



August 15, 2008

Dr Patricia Hughes
Executive Director
Law Commission of Ontario
Computer Methods Building,
Suite 201, 4850 Keele St.,
Toronto, ON M3J 1P3

Dear Dr. Hughes:

Re: LCO Consultation Paper: *Division of Pensions Upon Marriage Breakdown*

On behalf of the Ontario Bar Association (“OBA”), we are pleased to enclose our submission on the Law Commission of Ontario’s consultation paper entitled *Division of Pensions Upon Marriage Breakdown*.

We welcome the opportunity for further input on this important consultation and our submission in response to it.

Yours truly,

Gregory D. Goulin, LSM
President
Ontario Bar Association



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

**OBA Submission to the
Law Commission of Ontario
on
Division of Pensions Upon Marriage Breakdown**

Submitted on *August 15, 2008*

Submitted by:

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About the Ontario Bar Association

The OBA is the voice of the legal profession in Ontario, representing and advancing the interests of almost 17,000 lawyers, judges, students and legal professionals, while promoting respect for the justice system and the rule of law. As the voice of the legal profession in Ontario, the OBA, among other things, advances reasoned positions to the public, governments and LSUC for the benefit of our members and to improve the law and the administration of justice, provides our members with professional and personal support and with a variety of forums in which they can participate, and promotes equality and the elimination of discrimination.

Introduction

The method of valuing pensions and the method of dividing pensions, once value has been determined, are the essential policy issues which must be decided by the Ontario government in any project to reform the law of pension division on marriage breakdown. The primary reasons for amending the *Family Law Act* and *Pension Benefits Act* provisions governing pensions are to provide for a more equitable division of pension assets while reducing the costs and uncertainties that are associated with division of pensions under the current system.

There is a large measure of consensus within the OBA on the questions presented by the Law Commission of Ontario. However, the differing expertise, client constituencies and practice experience of the lawyers within the Sections whose members are most concerned with the division of pensions on marriage breakdown have predictably led to some differences in how we assess the available options for reforming the law in this area. Where we differ, we share the view that setting out our opinions and the reasons for them will be useful to the Law Commission because it will clearly show where the crucial policy decisions have to be made and what considerations are relevant to making them.

In any discussion of policy for pension division purposes, a number of factors must be considered, including the following:

1. The economic realities for Ontario seniors and the goal of maintaining financial independence for Ontario's aging population;
2. Which (if any) parties to a marriage have had the opportunity to participate in a pension plan;
3. The type of pension plan in which parties to a marriage have participated; and
4. Retirement savings in vehicles other than pension plans, including personal Registered Retirement Savings Plans (RRSPs), group RRSPs sponsored by an employer, Deferred Profit Sharing Plans (DPSPs), and Tax Paid Savings Plans (TPSPs).

Question 1: Whether the ISM or the DSM¹ is fairer

1. *Which approach is essentially fairer to the parties: the ISM or the DSM (or some other model) and why? We want to know whether you think the ISM is unfair to the nonmember spouse or creates a windfall for the pension plan, and if so, whether it can be modified in such a way as to alleviate these problems. Similarly, we seek your views on whether the DSM gives the non-member spouse a share in increases in pension plan value that truly are attributable solely to the post-breakdown period, and if so, whether it can be modified to reduce or eliminate any injustice to the member spouse.*

The OBA believes that which model is adopted — the ISM or the DSM — will depend on the policy objectives the Government is seeking to meet. One such policy choice is whether to regard a pension primarily as a capital asset or primarily as a source of income. Questions to consider include whether a non-member spouse who receives a capital transfer at the time of separation under the ISM is more likely to make a spousal support claim later, and whether a spouse who receives a separate pension under the DSM is less likely to seek spousal support.

Fairness

The OBA believes that it is important at the outset to define what “fair” means. We submit that the elements of fairness, in the context of pension division on marriage breakdown, are:

1. Fairness of value: a method that results in fair values being assigned to pension interests;
2. Fairness of form: the asset received by the non-pension holder should afford him or her investment opportunities that are not significantly different from those enjoyed by the pension holder;
3. Clarity and comprehensibility: the parties and their lawyers should be able to understand the pension division process. We point out, as well, the increasing trend to self-representation by people who cannot afford or do not wish to use lawyers. They must be able to understand the process without a lawyer’s explanation;
4. Ease of implementation for spouses and for pension administrators;
5. Lack of expense: costs to the parties should be lessened or eliminated and administrative costs should be minimized; and

¹ With the Immediate Settlement Method (“ISM”), the non-member spouse’s share of a pension is settled immediately by way of a lump-sum transfer from the pension plan to another pension plan or to an RRSP. The ISM may also involve a member purchasing or offsetting (using other marital property) the non-member spouse’s interest in a pension, in which case an actual division of pension benefits may not occur. With the Deferred Settlement Method (“DSM”), the non-member spouse is assigned an interest in a portion of the member’s pension. Actual division of benefits occurs later on a “trigger” date such as termination of employment, death or retirement. At the trigger date, the non-member spouse’s interest may be settled as a lump-sum transfer or as a life pension payable from the plan.

6. Enhanced future income security for non-member spouses (thereby minimizing the potential for future spousal support disputes).

Valuation and settlement are separate issues

The OBA believes that it is important to distinguish the question of how the pension asset should be valued from how the non-pension holding spouse's entitlement should be settled. For example, the question of whether the DSM gives the non-member spouse an inappropriate share in the post-separation increase in the value of the pension assumes a retirement method valuation. However, the DSM does not *per se* presuppose either a termination or a retirement method valuation.

The ISM does presuppose one valuation method, the termination method. The question of whether the ISM is "unfair" to the non-member spouse assumes that the non-member spouse should share to some extent in post-separation increases in the value of the pension. The decision whether such post-separation increases are or are not to be shared by the non-member spouse is one of policy; the issue is ultimately not a legal one.

Generally speaking, if it is determined that some or all post-separation increases in the value of a pension earned during the relationship (*i.e.*, accruals and contributions made to the plan after the end of the relationship) should be taken into account for purpose of determining a value to be assigned to a non-member spouse, then a retirement method will be chosen and the DSM makes the most sense. In contrast, if it is determined that post-separation increases in value should not be taken into account and a termination method is chosen, then the ISM would seem to make more sense, since the value of the pension will not change after separation. Issues arising around the form of the asset received by the non-member spouse on an immediate settlement of the division are addressed below under the heading "Dealing with ISM Settlements".

A single prescribed valuation method

Ideally, there should be one clear prescribed method for valuing the pension that includes prescribed assumptions for variables such as the retirement date of the plan member and life expectancy. If clear valuation rules are prescribed, the parties will not have to hire competing experts to prepare valuations. Under the current regime, situations arise where the cost of valuing and dividing a pension on marriage breakdown approaches or exceeds the value of the pension itself. Reform of pension division on marriage breakdown should focus on substantially reducing the likelihood that such situations will occur.

Therefore, regardless of the settlement approach that is adopted, the OBA strongly recommends that the valuation method, the reporting of pension values, the method and terms of the pension division, and the elections available to members and non-member spouses, all be clearly prescribed. There should be no discrepancy between the valuation methods prescribed by the PBA and the FLA. The particulars of a prescribed method of valuation and division, and the use of prescribed forms, are discussed in detail in other sections of this submission. Ontario can benefit from the experience of other provinces in this regard. At the same time, the experience of other provinces is but one factor to consider. The particular context and circumstances of pension division law reform in Ontario, including the Province's economy in the broad

sense and its entire family law regime, are the essential framework into which the reform of pension sharing must be placed.

Pension plans and plan participation in Ontario

The OBA observes that the question posed seems to presume that non-member spouses of pension plan members are predominantly women and are disadvantaged. That is not necessarily the case. The largest group of members of final average earnings defined benefit pension plans are in the public sector, and female members of public sector pension plans significantly outnumber male members.

At the same time, there do not appear to be any statistics readily available that address the marital status of pension holders. Therefore it is difficult to assess who is affected, or how many pensions are affected, or the types of pension that are affected on the breakdown of marriages in Ontario.

More men than women participate in pension plans, but women are catching up. In 1993, men accounted for 57.7 percent of total pension plan membership in Canada. In 2003, this percentage had dropped to 53.6 percent and in 2007, to 51.5 percent. From 1998 to 2003, most (about two-thirds) of the growth in female pension plan participation occurred in the public sector. In 2007, overall female participation in defined-benefit (DB) pension plans surpassed male DB pension plan membership, for the first time ever.² As we have noted, there are no readily available statistics on the marital status of pension holders.

There are several different types of retirement plan in Ontario with varying degrees of value for the member and former spouse of the member of the plan, depending on the benefits provided in the plan text. DB pension plans typically provide benefits that are more generous than defined-contribution (DC) pension plans. DB pension plan participation is overwhelmingly weighted to the public sector, where 85 percent of workers belong to a pension plan. Most public sector DB pension plans provide pension benefits using a final average earnings (FAE) formula that determines pension amounts based on a member's earnings at or close to retirement, which are usually the highest. Public sector pension plans also provide indexing, bridging and subsidized early retirement benefits. Private sector DB pension plans are more likely to provide benefits based on career average earnings (CAE) and to offer less generous indexing and early-retirement benefits. In the private sector, 1.1 million (more than one-third) of pension plan members belong to DC and hybrid/combination pension plans, which typically provide less generous benefits than FAE/CAE DB pension plans. Of the membership in DC and hybrid/combination DB pension plans, 690,000 (58 percent) are male.

Fewer than 40 percent of employed Ontario workers participate in a pension plan. In the private sector, pension plan participation is below 25 percent.³ Those who don't participate in a pension plan rely mainly on accumulations in personal or group RRSPs. The fact that retirement saving for most happens outside registered pension plans raises

² See Statistics Canada, "Pension Plans in Canada" January 1, 2003 at <http://dsp-psd.tpsgc.gc.ca/Collection/Statcan/13F0026M/13F0026MIE2004001.pdf> and Statistics Canada "The Daily" July 4, 2008 at <http://www.statcan.ca/Daily/English/080704/d080704a.htm>.

³ See <http://www40.statcan.ca/101/cst01/labr66g.htm> and <http://www40.statcan.ca/101/cst01/famil119g.htm>.

the question as to why retirement savings vehicles other than pension plans do not appear to be considered in any pension division regime in Canada, including Ontario.

Policy reasons supporting the DSM

Lawyers representing the Family Law Section of the Ontario Bar Association believe that the preferable model for pension division reform is the DSM.

This preference is based principally on the view that the deferred settlement method of division results in a fairer division, because it takes into account the actual realized value of a given pension. It does not entail the making of numerous assumptions about future events and their impact on that pension's value. The goal of the DSM is to ensure that the spouses benefit equally from the pension that accrued during their marriage.

The ISM, while administratively simple, may result in values that are lower by one third to one half than those that result from the DSM.⁴ The reason is that the ISM assumes that the pension member terminated employment at the date of separation and would not have retired until age 65. This approach to value has been rejected by the Ontario courts, which have struggled with issues of pension value in the 22 years since the law of Ontario first required pensions to be included in a spouse's net family property for the purposes of equalization. The introduction of the ISM into Ontario would run contrary to the expectations of spouses during their marriage and would result in payments to spouses which are considerably lower than is currently the case.

With the DSM, no assumptions are necessary. The spouses end up sharing exactly what the pension turns out to be worth. Deferred settlement does involve some fractional sharing of value accrued after separation, but the Family Law Section believes that this is not unfair for the following reasons:

1. Pensionable service accrued during a marriage may increase in value as a function of vesting of ancillary benefits (e.g. bridging benefits; early retirement subsidies) that depend in part on the total number of years of pensionable service accrued by a member, including during marriage.
2. Pension plans sometimes experience surpluses, which may have accrued during the marriage, and these would not be shared with a spouse except under a DSM combined with a retirement method of valuation that allows the spouse to share any plan improvements.
3. Some post separation benefit enhancements (such as may be caused by promotions) may appear to be attributable only to the post-separation efforts of the member, but an analysis which takes into account the complex realities of how family members divide their roles and responsibilities would reveal that this is not necessarily the case. One spouse may have focused on career development while the other took on a greater share of household or child care responsibilities. The

⁴ The British Columbia Law Institute (BCLI) provides an excellent comparison of the differences in valuations produced using an ISM as opposed to a DSM model in Appendix D to their 2006 report: "Pension Division on Marriage Breakdown – A Ten Year Review".

existing law recognizes marriage as a partnership and mandates recognition of all types of contributions by spouses to the marriage.

It is important when a marriage breaks down to consider not only the economic circumstances of the spouses at the time they separate, but their future economic security, particularly as they approach retirement age. The life expectancy of both men and women has increased significantly during the last century. While more women have entered the labour force during this time period, the average earnings for women, compared with men, have not climbed much beyond the 60 percent level. Ontario women still spend significantly more hours than their male counterparts providing unpaid housework and unpaid childcare. As a result of the continuing wage gap and the greater assumption of unpaid labour in the home, it is not surprising that there are twice as many low-income women at age 65 and over, compared with men in this same age range.

The preamble to the FLA states that marriage is a form of partnership. While contributions to this partnership may end at separation, the benefits from participation in a pension plan during marriage may increase after the end of the marriage. By allowing the non-member spouse to share the benefit of post-marriage contributions and benefit accrual the DSM model offers enhanced income security to the non-member spouse.

Policy reasons supporting the ISM

Lawyers representing the Pension and Benefits Section of the Ontario Bar Association believe that the preferable model for pension reform is the ISM, for it is both simple and fair.

The ISM method is simple, for it is easily understood by the parties and their family lawyers and does not unduly complicate the administration of defined benefit pension plans. It also treats DB pension property in a manner that is consistent with other retirement savings, such as RRSPs and DC pension plan benefits.

As we have already noted, the question of whether the ISM is “unfair” to the non-member spouse assumes that the non-member spouse should share to some extent in post-separation increases in the value of the pension. The decision whether such post-separation increases are or are not to be shared by the non-member spouse is one of policy; the issue is ultimately not a legal one.

While the DSM model tends to provide higher values for a non-member spouse, the value of a DSM settlement varies significantly depending on the type of pension plan. A number of factors cause increase in value of a pension associated with the period of marriage. In a capital accumulation plan (CAP) such as a DC pension plan, RRSP, DPSP or TPSP, continuing accrual of investment earnings is responsible for the increases in the post-separation value of retirement savings accumulated during the marriage. Post-separation increases in the pension accrued during the marriage in a DB pension plan are also attributable to post-separation contributions and plan participation. The difference between DB and DC pension plans is that in the case of a DB pension plan (particularly an FAE plan) the value of continued participation increases substantially as a member ages, making participation much more valuable in late career than in early career. The DSM model presumes that some of this increased post-separation value relates to years of service during marriage. There is a logical basis for this presumption in DB pension plans

that offer final earnings formulae, early retirement and bridging benefits, which vest as a function of the number of accumulated years of service. However, not all DB plans provide these benefits.

The DSM model is not generally applied to DC pension plans, even though they are similar to DB pension plans in that there is post-separation added value. However, that added value is a function of post-separation investment earnings which can in theory be replicated by the ISM through investment of the divided capital sum. Nevertheless, some DC pension plans have contribution formulae that increase as the number of years of participation increases, which effectively relates some post-marriage contributions to years of participation during marriage. This raises some interesting questions:

- Is it appropriate to apply the DSM model to DB plans but not to DC plans?
- Should the DSM model be applied to other CAPs (*i.e.*, DC pension plans RRSPs, DPSPs and TPSPs)?
- From an administrative point of view, is it feasible or desirable to apply the DSM model to CAPs?

The value of a DSM settlement will be highest in a DB pension plan that has an FAE benefit formula because pension benefits are based on the member's end-career salary, which is usually the highest salary. Whether or not the DSM model would deliver a higher value than an ISM settlement in a DC plan or other CAP will depend on whether the non-member spouse gets a share of contributions made in respect of a member after marriage breakdown, and on whether investments within the DC plan will outperform investments selected by the non-member spouse outside the plan.

In effect, the DSM model applied to a DB pension plan provides to a non-member spouse the opportunity to benefit from contributions made to the plan after marriage breakdown. For this reason, the DSM model can be used to address expected income disparity between men and women. However, this seems to presuppose that more men than women are members of DB pension plans that have an FAE benefit formula. Further research is needed to determine whether the DSM model can in fact address income disparity between men and women because the fact that female members of DB pension plans outnumber males suggests that the majority of beneficiaries of a DSM settlement will be male. In the public sector, where most members of FAE pension plans are found, the difference may be even greater.⁵ In itself, this is not sufficient information to conclude that that a DSM model applied to DB pension plans would in fact disadvantage women. Other factors, such as wage disparities, would also need to be considered. However, given that the overwhelming number of members of FAE pension plans is in the public sector, where pension plan membership appears be weighted toward women, it may be inappropriate to presume without further study that DSM settlements providing higher values for non-member spouses will tend to correct income disparities between women and men.

⁵ For example, the federal public sector pension plan has 9% more female active members than males. Almost 73% of the active membership of the Ontario Teachers Pension Plan is female. Data for the entire Ontario public sector indicate that in 2007, 465,651 pension plan members were female as compared to 263,615 male members (source: Statistics Canada Table 280-0009).

As a final point, it should be noted that the extent to which a DSM settlement can or will address future income disparities between separating spouses depends to a large extent on employment choices made by the member spouse after marriage breakdown, which are outside the control of the non-member spouse. Since a DSM settlement gives the non-member spouse rights to participate in future increases in value of a pension accrued with a particular employer, the value of a DSM settlement will be significantly lower if the member spouse changes jobs after marriage breakdown. Whether or not a new job involves pension plan membership, the non-member spouse will not participate in the value of future pension accrual after a job change. Particularly in the private sector, where job changes are common, this will be an important consideration in determining whether the DSM or the ISM model is preferable from a value perspective.

Dealing with ISM Settlements

One concern associated with the ISM, particularly for DB pension plans, is that non-member spouses lose the benefit of professional asset management because when an ISM settlement is transferred from a pension plan, the non-member spouse must determine how to invest the transferred assets. A large body of research demonstrates that individuals don't do a good job of selecting investments and that investments selected by individuals typically under-perform market indices.⁶ This issue could be addressed by creating a public pension fund (*e.g.*, the "Ontario Pension Trust" or "OPT") operated on a cost-recovery basis by an arms-length agency analogous to the Canada Pension Plan Investment Board. The OPT could receive transfers relating to ISM settlements, providing non-member spouses with professional investment management services at reasonable rates and at no cost to taxpayers. The OPT could also accept transfers in respect of missing pension plan members, thus removing a major administrative burden from pension plan sponsors and providing a single point of contact for recovery of pension funds by former pension plan members.

Windfalls

The payout of a commuted value to a pension plan member is generally not considered to create a windfall for the plan. It follows that the payment of a commuted value to a non-member spouse does not create a windfall.

⁶ See Broadbent, John, Michael Palumbo and Elizabeth Woodman. "The Shift from Defined Benefit to Defined Contribution Pension Plans - Implications for Asset Allocation and Risk Management". Prepared for a Working Group on Institutional Investors, Global Savings and Asset Allocation established by the Committee on the Global Financial System. December 2006 and Tapia, Waldo and Juan Yermo. "Implications of Behavioural Economics for Mandatory Individual Account Pension Systems" at 8. OECD Working Papers on Insurance and Private Pensions No. 11. Organisation for Economic Co-operation and Development. France. July 2007.

Question 2: Mandatory or Optional Pension Division Regime

2. To what extent should the parties be bound by the Regime? Should there be a presumption that the approach will be used unless certain exceptional circumstances exist, and if so, what are those exceptional circumstances? Might it instead simply be a default regime, which applies only if the parties cannot agree to some other means of settling their affairs? Or should it apply in all cases, without exception?

The purposes of reforming the law governing division of pensions on marriage breakdown are to reduce the sources of dispute between separating spouses, to reduce the cost of settling their affairs and to provide a clear, fair and efficient method of dividing pensions without unduly burdening pension plan administrators — indeed, to eliminate the burdens on administrators caused by some aspects of the present system.

Lawyers representing the Pension and Benefits Section of the Ontario Bar Association favour a division scheme that is voluntary to enter, but mandatory and with clear prescribed rules, if applied. Once an equalization calculation is performed (and we are assuming that the pension would continue to be valued in the net family property calculation), the parties to a marriage should have the option of determining how they wish to settle the equalization obligation, and should not be required to divide a pension simply because it exists. A mandatory division at source can also create awkward situations and unnecessary work where both parties have independent pension plan entitlements.

However, if the parties do opt to divide a pension at source, it is our view that it would create more certainty for all involved (the parties, pension plan administrators, employers, regulators, legal counsel, etc.) if the scheme into which they opt is prescribed and would apply in all cases. We are assuming, however, that the prescribed regime will be relatively simple (not highly customized). As such, it will not be suitable for all and it will be difficult to identify in advance for whom it is unsuitable. Therefore an opt out prevents the regime from being too intrusive.

It would be inappropriate to create a default election into a division scheme as this might encourage too little attention to the pension issues. Rather, the “default” in the absence of a positive election would be no division at source.

Lawyers representing the Family Law Section of the OBA note that while including pensions in spouses’ shareable property was a progressive step, the method of sharing pension assets under the FLA is costly to spouses and to the court system. The FLA does not contain a definition of “value” and does not prescribe a method for valuing pensions. One of the main sources of dispute and cost is the valuation of pensions in a family property regime in which the *value* of property acquired during the marriage is shared, rather than the assets themselves, and the legislated way of settling equalization obligations is by a cash payment.

The simplest way to address the difficulties that arise from the current treatment of pensions in the FLA is to remove pensions from the net family property equalization calculation and deal with them in a separate Part of the FLA. Valuation and settlement would be carried out under a mandatory scheme with a prescribed valuation method and a prescribed settlement method; these issues are discussed in detail in our responses below.

An alternative is to prescribe a mandatory valuation method, but to give spouses the option, once the pension has been valued, of dividing it at source or including its value in the net family property calculation and equalization process. Where both spouses have pensions, particularly if the pensions are relatively close in value, keeping the pensions in the equalization calculation might be simpler than dividing both pensions at source.

Allowing spouses to opt out of division at source is workable only if all pensions of separating spouses are valued according to a prescribed method. If spouses must obtain actuarial valuations (separate, competing valuations in many cases) in order to decide whether to opt in or out of the division regime, an important purpose of reforming the treatment of pensions on marriage breakdown is defeated.

If the parties opt to divide a pension at source, the OBA's view is that the scheme into which they opt should be prescribed and should apply in all cases. A single, prescribed scheme would create more certainty for all involved (the parties, pension plan administrators, employers, regulators, legal counsel, etc.) We are assuming, however, that the prescribed regime will be relatively simple (not highly customized). As such, it will not be suitable for all and it will be difficult to identify in advance those for whom it is unsuitable. An opt-out prevents the regime from being too intrusive.

The OBA submits that the parties should be required to make an irrevocable election to divide or not to divide any pension owned by either spouse when they finalize their affairs after separation. We note that it will be important to develop measures to ensure that parties who do not seek legal advice do not inadvertently fail to address pension issues.

Question 3: Prospective or Retrospective Application

3. Retroactive or prospective application: A decision will also have to be made about temporal application, i.e., should the new regime apply where the valuation date under the FLA falls on or after the day on which the legislation creating the regime comes into force (even though, in the case of the DSM, pensions would no longer be subject to the equalization requirements), or should some other date be chosen?

The new settlement regime should be implemented on a prospective basis, as of a fixed date, to provide pension plans with the time necessary to implement required administrative changes. Some of the changes will require pension plan administrators to revise their administrative systems, practices and procedures. This means some lead time is needed to prepare for the new regime.

Parties who separate after the day on which the new regime is proclaimed into force would automatically be subject to the regime. Parties who separated prior to the new regime being proclaimed into force, but who have not yet settled their affairs, could be permitted to elect to proceed under the new regime. Parties who had already separated and had not yet incurred the expense of an actuarial valuation would thus be able to take advantage of cost savings under the new regime. Voluntary opting in by already separated parties would need to be on consent of both parties, and be subject to the approval of the pension administrator in those cases where pension division has already been initiated.

Question 4: Taxation Issues

4. Taxation Issues: Since both the ISM and the DSM will result in the non-member spouse receiving a benefit at source, he or she will pay income tax on that benefit. Some might suggest that this is unfair in the case of the ISM if pensions are to remain subject to the FLA equalization regime, in that an equalization payment should be tax-free.⁵⁴ Is it unfair, and if so, is there a way to reduce or eliminate the unfairness? The DSM divides the pension outside of the equalization provisions, but does this mean that there is no unfairness in the non-member spouse being taxed on what he or she ultimately receives? In the case of either model, if there is a tax-related unfairness, is there a way that it can be reduced or eliminated?

While an equalization payment is an “after tax” payment, when it is calculated, contingent liabilities (including income tax) are deducted from the value of assets at the date of separation. More particularly, when valuing pensions pursuant to the FLA, the pension value is reduced by the estimated rate of tax that the pension member will ultimately pay on his pension. This estimate of the future average tax rate, which may well turn out to be inaccurate, is one of the many variables that are taken into account in pension valuations. The risk of inaccurate discounting for tax is one of the problems in the present approach to pensions.

The Family Law Section of the OBA envisions a reform of pension division legislation under which pensions would not automatically be included in the equalization calculation prescribed by the FLA. The Act would continue to provide for sharing of pensions, but outside the net family property equalization mechanism, unless the spouses elected to include them by opting out of division at source.

It is not the case that an ISM settlement generates an immediate tax burden for a non-member spouse. Within a pension plan, the division of a pension asset is done on a pre-tax basis. The member and non-member spouse will each hold an entitlement that is taxed only when the asset matures and provides income. There is one exception: a pension plan member who takes a transfer value upon termination of employment has a tax-free rollover up to a prescribed limit and must pay tax on any excess amount (which is unlocked and payable in cash), while an assignee spouse who receives a transfer value settlement on marriage breakdown has a tax-free rollover without any cap. However, the terminating member is not required to take a transfer and can avoid this taxation by choosing a pension from the plan. Thus, even with this one difference, there is no fairness problem.

Where members and their former spouses receive taxable payments from a pension plan, such as from separate pensions under the DSM, differences in the after-tax value of such payments arise only to the extent that there are differences between the marginal tax rates that apply to such payments. Such differences, which are completely extrinsic to the pension plan, arise as a result of differences between the parties’ other sources of taxable income.

Question 5: Valuation Method under the ISM

5. The ISM and Valuation: If the ISM approach is adopted, should a particular valuation method be required as a matter of law, and if so, what should that method be? Should the valuation be performed by the plan administrator, as under Quebec's Supplemental Pension Plans Act 55 (which essentially adopts an ISM approach), rather than by actuaries retained by the spouses, with the hope of reducing disagreement and litigation?

The OBA submits that a primary goal of pension reform is to reduce transaction costs by reducing the scope for dispute. For that reason, if the ISM approach is adopted, one valuation method should be required as a matter of law. The use of a uniform, accepted valuation method reduces the possibility of disputes arising over the valuation of pension benefits.

In Quebec, pension benefits are valued on a termination basis using the Canadian Institute of Actuaries' 2005 Standard for Determining Pension Commuted Values ("CIA Standard"). The Pension and Benefits Section of the OBA believes that the Quebec approach, which prescribes a valuation methodology as well as the date of valuation in regulation, is appropriate. The use of a uniform, accepted valuation method (such as the CIA Standard) reduces the possibility of disputes arising with respect to the valuation of pension benefits. Valuations of this nature should be performed by the plan administrator. If the valuation method is clearly set out in the regulation, there would be no need for the spouses to obtain two independent valuations. Furthermore, since the administrator has easy access to the data required to do the valuation, it would be most efficient for the administrator to do so. However, if a single uniform valuation method such as the above is not prescribed, then the administrator will likely not be in a position to perform the valuation.

Alternatively, the Pension and Benefits Section of the OBA submits that a "progressive ISM approach" could be adopted whereby the parties are provided with estimates of the commuted value of the pension at certain prescribed times (e.g. date of separation, earliest unreduced retirement date, and the normal retirement date) based on a prescribed valuation method. The parties could then decide on the most appropriate value to be used in the settlement, based on the unique factual circumstances of those parties, with appropriate external independent legal and/or actuarial advice and with the intervention of the family court (if necessary). The agreed upon/ordered valuation amount can then be settled when the anticipated trigger date occurs (as an ISM settlement). This approach would provide the parties with some flexibility, while maintaining a level of certainty in the pension division process. That being said, if the parties have to choose among the different valuations, it may lead to litigation if they cannot agree on the most appropriate one.

However, the Family Law Section of the OBA submits that in some situations, the retirement method may be preferable as a means of addressing future income disparities between separating spouses and may thus be more consistent with the existing family law regime in Ontario. The termination method of valuation assumes job loss as of the date of separation, which may not be an appropriate assumption in all cases. Under the FLA, some assets are valued for equalization purposes based on their value at the date of marriage breakdown; others are valued based on reasonable assumptions about their expected date of realization, adjusted for their present value to the date of separation. It

may be appropriate to have similar flexibility with respect to pension valuations. The Family Law Section also submits that other standards, such as the annuity purchase standard (which tends to produce higher values than the CIA standard) are also available and should be considered.

We note that the assumption that most people will work for the same employer to their normal retirement is no longer valid. With the exception of the public sector, workers can be expected to change jobs more frequently than was usual in the past. We note, as well, a trend toward early retirement.

The OBA recommends that the plan administrator perform the valuation based on a legislatively determined approach. The plan administrator can most cost-effectively deliver that service. Valuation by the administrator relieves spouses of the expense of hiring experts or entering into extended negotiations. Once implemented, the pension division scheme should be accessible to spouses who do not have the benefit of legal or actuarial advice.

As discussed in the response to question 8, the OBA recommends that a fixed-fee structure be prescribed so that separating spouses may be required to pay part of the cost of pension valuations and partitions, at the option of the administrator. The OBA believes that pension plan members and their former spouses should not be required to pay fees on a full cost-recovery basis, to the extent that such fees would significantly exceed the fee rates prescribed in other provinces.

The OBA submits that valuation of pension benefits by plan administrators on a partial cost-recovery basis will be of significant benefit to members and their former spouses because it will reduce the cost and delay of obtaining valuations and effecting partitions, and related disputes.

Question 6: Spouse's Pension Commencement Time under the DSM

6. *The DSM model: If the DSM approach is adopted, should a non-member spouse who elects to take a pension from the member spouse's pension plan have the option of having his or her pension commence at a time other than actual retirement of the member spouse?*

The OBA submits that if a DSM approach is adopted, the non-member spouse should not be provided with an election to commence his or her pension at a time other than the member's trigger dates. Such "trigger dates" should be the member's termination of membership, the member's pre-retirement death, the termination of the pension plan or the member's pension commencement date. In general, permitting different start dates for the member and the non-member spouse will increase the cost and complexity of administration for pension plan administrators. For further details, please see the response to question 9, below.

The OBA suggests that an exception to the general rule that the non-member spouse should not be provided with an independent election should be permitted only in the case of diagnosis of shortened life expectancy, as defined in section 49 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("PBA") for the non-member spouse, prior to the member's trigger date. This provision is intended to apply to plan members, but could be modified to apply to a non-member spouse:

49. (1) A pension plan may permit variation in the terms of payment of a pension or deferred pension by reason of the mental or physical disability of a member or former member that is likely to shorten considerably the life expectancy of the member or former member.

(2) A pension plan shall be deemed to permit variation in the terms of payment of a pension or deferred pension in such circumstances of shortened life expectancy as may be prescribed, if the prescribed conditions are satisfied.

Section 51.1 of Regulation 909 of the PBA sets forth the conditions which must be met in the circumstances.

Further, the OBA notes that new, phased-retirement (PR) rules permitted under the *Income Tax Act* will introduce uncertainty to the meaning of "retire" and "retirement". While the PBA does not currently allow for phased retirement, it can be expected that it will be amended to accommodate the new phased retirement tax rules after the Ontario government has had an opportunity to review the Ontario Expert Commission on Pensions' report that will be delivered in November 2008. The OBA submits that the impact of PR rules needs to be considered carefully if a DSM approach is adopted. As a starting point, the OBA submits that non-member spouses should not be permitted to commence pension payments during a PR period (*i.e.*, they should be required to wait until the member has fully retired), provided that the non-member spouse is permitted to transfer his/her entitlements from the plan.

Structuring Alternatives - Transfer to Other Retirement Vehicle

There are two main settlement alternatives under the DSM, a **separate pension paid from the plan to the non-member spouse** and a **commuted value transfer out of**

the plan (a “locked-in transfer”). A spouse receiving a locked-in transfer should have the same range of options available to members who have this right, except that the purchase of an annuity should be excluded because of the expense and because of the implications posed by section 147.4 of the Income Tax Act.

The Pension and Benefits Section of the OBA submits that the CIA CV Standard should be used where there is to be a transfer to another retirement vehicle.

DSM valuation

The OBA submits that the valuation should be performed by the plan administrator. The administrator is in the best position to value the pension, if it has all of the data. There will be no need to make assumptions about future increases in value if the pension is valued as of the trigger date.

To reduce disputes between members and their former spouses, and to avoid unduly increasing plan administrators’ costs, comprehensive rules for the valuation of pensions to be divided pursuant to the DSM approach should be prescribed by regulation.

Interest on non-member spouse’s settlement under termination method

If a termination valuation method is chosen for the DSM, the value of the non-member spouse’s settlement should be increased with interest at a prescribed rate from the date of valuation to the date pension payments begin, to avoid loss to the non-member spouse from inflation and forgone investment returns. To the extent that the DSM will permit post-separation increases in the value of a pension accrued during marriage to be subject to division, a retirement valuation method that assigns benefits to the non-member spouse pro-rated on service would appear appropriate.

Question 7: The Fifty Percent Rule

7. *Fifty percent rule: Change or drop? If it is to be retained, should the currently-prescribed method of valuation be changed?*

The OBA recommends that the 50 percent rule be reconsidered with respect to sections 51, 65 and 66 of the PBA. These sections provide that neither a domestic contract nor a court order may permit a spouse to become entitled to more than 50 percent of the pension benefits or moneys payable from a pension (including a life annuity) that were accrued by a member or former member during the period when the party and the member or former member were spouses. Under the PBA spouses are “special creditors” in that they are permitted through domestic contract or court order to receive up to one half of prescribed benefits. No other creditor has such standing as pensions are otherwise exempt from execution, seizure or attachment.

The Family Law Section of the OBA recommends that this special creditor standing be expanded to permit the transfer of up to 100% of the pension benefits, whether at source, or upon moneys in pay from a pension. Such transfers would be at a Court’s discretion. For example, a transfer of 100 percent of pension benefits or moneys payable under a pension would be appropriate when:

- a) no other Ontario assets are available to satisfy an Order that is in breach by the member spouse, or
- b) the member spouse has deliberately placed all other assets and income sources outside the jurisdiction of the Court, or
- c) a member spouse wishes to satisfy a lump sum payment of support or equalization from his or her pension.

Such an extension is consistent with the federal *Pension Benefits Standards Act, 1985*, which allows assignment of 100 percent of accrued benefits.

Active pension plan members who assign 100 percent of the value of a pension accrued during marriage will generally — barring abrupt career curtailment — continue to have an opportunity to accrue pension benefits for the remainder of their careers. There may be different considerations that support a transfer of 50 percent or less for members who have fully retired and whose pensions have commenced at the time of separation.

Allowing the Courts discretion to assign up to 100 percent of a pension or moneys payable from a pension assures that the purposes of the FLA and the *Divorce Act* will no longer be frustrated by creditor exemption provisions within the PBA.

The Pension and Benefits Section of the OBA agrees with the removal of the 50 percent limit if an ISM settlement regime is adopted but not if a DSM settlement regime is adopted.

The current method stipulated for valuation of a pension under the 50 percent rule is the termination method. If the DSM settlement method is adopted, combined with a retirement method of valuation, and the 50 percent rule is retained, there must be

consistency in valuation methods. Therefore, the Family Law Section advocates for the application of the retirement method of valuation for the 50 percent rule prescribed by subsection 51(2) of the PBA.

Question 8: Reducing Burdens on Plan Administrators

8. Reducing Burdens on Plan Administrators: Either approach, but particularly the DSM, would impose burdens on pension plan administrators. Are there ways of minimizing those burdens? Should administrators have the option of charging fees to member or non-member spouses so as to offset their additional costs?

In its submissions to the Ontario Expert Commission on Pensions, the OBA noted that the promotion of Defined Benefit pension plans requires a reduction in the burden of administering these plans.

The adoption of the ISM method would significantly minimize the burden of dividing pensions. In the alternative, a DSM method that allows a plan administrator to pay out the spouse's share in a lump sum upon the occurrence of the trigger event (member's termination, plan termination, member's pre-retirement death or member's retirement) would also minimize the administrative burden. (This option is explained in greater detail in the response to Question 9, below.) While plan administrators would still be required to keep track of the non-member spouse from the date of separation and provide him/her with fiduciary level service until the date of the trigger event, the administrator would be relieved of all of the service demands posed by the non-member spouse from the date of the trigger event to the date of the non-member spouse's death, because the payment would have already been made in a lump sum.

The OBA believes that one of the greatest burdens for plan administrators, whether under the ISM or the DSM approach, is the requirement to interpret separation agreements and/or court orders as they pertain to the partition of pensions at source. This is particularly burdensome in light of the fact that separation agreements and court orders are all worded differently and are often incomplete or unclear. The need for plan administrators to interpret separation agreements and court orders, to seek legal advice and to circle back to the parties repeatedly to clarify intent is costly, time-consuming and frustrating for all involved. Moreover, the need to interpret such documents creates significant risk both for administrators and for separating spouses

The OBA therefore recommends an approach under which plan administrators are not required to interpret court orders or separation agreements. The OBA believes that this will be advantageous to all stakeholders. Specifically, we propose that prescribed forms be developed. These forms would be completed by the pension plan member and their spouse and would include all necessary information for the pension plan administrator to divide the pension, without the need to review the specific terms of a separation agreement or an order. It is particularly important, if the DSM approach is adopted and the non-member spouse's share is not paid out in a lump sum, for the forms to include directions for settlement of the spouse's share should *any* contingent event occur, such as death, termination, or retirement of the member. We recommend that the forms also include a designation of trustee to cover the possibility of future incapacity of the spouse. The OBA believes strongly that prescribed forms should expressly provide administrators with a discharge of liability provided that they perform pension divisions in accordance with the instructions in the form. The OBA also recommends that the Law Commission consider measures to alleviate the burden that plan administrators face in collecting pension overpayments that have been inadvertently paid to a non-member spouse following his or her death. Many plan administrators make pension payments by

direct deposit and must rely on notification of the pension recipient's death by a third party. If timely notification is not provided, the payments continue beyond the entitlement period.

In addition to the burden of interpreting separation agreements and court orders, the OBA notes that plan administrators face further challenges when administering pension partitions at source. Agreements reached by the parties, or imposed by the courts, vary in the types of calculations they require plan administrators to perform, making it difficult for plan administrators to implement streamlined and efficient processes, and making it virtually impossible to automate such calculations within their normal benefit administration systems. For example, some separation agreements and court orders require plan administrators to split pension payments at source until a specified limit, which is not always readily identifiable, is reached. These types of obligation expose plan administrators to additional legal risk and strain their resources. Additional costs associated with these types of arrangement are absorbed by the pension fund and ultimately borne by all members of the plan.

The OBA believes that limiting the range of calculation options for pension division purposes through a prescribed method of valuation and division would alleviate the administrative burden on plan administrators and reduce the sometimes excessive cost of valuing and dividing pension benefits. Moreover, the OBA submits that separating spouses will benefit from more efficient and expedited processes.

The OBA notes that some of the best-understood pension division rules are underpinned by strong informational resources and tools provided by the responsible government body. The best example is found in British Columbia, where information and tools include a comprehensive Question and Answer document developed by the British Columbia Law Reform Commission and now maintained by the British Columbia Law Institute. Ontario should take advantage of the work already done in many provinces across Canada in this area.

The OBA submits that pension plans should not have to bear increased administrative costs as a result of law reform. We recommend that a fixed fee structure be prescribed so that separating spouses may be required to pay part of the cost of pension valuations and partitions, at the option of the administrator. We note that the most common approach is to permit the administrator to charge a maximum fee of \$500 in respect of defined benefit plans, in relation to valuation/disclosure and/or actual pension partition. British Columbia, Alberta, Nova Scotia and Newfoundland all prescribe a \$500.00 maximum fee in relation to defined benefit plans. The OBA believes that fees at this level are reasonable, although they will not typically represent full cost recovery. The OBA further believes that such fees should be shared equally between the spouses and that in order to decrease the burden on both plan administrators and separating spouses, the plan administrator should be clearly permitted to deduct the fee from any amount paid to the plan member or spouse. This would require an amendment to section 65 of the PBA, which prohibits any "transaction that purports to assign, charge... or give as security money payable under a pension plan".

Question 9: Structuring Alternatives for the Deferred Settlement Model

9. *DSM Structuring Alternatives: If the DSM is adopted, are there ways to structure the division other than creation of a separate pension for the non-member spouse that would be more advantageous? If there are, should these be available as options, and if so, at whose option would they be?*

It is the OBA's view that there is no single answer to the question whether any particular structuring option for a deferred settlement is advantageous or not. What is advantageous depends on the circumstances of each non-member spouse and each plan administrator. Therefore, it is the OBA's position that if the DSM is adopted, some flexibility should be built in. The extent of the flexibility should depend on the nature of the triggering event:

- retirement at the member's normal retirement date;
- termination of employment before normal retirement date but after becoming eligible for early retirement; or
- pre-retirement death of the member.

There are two main settlement alternatives under the DSM, a **separate pension paid from the plan to the non-member spouse** and a **commuted value transfer out of the plan** (a "locked-in transfer"). The Family Law Section of the OBA submits that the non-member spouse should not, in any scenario, be forced to take a transfer if the member is able to take a pension and that a spouse receiving a locked-in transfer should have the same range of options as is available to members who have this right.

It has been suggested that the direct purchase by the plan administrator of an annuity for the non-member spouse would lead to conflict with section 147.4 of the *Income Tax Act*. Study is necessary to determine whether such a conflict would arise. If it would, that option for the non-member spouse should be excluded. If there is no conflict, the option of direct purchase of an annuity should be available to a non-member spouse who transfers a lump sum value from the plan.

Retirement

The OBA believes that where the trigger is the member's normal retirement date, the best approach would be to permit a choice of settlement options for the non-member spouse. The non-member spouse should be entitled to elect either a separate pension in a life only form (with or without a guarantee period, as permitted by the terms of the plan) or a locked-in transfer. The OBA believes that this election should not be put to the spouse until the member's pension calculations are being performed upon the member's actual retirement (as opposed to requiring this decision to be made when the separation agreement is finalized). Since the spouse's age will often differ from the member's age, it would make sense to provide the transfer option for the non-member spouse regardless of the member's age and even if the member does not have the option. This approach maintains flexibility for the spouse, while at the same time creating the possibility that the administrative burden of managing two separate pensions may be lessened.

Termination

(i.) Before normal retirement but after eligibility for early retirement

The OBA supports similar options where the trigger is the member's termination of employment before normal retirement date but after becoming eligible for early retirement. However, in order to eliminate potential confusion and to streamline administrative processes, we recommend that the separate pension option be limited to a choice of either an immediate pension at the time of the triggering event or a deferred pension payable at the non-member spouse's age 65. The non-member spouse's election to take a locked-in transfer, immediate pension or pension deferred to age 65 should be required at the time of the triggering event and should be irrevocable. For a deferred pension, there must be a provision that if the non-member spouse dies before age 65, the commuted value of the pension is paid to the spouse's estate or beneficiary.

(ii) Before eligibility for early retirement

Where the triggering event is the member's termination of employment prior to becoming eligible for early retirement, the Pension and Benefits Section of the OBA does not believe that a separate pension for the non-member spouse is appropriate. Rather, the Pension and Benefit Section believes that only a locked-in transfer should be provided in order to ease the administrative burden of pension plans.

In contrast, the Family Law Section believes that non-member spouses should be entitled to the same options as the member. If it seems advisable to require the spouse to take a locked-in transfer where the value of the member's pension or the non-member's interest is small, reasonable definitions are required.

Pre-retirement Death

The OBA believes that if the triggering event is the death of the plan member before employment terminates the benefit available to the non-member spouse should not differ from the pre-retirement death benefits otherwise payable from the plan. (See also question 11). Eliminating the separate pension option altogether in these scenarios will alleviate some of the administrative burden for pension plan administrators. Therefore, it is the OBA's submission that the non-member spouse should be given a lump sum cash payment or a transfer to a non-locked in RRSP on the pre-retirement death of the member (as pre-retirement death benefits are not locked in under the PBA).

Question 10: Subsequent Spouses

10. *Possibility of Subsequent spouses: There is a possibility that the member spouse will have entered into spousal relationships with one or more individuals between the date of marriage breakdown and the date that the pension comes into pay. Does the DSM need modification so as to deal with this possibility?*

The DSM does not need modification to deal with the possibility that a pension owner will have entered into one or more subsequent marriages between the date of marriage breakdown and the date the pension comes into pay. An individual cannot be married to more than one spouse at a time. Each spouse may potentially receive a share of the pension accruing *only* during the years of his or her cohabitation with the member spouse.

Question 11: Pre-Retirement Death Benefits under the DSM

11. *Pre-Retirement Death Benefits: If the DSM is adopted, should the non-member spouse, in the event that the member spouse dies before retiring, be entitled to a pre-retirement death benefit (or to a share of it if the member spouse acquired another spouse or spouses following marriage breakdown)?*

Pension benefits are payable from a plan upon the occurrence of a triggering event: termination of plan membership, wind-up of the pension plan, retirement of the plan member or death of the plan member. A spouse's entitlement to a division of the pension plan assets would also be paid upon the occurrence of the member's triggering event. In the case of a member spouse's death before retirement, the non-member spouse should be entitled to a share of the death benefit, as otherwise his or her pension interest would be frustrated.

If the non-member spouse does not receive a right to a *pro rata* share in the pre-retirement death benefits, then the member spouse would need to obtain life insurance to secure the DSM interest for the non-member spouse, adding to the transaction costs of a matrimonial settlement. Furthermore, some member spouses may be uninsurable at all or at a reasonable cost because of age or health concerns.

Please see the responses to questions 9 and 10 for further suggestions on the division of the pension in the case of the plan member's death before retirement.

Question 12: Pensions in Pay

12. *Pensions in Pay: What rules should apply where payment of pension benefits had already commenced before the spouses separated?*

Many of the uncertainties associated with valuing a pension disappear if the pension is already in pay when the spouses separate. The plan member has retired and is no longer accruing any further credits and the applicable plan terms have been fixed. Retirement may, however, give rise to an additional pension valuation issue if the non-member spouse is entitled to a spousal survivor pension.

Subsection 44(1) of the PBA provides that: “Every pension paid under a pension plan to a former member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension.” This means that a spouse who separates from the plan member after the plan member’s pension has commenced, is entitled to a spousal survivor pension upon the plan member’s death. While subsection 46(1) of the PBA permits a spouse to waive this entitlement, any waiver must be submitted to the administrator before the plan member’s pension commences. After that date, the survivor pension has vested in the spouse and becomes his/her vested, contingent property which meets the definition of “property” in subsection 4(1) of the FLA.

As a result, the survivor benefit should be valued and incorporated in the pension property to be divided, just as the member’s retirement pension is valued and divided. The plan administrator should not be responsible for making any retroactive adjustments to pension payments that have already been made. The pension is valued as of the valuation date, and not the date of retirement.

Once the issue of the valuation of the spousal survivor pension is resolved, the next step is settlement, which involves the actual division of the payments.

Under the ISM, the present value of the spouse’s share of the member’s retirement pension as well as the spouse’s share of the survivor pension should be calculated and paid out to a locked in retirement vehicle selected by the spouse, and the member’s retirement pension should be actuarially reduced accordingly. Further to our comments on question 7 regarding the division of pensions in pay, it would not be appropriate for policy reasons to permit assignment to a non-member spouse of an amount that exceeds 50% of the total remaining value of the joint-and-survivor pension in pay attributable to the period of in-marriage accrual.

Under the DSM, the administrator should be required to divide the joint and survivor retirement pension on an actuarially equivalent basis into two independent life pensions payable to each of the member and the spouse for life. The non-member spouse does not receive a survivor benefit upon the member’s death.

Question 13: Plans Other Than Defined Benefit Plans

13. Plans other than Defined Benefit Plans: Is the current law satisfactory insofar as defined contribution plans, RRSP's and RRIF's are concerned? What about supplementary health plan benefits and dental plan benefits that an employer makes available to retirees? Are special rules needed in the case of pension plans that combine elements of a defined contribution plan and a defined benefit plan?

Defined contribution plans and hybrid plans

Under current law in Ontario, the only real issue regarding defined contribution plans is the determination of tax liability. Often this is solved by a “rollover” of the plan from the holder to the non-holder’s plan. The current law is therefore satisfactory.

Whatever method of division is accepted could apply to both parts of a hybrid plan. We note that in British Columbia, hybrid plans are divided in two steps. The defined contribution element of the pension is divided according to rules that apply to DC plans and the defined benefit portion is divided according to rules that apply to DB plans.

Whatever approach is taken to hybrid plans should be consistent with the Ontario government’s overall policy decisions.

Supplementary health benefits

Supplementary health benefits are not considered “property” for division purposes. These plans do not provide for continuation upon divorce and they usually do not permit the non-member spouse direct access to the benefits provided under the plan. Supplementary benefits are usually considered a support-related issue. More support is awarded, where possible, to compensate the non-member spouse for the loss of these benefits. Where there is a great need for these benefits, support is not a sufficient remedy as the member spouse usually does not have enough income to fully fund the need.

Most plans provide that the member spouse can designate only one spouse as beneficiary under the plan. Upon divorce, the first spouse is removed as beneficiary and, if there is no second spouse, then the benefit is lost. One option might be to allow the plan holder to continue coverage for the divorced spouse under the plan. In addition, it might be possible to require that such plans must, upon appropriate directions being executed, deal directly with the non-member spouse with respect to paying for the benefits covered. These would not be complete solutions to a spouse’s loss of benefits, as the divorced spouse would be removed as beneficiary if the plan member remarried or re-cohabited. The need to renegotiate the employer’s contract for benefits might be an obstacle.

Retirement savings vehicles not subject to the PBA

It is important to note that a portion of the pension to be divided on marriage breakdown may be paid from a Retirement Compensation Arrangement, in addition to payments from the registered pension plan. Since pension contributions are tax sheltered, federal legislation limits the annual pension benefit which an employer can pay to a retiree. The limit applies to registered defined benefit pension plans. Typically in such plans the beneficiary would receive a percentage of annual earnings times the number of years of service, the legislated maximum being 70 percent of recent earnings. Retirement

Compensation Arrangements are not subject to the PBA. Therefore, if pensions are removed from the definition of family property in the FLA, the Law Commission of Ontario must ensure that supplementary pension arrangements that are outside of the scope of the PBA are included in the new pension division scheme. To be clear, it would not be enough to house the new regime rules entirely in the PBA because there are many supplemental pension plans that are not subject to the PBA.

Question 14: Where Both Spouses Have Pensions

14. Where Both Spouses have Pensions: Are special rules needed for this situation? What if one pension is a defined benefit pension and the other is a defined contribution pension?

The OBA submits that no special rules should be applied to the division of pension benefits where both spouses have pensions, regardless of whether the spouses belong to the same plan or different plans or whether one is a defined contribution plan and the other is a defined benefit plan.

The Pension and Benefits Section of the OBA notes that the adoption of the ISM method would alleviate any discrepancies between the division of defined benefit pensions and defined contribution pensions;

Question 15: Canada Pension Plan Credits

15. CPP Credits: Should credits under the CPP be excluded from the definition of “family property” under the FLA? Is legislation needed to address whether and how such credits are to be taken into account under either the ISM or the DSM? Should Ontario enact legislation allowing spouses to agree to opt out of the equal division of credits provisions of the CPP?

The longstanding and widespread practice in Ontario when addressing property division issues under the FLA has been to disregard the existence or value of CPP entitlements. Family law lawyers advise spouses of their right to apply for a division of credits under the Canada Pension Plan. It has been helpful to economically vulnerable spouses who need retirement income to know that a division of credits will produce some CPP income. The CPP is a self-contained program which operates reasonably fairly and spouses do not, for the most part, require a lawyer’s assistance in arranging for the credit division.

If there are any problems in the operation of the Plan, it would be preferable for these to be the subject of reform at the federal level, rather than for Ontario residents to have to seek legal advice before applying to divide credits.

It has been to the benefit of all concerned that there has been no means to opt out of this federal program. It would not be helpful to spouses for one of them to be subject to pressure from the other to give up this right. In summary,

- CPP credits should be excluded from the definition of “property” under the FLA;
- No further legislation is necessary to take these credits into account;
- Ontario should not adopt legislation to allow spouses to opt out of the CPP pension credit division program.

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