May 7, 2024

Andrew Fung
Executive Vice President, Pensions
Financial Services Regulatory Authority of Ontario
25 Sheppard Avenue West, Suite 100
Toronto, ON M2N 6S6

Re: Consultation on Proposed Guidance: Pension Plan Amendments No. PE0301INT v2 (the "Proposed Guidance")

Dear Mr. Fung:

We write to you on behalf of the Pensions and Benefits departments of the undersigned law firms to share our views on the Revised Proposed Guidance released for comment in November 2023 and respond to the feedback provided by: (i) the seven law firms in a letter to FSRA dated January 19, 2024 (the "Seven Firms Letter"); and (ii) the Association of Canadian Pension Management in a letter to FSRA dated January 19, 2024 (the "ACPM Letter").

As set out in greater detail below, we agree that FSRA has the authority under the *Pension Benefits Act* ("PBA") to refuse to register non-void pension amendments that have an effective date prior to the filing date of the amendment.

1. The PBA's Treatment of Retroactive Amendments

In our view, and as set out in Appendix A to the Revised Proposed Guidance, the PBA does not permit retroactive amendments in a large number of circumstances. Subsection 13(2) of the PBA cannot be read in isolation. When subsection 13(2) is read in context with section 12 and subsections 13(1) and 19(3) of the PBA, these provisions operate to:

a. require administrators to administer the pension plan and the pension fund in accordance with the documents that are on file with FSRA;

b. require the filing of plan amendments with FSRA before implementing them; and

c. restrict the retroactive effect of any amendments to the filing date with FSRA.

Subsection 13(2) must also be read in the context of Section 25, which requires the giving of notice of any "adverse amendments" to Plan members. Such notice would be largely irrelevant and moot if amendments could be made retroactively without providing notice and the ability to comment

on the amendment. This interpretation is consistent with the PBA's broader remedial purposes of protecting and safeguarding pension benefits and the rights of pension plan beneficiaries, in particular by ensuring transparency with respect to plan administration.

It is certainly clear from jurisprudence in the Supreme Court of Canada that every statute must be read as a whole, giving meaning to every provision. The "modern principle" of statutory interpretation calls for words in legislation "to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intentions of Parliament."[1] Further, if provisions of a statute appear to conflict, the provisions "are meant to be read to work together both logically and teleologically, as parts of a functioning whole."[2]

Accordingly, a complete reading of the statute with respect to the ability to make retroactive amendments must consider other provisions of the statute such as notice and the requirement to administer a pension plan in accordance with its terms in a consistent manner. This would certainly mitigate against Section 13(2) permitting any retroactive amendments which were in any way adverse in nature to the plan members.

By contrast, if FSRA adopted the interpretation urged in the Seven Firms and ACPM Letters, subsections 13(1) and 19(3) would be materially undermined. For example, if administrators could simply cure prior non-compliant administration by filing retroactive amendments, then the requirement to administer pension plans in accordance with the documents filed with FSRA has little value and does little to ensure that plan beneficiaries are on notice of their rights and plan administrative practices. Further, the provisions of Section 25 regarding adverse amendments would be rendered meaningless.

Contrary to the Seven Firms Letter, the decisions in *Nolan v Kerry (Canada) Inc*.[3] ("*Nolan*") and *Gay Lea Foods Co-operative Ltd. v Ontario (Superintendent of Financial Services)* ("*Gay Lea Foods*")[4] do not stand for the proposition that retroactive amendments are permissible under the PBA.

Nolan involved an appeal from two decisions of the Financial Services Tribunal that ordered the Superintendent to deny registration of an amendment that would have changed the employer's funding obligations with respect to payment of plan expenses from the pension fund.[5] In the second decision, the Financial Services Tribunal determined that the employer was permitted to take contribution holidays under the existing terms of the plan, and, with respect to a newly created DC component of the plan, directed the Superintendent to allow a revised version of the amendment that was retroactive back to the date of filing.[6]

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[1] *Rizzo and Rizzo Shoes Limited*, [1998] 1 SCR 27 (SCC).

[2] See *Sullivan on the Construction of Statutes,* 6th Edition, Section 11.01 (2022).

[3] *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 ["*Nolan*"].

[4] *Gay Lea Foods Co-operative Ltd. v Ontario (Superintendent of Financial Services)*, 2010 ONFST 10 ["*Gay Lea Foods*"].

[5] *Kerry (Canada) Inc. v. Ontario (Superintendent Financial Services)*, 2004 ONFST 5.

[6] *Nolan v. Ontario (Superintendent Financial Services)*, 2004 ONFST 8.

The revised amendment made members of the new DC component of the plan beneficiaries of the trust by which the plan fund was held, thereby permitting surplus from the existing DB component of the plan to be used to pay contributions to the DC component. It is clear from the Tribunal's reasons that the amendment had not been registered by the Superintendent, hence the retroactivity of the revised amendment was to the date of filing.[7]

The Supreme Court of Canada affirmed both the Financial Services Tribunal decisions. In doing so, the court made repeated references to "retroactive amendments," including that section 13(2) "permits retroactive amendments."[8] This is because members of the plan challenged the permissibility of the revised amendment to make the DC component part of the same plan as the DB component, thereby making members of both components the beneficiaries of the trust. This gave rise to a disagreement on the court, with the majority finding that the amendment was permissible and two justices (LeBel and Fish) dissenting on this point.

However, there was no disagreement about the amendment's retroactivity, which was not a basis for the members' challenge. Most importantly for our purposes, the retroactivity that the Court identified as permissible in *Nolan* (albeit in *obiter*) was wholly consistent with the schema set out by FSRA in the Revised Proposed Guidance as the decision endorsed by the Court allowed the filing of a retroactive amendment effective from the date of filing, not beyond.

Likewise, *Gay Lea Foods* does not stand for the proposition that retroactive amendments are permissible in single employer plans beyond the date of filing. *Gay Lea Foods* involved a multi-employer pension plan seeking to register amendments that would reduce certain benefits to address serious plan shortfalls. Notably, multi-employer pension plans are entitled to reduce accrued benefits and therefore retroactive amendments give rise to fewer concerns, if any, as compared with single-employer plans, which we understand to be the primary focus of the Revised Proposed Guidance.

Further, the retroactivity at issue in *Gay Lea Foods* was the result of litigation related to the amendments' validity, which meant delayed registration after the amendment had been filed; again, the permissibility of this kind of retroactivity is wholly consistent with FSRA's Revised Proposed Guidance. In any event, the Tribunal in *Gay Lea Foods* did not seriously consider the retroactivity issue as it was determined to be irrelevant to the entitlement concern raised by the member.[9]

2. Retroactive Amendments Should Always be Carefully Scrutinized

In our view, FSRA's proposed approach as we understand it from the Proposed Revised Guidance is permissive in situations dealing with retroactive amendments that do not adversely affect the plan members. The Proposed Revised Guidance indicates that FSRA will "generally exercise its

[7] *Ibid*, at page 3, "The 2000 Plan has been submitted to the Superintendent of Financial Services (the "Superintendent"), the other respondent in this proceeding, for registration but has not yet been registered." See also the disposition at page 13, which ordered the Superintended to deny registration of the "2000 Plan" but permit amendment "with effect from January 1, 2000," which is to say the effective date of the 2000 Plan as originally filed.
[8] *Nolan*, at para 82.
[9] *Gay Lea Foods*, at para 105.

discretion and register" retroactive amendments that are not considered "adverse," as defined in the Proposed Revised Guidance. This is consistent with the overall scheme of the Act and a holistic reading of the legislation.

We note, however, that the Proposed Revised Guidance distinguishes between what FSRA describes as retroactive amendments that have a "truly" adverse effect and those that do not. In our view, this distinction is unhelpful because it introduces unwelcome ambiguity and risks minimizing the harm that beneficiaries suffer when a plan is administered in a manner that is not consistent with the plan documents. Such administration is contrary to the PBA's requirements and the PBA's objectives of ensuring plan members and beneficiaries are on notice of their rights and entitlements.

Contrary to the concerns raised in the Seven Firms and ACPM Letters, FSRA's proposed approach to reviewing proposed retroactive amendments does not create unwarranted uncertainty about the registration of amendments. FSRA has outlined the relevant principles it will consider. Based on the concerns raised by retroactive amendments effective before the filing date, administrators should have to show a reasonable and good faith belief that a retroactive amendment complies with the PBA's objectives and should be registered. Such an approach serves the PBA's objectives by encouraging timely registration of amendments and administration in accordance with the PBA.

As already noted, however, many of the concerns addressed in the Proposed Revised Guidance are inapplicable to multi-employer plans because reductions in accrued benefits are permissible for such plans, so adverse retroactive amendments do not give rise to the same regulatory concerns. Similarly, the collective bargaining context largely mitigates concerns around transparency, equity, and predictability. Accordingly, it would be helpful if FSRA clarified that the Proposed Revised Guidance is mainly applicable to single-employer plans.

Further, given the presumptive impermissibility of retroactive amendments, ACPM's objections to the "administrative burden" of justifying a retroactive amendment are unreasonable. Retroactive amendments should be the exception, not the rule. Administrators seeking to register amendments that are retroactive beyond the date of filing should have to justify them.

We also disagree with ACPM that FSRA's approach under the Proposed Revised Guidance will unduly restrict "housekeeping" amendments and amendments that clarify "less-than-ideal wording." In our view, the Proposed Revised Guidance is consistent with the long-standing regulatory practice of disallowing retroactive amendments that meaningfully conflict with rights and obligations under the PBA. The Proposed Revised Guidance is clear that FSRA's approach will not prohibit retroactive amendments that are demonstrably reasonable and filed in good faith.

Finally, we are concerned that ACPM suggests that amendments are not required to be fair and equitable. All members and beneficiaries are entitled to fair and equitable treatment with respect to the administration of their pension benefits; this includes the administration of plan amendments. We note that ACPM has cited no support for its assertion that, as a matter of pension plan administration, the Proposed Revised Guidance "imports concepts and limitations on amendments that are inconsistent with the law," and we strongly disagree with that statement.

Thank you for the opportunity to comment on the Revised Proposed Guidance. If you have any questions or concerns about any of the above comments, do not hesitate to reach out to any of the undersigned.

Yours truly,

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