



Financial Services Commission Surplus Policies Consultation

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Submitted by: The Ontario Bar Association



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Contents

Introduction	2
The OBA	2
The Issue of Missing Members.....	3
Conclusion.....	4



Introduction

The Pensions & Benefits Section (the “**Section**”) of the Ontario Bar Association (the “**OBA**”) appreciates the opportunity to comment on two recent regulatory proposals put forward by the Financial Services Commission of Ontario, Pension Policy Branch (“**FSCO**”). The proposals “set out FSCO's expectations with respect to applications for the payment of surplus to employers, plan members, former members, retired members and other beneficiaries entitled to surplus, under the Pension Benefits Act (PBA) and Regulation 909 (Regulation) under the PBA.”¹ The relevant policies are Application by Employer for Payment of Surplus on Wind Up of a Pension Plan (S900-512)² and Surplus Distribution by Written Agreement – The Role of Legal Counsel (S900-514).³

We note that the time period for providing comments on both of these consultations is short, and in the time allotted the OBA has aimed to consider the contents of both draft policies. In this respect, our members have identified, and we wish to highlight, one issue that we believe impacts both consultations: in the context of surplus distribution by written agreement, what steps should be taken to deal with missing members?

The OBA

Established in 1907, the OBA is Ontario’s largest legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

The OBA’s Pensions and Benefits Law Section represents lawyers who serve as legal counsel to virtually every stakeholder in the pension and benefits industry, including pension and benefit plan administrators, employers, plan members, bargaining agents, pension and benefit consultants, investment managers, actuarial firms and other

¹ FSCO Surplus Policies, online:

http://www.fSCO.gov.on.ca/en/pensions/fSCO_consultations/pages/surplus_policies.aspx

² Application by Employer for Payment of Surplus on Wind Up of a Pension Plan, online:

http://www.fSCO.gov.on.ca/en/pensions/fSCO_consultations/Documents/aoda-surplus-pension-s900-512.pdf

³ Surplus Distribution by Written Agreement – The Role of Legal Counsel, online:

http://www.fSCO.gov.on.ca/en/pensions/fSCO_consultations/Documents/aoda-surplus-pension-s900-514.pdf



stakeholders. Our members have analyzed and provided assistance decision makers over the years on several important legislative and policy initiatives in the pension field.

The Issue of Missing Members

The issue of missing members is one that is frequently confronted by plan administrators, trade unions, and other industry stakeholders. In the context of surplus sharing agreements, this issue arises in three distinct ways. The first relates to the notice to be provided to members, the second relates to consent thresholds, and the third relates to how missing members who cannot be found should be dealt with in the context of rules which require that all funds be distributed to members before the employer can withdraw its share of the surplus.

The OBA recognizes that FSCO has provided guidance on related issues in its policy on Searching for Plan Beneficiaries, and acknowledges that the practices highlighted in that policy are important tools for minimizing the issue of missing members. However, even an administrator with a proactive and comprehensive approach to missing members will sometimes be unable to locate everyone. This can create several issues with respect to surplus sharing agreements. Accordingly, we believe that it would be helpful to have some guidance from FSCO on reasonable steps to be taken to deal with missing members in the context of surplus sharing agreements. As a starting point, the policies should address the impact of missing members on notice and consent thresholds. Both of these requirements currently contemplate a certain amount of regulatory discretion, and we think there should be some treatment of how missing members might impact how that discretion is exercised.

Perhaps most importantly, the OBA urges FSCO to provide guidance on how administrators and lawyers acting for administrators, trade unions and Affected Members should address missing members during the surplus distribution phase. The current text of draft proposal S900-512 notes that "The Administrator must ensure that all benefits and liabilities under the plan are settled and that any surplus owing to Affected Persons is distributed before the remaining surplus assets are paid to...the employer". Even in small plans, it can be difficult to locate every single member or beneficiary. FSCO should provide some practical guidance on how the distribution to all members can be achieved when some members are missing. We note that any such method should be designed to protect member benefits and allow a discharge for the administrator and/or employer, as the case may be, whether it be through paying the money into court, holding the funds in reserve or through some



other reasonable mechanism. It may be that a variety of options would be acceptable to FSCO and it would be valuable if the policies addressed this.

Conclusion

The OBA appreciates the opportunity to comment on these matters. The OBA would welcome the opportunity to discuss these views in more detail, and to provide any other feedback as the process continues. Please do not hesitate to contact us in this regard.