MAY 09, 2011

Pension *Pulse*

Two More Pension Decisions from the Ontario Court of Appeal: Caution for Pension Plan Administrators

The Ontario Court of Appeal released two decisions recently concerning pension plan administration. The issues addressed by the court are precisely those that every pension plan sponsor, pension committee and pension plan administrator should be alert to.

Should Employers Use Customized Administration Forms?

The court's decision in *Smith v. Casco Inc.* 2011 ONCA 306, released on April 20, 2011, concerned the use of a pension benefit waiver form that had been designed by the employer, Casco Inc. The purpose of the waiver was to permit a pension plan member and the member's spouse to waive entitlement to an automatic lifetime joint and survivor pension under which the spouse would be entitled to 60% of the member's pension upon the death of the member.

In this case, the plan member decided to retire after 39 years of service. In advance of doing so, he signed a pension option election form and selected one of fourteen payment options. The option he selected was a lifetime pension with a five-year guarantee of pension payments, with no lifetime survivor pension to his spouse in the event he predeceased his spouse. The member and his spouse had also signed a joint and survivor benefit waiver form under which the lifetime survivor pension for the benefit of the spouse was waived.

According to the finding of facts by the lower court, the plan member brought the waiver form home at lunch and asked his spouse to sign the form so that he could retire. The spouse glanced at the form. She did not review it and did not understand that she was waiving entitlement to a survivor pension. Unfortunately, the plan member died three years after retirement, leaving only two years of pension payments from the five-year guarantee for the benefit of his surviving spouse.

The Ontario *Pension Benefits Act* was amended as of January 1, 1987 to include a minimum level of protection for spouses of pension plan members in the form of survivor pensions. The "automatic" form of pension payment under a pension plan is a reduced lifetime pension payable to the plan member, with 60% of the amount of the plan member's pension continued to the surviving spouse for the lifetime of the surviving spouse.

The legislation also provides for the ability of a pension plan member and the member's spouse to jointly waive payment of the automatic joint and survivor pension. The legislation prescribes a form for the waiver. In this case, Casco drafted its own form, which was modeled after the prescribed form, but different in certain respects. Many employers have taken this approach with the intent of making the prescribed form more intelligible. The issue the court had to grapple with was whether the waiver was valid under the *Pension Benefits Act*.

The court held that the surviving spouse was not bound by the waiver and therefore was entitled to the lifetime survivor pension. The court referred to the Ontario *Interpretation Act* and the Ontario *Legislation Act, 2006*, which replaced the *Interpretation Act*. This legislation provides certain rules in respect of the interpretation of legislation. One of the rules is that where legislation refers to a prescribed form, deviations are permitted, but only those that do not affect the substance of the form.

The court reviewed the customized form, compared it with the prescribed form and concluded that the differences affected the substance of the form. The main difference, according to the court, was that the customized form referred to an entitlement to the 60% joint and survivor pension **under the pension plan** and then stated that the 60% joint and survivor pension mandated **under the legislation** would be waived. The prescribed form, being a generic form, refers only to the pension under the legislation.

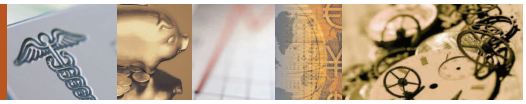
The court did not refer to this clear statement on the customized form:

> *"We understand that we may waive the right of the spouse or same-sex partner to receive the 60% survivor's pension. In this case, the member will be entitled to elect an alternate form of pension benefit from the Plan which does not provide any survivor's pension to the spouse or same-sex partner."*

There were other inconsistencies, such as certain statements not being in bold, or the caution to seek independent legal advice being placed immediately prior to the signature line rather than after, etc. The court held that these changes affected the substance of the prescribed form. The customized form was therefore not valid or binding upon the surviving spouse. Essentially, it seems apparent that the court was doing its best to reach a conclusion that would not preclude the surviving spouse from receiving a pension as a result of hastily signing a form.

The court rendered a similar decision in 1999, in *Deraps v. Labourers' Pension Fund of Central and Eastern Canada* (1999) 179 D.L.R. (4th) 168. In that case, a multi-employer pension plan also used a prescribed form and went so far as to employ an internal pension counsellor. The decision by the court did not hinge on the use of a customized form, but rather that in the counselling session, the internal pension counsellor did not make it crystal clear to the plan member and spouse that if the joint and survivor pension were waived, the spouse would receive nothing upon the death of the member. The court decided in favour of the surviving spouse.

Certain lessons can be gleaned from these two court of appeal decisions: (i) pension concepts are complex; (ii) they are often misunderstood by pension plan members and beneficiaries; (iii) they are challenging to communicate effectively; (iv) prescribed forms should be used; (v) ambiguities between a prescribed form and a customized form will be resolved in favour of the plan member and surviving spouse; and (vi) no matter what steps a plan sponsor or administrator takes, it might not be sufficient to avoid a court from reaching a conclusion that provides equitable relief to the plan member or surviving spouse.



When Is a Termination of Employment Considered to be a Retirement?

The distinction between a termination of employment and a retirement is often ill-defined in pension plan documents. The proper characterization can mean the difference between entitlement to a regular retirement benefit at age 65 or to lucrative subsidized early retirement benefits. This was the issue the Ontario Court of Appeal dealt with in *Revios Canada Ltd. v. Creber* 2011 ONCA 338, released on May 3, 2011.

In this case, the pension plan member, who was an actuary and senior vice-president and therefore very knowledgeable about pension matters, terminated employment at age 52. He participated in a basic defined benefit registered pension plan and an unregistered supplementary pension plan. Under the registered plan, he was entitled to either a pension at age 65 or to an early retirement pension as early as age 55, the value of which would be the actuarial equivalent of the age-65 pension.

If the member had terminated employment or retired on or after age 55, he would have been entitled to a full pension without any reduction at age 62 from the registered plan. He would have also been entitled to a pension as early as age 55 with a subsidized early retirement reduction. The supplementary pension plan provided benefits that the registered plan would provide but for the limits under the *Income Tax Act*.

The supplementary plan also provided for a full pension at age 62, without reduction. The early retirement subsidy for commencing a pension prior to age 62 was more generous than under the registered plan. The supplementary plan did not adequately distinguish between early retirement and termination of employment; it simply stated that a pension benefit would be payable in full at age 62.

The court examined both plans. It found that the supplementary plan was not a stand-alone document. It was essentially an add-on to the registered plan and for that reason, according to the court, it should be interpreted consistently with the underlying registered plan. The court held that the meaning of "early retirement" should be consistent in both plans, meaning termination of employment on or after age 55. The member was therefore not entitled to an unreduced pension at age 62.

The employer in this case was fortunate that the court interpreted the plans together. In many other decisions, ambiguities of this nature have been resolved in favour of the plan member. This decision highlights the need to draft documents carefully, particularly those provisions that have significant financial implications, such as early retirement benefits. In addition, it is important to properly link documents where one is dependent upon another, in order to remove ambiguity. ■

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