Submission to the Ontario Expert Commission on Pensions

from the

Canadian Union of Public Employees

Ontario Division

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Introduction

CUPE is the voice of nearly 200,000 public sector and public service workers in Ontario – people who work on the front lines in hospitals, municipalities, utilities, long-term care facilities, social service agencies, schools and universities. As members of dozens of different Ontario pension plans in both the public and private sector, CUPE members have substantial first-hand experience and knowledge to contribute to the work of the Expert Commission on Pensions ("the Commission").

We would like to thank the Chair of the Commission for this opportunity to present the following written submission. We aim to supplement this submission with an oral presentation in the coming weeks.

We begin with several general observations regarding two of the guiding principles that were attached to the Terms of Reference for this Commission. The first, and for us the most important, guiding principle is as follows:

> ***The importance of maintaining and encouraging the system of defined benefit pension plans in Ontario***

As one of the many trade unions that has long fought for the establishment and defence of defined benefit pension plans, we are greatly encouraged to see that the mandate of the Commission includes reference to not only maintaining but also **encouraging** defined benefit pension plans. Under the circumstances of recent pressures against defined benefit (hereafter "DB") plans, we consider this guiding principle to be crucial, and it informs our entire submission.

Secondarily, we note that another listed "guiding principle" for the Commission is:

> ***The need to balance the rights and obligations of employers, plan members and pensioners***

This principle is of considerable interest to CUPE, as it raises the analytical question: Where does the balance of rights and obligations among these different parties currently sit? In CUPE's experience, the fight for pension rights for workers has been a long and difficult one, and is far from over. From the time that pensions were first established and used quite brazenly by employers to reward, retain, discipline, and punish their workers, much has been won. Over many decades, the legal and regulatory environments that we fought for have placed certain limits on the ability of employers to exercise unilateral discretion and control over pension entitlements.

However, we do not see this struggle as over, nor do we see that the "rights and obligations" of plan members are in any sense currently "balanced" with those of employers. Rather, we continue to see pension plans being administered and controlled by employers or their agents, and decisions being taken in the interest of employer-Administrators, all too often at the expense of plan members.

Particularly in cases where pension plan members do not enjoy the benefit of trade union representation, employers are all too often able to make crucial decisions about workers' pensions – benefit levels, surplus disposition, contribution rates, investment policies, member communication – unilaterally. In our view, this concentration of power often has serious negative consequences for the pension rights – and actual entitlements – of pension plan members.

CUPE and other trade unions have struggled long and hard against this power imbalance, and won important victories along the way. The strengthening of pension legislation and regulation has extended vital protections over pension plans, and we work hard to supplement these protections through collective bargaining over individual plans. In certain cases, Jointly Trusteed, or "Jointly Sponsored" plans have been established, such that significant decision-making authority over a plans is conferred on a Board of Trustees, one-half of which is named by trade union (or other plan member) representatives.

Nonetheless, in spite of the important progress made, serious problems continue – even within plans that are jointly controlled. The recommendations in the present submission are directed to addressing and mitigating this continuing power imbalance.

Key Issues

CUPE affirms our support for the submission of the Ontario Federation of Labour (OFL) of which we are one of the largest affiliates. We intend to focus our attention on the following issues that are of particular concern to CUPE members:

1. Pension fund and surplus security
2. Public-Private Partnerships (P3s) and other risky pension investment trends
3. Raising minimum standards
4. Improving plan governance
5. Declining DB pension coverage and benefit inadequacy

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1. The importance of pension fund and surplus security

We observed in our introduction that there remains a power imbalance between pension plan members (sometimes represented by trade unions) and employers. This imbalance is directly relevant to another of the focal issues for the Commission's core mandate – the rules on funding, surpluses, deficits and security.

Following the market drops of 2000-2002 and the decline in long-term interest rates, many of CUPE's local unions saw their pension funds reporting funding deficiencies. These deficiencies were revealed under either or both of the "going concern" and "solvency" measures of funding balance. When these deficiencies are revealed, particularly when the obligation to fund them falls to the employer, the situation is invariably presented to plan members as a "crisis".

The employer response to such "crises" is predictable: benefit cuts, member contribution rate increases and new claims on future surpluses – sometimes all three. In certain cases, employers have even moved to freeze or shut down their plans entirely.

CUPE views pension funds as holding workers' deferred wages. In practice, we know very well that all pension contributions made by employers are incorporated into their calculation of their payroll cost, and this cost directly informs their bargaining (both formal and informal) around wages and other compensation.

These deferred wages are earned at the time that contributions are made – not at the time that pension benefits are eventually paid out. When contribution requirements rise, and when deficiency payments are required of employers, these cost increases automatically and understandably affect the employer's negotiating position on other cost and compensation issues.

In this light, the claim that employers suffer from an "asymmetry" of risk and reward with defined benefit pension plans is entirely spurious.[1] The risk faced by employers who face short-term pension liability is ultimately, always, shared with their workers. The overarching risks faced by workers – of pension benefit cuts, of contribution rate increases, of plan "conversions" – tend to go unmeasured in these equations.

The Dangers of Contribution Holidays

CUPE and other trade unions have seen the practical reality of pension "risk-sharing" revealed in actual lived experience. At a very general level, pension funds were awash in surpluses through the roaring 1980s and 1990s. Many employers enjoyed years of contribution holidays during this period – all too often without reporting this to plan members. When asset values dropped in 2000-2002, the party was over, and employers were forced to not only start making their full current service contributions again, but in many cases to add additional payments to amortize deficiencies. Not surprisingly, they do not like this growth in pension cost, and they have responded with the claim that the entire DB system is "in crisis".

Fortunately, we do have some industry voices willing to admit that such claims are overblown, fuelled by employers and other industry players simply wanting to escape pension costs (or recover them through future contribution holidays). A comprehensive August 2007 study by DBRS suggests that the public perception of a serious pension funding problem in North American pension plans is, in fact, "a myth". Their conclusion, following an extensive review of the recent financial history of 536 North American plans, is that 70% of plans are well funded. Looking forward from mid-2007:

> …DBRS believes that the funded status of plans is likely to continue to improve in 2007, leading to an increased number of fully funded plans. With few exceptions, pension funding deficiencies are becoming less of an issue.[2]

We consider such reports to be important counterweights to the continuing marketing of a "pension crisis" resulting from "asymmetric risks" faced by employers.

CUPE also urges the Commission to examine the recent spate of deficiencies closely. A research analysis published in June 2005 reviewed the data on employer contribution holidays in the British Columbia and federal jurisdictions. They discovered that these holidays – resulting in huge cost savings for employers - were a significant factor in the emergence of the later deficiencies.

> Of the 42 significantly under-funded (i.e. going-concern funded ratio of 80 to 89.9 per cent) or extremely under-funded (i.e. going-concern funded ratio of 70 to 79.9 per cent) pension plans in the study, *45 per cent would have completely eliminated their current actuarial deficit if contribution holidays had not been taken*.[3]

It seems to us very likely that a similar analysis of Ontario plan experience would show similar results. This study also showed that in many cases, the employer involved recognized the funding deficiencies, but they continued to take them (and put funding security at risk).

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1 The concept of "asymmetry" of the risk-reward dynamic suffered by employers is most elaborately developed by the Association of Canadian Pension Management (ACPM) in: "Back From the Brink: Securing the Future of Defined Benefit Pension Plans," Association of Canadian Pension Management, August 2005. Available at: http://www.acpm.com/docs/ACFD2B.pdf For an even more aggressive formulation of this employer view, see David Laidler and William B. P. Robson, "Ill-Defined Benefits: The Uncertain Present and Brighter Future of Employee Pensions in Canada," Commentary, C.D. Howe Institute, June 2007, and CGA-Canada, "The State of Defined Benefit Pension Plans in Canada: An Update," Research Report, 2005. Available at: http://www.cga-canada.org/en-ca/Pages/default.aspx

2 DBRS, "Pension Plans: The Myth of a Pension Problem", Industry Study, August 2007, p. 6

3 SHARE, "Taking a Holiday: The Impact of Employer Contribution Holidays on the Funding of Defined Benefit Pension Plans," Research Report, June 2005, p. 5-6. Available at: http://www.share.ca/files/Taking%20a%20Holiday.pdf

> OSFI documents that in 2003/2004, 16 federally regulated pension plans continued to take contribution holidays when they were aware that they might no longer be in a surplus position…While these plans resumed their contributions following OSFI's enquiries, the regulator's findings raise concerns about employers' contributions, as well as policy and enforcement practices related to contribution holidays.[4]

Too often, we see these same employers responding to the obligation to contribute again – or contribute more - with moves to cut members' benefits, or using the funding problems that they helped create (by taking holidays) as a rationale for full conversion or plan windup. At that point, we have a particularly difficult time accepting the notion that it is the employers who suffer from a risk-reward "asymmetry".

In our view, the risks associated with pension funding are still ultimately shared by workers.[5] Moreover, we see no reason to believe that offering still more contribution holidays, or relieving employers of their funding responsibilities, will actually contribute to pension fund security.

"Excess Surplus" Rules

Where CUPE members do see an asymmetry – at their expense – is in the *Income Tax Act* (ITA) rules on so-called "excess surplus". The ITA requirement of employer contribution holidays in instances where valuations show an "excess" surplus has only exacerbated the current problems by cutting off the employers' funding flow to the plans. CUPE has repeatedly argued, along with many in the labour movement, that the excess surplus rules in place and the "remedy" of employer contribution holidays were ill conceived at the outset and should be repealed.

We note that on this issue, our critical view is shared by analysts at both the C.D. Howe Institute and the Certified General Accountants Association of Canada. Both groups have argued that the existing excess surplus thresholds are too low and should be immediately raised.[6] Our view is that the original "excess" threshold was never justified, and that even if it were, benefit security or enhancement ought to have been the priority for eliminating such "excesses". Plan members should benefit from positive plan experience.

Funding Deficiencies

CUPE strongly supports the security that was won in the establishment of real funding for defined benefit pension promises. Through various phases of legislative and regulatory reform, that security was further enhanced through the requirement that funding deficiencies be amortized over prescribed schedules.

Several prominent advocates of the "asymmetry" and "crisis" theories described above have developed proposals for reducing the cost of pension liabilities. They include the following:

- Letters of Credit as a partial or full alternative to real deficiency funding;
- Longer schedules for amortizing solvency deficiencies;
- New tax-assisted trust accounts to hold additional – but refundable – pension contributions from employers;
- Automatic calls on future surplus for employer "recovery" of deficiency amortization payments.

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[4] Ibid. p. 11 We hope that a similar detailed analysis of Ontario's experience with contribution holidays will be one of the benefits of the Commission's Research Programme.

[5] In the UK, trade union advocates have argued that the move by employers to close DB pension plans was a simple response to the fact that "contribution holidays were over". See citation in Monica Townson, Growing Older, Working Longer: The New Face of Retirement, Canadian Centre for Policy Alternatives, 2006, p. 66.

[6] See Laidler and Robson, Ibid., p. 9 and CGA-Canada, Ibid., p. 44.

CUPE rejects these proposals. All of them have the result of either reducing pension funding security or increasing employer contribution holidays – or both. We consider the existing funding system to be basically sound, and are not persuaded that recent developments amount to an insurmountable "crisis".

We would suggest, however, that the application of PBA solvency funding rules to multi-employer plans (MEPPs) is unnecessary. The recent modification of the funding regime for specified Ontario MEPPs (SOMEPPs) was in our view a reasonable acknowledgement that stringent solvency funding requirements are less urgent when the risk of employer insolvency is spread among more than one employer. In large multi-employer plans, the risk of insolvency is very low.

CUPE Recommends:

1. That the PBA be amended to provide that all allocations of actuarial funding surpluses will be dedicated to plan benefit improvements, and failing that, that any other application of surplus be subject to the approval of all bargaining agents (if any). In the absence of such bargaining agents, any allocations to employer cost (i.e. contribution holidays) should be subject to an appropriate majority vote of affected plan members.

2. That the Commission highlight the problem posed by the "excess surplus" rule in the *Income Tax Act* and propose that the rule itself be eliminated. At a minimum, any prescribed resolve to surpluses deemed excessive should be an allocation to benefit improvements rather than the one-sided employer windfall established under the existing rules.

3. That the PBA be amended to exclude multi-employer plans (MEPPs) from the requirement to fund for solvency.

2. Public-Private Partnerships (P3s) and other risky pension investment trends

The Commission's Discussion Paper poses a question that we consider of central importance:

> What is the impact of privatization…on defined benefit plans? (p. 12)

As a trade union representing over 200,000 of the workers in Ontario that are most directly targeted by privatization and contracting-out, we are very well positioned to provide answers to this question.

In most instances, the central driving force behind the recent moves to privatize public services, public infrastructure and public sector employment, has been the desire to cut government costs. Of course, such cost cutting translates into real, material effects on the workers involved: alongside de-unionization, wage losses, employment insecurity and privatization often results in workers losing their pension plan.

CUPE members in Ontario have experienced this when public sector employers contract-out certain jobs that had traditionally been within the public sector, and eligibility to participate in the established pension plan.
We have also seen the growth of new forms of privatization, such as "public private partnerships" (or P3s) and "alternative funding and procurement". In all such cases, the very logic of the new model rests on increasing the ownership or control mandate for private sector "partners" in the delivery and management of what had previously been public sector assets or functions.

Across Ontario (as in other jurisdictions), the result of these developments has been the erosion of public sector employment and the union representation and pension coverage that has tended to come with it. We are doubtful that there is even much debate on this question.

CUPE is widely recognized as one of Ontario's leading forces mobilizing the growing opposition to privatization. We challenge not only the negative impact of privatization on the job security and working conditions of public sector workers, but also the often disastrous consequences for the quality, security and efficiency of public services and infrastructure. In the case of the over-sold "P3" model for privatized infrastructure, we have shown repeatedly that these projects are based on the fundamental design flaw of unnecessarily expensive private sector financing. Along with being bad for workers, and bad for public assets and services, P3s are also bad (and risky) public policy for taxpayers. On the other hand, they are extremely profitable for the investors that finance and (in most cases) manage them.

Pension funds investing of P3s

This brings us to a second important relationship between privatization and pensions that is not addressed directly in the Commission's Discussion Paper but is of serious concern for CUPE members. One of the especially perverse developments in recent years in the evolution of pension fund investment has been the increasing role played by large pension funds in financing the very privatizations discussed above. Large pension funds have been increasingly sought out as underwriters and financiers for major privatization projects. As the C.D. Howe Institute recently reported enthusiastically that:

> Private-sector and government-worker plans are scouting the world for investments in power and gas transmission, water, roads, bridges and tunnels, airports and ports…More Canadian savers, large and small, would do well to get a piece of this action.[7]

Notwithstanding the implication of this commentary, the novelty of this development is not the fact of pension fund investment in infrastructure. Pension funds have long been relied upon to invest in the government bonds issued for financing capital-intensive infrastructure projects. Indeed, the original reserve fund of the Canada Pension Plan was dedicated almost exclusively to funding this valuable infrastructure via purchase of long-term bonds from the provinces. The innovation that attracts the C.D. Howe's Institute's interest is that the pension funds described are taking over direct ownership and control of these assets, and operating them as private, for-profit investors. In several cases, pension plans have become direct and indirect agents of privatization – a development that the Institute ideologically supports.

In Ontario, this has taken various forms. Pension funds have been invested in projects such as toll highways, toll bridge and tunnel construction, hospital and school construction and management. Many of these projects are structured and labelled as "public private partnerships" (P3s), though recently the negative publicity associated with this term has led P3-privatization advocates to find new labels for their concept.[8]
CUPE, along with the Ontario Federation of Labour (OFL) and many other trade unions, has argued strenuously that P3s are terrible public policy. We have shown that it always costs the government less to borrow than it would cost a private corporation. P3s arrange for a government to pay a private corporation to go out and borrow on the government's behalf, at a cost of borrowing that is substantially higher than the government's own direct borrowing cost.

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[7] William B. P. Robson, "Found Money: Matching Canadians' Saving with their Infrastructure Needs," C.D. Howe e-brief, March 8, 2007. Also see John Chenery, "Financing the Future: Building Canadian Infrastructure," *Summit Magazine*, Focus Issue: Public-Private Partnerships, 2001.

[8] See, for example, "Big pension funds hope for new infrastructure opportunities," *Globe and Mail*, November 24, 2006

The result, consistently, is that P3 projects generate much higher costs (for the public "partner") than if the same project were pursued on a traditional public sector model. This conclusion is being reached by an increasing number of independent research studies, including one released just weeks ago by the Federation of Canadian Municipalities.

Their analysis, focused on municipal sector P3s, concluded as follows:

> To make infrastructure investments, municipal governments can easily borrow almost all the funds they need at very favourable rates. Indeed this fact is so clear, it is rarely challenged. To leave the responsibility of financing to the private partner is a poor solution to a non-existent problem, when traditional municipal financing is simple, relatively easy and, above all, **much less costly than the private-sector equivalent**. Nevertheless, the truth is that some people have an interest in making us think that there is a problem … because they have solutions to sell.[9]

We outline this argumentation and research at such length for an important reason. We consider our policy critique and our opposition to these projects to be based on fundamental principle. Our position has also been repeatedly ratified by our membership. In addition, our National structure voted to approve a policy statement in 1999 that called on the trustees and managers of CUPE member pension plans to resist the promised returns associated with these projects and turn them down on the ground that they are not in the interest of plan members, nor of taxpayers.

Yet, many of our own pension funds are still being used against us. Even in cases where CUPE is able to name one or more trustees to a decision-making Board that sets out investment policy, they are often advised that their fiduciary obligation to plan members *requires* them to invest in P3s – even where it can be shown to be bad public policy, bad for public services, and bad for workers' pension coverage. The argument advanced, stripped down to its most simplistic formulation, is that fund trustees are obliged to aim to "maximize" their rate of return, and rest indifferent to all "non-financial" considerations.

While CUPE takes issue with this simplistic formulation of the legal parameters of fiduciary duty, there is no doubt that ambiguity and dispute over this issue remains. Just as with an older (but continuing) debate about "socially responsible investment" (SRI), our struggle to restrain aggressive and (in our view) high-risk privatization investments is hampered by the lack of clear language in *the Pension Benefits Act* (PBA) that would expressly permit and legitimize such considerations or exclusions. While CUPE certainly recognizes the need to earn "reasonable" returns on fund investments, we reject the notion that this responsibility creates an absolute obligation to support every high-yielding project that Bay Street develops.

CUPE's concerns regarding pension investment trends extend beyond just P3s and privatization. We are also seeing rapid growth in more complex and less transparent financial vehicles and instruments that are being increasingly marketed to pension funds.

Hedge funds, private equity funds, highly leveraged and "short-sell" investments, and various types of derivatives are becoming more popular as pension fund investments.

As this past summer's "asset-backed commercial paper" (ABCP) crisis illustrates, pension funds are increasingly becoming involved – perhaps even lured – into complicated investments whose risk profile may be beyond their current capacity to measure and monitor.[10]

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[9] Pierre J. Hamel, "Public-Private Partnerships (P3s) and Municipalities: Beyond Principles, a Brief Overview of Practices," Institut national de la recherche scientifique, Commissioned by the Federation of Canadian Municipalities, August 31, 2007. Emphasis added. http://www.fcm.ca/english/media/backgrounders/p3report.pdf

[10] We would argue that all boards and Administrators – including so-called "lay" boards and "expert" boards – face the capacity problem identified here.

For example, in the course of his reflections on the 2006 fiasco surrounding a collapsed US-based hedge fund called Amaranth, one hedge fund manager admitted:

> Hedge-fund strategies have become so obtuse, their sales pitches so aggressive, and their monitoring so lax that one could question whether anyone should be in these funds, let alone pension-plan managers who have no ability to judge what these funds are doing and are supposed to invest regular folks' money in relatively safe places.[11]

A related but separate set of concerns is also emerging in relation to the rapid recent growth in private equity as an asset class for pension funds and other financial investors. A February 2007 submission by a Europe-based international hotel and food workers' union to British Members of Parliament sounded a serious alarm about the emergence and increasing domination of financial markets by private equity. The union describes private equity funds as follows:

> Enormous pools of money provided largely by institutional investors and managed by the fund for the purpose of acquiring other companies in whole or in part, delisting them from stock exchanges if they are publicly listed, restructuring them and then selling them to other investors, either through public stock offerings or to another buyout fund. While private equity firms have traditionally set targeted rates of return of 20 to 25% annually, the largest funds have generated returns of 40% a year over the past 10 years.[12]

The union presented disturbing evidence of a virtual explosion of private equity buyouts and sell-offs, and argued that the scale of these deals – particularly their highly leveraged character – poses risks to the financial system as a whole. Moreover, they suggest that the funds (with the associated leverage) are so large that all public corporations have become potential takeover targets (an observation familiar to many observers of recent shifts in Canadian financial circles). The effect, they suggest, imposes a serious cost on workers affected:

> A pre-bid environment hangs over the economy as a whole, meaning short termism is institutionalized, bringing with it more job cuts and more attacks on wages and working conditions and more attacks on trade union rights.[13]

While it is possible that Canadian practices with private equity are more benign than this, CUPE is nonetheless concerned about these dynamics and their implications for our members (and their pension coverage). While promising – and perhaps delivering – substantial rates of return to pension fund investors, such predatory investment practices are anathema to the trade union movement and to CUPE members. We certainly do not expect that our pension funds will be secured - or workers' DB pension coverage improved – through such practices.

Rather, as negotiators of pensions, and as a trade union that names pension fund trustees to various Boards, CUPE is concerned that while Ontario's securities and financial sector regulations seem under-developed, pension fund trustees and money managers face legal arguments about the need to "maximize" their rate of returns within a new and rapidly changing environment. We are concerned that aggressive marketing campaigns by financial specialists and marketers may be pressuring pension fund trustees and money managers to pursue strategies that are both riskier and more punishing to affected workers than their advocates are inclined to admit.

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[11] James J. Cramer, "After Amaranth," *New York Magazine*, September 22, 2006.

[12] Peter Rossman, "Presentation to Trade Union Sponsored Labour MPs on Private Equity and Leveraged Buyouts," International Union of Food, Agricultural, Hotel, Restaurant, Catering and Allied Workers Associations (IUF), February 27, 2007

[13] Ibid., p. 5

CUPE Recommends:

1. That the Commission's report to the Minister directly addresses the corrosive effects of privatization and P3s on pension plan coverage in the province.
2. That the Commission appeal for the clarification of pension investment and trust law in order that decisions by pension fund trustees to expressly avoid investments in P3s and other forms of privatization are clearly permitted.
3. That the Commission propose concrete policy measures to strengthen the existing regulatory framework covering pension investment in complex financial instruments such as hedge funds, derivatives, private equity funds, etc. Such measures should mandate greater transparency rules that will clarify both the character and the risk profiles of any such investments.

3. Raising minimum standards

As with real funding security, the minimum standards established in the existing system represent important and hard won gains. DB pension coverage would not be as high as it is today were it not for the existing rules on vesting, eligibility, and portability.

We would suggest, however, that there is still significant room for improvement to the minimum standards. CUPE represents many of the growing number of precariously employed workers – part-time, temporary, and contract workers who struggle from job to job, either excluded from participation in workplace pension plans or unable to vest, defer or transfer entitlements when they do earn them.

Moreover, we are very aware that it is workers that face discrimination and disadvantage in the labour market – women, new Canadians, people of colour, workers with disabilities, etc. – that are disproportionately represented in these categories. Under the existing rules, even part-time workers who become permanent and long-term will self-exclude by opting-out. As a result, these same workers are far less likely to build up decent pension entitlements by the time they are ready to retire.

Immediate Vesting and Coverage for Part-time Workers

Immediate and valuable extension of defined benefit pension coverage could result from relatively simple and low-cost improvements to the standards in place. The province of Québec has shown that immediate vesting is viable. Coverage could also be extended if rules were established requiring that part-time workers be required to join pension plans anywhere that full-time workers' participation is mandatory.

Mandatory Indexation

CUPE has always supported the principle that workers' pensions should not have their purchasing power lost to the effects of inflation. While recent years have seen a settling of inflation rates at the 2-3% level, the combination of improving mortality and above-inflation increases in health care and long-term care expenses underline the importance of mandatory indexation.
We note the fact that while the Ontario PBA provides for the concept of mandatory indexation, an actual *rate* for that indexation has not yet been established. We think it is time to do so.

Transfer Rights

A more complex section of the PBA deals with securing lock-in and portability rights in the event of termination, divestments, and transfers.

In our view, the lack of meaningful portability of DB pension entitlements is a serious weakness of the existing system. The result is that many workers are forced to choose between deferring an entitlement (which often means sacrificing the wage-indexation that would otherwise have applied to it), and transferring the value out to a locked-in RRSP and seeing the benefit promise erased.

Earned pension entitlements should be more secure than this, and the ideal of portability should be facilitated. For example, the PBA should strengthen the obligation employers to accept transfers-in of accrued locked-in pension entitlements from either individuals or transferring-in groups of workers. The fact is that employers and administrators consider such transfers to be an administrative irritant and cost that they increasingly choose to avoid. While this may be understandable, such transfers are key tools for preserving and building secure DB pension entitlements. Workers' confidence in the DB pension system would be greatly enhanced through such positive innovation.

Plan Disclosure

One of the primary means by which employers continue to exercise unequal power over pension plans is through their control over information about the pension plan. The disclosure rights established in the PBA are crucial, but they are still not enough. CUPE continues to find that employers are reluctant to provide members with meaningful information about their pension plan, including the documents that they are required by law to provide.

An Ontario CUPE Local was provided with a stark illustration of this problem this year. The employer is an Ontario municipal-sector agency with a single-employer pension plan. Through their de facto control of a "pension committee" – which did include a union-named plan member representative – the employer ensured that plan members were not aware that their plan was designed with a fixed member contribution formula where the employer's obligation was to fund the residual actuarial cost not met by fixed member contributions. Members had always been told, and believed, that the plan was "designed" to be a 50-50 cost-shared plan. It was not made clear, of course, that the only way that the employer normal (current service) cost kept to only a match of member contributions was through the application of fund surplus to employer cost – i.e. to take partial contribution holidays.

This scenario is disturbingly common. Too often, we find that contribution holidays are denied or disguised. Benefit improvement possibilities (including indexation) are suppressed or needlessly deferred. And, when deficiencies emerge, the close relationship between employers (and employer agents) and plan agents leads to the presentation of selective menus of "solutions" to funding problems being presented to plan members – often by the authoritative and ostensibly independent plan actuary. This selective communication of plan financial and legal information to plan members by employers (and even Boards of Trustees) demonstrates to us that the letter and spirit of the minimal disclosure provisions of the PBA are too often evaded, ignored, or insufficient.

CUPE would like to see the PBA require far more disclosure of plan information by employers and plan administrators. All documents that must be provided to FSCO should also be automatically provided to any plan member on request (rather than provided "for viewing" at the workplace). Automatic provision of these same documents to all trade unions representing plan members should also be mandatory.

Beyond these general expansions of disclosure rights, CUPE has two very specific proposals to make. First, employers and administrators are already required to report their application of surplus to "employer current service cost "(i.e. partial or full contribution holidays) to the regulators via the Annual Information Return (AIR).

Unfortunately, this crucial document – though technically available "for viewing" – is almost never provided to plan members or their trade union representatives.

It would be a simple and cost-free improvement to the disclosure rules to require that the funding information reported in the AIRs also be included in the annual statement sent to all plan members. We see no good reason to deny this information to plan members when it is being annually reported to the regulators.

Second, we would suggest that plan disclosure rights could be easily enhanced through a requirement that employers and administrators provide pension committees and/or plan member trade unions with copies of draft (not yet filed) actuarial valuation reports that report "excess surpluses" under the terms of the current ITA. It should be made clear to plan member trade unions or other representatives that the ITA "requirement" of employer contribution holidays to eliminate "excess" surplus is only triggered |upon the filing – not the preparation – of a valuation that shows it. At the very least, plan members should be provided with an opportunity to propose alternatives to contribution holidays.

Phased Retirement

The minimum standards of the PBA and regulations that we aim to defend and improve are complemented by important and related standards established by the ITA. One of the federal tax rules on pensions that has recently been subject to review and (proposed) amendment is the restriction on continuing to work with an employer whose pension plan is paying out a pension benefit. This framework – sometimes considered a version of "no double dipping" – established the concept that pensions are for retirement, and they are tax-assisted because there is a public interest in ensuring that more workers are able to *retire* with income security.

The federal budget of March 2007 set out plans to amend the ITA to change this framework – possibly quite dramatically. Under the rubric of "phased retirement", the proposal contemplates a liberalized system where employers will be permitted to begin pension payments to eligible (i.e. older and long-service) workers that remain in the workforce. While phased retirement is usually described as a system to replace sudden retirement with a more gradual withdrawal from the workforce, the budget proposal would actually permit employers to begin paying pensions to workers that continue to be employed full time.

CUPE has serious reservations about this direction for pension policy. We can imagine such models of phased retirement being applied in ways that undermine trade union wage bargaining and envision the use of pension funds to supplement and subsidize employers' payroll. Further, this model is being proposed alongside three other retirement age related developments:

1. Legal norms regarding the age of "mandatory" retirement are changing in many provinces;
2. Many employers are concerned about a rapid exit of experienced workers from the workplace in the coming 10-15 years;
3. More and more employers and industry organizations favour an increase to their plan's age of eligibility for retirement and a discontinuation of programs for early retirement as a means to reduce pension liabilities.

In this context, the proposal to permit pension funds to begin flowing to workers who continue working – potentially indefinitely – is disturbing. We can envision a situation where a growing percentage of a given workforce is receiving "extra-pay" (i.e. regular wage plus pension), possibly to a level that is the same or more than their regular pay, for the same or less hours of work.

CUPE is concerned that the effect of such an arrangement will be to introduce a second, advantaged category of worker into the workplace and thereby undermine collective bargaining and trade union solidarity. Finally, we foresee such models strengthening the campaign already under way to raise the "normal" age of retirement for both workplace and public pension plans from the current standard of age 65 to 67, 70, or beyond.

Pension Benefits Guarantee Fund (PBGF)

CUPE considers the additional security provided by Ontario's PBGF to be a major gain for pension plan members and deserving of a strong defence. Through various periods of economic difficulties and employer insolvencies, the extra security that the Fund provides has offered reassurance to plan members whose benefits might otherwise be rolled back.

However, the existing cap on the coverage provided – set at $1000 of benefits per month – is badly in need of updating. We consider the level of $2750 per month (advanced by the Ontario Federation of Labour and others) to be both sufficient and affordable if funded through reasonable increases to premiums levied on covered plans.

CUPE recommends:

1. That the Commission develop a set of minimum standard improvements to the PBA, including a move to immediate vesting, mandatory enrolment for part-time workers everywhere that full-time workers must participate, and mandatory indexation.
2. That the Commission consider the limitations of member transfer rights under the existing framework and develop a comprehensive recommendation for changes that will improve basic portability rights and establish greater obligations on plan Administrators to accept transfers of individual and group pension entitlements into established plans.
3. That the Commission propose other means of protecting the value of accrued pensions, such as a new obligation on Administrators to extend any indexation provided to retiree benefits to deferred pensions.
4. That the Commission develop a comprehensive expansion of disclosure rules under the PBA, beginning with a requirement to report actual contributions made and surpluses applied to employer costs (i.e. contribution holidays) on plan member annual statements. Expanded disclosure should make it automatic that all documentation provided to the regulators should be provided to plan member trade unions and, when requested, plan members.
5. That the Commission recommend a new transparency system for "excess" surpluses whereby Administrators will be required to provide pension committees and plan member trade unions with copies of any draft actuarial valuations reporting "excess" surpluses under the ITA. Such member representatives should be provided an opportunity to propose alternatives to filing a valuation with an "excess" surplus and thereby prevent damaging contribution holidays.
6. That the Commission directly address the dangers and concerns relating to the various proposed models of "phased retirement", and develop recommendations that will ensure that pension funds are not used to subsidize employer payrolls.
7. That the Commission support the existing PBGF model and recommend the expansion of its current coverage levels up to at least $2750 per month.

4. Improving Plan Governance

CUPE is a strong supporter of improved pension plan governance. We participate in plan governance in various ways, including through collective bargaining, as participants in Jointly Trusteed governance arrangements, and in our general defence of plan members' pension rights. Yet, while we feel we play a positive role in the enforcement of existing pension law, we consider it a weakness of the existing PBA that the role of trade unions is not specified and developed in more detail.

In addition to the disclosure rule enhancements mentioned above, we would suggest that the plan member representation role of trade unions should be enhanced and empowered. In situations of significant plan change, such as partial or full wind-ups, divestments, "excess" surplus dispositions, benefit changes, governance changes, plan member trade unions can play a constructive role in negotiating the resolution of problems and communicating outcomes to members. However, to play this role effectively, the PBA needs to spell out clear authorities and responsibilities.

On the other hand, CUPE also has experience with problematic plan governance and administration as a result of an unclear allocation of fiduciary duties and rules around conflicts of interest of plan agents. For example, we frequently find key plan agents – such as the plan actuary – being used by employers as their de facto representative, even within adversarial collective bargaining relationships. This strikes us as a clear conflict of interest for plan actuaries whose work is paid for out of plan resources, and who – we feel – owe a fiduciary obligation to the plan members. We would suggest that all plan agents owe fiduciary obligations to plan members.

To provide just one recent illustration, an Ontario CUPE Local with a single-employer negotiable pension plan was involved in collective bargaining over their plan in 2006. Within that bargaining, the plan actuary played a very aggressive and partisan role, advocating the employer's position and refusing to answer straightforward questions posed by the union. The union complained to both the employer and the actuarial firm. While the employer ignored the complaint, the actuarial firm investigated the complaint and concluded that their actuary had, in fact, behaved unprofessionally and inappropriately. To their credit, they acknowledged the problem, and committed to ensuring it would not be repeated.

The point of this example is that we should not have had to file this complaint. Employers, actuaries, and trade unions should all be provided with very clear guidelines – set out in the legislation itself – regarding the fiduciary duties of plan agents and the avoidance of such conflicts of interest. We are aware that many employers with less informed trade unions – or no trade unions – are utilizing plan agents in exactly this fashion, and face no accountability in this regard. This is one of the most direct ways that employers – who are often deciding on the retention of plan agents – wield unfair power over plan members.

We are greatly encouraged that the Province of Québec has recently amended their pension legislation to clarify these fiduciary obligations of plan agents.

CUPE Recommends:

1. That the Commission develop recommendations for specifying and enhancing the key role that trade unions play on behalf of pension plan members. Whether within formal "Joint Trust" plan structures or with more conventional employer-Administrator structures, the role of trade unions in negotiating the resolution of various problems should be enhanced within the PBA.
2. That the Commission recommend that the PBA be amended to clarify that all plan agents owe fiduciary obligations to all plan members in the same manner as the pension legislation in the Province of Québec.

5. Declining DB pension coverage and benefit inadequacy

CUPE recognizes that the primary focus of the Commission's mandate is defined benefit pension plans – meaning workplace DB plans. Moreover, we understand that one of the primary driving forces behind its formation has been the gradual decline, since 1991, in the percentage of workers covered by DB pension plans and the threat by many employers to dismantle their plans.

We are also well aware that certain employers and industry bodies have reacted to the combination of declining coverage and today's funding deficiencies by arguing that greater employer access to fund surpluses will resolve the problem. One pension industry organization, the Association of Canadian Pension Managers (ACPM), proposes the following "solutions" to the supposed asymmetry problem identified above in Section 1:

> Governments should move quickly and decisively to deal with asymmetry. Governments should pass legislation overriding common law trust precedents [that protect surplus for plan members] and establishing the paramountcy of contract law for pension plans…The use of plan surplus for contribution holidays should continue, where permitted under current plan provisions. But governments should also provide greater flexibility for plan sponsors to withdraw plan surplus…[14]

The ACPM suggests that providing employers with such enticements would improve the environment for DB plans, and allowed to be maintained and improved, while "*a lack of action will worsen the situation*."[15]

Such arguments are only a step removed from the threat that if employers are not given more control over surplus, they will shut down their plans. This is also a way of blaming plan members and their advocates for the recent decline in DB coverage.

CUPE completely rejects this logic. We would point out that among the employers that have succeeded in freezing or dumping their DB plans, the bulk have been either in the non-union private sector, or a result of the privatization and contracting-out outlined in Section 2 above.[16] This would suggest that the driving forces behind the coverage declines of recent years have been larger, economic processes involving massive losses of manufacturing jobs, privatization, and a gradual de-unionization of the Canadian workforce. If so, handing employers still more pension surpluses on top of what they have enjoyed to date would appear very unlikely to significantly reverse the long-term trend. It would nonetheless be quite popular among the employers who would directly benefit.

Having said this, we sustain no illusions about recent trends. The pension participation rate for employed Canadian workers fell from 46% in 1991 to 38.5% in 2005.[17] However, we would suggest that reversing this long-term decline would require significant changes in the larger economic climate, such that good quality, and unionized jobs, in both the public and private sector, are created and protected. Without question, such changes will require a substantial reorientation of public policy. To suggest that such significant political and economic trends could be substantially affected by creating a "surplus access incentive" for employers seems to us to be highly unlikely.

These employer and industry arguments do, however, bring us to recall the great debate that took place in the early 1960s over the best means to secure universal retirement income security. For many years, trade unions and other popular organizations had been demanding that the Government of Canada follow the lead of many European countries and establish a comprehensive, earnings-based public pension that would provide all workers with adequate retirement incomes. At that time, many employers and their organizations fought hard against the very concept, and insisted that the path to retirement income security was found in the establishment of workplace-based "private" arrangements.

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[14] ACPM, Ibid., p. 26 Parenthetic comment added.
[15] ACPM, Ibid., p. 9
[16] For a representative illustration of the former, see Craig Sebastiano, "Sears Canada changes pension, benefit programs," Benefits Canada, February 5, 2007.
[17] Statistics Canada, "The Daily – Pension Plans in Canada," June 21, 2007. Available at: http://www.statcan.ca/Daily/English/070621/d070621b.htm

The result of that debate was a tenuous compromise – the establishment of a Canada (and Québec) Pension Plan that provided a relatively low earnings-replacement rate of 25%, and only covering earnings up to the average industrial wage.

At the time, the rationale for this relatively low replacement rate was the notion that this provided an incentive to both employers and unions to establish so-called “supplemental” workplace plans. Of course, hindsight tells us that this optimistic notion must have rested on an expectation of an increasingly unionized workforce and an employer community with both foresight and flexibility. Instead, not long after the establishment of the CPP/QPP, powerful social and economic forces launched an assault on trade unions, job security, and the public sector itself.

Hindsight now tells us that this optimistic vision has not borne out. For the reasons outlined, the hopes of too many Canadian workers to be able to count on adequate and secure retirement incomes have been dashed. It occurs to us that the private market for pensions has failed, and leaves a majority of workers to fend for themselves – and face poverty or near-poverty incomes at retirement. Today, these same workers are now being asked to give up their surpluses, just to keep the pension entitlements that they have already sacrificed to gain.

As a result, CUPE and an increasing number of other trade unions are reaching the conclusion that the pension advocates of the 1960s were right all along. As committed as we are to the improvements to the DB system recommended above, we also know that true retirement income security – providing universal coverage, inflation protection, and funding security, is unlikely to come from anything other than a state-based pension arrangement.

Indeed, while inadequate, it is the efficiency of the CPP/QPP and OAS that recommends their expansion. For example, the annual administration costs of CPP/QPP are low enough to make a mutual fund marketer blush, and their pooling of risk has allowed the plans to easily ride through every market drop and jump since its inception. It has truly been one of Canada’s most impressive public policy success stories.

We recognize that the Commission’s stated mandate is primarily focused on workplace based benefit plans and that public plans do not fall “directly within the terms of reference” of the Commission. However, just as the Commission’s review of DB pension plans in Ontario is taking place as part of a debate about their “security, viability, and sustainability”, we would argue that its deliberations form part of a renewed debate regarding the balance between public and workplace-based pension arrangements. We are concerned that if the Commission entirely excludes consideration of the central role of the public plans, and their potential expansion, there is a risk that it will be led to recommend policy remedies for problems that would in fact be most effectively addressed by other levels of government.

CUPE Recommends:

1. That the Commission include in its report to the Minister a serious examination of the vital role that the public pension plans play – alongside the DB pension system - in the retirement incomes of Ontario workers. We would also urge that the Commission recommend to the Minister that the Government of Ontario invite the federal and other provincial governments to establish a Roundtable on Public Pension Expansion.

Conclusion

CUPE greatly appreciates this opportunity to address several of the issues raised by the Commission’s Discussion Paper and overall mandate. We look forward to presenting our views in person, and would be happy to answers any questions that may arise from the foregoing.

List of CUPE Recommendations

The importance of pension fund and surplus security

1. That the PBA be amended to provide that all allocations of actuarial funding surpluses will be dedicated to plan benefit improvements, and failing that, that any other application of surplus be subject to the approval of all bargaining agents (if any). In the absence of such bargaining agents, any allocations to employer cost (i.e. contribution holidays) should be subject to an appropriate majority vote of affected plan members.

2. That the Commission highlight the problem posed by the "excess surplus" rule in the *Income Tax Act* and propose that the rule itself be eliminated. At a minimum, any prescribed resolve to surpluses deemed excessive should be an allocation to benefit improvements rather than the one-sided employer windfall established under the existing rules.

3. That the PBA be amended to exclude multi-employer plans (MEPPs) from the requirement to fund for solvency

Public-Private Partnerships (P3s) and other risky pension investment trends

4. That the Commission's report to the Minister directly addresses the corrosive effects of privatization and P3s on pension plan coverage in the province.

5. That the Commission appeal for the clarification of pension investment and trust law in order that decisions by pension fund trustees to expressly avoid investments in P3s and other forms of privatization are clearly permitted.

6. That the Commission propose concrete policy measures to strengthen the existing regulatory framework covering pension investment in complex financial instruments such as hedge funds, derivatives, private equity funds, etc. Such measures should mandate greater transparency rules that will clarify both the character and the risk profiles of any such investments.

Raising minimum standards

7. That the Commission develop a set of minimum standard improvements to the PBA, including a move to immediate vesting, mandatory enrolment for part-time workers everywhere that full-time workers must participate, and mandatory indexation.

8. That the Commission consider the limitations of member transfer rights under the existing framework and develop a comprehensive recommendation for changes that will improve basic portability rights and establish greater obligations on plan Administrators to accept transfers of individual and group pension entitlements into established plans.

9. That the Commission propose other means of protecting the value of accrued pensions, such as a new obligation on Administrators to extend any indexation provided to retiree benefits to deferred pensions.

10. That the Commission develop a comprehensive expansion of disclosure rules under the PBA, beginning with a requirement to report actual contributions made and surpluses applied to employer costs (i.e. contribution holidays) on plan member annual statements. Expanded disclosure should make it automatic that all documentation provided to the regulators should be provided to plan member trade unions and, when requested, plan members.

11. That the Commission recommend a new transparency system for “excess” surpluses whereby Administrators will be required to provide pension committees and plan member trade unions with copies of any draft actuarial valuations reporting “excess” surpluses under the ITA. Such member representatives should be provided an opportunity to propose alternatives to filing a valuation with an “excess” surplus and thereby prevent damaging contribution holidays.

12. That the Commission directly address the dangers and concerns relating to the various proposed models of “phased retirement”, and develop recommendations that will ensure that pension funds are not used to subsidize employer payrolls.

13. That the Commission support the existing PBGF model and recommend the expansion of its current coverage levels up to at least $2750 per month.

Improving Plan Governance

14. That the Commission develop recommendations for specifying and enhancing the key role that trade unions play on behalf of pension plan members. Whether within formal “Joint Trust” plan structures or with more conventional employer-Administrator structures, the role of trade unions in negotiating the resolution of various problems should be enhanced within the PBA.

15. That the Commission recommend that the PBA be amended to clarify that all plan agents owe fiduciary obligations to all plan members in the same manner as the pension legislation in the Province of Québec.

Declining DB pension coverage and benefit inadequacy

16. That the Commission include in its report to the Minister a serious examination of the vital role that the public pension plans play – alongside the DB pension system - in the retirement incomes of Ontario workers. We would also urge that the Commission recommend to the Minister that the Government of Ontario invite the federal and other provincial governments to establish a Roundtable on Public Pension Expansion.

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