



**ONTARIO  
BAR ASSOCIATION**  
*A Branch of the* CANADIAN BAR ASSOCIATION

**Submission of the  
Ontario Bar Association  
to the  
Ministry of the Attorney General  
on  
Pension Division Reform**

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## OVERVIEW

There is a pressing need for the Ontario Government to move forward with the reform of the law governing how spouses may divide their pensions upon marriage breakdown.

The existing system of determining and sharing pension values is widely viewed as unfair, uncertain, confusing and expensive by separating spouses, lawyers and judges. Disputes are difficult to resolve because of the significant range of possible pension values and the considerable risks associated with crafting agreements which attempt to divide retirement income.

It is a burden on our court system to have to address complicated disputes regarding valuation and implementation of entitlement, when an alternative is available. The Supreme Court of Canada has, in its decisions on such cases, joined in the call to Ontario to reform the law in this area.

Pension administrators are beset by difficulties in administering the court orders and agreements created as attempts to resolve the differences between spouses.

With the exception of Prince Edward Island, Ontario is the only province to have failed to address this problem. All other jurisdictions in Canada, including the federal government, have enacted legislation to provide one model or another of pension division.

All of the stakeholders, namely families, lawyers, judges and pension administrators, are unanimous in agreeing that the problem needs a remedy which can only be provided by reform legislation.

The root problem arises from the fact that pensions are defined as “property” for the purposes of family law, and are thus drawn into the calculation of what one spouse owes another upon marriage breakdown. This leads to costly disputes about the correct value to assign to the pension as well as difficulties in arranging for payment to the entitled spouse. To compound the problem, further disputes may erupt years later when a spousal support claim is made against pension income, where the pension source has been, previously shared as “property”.

## **DETAILED SUBMISSION**

### ***A. Background***

In 1986, Ontario’s Family Law Act established a scheme for division of the property of spouses upon the breakdown of marriage. The statutory definition of property specifically includes an entitlement to a pension. Ontario does not have “community of property” so spouses do not automatically share property with each other. Instead, after separation, spouses must value all their assets, and one spouse must pay the other an “equalization payment”. There is no statutory guidance as to how to value a pension. Therefore, judicial case law has developed a number of complicated rules relating to determining value. These rules are not always clear or consistently applied and cause much confusion and anxiety for both litigants and the legal profession.

The Pension Benefits Act permits a court order or domestic contract to create an interest in a pension for a spouse, but prohibits payment before the pension actually starts to be paid. It also creates a separate prohibition for sharing more than fifty percent of a pension (the Fifty Percent Rule) but, in doing so, employs a different method to calculate value for this purpose than is used under the Family Law Act. Orders made to divide a pension interest are the exception rather than the rule, due to the requirement of the Family Law Act for a lump sum equalization payment.

There are two principal types of pensions: defined contribution pensions and defined benefits pensions. There are no significant problems foreseen in dividing defined contribution pension plans. The problems described below apply to defined benefit plans.

### ***B. Problems with Value***

There are significant costs and difficulties involved in assigning a value to a pension. Since the value is based on a number of assumptions about events yet to happen, the figure arrived at is necessarily almost always wrong. It will turn out to be either too high or too low. Spouses and family law lawyers often have difficulty arriving at a compromise figure and they find the valuation issues confusing. Arguments arise over likely dates of retirement, future rates of tax, discounts for ad hoc indexing arrangements and discounts for specific health issues. Very large dollar differences can result from manipulating these variables and this adds to the difficulty of settling disputes over value.

### ***C. Problems with Payment***

A pension is, in many cases, the most significant asset owned by a spouse, and often results in a significant equalization payment owed to the other spouse. Yet, unlike real property, which can be sold on the open market or easily transferred, a pension is not a

ready source of cash or capital a spouse can look to in order to satisfy the equalization obligation. As a result, a pension member may be required to make a substantial payment to his spouse years before retirement.

Since by law, pensions are treated as assets which are subject to valuation and equalization upon marriage breakdown, a spouse who is entitled to such a payment is often unwilling to wait for payment until the pension member spouse retires. This is particularly so since there are presently considerable risks in tying the payment to the occurrence of a future event. Pensions cannot be pledged as security, nor can they be held as collateral. The value of the pension may decline or disappear due to winding up of a pension plan or the death of the member

From the perspective of the pension member, payment is required even though the pension member has no access to the asset until retirement, at which time it is paid as monthly income, and not as a lump sum. The current difficulty in obtaining an order or agreement to defer the division of the pension until it is in receipt by the pension member often creates considerable hardship for the pension member. The member is nevertheless obliged to immediately transfer other capital assets, such as an interest in the matrimonial home, to satisfy the equalization payment. The pension member may end up having left the marriage with no assets other than the pension, having had to transfer everything else to meet the equalization payment.

The payment is often viewed as unfair by the pension holder, who does not consider the pension to be an asset but as no more than a source of future income. Furthermore, if the pension member dies before retirement, or the pension fails, the pension member will have paid against the value of an asset that has failed to realize its full anticipated value.

Sometimes the spouse has insufficient assets altogether to satisfy the payment. The spouses are then left with two choices. One involves deferring payment by means of installments (which under the Family Law Act, must be paid within ten years). This is only an option if the paying spouse has an adequate income stream which is not already burdened with support obligations, and raises security issues for the recipient spouse.

#### ***D. Pension Division under the existing Pension Benefits Act, or “If and When” Agreements and Orders***

The second method used to avoid an immediate lump sum equalization payment involves an “if and when” settlement, that is, an agreement or order to divide the pension payments themselves upon retirement. “If and when” settlements involve a number of very real problems, which have lead many family law practitioners to avoid them, due to concerns regarding potential negligence claims.

However, these agreements or orders are unavoidable if there are insufficient liquid assets or income, from which to make the equalization payment. Since there is no sanctioned legislative model to follow, such agreements create issues for the spouses and

pension plans alike in interpreting and applying the language used. Common problems with “if and when” agreements and orders include:

- The non-member spouse’s entitlement to payment is deferred until a future date, namely retirement of the member, over which the member spouse has control;
- The language of the agreement or order may or may not exclude the non-member from sharing enhancements or increases after the valuation date (date of separation);
- The non-member’s entitlement may end when the member dies, which may occur before retirement, in some cases leaving the non-pension member former spouse with nothing;
- The implementation of the settlement can be frustrated by the operation of the Fifty Percent Rule, which restricts pension administrators from paying more than 50% of the commuted value of what accrued over the marriage. (The manner in which the commuted value is calculated for the purposes of the Pension Benefits Act differs from the calculation of the pension’s worth for family law purposes);
- The non-member’s interest is held in trust by the member and many pension administrators decline to deal directly with the non-member spouse, necessitating litigation and delay in payment.
- The non-member’s benefit is not secure and life insurance to protect it may be prohibitively costly.
- If the payments (or part of the payments, due to the Fifty Percent Rule) are made directly by the member spouse to the non-member spouse, there are income tax problems. The member is making the payments from after-tax dollars. Even if an adjustment is made to reflect the taxes paid by the member on the pension income, that may be at a higher rate than the one attracted by the non-member’s payments were it paid directly from the pension plan; and
- The experience of pension administrators has often been that the agreements or court orders providing for the division of the pension create problems of interpretation and implementation as a result of ambiguous, imprecise or incomplete language.

### ***E. Double Dipping***

Pension members are very concerned that, once they have paid an equalization payment which reflects the capitalized value of a pension that the same pension, once in pay, should therefore not be taken into account in a claim for spousal support by a former spouse. In practice, there are many cases where support is still granted taking into account the pension income, notwithstanding that the pension may have been part of a property settlement. In other cases, expensive actuarial evidence is required to determine what part of a pension was shared in the calculation of equalization, so as to exclude that part of the pension income from consideration. If pensions could properly be divided in specie, then both spouses would have separate and secure sources of retirement income, and the double dipping issue would largely disappear.

### ***F. Deferred Settlement Method versus Immediate Settlement Method***

There is significant consensus that the existing system is confusing, inaccurate, costly and difficult to implement. All agree that reform is necessary and that the only issue remaining is the choice of reform model. Two principal choices exist with respect to defined benefit pensions, the Immediate Settlement Method (ISM) and the Deferred Settlement Method (DSM).

There is some debate within the Bar about the merits of an ISM model versus a DSM model for settling a defined benefit pension entitlement. However, there is consensus on how the regulatory and statutory framework should operate for the generally preferred DSM model.

Those members of the OBA's Pension and Benefits Section who favour the ISM model do so because it is seen to be less administratively complex and costly. Members of the OBA's Family Law Section generally prefer the Deferred Settlement Method, as do many of the members of the Pension and Benefits Section. The Deferred Settlement Method is preferred because it is viewed as offering a more equitable value to a pension for purposes of dividing family property. Due to the nature of defined contribution plans, it was agreed that the ISM model would be the most appropriate option for both spouses.

## Appendix

Should the government legislate the Deferred Settlement Method model for defined benefit pensions, there is consensus within the OBA on a variety of issues, the main features of which are set out below. The Deferred Settlement Method scheme should include the following elements:

1. a non-member spouse would be permitted to seek a division of the other spouse's defined benefit pension on a deferred basis, with the proviso that the division itself does not take effect until the member's retirement. Commencement of the payment or settlement (as the case may be) of the non-member spouse's pension is triggered at the earliest of the member's termination, retirement, death or normal retirement date;
2. the amount of the assigned portion of the non-member spouse's entitlement would be valued based on an actuarial conversion from the assigned portion of the member spouse's pension, taking into account the life of the non-member spouse;
3. the non-member spouse will have prescribed options available for payment of the pension to the non-member spouse, which must be elected within a specified period after the parties have arrived at agreement or have obtained a court order. The options include:
  - (i) a life-only pension payable from the pension plan, and this would also be the default option if none of the other portability options is selected;
  - (ii) a transfer of the lump sum value of the pension, on a locked-in basis to a LIRA or to another pension plan if that plan accepts the transfer (to the extent permissible under ITA rules); and
  - (iii) a purchase of an immediate or deferred annuity (as the case may be).

The division scheme should fall under changes to be made to the Pension Benefits Act, and will apply only to pensions regulated under Ontario law. As a consequence, the Family Law Act must also be amended to operate to exclude Ontario-regulated pensions from the definition of property, where the parties elect (or the Court orders) to exercise the PBA-division scheme. Pensions arising in other jurisdictions that could be affected by these amendments (e.g., federally-regulated pensions) will continue to fall under the definition of property in the Family Law Act.

As stated, ISM will be the mandatory rule for defined contribution benefits. Further, ISM will be optional for defined benefit plans in certain prescribed cases such as small pensions and short marriages (e.g. under 5 years).

In either case, prescribed forms would be used allowing parties to choose the Deferred Settlement Method or ISM (where the choice is available), which forms would be clear and unambiguous, avoiding the need for interpretation or judgment calls on the part of pension plan administrators.

The forms used to initiate pension division should provide basic information to the non-member spouse about his or her position within the plan, and the available choices, as well as the advisability of seeking advice from a family law lawyer, in order to prevent a need for the administrator to provide advice. The plan administrator should not be responsible for ensuring either party's decision is an informed decision beyond the information it provides in the form.

Since a Deferred Settlement Method could increase the likelihood of there being additional unknown beneficiaries, a legislated fund and prescribed process administered by the Superintendent should be considered to allow for the deposit of the interests of persons who cannot be located by plan administrators, so as to bring to an end the responsibility of plan administrators to hold funds for such persons. This fund can be used also in the non-spousal breakdown context, e.g., for the deposit of unclaimed pension benefits, member surplus shares, etc.

Legislation should contain protections to discharge plan administrators from liability and claims by a plan member, non-member spouse and anyone claiming through them (such as a current spouse) where the administrator complies and makes payment in accordance with applications made under the prescribed forms.

Division cannot exceed 50% of the benefit accrued during the marriage save in exceptional circumstances ordered by a court, keeping in mind also that the Deferred Settlement Method will also recognize post-separation changes affecting the pension calculation such as changes in final earnings, vesting in early retirement subsidies, plan improvements, etc. that are applicable to the period of joint accrual.

Non-member spouses will not have all of the same rights available to plan members under the PBA, and will have the following restrictions on their rights:

1. their agreement to a payment of surplus to an employer will not be required under PBA Reg., s. 8 or 10 (although they will still share in any surplus payment made to the member, in proportion to their entitlement in the Plan). Non-member spouses will also necessarily have to share pro rata in the event of any plan deficit on wind up (but would be covered by the PBGF in the event the member is).
2. there should be clarity on a plan administrator's obligations to communicate with them.
3. they will be required to keep the plan administrator notified of their current address and contact information.

Some members of the Pension & Benefits Section endorse legislated fees to be charged to a member and to a spouse for the additional work necessary to effect a division.

The Family Law Section does not oppose reasonable fees charged to spouses for the division of their interests.

A non-member spouse's pension interest should not be subject to division in favour of a subsequent spouse, whether at source or by equalization. The member's interest is to be divided on a pro rata basis in the case of multiple spouses.

In the event of the death of the member before retirement, the non-member spouse will be entitled to a proportionate share of any pre-retirement benefit payable from the plan. For greater certainty, the quantum of the death benefit available for division would be the greater of the minimum statutory death benefit in the PBA and the death benefits payable under the pension plan to the member's current spouse, children, estate or beneficiary (as the case may be). If the non-member spouse dies before settlement of the division, the assigned share will pass to the estate or beneficiary of the non-member spouse. For this purpose, immediate settlement of the entitlement would be triggered.

In the event of the death of the member post retirement, a survivor benefit is available on his/her net interest if the member has a spouse at the time of retirement. However, the non-member spouse's interest if taken as a life pension form, will not include a survivor benefit (i.e., the non-member spouse's share will be in a life only form with no optional forms available unless expressly provided under the plan). The estate issues for non-member spouses need to be thoroughly addressed by family law lawyers with their clients when negotiating separation agreements.

The above summary relating to the Deferred Settlement Method outlines areas of consensus between the Family and Pension Law Bars of the OBA, in the event the Deferred Settlement Method is proposed by the Government in the course of introducing family law reform legislation. This summary has been approved by the executive members of the Family Law and Pensions and Benefits Sections.