



SECTION:	Surplus
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TITLE:	Surplus Distribution by Written Agreement – The Role of Legal Counsel - PBA s. 77.11(7) and 78(2)
APPROVED BY:	Superintendent of Financial Services
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REPLACES:	S900-503

This policy replaces S900-503 (Surplus Distribution – The Role of Legal Counsel in Obtaining Written Consent) as of the effective date of this policy. This policy is supplemental to S900-512 (Application by Employer for Payment of Surplus on Wind Up of a Pension Plan).

Note: Where this policy conflicts with the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 (FSCO Act), Pension Benefits Act, R.S.O. 1990, c. P.8 (PBA) or Regulation 909, R.R.O. 1990 (Regulation), the FSCO Act, PBA or Regulation govern.

*Note: The electronic version of this policy, including direct access to all linked references, is available on FSCO's website at www.fSCO.gov.on.ca. All pension policies can be accessed from the **Pensions** section of the website through the **Pension Policies** link.*

Policy Purpose

This policy provides guidance concerning the role of legal counsel in representing some or all of the members, former members, retired members or other persons entitled to payments from a pension fund (Affected Persons) where the employer intends to submit an application to the Superintendent of Financial Services (the Superintendent) for consent to the payment of surplus to the employer based on a written agreement between the employer and Affected Persons pursuant to section 77.11(7) of the PBA. This policy also provides guidance on the documentation that legal counsel must provide to the Superintendent to demonstrate that legal counsel has authority to act on behalf of Affected Persons. This policy is not meant to establish guidelines respecting the scope of legal counsel's authority to act on behalf of Affected Persons.

This policy applies to a surplus application relating to an ongoing plan or a plan that is winding up.

The Role of Legal Counsel in Surplus Distribution by Written Agreement

Under section 77.11(7) of the PBA, an employer may make an application to the Superintendent for payment of surplus to the employer based on a written agreement between the employer and the Affected Persons (sometimes referred to as a surplus sharing agreement).

Where some or all of the Affected Persons are represented by legal counsel, they may choose to have their legal counsel represent them in negotiating a written agreement on their behalf. The exact scope of the legal services may vary depending on the situation. For instance, those represented by legal counsel may instruct the employer, through their legal counsel or otherwise, to transmit the notice required under section 78(2) of the PBA to their legal counsel.¹ FSCO's expectation is that legal counsel will clearly communicate the scope of legal counsel's authority to act on behalf of represented individuals to the individuals.

Documentation to the Superintendent

If legal counsel purports to represent Affected Persons in a surplus distribution application, the Superintendent will require legal counsel to provide the Superintendent with an affidavit that includes the following information:

- the names of the individual(s) represented by legal counsel including a description of each of their status in the pension plan (i.e., member, former member, retired member or other person entitled to payments under the pension fund); and
- the general scope of legal counsel's authority to act on behalf of the individuals represented by legal counsel.

The Superintendent may request legal counsel provide documentation confirming the scope of the legal counsel's authority.

¹ Under section 78(2) of the PBA, an employer who applies to the Superintendent for payment of surplus to the employer out of a pension fund is required to provide notice to the prescribed parties, including the Affected Persons.