

THE SUPREME COURT OF CANADA

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BEST v. BEST

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The Supreme Court of Canada issued important decisions in the case of *Best v. Best*¹, a marriage breakdown that happened over 11 years earlier. In the process, it recognized that the treatment of pensions in the division of property on marriage breakdown raises many contentious and confusing issues and questions. This leading decision by Canada's highest court sets the rules for other pension valuations.

In its careful deliberations, the court considered many cases, statutes and regulations and cited various authors. I was particularly pleased to see that it considered some of my opinions, which were published in *Money & Family Law* and in *Canadian Family Law Quarterly*.

While the *Best* case is frequently cited as dealing with the question of value added versus pro rata, the Supreme Court of Canada actually discussed more than ten important issues. The judges' comments will be useful in considering some of these areas in the future. However, their comments have also left many of these issues open to be decided in future cases.

The areas I will cover in this chapter are:

1. Value added vs. Pro rata
2. Termination method or Retirement method
3. Vesting
4. Vesting discount
5. Retirement age to be assumed
6. Subsequent events
7. "If and When" agreements
8. Support and double dipping
9. Costs
10. General.

Value Added or Pro Rata

By now, I assume that everyone realizes that the consideration of value added versus pro rata arises only when a portion of the pension was earned before the marriage. (See the Glossary for the meaning of these terms).

Often it has been said that the value added method of valuing pensions recognizes that the value of the pension earned in the early years of employment is much lower than the value earned in later years. The pro rata method assumes that the pension is earned equally during each year of service.

¹ (1999) S.C.J. No. 40, File No.: 26345, (1997) 31 R.F.L. (4th) 1 (Ont. C.A.), (1993) I.C.C.P.B. 8, 50 R.F.L. (3d) 120 (Ont. Ct. Gen. Div.) Court File No.: 32962-D.

The Supreme Court of Canada analyzed these two approaches very carefully. It considered and explained all of the aspects of each and their effects on the determination of the portion of the value earned during the marriage. One important consideration that had been raised in other cases was the argument that the Family Law Act supported the value added method. This argument also suggested that the value added method must be used in order to be consistent with the method used to value other assets on marriage breakdown.

In the lower court decision (later upheld by the Ontario Court of Appeal), Rutherford, J. said, "I prefer the value added method for the valuation of Mr. Best's pension to the Pro rated method because the former is more consistent with the method of determining the value of other assets in the same exercise." He certainly believed in following the same method to value all assets.

The Supreme Court pointed out that some cases had adopted the pro rata method, while others had adopted the Value added method. It ruled that it was **not** necessary that all assets be valued using the same method. In speaking for the court, Major, J. said:

I am of the opinion that the Family Law Act, on its face, does not state any rule indicating a preference for the value added method over the pro rata method or vice versa. This legislative silence means that the appellant's defined benefit pension must be valued according to the method that values the pension most equitably.

He went on to say, "The court should decide which valuation method most nearly describes how the defined benefit pension's value varied over time, with proper regard for the nature of the asset itself."

In considering these deliberations, it is important to keep in mind that the Supreme Court of Canada was considering the method of valuing a defined benefit pension plan (not a defined contribution pension plan). It is also important to keep in mind that Mr. Best's pension was a "final average earnings" plan and not a career earnings, a flat rate, or a contribution based plan. His pension benefit was equal to 2% of his final average earnings times his years of service.

In rendering the court's decision, Major, J. said, "I have concluded that, absent special circumstances, a pro rata method of pension valuation best achieves the purpose of the Family Law Act, namely, the equitable division of assets between spouses." He went on to say:

For the foregoing reasons, I believe that the termination pro rata method produces a fairer valuation of defined benefit pensions for equalization purposes than the termination value added method. The pro rata method is not without flaws, nor will it inevitably be preferable to the value added method. Although cases may arise where other considerations will tilt the balance in favour of a different valuation method, the nature of defined benefit pensions indicates that, as a general rule, the pro rata method is preferable.

As can be seen, although the Supreme Court of Canada ruled in favour of the pro rata method, it still left the door open for consideration of the value added method in “special circumstances”. It did not explain what these special circumstances might be.

In our experience, we have uncovered many cases where the value added method cannot be used because it is impossible to obtain or estimate proper information at the date of marriage. Also we have seen cases where the use of the Pro rata method would not be fair.

The pro rata method was chosen by the Supreme Court of Canada in the belief that Mr. Best’s pension was earned equally each year. Obviously in some cases this is not true. For example, trades people (e.g. electricians, plumbers, etc.) generally earn the pension based on the number of hours worked each year, to a certain maximum. Since these people are often out of work from time to time it is obvious that their pension is not earned equally each year. The value added method may be more appropriate in such a case. Some other cases where value added may be more appropriate are:

- When it is a Defined Contribution Plan.
- When it is a Career Earnings Plan.
- When the type of plan changed. For example, it was a Defined Contribution Plan at the date of marriage, but a Defined Benefit Plan at the date of separation, or vice versa.
- When the member received a refund of contributions during the marriage and has not paid them back at the date of separation.
- Where the person worked for one employer at the date of marriage and later (during the marriage) changed employers and transferred the commuted value.
- When the pension was not vested at the date of marriage.
- When the member was employed before marriage but not a member of the pension plan, then joined the plan during the marriage and was allowed to count all of his service (including the period before joining the plan) in calculating the pension benefit.

As can be seen, in spite of the Supreme Court of Canada's decision in *Best v. Best*, there still will be cases where the value added method is more appropriate than the pro rata method for valuing a pension on marriage breakdown.

Termination Method or Retirement Method

In considering the decision of the Supreme Court of Canada in this case, it is important to keep in mind that **Mr. and Mrs. Best had agreed** that the value of Mr. Best's pension should be determined by the use of the termination method and not the retirement method. They agreed that for the purpose of determining the amount of pension benefit that Mr. Best had earned, it should be assumed that he had terminated employment at the date of separation. However, there seems to be some confusion as to whether or not this agreement for using the termination method was also to be applied for the purpose of determining the assumed age of retirement. If literal termination of employment were assumed, Mr. Best would not qualify under the rule of 90 (age plus service total 90) until September 1992. If his future service were considered, he would qualify in June 1990 (a much more valuable pension).

It is also important, in most pension valuations, to understand that the value calculated under the termination method may not be the same as the amount the individual would receive as a transfer to a locked in RRSP etc. on literal termination of employment. The value determined by use of the termination method also may be quite different from the value determined under the Pension Benefits Division Act or by a pension administrator for termination of employment purposes. Therefore, it is still important that the pension be valued properly, **in all cases**, by an experienced and qualified pension valuator.

Major, J. explained the termination method, the hybrid termination method and the retirement method, and pointed out the confusion that has arisen regarding the use of these terms.

In this case, the parties had agreed on the termination method. However, Major, J. did say, "It is quite likely that a calculation which corresponds to a retirement method would have provided the fairest possible valuation of the defined benefit pension in this case."

He went on to say:

A retirement method could have much to recommend it, particularly given that a pension's true value might change drastically after marriage due to changes in the benefit formula or substantial increases in salary. As I have suggested, there are compelling reasons to treat these changes as having an effect over the entire life of the defined benefit pension, not just at the time they occur.

He then said that the retirement method "...might be appropriate in a case where the employee spouse's final salaries and years of service are known with sufficient certainty."

The Supreme Court's comments in this area could raise new conflict and disagreement on the value of many pensions (not just those involving a pre-marriage period). One party might be in support of the termination method and the other arguing for the retirement method. The values produced could be quite different.

Vesting

The Supreme Court pointed out that Mr. Best's pension was vested at both the date of marriage and, of course, at the date of separation. This was a part of its considerations when it concluded that the pro rata method was appropriate.

This leaves us wondering whether the pro rata method is appropriate when the pension has not vested at the date of marriage. In that case, should the value added method be used?

With regards to the value of early retirement provisions, the Supreme Court said:

The respondent might argue that the option of retiring before age 65 with an unreduced pension is itself a benefit that increased the pension's value, and that the value of that benefit should be included in net family property because it accrued during the marriage. This argument fails because it effectively considers the pension's value to be unaffected by the early retirement provision until the employee actually begins to qualify for the early retirement benefit. Put another way, the respondent would have the Court consider the early retirement benefit to have a value of zero until the employee began to satisfy the "rule of 90"... Each year is of equal importance in determining the employee's satisfaction of the "rule of 90".

Some pensions, rather than having a rule of 90, allow the member to retire on an unreduced pension regardless of age, when they have accumulated 30 years of service. Using the termination method and the Supreme Court ruling in Best, such a pension should be valued ignoring future service. However, at the same time, the value of the early retirement provision should be recognized in the valuation. There appears to be two conflicting decisions in this case, since it is usually impossible to recognize the value of the early retirement provision without considering future years of service. However, perhaps what the Supreme Court is again saying is that it would be appropriate to value the early retirement provision to the extent that it had been earned only, and thereby discount the value of the pension (by a service discount) in order to leave out the portion of the value that is attributable to future service.

Early Retirement Provisions and the Vesting Discount

This is another area where the Supreme Court's gratuitous comments may have raised new arguments. The Supreme Court said:

The respondent might argue that the option of retiring before age 65 with an unreduced pension is in itself a benefit that increased the pension's value, and that the value of that benefit should be included in net family property because it accrued during the marriage. This argument fails because it effectively considers the pension's value to be unaffected by the early retirement provision until the employee actually begins to qualify for the early retirement benefit. Put another way, the respondent would have the court consider the early retirement benefit to have a benefit of zero, until the employee began to satisfy the rule of 90...Each year is of equal importance in determining the employee's satisfaction of the rule of 90. Had the appellant not accumulated 20 years of service prior to marriage, the early retirement benefit would not have vested if at all, until after the separation. Those early years of service were hardly less important to the earning of the early retirement benefit than the years of service during the marriage.

The Court then explained that the Standards set by the Canadian Institute of Actuaries require that early retirement provisions be recognized. They also quoted from the Ontario Law Reform Commission report, which said:

The Commission therefore recommends that the proposed valuation regulations should provide that where a pension plan contains a provision for an early retirement benefit payable to a member on an unreduced basis once certain vesting requirements are met, such a benefit should be valued on the following basis. Vesting of the unreduced early retirement benefit should be assumed for the purposes of pension valuation and a discount for the possibility that plan membership will terminate prior to meeting the vesting requirements, should be applied.

The Supreme Court then said, "The statements of the Canadian Institute of Actuaries and the Ontario Law Reform Commission support the view that early retirement benefits that are contingent on years of service should not be viewed as obtaining value only once they are vested. They are continuously earned over the course of the employee's service."

In making these comments, the Supreme Court of Canada is supporting a view that I have held for some time now and one of the considerations that I follow in valuing a pension. In my reports, I do reduce the value based on early retirement by a discount for the possibility that it may for many reasons not transpire.

On the other hand, if no future service accruals are considered, as in *Best v. Best*, and retirement age is based on service at the date of separation, then the application of a service discount would not be appropriate.

Retirement Date

The age at which it is assumed that the member will retire often has a substantial effect on the value of the pension for marriage breakdown purposes. I have had many cases where the person retired after the date of separation, but before property matters had been settled. In these cases often it was said that the pension should be valued based on the actual date of retirement. The Supreme Court does not necessarily support this position.

Mr. Best retired after his appeal was submitted to the Ontario Court of Appeal but before the Supreme Court of Canada considered the case. Mr. Best, therefore, argued that his actual date of retirement should be used in the calculations rather than some assumed date.

The Supreme Court of Canada decided that the actual date of retirement was a post-separation event that should be ignored. They agreed with the Ontario Court of Appeal decision in *Kennedy v. Kennedy*², that the date of retirement to assume should be based on the facts of the particular case and the member's state of mind at the date of separation.

The Supreme Court of Canada made no mention of considering the mid-age value as suggested by Justice Kurisko, in the case of *Bascello v. Bascello*³.

The Supreme Court concluded that based on the circumstances and facts of this case, and the fact that Mr. and Mrs. Best had agreed on the termination method of valuing Mr. Best's pension, the age of retirement to assume must be the earliest date at which Mr. Best could receive an unreduced pension, ignoring future service in the calculation.

Ignoring future service in determining the earliest date of unreduced pension would reduce drastically the value of many pensions. I have covered this matter more fully elsewhere in this book.

Subsequent Events

As explained above, Mr. Best argued that his actual date of retirement should be used in calculating the value of his pension, rather than an assumed age of retirement.

² (1996) 19 R.F.L. (4th) 454

³ (1995) 18 R.F.L. (4th) 362

The Supreme Court of Canada said:

On October 3, 1997 the Court of Appeal dismissed the appellant's appeal. Charron, J.A. agreed on all points with the trial judge's reasoning regarding pension valuation. She added that, since the trial judge's reasons had been released, the Court of Appeal had decided in *Kennedy v. Kennedy* that a retirement date must be chosen "on a case by case basis upon consideration of all of the relevant evidence". Charron, J.A. concluded that Rutherford, J. had followed this rule by examining all of the evidence before him in choosing a probable retirement date of September 9, 1992.

The Supreme Court went on to say:

Charron, J.A. also noted that using "hindsight" in choosing a retirement date for valuation purposes would "introduce great uncertainty in the litigation process" and "may well mitigate against the early resolution of matrimonial disputes". Charron, J.A. considered that post-separation events could be relevant to determine "the probable age of retirement as contemplated by the pension plan holder" on the date of separation. Conduct contemplated as of the separation date, as well as the fact of separation itself, could also be relevant, but facts that were unknown to or not contemplated by the pension holder at separation could not.

Major, J., after careful consideration, then said, "I therefore agree with the Ontario Court of Appeal that under a termination method, post-separation evidence should not be used in determining a likely retirement date unless the evidence reflects facts that were within the employee spouse's contemplation at the time of separation."

The Supreme Court then pointed out three circumstances in which it was proper to consider post-separation events. They said that in using a projected retirement method, "...it might be fair to use hindsight evidence in choosing the retirement age as well."

Regarding consideration of subsequent events at the date of marriage, Major, J. said:

I do not believe that there was any reason to value the pension on the date of marriage in light of an assumption that the employee terminated employment on that date. That assumption ignored the actual economic facts that occurred during the marriage. Namely that the appellant continued to work continuously and eventually brought himself within reach of retirement.

The Supreme Court also indicated that it might be appropriate to consider post-separation events in determining the amount of pension benefit to value. Major, J. said:

My conclusion that all the information available at the time of separation should be used in calculating the pension's value at separation and at marriage, ordinarily suggests that one should also consider post-separation information to the extent that it bears upon the benefit formula. For instance, it is now known for a fact, that the appellant retired at age 61, with 40.83 years of service. His best salaried years could also be ascertained with precision. It is quite likely that such a calculation, which essentially corresponds to a retirement method, would have provided the fairest possible valuation of the defined benefit pension in this case.

With regards to post-separation events, the Supreme Court of Canada also said, "Thus there was no error in valuing the pension as though the appellant terminated employment in 1988, even though in determining the spousal support the trial judge recognized that the appellant was still employed in 1993."

It seems rather odd that one should ignore post-separation events in determining the age of retirement to assume but consider post-separation events in determining the amount of benefit to include in the calculations. However, consideration of post-separation events is certainly appropriate in determination of the need for and the ability to pay support.

"If and When" Agreements

The Supreme Court of Canada said:

Once the pension and all other assets have been tallied to produce the appellant's "net family property", the appellant is required to pay the respondent an amount equal to one-half of the difference between his and her net family properties. Section 9 of the Family Law Act allows a court to choose among several methods for payment of the equalization amount, including an order of immediate payment, the granting of security interest, an instalment scheme, postponement of payment, creation of a trust, and the transferal, partition or sale of property.

The lower court and the Ontario Court of Appeal decided that it was appropriate to allow Mr. Best to pay the equalization amount over a ten-year period, as allowed by the Family Law Act.

The Supreme Court considered all of the complications involved in drafting an If and When agreement. For some reason, they assumed that an If and When agreement would provide that Mrs. Best would receive a part of Mr. Best's pension only as long as payments were being made on his pension. They assumed that if Mr. Best died prematurely, Mrs. Best's payments would cease, when she may not have received the full amount of the equalization amount owing. They also assumed that there was a possibility that Mrs. Best would continue to receive a part of Mr. Best's pension long

after the equalization amount had been paid in full. They seemed to ignore the fact that the wording of the agreement and the provision of life insurance or other security could avoid these two possibilities.

The Supreme Court pointed out that the Family Law Act, "...allows a court to delay an equalization payment for up to 10 years, suggesting that the Ontario legislature did not object to continued ties after divorce as long as they were for a 'limited' time. Thus an If and When scheme might be the appropriate option where retirement was clearly imminent."

Major, J. concluded, "In light of the difficulties that seem to attend the drafting and administration of a fair "If and When" order in Ontario, I do not believe that Rutherford, J. exceeded his discretion in choosing an instalment scheme for settlement of the appellant's equalization payment."

It is interesting to note that the Supreme Court concluded that an "If and When" settlement was allowed by the Family Law Act. The Court determined that this method might be appropriate when retirement and receipt of the pension payments is not far in the future.

Spousal Support and Double Dipping

In the lower Court, Rutherford, J. ordered Mr. Best to pay \$2,500.00 in monthly spousal support as long as he continued to draw a salary. Mr. Best argued that because much of the pension had been subject to equalization as an asset, considering it as income for purposes of support would result in double dipping.

The Supreme Court said, "Cases and commentaries appear to be divided on the issue of whether a pension, once equalized as property, can also be treated as income from which the pension holding spouse may make support payments." The Supreme Court concluded that the trial judge did not err in valuing the pension as though the appellant terminated employment in 1988, but at the same time recognizing that he was still employed in 1993 when considering the payment of support. They pointed out that it was appropriate for Rutherford, J. to order continuing support (rather than time limited support), and that since he was now retired, Mr. Best could apply for a variation of the support on the basis of change of circumstances.

The Supreme Court concluded that in determining Mr. Best's ability to pay support that the trial judge had not considered his pension as income (since he was not then retired). The lower court ordered support based on the fact that Mr. Best was drawing a salary at the time. Therefore, the order for support was upheld.

Costs

The costs in this case were substantial, even at the lower court level. Although the respondent had made an offer of settlement that was more favourable than the judgement rendered, the judge in the lower court concluded that numerous factors detracted from the respondent's presumptive right to costs from the date of his settlement offer. He held that the respondent was entitled to recover one-half of his costs to date.

The Ontario Court of Appeal awarded costs of the appeal to the respondent.

The Supreme Court of Canada said, "In light of the fact that the dispute was legitimate and complex, I do not believe that either party should recover costs from the other. The parties will therefore bear their own costs in all courts."

General Comments

The Supreme Court of Canada has clarified that **absent special circumstances**, in a case where there is a pre-marriage period, pro rating the value of the pension based on the number of years of service best achieves the purpose of the Family Law Act (namely the equitable division of assets between spouses) when the case involves a final average earnings defined benefit pension plan.

The Court suggested that the retirement method might be more appropriate than the termination method, when retirement was imminent or all of the information was available to use this method.

It opened the door to the deduction of a service discount to reduce the value of a pension, when the value for early retirement is being considered.

Overall, the judges' comments and decisions may have raised more questions and problems than they solved. It is important, of course, to keep in mind that these decisions were based on the facts of this particular case and may not be valid in a case with different facts.

The discussion and decisions in this Supreme Court of Canada case certainly make it clear that the valuing of pensions for the equalization of property on marriage breakdown is complicated and that it is never safe to settle the property matters without having the pension properly valued. The case of *Best v. Best* required a total of 13 learned judges finally to come to a conclusion of the proper value in this case. How can anyone ever hope to determine the proper value of a pension (or the spouse's pension) without considerable input from a qualified expert and a detailed proper valuation report?