are insufficient assets to

⁴ PBR, subsection 3.1(1).

⁵ PBR, subsection 1.3.1(3).

⁶ See PBA, subsection 1(2) and subsection 55(4).

make required payments out of the fund in any particular year.⁷ The Province is also permitted to make additional contributions in respect of a solvency deficiency⁸ (although, as noted above, solvency funding is not required under the OTPP). Notwithstanding that subsection 5(1.1) of the OTPP provides a *cap* on the Province's normal cost contribution obligation, rather than requiring 50/50 cost sharing, we understand that in practice there has been 50/50 cost sharing of the normal contribution cost under the OTPP during most periods of time since the inception of the plan.⁹ The plan text itself also provides for equal contributions, at the basic level (see sections 25(1) and 26(1)).

Currently, the Sponsors are also required to mutually agree upon how any plan deficits are to be addressed.¹⁰ While not binding upon the Sponsors, the FMP indicates that deficits may be addressed through increases to the contribution rates, lowering the amount of indexation and/or other decreases in benefits.

Joint governance and cost sharing form two of the core features of the OTPP. Consistent with the equal sharing of risk permitted under the JSPP plan design, there is a requirement for decisions relating to plan design and plan amendments to be made jointly by the Sponsors. In this regard, the FMP requires the Sponsors to negotiate and agree upon decisions relating to surplus utilization. Accordingly, the Sponsors can be said to have equal *opportunity* to benefit from surplus utilization through the negotiation process.

2. Provisions in the Legislation and Plan Documentation Relating to the Utilization of Surplus

(a) *Pension Benefits Act*

The PBA and PBR do not mandate any particular treatment of surplus that may arise in a pension plan. One must therefore look to the Teachers' Act, and to the Partners' Agreement and FMP in order to determine how surplus is dealt with under the OTPP.

(b) *Teachers' Pension Act (Ontario)*

Paragraph 10(1)3 of the Teachers' Act provides that the Minister of Education and the executive of the OTF may enter into an agreement (i.e., the Partners' Agreement) that

⁷ Teachers' Act, subsection 5(3).

⁸ Teachers' Act, subsection 5(7).

⁹ See, Ontario Teachers' Pension Plan: "How Contribution Rates Have Evolved" available at: <https://www.otpp.com/documents/10179/20940/-/5e471c2b-23f1-44e6-b5c1-d22e3e50dbc3/How+Contribution+Rates+Have+Evolved.pdf>

¹⁰ See, for example, Section 3.09 and 3.11 of the FMP.

provides for certain matters, including: “3. The sharing of entitlement to gains or surplus under the plan and of liability for deficiencies in the pension fund by the Minister, the employers who contribute under the plan and the active plan members”. This is a fundamental legislative pronouncement that the Province and the members of the plan are meant to “share” both upside (surplus) and downside (deficit) under the plan. Although it is not an express statement of 50/50 sharing, it would presumably inform the expectations of the Sponsors regarding how any surpluses are to be utilized.

(c) Partners’ Agreement and FMP

While the Partners’ Agreement itself does not address the utilization of surplus, the notion that the Sponsors have “agreed to establish a partnership” for the purposes of designing and administering the OTPP and managing the OTPP fund¹¹ is reinforced throughout the Partners’ Agreement. For example, Section 4 of the Partners’ Agreement provides that “[t]he partnership established by this agreement is intended to govern all aspects of the plan and the fund...” Similarly, Section 8 of the Partners’ Agreement notes that the partners are jointly 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”. The expectations of the Sponsors regarding how surpluses are to be utilized are presumably informed by the commitment noted above for the partnership established “to govern all aspects of the plan and the fund”.

The procedures pursuant to which surplus may be withdrawn or utilized from the OTPP are identified in the FMP (which forms Appendix “A” to the Partners’ Agreement).

We understand that the FMP was first established in March 2003, as a supplement to the Partners’ Agreement, to provide a guidance framework to the Sponsors for decision-making when the OTPP has a funding surplus or shortfall. Prior to the creation of the FMP, the OTPP was considered fully funded (and surplus could be utilized, including through permanent benefit improvements) where assets equalled at least 100% of liabilities. The FMP is intentionally conservative through prioritizing the preservation of assets until a sufficient surplus “cushion” has been built to justify the utilization of surplus for contribution reductions or benefit improvements.

The FMP contemplates five “funding zones”, each defined by a range. These funding zones provide the Sponsors with guidance as to when, based upon the funding level of the plan, it may be appropriate to (amongst other things) increase or decrease benefits, raise

¹¹ Partners’ Agreement, section 1.

or lower contribution rates or conserve assets. The Sponsors always have the discretion, however, to agree to pursue a course of action that is not expressly provided for in the FMP. As will be discussed below, the ultimate discretion of the Sponsors is reflected throughout various provisions of the FMP.¹²

In the context of plan surpluses, three funding zones are of relevance, each of which is discussed below in greater detail.

(i) Restoration Zone

Article III of the FMP (Funding Zone – Restoration) (the “**Restoration Zone**”) is the “fully funded” zone where assets equal at least the liabilities, determined on the basis set out in the FMP. It is our understanding that the OTPP is currently in the Restoration Zone.

In the Restoration Zone, benefits cannot be improved and contributions cannot be reduced until certain actions are taken to restore past benefit reductions or past contribution increases. In this regard, Section 3.06 of the FMP provides the following:

Section 3.06 *Application of Restoration Basis Excess*: For purposes of clarity, excesses identified pursuant to Section 3.05 shall be applied in the following order, provided that the partners reserve the right to reconsider such application having regard to the contribution rate and benefits then in effect, prevailing economic circumstances and other relevant factors:

(a) *Bring Escalated Adjustments to 50% for Post-2013 Service*: to provide escalated adjustments up to 50% of the CPI adjustment in respect of service accrued after 2013 for the period covered by the valuation, and assumed thereafter at the same rate;

(b) *Bring Escalated Adjustments to 100%*: to provide escalated adjustments up to 100% of the CPI adjustment for the period covered by the valuation, and assumed thereafter at the same rate;

(c) *Restore Escalated Adjustments for Post-2013 Years*: to provide escalated adjustments to increase, to the extent possible, the current accumulated adjustment ratio for each year after 2013, to the current accumulated adjustment ratio for the period from 2010 to 2013, beginning with the first year in which current escalated adjustments were less than 50% of the run-rate escalated adjustments;

¹² See, for example, the opening words of Section 3.06 of the FMP, which section provides for various uses of surplus: “... provided that the partners reserve the right to reconsider such application having regard to the contribution rate and benefits then in effect, prevailing economic circumstances and other relevant factors”. See also Section 4.05 and 5.05.

(d) Restore Escalated Adjustments for Post-2009 Years: to provide escalated adjustments to increase, to the extent possible, the current accumulated adjustment ratio for each year after 2009 to the run-rate accumulated adjustment ratio, beginning with the first year in which current escalated adjustments were less than run-rate escalated adjustments;

(e) Provide Benefit Increases or Contribution Rate Reductions: to provide the following:

- (i) an increase in benefits, where the present value of current benefits is less than the present value of run-rate benefits,
- (ii) a reduction in contribution rates, where the present value of current contributions exceeds the present value of basic contributions, or
- (iii) a combination of (i) and (ii).

In summary, the Restoration Zone allows for surplus to be utilized to “restore” foregone indexation (Sections 3.06(a)-(d))¹³ and then to either increase benefits to the “run-rate benefit” level (i.e., the long-term target level) or to lower contributions to the basic target rate (or a combination of these two options) (Section 3.06(e)). While the FMP contemplates that the actions will typically be taken sequentially (i.e., starting with Section 3.06(a) and ending with the actions in Section 3.06(e)), the Sponsors are required to first agree to the actions taken under Section 3.06 and have the discretion to apply the actions in a different order or to take different action (or to take no action to utilize the surplus).¹⁴

As noted, under Section 3.06(e), surplus can be utilized to reduce contribution rates “where the present value of current contributions exceed the present value of basic contributions” (the “**Restoration Contribution Reduction**”). We understand that in 2001 the Sponsors agreed to a 1.1% increase to both member/employer contributions (phased in over a three year period) to address a funding deficit in the OTPP and that the Restoration Contribution Reduction under Section 3.06(e) would permit these additional contributions to be eliminated, thus restoring contributions to the “basic” level.

¹³ This is achieved by first increasing go-forward indexing to 50% for the post-2013 service period, then to 100% on all post-2009 service periods and next, by restoring current pension amounts to a certain prescribed level starting with the years where indexing was less than 50% until all years of partial indexation are restored to the same level and then by restoring indexation to 100% for all service periods.

¹⁴ As noted above, pursuant to Section 3.06 of the FMP, “the partners reserve the right to reconsider such application having regard to the contribution rate and benefits then in effect, prevailing economic circumstances and other relevant factors...”

The 2013 Term Sheet sets out an agreement between the Sponsors that is in effect from December 31, 2012 to December 30, 2017 (the “**Freeze Period**”), the terms of which are reflected in the FMP. Under Section 3.08 of the FMP, there are certain limits (relating to the funded status of the OTPP) on the ability to make escalated adjustments or to improve benefits pursuant to Section 3.06 during the Freeze Period.

As noted below, no action can be taken under the Temporary Improvement Zone (as defined below) or the Permanent Improvement Zone (as defined below) until all restorative actions under Section 3.06 of the FMP have been provided for (subject to the general discretion of the Sponsors to deviate from the guidelines set out in the FMP).

(ii) Temporary Improvement Zone

Article IV of the FMP (Funding Zone – Temporary Improvements) (the “**Temporary Improvement Zone**”) was added to the FMP in March 2015 and allows for: (i) temporary contribution decreases (a contribution holiday), (ii) surplus distribution, and/or (iii) benefit improvements, provided in each case that the plan’s funding level reaches thresholds set out in the FMP.

We understand that in this zone the plan is considered well-funded and able to afford temporary changes, so long as they do not increase the long-term cost of the OTPP. Surplus cannot be utilized under the Temporary Improvement Zone until the Sponsors have provided for all of the changes specified in Section 3.06 of the Restoration Zone (again, subject to the general discretion of the Sponsors to deviate from the guidelines set out in the FMP).¹⁵

In all cases the Sponsors’ prior agreement is required in order for there to be a temporary contribution decrease, a surplus distribution or a benefit improvement.¹⁶ Where the Sponsors agree to a change that would result in surplus being distributed or utilized for a temporary benefit improvement, the Sponsors are required to enter into a written agreement “governing the manner in which the contributions by the Minister and employers may be adjusted to offset any surplus distribution or temporary improvement of benefits that is reflected in the value of the liabilities.”¹⁷ We understand that this provision is a recognition of the partnership of the Province and the OTF, and requires the Sponsors to enter into an agreement addressing the possible value to be obtained by the Province where there is a decision to provide value to the members (but the provision is not a guarantee that such value will in fact be provided to the Province).

¹⁵ FMP, section 4.03

¹⁶ FMP, section 4.05.

¹⁷ FMP, section 4.06

We note that, as a temporary measure, the OTF has “first call” rights on 100% of the surplus disclosed in valuation report with a valuation date after December 30, 2017, up to certain amounts as set out in the FMP (the “**OTF Call Right**”).¹⁸ The 2013 Term Sheet indicates that “[t]his is a one-time arrangement intended to compensate Plan members for absorbing 100% (rather than 50%) of funding shortfalls arising in the government initiated Freeze Period and is without prejudice or precedent for any future situation.” In other words, this one-time opportunity to benefit from surplus utilization is directly linked to the asymmetrical assumption of risk by OTPP plan participants during the Freeze Period. In light of the Freeze Period and the OTF Call Right, it is our understanding that no actions under the Temporary Improvement Zone will be permitted until the Freeze Period has ended and the OTF Call Right in Article VI of the FMP has been satisfied.¹⁹ It is our understanding that the quantum of the OTF Call Right is not presently expected to be material.

(iii) Permanent Improvement Zone

Where the surplus reaches certain levels as set out in the FMP, Article V of the FMP (Funding Zone – Permanent Improvements) (the “**Permanent Improvement Zone**”) will apply. We understand that in the Permanent Improvement Zone adequate funding security is considered to exist to support permanent changes (either an improvement in benefits or a reduction in contributions).

Under the FMP framework, these changes can be introduced only once the Sponsors have already provided for the changes specified in Section 3.06 (i.e., no further action to restore benefits remains to be taken under the Restoration Zone), subject to the general discretion of the Sponsors to deviate from the guidelines set out in the FMP.²⁰

The Sponsors are required to mutually agree to any change made in the Permanent Improvement Zone. As in the Temporary Improvement Zone, where the Sponsors have agreed to a change which would result in an improvement to member benefits, the Sponsors would be required to enter into a written agreement “governing the manner in which the contributions by the Minister and employers may be adjusted to offset any change in current benefits that is reflected in the value of the liabilities.”²¹

¹⁸ FMP, section 6.03.

¹⁹ See FMP, sections 4.05 and 4.09.

²⁰ FMP, section 5.03.

²¹ FMP, section 5.05(b).

In light of the Freeze Period and the OTF Call Right, it is our understanding that no actions under the Permanent Improvement Zone will be permitted until the Freeze Period has ended and the OTF Call Right in Article VI of the FMP has been satisfied.²²

3. History of Surplus Utilization

The history of OTPP surplus utilization from the time the OTPP became a jointly-sponsored pension plan²³ to the date that the FMP was established (in March 2003) demonstrates a past practice of the Sponsors equally sharing (in the aggregate) the benefits of surplus utilization:

Valuation Date	Surplus/(Deficit)	OTF	Ontario Government	Surplus Remaining
1990	\$(7.8 billion) unfunded liability	Increased contributions by 1% to 8.9%	Agreed to make a series of special payments to eliminate the unfunded liability and match increased contributions	Special payments considered an asset bringing the plan to a \$0 surplus
1993	\$1.5 billion	\$325 million to offset social contract days	Eliminated special payments for \$1.2 billion saving	\$0
1996	\$0.7 billion	\$0.6 billion for benefit improvements and RCA contributions	N/A	\$0.1 billion
1998	\$6.8 billion	\$2.2 billion for benefit improvements	\$4.6 billion to reduce the value of remaining special payments	\$0
1999	\$3.5 billion	N/A	\$3.5 billion to reduce the value of remaining special payments	\$0
2001	\$6.8 billion	\$6.2 billion for benefit improvements	N/A	\$0.6 billion
2002	\$1.9 billion	Sponsors agreed not to make any changes to benefits or contributions		\$1.9 billion

²² See FMP, sections 5.05 and 5.08.

²³ The Partners' Agreement is dated July 15, 1991.

Total		\$9.3 Billion	\$9.3 Billion	
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* Source: Ontario Teachers' Pension Plan Board "Report on Funding" (April 2002)

Although surplus utilization prior to 2003 may not have been 50/50 each time, from 1990 to 2002 the aggregate value obtained by each of the Sponsors was equal. In certain instances where the Province received a disproportionate share of the financial benefits from surplus utilization, a commitment was made to the OTF that they would receive future surplus available for utilization. In 1998, \$6.8 billion in surplus was utilized to cause a \$2.2 billion benefit improvement and to provide the Province with a \$4.6 billion reduction in the value of special payments owed by the Province. As part of this negotiation, the OTF and the Province agreed to allow future surplus to be utilized to eliminate the Province's remaining special payments (which resulted in \$3.5 billion surplus being utilized in 1999 to reduce the value of the Province's remaining special payments) and a commitment was made for the next \$6.2 billion in surplus to be available to OTF for benefit improvements (such surplus being utilized for benefit improvements in 2001).²⁴

As noted above, the FMP was introduced in March 2003 to provide a guidance framework to the Sponsors when the OTPP has a funding surplus or shortfall. It is our understanding that there have been at least 2 material amendments to the FMP framework since its introduction. Below is a summary of the key funding decisions since the introduction of the FMP:

Year	Valuation Status and Key Decisions
2003	\$1.5 billion surplus; no changes to benefits or contribution levels. Funding Management Policy adopted by plan sponsors.
2005	A preliminary \$6.1 billion shortfall was resolved, leaving plan with a \$0.1 billion surplus. Shortfall resolved with special contribution rate increases, totalling 3.1% of base earnings by 2009 for teachers, the Ontario government and other employers. OTF used the \$76 million contingency reserve set aside in 2001 to reduce contribution rate increases for members in 2008.
2008	A preliminary \$12.7 billion shortfall was resolved with the introduction of conditional inflation protection for pension benefits earned after 2009 and an increase in the basic contribution rate for members and the government to 9% from 8%. Employers agree to make special payments equal to any annual pension increases retirees forgo to a maximum of 50% missed inflation.

²⁴ See Ontario Teachers' Pension Plan, "Key Funding Decisions Since 1990", available at: <https://www.otpp.com/documents/10179/765840/-/d4e2fea5-624d-420f-af15-e2daf9bc2711/Key+Funding+Decisions.pdf>

2009	A preliminary \$2.5 billion shortfall was resolved primarily by assuming a slightly higher long-term rate of return on investments: yield on real-return bonds plus 1.5%, versus real-return bonds plus 1.4%. Other minor changes made to assumptions to reflect recent plan experience.
2011	A preliminary \$17.2 billion shortfall was resolved with a 1.1% contribution rate increase (phased in over three years), slightly smaller annual cost-of-living increases for teachers who retired after 2009, and recognition of current contribution rate as the permanent base rate.
2012	\$9.6 billion preliminary shortfall adjusted to reflect changes in mortality assumptions and impact of two-year freeze on teachers' salaries. 2012 shortfall resolved by making inflation protection for pension credit earned after 2013 fully conditional on plan's funded status and providing slightly smaller pension increases, beginning in 2014, for members who retired after 2009. These changes enabled the plan to assume a slightly higher discount rate. The changes left the plan with a \$200 million surplus at Jan. 1, 2012.
2014	\$5.1 billion preliminary funding surplus used to boost pensions of members who retired after 2009 to the level they would have been at if full inflation protection had been provided each year since they retired. The surplus funds were also used to raise conditional inflation protection to 60% of the increase in the cost of living for the portion of retirees' pensions earned after 2009. Both changes are effective with January 2015 pension payments.
2015	Some of the \$6.8 billion preliminary funding surplus was used to boost pensions of members who retired after 2009 to the level they would have been at if full inflation protection had been provided on January 1, 2015. The surplus funds were also used to raise conditional inflation protection for pension credit earned after 2009 to 70% from 60% of the increase in the cost of living. Both changes were effective January 2016. In addition, some surplus funds were reserved to help facilitate stability in contribution and benefit levels should a future funding valuation show a decline in assets or increase in pension costs.

* Source: Ontario Teachers' Pension Plan, "Key Funding Decisions Since 1990"

In September 2016, the Sponsors announced that a portion of the \$13.2 billion in funding surplus would be utilized to restore inflation increases, with the remaining surplus funds to be reserved "to help facilitate stability in contribution and benefit levels should a future funding valuation show a decline in assets or increase in pension costs".²⁵

²⁵ Ontario Teachers' Pension Plan, "Funding News", available at: <https://www.otpp.com/corporate/plan-funding/funding-updates>. We assume that a written agreement was reached by the Sponsors in this regard; however, we have not been provided with a copy of such agreement.

In summary, surplus has been utilized three times since the FMP was introduced – in each of 2014, 2015 and 2016 escalated adjustments were provided to increase the pensions of members who had retired after 2009. As noted above, the OTPP is currently in the Restoration Zone which, pursuant to Section 3.06, prioritizes the utilization of surplus to “restore” foregone indexation before any other actions are taken with respect to surplus. In other words, since the FMP was established the OTPP has not reached a level of surplus under the FMP which would allow for the Sponsors to enter into an agreement regarding its utilization under the Temporary Improvement Zone or the Permanent Improvement Zone.

It is also notable that, consistent with the 50/50 cost sharing principle under the plan, there is recent precedent for the Sponsors agreeing to equally share in the cost of funding a plan deficit (as with the case of surplus utilization, the Sponsors are required to mutually agree upon how to address any funding deficit in the OTPP). Specifically, the preliminary \$17.2 billion shortfall identified in 2011 was resolved through a 1.1% increase to the contribution rate for both the participating employers and plan members (phased in over a three-year period).

Given the historical use of surplus under joint sponsorship of the OTPP prior to the adoption of the FMP, and the fact that over that time the Sponsors shared equally in surpluses, it may be that the Sponsors will expect to also share future surpluses on an equal basis, at least over time. In any event, based on the Plan Documentation, both parties will have opportunity to benefit from surplus utilization through the negotiation process.

V. LEGAL RIGHT OF THE PROVINCE TO UNILATERALLY UTILIZE SURPLUS

As discussed in Part IV of this opinion, the Plan Documentation allows for the Sponsors to agree to utilize surplus in a variety of circumstances, depending on the funded status of the OTPP. These surplus utilization options include the following avenues through which the Province may potentially receive a financial benefit through the utilization of surplus:

1. In the Restoration Zone, a Restoration Contribution Reduction may be agreed upon, once certain other requisite conditions have been met.
2. In the Temporary Improvement Zone, surplus may be utilized to provide a temporary contribution reduction (a contribution holiday), either as a stand-alone measure or in combination with other surplus utilization options (i.e., benefit improvements or surplus withdrawal).

3. In the Permanent Improvement Zone, surplus may be utilized to permanently reduce the current contribution obligations of the employers and the members, either as a stand-alone measure or in combination with changes to benefits.

Notwithstanding the foregoing, as noted above, the Sponsors have the discretion to, by mutual agreement, utilize surplus in any other manner agreed upon. (For example, Section 5.05 which relates to the Permanent Improvement Zone provides that “the partners may apply all or part of the [surplus] to change current benefits, current contributions, or both”, subject to certain conditions.)

Any enforceable legal right of the Province to utilize surplus pursuant to the Partners’ Agreement (and FMP appended thereto) would be grounded in the law of contract, the Partners’ Agreement and the appended FMP being a contract between the Sponsors. A contract is an agreement “...which gives rise to an obligation that may be enforced in the courts.”²⁶ It is our view that the relevant provisions in the Partners’ Agreement²⁷ that contemplate the ability for the Province to receive a financial benefit through the utilization of surplus do not, by themselves, give rise to a legally enforceable right. Such a legally enforceable right would only arise by agreement between the Sponsors, either through negotiations or mediation, or if an order were issued by a board of arbitration as contemplated by the dispute resolution mechanisms found in the Partners’ Agreement (see Section VI of this Opinion for further discussion of the impact of binding arbitration on the Sponsors’ legal rights).

In this regard, the FMP can be thought of as being similar to an “agreement to agree,” which does not create an enforceable legal interest in relation to the utilization of surplus.²⁸ Because there are a number of different options that are contemplated as to how excess funds could potentially be allocated (e.g. provide for a benefit improvement, provide for a surplus distribution, or modify the contributions), and in light of the fact that the utilization of surplus is subject to the ultimate discretion of the Sponsors, it is unlikely that a court would find the Province to have a legally enforceable right with respect to any particular application of surplus, absent the mutual agreement of the Sponsors to utilize surplus in such manner.

²⁶ CED – Contracts – I Basis of Contract – 1 – Contract Defined.

²⁷ Article III, Section 3.06; Article IV, Section 4.05; and Article V, Section 5.05.

²⁸ For a statement of the principle that an “agreement to “agree” is not an enforceable legal interest, see, for example: *Simpson v. Canada (Attorney General)*, 2011 ONSC 5637 at para. 60 citing *Ward v. Ward*, 2011 ONCA 178 and *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734 (Ont CA). See also G. H. L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell Publishing, 2011) at 23 where the author states “There cannot be a contract to enter into a contract. Nor can there be a contract to negotiate, i.e., an agreement to agree.” (“*Fridman*”).

To draw another analogy in contract law, the terms of the FMP can be thought of as lacking in “sufficient certainty”²⁹ and cannot be said to be capable of “... the bringing of legal proceedings to compel observance of... the terms of a contract...”³⁰ in relation to an alleged obligation to apply excess funds to a particular purpose.

That being said, when a valuation is prepared to be filed and the Sponsors have to discuss the treatment of a surplus disclosed in the valuation, section 74 of the Partners’ Agreement requires the Sponsors “to bargain in good faith and make every reasonable effort to reach an agreement on the changes, if any, that will be made to the plan”. One might therefore argue that that obligation of good faith may include the obligation to take into account the “sharing” principles described elsewhere in this opinion, given that the OTPP is a jointly-sponsored plan.

As will be discussed below, where the Sponsors are unable to agree upon the utilization of surplus pursuant to the negotiation/mediation processes set forth in the Partners’ Agreement, there is an ability for the Sponsors to submit the matter to arbitration. The issuance of an order by an appointed board of arbitration regarding the use of surplus funds under the OTPP would create a legally enforceable right, as the submission to the board of arbitration would constitute a proceeding under the *Arbitrations Act* – as specified in paragraph 87 of the Partners’ Agreement – that is enforceable by a court.³¹

VI. IMPACT OF BINDING ARBITRATION ON THE SPONSORS’ LEGAL RIGHTS

Section 8.01 of the FMP provides the following:

Section 8.01 Unless the partners mutually agree to the contrary, they shall follow the procedures described in paragraphs 74 to 100 when determining the plan changes arising from Section 3.07.

²⁹ *Fridman*, *supra* note 28 at 20 where the author writes “Uncertainty about some specific obligation may suffice to make impossible the conclusion that there is a contract in effect between the parties.”

³⁰ Daniel Greenberg, ed, *Jowitt’s Dictionary of English Law*, 1st ed (London: Thomson Reuters, 2010) *sub verbo* “Enforce” where it states, “[t]here are two stages – before and after judgment – to both of which the term “enforcement” can be applied. (i) Before judgment, enforcement describes the bringing of legal proceeds to compel observance of, for example, the terms of a contract...”. See also *The Dictionary of Canadian Law*, 3d ed, *sub verbo* “enforceable” citing *U.N.A. v Alberta (Attorney General)*, 192 CarswellAlta 10 at para 55 that enforceable refers to a process “... to enable measures to be taken to secure compliance...”.

³¹ Section 50(1) of the *Arbitration Act*, 1991, SO 1991, c 17 states “A person who is entitled to enforcement of an award made in Ontario or elsewhere in Canada may make an application to the court to that effect.”

We first note that the mediation/arbitration process would not be triggered unless there is an actuarial valuation to be filed with the regulators that requires the Sponsors to agree on how any surplus or deficit is to be addressed. If a valuation is prepared in a year when no filing is required (filings generally only being required every three years), and the Sponsors do not agree to file the valuation, then the Sponsors do not necessarily have to address funding and benefit issues and therefore no negotiations may occur.

The processes in paragraphs 74 to 100 of the Partners' Agreement that are referred to in Section 8.01 of the FMP provide, amongst other things, for the following:

- The Sponsors are required to meet to bargain in good faith and make every reasonable effort to reach an agreement on the changes, if any, that will be made to the plan (section 74);
- The parties may at any point appoint a mediator by agreement of the parties or by a method to which they agree at that time (section 77);
- If the parties agree, the mediator may be appointed as a mediator/arbitrator in which case the appointee will decide on the process and time frame for conducting mediation/arbitration (section 80);
- Within 30 days of appointment, the mediator will prepare a confidential report setting out his or her views on the positions of the two partners and containing a recommendation (section 82);
- If the partners do not accept the report within 14 days of its being delivered to them it will be destroyed and an arbitration board will be appointed (section 84);
- This agreement together with a referral to a board of arbitration constitutes a submission under the *Arbitration Act, 1991*³² (section 87);
- The board of arbitration in making an award will consider prevailing economic conditions and the overall state of the provincial economy (section 91);
- The award made by the board of arbitration, must comply with certain prescribed requirements, including to “provide that the contributions of the Minister and those employers who are required to contribute are equal to the contributions of members” (section 92(c));

³² SO 1991, c. 17 (the “*Arbitration Act*”).

- The Board will prepare a final valuation of the plan which implements all of the changes to the plan which have been awarded or agreed to by the partners (section 94);
- The Sponsors may agree to change the procedure described in this agreement, either for one round of negotiations or for all future negotiations; and
- Pursuant to Section 8.02 of the FMP, certain limitations on amendments set out in the FMP also apply to an award made by a board of arbitration (generally, these limitations are intended to ensure that the plan is adequately funded after providing for the utilization of surplus).

The Partners' Agreement and the FMP contain no general arbitration clause governing all disputes relating to the agreement, although Section 14 of the Partners' Agreement provides for the possibility of voluntary arbitration. We are not aware of any instance where the arbitration provisions have been invoked by the parties since the FMP was established. It is not immediately clear whether disputes relating to the utilization of surplus under Article IV of the FMP (i.e., the Temporary Improvement Zone) and under Article V of the FMP (i.e., the Permanent Improvement Zone) would be subject to arbitration.³³ It is our understanding from discussions with OTPP's internal legal counsel, however, that the arbitration provisions in the FMP would be expected to apply to disputes relating to the utilization of surplus under each of these provisions.

Where a matter has been submitted to arbitration, case law has established that the agreement between the parties that is being arbitrated is the fundamental source of subject matters that come within the arbitration board's jurisdiction.³⁴ The parties are free to design their own procedures, including setting the scope of the arbitration board's jurisdiction and specifying the potential outcomes of the arbitration (subject to certain default appeal rights and mandatory grounds to set aside an award under the *Arbitration Act*). The arbitration board is empowered to make binding decisions because of the

³³ On the one hand, Section 8.01 of the FMP provides for the procedures in the Partners' Agreement relating to arbitration to apply "when determining the plan changes arising from Section 3.07". This may suggest that only disputes relating to the utilization of surplus under Article III (i.e., the Restoration Zone) can be arbitrated. On the other hand, Section 8.03 of the FMP provides that "Subject to the 2013 Term Sheet, nothing in Article II to Article IX affects the timing of the triennial negotiation, mediation and arbitration process referred to in paragraph 72 to 100", which may suggest that any agreement relating to the utilization of surplus, including under Article IV or Article V of the FMP, may be subject to arbitration (when a valuation is to be filed the parties have to agree on how any surplus – including surplus in the Temporary Improvement Zone and Permanent Improvement Zone, if any – will be used).

³⁴ See for example: *Desputeaux v. Éditions Chouette* (1987) Inc., [2003] 1 SCR 178, para. 22.

arbitration agreement, including any limitations on that authority. Canadian courts have traditionally granted deference to arbitration awards.

Arbitration provisions are generally procedural in nature and therefore do not provide a strong foundation upon which to base parties' reasonable expectations about their substantive rights under an agreement. To resolve a dispute, the arbitration board would engage in an exercise in interpretation of the operative substantive provisions of the relevant governing documents, including any applicable statutory provisions. However, as noted above, under section 92 of the Partners' Agreement, the arbitral award must meet certain mandatory conditions. Among other things, the arbitral award is required to provide that the contributions of the Minister and those employers who are required to contribute are equal to the contributions of members (section 92(c) of the Partners' Agreement). The arbitration board does not have discretion to ignore this mandatory provision, although the provision would need to be given effect within the context of the relevant documents and applicable statutes, interpreted as a whole, and other relevant factors, such as past conduct of the parties. In general, however, the prospect of arbitration would not put the Province in any stronger position vis-à-vis its right to obtain value from any plan surplus.

Yours truly,

Osler, Hoskin & Harcourt LLP
JS/DR/JM:jm

Draft

Re_OTPP FMP questions.rtf

From: Rienzo, Douglas [DRienzo@osler.com]
To: Jeff Davis [Jeff_Davis@otpp.com]
CC: Barbara Zvan [Barbara_Zvan@otpp.com]; Marin, Jon [jomarin@osler.com]; Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]
Subject: Re: OTPP FMP questions
Date: Sunday, September 18, 2016 17:41:30
Attachment 1: image001.gif
Attachment 2: image002.gif
Attachment 3: image003.jpg

Thanks Jeff. Are you around tomorrow morning?

On Sep 18, 2016, at 5:11 PM, Jeff Davis <Jeff_Davis@otpp.com> wrote:

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We have in our files a lot of correspondence but that will take time to review.

Let me know when you'd like to chat.

Jeff Davis

General Counsel, Senior Vice-President,
Corporate Affairs & Corporate Secretary

jeff_davis@otpp.com

Direct [416-730-3753](tel:416-730-3753)

Canadian mobile [416-371-0191](tel:416-371-0191)

US mobile [347-515-4895](tel:347-515-4895)

www.otpp.com

<http://www.otpp.com/documents/10179/729401/red-line.gif/0db64f2b-a6cc-4727-b909-7ee8a8fa-da04?t=1445866411000>

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Also, has there ever been a mediation or arbitration under the FMP?

Doug Rienzo

<image001.gif>

Douglas Rienzo

Partner, Pensions & Benefits

Chair, Diversity Committee

416.862.5683

DIRECT

416.862.6666

FACSIMILE

drienzo@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

[<image002.gif>](#)

<image003.jpg>

From: Jeff Davis [mailto:Jeff_Davis@otpp.com]
Sent: Sunday, September 18, 2016 9:22 AM
To: Steele, Jana <JSteele@osler.com>
Cc: Barbara Zvan <Barbara_Zvan@otpp.com>; Marin, Jon <jomarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>; Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>; Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>
Subject: Re: OTPP FMP questions

Jana -

Let me know you'd like to discuss any of the legal aspects.

Sent from my iPad

On Sep 17, 2016, at 2:25 PM, Steele, Jana <JSteele@osler.com> wrote:

Thanks Barb. And thanks again for your time today. Jana.

Sent from my iPhone

On Sep 17, 2016, at 2:16 PM, Barbara Zvan <Barbara_Zvan@otpp.com> wrote:

Hi all

Please find attached. BZ

FMP history – this is the document we use for board orientation

FMP Coles Notes – we created this summary in 2015 with a group from the Sponsors and their consulting actuaries and plan actuary

OTPP JSPP agreement – this was the term sheet sent to us. You can see only a small component was added to the FMP. In fact, we spent a lot of time speaking about this, how to incorporate. Given the term nature and low likelihood other benefit reductions would have to be put in place other than CIP, we only insert the small section in 3.08.

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Barbara Zvan, FSA, FCIA, CERA

SVP, Strategy & Risk, Chief Investment Risk Officer

barbara_zvan@otpp.com

Direct 416-730-6364

Assistant: Karen Titus, 416-228-3172, karen_titus@otpp.com

<http://www.otpp.com>

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5650 Yonge Street, Toronto, Ontario M2M 4H5, Canada

[<image002.png>](#)

[<image003.png><image004.png><image005.png><image006.png>](#)

From: Steele, Jana [<mailto:JSteele@osler.com>]
Sent: Saturday, September 17, 2016 12:01 PM
To: Barbara Zvan <Barbara_Zvan@otpp.com>
Cc: Marin, Jon <jomarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>; Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>; Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>
Subject: Re: OTPP FMP questions

Call in details for 1 pm

416-343-4295

ID: 7801041

Sent from my iPhone

On Sep 17, 2016, at 11:57 AM, Barbara Zvan
<Barbara_Zvan@otpp.com> wrote:

Sure -. Just in the middle of taking my daughter between her activities. Can I call you around 1?

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Steele, Jana

Sent: Saturday, September 17, 2016 11:20 AM

To: Barbara Zvan

Cc: Marin, Jon; Rienzo, Douglas; 'Hatzis, Len (TBS)'; Kaufman, Paul (TBS)

Subject: OTPP FMP questions

Hi Barb:

We were just speaking with Jim Leech regarding the FMP. We are working with the Province of Ontario regarding the accounting issue.

Would you have some time for a call today?

Best regards,

Jana Steele

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<FMP history - updated September 29 by MC new format.pdf>

<FMP Coles Notes.pdf>

<OTPP JSPP Afreement final March 2013.pdf>

<Report on Funding.pdf>

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Subject: Re: OTPP FMP questions
Date: Sunday, September 18, 2016 19:09:23

Thanks Jeff. I'll try to call you shortly after 9.

If anyone else on this chain wants to participate let me know and I'll circulate a number and time.

Doug

On Sep 18, 2016, at 6:05 PM, Jeff Davis <Jeff_Davis@otpp.com> wrote:

Yes

Jeff Davis
General Counsel, Senior Vice-President,
Corporate Affairs & Corporate Secretary
jeff_davis@otpp.com
Direct [416-730-3753](tel:416-730-3753)
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Douglas Rienzo

Partner, Pensions & Benefits

Chair, Diversity Committee

416.862.5683

DIRECT

416.862.6666

FACSIMILE

drienzo@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

[<image002.gif>](#)

<image003.jpg>

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>

From: Steele, Jana [<mailto:JSteele@osler.com>]

Sent: Saturday, September 17, 2016 12:01 PM
To: Barbara Zvan <Barbara_Zvan@otpp.com>
Cc: Marin, Jon <jomarin@osler.com>; Rienzo, Douglas <DRienzo@osler.com>; Hatzis, Len (TBS) <Len.Hatzis@ontario.ca>; Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>
Subject: Re: OTTP FMP questions

Call in details for 1 pm

416-343-4295

ID: 7801041

Sent from my iPhone

On Sep 17, 2016, at 11:57 AM, Barbara Zvan <Barbara_Zvan@otpp.com> wrote:

Sure -. Just in the middle of taking my daughter between her activities. Can I call you around 1?

Sent from my BlackBerry 10 smartphone on the Rogers network

From: Steele, Jana

Sent: Saturday, September 17, 2016 11:20 AM

To: Barbara Zvan

Cc: Marin, Jon; Rienzo, Douglas; 'Hatzis, Len (TBS)'; Kaufman, Paul (TBS)

Subject: OTTP FMP questions

Hi Barb:

We were just speaking with Jim Leech regarding the FMP. We

are working with the Province of Ontario regarding the accounting issue.

Would you have some time for a call today?

Best regards,

Jana Steele

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<FMP history - updated September 29 by MC new format.pdf>

<FMP Coles Notes.pdf>

<OTPP JSPP Afreement final March 2013.pdf>

<Report on Funding.pdf>

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Re_opinion .rtf

From: Rienzo, Douglas [DRienzo@osler.com]
To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Marin, Jon [jomin@osler.com]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]
Subject: Re: opinion
Date: Monday, September 19, 2016 20:58:46

Can we chat in the morning, Len?

> On Sep 19, 2016, at 8:47 PM, Hatzis, Len (TBS) <Len.Hatzis@ontario.ca> wrote:
>
> Can we chat with you later this evening before you look to finalize?
>
> Sent from my BlackBerry 10 smartphone on the Rogers network.
> From: Hatzis, Len (TBS)
> Sent: Monday, September 19, 2016 7:59 PM
> To: Rienzo, Douglas
> Cc: Marin, Jon; Kaufman, Paul (TBS); Steele, Jana
> Subject: Re: opinion
>
>
> Thanks douglas
> I need to review with my clients and will be back to you.
>
> Sent from my BlackBerry 10 smartphone on the Rogers network.
> From: Rienzo, Douglas
> Sent: Monday, September 19, 2016 7:06 PM
> To: Hatzis, Len (TBS)
> Cc: Marin, Jon; Kaufman, Paul (TBS); Steele, Jana
> Subject: RE: opinion
>
>
> Len:
>
> Please find enclosed the draft opinion. Please let us know if you have any comments or questions;
subject to your comments we can prepare it in final form. Please note that due to time restrictions we are
still reviewing it internally, so there may be some minor changes to be made before finalizing.
>
> Doug
> [cid:image001.gif@01D212A8.CC388EB0]
>
> Douglas Rienzo
> Partner, Pensions & Benefits
> Chair, Diversity Committee
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>
>
> 416.862.5683
>
> DIRECT
>
> 416.862.6666
>
> FACSIMILE
>

> drienzo@osler.com
>
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>
> Osler, Hoskin & Harcourt LLP
> Box 50, 1 First Canadian Place
> Toronto, Ontario, Canada M5X 1B8
>
> [cid:image002.gif@01D212A8.CC388EB0]<http://www.osler.com/>
>
> [2016%20diversity-english]
>
>
>
> From: Hatzis, Len (TBS) [mailto:Len.Hatzis@ontario.ca]
> Sent: Monday, September 19, 2016 3:15 PM
> To: Rienzo, Douglas <DRienzo@osler.com>
> Cc: Marin, Jon <jomarin@osler.com>; Kaufman, Paul (TBS) <Paul.Kaufman@ontario.ca>; Steele, Jana <JSteele@osler.com>
> Subject: opinion
>
> Hi
> Any update on delivery of draft opinion . thanks
>
>
>
> Len Hatzis
> Deputy Director
> Legal Services Branch | Treasury Board Secretariat
> 77 Wellesley Street West, 9th Floor, Toronto ON M7A 1N3
> 416.327.6393
>
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Re_opinion .rtf

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To: Hatzis, Len (TBS) [Len.Hatzis@ontario.ca]
CC: Marin, Jon [jomarin@osler.com]; Kaufman, Paul (TBS) [Paul.Kaufman@ontario.ca]; Steele, Jana [JSteele@osler.com]
Subject: Re: opinion
Date: Monday, September 19, 2016 22:27:08

Works for me. Jana/Jon?

> On Sep 19, 2016, at 10:21 PM, Hatzis, Len (TBS) <Len.Hatzis@ontario.ca> wrote:

>

> Can we chat at 9 am tomorrow pls

>

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

> Original Message

> From: Hatzis, Len (TBS)

> Sent: Monday, September 19, 2016 10:04 PM

> To: Rienzo, Douglas

> Cc: Marin, Jon; Kaufman, Paul (TBS); Steele, Jana

> Subject: Re: opinion

>

>

> Douglas

> No problem - we intend to send some comments by email tonight for your consideration re incorporation into draft. Hopefully these comments make sense in your view and can be accommodated to the extent possible for tomorrow morning. Happy to discuss tomorrow morning

>

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

> Original Message

> From: Rienzo, Douglas

> Sent: Monday, September 19, 2016 8:58 PM

> To: Hatzis, Len (TBS)

> Cc: Marin, Jon; Kaufman, Paul (TBS); Steele, Jana

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>>
>>
>>
>> 416.862.5683
>>
>> DIRECT
>>
>> 416.862.6666
>>
>> FACSIMILE
>>
>> drienzo@osler.com
>>
>>
>>
>>
>> Osler, Hoskin & Harcourt LLP
>> Box 50, 1 First Canadian Place
>> Toronto, Ontario, Canada M5X 1B8
>>
>> [cid:image002.gif@01D212A8.CC388EB0]<<http://www.osler.com/>>
>>
>> [2016%20diversity-english]
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>> Subject: opinion
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>> Hi
>> Any update on delivery of draft opinion . thanks
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>> Len Hatzis
>> Deputy Director
>> Legal Services Branch | Treasury Board Secretariat
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