

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
OMERS SPONSORS CORPORATION) Allan Rock, Q.C., Freya Kristjanson, and
) Amanda Darrach, for the Applicant
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Applicant)
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- and -)
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)
OMERS ADMINISTRATION) Jeff Galway and Jeremy Forgie, for the
CORPORATION) Respondent
)
)
Respondent)
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) **Heard: January 21, 2008**

2008 CanLII 3970 (ON SC)

Archibald J.

A) Introduction

[1] The Applicant OMERS Sponsors Corporation (“SC”) is a statutory corporation created under the *Ontario Municipal Employees Retirement System Act, 2006*, S.O. 2006, c. 2 (“*OMERS Act, 2006*”). The Respondent OMERS Administration Corporation (“AC”) is a statutory corporation which was continued under the *OMERS Act, 2006*. The two corporations are charged by statute with the governance of the OMERS Pension Plans. They are contributory defined benefit pension plans that provide benefits to approximately 372,000 members employed in the municipal sector.

[2] The respective roles of the two corporations are set out in the *OMERS Act, 2006*. Section 27 provides that the AC is to reimburse the SC for costs that in the opinion of the AC may lawfully be paid out of the OMERS Pension Funds. Sections 35(2)(c) and 35(2)(d) provide that the AC can provide technical and administrative support to the SC. The *OMERS Act, 2006* does not specify the nature of such costs or support. The SC and the AC have established a Joint

Protocol regarding the categories of costs and support to be provided by the AC to the SC in accordance with the Act.

- [3] The SC and AC bring this application for a declaration that:
- (a) the SC may, pursuant to section 27 of the *OMERS Act, 2006*, lawfully require the AC to reimburse it for the categories of costs set out in the Joint Protocol;
 - (b) the AC may, pursuant to section 27, lawfully reimburse the SC for those costs; and
 - (c) the AC can provide, pursuant to section 35, technical and administrative support to the AC as set out in the Joint Protocol.

[4] Based on an analysis of the *OMERS Act, 2006*, the *Pension Benefits Act, R.S.O. 1998, c. P.8*, and the common law, I conclude that the Joint Protocol is legally valid. The categories of costs requiring reimbursement to the SC are appropriate. Equally, the categories of technical and administrative support to be provided by the AC to the SC, when required, are reasonable and appropriate.

B) The Facts

(a) The OMERS Pension Plans

[5] The facts are taken from Marianne Love's affidavit of October 4, 2007 and Jennifer Brown's affidavits of October 16, 2007 and January 10, 2008. Ms. Love is the co-chair of the SC. Ms. Brown is the Senior Vice-President, Pensions, of the AC. The facts were unchallenged by any party.

[6] OMERS is one of the largest pension plans in Canada. The OMERS Pension Plans provide pension benefits to current and former employees of more than 900 municipal governments, school boards (non-teaching staff), police and fire departments, children's aid societies, electrical utilities, transportation commissions, libraries, public health and housing units, and other local agencies throughout Ontario.

[7] Approximately 80% of the OMERS active members are represented by some 35 unions and bargaining agents. The remaining 20% of active members are management, union exempt, or are otherwise unaffiliated.

[8] Prior to June 2006, the OMERS Pension Plans were governed pursuant to the *Ontario Municipal Employees Retirement System Act, 1961-1962*, and the *OMERS Act, 1990*. The Province of Ontario was the sponsor of the OMERS Pension Plans. The Province was responsible for issues such as plan design and changes to contribution rates. The OMERS Board was made up of 13 members with representatives from participating employers, plan members,

and the government, all of whom were appointed by the Ontario government. The OMERS Board was the administrator of the Pension Plan.

[9] On June 30, 2006, the *OMERS Act, 2006* was proclaimed. The SC was created as a new corporation without share capital, and the OMERS Board was renamed the AC and continued as a corporation without share capital. The governance of the OMERS Pension Plans was assumed by these two statutory corporations. Each of the SC and the AC were given separate duties with regard to the governance of the OMERS Pension Plans. The government is no longer part of the governance structure.

(b) Role of the SC

[10] The SC is made up of fourteen Members who act as a board of directors for that corporation. The Members are appointed by sponsor groups who participate in the OMERS Pension Plans. Seven Members are appointed by employers and seven by plan members. In most cases, decisions require majority approval. Some key decisions require a super-majority of votes (see ss. 26 and 33(2)).

[11] Section 24 of the *Act* provides that the objects of the SC are the following:

- (a) to make decisions about the design of benefits to be provided by, and contributions to be made to, the OMERS Pension Plans; and
- (b) to perform such other duties as may be provided under this Act.

[12] Subsection 16(1) further provides that the SC shall determine the terms and conditions of the OMERS Pension Plans, subject to the restrictions set out in the statute. In particular, the SC may amend the OMERS Pension Plans, including the contribution rates (ss. 18 and 25).

[13] The OMERS governance structure differs from typical private or public sector pension plans. The SC, as sponsor, has no other purpose than to participate in the governance of the OMERS Pension Plans. Its membership is equally divided between employers and unions. Its members serve as directors of the SC Corporation and are subject to the fiduciary duties that accompany that role. By contrast, in a typical single-employer pension plan, the employer serves as both plan sponsor and administrator.

(c) Role of the AC

[14] As provided in section 34 of the *OMERS Act, 2006*, the AC's objects are: (1) to act as administrator of the OMERS pension plans and as trustee of the pension funds; (2) to advise and assist the SC; and (3) to act as agent of the administrator of other pension plans and to manage other pension funds in accordance with agreements authorized by section 29.

[15] Effective June 29, 2009, the composition of the AC and the method of choosing its members (who effectively function as a board of directors) will be specified by the by-laws of

the SC (section 33(1)). A member of either the AC or SC is not permitted to hold office in the other corporation (sections 23(3) and 33(4)).

[16] The initial appointments to the AC were made by the Lieutenant Governor in Council for terms up to three years, with subsequent appointments up to June 29, 2009 to be made directly by employers, employer associations, employee associations and retiree associations. Currently, the AC board comprises seven employer and seven plan member representatives.

[17] As plan administrator, the AC acts as a fiduciary in determining which expenses are to be paid out of the plan. The *Pension Benefits Act* stipulates that a pension plan administrator must exercise the care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person (s. 22 (1)). The administrator must also use all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business, or calling, ought to possess (s. 22(2)). This standard of care signifies that the AC must act reasonably and prudently in considering a request from the SC that certain SC costs should be paid from the OMERS Pension Plan funds.

(d) Reimbursement of Costs and Provision of Support by the AC to the SC

[18] The *OMERS Act, 2006* requires that the AC reimburse the SC, upon the SC's request, for any expenses which may lawfully be paid out of a pension fund. Section 27 provides:

The Sponsors Corporation may require the Administration Corporation to reimburse it from any pension or other fund for any of its costs that in the opinion of the Administration Corporation may lawfully be paid out of the fund.

[19] The legislation also allows the AC to provide the SC with reasonable support, both technical and administrative, as set out in section 35(2):

35(2) For furthering its objects and without limiting the generality of subsection (1), the Administration Corporation may,

...

(c) provide reasonable technical support to the Sponsors Corporation, including, without limitation, providing actuarial advice and cost estimates, estimates of the impact of changes to the OMERS pension plans or other changes on contribution rates and advice with respect to any administrative or other issues arising out of proposed changes to the pension plans;

(d) provide reasonable administrative support to the Sponsors Corporation.

(e) The Section 28 Levy Power

[20] The second source of funding for the SC is the imposition of a fee upon employers who participate in an OMERS pension plan and employees who are members of an OMERS pension plan, pursuant to section 28 of the Act.

28(1) The Sponsors Corporation may, by by-law, require the employers who participate in an OMERS pension plan and the members of an OMERS pension plan to pay a fee for the purpose of funding any of the Sponsors Corporation's costs that may not lawfully be paid out of a pension fund.

For convenience, I will refer to fees collected under s. 28 as the "levy."

[21] The s. 28 levy is payable only by participating employers and active employees. The legislature identified two specific circumstances in which the SC's costs must be paid by the levy (section 28(2)):

- i. expenses relating to the statutory "supplementary decision-making mechanisms" described in s. 26 of the Act.

Section 26 provides that the SC is to make decisions by majority vote except where a super-majority vote is required for certain key changes, such as a change in benefits, that are listed in section 26(2). The supplementary decision-making mechanism is mediation or arbitration unless the SC, by bylaw, establishes alternate mechanisms. The s. 26 mechanism is therefore engaged when the Members are unable to form the required consensus.

- ii. "the expenses incurred for collecting or administering" the levy.

If the AC collects the levy on behalf of the SC, then the SC "shall reimburse" the AC for costs of collection (s. 28(5)). The SC "shall establish a separate fund for fees collected under the levy, and the money in the fund may only be spent for the purpose of funding the SC's costs that "may not lawfully be paid out of a pension plan", and for no other purpose. (s. 28(6) and (7)).

(f) Government Start-up Funding

[22] In addition to the statutory sources of funding, the Ministry of Municipal Affairs and Housing committed to provide the SC with interim start-up funding under a Transfer Agreement. The last instalment of the funds will be received by the SC in June 2008. The Transfer Agreement will expire on March 31, 2009.

[23] As a condition of the interim start-up funding, the Ministry required the SC to establish a mechanism for self-funding for the long term. The Ministry identified four components of a sustainable self-funding model. They are as follows:

- (a) the levying mechanism pursuant to s. 28;
- (b) an enabling by-law to institute the levy;

(c) the reimbursement of SC costs and technical and administrative support to be provided by the AC as set out in the Joint Protocol; and

(d) an Application to the Ontario Superior Court of Justice to confirm the lawfulness of the Joint Protocol.

(g) Development of the Joint Protocol

[24] The OMERS legislation does not set out the kinds of expenses which may “lawfully” be paid out of a pension fund, or what support can be construed as being “appropriate” in the context of the governance structure.

[25] The SC and the AC decided that in order to ensure the good governance of the OMERS Pension Plans, they would work cooperatively to determine what categories of expenses and support could be paid and provided from the OMERS Pension Fund pursuant to sections 27 and 35 of the *Act*. The combined efforts of the two corporations produced the Joint Protocol, which is attached to this judgment. The SC and AC were assisted in the negotiations by a government-appointed facilitator, Mr. Martin Teplitsky. The Joint Protocol was approved by both the SC and the AC Boards in June, 2007.

(h) Types of Costs To be Reimbursed Under Joint Protocol

[26] Schedule “A” to the Joint Protocol sets out those costs which in the opinion of the SC and the AC may properly be reimbursed, and the types of support which may properly be provided. The main criterion employed by the SC and AC in developing the Joint Protocol was whether an item was necessary for the administration of the OMERS Pension Plans, including for plan governance.

[27] The categories of costs incurred by the SC which are authorized to be paid by the AC under the Joint Protocol include,

- (a) SC education and development related to plan governance;
- (b) Cost estimates of proposed plan changes;
- (c) Establishment of conditions for employer participation;
- (d) Facilities and technical, administrative, and secretarial support for SC meetings;
- (e) Meeting expenses of SC members (travel, remuneration, and business expenses);
- (f) Arrangement of the annual SC audit and auditor’s fees;
- (g) Preparation, printing, and distribution of SC’s annual report;
- (h) Directors and Officers and fiduciary insurance; and

- (i) Communications with plan members.

[28] Schedule A to the Protocol goes on to outline the types of support that the AC can provide to the SC: facilities and technological support for SC meetings, assistance with the preparation of the SC annual report, assistance with SC education and development, support in connection with SC requests for cost estimates in respect of proposed plan changes, support in establishing conditions for the participation and termination of participation in the pension plans by employers, support in arranging director and officer and fiduciary insurance, and support in the SC's communications with members and employers.

[29] The SC has prepared an operating budget for the calendar year 2007. While much of the 2007 Budget was maintained through the use of provincial funds pursuant to the Transfer Agreement, if the provincial funds were not available and the SC were to rely solely on the self-funding model, the total budget would have been funded as follows:

- (a) 61% of the budget represented costs stipulated under the Joint Protocol, for which the SC would require reimbursement from the AC;
- (b) 17% of the budget represented the value of technical and administrative support under sections 34 and 35 of the *OMERS Act, 2006*;
- (c) 22% of the budget represented costs funded by levy pursuant to s. 28 of the *OMERS Act, 2006*;

(i) **Shareholders' Notice Program of this Application**

[30] On Friday, October 12, 2007, counsel for the SC and the AC brought a motion in the Superior Court of Justice for directions with regard to the appropriate notice to be given to the members and sponsors of the OMERS Pension Plans, along with all other potentially interested parties. An Order was issued which provided for the following Notice:

- (a) **Service on Sponsors (Employers and Unions/Bargaining Agents):** The Notice of Application, a one page Special Notice, and a copy of the Order were served on (i) each designated OMERS contact person at each participating employer, and (ii) the central office of each of the 35 unions and bargaining agents (completed on October 23, 2007). In total, 952 packages of these materials were mailed in accordance with the Order;
- (b) **Mailing to Active Members of Plans:** The Special Notice together with the OMERS Newsletter were mailed to active members at their last known address or distributed to active members by their Participating Employers. In total, 246,890 English version newsletters were sent or distributed to active members, and 5,385 newsletters were mailed to active members on disability waiver. The English version was mailed between October 29 and 31, 2007. The

French version was mailed to 4,727 members or provided to their Participating Employers on November 7-8, 2007;

(c) **Mailing to Other Members of Plans (retirees, inactive, deferred vested):** The Special Notice was included in newsletters and mailed to all other OMERS Pension Plans members and to the designated OMERS contact person at each Participating Employer (completed between October 30-31, 2007 for English newsletters, and, for French newsletters, due to a delay in translation, on November 7, 2007). In total, 96,555 newsletters were mailed to English-speaking retirees, and 735 newsletters were mailed to French-speaking retirees. In addition, 26,195 newsletters were mailed to English-speaking inactive and deferred vested members, and 609 newsletters to French-speaking inactive and deferred vested members;

(d) **Participating Employers:** The Special Notice was included in the OMERS newsletters for Participating Employers.

(d) **Newspaper Publication:** The Special Notice was published (in English in the national edition of the Globe and Mail, Wednesday October 24, and Saturday October 27, 2007; and in the Montreal Gazette, Wednesday October 24, and Saturday October 27, 2007; and in French in La Presse on Wednesday October 24 and Saturday, October 27, 2007); and

(e) **Website Posting:** The Notice of Application, the supporting affidavits, the Special Notice, and a copy of the Order were posted on the AC website on October 19, 2007.

[31] The AC received a total of sixteen telephone calls with inquires regarding this matter. The AC also received two emails. The AC responded to all of the inquiries. No follow-up to any of these communications has been received by either the AC or the SC.

[32] The Order provided that any Participating Employer, Union, or Plan Member could participate as a full party in this application by serving a Notice of Application on or before December 14, 2007. As of January 10, 2008, no Notice of Appearance had been filed with the Court in this matter. The SC and the AC have no knowledge of any objector.

[33] The SC and the AC have complied with the notice ordered by the Superior Court of Justice. The breadth and service of the Notice is also sufficient to permit me to adjudicate upon this application.

C) **The Legal Issues**

[34] The SC and the AC submit that since the SC will incur the expenses and support requirements in the Joint Protocol in the discharge of its statutory duties, including plan

governance, and the expenses and support are required in the public interest, they may properly be paid out of the fund pursuant to ss. 27 and 35 of the *OMERS Act, 2006*. This submission is based on the statutory nature of the plans and their unique governance structure.

[35] In interpreting the provisions of the *OMERS Act, 2006*, including the question of whether a cost is one which may be “lawfully” paid out of the pension fund, a Court must consider the Act in the context of the OMERS Pension Plans text, the *Pension Benefits Act* and the common law applicable to the payment of expenses from pension funds.

[36] Both the SC and AC submit that the governance model of the OMERS Pension Plans differs significantly from the traditional sponsor/administrator employer’s role typically found in pension plans. Generally, the common law is permissive with regard to the payment of administrative expenses from a pension fund where the applicable legislation and the plan documents allow for their payment. As the *Pension Benefits Act* does not speak directly to the issue of the types of expenses which may be paid out of a pension fund (other than the expenses of an administrator or an agent thereof), the court must look to the context and language of the entire *OMERS Act, 2006*.

[37] Taken together, and within the context of the common law and the overall *OMERS Act, 2006*, and in light of the statutory duties of the SC and the AC, the SC and AC submit that the Joint Protocol sets out categories of expenses and support that may properly and lawfully be paid out of the OMERS Pension Funds. I agree entirely with these submissions.

(a) **The Traditional Roles of Sponsors and Administrators in Pension Plans**

[38] In a traditional single employer pension plan, the employer is both plan sponsor and plan administrator. These distinct roles give rise to separate duties.

[39] In its role as plan sponsor, the employer decides whether to establish a plan and on its funding design. As plan sponsor, the employer owes no fiduciary duties to the plan members. In deciding whether to establish or terminate a plan, in defining the categories of employees who are eligible for membership, and in determining what benefits will be offered, the sponsor may act in its own interests and may prefer the company’s interests over those of the employees. See *Imperial Oil Limited v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (P.C.O.) at para. 31 and *Sutherland v. Hudson’s Bay Company* (2007), 61 C.C.P.B. 171 (Ont. Sup. Ct.) per Siegel J. at paras. 310-311.

[40] Once the pension plan is established, the employer makes the following decisions as plan administrator:

- (a) the enrolment of members;
- (b) the calculation and payment of benefits under the plan; and
- (c) the investment of the assets of the plan.

In its role as administrator, the employer is a fiduciary. The duty of care is confirmed in s. 22 of the *PBA*. Since the administrator must act in the best interests of the plan, its expenses may lawfully be paid out of the fund.

[41] Unlike an employer, the SC has no independent corporate interests beyond fulfilling its statutory duties and ensuring the health and viability of the OMERS Pension Plans. Although the SC is composed of employer and plan member appointees, as directors of the SC Corporation, the Members owe fiduciary duties to the SC Corporation and must act in its best interests. In the context of the overall Act, the only interests of the SC would appear to be the proper governance of the OMERS Pension Plans.

[42] The SC has significant statutory duties related to the governance of the Plan. By statute, it is assigned certain duties that traditionally are performed by the administrator. For example, under sections 30 and 31, the SC is required to hire auditors and to publish annual reports on its activities. Under section 25(2) of the Act, the SC may decide on the timing of the filing of a valuation report under the *Pension Benefits Act*, which is traditionally an administrator's function.

(b) Payment of Expenses at Common Law

[43] In *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1, the Ontario Court of Appeal considered the issue of payment of expenses in a traditional single employer plan. The Court determined that the *Pension Benefits Act*, the common law, and the plan text should be examined to determine whether pension plan expenses may be properly paid from the pension fund (paras. 54-65).

[44] The Court held that where there is no governing legislative provision, expenses relating to the administration of a pension plan may properly be paid out of a pension fund where the pension documents (the plan text and the trust in *Kerry*) reasonably permit them to be paid out. Expenses relating to sponsor functions such as the establishment of a pension plan and the costs associated with plan design would not be properly paid out of a pension fund (see paras. 56-58). See also *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 538 (B.C.C.A.) at paras. 57-59.

[45] The essential point is the manner in which the SC/AC arrangement differs from the traditional single employer plan, taking OMERS out of the ambit of *Kerry* and permitting sponsor expenses to be paid out of the fund.

(c) Payment of Expenses Under the *Pension Benefits Act*

[46] The Ontario *Pension Benefits Act* does not speak directly to the issue of the payment of expenses from a pension fund, except for subsections 22(9) and 22(11). It does, however, allow the administrator to be reimbursed for any expenses which it incurs that are related to the administration of the pension fund, subject to the requirements of common law and the pension plan text. Section 22(9) provides that:

The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

[47] This section suggests that where the SC carries out functions that would normally be fulfilled by the plan administrator, its expenses may be paid out of the plan.

(d) The Text of the Plan and the *OMERS Act, 2006*

[48] The provisions of the OMERS Pension Plans allow for the payment of expenses to the SC from the OMERS Pension Funds by reference to the *OMERS Act, 2006*:

The benefits payable under this Plan, the expenses of the Administration Corporation that constitute fees and expenses of administering this Plan, and costs of the Sponsors Corporation described in section 27 of the *OMERS Act, 2006* shall be paid out of the Fund.

(OMERS Primary Pension Plan Text, s. 2(4), Amended and Restated as of April 30, 2007; OMERS Supplementary Pension Plan text, s. 3(4)).

[49] The interpretation of the plan is therefore an exercise in statutory interpretation according to Driedger's often-cited modern approach. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. See e.g. *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 at p. 580.

[50] A review of Hansard indicates that the *OMERS Act, 2006* was enacted to eliminate the Ontario government's involvement as sponsor and to establish a system of plan governance that gave equal participation to municipal employers and unions (Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 152 (1 June 2005) at 7348-9 (Hon. John Gerretsen)).

[51] Unlike a traditional employer or sponsor, the SC has no funds of its own. Its only sources of funds are reimbursement under s. 27 for costs and the provision of "in kind" services by the AC under s. 35, and (ii) money collected by the levy upon employers and active employees under s. 28. Whatever may not be paid out of the plan must be funded by the levy. I also note that s. 27 is titled "Recovery of Costs" and that s. 28 is titled "Fees to Fund Other Activities."

[52] Under s. 28, the SC may by by-law collect fees for those costs "that may not be lawfully paid out of a pension fund." The only example of an expense that must be paid with s. 28 funds are expenses relating to the "supplementary decision-making mechanisms" in s. 26. The supplementary decision-making process is reserved for those situations where the Members of the SC are unable to form the required consensus. In other words, the costs are incurred to sort

out separate stakeholder interests. This is the situation which most closely reflects collective-bargaining type disputes, which under a typical pension plan cannot be charged to the plan because they are associated with distinct employer/employee interests rather than the best interests of the plan as a whole.

[53] I further note that only employers and active employees are required to contribute to a s. 28 levy. Retired members, former members, beneficiaries, and former participating employers are not required to contribute to the levy under s. 28. Using the levy for costs relating to the good governance of the plan as a whole could create an unequal burden among the beneficiaries of the OMERS Pension Plans. From my perspective, that would not appear to be the legislature's intention unless there was express language to support such an interpretation.

D) Analysis of the Joint Protocol

[54] I conclude that the SC and the AC have devised appropriate categories of expenses and support as set out in the Joint Protocol. The Joint Protocol ensures that expenses and support not related to the good governance of the OMERS Pension Plans are not to be paid from the OMERS Pension Fund. For example, expenses or support related to the recruitment of Members of the SC are not eligible for the payment of expenses or the provision of support, as those are related to activities of individual sponsor groups rather than the SC as a whole in performing its governance role. (Schedule "A", Item 8 of Joint Protocol).

[55] The Joint Protocol provides that in interpreting s. 27, expenses incurred by the SC in the interests of the OMERS Pension Plans as a whole, the governance of the Plans, and for the purpose of carrying out statutorily mandated duties, will be reimbursed by the AC. The categories of reimbursable costs agreed upon in Schedule A are directed at assisting the SC to perform its statutory duties. For example, costs incurred in connection with the SC's meetings (e.g. facilities and technological support, administrative/secretarial support, member remuneration and travel expenses) are costs that the SC must incur in the course of fulfilling its statutory objects. Similarly, costs relating to SC education and development, and expenses incurred in costing proposed plan changes, are all costs directly associated with the SC's performance of its duties.

[56] The Joint Protocol permits sponsor-type expenses, relating to plan design and governance, to be paid out of the fund. This is a departure from the traditional model of pension plan design. However, the structure of the SC makes such a departure appropriate. The membership of the SC provides equal representation of employers and plan members. The SC Members owe duties to the SC Corporation. The SC, in turn, has statutory duties under the *OMERS Act, 2006*. I am satisfied that the SC is charged with acting in the best interests of the Plan as a whole and, therefore, may be reimbursed and supported by plan funds when it works in that capacity.

[57] From my perspective, the costs in the Joint Protocol are costs that may be “lawfully” paid from the fund. Those costs that relate to sorting out separate stakeholder interests rather than the interests of the Plan as a whole will be met by the s. 28 levy.

[58] Provided that the SC’s costs requests are reasonable and are otherwise in accordance with the AC’s Policy in respect of SC requests for reimbursement or support, the AC will have acted prudently and in a manner consistent with its statutory and fiduciary duties in reimbursing the SC for these costs out of the OMERS pension plan funds.

[59] In the Joint Protocol, a similar interpretation is given to the reasonable technical and administrative support to be furnished by the AC to the SC where the support is not in the interests of the stakeholders as a whole. For example, item one of Schedule A refers to technical and administrative support to assist the SC with its meetings. As is noted in the column headed “Rationale” in Schedule A, given that facilities and technical support already exist with the AC, it is reasonable to make these facilities/services available to the SC to avoid duplication of costs. The types of AC support contemplated in Schedule A to the Protocol come within these statutory provisions.

E) Conclusion

[60] In my view, this interpretation of the categories of costs and support in the Joint Protocol best accords with a proper reading of the overall scheme and purpose of the Act. It recognizes the important roles of each statutory corporation in the governance of the OMERS Pension Plans. It reduces duplicative costs. It reduces the burden of the levy. It accords with the plain language of the sections, the legislative framework including the *Pension Benefits Act*, and the common law.

[61] In light of the unique nature of the governance structure of the OMERS Pension Plans, and mindful of the duties owed by both the SC and the AC to the members of the OMERS Pension Plans, I am of the view that the categories of expenses and support outlined in Schedule “A” to the Joint Protocol may be paid and provided legitimately from the OMERS Pension Fund.

Archibald J.



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Sponsors Corporation

2008 CanLII 3970 (ON SC)

PROTOCOL

B E T W E E N :

OMERS SPONSORS CORPORATION (SC)

- and -

OMERS ADMINISTRATION CORPORATION (AC)

WHEREAS pursuant to Section 27 of the *Ontario Municipal Employees Retirement System Act of 2006* (the “Act”), the SC may require the AC to reimburse it for any of its costs that in the opinion of the AC may lawfully be paid out of the pension funds relating to the OMERS pension plans (the “Funds”);

AND WHEREAS pursuant to Section 17 of the Act, AC is the administrator of the OMERS pension plans and the Funds and is subject to the requirements of the *Pension Benefits Act* (Ontario) (the “PBA”);

AND WHEREAS pursuant to Section 28(1) of the Act, the SC may levy employers who participate in an OMERS pension plan and the members to fund any SC costs which may not lawfully be paid out of a Fund;

AND WHEREAS pursuant to Section 35(2)(c) and (d) of the Act, the AC may provide reasonable technical and administrative support to the SC;

AND WHEREAS the parties wish to establish a protocol to continue their cooperative approach to these issues and to ensure that each is fulfilling its statutory obligations with respect to reimbursements, levies and providing technical and administrative support;

The SC and AC have agreed to proceed as follows:

1. Annexed as Schedule “A” is a list of categories which the SC and AC, after consultation with their respective solicitors believe are either appropriate or inappropriate for reimbursement or for the provision of technical or administrative support. A brief rationale is also included.
2. SC and AC agree to approach the Financial Services Commission of Ontario (“FSCO”) with a view to obtaining any confirmation or acknowledgement of the propriety of Schedule “A” that FSCO is able to provide pursuant to the PBA.
3. If FSCO does not provide any acknowledgement or confirmation, or if such confirmation or acknowledgement is not acceptable to AC or SC, AC and SC together will apply to the Superior Court of Ontario for its opinion and interpretation of (1) AC’s authority and responsibility under the Act and the PBA relating to the reimbursement of costs by AC to SC and the provision of technical and administrative support by AC to SC; and (2) SC’s entitlement to reimbursement of costs and provision of technical and administrative support from AC in accordance with the general outline of the cost and support items contained in Schedule “A”.
4. SC will submit its claims for reimbursement or support to the AC with reasonable particulars and supporting documentation.
5. If the AC, in its opinion, declines to reimburse or provide any requested support, then the parties will consult and endeavour to resolve their differences.
6. Failing resolution with respect to a particular request, AC and SC, may apply to the Superior Court of Ontario for its opinion and interpretation relating to the specific request for reimbursement or provision of support, as applicable. Subject to this paragraph 6, AC and SC shall share equally the costs of any such court application. AC may in its discretion and subject to the Act and the PBA elect to have all of the costs relating to such court application paid by AC.
7. The SC will use available government funding to the extent possible for its costs. In the event that the issue of its entitlement to reimbursement and support is not finally determined prior to depleting its funding, AC agrees to provide reimbursement pursuant to Schedule “A”.
8. The AC will advise the SC immediately if there is any challenge to any reimbursement or support already provided by the AC to the SC and the parties will cooperate in addressing this issue. If there is a final binding determination by either FSCO or a court of competent jurisdiction that the reimbursement or support provided was inappropriate or not permitted under the Act or the PBA (“Adverse Determination”), SC will return to the

AC any reimbursement made or the fair value of any support provided together with interest from the date of

reimbursement or the date the support was provided, as applicable, at a rate equal to the rate of return earned in the applicable Fund over such period. The provisions of this paragraph 8 shall survive the termination of this Protocol.

9. This Protocol may be amended by written agreement between AC and SC.

10. Following the application of the parties to FSCO and the Superior Court of Ontario as set out in paragraphs 2 and 3 of this Protocol, the Protocol may be terminated by either party in accordance with the Act by giving the other party seventy five (75) days prior written notice.

DATED at Toronto this 27 day of JUNE, 2007.

OMERS ADMINISTRATION CORPORATION

By: Michael Norega
Name: MICHAEL NOREGA
Title: CHIEF EXECUTIVE OFFICER

By: John W. Macdonald
Name: JOHN W. MACDONALD
Title: CHIEF OPERATING OFFICER

OMERS SPONSORS CORPORATION

By: [Signature]
Name: Co-Chair
Title: Jim O'Loof

By: _____
Name: _____
Title: Co-Chair

Schedule “A”

Examples of AC’s Determination of Support and Expense Reimbursement Requests by SC

Item				
		Eligible for Payment by AC	Eligible for support to be carried out by AC	Rationale
1.	Meetings of the SC: facilities and technological support	Yes	Yes	Presumes that AC is providing the support, not a third party. Facilities and technological support already exist for AC; reasonable and appropriate to provide to SC to avoid unreasonable duplication of costs.
2.	Meetings of the SC: administrative/secretarial support	Yes	No	Secretarial support would be provided by third party to avoid a real or perceived conflict of interest. Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration as it encourages effective record keeping of SC matters.

Item		Eligible for		
		Payment by AC	support to be carried out by AC	Rationale
3.	Arranging annual audit of SC: auditor's fees	Yes	No	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration also supports accountability.
4.	Preparing SC annual report: printing and distribution	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration also supports accountability.
5.	SC education / development related to pension plan governance	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration. Training and education improves governance, attendance at conference (either as a participant or speaker) benefits the Plan profile/confidence

Item		Eligible for		
		Payment by AC	support to be carried out by AC	Rationale
6.	SC request cost estimates of proposed plan changes	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration.
7.	Establish conditions for participation in the pension plans with associated employers and termination of participation in the pension plans by employers	Yes	Yes	Payment would be considered to be for the benefit of the administration of the Plan and support prudent administration.
8.	Recruiting SC members	No	No	Individual sponsor group responsibility. Constitutes a reimbursement to a sponsor group rather than SC as the sponsor group bears the responsibility of identifying and nominating the appropriate candidate.
9.	Recruiting AC members	No	No	As in 8 above

Item		Eligible for		
		Payment by AC	support to be carried out by AC	Rationale
10.	Meetings of the SC: member remuneration and travel and business expenses	Yes	No	SC Meetings that are required for effective pension plan governance, e.g.: <ul style="list-style-type: none"> • to receive reports from AC; • to perform plan governance tasks such as decision on frequency of valuation filings
11.	Development of initial SC by-laws: legal costs	No	No	Not required for plan administration; required for sponsor role. Legitimate one-time start-up cost to be paid by current sponsor.
12.	Recruiting members of advisory committees	No	No	As in 9 above
13.	Legal costs required for dispute resolution re: specified changes	No	No	Section 28(2) of the OMERS Act, 2006 prohibits such costs to be paid for by Plan.

Item		Eligible for		
		Payment by AC	support to be carried out by AC	Rationale
14.	Obtain independent advice which is duplicative of advice already provided by the AC (e.g. cost estimates, valuation).	No But AC will consider costs where warranted on case by case basis	No	Substantially reduces duplication of effort.
15.	D&O and Fiduciary Insurance and related advisory services	Yes	Yes	The AC will consider costs, subject to further discussion and negotiations with insurers and related advisory consultants
16.	Communications with plan members, sponsors, public, web support, etc., except for communication on matters prior to a final decision by the SC	Yes	Yes	Required for effective plan governance, to ensure public and member confidence in plan as a whole and accountability

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DATE: 20080206

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

OMERS SPONSORS CORPORATION

Applicant

- and -

OMERS ADMINISTRATION CORPORATION

Respondent

REASONS FOR JUDGMENT

Archibald J.