OMERS ADMINISTRATION CORPORATION

APPEALS COMMITTEE

In the Matter of an Appeal by the Appellant

PANEL:	David Tsubouchi	Panel Chairperson
	Darcie Beggs	Panel Member
	Paul Elliott	Panel Member

BETWEEN

Appellant	)	Self- represented
	)	
	)	
- and -	)	
	)	
OMERS Administration Corporation	)	Counsel for OMERS
	)	
	)	
	)	
	)	
	)	Independent Legal Counsel
	)	
	)	Heard May 26, 2020
	)	

Overview

[1] A hearing panel of the Appeals Committee (the "**Panel**") of the Board of Directors of the OMERS Administration Corporation ("**OMERS**") convened a hearing in writing in respect of an

appeal initiated by the Appellant from a determination of the President of the OMERS dated September 19, 2019 (the "**President's Determination**").

[2] The Appellant brought the appeal from the President's Determination pursuant to article 2.1 of the OAC By-Law No. 4, which provides any person aggrieved by a determination made by the President relating to benefits under any provision of the OMERS Pension Plans with the right to appeal to the Board of Directors from such determination. The Appellant claims that OMERS acted without authority when it purported to make corrections to certain contributions made to the OMERS Primary Pension Plan (the "**Plan**") on his behalf in error. He seeks to have the erroneous contributions transferred to his additional voluntary contribution ("**AVC**") account.

[3] OMERS (or the "Respondent") takes the position that the Appellant's appeal should be denied as OMERS acted within its authority in correcting the contributions made in error.

[4] The Appellant did not request an oral hearing and the appeal proceeded entirely in writing. The Panel received 31 documents the parties had submitted for the appeal in a joint book of documents. Those documents were treated as exhibits for the purposes of the appeal. In addition, both parties filed extensive written submissions and briefs of authorities and case law.

[5] After considering the documents and submissions of both parties, the Panel decided to dismiss the appeal. These are the reasons for our decision.

Facts

[6] The Appellant is an employee of ♦ and a member of the Plan.

[7] In 2016, ♦ identified that it had erroneously included overtime pay in the contributory earnings of certain employees, including the Appellant. OMERS worked with ♦ to correct this error.

[8] In 2017, ♦ provided OMERS with corrected contributory earnings information for the period of 2010 onward.

[9] Based on the information provided by ♦, OMERS made corrections to the Appellant's contributory earnings information, which had been overstated by $1,041.91 for 2010 and $1,335.96 for 2016. These errors resulted in contributions made in error of $101.07 for 2010 and $195.05 for 2016, for a total of $296.12 (the "**Contributions Made in Error**").

[10] Because OMERS could not pay out funds from the Plan to ♦, to correct the Contributions Made in Error, OMERS provided ♦ with a credit towards future contributions in an amount equal to the Contributions Made in Error, plus interest calculated at the prime rate.

[11] The Appellant received payment from ♦ in respect of the Contributions Made in Error, along with interest.

[12] In correcting the Contributions Made in Error, OMERS followed an administrative practice for the correction of contributions made in error to the Plan that is set out in a resolution of the OMERS Board made September 22, 2005 (the "**Resolution**"). The Resolution provided as follows, with paragraph 2 dealing specifically with employer overpayments:

> The Pension Committee at its meeting on September 20, 2005 recommended the following resolution to the Board for final approval.
>
> RESOLUTION

It was moved by ■ and seconded by ■ that:

1. Employers be required to pay interest on any outstanding balances discovered after the Form 119 process has been completed. Interest at the rate of prime rate plus 1½ per cent should be applied starting February 1st of the year following the reconciliation year.

2. **OMERS will credit interest from the same point in time (i.e. February 1st of the year following) to employers in cases of over remittances using only the prime rate of interest**.

3. The new policy will be effective for the 2006 reconciliation year.

4. OMERS staff under the direction of the Acting Senior Vice President, Pensions be authorized to take all necessary action to implement and give effect to the foregoing.

Carried.

[Emphasis added].

[13] The Appellant disputed OMERS' authority to correct the Contributions Made in Error, and requested that the Contributions Made in Error be considered AVCs as of the date received, and subject to the pension fund rate of return over that period. He sought a determination from the President of OMERS of his challenge to the corrections.

[14] The President's Determination concluded that OMERS staff acted in accordance with the Plan text and the Board Process, and with the appropriate authority, in correcting the Contributions Made in Error. The President's Determination also concluded that there was no mechanism for contributions made in error to be allocated as AVCs.

[15] The Appellant appealed the President's Determination to the OMERS Board of Directors Appeal Committee as provided for under the Plan.

Issues

[16] The following issues were identified by the parties as the issues to be determined on this appeal:

1. Did OMERS have the authority to make the corrections it made to the Contributions Made in Error, and did OMERS have authority to use the methodology it did to correct the Contributions Made in Error?
2. Whether OMERS had the ability to re-classify the Contributions Made in Error as contributions to the Appellant's AVC account.

Relevant Statutory Provisions and Plan Terms

[17] In deciding those two issues, the Panel was directed to and considered various statutory provisions and Plan terms. The relevant provisions are set out in Appendix "A" to these reasons for decision.

Parties' Submissions

Appellant's Submissions

Issue 1: Did OMERS have the authority to make the corrections it made to the Contributions Made in Error, and did OMERS have authority to use the methodology it did to correct the Contributions Made in Error?

[18] The Appellant argues that the Administrator had a duty to return the overpayments made on his behalf and to refund the amount of the overpayments along with any investment growth. The Appellant argues that by not doing so, and by following a different methodology to correct the overpayments, OMERS failed to show the care, diligence and skills required of it as a

pension plan administrator as set out in the *Pension Benefits Act*, RSO 1990, c P.8 ("**PBA**"), ss. 19(1) and 22(1). Subsection 19(1) of the PBA requires a plan administrator to ensure that the pension plan and pension fund ensure that the pension plan and the pension fund are administered in accordance with the PBA, its regulations and the rules of the Financial Services Regulatory Authority of Ontario (the "**Authority**"). Subsection 22(1) requires OMERS, as the administration of the Plan, to exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

[19] The Appellant argues that the methodology used by OMERS breached ss. 19, 22, 62.1 and 63 of the PBA. According to that methodology, OMERS provided a credit to the employer in the amount of the overpayment plus interest, with the expectation that the employer would then refund the overpayment plus interest to the employee—in this case, the Appellant. He argues that such process does not demonstrate the necessary care, diligence and skill required of OMERS in the administration of the Plan. In his submission, OMERS should not have entrusted the employer (♦) with the responsibility to correct the error, because it was the employer who made the error in the first place. OMERS should not have given the employer the authority to calculate the amount of the overpayment, and to pay the refund. The Appellant argues that the employer should not have been allowed to correct its own mistake and by allowing this OMERS breached its fiduciary duty to the Plan members.

[20] The Appellant characterizes the credit that OMERS provided to ♦ as a withdrawal of funds from the Plan. Citing ss. 62.1 and s. 63 of the PBA, the Appellant argues that the legislation does not permit OMERS to withdrawal funds from the Plan without the consent of the

Chief Executive Officer of the Authority.[1] OMERS did not file an application for such consent under s. 63 of the PBA. As such, OMERS as not authorized to pay a refund to ♦ on account of the Contributions Made in Error and interest. He submits that the only options were for OMERS to deem the amount of the Contributions Made in Error an AVC or to transfer it to his RRSP. He argues that a reasonable person would be concerned by OMERS withdrawing funds in circumstances where the legislation prohibits it.

[21] The Appellant further agues OMERS contravened s. 65 of the PBA by transferring funds from the Plan to ♦ to correct the Contributions Made in Error. Section 65 of the PBA prohibits the administrator from purporting to "assign, charge, anticipate or give as security money" from the pension fund to the employer and deems any such transaction to be void. He does not accept the OMERS' position that the credit OMERS provided to the employer (which ♦ subsequent paid to him, with interest) was not a transfer of funds, and that it was in fact ♦ that paid him the refund. Considering the credit OMERS has provided to ♦ to be a transfer of funds from the Plan, the Appellant asserts that the correction of the Contributions Made in Error contravened s. 65 of the PBA. He further submits that the transaction cannot be characterized as a lawful "credit" from OMERS to ♦ because it does not meet the requirements of s. 55.2 of the PBA or s.147.1(7) of *Income Tax Act* (Canada), RSC 1985, c 1 (5th Supp) (both of which deal with employer payments *into* the pension fund by way of letters of credit).

[22] With respect to the Resolution that OMERS relies on as having established the Board Process for the correction of contributions made in error to the Plan, the Appellant submits that the Resolution was not valid as it was not "passed by the members" as required by s. 116 of the

[1] The Appellant's submissions refer to the Financial Services Commission of Ontario ("FSCO"). The Authority assumed the responsibilities of FSCO under the PBA effective June 2019.

Ontario *Business Corporations Act*, RSO 1990, c B.16 ("**OBCA**"). Consequently, it could not legally authorize the methodology that OMERS used to correct the Contributions Made in Error.

Issue 2: Whether OMERS had the ability to re-classify the Contributions Made in Error as contributions to the Appellant's AVC account.

[23] The Appellant seeks to have the amount of the Contributions Made in Error, plus growth based on the Plan's rate of return (rather than the prime interest rate), allocated to his AVC account. Although he acknowledges that under the PBA and the Plan text, employers cannot make contributions to AVCs, he argues that since ♦ received the overpayment back from OMERS (in the form of the credit toward future contributions), it cannot be said that ♦ contributed to the AVC. As such, he submits that it would comply with s. 47 of the Plan text to deem the amount owing to him in respect of the Contributions Made in Error to be an AVC.

[24] The Appellant raises the fact that ♦ errors are likely result in a reassessment of his income taxes and result in fees and penalties. He submits that because these financial consequences are the result of ♦ mistake, he is entitled to compensation. In reply to OMERS' submission that this claim for compensation is in substance a request that the Panel order OMERS to pay him damages—which are not available in this proceeding—the Appellant argues that he is not seeking damages but rather is seeking to be compensated for "costs", which the Panel can award under s. 7.4 of the *Rules Respecting Practice and Procedure for Appeals to the Board of Directions of the OMERS Administration Corporation* (the "***Rules***"). The costs that the Appellant is seeking also include the investment growth that he would have received on the Contributions Made in Error.

Respondent's Submissions

Issue 1: Did OMERS have the authority to make the corrections it made to the Contributions Made in Error, and did OMERS have authority to use the methodology it did to correct the Contributions Made in Error?

[25] The Respondent argues that pursuant to s. 19(3) of the PBA OMERS is required to administer the Plan in accordance with the terms of the Plan text. Subsection 11(1) of the Plan text provides that every member of the Plan is required to contribute to the Plan fund in each applicable pay period in respect of the member's contributory earnings. Subsection 12(1) of the Plan text requires the employer is required to contribute an amount equal to the contributions made by the member. The term "contributory earnings" is defined in s. 1(1) of the Plan text and explicitly excludes salary and wages paid for overtime. Based on those provisions, the Respondent argues that overtime pay cannot be included as part of a member's contributory earnings and it cannot be included as part of part of a member's pensionable earnings used in the Plan's pension formula.

[26] The Respondent argues that OMERS relies on the information provided by employers to establish contributory earnings under the Plan Text. If the employer notifies OMERS of an error in respect of a member's contributory earnings, OMERS must ensure it is corrected. OMERS has no authority to grant service or benefits in excess of that to which members are entitled under the Plan terms or applicable legislation. The Plan text does not provide any discretion in this regard. In this case, once OMERS became aware of the error in respect of the Appellant's contributory earnings, OMERS was required under the Plan Text and applicable legislation to correct the Contributions Made in Error.

[27] As a matter of practice, OMERS corrects contributions made to the Plan fund in error in accordance with the Board Process established through the Resolution. That process is as follows:

- Information pertaining to employer and member contributions, and the member's contributory earnings, is adjusted based on the information provided to OMERS by the employer.
- Interest at the prime rate is applied to the employer and member contributions made in error.
- The employer is provided a credit for the amount of contributions made in error, plus interest, against future employer contributions to the Plan; and the employer pays the member directly in respect of the member's contributions made in error, plus interest.

[28] The Respondent argues that OMERS acted in accordance with the Board Process for the correction of the Contributions Made in Error. The methodology used was explicitly authorized under the Board Process. OMERS staff did not have authority to deviate from the Board Process in correcting the Contributions Made in Error. The Board Process is not inconsistent with any requirement of the PBA or the Plan.

[29] In response to the Appellant's arguments that ss. 62.1 and 63 of the PBA prohibited OMERS from making the correction to the Contributions Made in Error in the manner it did, OMERS submits that those provisions do not apply to the correction of the Contributions Made in Error.

[30] Subsection 63(1) of the PBA provides as follows:

> No member, former member or retired member is entitled to a refund from a pension fund of contributions made in respect of employment in Ontario or a designated jurisdiction on or after the qualification date.

[31] The Respondent submits that the Contributions Made in Error are not "contributions made in respect of employment" as that term is used in s. 63(1) of the PBA. The Contributions Made in Error ought not to have been made in the first place, as they did not comply with the Plan and do not fall under any category of member contribution contemplated by the Plan. The Contributions Made in Error cannot be used to provide benefits under the Plan and it is not correct to consider them to be "contributions made in respect of employment" as that term is used in s. 63(1) of the PBA.

[32] The Respondent argues that this is also evident when considering that the process for obtaining consent from the Authority to issue a refund under s. 63(7) of the PBA, (on which the Appellant relies), specifically contemplates an employer "funding all pension benefits associated with the contributions". Since the Contributions Made in Error cannot be used to provide benefits under the Plan, s. 63 of the PBA is not applicable.

[33] The Respondent argues that even if s. 63 of the PBA could apply to the correction of the Contributions Made in Error, no refund of the Contributions Made in Error has occurred from the Plan fund. Rather a credit was provided to the Appellant's employer. The Respondent further argues that section 62.1 of the PBA does not apply to the correction of the Contributions Made in Error, since no reimbursement has been made from the Fund.

[34] The Respondent argues that s. 65 of the PBA also does not apply to the correction of the Contributions Made in Error. The Respondent relies on the decision in *Adams v. Adams*, 1983 CarswellOnt 1355, para 28, to argue that s. 65 applies only to funds that are presently payable in respect of a member under a Plan. Contributions Made in Error are not "money payable" under a pension plan as that term relates to s. 65 of the PBA. Rather, they are contributions made in

error, which are not permitted and cannot be used to provide benefits under the Plan. In correcting the error, funds did not in fact leave the Plan. As such, the Contributions Made in Error were not assigned, charged, anticipated or given as security. Rather, as explained above, a credit against future contributions was provided to ♦ in respect of the Contributions Made in Error.

[35] With respect to the Appellant's submissions that OMERS' method of correcting the Contributions Made in Error did not comply with the provisions of the PBA and *Income Tax Act* regarding letters of credit, the Respondent argues that these provisions do not apply to the Contributions Made in Error. Those provisions govern payments into the Plan made by employers by way of letters of credit. The Contributions Made in Error are not employer contributions under the ITA. Further, jointly sponsored pension plans such as OMERS are exempt from the letter of credit provisions in s. 55.2 of the PBA.

Issue 2: Whether OMERS had the ability to re-classify the Contributions Made in Error as contributions to the Appellant's AVC account.

[36] The Respondent has several responses to the Appellant's submission that the Contributions Made in Error should be re-classified as contributions to his AVC account.

[37] The Respondent argues that contributions under the AVC provisions of the Plan can be made only as provided for in s. 47 of the Plan, by way of automatic contributions or lump sum transfer. There is no mechanism under the Plan to permit the Contributions Made in Error to be re-classified as AVCs.

[38] The Respondent points out that the Appellant did not elect to participate in the AVC provisions of the Plan and that the AVC option was not added to the Plan until 2011 while the first portion of the Contributions Made in Error was made in 2010.

[39] Further, the Respondent argues that the Contributions Made in Error were made through employer contributions; the Plan text prohibits employers from contributing to AVCs.

[40] The Respondent argues that by definition, the Contributions Made in Error were not "voluntary".

[41] For these reasons, OMERS argues that the Contributions Made in Error do not meet the criteria in section 47 of the Plan and cannot be retroactively deemed AVCs.

[42] With respect to the other relief the Appellant is requesting in this appeal, the Respondent submits that the Appellant seeks an order that the Contributions Made in Error be returned to the Fund. The Respondent argues that there is no basis under the Plan or the PBA for such an order. OMERS has a duty to administer the Plan in accordance with its terms. There is no mechanism for OMERS to redeposit Contributions Made in Error into the Fund.

[43] The Respondent argues that the Appellant has not provided evidence of his alleged lost investment opportunities and tax consequences. The Respondent argues that there is no basis for such an award. The Appeals Committee does not have the power to award damages. None of the Plan, the By-Law or the Rules Respecting Practice and Procedure for Appeals to the Board of Directors of the OMERS Administration Corporation authorizes the Panel to make an award of damages.

[44] The Respondent argues that the Appellant's claim for compensation in respect of potential tax consequences of the correction and loss of investment growth is essentially a tort claim (as opposed to a claim for an entitlement under the Plan). The Appeals Committee of the Board does not have the power to award damages for tort claims.

Decision and Reasons for Decision

[45] The Panel has determined that the Appellant's appeal must be dismissed. In explaining the reasons for our decision, we will discuss the first issue as two sub-issues: (A) whether OMERS has the authority to make corrections to the Contributions Made in Error; and (B) whether OMERS has the authority to follow the methodology it used to correct the Contributions Made in Error. We will then turn to address the second issue of whether OMERS had the authority to re-classify the Contributions Made in Error as AVCs.

Issue 1A: OMERS has the authority to make the corrections it made to the Contributions Made in Error

[46] There appears to be no dispute between the parties that, pursuant to s. 19(3) of the PBA, OMERS is required to administer the Plan in accordance with the Plan text and the provisions of the PBA.

[47] Under the Plan text, every member of the Plan is required to contribute to the Plan fund in each applicable pay period in respect of the member's contributory earnings. An employer is required to contribute an equal amount of contributions made by the member. "Contributory earnings" is defined in the Plan text and explicitly excludes salary and wages paid for overtime.

[48] Because overtime pay cannot be included as part of a member's contributory earnings, it cannot be included as part of a member's pensionable earnings used in the Plan's pension formula.

[49] The parties agree that ♦ erred in including overtime in the Appellant's pensionable earnings. The Panel agrees as well. The PBA demands that conclusion.

[50] Because the Contributions Made in Error were not permissible under the PBA and the Plan text, they cannot be used in the calculation of the Appellant's pensionable earnings under the Plan's pension formula. Under s. 1(1) of the Plan text: "Unless the contrary is established to the satisfaction of the Administration Corporation, the contributory earnings of a member shall be deemed to be the contributory earnings that would be represented by the amount of contributions actually received by the Fund in respect of the member"

[51] OMERS was required under the Plan to correct the Contributions Made in Error once ♦ made it aware of the error. OMERS is not entitled to grant service or benefits beyond what members are entitled to under the Plan terms or applicable legislation. The Panel agrees with the Respondent that the Plan text allows OMERS no discretion in this regard.

[52] In a previous hearing before the Appeals Committee on July 21, 2009, a panel of this Appeals Committee found that "OMERS AC was correct in removing the additional 227 months of eligible service from the Appellant's Plan record as a matter of legal compliance." In that case the issue was whether correcting the error was a matter of discretion or a matter of legal compliance. The Appeals Committee found that correcting the error was required as a matter of legal compliance. We make the same finding in this case. OMERS had no choice but to correct

the Contributions Made in Error. To do otherwise would have contravened its legal obligations under the Plan text and the PBA.

Issue 1B: OMERS has authority to use the methodology it did to correct the Contributions Made in Error

[53] Under the Board Process, contributions made in error are to be corrected as follows:

- Information pertaining to employer and member contributions, and the member's contributory earnings, is adjusted based on the information provided to OMERS by the employer;
- Interest at the prime rate is applied to the employer and member contributions made in error;
- The employer is provided a credit for the amount of contributions made in error, plus interest, against future employer contributions to the Plan; and
- The employer pays the member directly in respect of the member's contributions made in error, plus interest.

[54] The Appellant argues that the Board Process cannot provide proper authority for OMERS to apply the methodology it did to correct the Contributions Made in Error because the Resolution was not "passed by the members" of OMERS that therefore is invalid. In an earlier motion on this appeal, the Appellant raised that same argument. In reason for its decision on that motion, the Panel held that the OMERS Board was not an ordinary corporation and therefore the Panel was not prepared to find that the Board's resolutions were required to be "passed by the members" pursuant to the OBCA. We see no reason to revisit that conclusion in deciding this appeal.

[55] Having accepted that the Resolution was valid, the Panel does not see any basis on which it is inconsistent with the PBA or the Plan text or is otherwise an unlawful or unauthorized process to deal with corrections to contributions made in error—including those at issue in this

case. OMERS followed the Board Process. While the Appellant might have preferred a different methodology, there is no legal basis on which the Panel can find that OMERS did not have authority to correct the Contributions Made in Error by following the methodology set out in the Board Process.

[56] The Panel does not agree with the Appellant`s submissions that the credit OMERS provided to ♦ to correct the Contributions Made in Error contravened the PBA because it was an impermissible payment from the fund requiring consent of the CEO of the Authority, or that it to purported "assign, charge, anticipate or give as security money" and as result is void under s. 65 of the PBA, or that the credit needed to meet the requirements for a letter of credit under the PBA and the *Income Tax Act*. Each of these provisions mischaracterizes the nature of the credit that OMERS provided to ♦. Sections 62.1, 63 and 65 of the PBA, properly understood, do not apply in this case where OMERS acted pursuant to its legal requirement to correct contributions erroneously made to the Plan.

Issue 2: OMERS had no ability to re-classify the Contributions Made in Error as contributions to the Appellant's AVC account

[57] Contributions under the AVC provisions of the Plan may be made in accordance with s. 47 of the Plan, by way of automatic contributions or lump sum transfer. The Panel has concluded that there is no mechanism under the Plan to permit the Contributions Made in Error to be re-classified as AVCs.

[58] AVC, or additional voluntary contributions, are—as the name suggest—*voluntary* contributions made by a member. Subsection 47(3) of the Plan Text sets out the conditions for AVCs, as follows:

> (3) Subject to any conditions determined by the Administration Corporation, upon the written request of,
>
> (a) a member referred to in subsection (2);
>
> (b) a member who is entitled to a deferred pension; or
>
> (c) a member who is in receipt of a pension,
>
> the Administration Corporation shall accept a lump sum voluntary transfer to the Fund of an amount for the member from another pension fund or plan or any other transfer otherwise permitted in accordance with the Income Tax Act (Canada). For greater certainty, a lump sum voluntary transfer can be requested by a member in lieu of or in addition to the options available under sections 35, 36 or 39.

[59] The Appellant did not voluntarily elect to participate in the AVC provisions of the Plan in respect of the Contributions Made in Error. In fact, the AVC option was only added to the Plan in 2011 (i.e., the year after the first portion of the Contributions Made in Error was made). He is seeking to have the Contributions Made in Error deemed, retroactively, to have been AVCs at the time they were made. They were not; they were contributions made by the employer *in error*. We have been pointed to no provision of the Plan text that would permit them to be deemed AVCs by operation of a legal fiction.

[60] Further, the Contributions Made in Error were contributions paid by the Appellant's employer, not by the Appellant himself. The Plan prohibits employers from contributing to AVCs.

[61] In summary, the Contributions made in Error were not "voluntary" and do not meet the criteria in section 47 of the Plan. As such, the Panel finds that the Contributions Made in Error cannot be deemed to be AVCs.

[62] As set out above, the Respondent in its submissions takes issue with the Appellant's claim for damages. The Appellant replies that he is not seeking damages. Rather, he Appellant argues that the Panel has discretion under s. 7.4 of the *Rules* to compensate a party for Costs. He asserts that he is making a claim for such "costs" and provided an estimate of the "costs" accrued from the error.

[63] The Appellant's claim is for financial loss he alleges he incurred (or will incur) as a result of OMERS' correction of the Contributions Made in Error. In substance, that is a claim for damages. An award of costs is not an award that compensates a party for the wrongdoing of another party. Costs are meant to indemnify a party for the costs incurred in pursuing a legal proceeding. Costs typically cover a portion of a party's legal fees and out-of-Panel does not have the power to award damages. Neither the Plan, nor the By-Law, nor the *Rules* authorize this Panel to make an award of damages.

[64] The panel finds that the Appellant has not met the onus on him to prove that OMERS did not have the authority to make the corrections it made to the Contributions Made in Error and did not have authority to use the methodology it did to correct the Contributions Made in Error and on the second issue that OMERS had the ability to re-classify the Contributions Made in Error as contributions to his AVC account.

[65] For these reasons, the Appellant`s appeal is dismissed. There is no order for costs in this matter.

I, David Tsubouchi, sign this Decision as Chairperson of the Panel and on behalf of the Panel members listed below.

DATED at Toronto this day of _____, 2020.

_____

David Tsubouchi, Panel Chairperson
Darcie Beggs, Panel Member
Paul Elliott, Panel Member

Appendix "A"
Relevant Statutory Provisions and Plan Terms

Pension Benefits Act, RSO 1990, c P.9

1 (1) In this Act,

> "additional voluntary contribution" means a contribution to the pension fund by a member of the pension plan beyond any amount that the member is required to contribute, but does not include a contribution in relation to which the employer is required to make a concurrent additional contribution to the pension fund; ("cotisation facultative supplémentaire")19(1)

19 (3) The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with,

(a) the filed documents in respect of which the Chief Executive Officer has issued an acknowledgment of application for registration or a certificate of registration, whichever is issued later; and

(b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void under this Act.

22 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

23 An employer shall provide to the administrator of the pension plan any information required by the administrator for the purpose of complying with the terms of the pension plan or of this Act, the regulations or the Authority rules.

55.2 (1) This section applies if a prescribed employer is required to make payments into the pension fund with respect to a reduced solvency deficiency.

(2) Instead of making payments into the pension fund with respect to the reduced solvency deficiency, the employer may provide a letter of credit to a prescribed person or entity if the requirements of this section are satisfied.

(3) The letter of credit must satisfy such requirements as may be prescribed.

(4) The employer is not entitled to provide a letter of credit if the total amount of all letters of credit provided to the prescribed person or entity for the pension plan would exceed 15 per cent of the solvency liabilities of the pension plan.

(5) For the purposes of subsection (4), the regulations may specify that solvency liabilities must be determined in a manner that may differ from the requirements that otherwise apply.

(6) The employer must provide the letter of credit to the prescribed person or entity within such period after it is issued as may be prescribed and the employer must give a copy of the letter of credit to the administrator within the same period.

(7) The administrator shall notify the Chief Executive Officer in the prescribed manner and within the prescribed period that a letter of credit has been provided and, upon request, the administrator shall give the Chief Executive Officer such information about the letter of credit as the Chief Executive Officer may specify.

(8) The prescribed person or entity holds the letter of credit in trust for the pension plan.

(9) In such circumstances as may be prescribed, the prescribed person or entity shall demand payment of the amount of the letter of credit into the pension fund by the issuer of the letter of credit.

(10) The fees or expenses associated with obtaining, holding, amending or cancelling a letter of credit are not payable from the pension fund. However, subject to section 22.1, the fees and expenses associated with enforcing a letter of credit are payable from the pension fund.

(11) This section does not apply with respect to a public sector pension plan unless the regulations specify that it applies to the pension plan.

(12) Despite subsection (11), this section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan.

62.1 (1) This section applies,

(a) if an employer pays an amount in respect of a pension plan that should have been paid out of the pension fund; or

(b) if an employer makes an overpayment into the pension fund.

(2) The administrator of the pension plan is not permitted to make or authorize a payment from the pension fund to reimburse the employer for a payment described in subsection (1) unless the Chief Executive Officer consents in advance to the payment from the pension fund to the employer.

(3) The employer or, in the case of a jointly sponsored pension plan or multi-employer pension plan, the administrator may apply to the Chief Executive Officer for consent to the payment from the pension fund to reimburse the employer for a payment described in subsection (1).

(4) The application must be made before the later of,

(a) 24 months after the date on which the employer made the payment described in subsection (1); and

(b) six months after the date on which the administrator, acting reasonably, becomes aware of the payment described in subsection (1).

(5) Subject to section 89, the Chief Executive Officer may consent to the payment from the pension fund to the employer if the application is made before the deadline described in subsection (4).

63 (1) No member, former member or retired member is entitled to a refund from a pension fund of contributions made in respect of employment in Ontario or a designated jurisdiction on or after the qualification date.

(2) Subsection (1) does not prevent the refund of an additional voluntary contribution and interest thereon to a member, former member or retired member or a payment under subsection 39 (4) (entitlement to excess amount).

…

(7) Despite subsection (1), on application by the administrator of a pension plan, contributions may be refunded to a member, former member or retired member with the consent of the Chief Executive Officer.

(8) On application by the administrator of a pension plan, the Chief Executive Officer may consent to a refund under subsection (7) if the pension plan provides or has been amended to provide for the refund and the employer has assumed responsibility for funding all pension benefits associated with the contributions.

65 (1) Every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void.

OMERS Primary Pension Plan Restated as of January 1, 2014

1 (1) In this Plan,

"**contributory earnings**" means,

(a) in the case of an employee who was a member before the 1st day of January, 1978, the earnings of the member, and

(b) in the case of an employee who was a member on and after the 1st day of January, 1978, the earnings of the member exclusive of salary or wages paid for overtime, payments made with respect to unused sick leave credit gratuities and payments

made as retirement bonuses or otherwise as a result of retirement or other termination of employment whether in respect of long service or otherwise, and

(c) in the case of a councillor who is a member, means any money paid to the councillor for the councillor's services as a councillor under the *Municipal Act, 2001*,

"pensionable earnings" means,

(a) where a member has 60 or more months of credited service, the result obtained by taking the sum of the member's contributory earnings for the 60 months of consecutive credited service during which such contributory earnings were the highest and dividing that sum by 5, and

(b) where a member has less than 60 months of credited service, the result obtained by taking the sum of the member's contributory earnings, dividing that sum by the number of months of such service and multiplying the figure so obtained by 12;

5 (1) All member and employer contributions in respect of the contributory earnings of a member shall be paid by the employer to the Administration Corporation so that they shall be received by the Administration Corporation at its office in Toronto on or before the last day of the month next following the month in respect of which the contributions were made.

…

(3) An employer shall provide the Administration Corporation with the name, sex, date of birth, marital status, earnings and service of each member and such other information as the Administration Corporation determines is necessary for the administration of this Plan, within such time limit as the Administration Corporation may establish.

11 (1) Every member shall contribute to the Fund by payroll deduction in each pay period a percentage of the member's contributory earnings while he or she is an employee or councillor of an employer who participates in this Plan, but no contribution shall be payable by a member from the date a pension must commence under subsection 16(3).

12 (1) Every employer shall contribute to the Fund an amount equal to contributions made under subsection 11(1) by employees or councillors of the employer

47 (1) In this section,

"**additional voluntary contributions**" means voluntary contributions to the Fund by a member in accordance with subsection (2) which are in addition to any contributions payable by a member as required under section 11 and any lump sum voluntary transfers; and

"**lump sum voluntary transfer**" means any amounts transferred to the Fund in accordance with subsection (3) to be held as additional voluntary contributions which, for

greater certainty, do not include amounts transferred to the Fund under sections 35, 36 or 39.

(2) Subject to any conditions determined by the Administration Corporation and the limitations prescribed by the Income Tax Act (Canada), a member who,

(a) is making contributions as required under subsection 11(1);

(b) is accruing credited service under subsection 18(4);

(c) is not eligible to make contributions under subsection 11(1) by virtue of subsection 11(5); or

(d) is not making contributions during an absence that is an absence described in clause (b), (c) or (d) of the definition of "continuous service" in section 1,

may make voluntary contributions to the Fund.

(3) Subject to any conditions determined by the Administration Corporation, upon the written request of,

(a) a member referred to in subsection (2);

(b) a member who is entitled to a deferred pension; or

(c) a member who is in receipt of a pension,

the Administration Corporation shall accept a lump sum voluntary transfer to the Fund of an amount for the member from another pension fund or plan or any other transfer otherwise permitted in accordance with the Income Tax Act (Canada). For greater certainty, a lump sum voluntary transfer can be requested by a member in lieu of or in addition to the options available under sections 35, 36 or 39.

(4) The Administration Corporation shall not accept additional voluntary contributions if the contribution or transfer does not meet the requirements of the Pension Benefits Act and the *Income Tax Act* (Canada), as applicable.

(5) For greater certainty, no employer shall contribute to the Fund any amount in respect of a member's additional voluntary contributions.

(6) All additional voluntary contributions deposited to the Fund in accordance with subsections (2) and (3) shall be held to the credit of the member and credited with such rate of return as can be reasonably attributed having regard to the operation of the Fund net of investment and administration fees and expenses.

(7) Despite subsection 11(8), and subject to subsection (8) and any conditions determined by the Administration Corporation, additional voluntary contributions that have been deposited to the

Fund in accordance with subsection (2) or subsection (3) and credited with the rate of return in subsection (6) may be,

(a) withdrawn by a member;

(b) refunded to a member; or

(c) transferred to a registered pension plan (including, for greater certainty, payments and purchases under this Plan), a retirement savings arrangement or a provider of an annuity,

as permitted or required under the *Pension Benefits Act* and in accordance with the *Income Tax Act* (Canada), as applicable.

(8) All additional voluntary contributions that have been deposited to the Fund in accordance with subsection (2) or subsection (3) and credited with the rate of return in subsection (6), shall be withdrawn, refunded or transferred from the Fund in accordance with subsection (7) from the earlier date on which the member,

(a) elects to receive a lump sum amount under subsection 25(6), a refund of contributions under subsection 27(1) or a lump sum payment under section 29;

(b) elects to transfer the member's entitlement under section 33, 34 or 36 from the Fund to any other fund, plan or arrangement; or

(c) must otherwise start to commence a pension under subsection 16(3).

(9) Clause (8)(a) or (8)(b), as applicable, do not apply if,

(a) the member is or has been an employee or councillor of more than one employer in overlapping periods; and

(b) the member elects to receive a lump sum amount or a refund of contributions described in clause (8)(a) or a transfer described in clause (8)(b) in respect of his or her service with one employer while still an employee or councillor with another employer.

(10) Subject to any conditions determined by the Administration Corporation, on the death of a member before all additional voluntary contributions that have been deposited to the Fund in accordance with subsection (2) or subsection (3) and credited with the rate of return in subsection (6) have been withdrawn, refunded or transferred from the Fund in accordance with subsection (7), the balance of additional voluntary contributions credited with the rate of return in subsection (6) held to the credit of the member shall be refunded to the member's,

(a) surviving spouse, if the member and the surviving spouse were not living separate and apart on the date of the member's death;

(b) designated beneficiary if there is no surviving spouse entitled to a refund under this section; or

(c) estate, if there is no surviving spouse entitled to a refund under this section and no designated beneficiary.

Business Corporations Act, RSO 1990, c B.16

116 (1) Unless the articles, the by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of a corporation.

(2) Where the directors make, amend or repeal a by-law under subsection (1), they shall submit the by-law, amendment or repeal to the shareholders at the next meeting of shareholders, and the shareholders may confirm, reject or amend the by-law, amendment or repeal.

(3) Where a by-law is made, amended or repealed under subsection (1), the by-law, amendment or repeal is effective from the date of the resolution of the directors until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it ceases to be effective under subsection (4) and, where the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.

(4) If a by-law or an amendment or repeal of a by-law is rejected by the shareholders, or if the directors do not submit the by-law, amendment or repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective on the date of such rejection or on the date of the meeting of shareholders at which it should have been submitted, as the case may be, and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.

(5) If a shareholder proposal to make, amend or repeal a by-law is made in accordance with section 99 and is adopted by shareholders at a meeting, the by-law, amendment or repeal is effective from the date of its adoption and requires no further confirmation.

(6) A by-law need not be described as a by-law in a resolution referred to in this section.

117 (1) After incorporation, a meeting of the directors of a corporation shall be held at which the directors may,

(a) make by-laws;

(b) adopt forms of security certificates and corporate records;

(c) authorize the issue of securities;

(d) appoint officers;

(e) appoint one or more auditors to hold office until the first annual or special meeting of shareholders;

(f) make banking arrangements; and

(g) transact any other business.

(2) Any matter referred to in subsection (1) may be dealt with by the directors by a resolution in writing in accordance with subsection 129 (1).

(3) Subsection (1) does not apply to a body corporate that is an amalgamated corporation under section 178 or that is continued under section 180.

(4) An incorporator or a director may call the meeting of directors referred to in subsection (1) by giving not less than five days notice thereof to each director, stating the time and place of the meeting.

118 (1) The following persons are disqualified from being a director of a corporation:

1. A person who is less than eighteen years of age.

2. A person who has been found under the Substitute Decisions Act, 1992 or under the Mental Health Act to be incapable of managing property or who has been found to be incapable by a court in Canada or elsewhere.

3. A person who is not an individual.

4. A person who has the status of bankrupt.

(2) Unless the articles otherwise provide, a director of a corporation is not required to hold shares issued by the corporation.

(3) At least 25 per cent of the directors of a corporation other than a non-resident corporation shall be resident Canadians, but where a corporation has less than four directors, at least one director shall be a resident Canadian.

Income Tax Act, RSO 1985, c 1 (5th Supp)

147.1 (7) The administrator of a registered pension plan shall

(a) administer the plan in accordance with the terms of the plan as registered except that, where the plan fails to comply with the prescribed conditions for registration or any other requirement of this Act or the regulations, the administrator may administer the plan as if it were amended to so comply;