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Implications of Bill 14 Amendments on the Carrigan Decision

Overview

On October 31, 2012, the Ontario Court of Appeal’s decision in Carrigan v. Carrigan Estate (Carrigan) denied the payment of a pre-retirement death benefit to the common law spouse of a plan member because the member was still legally married to another person.

On July 24, 2014, the Ontario government passed **Bill 14, the Building Opportunity and Securing Our Future Act (Budget Measures), 2014** . Schedule 26 of Bill 14 amended the spousal entitlement provisions in sections 44 and 48 of the **Pension Benefits Act** (PBA) to address the Carrigan decision.

The decision and the amendments directly affect members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person they are living separate and apart from; and
- are living with a person who qualifies as a common law spouse under the PBA.

Section 44 of the PBA

Section 44 of the PBA has been amended to confirm the entitlement of a common law spouse to a joint and survivor pension where the member is separated, but not divorced from, a married spouse on the date the member’s pension begins. It applies to spouses of members and former members who become entitled to receive their pensions on or after July 24, 2014, the date the amendments came into force.

New subsections

Section 44(10) has been added to the PBA to provide a discharge for plan administrators who commenced payment of a pension under the former section 44 provisions where the following circumstances exist:

- the retired member had a common law spouse and a married spouse from whom she or he was living separate and apart on the date the first installment of the pension was due;
- the common law spouse was the spouse for the purposes of determining that the pension

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should be paid in joint and survivor form;

- the pension was paid or continues to be paid in joint and survivor form to either the retired member or the common law spouse; and,
- the payments otherwise complied with the requirements of the PBA and regulations.

Section 44(11) has been added to the PBA. It provides that if the plan administrator made payment of a pension as a joint and survivor pension and all of the above circumstances existed, no person may make a claim against either the plan administrator or the common law spouse in respect of the payment.

Sections 44(10) and section 44(11) apply where a plan administrator commenced payment of the pension before the amendments came into force (i.e. before July 24, 2014).

Section 48 of the PBA

Section 48 of the PBA has been amended to provide that a common law spouse who is living with a member on the date of the member's death is entitled to the member's pre-retirement death benefit, despite the member having a married spouse, from whom she or he was living separate and apart on the date of death.

However, this amendment only applies where a member dies on or after the date the amendments came into force (i.e. on or after July 24, 2014). The amendments are not retroactive and do not change the Ontario Court of Appeal's interpretation of the former section 48 provisions in Carrigan.

Section 48, as interpreted by the Ontario Court of Appeal in Carrigan, continues to apply to all members and former members who died before the amendments came into force (i.e. before July 24, 2014). Subject to the discharge and release of claims provisions discussed below, it is FSCO's expectation that, for members who died before July 24, 2014, plan administrators pay benefits in accordance with section 48 as interpreted in Carrigan, where applicable, and the timelines set out in section 43 of Regulation 909.

It is ultimately the responsibility of each plan administrator, based on their own legal advice, to make a determination about whether the Carrigan decision applies to a specific situation. If a plan administrator is uncertain about the entitlement of a spouse or a beneficiary to a pre-retirement death benefit, it is incumbent on the plan administrator to take appropriate actions to resolve the uncertainty.

New subsections

Section 48(10.1) has been added to the PBA to provide a discharge to administrators who paid pre-retirement death benefits in respect of deaths occurring before the Carrigan decision (i.e. before October 31, 2012), where the following circumstances exist:

- the member or former member had a common law spouse and a married spouse, from whom she or he was living separate and apart, on the date of death;
- payment of the pre-retirement death benefit was made to the common law spouse; and,
- the payment otherwise complied with the requirements of the PBA and regulations.

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Section 48(10.2) has been added to the PBA. It provides that if the administrator made payment of the pre-retirement death benefit and all the above circumstances existed, no person may make a claim against either the administrator or the common law spouse in respect of the payment.

Other Spousal Rights and Entitlements

As the legislative wording of section 48 differs from the wording used in other provisions, the Superintendent's position continues to remain that in the absence of a tribunal or court decision, the Carrigan decision does not apply to any other provisions in the PBA and regulations that provide specific rights to, or obligations on, spouses who are not living separate and apart from the member at the relevant time.

Other Information

- [Carrigan decision](#) 
- [Letter](#)  from the Deputy Superintendent, Pensions, in support of the application for leave to appeal to the Supreme Court of Canada
- Previous communications
 - [Carrigan v. Carrigan Estate – Ontario Court of Appeal decision on entitlement to pre-retirement death benefits under section 48 of the Pension Benefits Act](#)
 - [Carrigan v. Carrigan Estate – Supreme Court of Canada Denies Leave](#)
 - [FSCO's Position on the Implications of the Carrigan Decision](#)