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The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

July 8, 2024

Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 3rd Floor
Toronto ON M7A 2S9
Via electronic submission to the Regulatory Registry

To Whom It May Concern:

RE: Public consultation on proposed amendments to the *Succession Law Reform Act* (SLRA) (Proposal Number 24-MAG005)

ACPM is the leading advocacy organization for a balanced, effective and sustainable retirement income system in Canada. Our private and public sector retirement plan sponsors and administrators manage retirement plans for millions of plan members, including both active plan members and retirees.

ACPM is pleased to provide its submissions in response to the call for comment on the *Public consultation on proposed amendments to the SLRA to offer greater clarity to substitute decision makers and financial institutions regarding beneficiary designations for a plan* (the "Proposal"), released by the Ministry of the Attorney General ("MAG") on May 22, 2024, outlining proposed amendments to the restrictions currently imposed on substitute decision makers in maintaining beneficiary designations during changes to pensions, registered savings plans, and similar instruments.

ACPM believes that the Proposal, which is broadly similar to measures already enacted in British Columbia, Alberta, Saskatchewan, and Manitoba, will allow for clarity and continuity for plan sponsors, administrators, and trustees in certain contexts. A notable example, as highlighted by MAG, is where the owner of a Registered Retirement Savings Plan (RRSP) reaches the maximum pension age under the *Income Tax Act* (Canada) requiring conversion of the RRSP to a Registered Retirement Income Fund. In that and similar contexts, the Proposal would be invaluable for incapable persons and their representatives as a means of preserving an existing designation. It will also lower the risk of disputes or litigation arising from plan mergers, changes, and transfers, and provide clear authority which the industry previously lacked.

We are, however, concerned about possible unintended implications of the Proposal in the context where the plan in which the beneficiary designation is being made by substitute decision maker is a registered pension plan. We have put forward several recommendations which would address these concerns.

”Same” vs. “similar” benefit

We note that the wording adopted in the provinces which have already enacted similar amendments is that the new designation must be made for a “similar instrument” (or plan, in Manitoba) to the one that it is renewing, replacing, or converting. Despite using the term “similar instrument” in the summary of the Proposal, the language of the amendment proposed by MAG specifies that a new designation may only be made regarding the “same benefit”.

We foresee certain scenarios under the proposed language where a new designation would be clearly permitted in other provinces, but the substitute decisions maker’s authority would be ambiguous in Ontario given the requirement that the two benefits be the same. For instance:

- when one pension plan is merged into another, the nature of the benefit is often changed, either in value or in its underlying terms, even though the new plan is the obvious replacement of the former. This can include mergers of defined benefit plans; and
- when a defined contribution plan is transferred to another defined contribution plan, or when the defined contribution record-keeper/custodian for a plan changes. Where there is a change in record-keeper, the provider often requires a new beneficiary designation, particularly if the prior designation had been completed electronically or is otherwise not held or “controlled” by the pension plan’s legal administrator. If investment options or other features of the plan change in conjunction with these events, it maybe unclear whether the benefit is “the same”,

In these situations, the pension plan administrator could not be certain whether they are permitted to accept the authority of a substitute decision maker in designating a beneficiary for the new benefit. MAG should therefore consider changing “same benefit” to “similar benefit”.

Using language that is analogous to the law in other jurisdictions would also provide more clarity for multi-jurisdictional plans and plan members who have moved between jurisdictions.

We note as well that the amendment as currently drafted, which refers to conversion, renewal, replacement or transfer of "the plan" would not apply to transfers of an individual's benefits under the plan. An example of such an excluded scenario is where benefits are being transferred from one plan or arrangement to a pension plan to consolidate benefits (for e.g., a reciprocal transfer) or for a transaction such as a past service purchase (for e.g., from a locked in retirement plan, registered retirement plan, defined benefit or defined contribution plan to pay for a past service purchase in the receiving plan); or where annuities are being purchased (whether in the context of a wind up or otherwise). We agree with this approach.

Competing beneficiaries

In the context of a plan transfer (e.g., an asset transfer between two pension plans), a member may have an existing entitlement in both plans pre-merger and different beneficiaries (or none) in each. Where a beneficiary designation exists for the receiving plan, if the substitute decision maker is empowered to make a new beneficiary designation post-merger that maintains the designation in the other plan, this may result in competing beneficiaries in the receiving plan or a result that is inconsistent with the member's intent. We therefore recommend that the amendment be expressed not to apply where the member has already designated a beneficiary under the receiving plan.

Incapacity

The amendment included in the Proposal does not specify that the plan member on whose behalf the substitute decision maker is acting must be incapable of designating a beneficiary when the designation is made (although an intention to do so is expressed in the Proposal). Such a proviso in the amendment itself would be appreciated, in order to avoid circumstances where an attorney and a plan member are both in a position to make designations and these competing designations create issues for the plan administrator. The determination of capacity for the purpose of the amendment should be consistent with any method specified in the relevant continuing power of attorney for property, rather than, for example, a requirement to obtain a certificate of incapacity under the *Mental Health Act*.

Discharge

The amendment should also address a plan administrator's liability in relation to a pre-existing designation that conflicts with any designation made by a substitute decision maker under the amendment that have not been brought to its attention (e.g., a designation in a will that is unknown to the administrator). The discharge under s.53(a) of the SLRA, which protects an administrator upon payment of a benefit in accordance with the most recent designation made under the terms of the plan, in the absence of actual notice of a more recent designation, should therefore be extended to cover a plan administrator that pays a

benefit in accordance with a beneficiary designation made by a substitute decision maker under the terms of the Proposal.

Co-ordinating amendment to the *Substitute Decisions Act, 1992* (the "SDA") and other consequential amendments

Subsections 7(2) and 31(1) of the SDA explicitly prohibit attorneys and guardians of property from making a will. There is case law that suggests that that prohibition has the effect of preventing a substitute decision maker from designating a beneficiary under a pension plan or other benefit plan.[1] If the Proposal is adopted, a co-ordinating amendment to the SDA should be made to clarify the scope of the substitute decision maker's authority in this regard.

In keeping with the concerns referenced above regarding pension plan mergers and transfers of pension benefits, we recommend that the government engage in further consultation about potential amendments to the relevant provisions in the *Pension Benefits Act,* specifically s. 42 regarding transfers, and ss. 80 and 81 regarding successor pension plans, to ensure that the proposed amendment to the SLRA works as intended within the pension context.

Thank you for the opportunity to comment on the proposed changes to the SLRA. If you have any questions or would like to discuss this matter, please do not hesitate to contact us.

Yours sincerely,

Karen Burnett
Chair, Ontario Regional Council, ACPM

Ruth Morayniss
Director, Communications, ACPM

[1] See, e.g., *Richardson Estate*, 2008 CanLII 63218 (ON SC).