



January 31, 2024

Via Email: Andrew.Fung@fsrao.ca

Andrew Fung, A/Executive Vice President, Pensions
Financial Services Regulatory Authority (FSRA)
25 Sheppard Avenue West, Suite 100
Toronto, ON M2N 6S6

Dear Mr. Fung:

Subject: FSRA Consultation Paper: Potential FSRA Rule on Family Law Matters

We are the administrators of the Healthcare of Ontario Pension Plan (“HOOPP”) and the Ontario Teachers’ Pension Plan (“Ontario Teachers”). Collectively, we administer the pension benefits of more than 835,000 members, with more than \$349.8 billion in net assets under management. HOOPP and Ontario Teachers’ are two of the largest public-sector pension plans in Ontario.

Thank you for the opportunity to review and comment on FSRA’s Consultation Paper regarding a Potential FSRA Rule on Family Law Matters. We are pleased to provide our comments and we appreciate FSRA’s approach to cooperative and collaborative engagement with stakeholders.

Consultation Item Commentary

Broadly speaking, our view is that the existing regime for family law matters functions well and that the proposed rules are not needed to address the items raised in the consultation paper. We believe that the pension valuation and division processes have become well understood in the pension sector since Bill 133 was passed in 2009. In our view, changes to the status quo could result in additional confusion, time delays, and cost for plan administrators, plan members and their spouses in an area of the law that is already complex. We nevertheless support efforts that help members and their spouses better understand and apply the relevant legal requirements in family law matters. We believe this is best accomplished through guidance aligned with existing jurisprudence rather than through new rules. Such guidance would remain in line with FSRA’s commitment to principles-based regulation and reducing regulatory burden. Our comments on the consultation items are as follows:

- **Lift and shift:** We are in favour of maintaining the existing regime. Our view is that the “lift and shift” approach would introduce, rather than prevent, uncertainty and inefficiency. The additional source of requirements to consult regarding the subject matter would create undue administrative complexity. In addition, creating such a rule may result in duplication and inconsistency with *Pension Benefits Act* (“PBA”) Regulation 287/11 (the “Regulation”), as FSRA does not have authority to amend or revoke sections of the Regulation and cannot guarantee that the Ontario government will update the Regulation to remain aligned with a new rule. If the rule conflicts with the Regulation, even for a limited time period, we anticipate this will lead to legal uncertainty.



We would support an approach to rule-making that seeks development of rules only in circumstances where substantive policy changes are needed and/or to provide clarity that cannot otherwise be achieved through guidance or regulatory change.

- **Payment of arrears:** We do not interpret section 39 of the Regulation as precluding a plan administrator from excluding arrears in the division and revaluation of a retired member's pension, if the plan administrator is satisfied, based on the settlement instrument, that the former spouse has waived the arrears to which they would otherwise be entitled. We believe this approach is consistent with a former spouse's ability to waive their right to receive a share of the imputed value under the existing framework in the PBA. This approach also enables plan administrators to provide members and spouses with the flexibility to arrange their affairs as they see fit, without sacrificing former spouses' statutory entitlements to arrears.

If uncertainty exists among administrators with respect to arrears, it would be best addressed through the expansion of FSRA's *Administration of pension benefits upon marriage breakdown* instead of a rule. We would caution, however, that any such guidance should preserve flexibility for spouses and administrators. Our experience is that spouses have addressed the issue of arrears in more than one way in settlement instruments. To avoid undue burden on members, spouses, and administrators, any guidance from FSRA should be sensitive to these differences and avoid any overly prescriptive requirements that could prevent administrators from accepting a settlement instrument as presented.

- **Payment of interest on lump sum transfers:** The Ontario Superior Court's 2014 decision in *Heringer v. Heringer* ("*Heringer*") is well-established case law, having been in place for nearly ten years. Our view is that any changes to the treatment of interest on lump sum payments would create rather than resolve any confusion and uncertainty. We also do not feel it necessary to develop a rule that sets out the *Heringer* treatment.

A more effective means of reaching members and spouses without adequate representation in their family law matters would be to consider revisions to the existing materials directly targeted to them. We would be supportive of revisions to the relevant content in FSRA's *Pensions and marriage breakdown – a guide for members and their spouses* (the "Member Guide"). This could, for example, include reorganization of the material such that this information is easier for the reader to find. We note that it currently exists within drop-down content in "Step four" under the "Where do I start?" section and is therefore not searchable unless the reader has already clicked to expand the section.

Additionally, section 2(a) in Appendix A of the Member Guide only advises members to "consider the rules on when interest applies. Different rules apply when the payment is as a dollar amount or percentage." It does not provide clear direction on the rules regarding how the transfer amount is expressed, and this can be simply revised to include a reference to the more detailed content above.

- **Forms:** Overall, we are supportive of administrative flexibility in the provision of information to members and spouses. We support FSRA permitting – but not requiring – plan administrators to design their own forms. Such flexibility would create the opportunity to tailor statements for specific circumstances to clearly educate and inform members and



spouses of the specific information relevant to them. This flexibility could also improve pension plans' ability to use electronic methods of communication in family law matters. We feel this change can be achieved using the existing framework under the Regulation which requires that the forms be approved by the FSRA CEO, without a need for a FSRA rule.

Conclusion

We appreciate having the opportunity to share our views on the potential use of FSRA's rule-making authority in respect to the valuation and division of pension benefits upon spousal relationship breakdown. We would be happy to discuss our submission with you or answer any questions you may have on the above.

Yours truly,

A handwritten signature in black ink that reads "Rachel M. Arbour." The signature is written in a cursive, flowing style.

Rachel Arbour
Head of Plan Benefits, Design & Policy
Healthcare of Ontario Pension Plan (HOOPP)

A handwritten signature in black ink that reads "A. Zalewski". The signature is written in a cursive, flowing style.

Anna Zalewski
Managing Director and Associate General Counsel, Pension Law & Policy
Ontario Teachers' Pension Plan (Ontario Teachers')