



# Draft Amendments to the Pension Benefits Act: Electronic Communications

**Date:** August 26, 2019

**Submitted to:** Pension Policy Branch,  
Ministry of Finance

**Submitted by:** The Ontario Bar Association





# Contents

<a href="#">Introduction</a> .....	2
<a href="#">The OBA</a> .....	2
<a href="#">The Proposed Framework</a> .....	2
<a href="#">A Flexible and Forward Thinking Approach</a> .....	2
<a href="#">Retired Members</a> .....	3
<a href="#">Secure Information Systems</a> .....	3
<a href="#">Clarification of Deemed Receipt</a> .....	4
<a href="#">Conclusion</a> .....	4



## Introduction

The Ministry of Finance (the “**Ministry**”) is proposing amendments to the *Pension Benefits Act* (the “**PBA**”) to create a framework that would permit pension plan administrators to use electronic communications as the default method (i.e., no consent required) for sending documents to members and former members if they meet certain conditions (the “**Proposed Framework**”).

The Pensions & Benefits Section (the “**Section**”) of the Ontario Bar Association (the “**OBA**”) appreciates the opportunity to respond to Ministry’s consultation. This submission will address a number of comments from our Section with respect to the Proposed Framework.

## 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 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 Proposed Framework

### A Flexible and Forward Thinking Approach

The Section welcomes these proposed amendments in keeping with the Government’s stated intentions in the 2019 Ontario Budget to “modernize the pension sector and streamline pension plan administration”. The Section also supports the granting of authority to the Financial Services Regulatory Authority (“**FSRA**”) to make rules in respect of the new provisions. As we have stated in our previous submissions, the Section supports principles-based rule-making authority for FSRA as a means of allowing for greater flexibility to deal



with new circumstances.<sup>1</sup> We feel that a flexible and forward thinking approach is especially appropriate when dealing with an ever-evolving area such electronic communications.

### **Retired Members**

The Proposed Framework is currently only applicable to members and former members. We would encourage the Ministry to consider how retired members might be brought into the Proposed Framework, with appropriate safeguards, without the need for future legislative amendments. While there is likely variation in the experience of our members regarding the utilization of electronic communications and other digital tools by retired members, for some pension plan administrators, retired members are the most active users of electronic communications. It is also reasonable to expect that utilization will increase in the future, particularly as current members become retired members. Further, we expect that active members who receive default electronic communications will expect to continue to receive communications in the same manner upon retirement—to force them into a different mode of communication, absent consent at that point in time, is likely to be disruptive to both administrators and members. In our view, providing for the inclusion of future retired members would be in keeping with taking a flexible and forward thinking approach to the Proposed Framework. It is also most in keeping with the government’s policy of burden reduction.

### **Secure Information Systems**

We would also encourage the Ministry to consider alignment between the requirements for providing electronic documents through a “secure information system” and the requirements for providing T4 information slips electronically. As of the 2017 tax year, the *Income Tax Act* (Canada) was amended to allow employers to issue T4 information slips electronically without the employee’s consent, if the specified criteria are met. For this purpose the Minister of National Revenue has specified that the T4 must be provided through a “secure electronic portal”. Many employers have put systems in place to provide T4s electronically through such secure portals. As T4s contain highly sensitive personal information, the Section is of the view that the requirements with respect to a secure information system should be no more stringent than exist for the provision of T4s electronically.

---

<sup>1</sup> Ontario Bar Association, Letter to the Minister of Finance re: *Feedback on the Implementation of the Financial Services Regulatory Authority*, October 26, 2017. Online: <https://www.oba.org/CMSPages/GetFile.aspx?guid=8d636eef-cf60-4d56-bdf9-a644ed2d7092>



### **Clarification of Deemed Receipt**

There is some ambiguity as to when a document provided through a secure information system would be deemed received by a member. The only requirement currently proposed for sending a document by way of secure information system is that the intended recipient identify themselves prior to accessing the document. However, the only electronic means of giving, serving, or delivering a document under the proposed subsection 112(1) are (c) by email and (d) “in another electronic form”. If sending a document through a secure information system is meant to be included in “another electronic form” then clause 112(1)(d) imposes an additional requirement that the sender be able to prove that the person received it, which is not the standard applicable to other modes of communication (e.g. a member does not need to have opened a piece of mail in order for a plan administrator to show that a document has been delivered/served). Further, the proposed clause 112(2)(b) provides that documents sent under clauses 112(1)(c) and (d) are deemed to have been received on the first business day after they were sent. The requirement for the sender to prove that a document was received is inconsistent with the document being deemed to have been received on the first business day after it was sent. In our view, an appropriate standard for documents provided through a secure information system is that the document be deemed to have been received when it is made accessible to the recipient.

### **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.