

# The Six-Minute Family Law Lawyer Pension Update

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## Income Tax Gross-Ups

- Receiving an increasing amount of attention.
- Used to increase an after-tax equalization payment which is paid from registered retirement assets (i.e. pension plan, RRSP).
- The intention of the gross-up is to compensate for the tax consequences of the transfer.
- There are several ways the gross-up can be done.
- This is not addressed in the law and there is not much case law.
- *Fawcett v. Fawcett*, 2016 ONSC 5331 (CanLII), judge confirming need for gross-up of transfer from pension plan.
- Judge used former spouse's average income tax rate in retirement as determined by the actuary.

## Income Tax Gross-Ups

- Judge confirmed this is not the correct tax rate, since it does not correctly reflect the former spouse's increased tax payable on the transfer amount from the pension plan, but no evidence was submitted to the courts on the correct gross-up rate.
- There are several possible approaches to a gross-up calculation including:
  - Former spouse's projected average tax rate payable on pension/RRSPs in retirement after transfer;
  - Former spouse's projected marginal tax rate payable on the additional pension/RRSP in retirement;
  - Member's contingent tax rate used to reduce the value of the pension/RRSP in the NFP (i.e. reverse the deduction);
  - Iterative calculation to ensure the NFP of both spouses is equal after gross transfer of assets, taking into consideration both spouse's changing tax liabilities.

## Double-Dipping

- Boston v. Boston, 2001 SCC 43 (CanLII), decision of the Supreme Court of Canada:
  - Allowing spouse to receive an equalization payment with respect to a pension earned during marriage and to receive spousal support on the same pension is 'generally unfair'.
  - However, 'double-dipping' cannot always be avoided.
- In order to avoid double-dipping, it is necessary to determine what portion of the pension income at retirement was previously equalized to be excluded from spousal support.

## Double-Dipping

- The portion of the pension income previously equalized will be less than 100% if:
  - There is a pre-marriage portion of the pension that was not equalized.
  - There is pension earned after separation.
- How should the equalized and unequalized portion of the pension at retirement be determined?
- Should the value of the pension used for equalization be adjusted for actual vs. assumed retirement age, other assumptions?

## Smith v. Werstine, 2014 ONSC 5319 (CanLII)

- An actuary calculated that the after-tax value of Mr. Smith's OMERS pension earned during marriage at the date of separation was:
  - \$270,773 assuming retirement at age 58; and
  - \$336,759 assuming retirement at age 55/56.
- Property equalization included an amount of \$270,773 for Mr. Smith's OMERS pension.
- Mr. Smith actually retired at age 55/56.
- Judge ruled that, in addition to pension earned after separation, 19.6% of the pension earned at separation had not been equalized and is available for spousal support without double dipping (i.e.  $19.6\% = 1 - \$270,773 / \$336,759$ ).

## Slongo v. Slongo, 2017 ONCA 272 (CanLII)

- An actuary calculated that the after-tax value of Mr. Slongo's pension earned during marriage at the date of separation in 2007 was:
  - \$589,205 assuming retirement at age 53; and
  - \$268,133 assuming retirement at age 65.
- An amount of \$268,133 was equalized.
- Mr. Slongo accepted early retirement at age 53 in 2012 and elected to transfer the commuted value of his pension from the plan, \$1,943,000 in total, \$1,296,000 to a LIRA and \$647,000 taxable.
- The original actuary redid the 2007 valuation, replacing the assumed retirement age and the pension amount with the actual retirement age and pension amount, resulting in a value of \$843,603.

## Slongo v. Slongo, 2017 ONCA 272 (CanLII)

- The actuary calculated that 31.78% of the total pension at retirement had been equalized (i.e.  $31.78\% = \$268,133 / \$843,603$ ).
  - This approach implicitly includes a pro-rata adjustment for the difference between actual and assumed retirement date like Smith v. Werstine, among other implicit adjustments.
- The actuary suggested a possible approach was to deem Mr. Slongo as receiving a fully-indexed pension income...the court rejected this approach.
- The court ruled that 31.78% of all pension payouts included in Mr. Slongo's line 150 income will be deducted when calculating his income for spousal support.



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