

Pensions, Spousal Support and Double Dipping: Pre and Post 2012 Issues

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Jamie Jocsak, FSA, FCIA

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Double-Dipping

- Boston v. Boston, 2001, 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.
- This presentation is addressing situations in which equalization occurs prior to retirement and there is to be no double-dipping from the pension after retirement.
- In order to avoid double-dipping, it is necessary to determine what portion of the pension income at retirement was previously equalized and should 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?

RRSPs/Defined Contribution Pension

- Value of pension is the account value.
- At retirement, what portion of income drawn from this account was previously equalized (i.e. excluded from income for spousal support):
 - Should the value of the account included in equalization be increased with investment return to retirement?

RRSPs/Defined Contribution Pension

- Example:
 - John equalizes a pension account worth \$300,000 at separation.
 - The \$300,000 grows with investment return to \$350,000 at retirement.
 - John continues to make contributions and the total account is worth \$500,000 at retirement.
 - Did John previously equalize \$300,000 or \$350,000 of the \$500,000 pension account at retirement?
 - The portion of John's withdrawals from the pension account previously equalized can be determined as 60% or 70% (i.e. $60\% = \$300,000 / \$500,000$ or $70\% = \$350,000 / \$500,000$)

Pre-2012 Defined Benefit Pension

- Typically the value of the pension was provided for a range of retirement ages.
- Value of pension equalized based on one assumed retirement age.
- At retirement, the monthly amount of pension previously equalized can be determined based on pension earned at separation:
 - Pro-rate for pre-marriage service, and
 - Increase by pre-retirement inflation-indexation, if provided by the plan and included in date of separation valuation.
- Should the pension at the date of separation be increased by the actual pre-retirement inflation increases provided by the plan or by the increases assumed for the pension valuation?

Pre-2012 Defined Benefit Pension

- Issue arises when actual retirement age is different than assumed.
- Should the equalized amount of pension be adjusted to reflect differences between the assumed and actual retirement date? If so, how should this be done?
 - Pro-rate equalized pension based on difference in pension value at separation based on actual vs. assumed retirement date (Smith v. Werstine, 2014 ONSC).
 - Equalized pension amount is different before/after assumed retirement date.

Pre-2012 Defined Benefit Pension

- Example, three possible methods to determine equalized pension:
 - Sue's pension earned during marriage is \$10,000 per year.
 - Pension was valued at separation as:
 - ❖ \$300,000 assuming retirement at age 55, and
 - ❖ \$150,000 assuming retirement at age 65.
 - Sue equalized pension based on value of \$150,000 assuming retirement at age 65.
 - Sue retired at age 55 with a pension of \$20,000 per year.
 - What portion of \$20,000 pension at retirement was previously equalized (i.e. excluded from income for spousal support):
 - a) \$10,000 per year, no adjustment for retirement age.
 - b) \$5,000 per year, equal to $\$10,000 * \$150,000 / \$300,000$.
 - c) No pre-65 pension equalized, \$10,000 per year of post-65 pension equalized.

Smith v. Werstine, 2014 ONSC

- 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 19.6% of the pension earned at separation had not been equalized and is available for spousal support without double dipping (i.e. $19.6\% = 1 - \$270,773 / \$336,759$).

Pre-2012 Defined Benefit Pension

- Situation becomes more complex if the member takes the commuted value of the pension out of the plan at retirement (Slongo v. Slongo, 2017 ONCA).
- With recent low interest rates/large commuted values, more members are taking their commuted values.
- Usually the member must take a portion of the pension value as a taxable cash payment...large tax bill in the year the commuted value is taken.
- Should pension income be imputed to the plan holder with respect to any pension income they have lost as a result of electing to take the commuted value (i.e. taxation, investment losses, etc.)?

Slongo v. Slongo, 2017 ONCA

- 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

- 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.

Post-2011 Defined Benefit Pension

- Since January 1, 2012, Ontario law prescribes the family law value as a weighting of values based on different assumed retirement ages.
- Should there be an adjustment for differences between the “weighted” assumed retirement age and actual retirement age?
- When the pension is divided at source, the equalized portion of the pension at retirement needs to correctly reflect the division.

Post-2011 Defined Benefit Pension

- Example:
 - Bob had a pension of \$20,000 per year at separation.
 - Bob's pension is divided at source, former spouse receives transfer to LIRA, Bob's pension is reduced by \$10,000 per year.
 - At retirement, Bob is receiving a pension of \$30,000 per year.
 - Equalized pension is \$10,000, the half of Bob's pension earned during marriage remaining in plan (i.e. not \$20,000).
 - Unequalized pension available for spousal support is \$20,000 out of a total pension of \$30,000.

Questions?

jamie.jocsak@bchactuarial.ca

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