Canadian Institute of Actuaries | Institut canadien des actuaires

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

The Canadian Institute of Actuaries (CIA) is pleased to submit its comments regarding the above. We appreciate being given the opportunity to make a submission even though the official comment deadline has passed.

Actuaries in the field of actuarial evidence work on a daily basis with family law lawyers, plan members, and former spouses on matters pertaining to the valuation of pensions and the equalization of net family property on marriage breakdown. Other actuaries work with plan sponsors and pension administrators.

The CIA's submission and comments are based on its members' experience working with both the users of the family law forms – family law lawyers and their clients – and the pension administrators who perform family law valuations and implement lump-sum transfers and at-source pension divisions to assist with net family property equalization.

Topic 1 – Lift and Shift

1. **Would creating a new rule and moving some, but not all, provisions currently in the Regulation into a rule via the "lift and shift" approach achieve the desired outcome of reducing uncertainty and improving efficiency? Please provide feedback as to whether FSRA should adopt a "lift and shift" approach with respect to all areas over which it has rule-making authority, subject to government decision-making, or whether a potential FSRA rule should only include requirements in areas where policy changes are being considered.**

The CIA has concerns over this proposal and would recommend against moving some provisions from the Regulation to a new rule:

- The courts may view a rule as carrying less weight than a regulation, which already carries less weight than an act. As a result, the courts may be less inclined to require that the Ontario valuation rules (as currently set out in Regulation 287/11 to the PBA) be adhered to. This could potentially result in legal decisions permitting variation from the valuation and division rules currently prescribed by regulation, an outcome that Bill 133 and the establishment of the current regime intended to eliminate.

- If some of the valuation and division rules are in a regulation and others are in a rule, it is possible that inconsistencies and contradictions between the two may arise over time.

- Administrators may find it confusing to adhere to processes that are specified partly in a rule and partly in a regulation. Errors may therefore occur, and these errors could be financially prejudicial to either the plan member, the member's former spouse or the pension plan itself. The potential for confusion and errors would apply in particular to smaller, less experienced plan administrators and those domiciled in other provinces (administering either Ontario-registered plans or providing family law valuations for Ontario plan members of non-Ontario plans). Having to navigate processes that are specified partly in a rule and partly in a regulation would be more complicated for all involved.

- It is unclear what penalties would apply if a plan administrator were to fail to follow a rule.

This said, it may be reasonable to move purely administrative matters such as fee and turnaround time maximums to a rule while leaving all computational aspects in the Regulation, so long as plan members and former spouses have some recourse if required turnaround times in the new rule are not adhered to.

Also, to the extent that omissions or lack of clarity in the Regulation are noted, it may be reasonable to deal with those omissions and other issues by way of a rule until the Regulation itself can be corrected.

Topic 2 – Fees for a DB Statement of Family Law Value

2. **Are the existing maximum fees currently set out in regulations under the PBA sufficient to recover the costs incurred in preparing statements? If not, what should the new maximum fees be? Please provide any details relating to cost experience (e.g., administrative and professional service costs associated with the statements) which may be relevant to support your responses.**

Access to justice is a real concern amongst family law lawyers and the general public. Some independent actuaries report being retained by individuals with low income seeking a "verbal" family law valuation because the administrator's fee of $600 + HST for a written valuation is seen as too expensive. An increase to the maximum fee for DB Statements of Family Law Value may serve to exacerbate this trend.

In this regard, we would observe that some other administrative functions that apply to only some plan members are performed at no cost to the member. One example of this would be the calculations and paperwork required when a plan member terminates their active participation in the plan.

If FSRA were to determine after broad consultation that maximum fees should be increased from current levels, perhaps an adjustment aligned with CPI increases since 2012 could be considered.

3. **Should special considerations be made for low-income applicants (e.g., a fee waiver), in order to mitigate the impact of the revised maximum fees?**

The CIA is concerned that a fee waiver regime may be complex to understand and expensive to administer. Who would be responsible for adjudicating the waiver system and who would be responsible for its costs?

Topic 3 – Payment of Arrears (Division and Revaluation of a Retired Member's Pension)

4. **Do you agree that uncertainty exists with respect to the division and revaluation of a retired member's pension where spouses have made arrangements outside of the pension plan to share pension amounts prior to its actual division?**

5. **If so, should FSRA make a rule to prescribe how this must be done or expand on its Guidance to address the uncertainty?**

The CIA is of the view that Section 39 of the current Regulation is sufficiently clear. One or two numerical examples in the Guidance might assist administrators in confirming how to calculate the retroactivity adjustment payments. Numerical examples may also assist administrators in understanding the correct application of Section 33 of the Regulation (adjustment to a member's pension after a LIRA transfer).

The question should not only be whether or not plan administrators are uncertain about how to address situations where the parties wish to commence a pension division as of a date later than the separation date, but also whether family law lawyers and their clients fully understand the financial ramifications of specifying a commencement date for a pension division that differs from the separation date (family law valuation date).

Some parties may agree to a current-date commencement for pension division, even if informal pension division has not occurred in the post-separation period either because this is deemed to be a simpler approach or because the plan member resists the retroactive adjustment.

Potential inequities could result if the parties and their lawyers do not fully understand the financial impact of foregoing the required retroactive payment adjustment. The CIA recommends, if the retroactivity requirement is to be removed, that the administrator be required to disclose the value of the pension division prior to implementing the division. For example:

- The Family Law Value of the retired member's pension is $400,000.
- The parties present the administrator with a separation agreement specifying that the former spouse is to receive 40% of each monthly pension payment beginning at a current date that is five years after the separation date.
- The administrator would be required to advise both parties of the value of the monthly amount payable to the former spouse using the original valuation date, the same actuarial assumptions as were used for the family law valuation, and the monthly amount that is 40% of the member's monthly pension when the division is to be implemented.

- The prescribed form for this purpose would disclose four amounts:
    1. The original Family Law Value of the member's pension ($400,000 in this example).
    2. The value of the portion of the member's pension that the former spouse will receive based on the separation agreement as drafted (perhaps $120,000).
    3. The value of the portion of the member's pension that the member will retain as a result of the delayed pension division without retroactivity (perhaps $280,000).
    4. The Family Law Value, if any, of the former spouse's spousal survivor pension (perhaps $30,000).

This disclosure would provide the parties will sufficient information to determine, in the context of all other aspects of the net family property equalization, whether or not the proposed pension division meets their objectives.

Both parties would then be required to sign and date the disclosure form and the administrator would not be permitted to implement the pension division described in the separation agreement (or court order) until the signed disclosure form was returned to them.

Topic 4 – Payment of Interest on Lump-sum Transfers

6. **Is there uncertainty as to when interest should be added on a lump sum transfer to a member's spouse as a result of Heringer?**

This appears to be largely a legal question. It should be addressed in conjunction with the family law bar to ensure that whatever approach is chosen is consistent with relevant family law legislation and precedent. The CIA takes no formal position on this and the next two questions.

7. **If so, could this uncertainty be adequately addressed by revisions to the Administration of Pension Benefits Upon Marriage Breakdown Guidance or new FSRA Interpretation Guidance?**

8. **If not, should FSRA propose a rule that sets out the treatment of interest as described in the Heringer decision such that:**

    a. **Interest is to be applied where the amount to be transferred is expressed as a percentage of the imputed value, and**
    b. **Interest is not to be applied where the amount to be transferred is expressed as a specified amount unless the settlement instrument expressly requires that interest be added.**

9. **If you disagree that FSRA should propose a rule that sets out the same treatment of interest as the Heringer decision, as described above, should FSRA propose a rule that provides for an alternative treatment of interest? If so, what should that treatment be?**

Ideally, administrators should refuse to implement a lump-sum transfer unless the separation agreement or court order is clear and specific as to whether or not interest is to be paid on the amount (or percentage) set out in the agreement or order.

The CIA would recommend against any guidance to administrators or any rule regarding "default" assumptions on the question of interest. If the court, lawyers and/or the parties are unaware of the existence of the "default" assumption, unintended financial prejudice could occur if the administrator's assumption turned out to be inconsistent with the intent of the court or the parties.

Topic 5 – Forms

10. **Should FSRA allow for greater flexibility with respect forms used by stakeholders. If so, what should be the scope of that expanded flexibility?**

No. Family law lawyers appreciate the consistency of the Statement of Family Law Value from administrator to administrator and from plan to plan. Administrators are free to add pages to the end or information to their cover letters if they deem this to be important.

11. **If expanded flexibility is desired, please share any views as to whether that would be better achieved through the use of existing CEO discretion or through the development of a FSRA rule.**

Expanded flexibility is not desired.

Topic 6 – Variable Benefits

12. **Should FSRA develop a rule relating to family law matters in the area of variable benefits? Why or why not and what considerations should FSRA take into account?**

13. **Should FSRA adopt a similar approach to rule-making for plans that offer variable benefits as for plans that do not offer variable benefits? Are there reasons why variable benefits should be treated differently for family law purposes?**

So long as there are no guarantees regarding the size of the amounts being withdrawn or the rate of return credited to the member's account balance in the plan, the CIA's view is that both the valuation and division options for a variable benefit plan be the same as for a traditional defined contribution plan:

- Account balance at separation – account balance at marriage.
- Lump-sum transfer is the only division option.

This approach would be consistent with how RRSPs, RRIFs and LIFs (all of which permit or require periodic withdrawals) are dealt with as net family property.

Ideally, the valuation and division rules for variable benefit plans would be added to the existing Regulation. In the interim, it may be appropriate to create a rule to provide guidance to

the administrators of variable benefit plans and to ensure consistency of practice amongst such administrators.

As noted earlier, the CIA recommends that all computation-related rules remain in the Regulation and that rules not be used except for administrative issues such as turnaround times and fees.

The CIA appreciates the opportunity to provide feedback on these issues, and we would welcome further discussion with you throughout this process.

If you have any questions, please contact Chris Fievoli, FCIA, Actuary, Communications and Public Affairs, at 613-236-8196 ext. 119 or chris.fievoli@cia-ica.ca.

Sincerely,

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President, Canadian Institute of Actuaries

The Canadian Institute of Actuaries (CIA) is the qualifying and governing body of the actuarial profession in Canada. We develop and uphold rigorous standards, share our risk management expertise, and advance actuarial science to improve lives in Canada and around the world. Our more than 6,000 members apply their knowledge of math, statistics, data analytics, and business in providing services and advice of the highest quality to help Canadian people and organizations face the future with confidence.