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The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

April 26, 2013

Honourable Charles Sousa
Minister of Finance
Ontario Ministry of Finance
7 Queen's Park Crescent, 7th floor
Toronto, ON M7A 1Y7

Dear Minister: **Re: Carrigan**

On behalf of the Association of Canadian Pension Management (ACPM), I am writing to request that the Ontario *Pension Benefits Act (PBA)* be amended on an urgent basis to address the issues arising from the recent decision of the Ontario Court of Appeal in the *Carrigan v. Carrigan Estate* matter. As all avenues of appeal through the Court process have now been closed and its impact on spousal entitlements is significant, we trust this matter will get your Ministry's urgent attention.

Overview

The Court of Appeal decision in Carrigan represents a significant departure from the way in which both pension plan administrators and the Financial Services Commission of Ontario interpreted and administered pre-retirement death benefits under the PBA. Previously, section 48 of the PBA has been consistently interpreted to mean that it was the "spouse in the house," whether legal or common law, at the date of the member's death who was the spouse for the purpose of determining entitlement to pre-retirement death benefits. This new interpretation from the Court of Appeal has the effect of:

- Placing Ontario out of step with how pre-retirement death benefits are administered in rest of Canada.
- Opening plan administrators to possible liability to make double payments in respect of past pre-retirement death benefit payouts.
- Going forward it places an undue burden on plan administrators to determine, not just the marital status of the deceased member at the time of death, but also past marital status for which there is generally no reliable record.
- Creates an inconsistency of treatment depending on marital status.
- May call into question in future cases the post-retirement joint and survivor pension afforded to spouses under section 44 of the PBA.

Accordingly, we urge the Minister to introduce amendments to the PBA to ensure the pre-Carrigan interpretation of spousal entitlements is accurately reflected in both sections 48 and 44 of the PBA. Such amendments should also include a discharge and a release from any further liability for plan administrators who have administered past pay-outs in accordance with the pre-Carrigan interpretation of sections 48 and 44 of the PBA.

ACPM: Who we are

The ACPM is the informed voice of retirement income providers for Canadians. It advocates for an effective and sustainable Canadian retirement income system. Our members are drawn from all aspects of the industry from across the country. They represent over 400 pension plans consisting of more than 3 million plan members, with assets under management in excess of $330 billion.

The ACPM promotes its vision for the development of a world-leading retirement income system in Canada by championing the following Guiding Principles:

- Clarity in legislation, regulations and retirement income arrangements;
- Balanced consideration of other stakeholders' interests; and
- Excellence in governance and administration.

The Carrigan case

The majority at the Ontario Court of Appeal held that where a pension plan member died prior to retirement, the common law spouse was not entitled to the death benefit payable from the plan. This was because the member had a spouse by marriage from whom he had separated, but never divorced. This new interpretation conflicts with the long-held understanding that the common law spouse would have been entitled to the spousal death benefit under the PBA in such a situation. Instead, the majority held that neither spouse qualified for the spousal death benefit. As a result, it found that the benefit should be paid to the member's named beneficiary (coincidentally, in the Carrigan case this included the spouse by marriage).

The decision alters the long-standing interpretation of the section 48 pre-retirement death benefit provisions of the PBA which have existed and have been applied since the provisions were introduced in the 1987 amendments to the PBA. It is a decision that resulted from an estates and family law matter, to which no pension plan was a party and no input was obtained from Ontario's pension regulator or other pension stakeholders.

Impact

Given the ACPM's guiding principles of clarity, balance and excellence in plan governance, the ACPM has serious concerns about the impact of the Ontario Court of Appeal decision on pension plans and their members.

The decision casts doubt on established procedures associated with determining and paying death benefit entitlements. For many years, these procedures have been widely communicated to pension plan members by both the plan administrators and FSCO in the course of explaining death benefits and beneficiary designations. A change at this point in time will certainly cause confusion for those members, and may well negatively impact those who have ordered their affairs and drafted marital agreements based on this long-time understanding of the provisions. It also places an undue burden on plan administrators to determine, not just the marital status of the deceased member at the time of death, but also past marital status for which there is generally no reliable record.

It could also have serious implications for the many thousands of common law spouses of plan members who have received and are receiving payments in situations similar to those of the *Carrigan* case. The decision calls into question past payments of death benefits made in similar circumstances. This could leave plan

administrators open to liability to make double payments in respect of past pre-retirement death benefit payouts should it now be determined that the spouse who originally received the death benefit payout is now not a spouse under the Court of Appeal's subsequent interpretation of section 48.

The Court of Appeal's interpretation also results in married and common law spouses being afforded different treatment under the PBA – this was clearly not the intention as "spouse" is defined under the PBA to mean both a married and common law spouse and does not distinguish between them.

The Court of Appeal's interpretation in Carrigan also places Ontario out of step with the other common-law jurisdictions in Canada – all of which go by the "spouse in the house" principle to determine entitlement for pre-retirement benefits.

Finally, the Carrigan decision may have an impact beyond pre-retirement benefits. Section 44 of the PBA, which has language similar to that interpreted by the Court of Appeal in Carrigan, requires that where a member has a qualifying spouse on his retirement date, the pension must be paid in a joint-and-survivor form (that is, a survivor pension will be paid upon the death of the member), unless such right is waived by the spouse. Applying the reasoning of the majority in *Carrigan* to this provision, the requirement to pay a joint-and-survivor benefit would not apply to a member with both a common law spouse and a legally married spouse from whom he or she is separated. Furthermore, the PBA does not provide for a beneficiary designation for a pension in pay. Thus on the member's death the pension would cease, with no benefit provided for under the PBA to be paid to a beneficiary, the legally married spouse or the common law spouse. Were such Carrigan reasoning to be extended to section 44, it would again result in an interpretation that would not conform to the manner in which the pension industry has interpreted and applied the law for many years nor what we believe was the public policy intention behind joint and survivor benefits.

In summary

The Ontario Court of Appeal decision in *Carrigan* creates a number of issues of serious concern which could have a substantial adverse impact on pension plans, plan members and their spouses. As the Supreme Court of Canada has dismissed an application for leave to appeal the decision, it is vital that the province consider amendments to the PBA that will bring clarity to this situation and protect plan administrators who made payments in accordance with the prior understanding of spousal entitlements on a member's death. This would allow plan administrators to carry on with the confidence that the intended interpretation applies, consistent with past practice.

Sincerely,

Bryan D. Hocking
Chief Executive Officer