



Simon Archer
Direct Line: 416.979.6449
Fax: 416.591.7333
sarcher@goldblattpartners.com
Our File No. 17-806

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Via E-mail and Registered Mail

Financial Services Commission of Ontario
Pension Plans Branch
5160 Yonge St., 16th Floor
Toronto, ON M2N 6L9

Attention: Lourdes Pineda

Dear Ms. Pineda:

**RE: CARLETON UNIVERSITY RETIREMENT PLAN, REGISTRATION
NO. 0526616 (THE “PLAN”)**

We are counsel to the Canadian Union of Public Employees, Local 2424 (“CUPE”). CUPE is the bargaining agent for 850 administrative, technical and library staff at Carleton University (“Carleton”). CUPE members participate in the above-noted Plan pursuant to a collective agreement between Carleton and CUPE.

We are writing on behalf of our client and on behalf of members of the Plan to bring to your attention several issues in the amendment and administration of the Plan that are not in compliance with the *Pension Benefits Act*,¹ and seek your intervention to protect the interests of Plan members.

We rely upon the following facts and law.

1. The Plan is registered with the Financial Services Commission of Ontario (“FSCO”) as a single-employer, “combination defined benefit / defined contribution” pension plan, that is also a public service plan.²

¹ R.S.O. 1990, c. P-8 (the “Act”).

² See “Plan Details”, FSCO Pension Plan Access, available online:
<http://planinfoaccess.fSCO.gov.on.ca/PlanDetails.aspx?PlanKey=0012061> (date accessed, March 18, 2018).

2. The Plan's sponsor and employer is required under the Act and Regulation 909 to fund the Plan on a solvency basis (subject to special solvency relief provided to certain broader public sector pension plan sponsors under Regulation 178/11).
3. Like other single employer defined benefit plans, the Plan is eligible for protection of benefits paid from the Pension Benefits Guarantee Fund ("PBGF"), and pays annual premiums in respect of these PBGF protections.
4. The terms of the Plan provide that, *inter alia*:
 - a. certain of members' required contributions are credited to a "Member's Money Purchase Component Account" (s. 4.01, Plan text, defined in s. 1.25, Plan text);
 - b. certain other members' required contributions, which include contributions toward special payment schedules required under the Act and Regulation 909, are credited to the Trust Fund (ss. 4.10 and 17, and defined in s. 1.30 and 1.36 of the Plan text);
 - c. at a member's normal retirement date, a member is eligible to receive a benefit under the Plan which is the greater of 1. the accumulated amount in the Member's Money Purchase Account or 2. a "minimum guarantee pension" calculated in accordance with a formula combining years of service with final average earnings (s. 7.01 Plan text);
 - d. the minimum guarantee pension is also described in the Plan text as a "DB Pension", being the "excess, if any, of the Member's minimum guarantee pension over the money purchase pension as calculated in Section 7.01, 7.02, 7.03 and 7.06" (s. 7.07(a)(iv) Plan text);
 - e. the pension benefits payable pursuant to s. 7 of the Plan text are subject to an annual adjustment based on a formula that takes into account the performance of the Plan's fund (s. 7.07 Plan text);
 - f. prior to July 1, 2003, if the annual adjustment of pension benefits in pay would have been negative, a member becomes entitled to a supplementary pension payment amount (s. 7.07(c) Plan text) such that the amount of pension that became payable at retirement is not reduced (the "**Minimum Benefit Guarantee**");

- g. effective July 1, 2003, the Plan was amended to provide that, *inter alia*, the Minimum Benefit Guarantee is eliminated in respect of future service (i.e., pension benefits accruing after July 1, 2003) (s. 7.07(b) Plan text);³
 - h. following July 1, 2003, the annual adjustment to pensions in pay under s. 7.07(b), which can be positive or negative, applies to all pension benefits, whether they are determined under the “minimum guarantee pension”, the “DB Pension” or are the pension payment derived from the Member’s Money Purchase Account, provided, however, that the portion of such pension which is defined as an “Eligible Pension” (s. 7.07(a) Plan text), being the portion calculated in respect of service and contributions prior to July 1, 2003, remains subject to the Minimum Benefit Guarantee;
 - i. a pension benefit in pay that was calculated under 7.01(b) (minimum guarantee pension) in respect of service following July 1, 2003, may be reduced under s. 7.07(b), such that it may be reduced below the amount calculated under s. 7.01(b), that is, reduced below the amount determined in accordance with the defined benefit formula, and guaranteed to be paid at the member’s retirement date;
 - j. effective July 1, 2003 and July 1, 2011, the Plan was amended to introduce a scheme for allocating any excess surplus in the Plan’s fund pro rata to the contributions made to the Plan by the members and Carleton (s. 4.08, s. 4.09, s. 4.10 Plan text); and
 - k. under these terms governing the allocation of excess surplus, Carleton and the members may, in effect, allocate a portion of any existing excess surplus to offset required contributions under the terms of the Plan.
5. According to these and other Plan terms, members and Carleton make contributions to the Plan’s fund in respect of the defined benefit component of the Plan.
6. Members and Carleton have an entitlement to the use of excess surplus to the amounts required to fund the defined benefit component of the Plan.
7. While a pension plan may have both defined benefit and defined contribution components,⁴ it must comply with the Act in respect of each of these components or characteristics.
8. “Defined benefit plans provide guaranteed specific benefits at retirement based on an amount fixed by formula and the benefits are not contingent on the level or return on contributions.”⁵

³ For a description of the amendments, see “Preface” to the Plan text, page 2-3 *et seq.*

⁴ *Bathgate v. National Hockey League Pension Society*, 1992 CanLII 7525 (ON SC).

9. The Supreme Court of Canada has described defined benefit and defined contribution provisions as follows:

[19] There are two main categories of pension plans. Defined Benefit plans (“DB” plans) guarantee the employees specific benefits on retirement. The employer is usually responsible to make contributions which ensure the plan’s trust fund can cover the expected future benefits that it will pay out to retiring employees. Actuaries are generally retained to estimate the contributions needed. Should the actuary determine that the funds in the trust are greater than the amount needed to cover future benefits, the plan is said to be in surplus. If the legislation and plan documentation permits, the employer may take a contribution holiday, whereby the surplus funds are used to cover the employer’s contribution obligations. Should the actuary determine that the trust has less money than is needed to cover future benefits, the plan is in deficit and the employer is required to make the necessary contributions to ensure the benefit obligations can be met.

[20] In Defined Contribution plans (“DC” plans), the employer guarantees the amount of contribution it will make for each employee. The benefits on retirement are determined by these contributions and any earnings from their investment. Since no benefits are guaranteed, DC plans do not have surpluses or deficits.⁶

10. Importing a defined contribution concept into a defined benefit plan is “inconsistent with the very definition of a defined benefit pension plan.”⁷

11. The Plan terms permit the administrator to reduce “guaranteed” “DB Benefits” in pay below the benefit amount calculated at the retirement date of a member.

12. The administrator of the Plan is administering the benefits payable under the Plan such that “guaranteed” “DB Pension” benefits in pay are or may be reduced below the amount that was “guaranteed” as a “DB Pension” at a member’s date of retirement in accordance with the terms summarized above.

13. To our knowledge, the Plan is the only pension plan in Ontario that is registered as a single employer pension plan that is both a defined benefit plan and a defined contribution plan, that permits variable benefits to be paid from the plan’s fund, and at benefit levels that are described as “minimum guarantees benefits” that may reduce to an amount below the “guaranteed” amount determined at a member’s retirement date.

14. The Plan is in effect being administered as either a defined contribution plan paying variable benefits from the Plan’s fund, or as a target benefit plan whose defined benefits

⁵ *R. v. Christophe et al.*, 2009 ONCJ 586 (CanLII) citing *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 1998 CanLII 2947 (ON CA), 158 D.L.R. (4th) 497 (Ont.C.A.); see also, *B.C. Nurses’ Union et al v. Municipal Pension Board of Trustees et al*, 2006 BCSC 132 (CanLII) at paragraph 104.

⁶ *Nolan v. Kerry (Canada) Inc.*, [2009] 2 SCR 678, 2009 SCC 39 (CanLII) at paragraphs 19-20.

⁷ *Baxter v. Ontario (Superintendent of Financial Services)*, 2004 CanLII 45494 (ON SCDC) at paragraphs 64-65, adopting the Superintendent’s position on the issue of the distinctions between “defined benefit” and “defined contribution” under the Act.

in pay vary in accordance with capital market performance. Neither category of plan are currently permitted under the Act.⁸

15. For service prior to, and following, 2003, the “guaranteed minimum benefit”, also called a “DB benefit”, is an “accrued benefit” of members.
16. The amendment to the Plan in 2003 was both an adverse amendment and a void amendment insofar as it eliminated the Minimum Pension Guarantee on future service.
17. To the extent that an accrued defined benefit is reduced or subject to reduction, an amendment to a pension plan is void.
18. Section 14(1) of the Act provides, *inter alia*, that an amendment to a pension plan is void if it purports to reduce the amount or commuted value of a pension or a deferred pension accrued under a plan.
19. Section 18 of the Act provides that the Superintendent may refuse to register or revoke the registration of a plan that does not comply with the Act or regulations pursuant to it.
20. Section 87 of the Act empowers the Superintendent to make an order in respect of the administration or other matters of compliance with the Act.

Accordingly, we respectfully ask that the Superintendent investigate this matter and make the appropriate orders and direction regarding the invalidity of the amendment to the Plan that eliminated the Minimum Benefit Guarantee for service following 2003, and revoke the registration of that amendment.

Our client hereby authorizes FSCO to contact the Plan’s administrator on behalf of the its members, discuss the members’ request with the administrator.

Our client has made information requests of the Plan’s administrator and sponsor with respect to the above-mentioned issues, and we reserve the right to make further or supplemental comments and submissions in respect of this matter pending the results of these information requests.

⁸ See new sections 1(1), 39.1 and 39.2 permitting variable benefit accounts or target benefits, which are not yet proclaimed into force. Although the Act has been amended to recognize and permit variable benefit accounts or target benefits to be paid from pension plans, those amendments are not yet in force. Once in force, the Plan’s sponsor would be required to qualify the Plan as a variable benefit or target plan.

Best regards,



Simon Archer

SA:sc/cope 343

cc CUPE Local 2424
Fiona Campbell, Goldblatt Partners LLP