



**Ontario Public Service
Employees Union**

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A Submission to

**John O'Toole, MPP
Parliamentary Assistant to the
Minister of Finance**

Regarding

***Surplus Distribution from
Defined Benefit Pension Plans***

September 14, 2001

This submission is an initial response from the Ontario Public Service Employees Union (OPSEU) to the Ministry consultation paper, *Surplus Distribution from Defined Benefit Plans*.

OPSEU urges the Government to reconsider its proposed changes to the Pensions Benefit Act and pension regulations. In addition to supporting the submission made by the Ontario Federation of Labour, we would like to point out the potential conflict of interest faced by the Government.

Directly or indirectly, Ontario Government expenditures pay for public sector employer contributions to pension plans. Thus, any easing of the restrictions on employers, allowing them to withdraw actuarial surpluses at various stages of a pension plan's life, will also be of short-term benefit to the Government of Ontario. Short-term, because plan deficits incurred because of underfunding are liabilities which can and do impact on the interests of the Government and the province.

In the case of our largest pension fund, the OPSEU Pension Trust, the Government of Ontario is our co-sponsor and makes substantial employer contributions. In the past, any distribution of surplus from this plan has been achieved *after* negotiation between two equal parties, representing the employer and employees. This model should be the same one in place for all pension plans.

Especially because of the Government's dual role as legislator and employer, it is very important that the Government act to ensure that the interests of members and pensioners are protected and that no changes are taken that tilt the balance any further in

favour of employers. Anything less will be seen as a move to appropriate pension funds for your own purposes, as well as those of the broader employer community.

Algoma Steel: Why Employers' Powers Must Remain Restricted

The case of Algoma Steel provides an object lesson to the Government about the negative ramifications of removing current restrictions on employers.

Following many years of employer under-funding, the Algoma pension plan faces a shortfall of \$624 Million. This huge shortfall could very well prevent the company from surviving the current negative economic climate. Not only Algoma Steel's future hangs in the balance but also that of the entire Sault Ste. Marie area.

A recent study by Ernst & Young suggests that as many as 12,000 jobs could be lost across Canada should Algoma Steel fall. Other ramifications of Algoma Steel's closure include 6,200 jobs lost in Sault Ste. Marie alone, \$830 Million in lost income, and \$266 Million in lost revenues for the Government of Ontario.

In addition to the indirect impact on the provincial finances, Ontario's Pension Benefits Guarantee Fund, which currently has \$200 Million in available funds, will be unable to cover the \$624 Million shortfall without additional funding.

It is our view that cases like Algoma Steel show that allowing employers increased access to pension surpluses today can create huge social and economic liabilities in the future. It is simply not in the public interest to loosen existing pension plan restrictions.

Keeping this in mind, we turn to the specific proposals outlined in the Government's consultation paper.

Ownership of Pension Plan Surpluses

We agree that the confusion raised by the Tecsyn case should be resolved. However, the proposal in the consultation paper would give rights to employers only. It is our position that pension plan funds belong to the members and pensioners of these funds, not to employers. This position has been accepted in court for the vast majority of plans that are established as trusts. In these cases, funds are held in a fiduciary capacity for the benefit of the employees and pensioners alone. This same principle should be extended to all pension plans. Precisely because members and pensioners have a vested interest in protecting their retirement income, this would be the most prudent fashion to ensure the health of pension plans in Ontario.

In those cases where ownership is clearly in the hands of employees, employers can (and do) approach the bargaining agent to negotiate surplus-sharing and other arrangements. While, OPSEU will certainly pursue in court any attempt by employers to establish their ownership over such funds, we certainly prefer negotiated agreements over litigation and believe that negotiations between employers and employees encourage a more prudent and cooperative relationship in the area of pension fund governance.

Consent Provisions

The consultation paper correctly notes that there remains some ambiguity in the definition and application of the consent provisions under legislation and regulation. We would support a clarification of the issue of consent.

In this regard, we recommend that the procedure for obtaining consent, outlined on page 13 of the consultation paper, be applied to any attempt to withdraw actuarial surpluses from pension funds – whether in a full plan wind-up, partial plan wind-up, or in the form of employer contribution holidays. In all cases, consent should be required from bargaining agents or, where there is no bargaining agent, two-thirds of plan members and a similar level of consent from pensioners and former plan members who are entitled to deferred pensions.

Obviously, we do agree with the proposal in this section to require employers to notify plan members, former members, and, presumeably, any bargaining agent, of their intention to withdraw surpluses.

Surplus Distribution on Full and Partial Plan Wind Ups

We strongly object to the proposal to withdraw the consent requirements established under Subsection 8(1)(b) of the Regulation. This proposal is inconsistent with the proposal under the **Consent for Withdrawals** section of the consultation paper.

Those cases where employers believe plan documents entitle them to surplus currently end up in protracted litigation. Plan members and their bargaining agents have

challenged employers' presumption of legal ownership over the plan and will continue to do so.

Recent court cases indicate that the law supports members in these cases. However, pursuing litigation is a costly and time-consuming process.

Finally, we do not recognize the need to distinguish between full and partial plan wind-ups. In either case, the consent of the members and/or bargaining agent – as currently required under regulation – should apply.

Surplus Withdrawals (Other than on Wind Up)

On the issue of contingency reserves, we see no need – especially in the current environment of market instability – to reduce the contingency reserve requirement below the current level of 125%. Surpluses are always an educated guess and actuarial estimates are notoriously vulnerable to plan performance, changing employment levels, and other demographic and economic changes.

The consultation paper raises the spectre of pension plans losing their status under the Income Tax Act should surpluses exceed the contingency reserve. This is a specious argument. In such rare cases, employees and their bargaining agents have a strong incentive to negotiate a mutually-acceptable agreement with employers. There is no need to weaken the existing provisions in this regard.

With regard to contribution holidays, again the current imbalance – where such holidays can be triggered by employers but not by employees and their bargaining agents – should be addressed in keeping with the principle of joint stewardship of pension funds.

This is not a separate issue, in our opinion, from that of surplus withdrawal in general. In all cases, funds are removed from the pension plans and this can have important negative ramifications.

In any case, there is a distressing lack of specificity in the consultation paper on this issue. If a matching contribution plan does not contemplate contribution holidays, that right should not be imposed by legislative or regulatory change. Again, it should be negotiated between the employer and employees. Furthermore, in those cases where contribution arrangements are established in collective agreements, the proposed changes could force an unacceptable intervention in the collective bargaining process.

Dispute Resolution

Finally, we agree in principle with the introduction of an arbitrated dispute resolution mechanism. However, this should not be a tool for employers alone. In particular, it runs counter to the philosophy of labour arbitration to allow only the employer to trigger arbitration.

Furthermore, a threshold for arbitration of 50% of those members *who vote* is unacceptable. The bar should be set much higher – at a fixed percentage of the entire plan membership or, where there is a bargaining agent or agents, with the consent of the bargaining agent(s).

While OPSEU would be pleased to contribute to a further discussion about the establishment of an arbitration regime for pension plans, we have serious concerns about

the criteria which will be imposed on arbitrators as well as the level of employee involvement in establishing such a system.

In our view, the proposals outlined in the consultation paper would resolve outstanding pension issues entirely in the employers' favour. In particular, we do not support any attempt by the Government to circumvent jurisprudence in order to weaken the constraints on surplus withdrawals. **In summary, OPSEU's position is that pension funds, including contributions from employers and employees as well as investment and other income, are the deferred wages of working people.**