Superintendent of Financial Services

Surintendant des services financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "*PBA*")

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 87 of the *PBA* relating to the OMERS Primary Pension Plan, Registration Number 345983

TO:

Mr. J.P.

AND TO:

Ms. J.P.

AND TO:

OMERS Administration Corporation
One University Avenue, Suite 800
Toronto, ON M5J 2P1

Attention: Mr. James Denovan
Manager, Pension Policy

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO MAKE AN ORDER in respect of the OMERS Primary Pension Plan, Registration Number 345983, (the "Plan") under section 87 of the *PBA* requiring OMERS Administration Corporation ("OMERS") to (i) credit interest only on Ms. J.P.'s (the "Former Spouse") share of the imputed value of Mr. J.P.'s (the "Plan Member") OMERS pension benefits that accrued on or after January 1, 2012; and/or (ii) requiring OMERS to calculate the Plan Member's pension at termination, retirement or death as if no interest had accrued to the Former Spouse's share of the imputed value prior to January 1, 2012 and requiring OMERS to recover any interest "overpayment" accordingly.

REASONS:

1. The Plan Member and the Former Spouse entered into a separation agreement dated July 19, 2012 (the “Separation Agreement”). The Separation Agreement was amended effective January 24, 2013 in order to provide for an equalization payment in a set amount, to be paid from the Plan to the Former Spouse. The amended Separation Agreement was silent regarding any interest amount payable.

2. The equalization payment was paid out of the Plan by OMERS without any accrued interest.

3. The Former Spouse, by letter dated March 27, 2013, contacted the Superintendent of Financial Services (the “Superintendent”), expressing her concern that she was not paid the interest that had accrued on her share of the imputed value of the Plan Member’s pension benefits, consistent with the Superintendent’s website published guidance on this issue.

4. The Superintendent, by letter dated May 24, 2013, wrote to OMERS requesting clarification from OMERS why interest was not paid to the Former Spouse.

5. OMERS responded to the Superintendent by letter dated June 24, 2013, that in its view the PBA and Ontario Regulation 287/11 (Family Law Matters) made under it (the “Regulation”) did not provide authority for OMERS to “alter the parties’ express ‘specified amount’” of the Plan Member’s imputed value that was payable to the Former Spouse pursuant to the parties’ amended Separation Agreement and that OMERS would only apply section 30 of the Regulation to update the maximum amount of the imputed value that could be transferred to a former spouse (i.e. the 50% limit). This, in OMERS view, was in contrast to what would occur if the parties’ happened to express an equalization payment as a proportionate amount of the imputed value in their settlement instrument, in which case, in OMERS view, “…as a by-product the proportion increases with interest updated to the FLV [family law valuation date]”. In other words, it was OMERS view that an equalization payment expressed as a proportion of an imputed value would accrue interest in accordance with section 30 of the Regulation but an equalization payment expressed as a specified amount would not accrue interest.

6. The Superintendent’s position was set out in a letter to OMERS dated August 14, 2013.

7. It is the Superintendent’s position that section 67.3(6) of the PBA requires that a former spouse’s entitlement to a lump sum amount be updated for interest in all circumstances (i.e. whether or not the eligible spouse’s share is expressed as a specified amount or as a proportion of the imputed value), in a manner consistent with the requirements of section 30 of the Regulation. There are no provisions in either section 67.3(6) of the PBA or section 30 of the Regulation that suggest that the payment of interest is conditional upon how an eligible spouse’s share of the parties’ imputed value is expressed in a settlement instrument (court order, family arbitration award, or domestic contract).

8. It is the Superintendent’s position that adopting an interpretation of section 67.3(6) of the PBA and section 30 of the Regulation which provides that interest is only payable “as a

by-product", if the parties "happen to choose" as their settlement a proportion of the imputed value, is arbitrary and inconsistent with the intention of the legislation generally, which is to ensure that interest is paid on all amounts payable out of a pension fund.

9. The Superintendent's position is that it is clear that interest is payable on the share of the imputed value payable to the former spouse of a retired member based on section 67.4(4) and section 67.4(5) of the PBA and sections 38(4,) 39(1)4 and 39(1)(8) of the Regulation. All lump sum arrears must be paid with interest in accordance with these sections and a retired member's pension must be revalued based on the lump sum arrears and interest amounts paid to the retired member's former spouse.

10. The Superintendent notes that interest is to be paid generally for purposes of the PBA as set out in section 115(1)(n) of the PBA and section 24.1(1) of General Regulation 909, which provide that interest must be added to any lump sum amounts owing to a person under a pension plan from the date of termination until the beginning of the month in which the lump sum is paid.

11. On this basis, OMERS was advised in the Superintendent's August 14, 2013 letter that if OMERS continued to disagree with the Superintendent's position, that the Superintendent would take steps to issue a Notice of Intended Decision ("NOID") requiring OMERS to pay the accrued interest that in the Superintendent's view was owed to the Former Spouse.

12. By letter dated September 9, 2013, OMERS wrote to the Superintendent confirming that OMERS would be calculating and paying interest on the specified amount of the imputed value payable to the Former Spouse as instructed by the Superintendent.

13. By letter dated September 19, 2013, the Plan Member wrote to the Superintendent objecting to the payment of interest to the Former Spouse on the basis that the Separation Agreement was silent on interest and was "final and non-variable".

14. By letter dated October 3, 2013, OMERS wrote to the Superintendent indicating that OMERS had reviewed the recent correspondence sent to the Superintendent by the Plan Member and would be suspending payment of the interest on the specified amount owed to the Former Spouse pending the Superintendent's response.

15. By letter dated October 18, 2013, the Superintendent responded to the Plan Member indicating that the Superintendent had once again reviewed his situation but that it remained the Superintendent's position that OMERS was required to pay interest on the Former Spouse's share of the imputed value consistent with the Superintendent's analysis in its letter to OMERS dated August 14, 2013. In this letter the Plan Member was advised that if he was not satisfied with the Superintendent's position he could request that the Superintendent issue an Order and the Superintendent would then inform him and OMERS of the Superintendent's intended decision on this issue through the NOID process. The Superintendent requested that the Plan Member respond before November 19, 2013 if he wished to pursue the NOID process.

16. The Plan Member contacted FSCO staff by telephone later in October of 2013 indicating he wished to pursue a hearing and questioning whether the Superintendent had considered whether the legislation could be applied retrospectively. He was advised at that time to respond in writing setting out any arguments he had to support his position.

17. No response was received by the Superintendent prior to November 19, 2013.

18. By letter dated December 6, 2013, the Superintendent wrote to the Plan Member advising him that as no Order had been requested to date, the Superintendent would be directing OMERS to pay the interest on the lump sum that was transferred to the Former Spouse. A copy of the Superintendent's letter to OMERS providing for the same was enclosed.

19. On January 7, 2014, OMERS, by e-mail, requested clarification with respect to the file and the Superintendent's direction to pay the interest owing to the Former Spouse.

20. By e-mail on January 31, 2014, the Superintendent reiterated to OMERS its December 6, 2013 direction to pay the interest owing to the Former Spouse.

21. By facsimile transmission dated March 14, 2014, the Plan Member indicated to the Superintendent that he was "seeking adjustment" and he included a copy of his original September 19, 2014 letter along with a copy of a communication dated October 29, 2013, which the Superintendent had not previously received, inquiring as to why, if the legislation only came into effect in January of 2012, interest amounts should be paid to the Former Spouse on amounts that accrued before the legislation was in effect.

22. By e-mail on March 27, 2014, OMERS informed the Superintendent that the interest was paid to the Former Spouse on March 4, 2014 and that the Plan Member and the Former Spouse were provided written confirmation of the payment on the same date.

23. By letter dated April 9, 2014, the Superintendent responded to the Plan Member explaining that section 30 of the Regulation requires interest to be credited from the parties' family law valuation date to the beginning of the month in which the lump sum is to be transferred. The Superintendent notes that there is no reference to limiting the crediting of interest to the period after January 1, 2012. The legislation is clearly retrospective and the date the new legislation came into effect is therefore not relevant for purposes of calculating interest on a former spouse's share of the imputed value.

24. The Plan Member filed a Request for Hearing (Form 1) with the Financial Services Tribunal dated April 29, 2014. It was returned to him under cover of letter dated May 6, 2014 as no NOID had been issued by the Superintendent.

25. By e-mail dated May 21, 2014, The Plan Member requested that FSCO issue a NOID.

26. Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the "Tribunal") pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Intended Decision is served on you.**[1]

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto, Ontario
M2N 6L9

Attention: The Registrar

FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE INTENDED DECISION AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this **26th** day of **June, 2014**

Original Signed By

Brian Mills
Deputy Superintendent, Pensions

[1]*NOTE - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.*