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LOSS PREVENTION BULLETIN

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Bulletin #110 Pensions in matrimonial property division

The following is a basic checklist to consult when confronted with a pension issue:

What are the sources of retirement or pension income?

1. Registered Retirement Savings Plan (RRSP)
2. Canada Pension Plan (CPP)
3. Federally regulated employment pensions
   - Public sector pension plans, [armed forces, federal government employees, members of parliament, diplomats]. Review the *Pension Benefits Division Act, S.C. 1992, c. 46.* Other federal statutes also create specific pension plans such as the *Royal Canadian Mounted Police Superannuation Act, The Public Service Superannuation Act,* etc
   - Private sector pension plan, [industries under federal jurisdiction such as airlines and railroads]. Review the *Pension Benefits Standard Act, 1985, R.S.C. c. 32 (2nd Supp.).*
4. Provincially regulated employment pensions Check your provincial legislation for rules about public sector pension plans [e.g., provincial and city employees , fire fighters, city police, university professors] and private sector pension plans.
5. Any supplemental employment pension plan?

Educate yourself about the plan

1. Get a copy of the employee pension plan handbook and review it.
2. Telephone or write to the pension administrator to obtain information.
3. Contact an actuary with expertise in the pension plan.
4. Has the plan vested?
5. Is the pension already being paid?

What type of employment pension plan is it?

1. Defined contribution (money purchase plan):
   - member's contributions or employer's contributions made on a member's behalf are 'defined'
   - contributions and investment income earned on the contributions is allocated to a member's account
   - the benefit the member will receive on retirement is determined by the accumulated contributions and investment income in the account
2. Defined benefit plan:
   - specifies the benefit that the member will receive at retirement (based on service, earnings, etc.)
   - contributions are not fixed and may vary
   - the value of the pension does not necessarily equal the sum of the contributions

What is the value of the pension plan?

1. RRSP – the value is generally equal to the contributions and accumulated interest.
2. Defined contribution pension plan – subject always to the terms of the plan, the value is generally equal to the accumulated contributions and any interest.
3. Non-vested defined benefit plan– subject always to the terms of the plan, the value is generally the member's contributions, if any, with interest.
4. Vested defined benefit plan – retain an actuary to determine the value of the plan. Obtain a list from the actuary of information that they will require to value the pension. It will usually include the following:
   - the date the member entered the plan
   - the date of marriage
   - date of valuation
   - member's and employer's contributions and interest which should be set out on the member's pension benefit statement
   - income information for the member for the last 3 years
   - whether the member has bought back any prior pension
   - whether the plan is indexed
   - at what age the member is expected to retire
5. Are there any tax implications in the valuation of any of the above-noted plans?

What are the options for division?

1. Funds may be transferred between spouses' RRSPS tax-free under section 146(16) of the Income Tax Act. Need a written separation agreement or court order. RRSPS may be valued as a cash asset (i.e., after tax) and set-off against other property. Need to consider an appropriate tax discount.
2. CPP: The *Canada Pension Plan Act* mandates the division of each spouse's credits (unadjusted pensionable earnings) earned

during their co-habitation. If either spouse has a disability pension, it may be impacted by a distribution of CPP Credits.

3. Employment pension plans may be divided in one of two ways: they may be valued and exchanged for other property, or the plan benefits themselves may be divided if and when received. In the latter case, note the following points:
   - Members' benefits are shared following a formula.
   - A spouse receives their share of the pension benefit at the same time as the member.
   - Payments may be made directly by the plan administrator to each party (split at source).
   - Alternatively, payments may be made directly from the plan member (retired spouse) to the other spouse. Need to impose a trust.
   - Consider pension elections.
   - Who receives the benefit of indexing?
   - What is the impact of the member taking early retirement?
   - What is the impact of the member failing to retire?
   - Should an agreement or order be in place?
4. Federally regulated private sector plans, in addition to 3 above, permit:
   - the valuation and transfer of the non-member's interest to another pension plan or locked-in vehicle
   - the pension administrator to split the benefit and pay one benefit to the member and one benefit to the non-member spouse.
5. Check to see whether your province has legislation regulating division of private sector pension plans.
6. Federally regulated public sector pension plans, in addition to 3 above, permit the valuation and transfer of the non-member's interest into a locked-in RRSP.

Spousal Support

Address the issue of double dipping. If the pension is being divided as part of a property settlement, what adjustment should be made to any spousal support award payable at retirement, so the income received from the previously divided pension is not considered part of the payor's income for support purposes?

Other matters

1. Death: What is the impact of death of the member spouse before retirement, of the non-member spouse before retirement, of the member spouse after retirement, and of the non-member spouse after retirement?
2. Survivor's benefits: What elections are possible? What happens if there is a new spouse?
3. Should life insurance be obtained on the member's life to protect the spouse's interest?
4. Definition of spouse (may include common law).
5. Are severance benefits payable (e.g. RCMP pensions)?

With thanks to members of the family law bar in Calgary.

■Bulletin #112
Will the U.S. Y2K Act affect your practice?

Counsel who advise plaintiffs in actions against U.S. defendants for Y2K failures should note the provisions of the Federal Y2K Act in the U.S. The Act limits legal liability for actions alleging failures related to year 2000 date-related data. It caps punitive damages for small corporate defendants, and makes defendants liable on a proportionate basis rather than jointly and severally. Plaintiffs must mitigate their damages, and must give a prescribed notice to each defendant before starting their action. There follows a 90-day period during which the defendants may attempt remedial action or pursue alternative dispute resolution. If you think the Act will apply to your client, seek specialized U.S. advice on the Act's application to your facts. The full text of the Act is available at www.senate.gov/~commerce/issues/y2k.htm

■Bulletin #111
Bad Company

Walter acted on the incorporation of a family company which imported delicacies from France. He relished the prospect of a continuing relationship with his French clients, not least because of the quality of the lunches he was offered.

But it was three years before Walter received further instructions from Henri, the eldest son and an original director of the company, about an action against a competitor company. More lavish lunches were enjoyed and proceedings were begun.

Nine months into the litigation, Walter was concerned that Henri was less forthcoming with instructions and with payments of costs. Two substantial bills remained outstanding.

Then the defendant company instructed new solicitors who noted that their predecessors had not carried out a search of the plaintiff company. This they undertook.

The result? Bad news for Walter. His client company had been struck off the register before he began proceedings on its behalf. Walter telephoned his client company's accountant to hear:

'Henri? He's become quite eccentric and keeps interfering in the family business even though he was voted off the board over two years ago. We allowed the company to be struck off the register for tax reasons. But surely you knew this?'

But Walter had not known, and Henri had disappeared. Walter lost his fees and faced a claim by the defendant company for payment of its costs. Walter's problems could have been avoided if:

— He had done a company search of his client first thing.

— He had ensured that Henri was still duly authorised to give him instructions.

— He had clarified the terms of his retainer at the outset.

As reported in the Gazette 95/19 13 May '98, Solicitors Liability Fund, England