By Email Only

MEMO

Date: October 31, 2013

To: Michael Banks, Chair, Designated Group

Copy: Chris Fievoli, Resident Actuary, Canadian Institute of Actuaries

From: Kelley McKeating
On behalf of the Committee on Actuarial Evidence

Comments on the Notice of Intent: ISAP1 and Reporting of Assumptions, Margins, Methods, and Related Rationales

The following represents the consensus of the Committee on Actuarial Evidence (AEC) concerning this Notice of Intent. We would be pleased to clarify any of our comments, if needed.

Specific feedback was requested on the following two issues:

1. Should the ASB actively pursue consistency with emerging international standards of actuarial practice?

There is little value to such a goal from the Actuarial Evidence practice area perspective. In the opinion of the AEC, a more appropriate goal may be for the Canadian and International standards to not be contradictory. This would not always mean that the Canadian standards should change.

The International standards, as they evolve, may be drafted by actuaries who represent large multinational insurers and consulting firms. These actuaries may not be familiar with the smaller actuarial practice areas that exist in different countries and the potential impact of the International standards on those smaller practice areas. In addition, they may not always consider the applicability of proposed International standards to small and sole practitioner consulting firms.

The suggestions contained in this submission are intended to allow the ASB to achieve consistency between ISAP1 and the Canadian standards while avoiding any unintended detrimental impact on the Actuarial Evidence practice area.

2. Are there situations where the proposed requirements may not be appropriate and modifications may be needed?

The AEC is concerned that the second and third of the five proposed requirements may not be appropriate for the Actuarial Evidence practice area.

In their June 20, 2013 memo concerning linkages between the General and Practice-specific Standards, Dave Pelletier and Jay Jeffery of the Actuarial Standards Board wrote:

> "The intent of the practice-specific standards is to narrow the range of practice considered acceptable under the general standards, and in exceptional cases to define as acceptable a practice that would not be acceptable under the general standards."

The second and third proposed requirements would result in General Standards that are narrower than the practice-specific standards for Actuarial Evidence (the version of Part 4000 that will become effective at the end of 2013). In the opinion of the AEC, it would be appropriate to stipulate in the General Standards that the standards set out in Part 4000 are acceptable if the actuary is performing Actuarial Evidence Work notwithstanding the requirements that are set out in the General Standards.

Here are our specific comments (note that we use CSOP as a short form for the Canadian General and Practice-specific Standards of Practice, to distinguish them from the ISAP1):

1. Sensitivity Analysis

The use of "sensitivity analysis", as this term is traditionally understood by actuaries, is rare in AE work. However, we often value different scenarios, when requested by our client or when we deem it useful to resolution of the dispute.

Since the proposed requirement is only that the actuary "would consider…", the AEC does not object to this aspect of the proposed changes so long as the revised Paragraph 1820.09 be drafted in such a way that it is clear that it does NOT override Paragraph 1720.07.

For your reference, here is the relevant portion of Paragraph 1720.07:

> "In assessing the utility of reporting the result of an alternative to an assumption for which the actuary does not take responsibility, the actuary would consider the dependence of external users on his or her work. For example,

> utility in actuarial evidence work would be assessed in the context of the adversarial system in tort litigation, which expects each side to develop its own case without help from the other side, or to identify and expose any flaws in the other side's case; therefore, it is consistent with that system for the actuary engaged by one side not to report the result of an alternative assumption if the lawyer for the other side is able to compel the actuary (or engage his or her own actuary) to calculate the result of a desired alternative…"

2. Required Opinion Where Assumptions Are Specified by the Terms of Engagement

The AEC has strong concerns about this proposed change.

Actuarial Evidence work often involves assumptions that are outside the realm of traditional actuarial expertise. Such assumptions will frequently be specified by the terms of engagement.

To assist the Designated Group in understanding our concern, here are three examples of situations where it would be inappropriate for an actuary to opine on an assumption that is specified by the terms of engagement:

- A medical expert has provided an assumption pertaining to the medical condition and the probable evolution of the medical condition of an injured plaintiff, and the client lawyer has instructed the actuary to use the medical expert's assumption;

- The client lawyer has instructed the actuary to use an assumption pertaining to or stemming from the interpretation of a law, a regulation, or a legal precedent (in this case, opining on the assumption may be illegal since the actuary would be offering a legal opinion when not qualified to do so);

- The client lawyer has instructed the actuary to use an assumption that has already been agreed upon by the parties to the dispute.

These are not unusual situations.

For your information, we have attached copies of Form 53 (which must be included with all expert evidence reports prepared under Ontario jurisdiction) and Rule 55.04 of the Nova Scotia Rules of Civil Procedure (which sets out the required contents and assertions of an expert report in a Nova Scotia civil matter). In Ontario, the expert cannot provide opinion evidence on matters that are not within his or her area of expertise.

Actuarial Evidence work involves assumptions that may be considered to be "data" in other practice areas. For example, future earnings levels are an assumption in the AE

practice area but would be “data” in the pension practice area. We ask that the Designated Group, in formulating its recommendations, be cognizant of the different meaning of the term “assumptions” in different practice areas.

The AEC requests that, if the proposed change is made, wording be added to stipulate that the new paragraph not override Part 4000, and in particular Paragraphs 4320.03 and 4320.07, if the actuary is performing Actuarial Evidence Work.

For your information, here are the two relevant paragraphs:

> 4320.03: “*The actuary should ensure that any assumptions stipulated by the terms of the engagement are plausible.*”
>
> 4320.07: “Notwithstanding paragraph 4320.03, the terms of an appropriate engagement may stipulate assumptions that are not considered plausible by the actuary or methods that are not considered appropriate by the actuary. In such case, if the actuary performs the work in accordance with the terms of the engagement, the actuary would report the deviation from accepted actuarial practice in Canada.”

We are already required to identify in our reports the assumptions for which we take responsibility and the assumptions specified by the terms of engagement (by another expert or by our client, the lawyer). If the assumption is plausible, then the AE actuary should not be obliged to state an opinion concerning the assumption being in accordance or not in accordance with accepted actuarial practice. It is not helpful to the dispute resolution proceeding to harm the client’s case by appearing to criticize either another expert’s opinion or the lawyer’s instructions.

We are concerned that this proposed change, if applied to Actuarial Evidence Work, would result in more non-actuaries being retained in lieu of actuaries to do AE work than is currently the case. Would the public be better served by such a development?

3. Assumptions and methodology mandated by law and not otherwise appropriate

The AEC is concerned with this proposed change.

Other practice areas are defined by a “product” (i.e., pensions or life insurance, etc.). Reports in one of these practice areas may have a number of different purposes, and a single user may receive reports with several different purposes (i.e., a pension plan sponsor may receive valuation reports prepared for financial planning, solvency, accounting, or funding purposes).

Actuarial evidence is a practice area defined by a purpose (please refer to the definition of Actuarial Evidence Work). By definition, if the report is Actuarial Evidence Work, then there can only be one purpose. Also, the users of the report (usually the plaintiff and

defendant lawyers plus the judge) will not receive an actuarial report prepared for any other purpose.

In AE, where assumptions or methodology are mandated by law, they are mandated due to the purpose of the report. Thus, the proposed change seems redundant to the AE practice area. The proposed requirement would add little value to the report, and could potentially prove confusing to the court and other readers.

The AEC is of the opinion that this requirement is inappropriate for the AE practice area. We suggest that that, in respect of this change, there be a stipulation that the new Paragraph not override Part 4000 if the actuary is performing Actuarial Evidence Work.

4. Independent Peer Review

Since the proposed requirement is only that the actuary "consider…", the AEC does not object to this aspect of the proposed changes. We suggest that this be guidance, not a recommendation ("would consider" and not "should consider").

The courts don't anticipate that experts will use peer review. The courts typically expect the expert to offer an unbiased, non-partisan personal expert opinion and not an opinion that has been swayed by another expert. As you may be aware, a few years ago an Ontario judge decided to attach NO weight to the report and the testimony of an actuary in a trial because, according to the court, that actuary's opinion had been influenced by others.

The attached Form 53 (Ontario) and Rule 55.04 (Nova Scotia) illustrate the expectations that the courts have of experts, including actuaries.

5. Timeliness of Report

The AEC feels that turnaround time is a business matter and not a standards issue. In our opinion, items such as this have no place in the CSOP. Would it be appropriate to initiate discipline proceedings because an actuary missed a deadline?

In AE, "reasonable" to one party may not be "reasonable" to the other party. In a dispute resolution proceeding, which side decides? Sometimes the timing of a report is part of the client's strategy.

In any event, we suggest that this item is already covered by Rule 1 of the Rules of Professional Conduct.

If the ASB does decide to proceed with including this item in the CSOP, then the AEC suggests that it be guidance (not a recommendation) and that "should" be replaced by "would".

FORM 53 (Ontario)

Courts of Justice Act

ACKNOWLEDGMENT OF EXPERT'S DUTY

(General heading)

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is ..... *(name)*. I live at ..... *(city)*, in the ..... *(province/state)* of ..... *(name of province/state)*.

2. I have been engaged by or on behalf of ..... *(name of party/parties)* to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date .....
Signature

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

RCP-E 53 (November 1, 2008

Content of expert's report (Nova Scotia)

55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
(a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
(b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
(c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:
(a) details of the steps taken by the expert in formulating or confirming the opinion;
(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;
(c) the degree of certainty with which the expert holds the opinion;
(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:
(a) the expert's relevant qualifications, which may be provided in an attached resumé;
(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
(c) reference to all publications of the expert on the subject of the opinion;
(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;
(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.