April 15, 2011

Justice Policy Development Branch
Social Justice Programs and Policy Division
Ministry of the Attorney General (Ontario)

Re: TAS Submissions regarding Draft Pension Regulations

The *Family Law Rules* govern the practice and procedure of family law litigation in Ontario. Rule 2(2) - the Primary Objective - acts as the touchstone and guide for the interpretation of and application of rules, legislation, regulations and court process.

The Primary Objective directs the court to deal with cases justly. Dealing with cases justly includes: ensuring that the procedure is fair to all parties, saving time and expense, dealing with the case in ways that are appropriate to its importance and complexity, and giving appropriate court resources to the case while taking into account the need to give resources to other cases. [1]

The draft *Regulations* are not consistent with the Primary Objective. Without amendment, the draft *Regulations* run the risk of increasing the cost, complexity and duration of family law litigation. This will inevitably cause further strain on an already overburdened judicial system and undue hardship on litigants.

As advocates, we are concerned with the impact the draft *Regulations* will have on court process and in particular the tenets of procedural and substantive fairness for litigants. Our comments, summarized below, are confined to this topic. We leave it to the actuaries and other qualified experts in the field of pension valuation to comment on the substantive issues and challenges associated with the draft *Regulations*.

Our concerns are summarized as follows:

1. Disputes over Valuation Date: Valuation date is a defined term under the *Family Law Act*.[2] For most couples, valuation date is "the date the spouses separate and there is no reasonable prospect that they will resume cohabitation." [3]

[1] Family Law Rules, O. Reg. 114/99 Rule 2(3)
[2] *Family Law Act*, R.S.O. 1990 C. F.3 s. 4(1)
[3] *Ibid*, "valuation date" means the earliest of the following dates:
1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted.
3. The date the marriage is declared a nullity. 4. The date one of the spouses commences an application based on subsection 5 (3) (improvident depletion) that is subsequently granted.
5. The date before the date on which one of the spouses dies leaving the other spouse surviving. ("date d'évaluation") R.S.O. 1990, c. F.3, s. 4 (1); 2006, c. 19, Sched. C, s. 1 (2); 2009, c. 11, s. 22 (1-3); 2009, c. 33, Sched. 2, s. 34 (1).

a. **Problem**: The draft regulations require agreement with respect to date of separation. Establishing date of separation is a fact-based analysis, which frequently is the subject matter of dispute between the parties. Traditionally, date of separation disputes are resolved in tandem with the larger issues in the case. In the face of a date of separation dispute, parties and counsel routinely agree to two sets of disclosure on both dates. Requiring a single agreed-upon date of separation as a precondition of any application to the plan administrator creates leverage for a party resisting disclosure or seeking to benefit from delay. Without amendment, the only remedy available in the face of a date of separation dispute would be a trial of an issue or bifurcation. This is an unnecessarily onerous and expensive burden to place on a party, particularly a family law litigant.

b. **Solution**: Parties should be able to submit, perhaps at an additional cost, for at least two dates of separation.

2. Timing and Delay: Under the proposed regulations, a plan administrator is required to complete the valuation within a maximum of 60 days. Any errors, omissions or further enquiries, presumably would result in the 60 day time period being re-triggered.

    a. **Problem**: Disclosure is a threshold step in family law cases. No resolution is possible without all appropriate values, including a pension valuation. Also, many parties are unable to dispose of assets or are required to hold proceeds of sale in trust pending resolution. In current practice, parties and counsel frequently rely on the efficiency of valuators to turn material around or make minor modifications, often on short notice. Actuaries have previously provided us with pension valuations within 3-14 business days, and updates, corrections or amendments within a day or two. The 60 day requirement in the current draft is onerous. In addition, without modification, a strict interpretation of the draft *Regulations* creates a 60 day time lag between each response from the administrator.

    b. **Solution**: The 60 day response period should apply only following the initial application. The Regulations should be modified to require a response within 15 days for additional changes/modifications or in the face of a clerical error or omission.

3. Duty of Administrator: In providing a valuation to the parties, the administrator assumes the rule of an expert in the litigation. Rule 4.1 of the *Rules of Civil Procedure* sets out the duty of an expert and provides that every expert engaged on behalf of a party to provide evidence is required to provide an objective and non-partisan opinion and clarifies that the duty of an expert is first to the court.[4]

[4] Courts of Justice Act, *Rules of Civil Procedure,* R.R.O. 1990 Reg. 194:
DUTY OF EXPERT
4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
(a) to provide opinion evidence that is fair, objective and non-partisan;
(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.
Duty Prevails

a. **Problem**: the plan administrator has an obvious pre-existing relationship with the plan holder.

b. **Solution**: the draft regulations should clearly set out that the plan administrator is an expert pursuant to Rule 4.1 of the *Rules of Civil Procedure* and is bound by the requirements set out therein. This approach is consistent with the federal Pension Benefits Standards Act.

4. Standing: The draft *Regulations* result in the production of a single figure for the purposes of valuing the asset. The plan administrator is responsible for producing the value, not the plan holder.

    a. **Problem**: The proposed scheme and process is inconsistent with the well-established legal principle that requires a party to prove the value of his or her own assets. This, in turn, creates standing problems in the event that the opposing party seeks to obtain additional information or challenge the administrator's valuation.

    Historically, a party will produce a value for an asset either through direct evidence or expert opinion. If the value is contested, the correct procedural route is for the opposing party to make additional and further disclosure requests through their spouse. The draft regulations are not clear about how the value ascribed by the administrator would be contested. Is the plan administrator a compellable witnesses or is a party required to follow Rules 19(11) and 20(5) and treat the administrator as a third party? If so, leave of the Court by way of motion would be required to obtain disclosure from the administrator or to conduct an examination of the administrator. Can, or should, the plan administrator be added as a party? Does the plan administrator have a duty to provide disclosure to both parties? Who pays for the disclosure? From the theoretical to the practical, these unresolved questions will create significant procedural roadblocks in the future.

    b. **Solution**: An amendment is required either to the draft regulations or the *Family Law Rules* to provide a process for dealing with disclosure, standing and procedure if a party seeks disclosure or wishes to contest the value ascribed by the plan administrator to the pension. Such an approach is consistent with the Federal Pension Benefits Standards Act.

At the outset of these submissions we noted that our comments were principally confined to issues surrounding challenges to the litigation process created by the draft *Regulations*. We are aware that other stakeholders, including actuaries, will also be making submissions on the draft *Regulations.* For that reason, we have left the detail to those who spend their days calculating pension values and who understand the intricacies of the calculations far better than we do. However, the Society does have very serious concerns relating to the proposed formula for arriving at the value of the pension and our comments would not be complete if we did not at least summarize those concerns in general terms and leave it to the actuaries to flush out the more technical analysis.

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(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

When the law reform process regarding family law pensions began, it was concerned with addressing the cash-flow difficulties that face a separating family when one spouse has a valuable pension. The common view was that the difficulty could be remedied by a scheme that allowed division of pension credits at source in the same way that CPP credits and federal pensions are shared. While the proposed *Regulation* does address the cash-flow issue, its complex approach risks substituting a new set of problems for the old ones.

Our specific concerns about the calculation method include, but are not limited to:

1. The complexity of calculating pre-tax value of the pension before adjusting for pre-marriage service;
2. Determination of value pursuant to section 5 of the draft *Regulations* on the "last date of the month immediately preceding the family law valuation date," a fixed date that doesn't necessarily correspond with all plans and can create difficulties in reaching a fair value;
3. Setting a retirement date when the valuation date occurs after the Plan's normal retirement date and the member remains active, not retired, which could yield results that are unrelated to reality;
4. The use of unisex mortality rates;
5. Generalization relating to "Family Composition," (assumptions about age, spouse's age, etc. are usually considered on an individual basis) which has henceforth been central to a pension valuation process;
6. Exclusion of the contribution-related minimum benefits in the "preliminary value" cited in section 4 of the draft *Regulations*;
7. The exclusion of "additional voluntary contributions," and
8. Failure to appropriately address the added value from "nonguaranteed inflation increases" indexing, a matter of significant value in family law pension valuations.

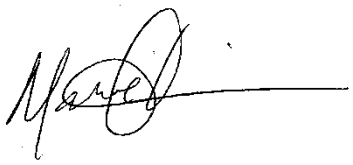
The concerns at items 1 through 6 all sacrifice an individualized approach to valuation on the altar of generalization. This has never been considered to be an appropriate approach in family law. Indeed, our system of individualized justice is one of the features that makes our family law system a leader on the international stage. It would be regrettable if this was the result of these amendments, particularly when a pension is usually the largest or the second-largest asset of a separating family. In short, the calculation really matters to individuals, and it is worth spending the time and complicating the matter with individualized concerns, in order to get it right.

The concerns listed as items 6, 7 and 9 exclude amounts from the calculation that are clearly "property" within the meaning of the *Family Law Act*, representing a serious departure from our statutory scheme and resulting in direct financial disadvantage to the non-pension-holder. This should either be remedied or spouses should have the ability to consider additional items of value that the administrator did not consider in the initial calculation. Such an approach is clearly not desirable since it will simply lead to the administrator becoming a witness, the parties being required to retain private experts, and litigation over values. Clearly this would be at odds with the stated objective of creating a more fair approach to pension sharing following marriage breakdown.

These are important substantive issues which, we respectfully submit, left unattended will create a built-in inequity in the valuation process. Such an inequity will frequently be to the detriment of the non-plan holder, who is almost exclusively the lower income earner and often a woman. Failure to address these inequities may serve to perpetuate the feminization of poverty and other systemic challenges inherent in the family law system.

Finally, from a practice perspective, many Ontario families are able to successfully resolve their disputes through negotiation and the assistance of various alternative dispute resolution mechanisms and without the necessity of litigation. However, to engage in meaningful negotiation, assets need to be valued in a manner consistent with the law. Often, the distribution of proceeds of sale of jointly held assets, the resolution of property issues, including paying an equalization payment, the payment of support and even the resolution of parenting disputes are intricately intertwined. For many families, their matrimonial home and their retirement plans are their two largest assets. Procedural roadblocks and unfair calculation approaches, such as those set out above, do a disservice to the family law system in this province and the people it serves: individual families.

Yours truly,



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