Comments on Draft Family Law Forms (Pension Valuation and Division on Marriage Breakdown)

Date: **October 31, 2011**

Submitted to: **FSCO**

Submitted by: **The Ontario Bar Association**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

The Ontario Bar Association appreciates the opportunity to provide comments to the Financial Services Commission of Ontario ("FSCO") on the proposed Family Law Forms which will support the new regime for the valuation and settlement of pensions upon marriage breakdown. We appreciate the work that has gone into developing the proposed prescribed forms in a very tight timeframe.

Below we suggest clarifications to a number of sections of the forms, the instructions and the corresponding Q&A's. In the course of reviewing the forms, we also raise a few questions about the overall scheme.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing 17,500 lawyers, judges, law professors and law students. The OBA's active Pension & Benefits and Family Law Sections have approximately 1,000 members who count among their clients virtually every stakeholder in pension valuation and division issue, including separating spouses, children, plan administrators, plan members, pension and benefit consultants, investment managers and other advisors. In addition to providing education to its members, the OBA assists government and other makers with dozens of legislative and policy initiatives each year – both in the interest of the profession and in the interest of the public. Our members have, over the years, analyzed and provided assistance to the Ontario government on most legislative and policy initiatives in the pension field. The OBA has assisted in virtually every pension and family law reform initiative in the last decade.

General Comments

In addition to reviewing the forms from a technical basis, we have also reviewed them from the perspective of a plan member, non-member spouse, plan administrator or a general practitioner who is not a family law or pension lawyer. We offer the following suggestions to make the instructions easier for these people to understand:

1. The forms should state the purpose of the form in each case: e.g. for Form 1 – Completion of this form is necessary in order to start the process of valuation and settlement of the pension asset. It should be clear that, until this form is filed, the member, non-member spouse or legal counsel will not be able to obtain the value of the member's pension for property equalization or division under the *Family Law Act* ("FLA").

2. The forms should set out the timing requirements where applicable: e.g. in Form 1, state that the administrator has 60 days to provide the requested information, so that the member, non-member spouse or lawyer will know when to follow up and the administrator will be reminded.

3. There should be a reminder on each form that it must be filled out accurately and completely in order to obtain or provide information and that the information must be provided as requested on the form (i.e. it may not be varied).

4. We would also strengthen the words "you may want to get legal advice" to "you are advised to get legal advice" or, at least, "it is strongly recommended that you get independent legal advice."

Review of Proposed Forms

Form 1 – Application for Family Law Value

1. Part C and D

We recommend the removal of the "Contact Person" fields for both Part C and Part D. This data must be included on Form 3 (Contact Person Authorization) should such a person be authorized, so it is not necessary to solicit it on Form 1. The removal of these sections will streamline the form and make it easier to understand and complete. Further, we note that contact information is not solicited on any other prescribed pension form.

2. Part G

We recommend the removal of the third box under the "Additional Documents" section which reads: "The spouse/former spouse of the Plan Member has a contact person, but I am not including a Contact Person Authorization (FSCO Family Law Form 3)". There is no reason for a plan administrator to collect this information or for a member/spouse to provide this information if it is not accompanied by Form 3.

We also recommend the addition of an "N/A" box to the "Required Fee" section because not all plan administrators will charge a fee for the statement. Plan administrators who will not charge the fee can pre-populate the "N/A" box, thus avoiding the need to return fees submitted by a misinformed applicant.

On page 5, it would be helpful to make clear in order for the form to be considered complete that sufficient contact information for both the member and non-member spouse must be provided (as per paragraph 21(2)2. of Reg. 287/11). Practically speaking, this requires complete contact information for the member/non-member spouse or the contact person (along with a completed Form 3). Notably, if the third check box under the heading "additional documents" is checked, but no contact information is provided, the form would not be complete and the plan administrator could not issue the statement of Family Law Value ("FLV") to both parties.

3. Appendix "A"

Applicants should be advised that the "Request for Two Family Law Values" cannot straddle the retirement date. Marital status on the date of retirement drives the calculation of the pension benefit as either a single life-only pension or a joint and survivor pension. This means that there will be a fundamental difference in the two calculations in many DB plans. Further, the plan administrator must be able to rely on the information provided by the plan member at retirement to calculate the benefit.

In the third paragraph of the joint declaration, we suggest indicating who selects the final separation date. It is not clear that this will be determined by the court order/cohabitation agreement/arbitration award. The applicant might be incorrectly led to believe that believe that the administrator makes the decision

Form 1 – Instructions

1. Instructions Part C (second paragraph - comment also applies throughout the instructions)

The concept of whether "proof of the date of birth if the Plan Member is already on file" should be removed. The parties are required to provide this information with the application (pursuant to paragraph 21(2)3. of Reg. 287/11). It is not the administrator's responsibility to provide this information or incur additional costs to cross check the data. Furthermore, the potential of having to provide the non-member spouse with the member's personal information, without the member's consent, raises privacy concerns.

2. Instructions Part C (fifth paragraph – comments also applies throughout the instructions)

If an applicant is able to use the "last known mailing address" to complete the form, there needs to be some policy direction from FSCO on:

(a) Whether the administrator's requirements to provide information to the non-applicant spouse will be met by sending the information to the last known address; and
(b) How this practice can be undertaken without violation of the privacy obligations of the administrator (eg. Sending personal information to the wrong address or, as the process proceeds, updating the address information on the forms sent out by the administrator (this update would be based on the personal information provided by a plan member, which information is not otherwise known to the applicant)).

Applicants should be encouraged to make best efforts to provide accurate, updated information.

3. Instructions Part D (last paragraph)

The date the plan member "retired" may not be the same as the date the joint and survivor pension crystallizes under section 44 of the *Pension Benefits Act* ("PBA") (i.e. the date that the first instalment of the pension is due). This should be clarified.

4. Instructions Part E

It is not completely accurate to say that the spouses must agree on the start date of the spousal relationship. It would be more accurate to explain that there are mandatorily applicable dates in certain circumstances (eg. the marriage date where there is a court order) and, in other circumstances, certain automatic default dates in the absence of an agreement. Regulation 287/11 provides the following:

- Subsection 17(1) of Reg. 287/11 provides that for an order, the start date is the date of the spouses' marriage. In other words, there is no choice. Similarly, if the parties ask for a statement of FLV with a start date other than their marriage date, another valuation could be required if the parties end up in court (i.e. the start date would have to be the date of marriage).

- Subsection 17(2) of Reg. 287/11 provides that for a domestic contract or family arbitration award: (a) if the spouses are married (i.e. Part I of the FLA applies), the start date is the date chosen jointly by the parties (which cannot be earlier than the date of cohabitation or later than the date of marriage) or if the parties do not jointly choose a date, the date of their marriage; or (b) if the spouse were not married, the date chosen by the parties (which cannot be earlier that the date on which the spouses' cohabitation began) or if the parties do not jointly choose a date, the date on which their cohabitation began.

5. Instructions Appendix A

Query whether the reference to "must" should be changed to "may"? While practically speaking the parties cannot receive a statement of FLV without a separation/family law valuation date, the fact remains that section 22 of Reg. 287/11 is permissive (i.e. where the FLVD has not be determined under the PBA, an application under s. 67.2(6) of the PBA ***may*** be submitted with two proposed valuation dates).

Form 1 – Q&As

1. **Q2:** It is not clear where the authority for the statement in paragraph 3 comes from. Pursuant to subsection 67.2(10) of the PBA, neither the member nor the non-member spouse is eligible to apply for a statement of FLV if an ***order*** (under Part I of the FLA) made before January 1, 2012 requires one spouse to pay the other spouse the amount to which the other spouse is entitled under section 5 of the FLA. It is less clear how the transition provisions work for ***domestic contracts***. There is a suggestion that the parties could enter into a new domestic contract that would be "made" after January 1, 2012 and, presumably, governed by the new rules.

   Generally speaking, PBA section 67.6 deals with the application of the "old rules" to an order, domestic contract or family arbitration award that requires one spouse to pay the other spouse the amount to which that spouse is entitled under section 5 of the FLA if the order/award/domestic contract was made before January 1, 2012. Subsection 67.6(1) does not refer to whether or not the order/award/domestic contract provided for the division of the pension. During the drafting/consultation stage of Bill 133, the purpose of s. 67.6(2) was generally understood to be to facilitate or effect changes to the existing division of the pension (e.g. to make clarifications or corrections) without triggering the new rules. Section 67.6 does not speak to when a member or non-member spouse is permitted to apply for a statement of FLV.

   The transition provisions require clarification

2. **Q5:** Same comment as for Q2 above.

3. **Q6:** Same comment as for Q2 above. In addition, the statement in the last paragraph is misleading and should be removed. The new legislation does not explicitly require the administrator to check the date in order to determine whether the old or the new pension division rules apply. The parties should have made this determination before Form 1 was completed. Furthermore, the parties are not required to provide the administrator with a copy of the domestic contract/court order/family arbitration award until the non-member

spouse makes an application to divide the pension thereby making it impossible for an administrator to make such a determinate (old vs. new rules) at the application stage.

Form 2 – Joint Declaration of Period of Spousal Relationship

1. Part B

We recommend adding a field for the address of plan member. The address information will assist the plan administrator to find the member record in circumstances where Form 2 is sent in separately from Form 1.

2. Box titled "Important"

The instructions in the box say that this form is not to be used if Appendix A of Form 1 is being submitted. However, we note that Appendix A deals only with the separation date, while Form 2 deals with both the separation date ***and the start date***. If the parties wish to provide a joint declaration in respect of the latter, both Appendix A and Form 2 could be submitted. In order to account for this circumstance, there should be an instruction above Part D that says not to fill in that part if Appendix A has also been submitted.

Form 2 – Q &A's

1. **Q1:** This question will need some modification to clarify the points raised above under "Form 2". This Q&A suggests that as soon as you are providing any one of the types of proof listed, the form is no longer applicable. However, it seems that if an applicant provides a marriage certificate, for example, that only potentially makes the part of the form relating to start date inapplicable, not the whole form.

2. **Q5:** We recommend some strong wording here urging the parties to carefully consider the dates being requested and to get the appropriate legal advice in advance.

Form 3 – Contact Person Authorization

Clarification of Purpose

The purpose of the Contact Person Authorization should be clarified for the benefit of the applicant, the lawyers and the plan administrators. Specifically, the following questions should be addresses:

(i) does the provision of contact information alleviate the administrator of the obligation to send a copy of the statement to the applicant or the spouse?

(ii) does the contact person receive information upon request?

Part D

We recommend the removal or at least additional clarification of the phrase "to Act on Your Behalf" from the heading to Part D. This phrase implies that the Contact Person also has the authority to make pension decisions (like apply for a pension division or transfer).

Form 4B – Statement of Family Law Value - Active Plan Member with a Defined Benefit

1. Part C

We recommend the removal of the fields that display the Plan Member's Contact Person Information. The provision of contact information is not mandatory on Form 1 and we question the need for the administrator to relay that information back on Form 4B. The regulations do not require the inclusion of contact person or their address on the Statement. The Statement is already lengthy – this is one area where it can be streamlined.

2. Part D

We recommend the removal of the fields that display the Contact Person Information for Spouse/Former Spouse of the Plan Member for the same reasons as listed in Part C above.

3. Part E

We recommend the removal of the phrase at the end of the fourth transfer option which reads "a payment resulting from shortened life expectancy of the Plan Member or a refund of contributions if the plan member is not vested". There are two concerns with this transfer option. Firstly, sections 12 and 13 of the regulations provide different rules for the VALUATION of pensions in cases of SLE. These sections do not create additional/different settlement options for the spouse of the member whose life expectancy is reduced. Secondly, the criteria for unlocking small amounts in section 50 of

the PBA seem to only apply to payments to former members or retired members. Bill 236 extended unlocking provisions to spousal survivor pensions but doesn't seem to apply to these transfer payments. There isn't anything in the Family Law Matters sections (i.e. sections 67.1 to 67.6 of the PBA) or Reg. 287/11 that would extend the unlocking provisions to payments to spouses.

4. Withdrawals from LIF

We note that section 8(2.1) of schedule 1.1 under the general PBA regulation allows withdrawals from the LIF of an amount up to 50% of total market value and we suggest that some reference to this right be included where transfer options are referenced, this being an important consideration for the non-member spouse in making a decision.

5. Part G

We recommend the removal of the field for the date a completed application was received. While there is a requirement to produce the statement within 60 days, the regulations do not require plan administrators to include the date the completed application was received directly on the Statement of Family Law Value. All other pension statements required by the PBA have delivery deadlines (for example termination statements, annual statement of benefits and death benefit statements) but do not require the administrator to disclose the date the applications are received. The removal of this requirement would assist plan administrators by limiting the number of data fields that need to be relayed back.

6. Administrator Certification requirement

On page 5, the certification provided by the plan administrator should contain the qualifier "to the best of my knowledge" since some of the information may be provided by the member/non-member spouse and/or the employer. This qualification is consistent with the certification provided by the member/non-member spouse on Form 1. This comment applies universally to the other "Statement of FLV" forms.

7. Reflect that Completion non-mandatory

On page 6, in the section called "Next Steps", we recommend the amendment of the phrase "should jointly complete" to "This form is optional. If you intend to complete this form, you should do so jointly" in the first sentence located under the heading "No Division". Form 7 is an optional form. The phrase "should jointly complete" gives the impression that this form is mandatory. The spouse may be under the impression that a 'lien'-like hold is put on the member's pension until this form is delivered, incorrectly rely on this impression and defer the application to transfer/divide the pension. In the meantime, the plan member may apply for a pension benefit.

8. Appendix "A"

On Appendix A, we recommend the removal of the phrase "(includes one-twelfth of a year for each full month during the period)" following the description of credit that accrued during the entire period of plan membership and during the spousal period. That phrase should be used only for variables "D", "E" and "T". This phrase will only cause confusion if it's introduced for a measure of credited service. Credited service should be as determined the plan administrator.

9. Appendix "E"

On Appendix E located on page 11 of Form 4B, we recommend the removal of the phrase "(years and full month)" to describe the plan member's age on the Family Law Valuation Date. Since there is no requirement in the regulations to describe age in years and full months, plan administrators should be permitted to continue to describe age in a manner that is consistent with its current practices. Ontario Teachers' Pension Plan, for example, describes a plan member's age to the fourth decimal point instead of in months.

10. Step 2 Calculations

In the Step 2 Calculations (Form 4B, page 14 of 15), we recommend the removal of the phrase "(includes one-twelfth of a year for each full month during the period)" following the description of credit that accrued during the entire period of plan membership and during the spousal period, for the reasons stated above.

Form 4D – Statement of Family Law Value Former Plan Member-with a Defined Benefit or a Combination Benefit

We reiterate the recommendations for Form 4B above.

Form 4E – Statement of Family Law Value - Retired Member with a Defined Benefit Pension

1. Family Law Value Summary (page 2 of 15)

We recommend the removal of the sentence:

The **maximum amount** of the **Family Law Value** of the Retired Member's **pension** that may be assigned to his or her spouse/former spouse from the pension plan as of the Family Law Valuation Date is:

because the spouse is not entitled to an assignment of the lump sum, given that this form is only to be used when the valuation date is post-retirement.

2. Pension Summary (page 2 of 15)

We recommend that the pension summary box at the bottom of page 2 be edited to allow for a lifetime pension plus a bridge benefit or a pension less a CPP reduction. The middle box on page 12 of Form 4E explicitly acknowledges that plans can be integrated with CPP, either by offering a lifetime pension benefit plus a temporary bridge benefit payable until age 65 or by providing a pension benefit that is reduced at age 65 by a CPP reduction. The Pension Summary box on page 2 of Form 4E should provide space to explain either option. The maximum pension amounts at the bottom could easily be expressed as $x up to age 65 and $y thereafter, thereby accommodating both plan designs.

3. Pension Summary (page 2 of 15)

We also recommend the addition of the phrase "accrued during the spousal period" following the phrase "or a maximum of 50% of the pension" in the middle of the pension summary box. The current statement is inaccurate because the 50% limit should be applied on the pension accrued during the spousal period and not on the total pension.

4. Pension Summary (page 2 of 15)

We suggest that a section be added to the Pension Summary that expresses the amount that can be paid to the non-member spouse as a percentage of the amount otherwise payable to the retired member. The expression of the maximum amount to be assigned as a proportion of the installment otherwise payable to the retired member on the pension summary would reflect the requirements of paragraph s.67.4(1)5 of the PBA. It would also greatly assist family lawyers, judges and plan members who must incorporate the amount to be divided into a separation agreement or court order.

5. Part E (page 5 of 15)

We suggest that lines (i) and (ii) below the first box be removed and replaced with a summary of the specified dollar amount of each pension installment or the maximum percentage of each pension installment that can be paid to the spouse.

6. Next steps (page 7 of 15)

We note that the third bullet point under "Division of Pension" appears to contemplate a different start date for the division of the pension than the FLVD. This would be inconsistent with the regulations. We also note that the 4th bullet directs the parties to make arrangements in the event that

the retired member dies before the spouse. As previously discussed, this circumstance should be covered in the regulations. If a plan member can die one month after retirement leaving the equalization payment to the spouse unsatisfied, we're back exactly where we started, with spouses seeking life insurance and other means of securing payments.

7. Appendix A (on page 8 of 15)

We recommend the removal of the phrase "(includes one-twelfth of a year for each full month during the period)" in the two years of credited service lines. The phrase also mistakenly appears for variables "H" and "J" on page 14. The retired member's age is also to be expressed in "years and full month" on the middle of page 12. This detail is not required by the regulation and so we suggest that the phrase "age" would be a sufficient (as noted above).

Form 5 – Application to Transfer the Family Law Value

Part E (on page 3 of Form 5)

As noted above, it is unclear whether the fourth transfer option is supported by the PBA and regulations.

Form 6 – Application to Divide a Retired Member's Pension

1. Part D (on page 3 of Form 6)

The form shouldn't support the option of assigning a different percentage of the bridge (or CPP reduction) than of the lifetime pension.

2. Indexation

With respect to indexation, if indexing is included in the calculation of the pension benefit (i.e. it is vested), then any division of that pension benefit must necessarily include indexing, if the division is expressed as a "proportion of the installment otherwise payable to the former member." If the division is expressed as a dollar amount, or if indexing is *ad hoc*, then it should not be applied by the plan administrator. The question of whether indexing is applied to the spouse's pension is determined by the plan design, plan terms and the expression of the division as either a specified amount or a proportion of each installment. It is not an option that can be elected simply on Form 6.

3. Delay where conflict/discrepancy identified

We suggest that a comment be added that, if the administrator identifies a conflict or discrepancy between the wording of the order, agreement or award on one hand, versus the application on the other, further steps may be required and settlement could be delayed. The same would apply for Form 5.

4. Part E (page 3)

The last sentence for the last check box states that the non-member spouse must waive the survivor benefit in order to receive the combination option. It is not clear where the authority for this statement comes from. See comments below on Part G.

5. Part G (page 4)

It is not clear where the authority for this requirement comes from. Subsection 67.4(8) of the PBA provides that an eligible spouse may waive his/her entitlement to a joint and survivor pension after the payment of the first installment and before the pension is divided. The combined payment option is set out in subsection 67.4(10). Neither of these provisions state that the survivor pension must be waived to receive the combined payment. Moreover, this interpretation would appear to render the second portion of paragraph 3 of subsection 67.4(10) meaningless (i.e. Why would it be necessary to state that the eligible spouse ceases to be entitled to payment of the joint and survivor pension if the eligible spouse has already waived his/her entitled to that benefit?). Regardless, it would be helpful to have a separate policy statement from FSCO on the application of subsection 67.4(8).

6. Instructions page 2 and 3.

See previous comments on authority for waiver requirement and combined payment option.

Form 7 – No Division of Family Law Value/Pension Assets

We recommend that this form be either revoked or clearly marked as "optional". There is no obligation under the PBA or Reg. 287/11 for the parties to inform the administrator that they will not be dividing the pension. This form could also suggest that there is an additional obligation on administrators to inquire into whether the pension will be divided when a statement of FLV has been issued. Again, there is no such requirement under the PBA or Reg. 287/11. Furthermore, this form would appear to contradict the public policy rationale behind the new rules – that is simplifying the process for all involved (the parties, legal counsel and plan administrators). Introducing an additional step that is not required by the legislation will add confusion (for the parties) and additional costs (for plan administrators) to the process. As a final point, past experience dictates that plan members are not predisposed to completing optional forms.

Conclusion

Thank you for considering our comments. Please do not hesitate to contact us if you have any questions or we can be of any further assistance. We look forward to the release of the finalized forms and thank you again for your significant efforts.