



Pension Commission of Ontario
Commission des régimes de retraite de l'Ontario

SECTION: Surplus

INDEX NO.: S900-500

TITLE: Distribution To Employer on Wind Up -
PBA, 1990 s. 78 and 79, O. Reg 909 (708/87 and 743/91 [eff. Dec. 18/91])
c. 7a(1)(b)

APPROVED BY: The Pension Commission of Ontario

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Distribution of Surplus to an Employer on Wind-up: Regulation 7a(1)(b)

Regulation 743/91, clause 7a(1)(b) provides for payment of surplus to an employer on the wind-up of a pension plan in whole or in part, in accordance with sections 78 and 79 of the *Pension Benefits Act*, R.S.O. 1990, c.P.8 (the "PBA").

The Regulation requires that written agreement be obtained from the employer, the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, two-thirds of the members of the plan, and such former members and other persons entitled to payments under the pension plan on the date of wind up as the Commission considers appropriate in the circumstances.

The following sets out the procedures for bringing an application pursuant to clause 7a(1)(b) of the Regulation on a full wind up.

General Principles

1. Where payment of surplus to the employer is sought on a wind-up, section 78 of the PBA requires the Commission's consent. Before such consent may be given, the requirements of subsections 78(2) and 79(3) of the PBA, regarding notice and entitlement to surplus, must be met.
2. Generally, an employer winding up a pension plan will apply to the Commission for its consent to payment of surplus under clause 7a(1)(b) of the Regulation when:
 - c the Superintendent of Pensions has approved payment of benefit entitlements out of the plan;
 - c the plan documents permit surplus reversion to the employer on the wind up of the pension plan; and
 - c the employer has the written agreement of:
 - a) the collective bargaining agent, or if there is no collective bargaining agent, of at least two-thirds

of the members; and,

- b) such number of former members and other persons entitled to payments under the pension plan on the date of the wind up as the Commission considers appropriate in the circumstances.

Procedure

- 3. When making application to the Pension Commission, applicants should follow the three-step procedure outlined below:
 - c send a draft Notice of Application, a draft Surplus Distribution Agreement, and a Preliminary Application to the Superintendent for advice;
 - c transmit to the parties specified in subsection 78(2) of the PBA Notice of Application and Surplus Distribution Agreement; and
 - c submit the final Application (which includes the finalized Notice of Application and Surplus Distribution Agreement) to the Commission.

STEP 1: Submission of Documents to the Superintendent

- 4. All documents sent for the Superintendent's advice are required to be sent in duplicate to: [Editor's Note: Address has been updated since original publication]

The Registrar
Pension Commission of Ontario
29th Floor
250 Yonge Street
Toronto, Ontario
M5B 2N7

Notice of Application

- 5. Regulation 708/87, ss. 22(2) and (3) require the Superintendent to advise the employer on the adequacy of the Notice of Application. This advice must be obtained prior to transmitting it to members, former members and other beneficiaries of the plan.
- 6. Consequently, a draft Notice of Application prepared in accordance with subsection 78(2) of the PBA and Regulation 24(5) must be submitted for the Superintendent's advice, and must be accompanied by a list of the classes of persons who are to receive the Notice of Application, and the proposed form of delivery.
- 7. Requirements for the content of the Notice of Application prescribed by Regulation 24(5) are as follows:
 - a) the name of the pension plan and its provincial registration number;
 - b) the review date of the report provided with the application and amount of surplus in the pension plan;
 - c) the surplus attributable to employee and employer contributions;
 - d) the amount of surplus withdrawal requested;
 - e) a statement that submissions may be made in writing to the Commission within thirty days of receipt of the Notice;
 - f) the contractual authority for surplus reversion; and
 - g) notice that copies of the wind-up report filed with the Commission in support of the surplus

request are available for review at the offices of the employer and information on how copies of the report may be obtained.

8. If the office or location where the members were employed is closed, the applicant must make alternative arrangements for members to review the documents close to the location(s) where business was conducted.
9. There must be full and open disclosure of all provisions of the plan and prior versions of the plan relevant to any determination of surplus entitlement, including all current and previous plan texts and trust agreements, insurance contracts, employee booklets and notices, etc.

Actual wording of relevant plan provisions, and of relevant plan provisions which authorize any relevant plan amendments, must be cited in the Notice of Application.

10. The Superintendent may require that the Notice of Application contain advice that members, former members and other plan beneficiaries may wish to consult a lawyer prior to giving their written agreement.
11. The Notice must state that:
 - c written submissions to the Pension Commission are to be directed to the attention of the Registrar; and
 - c the date on which the application will be considered by the Commission may be obtained from the plan administrator.

Surplus Distribution Agreement

12. Clause 7a(1)(b) of the Regulation provides that surplus may be paid out of a pension plan to an employer with the written agreement of:
 - i) the employer,
 - ii) the collective bargaining agent of the members of the plan, or if there is no collective bargaining agent, at least two-thirds of the members of the plan, and
 - iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of wind up as the Commission considers appropriate in the circumstances.

In order to obtain the agreements required under clause 7a(1)(b) of the Regulation, the Surplus Distribution Agreement must be given to all persons listed in paragraph 24 below.

13. Preliminary submission of the draft Surplus Distribution Agreement is required to permit the Superintendent to advise the applicant as to its adequacy prior to distribution.
14. The Surplus Distribution Agreement to be signed by plan members, former members, and other plan beneficiaries must include:
 - i) the member's name;
 - ii) the member's signature;
 - iii) the witness' name; and,
 - iv) the witness' signature.
15. The appropriate bargaining agent for the purposes of subclause 7a(1)(b)(ii) is the certified bargaining agent which

represents members of the plan at the date the written agreement is signed.

16. The consent of a collective bargaining agent is only relevant for those plan members represented by the agent. Therefore, if a pension plan involves more than one bargaining agent, then each bargaining agent must consent.
17. If a pension plan involves both unionized and non-unionized members, then the bargaining agent as well as two-thirds of those members not represented by the bargaining agent must consent.
18. Even if the bargaining agent does not bargain the pension plan, it must consent to the payment of surplus to the employer.

Preliminary Application

19. Submission of the Preliminary Application is required to permit the Superintendent to advise the applicant as to its adequacy prior to submission to the Commission.
20. The Preliminary Application should be divided into parts containing the following information:

- i) Prepared By

The name of the employer making the application, and the name and title of the corporate officer authorized to act on behalf of the employer in respect of the application. All communication from the Commission will be directed to the person so named. Identify any consultants, actuaries and/or lawyers assisting in preparing the application.

- ii) Pension Plan

The full and proper name of the plan and its provincial registration number.

- iii) Nature of the Application

A description of the application with reference to the specific sections of the PBA and Regulation.

For example:

"An application for consent pursuant to subsection 78(1) of the PBA and clause 7a(1)(b) of the Regulation to a payment of surplus to the employer in the amount of"

- iv) Collective Bargaining Agent

The name of any collective bargaining agent(s) who represent any members or former members of the pension plan.

- v) Background

A brief summary of the history of the plan and prior versions of plans, if any, and the events giving rise to the application, including:

- a) the effective date(s) of the plan(s);

- b) classes of members covered by the plan(s);
- c) the benefit structure (e.g. non-contributory, final average earnings benefit);
- d) date of and reasons for the wind up;
- e) a description of any benefit enhancements granted on wind up;
- f) the date the Superintendent approved the wind-up report.

21. The application should set out:

- a) a description of the method used to determine the surplus attributable to employee and employer contributions, and
- b) a statement by the actuary performing the calculation that, in the opinion of the actuary, the method employed is consistent with sound actuarial principles and practices, and is appropriate for the intended purpose.

22. The application should set out relevant corporate history, including reference to any corporate restructuring affecting the pension plan.

STEP 2: Transmit the Notice of Application and Surplus Distribution Agreement

23. The Notice of Application is required to be transmitted to all parties named in subsection 78(2) of the PBA.

24. Normally, service by personal delivery or first class mail of the Notice of Application and the Surplus Distribution Agreement is required for:

- a) active plan members;
- b) anyone defined by the pension plan text as a member or former member;
- c) where the plan wind-up results from an event affecting the employment of the members, such as a plant closure, all members participating in the plan on or after the date notice of the event is released (see: Compliance Assistance Guideline No. 4, BBS Index No. W100-100)*;
- d) each trade union that represents members of the plan;
- e) any advisory committee established in respect of the pension fund;
- f) former plan members entitled to receive benefits from the plan;
- g) any other persons who are entitled to payments under the pension plan on the date of wind-up.
This includes:

- c any former spouse or widow or widower of a member or former member who is receiving payments out of the pension fund, and

- c any dependent child of a former member who is receiving payments out of the pension fund.

In addition, the Superintendent may require that any plan beneficiary, as described in paragraph 25.d., for whom the plan administrator has purchased a pension, deferred pension, or ancillary benefit shortly before the date of wind-up may be entitled to service by personal delivery or first class mail of the Notice of Application and the Surplus Distribution Agreement, and may be required to consent to the application.

25. The following are considered to be "former members" of the pension plan for the purposes of clause 78(2)(a) of

the PBA, and are entitled to service of the Notice of Application. However, the Superintendent may authorize alternative service by newspaper advertisement under subsection 112(3) of the PBA, subject to approval of the contents of the proposed newspaper advertisement for the following:

- a) former vested plan members who terminated employment within six years before the effective date of wind-up, and commuted or transferred their pension benefit out of the plan;
- b) former non-vested plan members who terminated employment within six years before the effective date of wind-up;
- c) former plan members who had their pension benefits transferred to another pension plan sponsored by the same employer or another employer within six years before the effective date of wind-up;
- d) any plan beneficiary for whom the plan administrator has purchased a pension, deferred pension, or ancillary benefit.

When considered appropriate in the circumstances, the Superintendent may require personal service or other forms of notice for those listed in this paragraph.

26. In an application for surplus distribution where the plan wind up results from an event affecting the employment of the members, such as in the case of a plant closure, all members participating in the plan on or after the date notice of the event is released must be included as members for purposes of the wind up, including the surplus distribution. This applies even if a member terminates after the notice date but prior to the event actually occurring. (see PCO Compliance Assistance Guideline No. 4, Revised Dec. 1990).
27. In order to satisfy Regulation 7a(1)(b)(iii) an applicant employer is required to obtain the written consent of two-thirds of the aggregate of those former members and other plan beneficiaries who are included in paragraph 24. This requirement is subject to the Commission's discretion depending on the circumstances.

STEP 3: Filing the Completed Application with the Commission

28. A completed Final Application must be filed with the Registrar at least thirty (30) days prior to the Commission meeting at which the application will be considered.

It is the applicant's responsibility to provide 25* copies of all required documentation with the final Application.

29. The Commission will not normally consider the Application until a period of forty-five (45) days has passed from the date the Notice of Application and the Surplus Distribution Agreement is transmitted to plan members.
30. Copies of all of the Surplus Distribution Agreements signed by plan members, former members, and other plan beneficiaries must be filed with the staff of the Pension Plans Branch of the Commission, not with the Registrar (one signed sample is required to be submitted with the Application).
31. The Final Application is filed with the Commission by sending 25* copies to:

The Registrar,
Pension Commission of Ontario
250 Yonge Street, 29th Floor
Toronto, Ontario M5B 2N7

32. The employer must forward a copy of the Final Application to the plan administrator, if the administrator is a person other than the employer.

33. The applicant's submission regarding plan surplus provisions must trace in the plan documents, trust agreements, insurance company contracts, employee booklets, collective bargaining agreements and any other relevant documents under the current pension plan and any prior pension plans from inception, the provisions that are relevant to any provision for surplus in the plan, whether such provision relate to the employer or employees.
34. Where the original documents contain no surplus provisions, the submission must acknowledge that fact and comment on the validity of any amendments made to address the question.
35. The submission regarding plan surplus provisions must include a description of any actions taken to further clarify any provision for surplus in the plan documents.
36. Any other explanations or submissions, including reference to precedents, if appropriate, relating to any provision for surplus in the plan documents should also be presented.
37. If the submission regarding plan surplus provisions cannot be included in the body of the completed Application, it may be appended to the Final Application.
38. The Final Application submitted to the Commission must contain:
 - a) all of the information contained in the Preliminary Application as described in paragraphs 20, 21 and 22;
 - b) confirmation that the Notice of Application contains the items prescribed by Regulation 24(5), and that the Notice of Application and the Surplus Distribution Agreement were submitted to the Superintendent for advice pursuant to Regulation 22(3) prior to transmittal;
 - c) a statement that subsection 78(2) of the PBA has been complied with, the date the last Notice of Application was distributed, and details as to the classes of persons who received the Notice of Application and the Surplus Distribution Agreement.
 - d) the following documents:
 - i) copies of all relevant extracts from the plan documents, trust agreements, insurance contracts, employee booklets notices, and any other documents respecting surplus entitlement, clearly labelled,
 - ii) the wind-up report and any supplementary wind-up report,
 - iii) the Superintendent's approval of the wind-up report and any supplementary report,
 - iv) a certified copy of the Notice of Application and the Surplus Distribution Agreement distributed to plan members, former members and other plan beneficiaries,
 - v) the Superintendent's advice regarding the adequacy of the Notice of Application, the Surplus Distribution Agreement, and the Preliminary Application,
 - vi) the balance sheet for the plan as of the effective date of wind up, together with any subsequent revision or up-date including:
 - c the market value of the assets;
 - c the liabilities for the basic benefit entitlements;
 - c the liabilities for any other enhancements granted in conjunction with the wind up; and

- c estimates of any other deductions to be made from the surplus, such as fees and expenses.
 - e) certified copies of all written agreements between the employer and any collective bargaining agent;
 - f) one sample of a Surplus Distribution Agreement signed by a plan member, former member, or other plan beneficiary;
 - g) a list of all plan members at date of wind up;
 - h) a summary (by class of employee) of:
 - i) the number of members, former members and other plan beneficiaries to whom notice was transmitted;
 - ii) those included in i) who are entitled to payments under the pension plan on the date of wind up; and
 - iii) the number of those included in ii) who signed Surplus Distribution Agreements;
 - i) any written representations objecting to the application, as well as a description of the actions taken by the applicant to resolve the objections, and a description of the results of those actions.
 - j) any other relevant submissions in support of the application, including any comments on negotiated agreements in respect of the surplus.
39. A supplement to the wind-up report will be required where the Pension Officer reviewing the wind-up report determines omissions or inadequate information.
40. In addition, the applicant should comment on the status of assets and liabilities, asset distribution to the members, former members and other persons entitled to payment, and describe any other actions taken to make provision for the payment of the liabilities.
41. Pursuant to clause 79(3)(c) of the PBA, no money may be paid out of a pension fund to an employer until provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan, including enhancements to members and former members from surplus.
42. For the purpose of resolving any outstanding issues, the Registrar will forward a copy of any objections to the application received which raise legal or technical issues to the applicant.
43. Any applications which have already been prepared so as to satisfy clause 7a(2)(b) as it read prior to December 18, 1991, will be handled using the same procedures set out in this Administrative Practice.

After Filing the Application

44. The Registrar will acknowledge receipt of the application.
45. PCO staff will review the application and attempt to resolve any outstanding issues with the applicant or anyone who made representations under subsection 78(3) of the PBA. When the staff review has been completed the application will be referred to the Commission for a decision.

Commission Decision

46. The applicant and anyone who made representations under subsection 78(3) of the PBA will be advised of the date on which the Commission will consider the matter.
47. Parties are entitled to make written representations to the Commission.
48. Guidelines for contested surplus applications will be published as a separate Administrative Procedure.

After the Commission has made its decision, the Registrar will communicate the Commission's decision to all parties.

Appeals from Commission Decisions

49. Any party to a proceeding before the Commission under section 79 of the PBA may appeal to Divisional Court from the Commission's decision pursuant to section 91 of the PBA.

Approved by the Pension Commission of Ontario on May 28, 1992. Reprinted with minor revisions to the version issued June 11, 1992.

*PCO Staff Comment Summer 1996: * W100-100 was revised by W100-101.*

*Address references have been updated and the *number of copies required to be filed with the Registrar was changed as of June 23, 1994 to 18 copies. This policy was replaced by S900-501 and recently revised by S900-504.*