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SUBMISSION

of the

Association of Management, Administrative and Professional

Crown Employees of Ontario

to the

Ontario Expert Commission on Pensions

Presented by Gary Gannage, AMAPCEO President, on

October 17, 2007

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Introduction

The Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) welcomes the opportunity to file this submission with the Ontario Expert Commission on Pensions. AMAPCEO is the second largest bargaining agent in the Ontario Public Service, representing over 10,000 professional and supervisory civil servants working directly for the Government of Ontario in every ministry, as well as in a number of agencies, boards and commissions. Our members, who work in over 130 communities across the Province, include policy and financial analysts, program supervisors, auditors, nursing supervisors, pharmacists, scientists, mediators, arbitrators, veterinarians, chaplains and economists.

All employees represented by AMAPCEO are members of the Public Service Pension Plan (PSPP).

At the outset, AMAPCEO would like to offer its endorsement of the following core principles guiding this Commission in its mandate to develop “pension legislation that is fair and up to date”:¹

- the importance of maintaining and encouraging the system of defined benefit pension plans in Ontario;
- the importance of maintaining the affordability of defined benefit pension plans for both members and sponsors;
- the importance of pension plans in supporting a competitive economy;
- the need to safeguard the security of pension benefits; and
- the need to balance the rights and obligations of employers, plan members and pensioners.

While the Commission may receive submissions from organizations critical of defined benefit plans, AMAPCEO is confident that the renewed *Pension Benefits Act* that will emerge from the work of this Commission will be one that provides a reliable framework which facilitates the continuation – and encourages the development – of defined benefit plans. In a very real sense, every citizen of this country is a member of a defined benefit pension plan, by virtue of his or her eligibility for CPP and OAS pensions. The value of defined benefit pension plans to Canadian society and our economy should be obvious and, in light of the provincial government’s enunciation of

¹ Ontario, Ministry of Finance, News Release, “McGuinty Government Improving Pension System” (9 November 2006) online: <<http://www.fin.gov.on.ca/english/media/2006/nr11-occp.html>>.

the Commission's core principles, we do not believe our brief needs to address this matter further.

The focus of AMAPCEO's submission is squarely on "pension asset transfers involving groups of employees", which is number 16 on the list of "Issues to be Addressed in the Report" included with the Commission's Terms of Reference. AMAPCEO's primary concern in the area of pension asset transfers relates to the impact of section 80 of the *Pension Benefits Act (PBA)* on employees transferring on divestment between various employers within the broader public sector.² AMAPCEO believes that the terms of section 80 are currently being interpreted and applied very narrowly by the Ontario Superintendent of Financial Services (the Superintendent) with the result that pensions of divested employees, in particular those in the broader public sector, are being seriously adversely affected.

In short, the Superintendent interprets section 80 as prohibiting a transfer of assets from one public sector employer to another public sector employer unless both plans are "mirror" plans, i.e., exact replicas of each other. Essentially, this means no asset transfer can be made on a divestment of such employees since, although public sector plans are all very similar, there are minor differences between them (for example, in terms of death benefits). The consequence of this application of the *PBA*, is that the pensions of affected employees are split between two pension plans. This split causes, what is for many, a substantial loss in retirement income.

This application of section 80 to divestments within the broader public sphere is particularly unreasonable, given the number of Reciprocal Transfer Agreements (RTAs)

² R.S.O. 1990, c. P.8.

between such plans. These RTAs are specifically designed to permit pension assets to be transferred between plans which are covered by the agreements, thereby facilitating the – extremely common – movement of employees around the broader public sector. Only where employees are divested are these employees prevented from utilizing the RTAs for their benefit. This is manifestly unfair.

In what follows, AMAPCEO will (in Part 1 of this submission) explore some of the background to section 80, highlighting its positive and negative consequences for many workers. In Part 2, we will further probe some of the negative consequences of section 80 for public sector employees, providing some ‘real world’ examples of how the application of section 80 to public sector staff divestments negatively impacts employees in that sector. In Part 3, AMAPCEO will provide suggestions for policy reform meant to alleviate these difficulties.

Part 1 – Section 80: Background and Positive Effects

AMAPCEO understands the *PBA* to be a piece of “minimum standards” legislation. As Ari Kaplan, partner in the Pension Group at Koskie Minsky, puts it in his text on pension law, the *PBA* “is designed to accomplish two objectives: secure employee pensions from discretionary revocation and preserve the financial integrity of earned pension entitlements”.³ Moreover, Kaplan states:

[t]he *PBA* has consistently been identified by the courts as public policy legislation designed to “benefit,” “protect” and “expand” the interests of employees⁴ and redress social policy concerns relating to “poverty among the

³ Ari N. Kaplan, *Pension Law*, (Toronto: Irwin Law, 2006) at 9.

⁴ See *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1988), 158 D.L.R. (4th) 497 at 503 (Ont. C.A.).

elderly”⁵ and should therefore be interpreted broadly and in accordance with its purpose. The focus has invariably been on preserving employee rights.⁶

It is in this spirit that section 80 – the successor employer rule – was included in the *PBA*. The successor employer rule is meant to ensure that certain minimum standards of protection apply to pensions in the event of a sale-of-business transaction. AMAPCEO believes that section 80 should be applied broadly and in a manner which is consistent with the overall purpose of the Act to protect plan members.

Section 80(1) provides that:

Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer’s business or all or part of the assets of the employer’s business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer

(a) continues to be entitled to the benefits provided under the employer’s pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;

(b) is entitled to credit in the pension plan of the successor employer for the period of membership in the employer’s pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

(c) is entitled to credit in the employer’s pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer’s pension plan.⁷

Section 80(1) applies where assets are not transferred to the pension plan of the successor employer. Section 80(2) provides similar protection where there is a transfer of assets to the successor employer; in that situation the successor employer’s plan is “deemed to be a continuation of the [predecessor] employer’s plan with respect to any benefits or assets

⁵ See *Salvation Army, Canada East v. Ontario (Attorney-General)* (1992), 88 D.L.R. (4th) 238 at 285 (Ont. Ct. Gen. Div.).

⁶ Kaplan, *supra* note 3 at 9-10.

⁷ *PBA*, *supra* note 2, s. 80(1).

transferred” and consequently 80(1)(a) does not apply. The subsections operate so that in both situations, at least for purposes of determining eligibility for plan membership or entitlement to benefits, a transferring plan member gets credit in the successor employer’s plan for the period of membership in the predecessor plan and, similarly, credit under the predecessor employer’s plan for the period of membership under the successor plan.

These provisions are designed to ensure that there is no break in service when the member changes from one plan to another. These are important protections. However, they do come at a cost. Subsections 80 (2) and (3) provide that the re-employment with a successor employer is to be treated under the *PBA* as a continuation of employment. This means that affected employees cannot take advantage of the portability provisions and other *PBA* rules that normally apply on the termination of employment.⁸

Pension portability has long been considered a goal of the pension system. Notably, as the Report of the Haley Commission reminds us, “the body appointed in 1960 by the Government of Ontario to study pensions was called the Committee on Portable Pensions”.⁹ As suggested by the name, “the major issue facing the Committee was how a worker might move from one job to another without losing pension credits and pensionable service accrued”.¹⁰ Movement without loss is considered vital as this (recalling Kaplan’s enunciation of the *PBA*’s objectives) best allows for the “financial integrity of earned pension entitlements” to be preserved.¹¹ In his text on pension law,

⁸ *Ibid.* s. 42(1)(a).

⁹ Ontario, *Report of the Royal Commission on the Status of Pensions in Ontario: Design for Retirement*, vol. 2 (Toronto: Queen’s Printer, 1981) at 28 [Ontario, *Design for Retirement*].

⁹ *Ibid.*

¹¹ Kaplan, *supra* note 3 at 9.

Kaplan argues that, even though the successor employer rules can result in the loss of the portability rights,

the successor employer rules are a form of benefit protection for the employee and, in the greater scheme, more beneficial to employees. This is because, by deeming employment and plan membership to continue after the purchase transaction, employees remain entitled to count their service in the buyer's plan for the purpose of qualifying for any enhanced benefits offered under the seller's plan or, alternatively, to count their service in the seller's plan for the purpose of qualifying for any enhanced benefits offered under the buyer's plan.¹²

Thus, in keeping with the *PBA*'s minimum standards orientation, section 80 provides some much-needed security for employees facing a sale-of-business or divestment transaction. In this respect, section 80 has a beneficial effect.

However, a problem arises with the current interpretation and application of the transfer provisions found in subsections 80(4) and (5). These provisions are currently interpreted and applied by Ontario's pension standards regulator in a way that has an overall adverse effect on plan members. Subsection 80(4) requires that the Superintendent's consent must be obtained before any assets can be transferred from a predecessor employer's pension plan to a successor employer's plan. Subsection 80(5) requires the Superintendent to refuse consent where the transfer would fail to protect the member's benefits. Section 80(5) states:

The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the [predecessor] employer's pension plan or that does not meet the prescribed requirements and qualifications.¹³

Since there are currently no prescribed requirements, the focus of regulatory consideration is whether or not a proposed asset transfer would fail to protect "the

¹² Kaplan, *supra* note 3 at 472.

¹³ *PBA*, *supra* note 2, s.80(5).

pension benefits and any other benefits” of affected members. The Superintendent has applied section 80(5) as constituting an absolute bar to transfers of assets between public sector pension plans. Consequently, even if there were only very minor differences between the plans of the predecessor and successor employers (such as a variation in the survivor benefits provided) consent would not be given to a transfer. Consent would be refused, despite the very real and very significant pension loss resulting from the division of benefits between two plans. AMAPCEO believes this interpretation and application of section 80 to be inequitable and totally inconsistent with the protective intention of the *PBA*.

Part 2 – The Negative Effects of Section 80 in Public Sector Divestments

The Haley Commission acknowledged that RTAs between various pension plans were “more frequent ... in the public sector than in the private sector” and that this increased prevalence was “attributable to the homogeneity of employers within the transfer group”.¹⁴ Speaking further to RTAs, the Haley Commission stated that

[t]he key to such agreements is in the essential homogeneity of several employers (and often the occupational homogeneity of their employees) and in the ability of those employers to accept the cost transfers required in the operation of the agreement. It is not surprising that reciprocal agreements are commonly found among governments at federal and provincial levels, some of the larger municipalities, crown corporations, universities, and other educational institutions.¹⁵

Owing to this homogeneity, there is considerable movement of employees between different employers within the broader public sector. It is precisely because of this considerable movement that the many RTAs between plans, as well as the over-arching

¹⁴ Ontario, *Report of the Royal Commission on the Status of Pensions in Ontario: Pensions for Ontario Public Sector Employees*, vol. 6 (Toronto: Queen’s Printer, 1981) at 200.

¹⁵ Ontario, *Design for Retirement*, *supra* note 9 at 32.

Major Ontario Pension Plans (MOPPS) Pension Portability Agreement, have come to be. In the words of the Ontario Pension Board (OPB), which administers the PSPP, “[t]he MOPPS Agreement recognizes that employees often move between the larger Ontario public sector employers throughout their careers.”¹⁶ Because employees move around the public sector with regularity, the MOPPS agreement, and other RTAs, simply make a great deal of sense.

These RTAs are routinely used by employees moving between employers situated in the broader public service. The existence of these RTAs makes such staff movements more appealing than they otherwise would be, thereby increasing efficiency and service-delivery standards across the public sector. Beyond such systemic improvements, though, one must note that these RTAs are simply fair. As noted above, widespread pension portability has long been considered an ideal goal for the private pension system in Ontario.

Unfortunately, due to the narrow interpretation given to the transfer provisions under section 80, this fairness is not achieved in the event of a government divestment of staff. When the government engages in a divestment, the successor employer rules come into play. Section 80 is currently applied in a manner that negates the negotiated RTA agreements. Employees who otherwise would have been able to transfer their pension entitlements from plan to plan are consequently prevented from doing so in a divestment. Perversely, this means that, when there is a government divestment, the minimum standards provisions contained in the *PBA* – language meant to preserve the rights and

¹⁶ Ontario Pension Board, “Pension Portability Agreements as of May, 2007” at 3, online: <<http://www.opb.ca/CMS/Assets/Related+Information/MOPPS-RTA+Agreement.pdf>>.

entitlements of employees – are applied so as to eliminate key rights and entitlements, which could otherwise easily be facilitated. To demonstrate the consequences of this, we now turn to two ‘real world’ examples which show the deleterious effect the operation of section 80 has had recently on AMAPCEO members.

2.1 – Divested Employees

The Government of Ontario, from time to time, makes efforts to alter its service delivery options by divesting employees either to other levels of government or to agencies within the broader public sector. Herein, for the purposes of example, we will focus on one such divestment, which accompanied the April 2006 creation of Local Health Integration Networks (LHINs). In an effort to make the Ontario health care system “more patient-centred, efficient and accountable” the Government of Ontario established the system of fourteen LHINs, meant to oversee the integration of health care services in each of their specific geographic areas.¹⁷

The establishment of the LHINs required the government to eliminate approximately 175 positions from the Ministry of Health and Long-Term Care (MOHLTC). As part of this re-organization, these members were told that their positions with the MOHLTC were being terminated, and that they would be able to seek new employment with a LHIN. Approximately 25 AMAPCEO members took subsequent employment with a LHIN through this process.

The LHINs are part of the Hospitals of Ontario Pension Plan (HOOPP), while the MOHLTC is, for AMAPCEO members, part of the PSPP. There exists, between HOOPP and the PSPP, an RTA which is meant to facilitate the transfer of pension monies

¹⁷ See Ontario, *Local Health System Integration Act, 2006, Frequently Asked Questions*, online: <http://www.health.gov.on.ca/english/public/legislation/lhins/lhins_faq.html#4>.

between the two plans when employees make a move between public sector employers that are members of the respective plans. As stressed above, the utilization of the RTA is a common occurrence in the public sector. It is precisely because employees move around the public sector with regularity that RTAs and the MOPPS agreement came into existence. This movement of employees with their accrued pension benefits is feasible due to the fact that all major public service pension plans offer a substantially similar package of benefits.

However, despite the existence of the RTA between the PSPP and HOOPP, the transfer provisions of section 80 were applied to the employees divested in the LHIN process so as to require their pensions to be split between two different plans (the PSPP and HOOPP). Although AMAPCEO is well aware of the positive aspects of section 80, the narrow interpretation of the transfer provisions of section 80 in this instance (which is but a specific example of a regular occurrence) has been extremely adverse for our members. The refusal to permit asset transfers for the divested employees has resulted in the division of their pensions between two plans, thereby saddling them with a substantial reduction in their ultimate pension entitlements. This narrow application of section 80, in particular for public service divestments where plans are overall highly homogeneous and covered by existing RTAs, is unreasonable.

Simply put, because the transfer of employment from MOHLTC to the LHINs was deemed to be a divestment of a group of staff, the transferred employees were forbidden from doing jointly what they could, with ease, have done individually. Consider it this way: if today, 25 employees of MOHLTC independently decided to each take a position with a LHIN, all would have the option of transferring their pensions from

the PSPP to HOOPP. This would be routine. However, merely because the 25 employees in question were considered to be divested, they were prevented from doing the same. This is illogical and inequitable.

2.2 – Employees Unknowingly Caught in Divestment

The most egregious effects – those that most clearly show the illogic of the application of section 80 in this sphere – can be seen in the instance of those who are inadvertently caught in the net of “divestment” despite not even being part of the divestment. To describe how this situation emerged, let us explore Dorothy’s case.¹⁸

Dorothy’s case also resulted from the establishment of the LHINs. Unlike the class of employees discussed above, however, Dorothy was not part of the re-organization. Rather, Dorothy was an employee of MOHLTC who applied for, and accepted, an advertised position with a LHIN. Dorothy’s former position at MOHLTC did not disappear. It was advertised before she left it, and filled shortly after her departure.

Subsequent to her wholly voluntary move from MOHLTC, Dorothy found that all employees who changed employment from MOHLTC to a LHIN were deemed to be part of the divestment. By being artificially swept under the divestment umbrella, Dorothy was also affected by section 80 of the *PBA* and prevented from transferring her pension credits. Had Dorothy taken a position with **any other** HOOPP employer, she would have been able to transfer her pension entitlements. It is only because of the unfortunate timing of her change of employment, i.e. simply because some other employees

¹⁸ “Dorothy” is a composite of actual AMAPCEO member experiences.

happened to have been coincidentally divested to LHINs, that Dorothy was stripped of her ability to transfer her accrued pension.

This defies common sense. To see this result of the narrow interpretation of a section of the *PBA* that was meant to **protect** employee interests is the bitterest of ironies for the likes of Dorothy. The current interpretation of section 80 limits Dorothy from doing what she would otherwise easily be able to do under the existing RTA. This limitation places Dorothy in a significantly worse financial position than had section 80 been applied in a manner more consistent with employee interests.

These inequitable outcomes – both for Dorothy and the divested employees discussed above – suggest that something is very, very wrong with the application of section 80 to divestments in the public sector. It is AMAPCEO's hope that this Commission will see fit to address these difficulties. Below, we offer suggestions as to how the *PBA* can be applied in a manner that responds positively to the situation AMAPCEO has outlined here.

Part 3 – Fixing Section 80 for Divested Public Sector Employees

The impact of section 80 on public sector divestments is harmful to employee interests. As noted above, the *PBA* is meant to achieve two objectives: to “secure employee pensions from discretionary revocation and preserve the financial integrity of earned pension entitlements”.¹⁹

AMAPCEO agrees that the protections inherent in section 80 are vitally important and are consistent with the *PBA*'s objectives. However, the narrow application of the transfer provisions in section 80 have had a disastrously adverse effect that cannot have

¹⁹ Kaplan, *supra*, note 3 at 9.

been intended. In particular, as described above, in circumstances of a government divestment, the provisions have had a discriminatory effect.

In the broader public sector there is, as we have made clear above, homogeneity between employers, employees and pension plans. In this sphere, transfers between employers and pension plans are routine and present no difficulties. It is **only** when a divestment occurs that the problematic interpretation of section 80 is triggered, preventing a transfer of pension assets to the new employer.

The homogeneity of the broader public sector has been acknowledged by previous pension commissions, and is underlined by the MOPPS Agreement and the myriad of RTAs in the broader public sector. This homogeneity makes pension asset transfers on divestments reasonable. Indeed, allowing such transfers between public sector plans is necessary in order to allow the *PBA* to achieve its objectives. In short, the financial integrity of our members' earned pension entitlements is not, currently, being protected in a divestment situation. Clarification that section 80 will be applied in this context in a beneficial manner so as to permit transfers between public sector plans would ensure such financial integrity. This would be a significant improvement for our members, and one consistent with the minimum standards of the *PBA*.

Conclusion

Thus, AMAPCEO recommends that section 80 be clarified as it relates to divestments within the broader public sector. AMAPCEO desires an outcome in which divested employees are able – if they should so choose – to transfer their pension assets using the existing RTA structure.

Once again, we appreciate this opportunity to participate in the important work of the Commission and invite the Commission to contact us if there is a need for clarification or further information.