

**TAB 17**

## **Pension Update**

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With special thanks to Angelika Heim, Student-at-law for her assistance with this paper.

## **The Six-Minute Family Law Lawyer**



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## ***PENSION UPDATE***

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In preparing this paper, I had occasion to review the last two papers on pensions prepared for the previous Six Minute Family Law Lawyer Programs and could not help but be struck by the perhaps naïve sense of optimism regarding the case law surrounding pensions that we were all feeling at the time those papers were written.

In 2000, Esther Lenkinski wrote:

“In the decision of *Best v. Best*, ...the Supreme Court of Canada regrettably did not clearly articulate its views with respect to double dipping. Furthermore, there are a list of cases which have determined the issue in different ways.

The Supreme Court of Canada will be asked to deal with the issue of double dipping and to articulate principles regarding its application”.<sup>1</sup>

Lorne Wolfson and Andrea Himel in that same year wrote:

“In *Boston v. Boston*, the Supreme Court will hopefully shed some light on this issue and find an appropriate balance between the recipient’s need for support and the apparent inequity of providing the recipient with in excess of 50 per cent of the value of the payor’s pension.”.<sup>2</sup>

In 2001, J. Yvonne Pelley when discussing the Supreme Court of Canada decision in *Boston v. Boston* stated:

“The terms “double dipping” or “double recovery” or “double accounting” are used to describe the situation where a pension is equalized as part of a property

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<sup>1</sup> Double Dipping and Pension, Esther L. Lenkinski, Return of the Six Minute Family Lawyer 2000, Law Society of Upper Canada

<sup>2</sup> The “Best” of What’s New in Pension Law, Lorne Wolfson and Andrea Himel, Return of the Six Minute Family Lawyer 2000, Law Society of Upper Canada

settlement and then the pension income is used in a determination of ongoing spousal support. Many litigants are faced with this troubling situation and until the decision in Boston, there has been great uncertainty in the law as to how these issues should be resolved....the Supreme Court held that “double dipping” is to be avoided, whenever possible. The court was aware that a general rule against “double dipping” might not be realistic and so left the door opened for situations where “double dipping” might be impossible to avoid.”<sup>3</sup>.

Here we are, however, almost four years post Boston and one cannot help but question whether we are any further ahead than we were before the decision. As the cases that have been decided since Boston illustrate, a clear rule has not yet emerged.

In both Best<sup>4</sup> and Boston<sup>5</sup>, the Supreme Court of Canada remarked on its limited capacity to remedy the pension problem at hand, commenting that legislative reform in this area was long overdue. The good news is that the Ontario Bar Association is working with the Attorney General of Ontario to hopefully reform pension legislation in the Province.

### **The Pension Problem**

The principle problem with the treatment of pensions in the family law context is that they are treated as assets, subject to valuation and equalization upon marriage breakdown, even though the pension member has no access to the asset until retirement, at which it is received as income. This current inability to defer the division of the pension until it is in receipt by the pension holder, often creates considerable hardship for the pension holder who may very well end up leaving the marriage with no other assets.

Often, a pension is the most significant asset owned by a spouse, resulting in a larger net family property and correspondingly significant equalization payment owed to the other spouse.

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<sup>3</sup> Boston v. Boston by J. Yvonne Pelley, the Six Minute Family Lawyer 2001: Law Society of Upper Canada

<sup>4</sup> Best v. Best [1999] S.C.J. No 40, [1999] 2 S.C.R. 868

<sup>5</sup> Boston v. Boston, [2001] 2 S.C.R 413

Yet, unlike real property which can be sold or transferred, a pension is not a ready source of cash or capital that a spouse can look to in order to satisfy any equalization obligation.

### **What is the Double Dipping Issue**

“Double dipping” is also known as “double recovery”. The concept of double dipping applies to situations where property is divided, an equalization payment is made to the other spouse on the basis of valuing an item as property, and that same item is then considered as income in the determination of ability to pay support.

The concept of double dipping is most widely discussed in relation to pensions. The most common scenario is where the pension has been valued and the non-member spouse has been compensated for his or her share of the pension, with the member spouse retaining the pension. When the member spouse later retires, and his or her income is reduced, that spouse then applies to reduce the support payable. The argument is that the pension was already valued as property and that it is inequitable to treat the pension once as property, for which compensation was paid to the other spouse, and then again as a source of income for which support may be paid.

### **The Decision in Boston**

In the Supreme Court of Canada decision in Boston, the court seems to firmly establish the rule against double dipping. The parties had a lengthy marriage and the wife did not work outside the home. The value of the parties’ net family property was equalized.

The husband retired and began receiving his pension income. The wife had invested her assets well and had increased them. The husband applied to reduce the support payable based on his reduced income and the notion that he would be sharing his pension twice. The husband was successful in reducing the support to one-third of the previous amount, based on the pension amount earned since equalization. On Appeal, the wife had the amount returned to two-thirds of the original amount.

The Supreme Court of Canada noted that the parties used a lump sum implementation in which the pension holding spouse transferred real assets to the other spouse to settle the

equalization claim. The Court held that the spouse receiving the assets has an obligation to use those assets to produce income and, in effect, create a pension for themselves. Allowing the wife to get the benefit of the husband's pension again, once he became entitled to it, would be inequitable. The Court restored the original decision to reduce the support.

While the case seemed to impose a fairly strict interpretation of the "Rule" against double dipping so that spousal support based on a previously equalized asset was to be limited, many cases since Boston have defined situations where the rule should not apply. The bottom line appears to be that the courts have retained their right to double dip where they have found spousal support merited and, as a result, (and probably not surprisingly) a case by case analysis is still required.

### **Post Boston Case Law**

I do not believe that the law regarding double dipping has changed significantly since Boston. The courts have upheld the "prohibition" against double dipping, however, based on each case they are prepared to employ exceptions, especially if the payee spouse demonstrates need.

The cases seem to suggest that there is reasonable onus on the non-pension holding spouse to use assets received in lieu of a share of a pension to earn income as a form of self-provided pension. Nevertheless, where a case for support is meritorious, the court will find a way to avert the "rule" against double dipping, sometimes by finding that the situation before them did not even trigger the "rule" against double dipping. The courts have applied this reasoning where they have found a continuing need for spousal support or a continued disadvantage arising from the marriage or its breakdown. Often the courts have used the reasoning that the pension was not fully valued or properly valued to include that portion of the pension for which the income could be derived. Other times, they have viewed pensions as different from other assets in that "when a pension produces income the asset is being liquidated". By contrast, when a business or investment is producing income, that income can be spent without affecting the asset itself. In fact, the business or asset may continue to increase in

value. The value of the business or investment can be equalized, but neither is depleted solely by producing income<sup>6</sup>

For the purposes of a trial, it appears from the cases to be a valuable exercise to have the pension valuator specifically address the value that has been ascribed to the “future income producing” aspect of the asset. The intention of this is to serve as a defense to the argument that inadequate value was ascribed to that portion of the pension.

You should think about specifically providing in your separation agreements, an explanation of the valuation ascribed to the “future income producing” aspect of the asset and specifically articulate the contemplated arrangements for support, or waivers of support, intended to apply after the date of retirement of the support payor.

### **Synopsis of Cases**

Set out below are pension cases of interest decided in 2003 and 2004.

#### ***Riml v. Riml [2003] O.J. No. 610 (Ontario Superior Court of Justice)***

- Motion by husband to decrease spousal support after his retirement. Husband arguing that most of his pension had already been divided in the equalization payment.
- The Court found this to be an appropriate case for double dipping based “namely on the need of the respondent”.

#### ***Meikle v. Meikle [2003] O.J. No. 983 (Ontario Superior Court of Justice)***

- Motion by Husband to reduce spousal support after receiving pension income.

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<sup>6</sup> Bedy v. Bedy (2004) Carswell Ont 2102

- Separation agreement provided that in any variation, only 50 per cent of the pension income would be taken into account as the capitalized value of the Applicant's pension had been included in the equalization calculation.
- Court agreed to prevent "double dipping".
- Court did not agree that wife had an obligation to invest her equalization assets as per Boston because of her age and the nature of the assets.
- Spousal support reduced however because of a material change in circumstances.

**Leckie v. Leckie [2003] O.J. No.746 (Ontario Superior Court of Justice)**

- Husband's position that only the unequalized portion of his monthly pension benefits should be considered in calculating his ability to pay spousal support.
- Court acknowledges that husband's pension income should be discounted because of "the Boston principle" but awards spousal support to the wife, nevertheless, because of her need.

**Labelle v. Labelle [2003] O.J. No.5533 (Ontario Superior Court of Justice)**

- Property between husband and wife had been equalized.
- All of husband's means were based on pension assets.
- Court found that the wife would be "rendered destitute if the double dipping rule were rigorously applied".
- Wife required to apply for whatever pension benefits that she might have available and spousal support would be reduced by that number.

***Levandusky v. Levandusky [2003] O.J. No.2783 (Ontario Superior Court of Justice)***

- Court looked to that portion of husband's pension not previously equalized in determining husband's ability to pay support.

***Chamberlain v. Chamberlain [2003] N.D.J. No.168 (New Brunswick Court of Appeal)***

- Good review of principles in Boston, including exceptions to the rule against double recovery.
- Wife entitled to continued support from the equalized pension, based upon her demonstrated continued need.

***Wolfe v. Wolfe [2003] O.J. No.3386 (Ontario Superior Court of Justice)***

- Court finds that double recovery is not something that "must be avoided" but rather every effort should be made to avoid it as much as possible, consistent with the objectives that a support order should serve.
- Trial re-opened to allow for evidence of what wife might expect if her capital share of the pension was used to produce an annuity and when both parties would begin receiving Canada Pension and in what amount.

***Cymbalisty v. Cymbalisty [2003] M.J. No:398 (Manitoba Court of Appeal)***

- Court finds facts clearly within the exception described in Boston and allows a double recovery on the basis of both need and compensation.
- Court finds that the rejection of the double recovery argument was consistent with the manner in which the Boston principles have been interpreted and applied in subsequent decisions of the Courts.



**Craig v. Craig [2003] O.J. No. 5392 (Ontario Superior Court of Justice)**

- At the time that the separation agreement was negotiated, wife believed that husband would retire at age 65. Husband retired at age 60.
- Court found that husband created his change in circumstances and that it would be unconscionable to allow him to create the change in circumstances and then seek a reduction in support.
- Emphasis on the fact that both parties, during the settlement discussions, contemplated husband's retirement at age 65.

***Bennett v. Bennett, 68 O.R. (3d) 619 (Ontario Superior Court of Justice)***

- Court reiterates Boston position that it is unfair to compel a spouse to share a pension as a capital asset and then again as a source of income.
- Husband to pay spousal support with that portion of the pension which was not included in the equalization payment.

***Bertrim v. Bertrim [2004] O.J. No.3 (Ontario Superior Court of Justice, Divisional Court)***

- Divisional Court confirms Application Judge's decision that case fit within the exceptions to the prohibition on pension double dipping. Court finds that the spousal support was based on need as opposed to compensation and husband had ability to pay continuing spousal support. Court comments that wife was irresponsible with her money and that she continued to experience economic hardship due to the marriage breakdown.
- Court focuses on the observation that the spousal support order in this case was needs based as opposed to compensation based.

***Kirk v. Kirk [2004] O.J. No.339 ( Ontario Superior Court of Justice)***

- Court finds that only the pension that had accumulated post-separation could be taken into consideration when varying the spousal support order.

***Bullock v. Bullock [2004] O.J. No.909 (Ontario Superior Court of Justice)***

- Court distinguishes facts of this case from Boston because husband voluntarily retired at age 62. Court finds that voluntary retirement at age 62 was not a basis for finding a material change in circumstances. Court states that a support payor cannot choose to be voluntarily underemployed, whether it by retirement or otherwise, and thereby avoid his or her spousal support obligations.

***Tambeau v. Tambeau [2004] O.J. No.2038 (Ontario Superior Court of Justice)***

- Court orders a reduction in the amount of spousal support.
- Court agrees with Boston but employs the exceptions citing wife's need and her inability to obtain meaningful employment after a traditional marriage.
- Court concludes that it should base spousal support not only on income from unequalized assets still in husband's possession, but also "encroach to some extent on income from a portion of husband's pension already equalized."

***MacDonald v. MacDonald [2004] O.J. No.2359 (Ontario Superior Court of Justice)***

- Court finds that Boston principles do not apply when the payor was already retired at the time Minutes of Settlement signed and parties knew that the major source of spousal support would be pension income.

***Chandler v. Chandler [2004] O.J. No.2851 (Ontario Superior Court of Justice)***

- Court applied Boston principle and calculates spousal support based on pension funds not included in equalization, however, Court then increases the sum based upon the wife's need.

***Thomson v. Thomson [2004] O.J. No 3469 (Ontario Superior Court of Justice)***

- Court upholds Boston principles and finds that only that part of the pension not calculated in the equalization payment can be used to determine the amount of spousal support.

***Huszarik v. Fairfield [2004] O.J. No.3957 (Ontario Superior Court of Justice)***

- Court permits double dipping.
- At the time the separation agreement was signed, Husband's pension interest was one of many assets.
- Assets of both husband and wife have suffered great losses since the date the agreement was signed.
- Husband's contributions to the pension post-separation were significant.
- Wife has need for spousal support.