

**Financial Services  
Commission  
of Ontario**

**Commission des  
services financiers  
de l'Ontario**



Deputy Superintendent  
Pension Division

Surintendant adjoint  
Division des régimes de retraite

5160 Yonge Street  
Box 85  
Toronto ON M2N 6L9

5160, rue Yonge  
Boîte 85  
Toronto ON M2N 6L9

Telephone: (416) 226-7795  
Facsimile: (416) 226-7787

Téléphone: (416) 226-7795  
Télécopieur: (416) 226-7787

December 6, 2012

Mr. Raymond Colautti  
Barrister and Solicitor  
2510 Ouellette Avenue, Suite 300  
Windsor ON N8X 1L4

Dear Mr. Colautti:

**Re: Carrigan v. Carrigan Estate, 2012 ONCA 736**

---

The Superintendent of Financial Services (the "Superintendent") supports the application for leave to appeal that your client, Jennifer Margaret Quinn, is filing with the Supreme Court of Canada regarding the above decision of the Ontario Court of Appeal.

**Superintendent and FSCO**

The Superintendent is the Chief Executive Officer of the Financial Services Commission of Ontario ("FSCO"), which is an arm's length agency of the Ontario Ministry of Finance. FSCO and the Superintendent are established by the *Financial Services Commission of Ontario Act, 1997* (the "*FSCO Act*").

The *FSCO Act* states that one of the purposes of FSCO is to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors. The regulated sectors as defined in the *FSCO Act* include all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* (the "*PBA*") and all employers or other persons on their behalf who are required to contribute to any such pension plan.

The Superintendent's powers under the *FSCO Act* include the administration and enforcement of the *PBA* and the general supervision of the pension sector. The enforcement powers under the *PBA* include a general power under section 87 to order any person to comply with the *PBA*, its regulations, or the pension plan.

The Superintendent therefore has concurrent jurisdiction with the courts to order the payment of pension benefits, including pre-retirement death benefits.

The Superintendent understands that the pension sector is concerned with the confusion and uncertainty created by the Court of Appeal's majority decision in this case. The Superintendent shares the concerns that have been expressed.

***Pension Benefits Act***

The *PBA* applies to any pension plan that is provided for persons employed in Ontario. At present 8,426 pension plans are registered with FSCO. In addition, 1,690 multi-jurisdictional pension plans are registered in other provinces of Canada and many of these have members in Ontario. The benefits in the *PBA*, including spousal survivor rights, apply to such Ontario members.

The *PBA* is a public welfare statute that provides minimum statutory standards for plan members and their spouses and beneficiaries. Section 48 is an example of the minimum statutory standard provided to spouses of plan members who die before reaching retirement age.

Section 48 of the *PBA* governs pre-retirement death benefits, which are to be paid out in the following order of priority when a pension plan member dies before reaching retirement age:

- a) The spouse who is the plan member's spouse at the date of death has a pre-emptive right to the death benefits (subject to the trumping effect of subsection 48(13) set out below), provided that the plan member is not living separate and apart from that spouse or provided that the spouse has not signed a waiver of the death benefits;
- b) If there is no spouse who is not living separate and apart from the plan member, the beneficiary named in a designation by the plan member is entitled to the death benefits, subject to the same trumping effect of subsection 48(13);
- c) If there is no spouse living separate and apart from the plan member and no beneficiary, the death benefits are paid to the plan member's estate, again subject to the same trumping effect of subsection 48(13).

The trumping effect in subsection 48(13) states that an entitlement under section 48 is subject to any right to or interest in the death benefits set out in an order under Part I of the *Family Law Act*, a family arbitration award, or a domestic contract. That is the protection provided by the *PBA* for former spouses of plan members who die prior to retirement.

Based on the above, Mrs. Carrigan had no right to "trump" an existing spouse under section 48 of the *PBA*. She had been living separate and apart from the plan member

Mr. Carrigan since 2000; and there was no court order, arbitration award, or domestic contract that entitled her to a share of the pre-retirement death benefits.

In addition, the beneficiaries under the designation signed by Mr. Carrigan had no right to the pre-retirement death benefits because there was a spouse at the date of Mr. Carrigan's death, who had a pre-emptive right to the benefits – Ms. Quinn. Ms. Quinn was a "spouse" within the meaning of section 48 of the *PBA* at the time of Mr. Carrigan's death because she had been living continuously with Mr. Carrigan in a conjugal relationship for at least 3 years prior to his death. This was the finding of the trial judge and the period of conjugal cohabitation appears to have been an agreed-upon fact before the Court of Appeal.

The *PBA* defines "spouse" as meaning, **except where indicated otherwise in the *PBA*, either of two persons who are married to each other or who are not married to each other and are living together in a conjugal relationship continuously for a period of not less than 3 years** or who are in a relationship of some permanence if they are the natural or adoptive parents of a child as defined in the *Family Law Act*. Because the *PBA* does not "indicate otherwise" in section 48, the Superintendent has always interpreted "spouse" to include unmarried spouses as defined in the *PBA* for the purposes of section 48. The Superintendent's interpretation and application of section 48 is reflected on FSCO's public web site, which contains a publication for plan members called "If You are Thinking About Retirement", which explains that surviving spouses – clarified as including unmarried spouses as defined in the *PBA* – are entitled to death benefits under the pension plan.

The legislative scheme in section 48 and the definition of "spouse", as set out above, have been in the *PBA* since 1987.

The Court of Appeal's majority decision does not seem consistent with section 48 of the *PBA* as the Superintendent has always interpreted and applied it.

A "spouse" is given a number of other rights and entitlements under the *PBA*. The Court of Appeal's majority decision could be interpreted to disentitle unmarried spouses from the following rights or entitlements in addition to those provided in section 48 (this is not necessarily an exhaustive list):

- Post-retirement death benefits under section 44;
- The right to inspect certain prescribed records of the plan under section 29;
- The right to waive a survivor pension under section 46;
- The right to have a survivor pension guaranteed by the Pension Benefits Guarantee Fund under section 84 (the Pension Benefits Guarantee Fund acts as a partial insurance fund for defined benefit plans when their sponsors have become insolvent);

- The right to receive a statement of survivor benefits from the plan administrator, under section 43 of Regulation 909 to the *PBA*;
- The right to consent to a withdrawal of retirement savings arrangement by the owner of that arrangement in financial hardship circumstances, under section 85 of Regulation 909;
- The right to consent to withdrawal or transfer of funds and survivor benefits in respect of various locked-in retirement savings arrangements, under Schedules 1, 1.1, 2, and 3 of Regulation 909.

The Court of Appeal's majority decision may therefore have implications under the *PBA* for unmarried spouses beyond the entitlement to pre-retirement death benefits under section 48.

### **Issues arising from Court of Appeal's Majority Decision**

The pension sector looks to the Superintendent for guidance on interpreting and achieving compliance with the *PBA*. Guidance is given both on an individual basis in response to specific inquiries, and more generally through web-site publications such as the publication mentioned above.

The pension sector comprises not only plan sponsors and administrators, but members, former members, pensioners, trade unions, trustees, custodians, actuaries, auditors, investment consultants, and legal advisors.

Because pension benefits attract beneficial tax treatment, the Canada Revenue Agency also looks to the Superintendent from time to time for guidance in an attempt to have the *PBA* and the *Income Tax Act* work consistently with each other.

As a result of the Court of Appeal's majority decision, there is confusion and uncertainty in the pension sector which the Superintendent shares. Even if the majority decision is now the law, and unmarried spouses no longer have any entitlement to death benefits under section 48 of the *PBA* where the plan member is still legally married, the answers to a number of other questions remain unclear: Do unmarried spouses no longer have any status under the *PBA* at all in these circumstances? What is the effect of this decision on domestic contracts? What is the effect on waivers? Can designations made by plan members prevail over the minimum standards provided in the *PBA*?

Another source of confusion arises from the two majority decisions, which are inconsistent with each other. The decision of Juriansz, J.A. indicates that unmarried spouses have no entitlement under section 48 of the *PBA* and seems to lean in favour of a plan member having freedom of choice to designate someone else when the plan member has an unmarried spouse. On the other hand, the decision of Epstein, J.A. indicates that an unmarried spouse has no status under section 48 if there is a married spouse – even if the married spouse is living separate and apart from the plan member. This is a subtle distinction but one that requires clarification.

The majority decision raises important questions of statutory interpretation. As noted in the dissenting judgment, the majority's reasons seem to go against the principle of statutory interpretation that the same words should be given consistent meaning throughout the statute.

Also, many of the 1,690 multi-jurisdictional plans registered across Canada have members in Ontario. There are multi-jurisdictional agreements in effect among all of the jurisdictions that provide that regardless of the province of registration, the pension statute of the province in which a particular plan member reports for work governs that member's benefits. The Court of Appeal's majority decision therefore has implications for pension plans registered outside Ontario.

Finally, most jurisdictions in Canada have similar pension standards legislation that provides for the priority of payment of pre-retirement death benefits on a pre-emptive basis to spouses or other recognized spousal relationships. Therefore, this issue has a national dimension.

**Conclusion**

For all of the above reasons, the Superintendent supports the application for leave to appeal the Court of Appeal's majority decision.

Yours very truly,



K. David Gordon  
Deputy Superintendent, Pensions  
by delegated authority from  
the Superintendent of Financial Services

