



A Permanent Framework for Target Benefits

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Introduction

The Ontario Bar Association ("**OBA**") welcomes the opportunity to provide technical feedback regarding the draft regulatory provisions to the *Pension Benefits Act, RSO 1990, c P.8* (the "**Act**") supporting the permanent framework for target benefits. We provide below a general comment on the draft regulations and the technical review process, as well as specific comments on the following draft regulation documents:

- Document 1 – Written Policies Under Section 10 of the *Act*
- Document 2 – Target Benefits Regulation
- Document 3 – Conversions to Target Benefits Under Section 81.0.2 of the *Act*
- Document 4 – Provision of Information Overview
- Document 6 – Amendment to Reg. 909 of RRO 1990
- Document 9 – Family Law Matters

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Pensions and Benefits Law and Family Law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience dealing with all aspects of pensions, including the treatment of pensions as matrimonial property in the context of separation.



Comments & Recommendations

General Comment

As an initial point, we note that the 9 documents included in the draft regulations include many details beyond, and in some cases contradicting the policies reflected in the August 2023 Follow-Up Consultation Document. Furthermore, the Technical Review Guide (the "Guide") creates the impression that the consultation documents are reflected except for the changes noted in the Guide. The effect of this is misleading in terms of the breadth of new policies that are included in the draft regulations. In our view there are significant differences and/or new requirements contained in the draft regulations. We recommend that additional time be taken to allow for a sufficiently thorough examination of the implications of the draft regulations, beyond the 45 days allocated for technical feedback.

Document 1 – Written Policies Under Section 10 of the Act

Communications Policies

This draft regulation includes requirements at s. 6 for Communications Policies for pension plans that provide target benefits. We agree with the requirement that plans providing target benefits should have a communications policy, however, the requirements in the draft regulations are at the same time extremely prescriptive and ambiguous in terms of what is required. To provide an example, subsection 6(1)3 provides that the following is prescribed as information to be contained in a pension plan's communications policy:

3. An explanation of the different communication needs of members, former members, retired members and other persons entitled to benefits under the plan based on their demographics, and how the communication processes and methods identified in paragraph 2 might be adapted to meet those different needs.

It is unclear whether, for instance, a study of the demographics of the plan would be necessary to meet this requirement, and what kinds of "communications needs" are



contemplated. In any case, developing a policy that meets this requirement would be administratively burdensome, would likely lead to a significant expense to be paid from the Plan's trust assets. There may be plans for which the exercise contemplated under subsection 6(1)(3) would be necessary or a best practice, but in the case of smaller plans the time and expense may not be justified.

We recommend an approach to communications policies that is clear in what is required, but is much less prescriptive. A requirement that leaves to administrators the task of determining what communications issues should be addressed in the particular case of their plans would be preferable to a "one-size-fits-all" approach that will lead to unnecessary administrative burden and cost for many plans.

Document 2 – Target Benefits Regulation

Benefit Reduction and Improvement

The proposed requirement that previously reduced accrued benefits for former members must be restored before accrued benefits for members could be improved beyond a restoration of previously reduced benefits is captured in s. 7. We appreciate the clarification at subsection 7(3) that this requirement does not apply to any reductions effective before the date of the conversion. However, the clarified requirement at subsection 7(4) still does not include any expiration or cut-off, which significantly ties the hands of administrators in terms of making plan-design decisions. Plan administrators have fiduciary duties to act with an even hand, and must (even in the absence of requirements such as those contained in s. 7) consider the interests of different classes of members including both active and former members. Subsection 7(4) dramatically limits the decisions plan administrators can make to address those interests by requiring that a reduced benefit, even decades after the fact, must be restored before a benefit increase can be made, even where the interests of all affected members and former members could be better served by other means. We suggest that plan administrators would be better empowered to uphold their fiduciary duties to members and former members through a broader range of plan design possibilities if subsection 7(4) was



removed from the draft regulation. Alternatively, if subsection 7(4) is not removed, there should be a limit imposed as to how long it applies.

Fixed Minimum PfAD

The August 2023 Follow-Up Consultation Document stated the following with respect to provision for adverse deviation ("PfAD"):

Most stakeholders have acknowledged the role of a PfAD but have suggested the Ministry look at approaches such as the recently implemented PfAD in British Columbia, which is simpler and includes a discretionary component.

Most stakeholders also noted that many plan administrators currently employ a form of funding margin. The Ministry also heard that a PfAD with a fixed minimum could be problematic for some plans given the diversity of MEPPs.

As a result, the Ministry is proposing a different approach in which each plan administrator would have the discretion to establish their own plan's PfAD in compliance with the plan's funding and benefits policy...¹

Many stakeholders received the above passage as an assurance, in response to concerns that were raised regarding fixed minimums, that there would be no fixed minimum requirement for PfAD in the permanent target benefit framework. However, the provisions for determining surplus in a continuing pension plan at s. 18 effectively establish a fixed minimum PfAD of 5% by requiring that the value of a plan's liabilities be at minimum 105 per cent of going concern liabilities. Subsection 18(b) provides:

18. For the purposes of determining surplus in a continuing pension plan,

¹ "A Permanent Framework for Target Benefits: Revised Proposals" August 2023 Follow-Up Consultation Document at page 14.



[...]

(b) the value of the liabilities of the pension plan shall be the greater of “A” and “B” or, if a benefit allocation method is not used to set contribution rates, the greatest of “A”, “B” and “C”, where,

[...]

“B” is 105 per cent of going concern liabilities determined using a benefit allocation method, as disclosed in the last valuation report...

We recommend that, in line with the policy reflected in the August 2023 Follow-Up Consultation Document, that no fixed minimum PfAD be imposed, subsection 18(b)“B” be removed, and plan administrators be given the discretion to establish their own plan’s PfAD in compliance with the plan’s funding and benefits policy.

Document 3 – Conversions to Target Benefits Under Section 81.0.2 of the Act *Gap in exemption to solvency funding requirements*

The draft regulations with respect to conversion do not appear to provide a way for plans temporarily exempt from solvency funding requirements as SOMEPPs to seamlessly transition to exemption under the target benefit framework.

The funding rules for SOMEPPs have been extended to whichever is earlier: January 1, 2025; or the date the new target benefit pension plan framework under the Act comes into force.

Effective January 1, 2025, an administrator may apply for the Chief Executive Officer's consent to a conversion, per subsection 81.0.2(12) of the Act. Subsection 5(1) of this draft regulation provides that the effective date of conversion "must be after the day on which the Chief Executive Officer consents the proposed conversion and no later than 12 months after that day." As currently written, there does not appear to be a way for a SOMEPP to avoid a period of time during which it will not be exempt from solvency funding requirements.



We recommend an explicit mechanism for seamless transition, which could be achieved by extending exemptions for SOMEPPs upon filing for conversion, and allowing for a retroactive deemed conversion back to January 1, 2025.

Document 4 – Provision of Information Overview

Throughout the provisions for notices and statements contained in this draft regulation, there are references to inspection and making available "the plan's funding and benefits policy, its communications policy and its governance policy, and any document that changes those policies." We recommend some clarification of what is intended to be captured by "any document that changes those policies." In our experience it is rare for such policies to be changed by formal amendment documents as would be the case for a trust agreement, for instance. As such it is unclear what documents are being identified by these provisions. In our view it would not be appropriate for minutes of meetings of trustees, for instance, during which decisions to update policies, or approval of updated policies are made, to be captured by these provisions.

Document 6 – Amendment to Reg. 909 of RRO 1990

This draft regulation includes the addition of subsection 14(8.0.4.3)(a) and s. 14.1 concerning stress testing, and information about stress testing that must be included in a report. We note that the Canadian Institute of Actuaries ("CIA") already provides rules for stress testing covering the same ground as 14.1. We recommend allowing the CIA rules to govern stress testing, as to the extent these requirements are different than the CIA rules, it would cause an unnecessary administrative and cost burden, particularly for smaller plans.

Document 9 – Family Law Matters

The OBA has some concerns from the perspective of family lawyers. The treatment of these types of pensions in the context of valuing it as a matrimonial asset is complex, with valid and incompatible concerns from the perspectives of the member spouse, non-member spouse, and the plan as a whole. Rather than endorsing or opposing the proposal in its



totality, we have opted to provide these concerns for consideration as the final details are worked through.

1. Calculations based on the proposed regulations, as compared with those used for defined benefit plans, could result in understating the value of the pension as a matrimonial asset to the detriment of the non-member spouse;
2. If the valuation of target benefits are calculated using the methods and assumptions for defined benefit plans subject to subsection 14(1) of the PBA (that do not account for the possibility of reduction to accrued benefits), as compared to the calculations based on the proposed regulations, this could overstate the value of the pension at marriage breakdown, resulting in unfairness to the member spouse and the plan as a whole (and therefore all members).

The OBA does not comment on whether the proposed regulations address these concerns and appropriately balance the interests of member and non-member spouses, given the time constraints for providing comments on the proposed regulations and the fact that this question would have to be addressed in consultation with actuarial experts.

The OBA would be pleased to discuss this further and answer any questions that you may have.