STANDARD LIFE

Group Savings & Retirement

Legislation matters

The Standard Life newsletter on legislation and governance

April 2008

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Update on the Kerry case

The Supreme Court of Canada announced on January 31, 2008, that it will hear the Kerry appeal, which deals, among other things, with the use of surplus from a defined benefit (DB) component to fund a defined contribution (DC) component and with the payment of plan expenses from the pension plan trust fund.

This means that the Supreme Court of Canada will reconsider the Ontario Court of Appeal decision released on June 5, 2007.

Use of surplus from DB component to fund DC component

The Ontario Court of Appeal concluded that as long as the DC members were designated as trust fund beneficiaries, then it is permissible for the employer to use the surplus under the DB component to fund its contribution requirements under the DC component of the plan.

The Court of Appeal's findings are the following:

- The plan is a single plan with two components, rather than two distinct plans.
- Cross-subsidization is not prohibited by the trust agreement.
- DC members, whether or not they are new members or old DB members who converted to DC, should be able to become beneficiaries in the trust fund entitled to surplus even when the surplus accrued before some of them becoming members of the plan.
- DC members would have the same right as DB members to make a claim to any surplus in the trust fund, on plan termination.

Payment of Plan Expenses

In brief, the Court of Appeal's findings are the following:

- The *Ontario Pension Benefits Act* contains no provisions that govern the payment of pension plan expenses.
- There are no principles of law, trust or otherwise that would require the employer to pay the plan expenses.
- Silence from the plan and the trust agreement does not create a legal obligation on the employer to pay plan expenses.
- The fact that the employer voluntarily chose to pay the plan expenses for a period of time does not create a legal obligation on it to continue to pay such expenses.
- In accordance with general trust practice and principles, the trust fund would bear the plan expenses.
- An amendment to the plan text to pay plan expenses from the trust fund will not amount to a revocation of the trust fund, as long as the plan text allows such amendment, even if there is exclusive benefit language in the plan or in the trust agreement.
- If the plan documentation provides that the employer undertook to pay the plan expenses, the employer can change that obligation if the plan documentation allows such a change.

It is important to note that the Ontario Court of Appeal's decision is based on specific provisions of the Kerry pension plan text and trust agreement and therefore, you should review your pension plan documentation before applying the Kerry decision to your situation.

As mentioned before, these issues become again uncertain in the wait of the Supreme Court of Canada's decision.

We will keep you posted when the Supreme Court of Canada's decision will be released, most likely in the course of 2009.

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New Ontario Life Income Fund (LIF)

The Regulations under the Ontario Pension Benefits Act have been amended in 2007 in order to introduce a certain number of changes to the rules governing locked-in accounts – i.e., Locked-In Retirement Accounts (LIRAs), Life Income Funds (LIFs) and Locked-In Retirement Income Funds (LRIFs).

Some of the changes came into effect on July 27, 2007, while the others came into effect on January 1, 2008.

Amongst the changes that came into effect on January 1, 2008, the most significant change is the introduction of a new LIF. Our current Ontario LIF owners have already been advised of that change and changes that are affecting their current LIF contracts.

The main features of the new LIF are the following:

- A one-time opportunity of withdrawing in cash or transferring to an RRSP or RRIF an amount up to 25% of the value of the assets transferred into the new LIF if the owner makes an application to do so within 60 days after the money is transferred into the new LIF.
- There is no requirement for the LIF owner to purchase an annuity by the end of the year in which the owner reaches age 80. In addition, owners are entitled to keep their LIF after reaching age 90 and withdraw income from it in subsequent years, if there are assets remaining in the LIF.
- The annual maximum amount that can be withdrawn from the new LIF is determined differently than the old LIF. It is the greater between the amount determined as usual under a LIF and the amount of investment earnings of the new LIF in the previous year.
- Once a new LIF is purchased, assets cannot be transferred back to a LIRA. The new LIF transfer options are limited to a transfer to another new LIF or the purchase of an annuity.
- Direct transfers to an RRSP or RRIF instead of receiving a taxable lump sum payment are permitted in the following circumstances:
  - In favour of the surviving spouse in the event of the LIF owner's death.
  - If the LIF owner is at least 55 years old and the total amount in all his/her locked-in accounts is less than 40% of the Year's Maximum Pensionable Earnings (YMPE) for that calendar year (i.e., 40% of $44,900 in 2008, which is equal to $17,960).
- Cash withdrawal allowed if LIF owner who is a non-resident of Canada for taxation purposes after at least 2 years of departure from Canada.

Please note that the last two changes (i.e., direct transfers to an RRSP or RRIF and cash withdrawals) apply as well to LIRAs and LRIFs.

Prescribed forms for owners to apply for the above mentioned cash withdrawals are available from the Financial Services Commission of Ontario at http://www.fsco.gov.on.ca/english/pensions.

It is also important to note that current LIFs and LRIFs cannot be offered for purchase after December 31, 2008, but they still remain in force for current LIF/LRIF owners. Effective January 1, 2008, only the new LIF is available for purchase from Standard Life.

3 The new Anti-Money Laundering and Anti-Terrorist Financing Legislation

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (hereinafter called "AML") has been amended by Bill C-25 that has received Royal Assent on December 14, 2006. Thereafter, amendments to regulations have been made.

The changes that will impact the group savings & retirement products offered by financial institutions, such as Standard Life, will come into effect on June 23, 2008. As a result, all financial institutions will have to implement new procedures by then.

The plans that will be subject to the new regulations will be essentially plans not registered with pension authorities **under which members contribute directly to the plan**. The plans that will be subject to new AML legislation and regulations are the following:

- Non-Registered Plan
- Trust Employee Stock Purchase Plan (TESPP)
- Investment Only – Non-Registered Plan
- Employee Profit Sharing Plan (EPSP)
- Retirement Compensation Arrangement (RCA)
- Deferred Profit Sharing Plan (DPSP)

Financial institutions will be required to perform an identity check on members who contribute to a non-registered product, if their contributions are paid directly by the member in the form of a lump sum (i.e., voluntary contributions) regardless of the amount and the manner used to make such payment (e.g., cheque, internet banking or online contribution).

However, member identification is not required when a member contributes either by payroll deduction or through the plan sponsor.

The issues that will require special attention are the member identification process and training of personnel. The other issues are changes related to the financial institution's compliance regime; plan sponsor identification process and suspicious transactions.

You can contact us

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