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**A PRIMER ON PENSION LEGISLATION**

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## **INTRODUCTION**

The *Income Tax Act* (Canada) and pension standards legislation across Canada impose a complicated set of rules for the registration, funding and administration of registered pension plans. However, the rights of pension plan members are not limited to tax and pension legislation. Many other statutes impose rules that affect the rights and obligations of members, their beneficiaries and others. This paper will briefly describe several of those statutes.

## **PENSION STANDARDS LEGISLATION**

### **General effect of pension standards legislation**

Pension standards legislation (also called pension benefits legislation) exists in most provinces, and federally. It deals with a variety of benefit, funding, disclosure and reporting issues, including:

- disclosure of information to plan members and unions
- right to become a member
- entitlement to begin to receive a pension, and vesting of benefits
- the "locking-in" of benefits
- "unlocking" a benefit in a registered pension plan under the "shortened life expectancy" rules
- withdrawing from a locked-in RRSP under the "financial hardship" rules
- improvements to benefits when a pension plan is wound up
- surplus issues
- pension requirements on the sale of a business

- rights of members to transfer pensions on termination of employment ("portability")
- constitution and powers of the regulator (in Ontario it's the Financial Services Commission of Ontario; formerly called the Pension Commission of Ontario; it may be merged with the Ontario Securities Commission and re-named the Ontario Financial Services Commission)
- filing and assessment obligations of the administrator (e.g. the Pension Benefits Guarantee Fund requirements in Ontario)

### **Status of pension standards legislation**

Even though a pension plan is registered in Ontario, the pension benefits legislation of the province in which a member resides could affect the employer's administration of the pension plan. In other words, an employer whose employees work in provinces across Canada must be aware of the pension standards requirements of all of those provinces even though the employer's pension plan is actually registered in only one province. The jurisdiction in which the plan is registered administers the pension laws of the other jurisdictions.

Good sources of up-to-date information about the status of pension standards legislation and regulations across the country are the CCH Canadian Employment Benefits and Pension Guide Reports and the Canadian Pension & Benefits Institute Regulatory Summary.

In addition, releases by the pension regulators are essential reading for the pension practitioner. The Financial Services Commission of Ontario publishes a variety of materials, much of which is on their website([www.fSCO.gov.on.ca](http://www.fSCO.gov.on.ca)). The "Pension Bulletin" is most valuable; the January, 2003 edition is on the FSCO website under "Publications".

The federal pension standards regulator (the Office of the Superintendent of Financial Institutions) also publishes information and has a useful website: [www.osfi-](http://www.osfi-)

bsif.gc.ca. The Quebec pension regulator, the Régie des rentes du Québec, also has a friendly website: [www.rrq.gouv.qc.ca/an/English.htm](http://www.rrq.gouv.qc.ca/an/English.htm).

### **Which pension standards legislation applies?**

First find out whether federal pension legislation applies. The federal *Pension Benefits Standards Act, 1985* ("PBSA") applies to employers in all provinces within the legislative authority of the federal government (banking, communication, transportation, etc.). If the *PBSA* does not apply, the next question is whether a specialized pension statute applies. For example, for a civil servant employee such as a teacher, or a municipal or hospital worker, a special pension standards statute may exist in the applicable province. The CCH Canadian Employment Benefits and Pension Guide Reporter lists most of these additional statutes.

If neither the federal nor a specialized pension standards statute applies, the next question is which provincial pension statute governs. The Ontario *Pension Benefits Act* states that it applies to every pension plan that is created for Ontario employees. A person is deemed to be employed in Ontario if the employer's office or establishment where the employee reports to work is located in Ontario. The relevant provincial statute should be reviewed, if it is not clear where an employee resides or works; unfortunately, the provincial statutes are not entirely consistent in their provisions as to applicability.

If a single pension plan has members who are employed in more than one province, the plan sponsor does not have to register the plan in each of the provinces. Rather, the province of registration will be the province where the plurality of active members reside. This is pursuant to multilateral agreements among the federal government and the provinces of Ontario, Quebec, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland. Under the multilateral agreements, the "primary jurisdiction" (the province with the greatest number of members) applies the pension benefit entitlement provisions of the pension standards legislation of the other provinces, to the pension plan members who reside in those other provinces.

The result is that an employer who sponsors a pension plan with members in more than one province must apply a variety of pension standards legislation across the

country. Since standards vary, nation-wide employers must be aware of the myriad of differences among provincial pension standards.

### **THE "LECO" PROBLEM – ONTARIO VERSUS QUEBEC**

Vexing problems have arisen in the last few years for employers who have a pension plan registered in Ontario with some Quebec members. There is a multilateral agreement between the Ontario and Quebec pension regulators. Quebec has agreed that Ontario may administer the applicable Quebec pension standards legislation, as it applies to Quebec employees. The Quebec pension regulator will not get involved with the Quebec members of an Ontario-registered pension plan, as long as there are no problems. If, however, a Quebec member of an Ontario-registered pension plan complains about his pension benefits to the Quebec pension regulator, the Quebec regulator will not necessarily defer to the Ontario regulator.

In a case referred to as the "Leco" case, problems arose in the context of a surplus sharing arrangement. The Quebec pension regulator withdrew from the multilateral agreement with the Ontario pension regulator, only with respect to the Leco pension plan. The result is ongoing lawsuits in both Ontario and Quebec to sort out which province's pension surplus rules should be applied, and how. The lesson of the Leco case is that there is uncertainty and potential problems with pension plans registered in Ontario, who have members in other provinces, and vice versa. The Canadian Association of Pension Regulatory Authorities ("CAPSA") is an organization of pension regulators across Canada. Its members have been trying for several years, in several ways, to achieve uniformity of pension legislation. So far they have been unsuccessful.

### **MULTI-EMPLOYER PENSION PLANS**

The term "multi-employer pension plan" ("MEPP") refers to a pension plan where there is more than one employer. There are several different types of plans that could be labelled MEPP's:

- *NOT A MEPP*: There are many pension plans where several related employers are participants. A Canadian "parent" company and its associated or subsidiary companies jointly participate in a

single pension plan. The rules applicable to these pension plans do not differ from the legislative requirements for a single-employer registered pension plan. These plans don't fall in the definition of MEPP's in pension benefits legislation. They are not subject to the special MEPP rules listed below.

- *A TRUE MEPP:* The term "MEPP" often applies to a plan provided for employees of several unrelated employers. They are common in the construction industry and the garment industry. Typically the employee workforce is mobile and unionized. These MEPP's usually provide for employer contributions of a specific amount per hour of employment. The benefits promised in these MEPP's are defined benefits.
- *A TRUE MEPP:* Another type of MEPP is a pension plan that covers public sector or quasi-public sector employers, such as the Hospital of Ontario Pension Plan (HOPP) or the Ontario Municipal Employees' Retirement System (OMERS). Often these plans are governed by statutes specifically applicable to these arrangements. Some require compulsory employer participation.

### **Special pension benefits legislation applicable to MEPP's**

Pension benefits legislation contains very specific MEPP rules that do not apply to single-employer pension plans. Please note that the following rules apply to "typical" MEPP's of unrelated employers. They do not apply to multi-employer plans where the employers are all related to each other (i.e. associated or affiliated or subsidiary companies).

- Employee service with all participating employers in the MEPP is recognized for vesting and eligibility purposes.
- The movement of an employee from one participating employer to another in the MEPP will not automatically trigger termination benefits.

- The defined benefits promised in a MEPP may be reduced in the case of a deficit.
- The Pension Benefits Guarantee Fund in Ontario does not apply to MEPP's – i.e. the annual levies are not paid by the pension plan, and the "protection" is not there if the plan fails to pay out the full benefits.
- The "administrator" of a MEPP is not the employer. Instead, the governing body must be a board of trustees, with equal representation from employers and employees/unions. This board of trustees is responsible for investment policy, funding strategy, plan design and all other aspects of administration.
- There will not necessarily be a partial windup of a MEPP simply because of the withdrawal of a participating employer.

Advantages to employers of MEPP's include the fact that administration is not the responsibility of the employers. The board of trustees is responsible for all aspects of running the plan. There are savings in pooling the various administration costs. The most significant advantage, in the opinion of some employers, is that there is no risk of deficit funding requirements, since the defined benefits promised by a MEPP can be reduced in the case of a funding shortfall.

## **TAX LEGISLATION**

### **Application of the Income Tax Act**

The *Income Tax Act* (Canada) applies to all registered pension plans, in addition to the relevant pension standards legislation. Accordingly, an Ontario-registered pension plan must be registered under both the *Income Tax Act* and the Ontario *Pension Benefits Act*. The *Income Tax Act* also applies to deferred profit sharing plans, registered retirement savings plans, employee profit sharing plans and retirement compensation arrangements, which are not currently subject to provincial or federal pension standards legislation.

Pension tax reform was achieved in 1990. The intent of pension tax reform was to permit all individuals to enjoy roughly the same opportunities for tax-assisted retirement savings, regardless of whether they participated in a registered pension plan, a registered retirement savings plan or a deferred profit sharing plan. If an employee enjoys accrual of a benefit under a registered pension plan in a year, his "RRSP contribution room" is reduced for that year.

### **General content of the Income Tax Act rules**

The pension tax rules cover a wide range of financial and administrative issues. They impose strict limits on the funding and payout of benefits from registered pension plans. They require employers to provide "PA" (pension adjustment) reporting, not to mention "PSPA" (past service pension adjustment) and "PAR" (pension adjustment reversal) reporting. They restrict the kinds of investments that can be made with assets of pension plans (the foreign property limit, for example, is found in the regulations). They contain detailed conditions regarding the rollover of funds from one plan to another. They regulate the accrual of pension benefits of individuals who are employed outside of Canada. ("foreign service" rules). Also, they require administrators to comply with registration, amendment, actuarial and other reporting requirements.

The extent and technical detail of the regulations is daunting; they can be virtually incomprehensible. One of the first guides a practitioner should consult is the series of newsletters produced by Revenue Canada (now called "Canada Customs and Revenue Agency") entitled "Pension Reform Update". The newsletters attempt to explain the Regulations, and notify administrators of Departmental policies, deadlines, new forms, etc. To get on the mailing list for this publication, write to Canada Customs and Revenue Agency ("CCRA"), Taxation, Registered Pension and Deferred Income Plans Division, 400 Cumberland Street, Ottawa K1A 0L8. A useful website for CCRA pension information is: [www.ccra-adrc.gc.ca/tax/registered/menu-e.html](http://www.ccra-adrc.gc.ca/tax/registered/menu-e.html).

## CLASS ACTION LEGISLATION

### The Class Proceedings Act

Ontario's *Class Proceedings Act* came into force on January 1, 1993. It gives pension plan beneficiaries and others a powerful tool in suing pension plan sponsors. The *Class Proceedings Act* removes several procedural obstacles which have historically impeded class actions. For example, it is not necessary for each member of the class to have sustained similar damages. The legislation permits an "aggregate" assessment of damages without proof of individual claims. The court can rely on statistical information, including information derived from "sampling", in order to assess damages and allocate awards among the members of the class.

The proceeding can be commenced by a notice of application, statement of claim or notice of action. The person who commences the proceeding must make a motion for an order certifying the proceeding as a class proceeding, and "appointing a representative plaintiff". The certification order may not be difficult to obtain, since the applicant has to show that "the claims or defences of the class members raise common issues", and that "a class proceeding would be the preferable procedure for the resolution of the common issues" (section 5 of the *Act*). The fact that the relief claimed relates to separate contracts involving different classes of members, or the fact that different remedies are sought for different classes members, is not a bar to certification (section 6). In fact, certification can be granted even if the number of class members or the identity of each class member is not known (section 6). These favourable plaintiff conditions seem well suited for pension claims, where there is a wide variety of types of beneficiaries, and where different employment contract promises may have been made to employees regarding pension benefits.

Once the certification order is made, class members are notified of the proceedings. Anyone may opt out of the class, but those who do not are bound by the outcome.

Lawsuits under the new system will likely be encouraged as a result of significant changes to permitted legal fee arrangements. The plaintiff's lawyers are permitted to enter into contingent fee arrangements (whereby they are paid only if the

lawsuit is successful). The amount of the legal fees may be determined by the court at a separate hearing following the trial or settlement of the lawsuit. The fee will be partially determined by a "base fee" which is the number of hours worked times the lawyer's hourly rate. A "multiplier" may be set by the court and applied to increase the "base fee". Section 33 of the *Act* states only that the court shall apply a multiplier "that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding...". Canadian courts may look to the precedents set by American courts in similar proceedings. Generally, multipliers set by American courts are in the range of 1.3. to 2.5.

Other financial features of the new system will also encourage plaintiffs to commence actions. Amendments to the *Ontario Law Society Act* which came into force on January 1, 1993, and O. Reg. 771/92, create the "Class Proceedings Fund". A plaintiff who makes a successful application to the Fund (administered by the Law Foundation of Ontario) will enjoy two benefits: first, financial assistance with disbursements related to the proceeding; and second, indemnification for cost awards made in favour of a defendant against the plaintiff. Pension claimants facing high disbursements for actuarial expert fees will find this helpful.

Note that an application for money can be made to the Fund before the certification order is granted. The Fund has been created with endowments totalling \$500,000. It will be replenished with repayments and contributions by successful plaintiffs. The Regulation provides for a levy on successful settlements or judgments in favour of the plaintiff in the amount of 10% of the amount of the award or settlement funds.

The Ontario *Class Proceedings Act* encourages the growth of lawsuits against pension plan sponsors, funding agents and others.

## **EMPLOYMENT STANDARDS LEGISLATION**

### **General**

Employment standards legislation exists in all provinces, and federally. The *Canada Labour Code* is the federal statute applicable to banks, airlines, etc., and the

*Employment Standards Act* is the Ontario statute. A few key pension issues exist in these statutes. There are potentially two regulators who can assist claimants regarding these issues (the Financial Services Commission and the Employment Standards Branch in Ontario, for example).

### **Pension rights on termination of employment**

Many Ontario employers are unaware of the fact that the Ontario *Employment Standards Act* requires them to continue the accrual of pension benefits for terminated employees during the statutory notice period. This is true even if the employer provides the dismissed employee with severance pay amounts in excess of the required statutory notice and severance pay. If an employee settles his or her wrongful dismissal claim on the basis of a generous severance payment, the *Act* still requires the continuation of pension benefits during the statutory notice period, since an employee cannot contract out of, or waive, the right to continued benefit coverage (section 3 of the *Employment Standards Act*).

The right to continued benefit coverage is in sections 61 and 62 of the *Employment Standards Act* [emphasis has been added]:

- 61.(1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,
- (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and
  - (b) **continues to make whatever benefit plan contributions would be required to be made** in order to maintain the benefits to which the employee would have been entitled **had he or she continued to be employed during the period of notice** that he or she would otherwise have been entitled to receive.
- 62.(1) If an employer terminates the employment of employees without giving them part or all of the period of notice required under this Part, **the employees shall be deemed to have been actively employed during the period** for which there should have been notice **for the purposes of any benefit plan** under which entitlement to benefits might be lost or affected if the employees cease to be actively employed.
- (2) If an employer fails to contribute to a benefit plan contrary to clause 61.(1) (b), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103.

The fact that a pension plan may specifically require active service for accrual of pension benefits will not conflict with this statutory right, since the above provisions in the Employment Standards Act state that employee shall be deemed during the period of notice to be actively employed. Note that the period of deemed employment is for the statutory notice period only; it does not extend to the longer period of common law notice.

### **Pension rights during pregnancy and parental leave**

The Ontario *Employment Standards Act* provides entitlement to a pregnancy leave of 17 weeks and a parental leave of 35 weeks (total: 52 weeks). Ten years ago, the right to pension and other benefits in Ontario ceased during the leave. The *Act* now provides that during pregnancy or parental leave, and a new "emergency leave", an employee must continue to accrue benefits under a pension plan (and other benefit plans) "unless the employee gives the employer a written notice that he or she doesn't intend to make the required contributions. The Act states:

51.(1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so.

(2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.

(3) During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any.

As part of the paperwork related to pregnancy and parental leaves, therefore, Ontario employers should ensure that the issue of continuing pension benefits is dealt with in writing by the employee. The Ontario legislation does not enlighten employers as to how to deal with the situation where an employee fails to make his or her pension contributions, and also fails (or refuses) to give the employer the required "written notice" that he or she does not want continuation of pension benefits. The *Canada Labour Code*, in contrast, specifically requires the employee to pay his or her pension contributions (if it is a contributory plan), unless he or she notifies the employer of his or her intention to discontinue contributions during the period of leave (section

209.2). The employer is not required to make employer contributions to a contributory plan if the employee fails to make his or her contributions; unlike the requirements of the Ontario legislation, the employer governed by the *Canada Labour Code* does not have to obtain a "written notice" from the employee in order to be entitled to terminate employer contributions during the leave period.

## **LABOUR LEGISLATION**

### **General**

Pension issues have become a significant part of the relationship between unions and employers. Although labour laws (such as the *Labour Relations Act* of Ontario) do not specifically address pension issues, many unions now play a role in pension plan governance. In addition, to the dismay of unionized employers, collective agreement rights often give unions valuable tools in pursuing pension rights. The following is a brief description of collective agreement pension issues.

### **Pension rights and collective agreements**

A collective agreement may describe pension benefits in a variety of ways. At one extreme, there could be only a brief reference to the fact that the employer will provide a pension plan, without reference to the type of benefits or any other aspect of the plan or its governance. At the other extreme, the entire text of a particular pension plan could be incorporated by reference into the collective agreement; this could be the case, for example, if the collective agreement states that the employer will provide "The Retirement Income Plan for Employees of ABC Company, amended and restated as at January 1, 1987".

The difference between these two extremes is significant, and unfortunately, some employers are unaware of the difference. Once a plan has become a collectively bargained term of employment, the union has acquired a variety of rights not otherwise available.

First, the plan administrator (usually the employer) may have lost its right to make unilateral amendments to the plan. This may be the case notwithstanding the

fact that the text of the pension plan itself purports to reserve to the employer the right to unilaterally amend the plan in accordance with applicable pension laws. (Under pension standards legislation, generally an administrator can make unilateral amendments to a pension plan in accordance with its terms, unless the amendments have an adverse effect on plan members and beneficiaries.)

Second, the union may have acquired the right to dispute the employer's interpretation of provisions of the pension plan.

Third, depending on the provisions of the collective agreement and the pension plan, the union may have acquired the right to grieve pension issues. This could create horrendous procedural and representation issues for an employer; an issue such as a dispute over the ownership of surplus assets could become subject to the jurisdiction of both the Pension Commission of Ontario, and an arbitrator appointed pursuant to the collective agreement.

A jurisdictional issue which has not attracted much attention is the possibility that the Ontario *Rights of Labour Act* prohibits any court action with respect to a pension plan which is part of a collective agreement. The Ontario *Labour Relations Act* and the grievance arbitration provisions of the collective agreement supposedly provide the sole procedures for the resolution of collective agreement disputes (see St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers' Union Local 219 (1986), 28 D.L.R. (4th) 1 (S.C.C.)). Notwithstanding this fact of labour law, it is an issue that has not been raised in recent court cases that have dealt with collectively-bargained pension plans. It is an issue that should be kept in mind by pension plan administrators who may wish to raise procedural hurdles for unions making pension claims.

Employers should be aware that as a general rule, the more specific the references to the pension plan in the collective agreement, the more powerful the rights of the union to dispute the employer's administration of the plan. When an employer negotiates the terms of a collective agreement, it should be informed as to of the legal effect of inserting references to the pension plan in the collective agreement.

### **When pension statutes override collective bargaining**

Another pitfall exists in the collective bargaining of pension issues when employers are uninformed about pension standards and income tax legislation. Employers and unions have agreed on pension issues that do not comply with pension standards legislation or the *Income Tax Act*. For example, employers have signed letters of intent with unions to provide past service pension benefits on the understanding that the cost of those benefits will be funded in a certain way, or over a certain time period. Unfortunately, the employers were unaware that there are statutory limits and requirements with respect to the funding of benefits, which conflicted with their promises to the unions.

Similarly, employers have agreed with unions to provide certain kinds of pension improvements on the understanding that those benefits could be reduced in future, if certain circumstances arose. They were unaware of the pension standards legislative restrictions on reducing benefits.

There is no legal mechanism for resolving conflicts between collectively bargained promises and legislative requirements. An employer caught in such a conflict will face the prospect of union grievances, labour board complaints, and difficulties with pension regulators. Any employer who negotiates pension issues with a union should be fully informed about their own pension plan, and aware of the various pension statutory requirements.

## **HUMAN RIGHTS LEGISLATION**

### **General**

Pension standards legislation permits discrimination among members of a pension plan, in that a single pension plan can provide different benefits for different "classes" of employees. For example, it is permissible to provide basic benefits for non-executive employees, and enhanced benefits for executives, within the same pension plan.

Even though pension benefits legislation permits a differentiation among "classes", employers still need to be aware of the restrictions of human rights legislation. It is not permissible under human rights legislation, for example, for a pension plan to create a special "class" of benefits for men, or for employees who are married, or for employees under or over a certain age (between the ages of 18 and 65, in Ontario). In other words, the basic prohibited grounds of discrimination under human rights legislation do extend to pension plans. Employers may not discriminate on those prohibited grounds in providing pension benefits.

### **Same-Sex Spousal Benefits**

Employers who want to know what their obligations are to provide same-sex spousal benefits under pension plans need to follow the media closely. Most provinces, and the federal government, have passed legislation to recognize the pension entitlements of same-sex spouses. These legislative changes were prompted by several cases decided by judges across the country that held that same-sex spouses were entitled to the same pension entitlements as opposite-sex spouses. Their judgements are based on the application of provincial human rights legislation and the Canadian Charter of Rights and Freedoms.

Unfortunately, there is still much confusion as to how administrators of pension plans should provide same sex pension benefits. There are inconsistencies among various provincial pension benefits legislation. For example, the period of cohabitation, or other circumstances, is not exactly the same across the country as to when the same-sex entitlement applies. Also, there are inconsistencies as to what the rights of spouses are, when a pension member simultaneously has a "legally married" opposite-sex spouse, at the same he or she has a same-sex partner. The effective date of provincial changes are also inconsistent.

Adding to the confusion about spousal benefits is the recent change to Quebec and Nova Scotia laws regarding "civil unions". On June 24, 2002, the concept of "civil union" came into effect in Quebec pursuant to "An Act instituting civil unions and establishing new rules of filiation." Nova Scotia has adopted similar legislation. Basically, civil unions are recognized as equivalent to marriages for almost all purposes.

There is no minimum required cohabitation period in order to qualify as a "civil union". The minimum pension standards legislation of both Quebec and Nova Scotia has been amended such that "spouse" under pension legislation now includes these civil unions. The following is the Quebec legislative definition of "civil union":

"A civil union is a commitment by two persons eighteen (18) years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status.

A civil union may only be contracted between persons who are free from any previous bond of marriage or civil union and who in relation to each other are neither an ascendant or a descendant, nor a brother or a sister."

No similar amendments have been made to the *Income Tax Act of Canada* to mirror this expanded concept of "spouse". Obviously, there is a conflict. Pension plan sponsors may have to deal with this conflict, if they have members in Quebec or Nova Scotia who register "civil unions".

Pension plan administrators still do not have a simple guideline as to how to treat same-sex partners under registered pension plans and other tax deferred retirement plans. As the provinces, and the federal government, are pushed towards reform, they are not passing legislation that is entirely consistent or clear. Sponsors might be forced to seek legal advice when providing same-sex pension benefits, especially if their plan includes members in more than one province.

## **FAMILY LAW**

### **General**

A difficult issue for pension plan administrators is how to deal with claims for pension benefits when there is marriage breakdown of a member of the plan. A pension can be the most valuable asset accumulated during a marriage. Administrators often find themselves in the middle of disputes between warring spouses as to whether, how much and when the non-member spouse will receive money in respect of the member spouse's pension entitlement.

The following is a brief description of a few of the critical issues in this area:

**Basic issues in valuing, dividing and distributing pensions on marriage breakdown**

Since 1986 pensions have been recognized by Ontario family law legislation as a family asset (see subsection 4(1) of the Ontario *Family Law Act*). The Ontario *Pension Benefits Act* also addresses certain limited issues in the division and payment of a pension to the spouse of a plan member (see section 51 of the *Pension Benefits Act* and section 56 of Regulation 909 thereunder). Unfortunately, neither of those statutes provides complete guidance as to how pensions should be valued, divided and distributed. Courts have not resolved the uncertainties.

The question as to how to value a pension under a money purchase or defined contribution plan is not always a difficult one. Generally, the value will be the value of the member spouse's account balance at the valuation date, minus the value as at the date of marriage. In the case of a defined benefit pension plan, however, there are a variety of methods of valuation. The two most common ones (both of which have been recognized by Ontario courts) are the termination method and the retirement method. Under the termination method, the present value of the benefit is determined at the valuation date as if the plan member terminated employment on that date. The retirement method, on the other hand, values the pension on the assumption that the member spouse will continue in employment until retirement; it assumes salary increases, and possibly other improvements over the course of the member spouse's career. The retirement method is usually preferred by the non-member spouse since it results in a higher valuation.

The Ontario *Pension Benefits Act* does not specify how a pension is to be valued for the purposes of settling an equalization claim in the event of marriage breakdown. (The spouse with the lower value of family assets is entitled to make an equalization claim, based on the net family property amount.) The *Act* does, however, limit the amount that can be paid to the non-member spouse. His or her equalization claim cannot be greater than 50% of the pension benefits accrued during the marriage, calculated as prescribed by section 56 of Regulation 909.

Once the valuation question has been settled by the spouses or by a family law judge, how is payment to be made to the spouse with the lower net family property amount? A popular method is to allow the member spouse to retain his or her entire pension benefit, and arrange for an exchange of some other asset to satisfy the equalization claim. This is definitely preferred by plan administrators, since it means the pension is unaffected. If no such other assets exist, however, the pension benefit itself must be divided in some way.

Under the Ontario *Pension Benefits Act* no payment of any part of the benefit can be made to the non-member spouse unless the member spouse is entitled in the ordinary course to receive his or her benefit (see subsection 51(1)). In other words, the benefit can be paid to the non-member spouse only upon the retirement or termination of employment of the member spouse, or upon the wind-up of the pension plan. The method of payment of the benefit to the non-member spouse must be specified in a domestic contract, or in a court order under the *Family Law Act*. A plan administrator who divides a pension "is discharged on making payment in accordance with the domestic contract or order" (subsection 51(3) of the Ontario *Pension Benefits Act*).

Again, neither the *Family Law Act* nor the *Pension Benefits Act* specifies the appropriate method of payment. The court order or domestic contract could provide that whenever the pension becomes payable, a lump sum must be paid to the non-member spouse out of the value of the pension. Alternatively, the order or contract could provide that the non-member shall receive a monthly pension whenever the member begins to receive his pension. The form of this type of payment (applicable to defined benefit plans) can vary; the payment could be a lump sum, a percentage of the member's pension, or some other structure of payment.

### **Tips for plan administrators regarding marriage breakdown pension issues**

Due to the absence of statutory or judicial certainty as to the valuation, division and payment of pensions on marriage breakdown, a plan administrator can be caught in the middle of expensive disputes between warring spouses. The administrator should keep the following points in mind.

The administrator is under no legal duty to determine the value of a pension in the context of marriage breakdown. Similarly, the administrator is not required to determine the manner of distribution of the pension to the non-member spouse. The administrator is obliged to provide certain information regarding the pension, as prescribed by the applicable pension standards legislation. The fight as to the value of the pension should be fought between the spouses and their actuaries; the administrator should avoid becoming involved. The administrator need only comply with the court order or domestic contract provisions.

There are two exceptions to the Ontario administrator's reliance on the court order or domestic contract. First, the administrator must ensure that it complies with the requirement of the Ontario *Pension Benefits Act* that no more than 50% of the benefit accrued during the marriage be paid to the non-member spouse. (Remember that Regulation 909 prescribes the method to be used in valuing the pension for the limited purpose of applying this 50% rule. The valuation method agreed upon by the spouses, or imposed by a court, may be irrelevant in respect of determining the application of the 50% rule.) Second, the administrator must comply with that *Act's* requirement that no payment be made to the non-member's spouse unless the member is entitled to receive payment. It is not unheard of for court orders to contravene one or both of these statutory requirements. Plan administrators cannot assume that family law lawyers and judges are aware of these requirements.

Another note of caution for administrators: unless pension standards legislation requires the release of certain information, an administrator should not provide information to the non-member spouse unless it obtains the prior written consent of the member.

Finally, although it may seem obvious, the administrator must be certain of which pension standards legislation applies, since the definition of "spouse" varies among the jurisdictions.

## **WORKERS' COMPENSATION LEGISLATION**

### **General**

Section 25 of the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c.16, Schedule A states that an employer must make contributions to benefit plans (including pension plans) throughout the first year after an employee's work-related injury. Subsection 25(6) provides that for the purpose of determining the worker's entitlement under a benefit plan, the worker shall be deemed, for one year after the date of the injury, to continue to be employed. An employer who fails to comply with this section must indemnify the worker for his or her loss.

An employer is not obliged to continue pension accrual if the pension plan is contributory and the worker fails to pay his or her contributions during the one-year period (subsection 25(1)(b)).

### **CONCLUSION**

This paper has only briefly described some of the statutes which apply to registered pension plans. The complexity and range of these statutes illustrate that the administration of Canadian pension plans is a challenge that will continue to provide pension consultants and lawyers with livelihoods for as long as employers offer pension benefits.