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PENSION DIVISION: THE NEW REALITY

HISTORICAL BACKGROUND

The 1986 *Family Law Act* created a system of property division which continued largely unchanged until the end of 2011, and remains so today, with the exception of how pensions are treated. Under the Act, pensions are specifically defined as property and required to be included in an individual's net family property (NFP). In the years since 1986, lawyers practising in family law had struggled with the complexities of dealing with pensions. In part, this was because it was very difficult for lawyers and clients alike to accurately assess the value of an asset which could not be converted to cash and which was not to be received until some unknown point in the future and for an undetermined period of time.

In addition, further difficulties arose at the stage of settlement of an equalization entitlement. Often, the payor spouse lacked the cash to make the equalization payment, especially if the payment was in large part due to an interest in a pension, when that pension was not convertible or exigible. Many spouses felt it was unfair to have to give up an interest in a home, or otherwise use up a cash asset to meet an equalization obligation, when the obligation related to an asset they could not put their hands on.

With the passage in 2009 of Bill 133, which amended both the *Family Law Act* (FLA) and the *Pension Benefits Act* (PBA), and the promulgation of new Regulations in 2011 under the PBA, all of which came into force on January 1, 2012, a new regime began both with respect to how value is determined, but also with regard to how an equalization payment may be settled.

The new law applies to all spouses, regardless of the date of separation, unless there exists an agreement, order or arbitration award predating January 1, 2012 which resolved the issue of equalization.

In the fourteen months since the amendments came into force, there has been little judicial treatment of the new provisions, but there now exists a great deal of practical experience on the part of lawyers in implementing the new law. Questions still arise about the implication of the reforms on our practices and on the rights and entitlements of our clients. It is fair to say that the new settlement options have introduced some welcome opportunities. However, the determination of value is marked with more confusion, complexity and controversy than had been hoped.

WHAT HAS NOT CHANGED

- Pensions remain property to be included in a spouse's Net Family Property (NFP).
- The manner of calculating an equalization payment is the same.
- The valuation of Defined Contribution (DC), as opposed to Defined Benefit (DB) pensions is largely unchanged.
- Spouses continue to assign a value for future income tax on pension income, and that value may be inserted as a deduction in the spouse's NFP calculation.
- Pension division continues to be subject to a (revised) 50% rule under the PBA.
- The customary practice of excluding the value of an interest under the Canada Pension Plan from a spouse's NFP will continue, supported by a new statutory provision specifically exempting the value of CPP pensions from inclusion in NFP.

WHAT HAS CHANGED

- The value of a DB pension interest is now calculated according to new rules.
- With certain exceptions, the value of the pension is determined by the pension plan administrator, at the request of a member or a spouse.
- The administrator may charge a fee for creating a statement of value.
- The manner of settlement of an equalization payment is governed by new discretionary rules. Therefore, the extent to which an equalization payment is funded by a cash payment or a transfer of funds out of the pension, depends on an individual family's circumstances.
- Only with the consent of the pension plan, and in the case of a pension not in pay, a spouse could in theory become a member of a plan and share the pension income*. However, the Regulations which have been passed do not yet contain the provisions needed to implement this.*
- A pension in pay prior to separation *may* be divided at source and the spouse will receive a share of the income stream directly from the pension plan. Discretion appears to exist with respect to obtaining a division of income for pensions in pay.
- Existing "if and when" agreements and orders will continue to be implemented but no new such agreement or order will be enforceable if dated on or after January 1, 2012. However, it is possible to vary or amend such 'grandfathered' agreements and orders, to "facilitate and effect" the pension division.
- *Only if the spouses consent*, unmarried spouses will be able to effect a pension transfer or division, and married spouses may include a period of cohabitation prior to marriage in determining the pension's value.

DETERMINING PENSION VALUE UNDER THE NEW RULES

When reform was introduced, the Ontario government adopted the recommendation of the Law Commission of Ontario to standardize the determination of value along the lines of a “hybrid termination” valuation. The new method of calculating value lacks the individual customization that was previously seen, and which led to parties debating issues such as age of retirement, future indexation and (in some cases) shortened life expectancy.

In the new regime, the result is more of a “one size fits all” approach which certainly simplifies the calculation and reduces the likelihood of conflict arising between spouses.

While this approach still gives rise to some concerns regarding fairness in an individual case, a party’s ability to challenge the determination of value is largely taken away, so long as the pension plan has complied with the Regulations in calculating value.

In some cases, a solution to perceived unfairness in value lies in ensuring that the equalization payment (or at least that part of it that is referable to the pension value) is made by using the pension itself. This will be addressed in further detail in the section on Settlement.

New Terms:

Family Law Valuation Date: essentially the same as “Valuation Date” under the FLA

Preliminary Value: the calculation of pension value to be made by the pension plan administrator in accordance with the new Regulations

Imputed Value: that part of the Preliminary Value that accrued during the marriage (a pro–rata calculation)

Statement of Family Law Value (SFLV): the document produced by the pension plan administrator that establishes the value of the pension

The Prescribed Calculation

A defined benefit (DB) pension is one that promises an amount of future pension income that is determinable by years of service or other such measure. A defined contribution (DC) pension is one by which an employer promises only to

contribute certain monies and to invest those monies. No guarantee is made as to future pension income.

The preliminary value of a DC Pension is simply the total of all contributions plus interest. Thus the imputed value is easy to ascertain, since it is the increase in the balance in the member's account from the date of marriage to date of separation.

The preliminary value of a DB Pension is determined by a new formula, which determines three separate commuted values (representing three possible dates of retirement). These are then combined but with a different weight assigned to each value, depending on the "T" factor. "T" is the number of years until the member of the pension plan can take early retirement with an unreduced pension. Therefore, the greater the years of service, the more the preliminary value will be weighted towards an early retirement (i.e. higher) value of the pension. This formula is how a "hybrid-termination" value is achieved.

Rules along the above lines exist for hybrid plans, those that are a combination of DB and DC pensions.

The mortality tables used will now be unisex, so account will no longer be taken of the different life expectancies of men and women.

The pension administrator will also place a value on the spouse's survivor benefit where the parties separate after retirement. The value of the survivor benefit is an asset (sometimes one of considerable value) of the spouse and must be included in the spouse's NFP.

Some Pension Values Are Not Included in the SFLV

It is essential to note that not every component of a pension will necessarily be included in the value calculated by the administrator, and the following is a list (which is not necessarily exhaustive) of interests we must be especially alert to:

- pensions which are not governed by the PBA (but are regulated by other jurisdictions);
- additional voluntary contributions (these are to be disclosed but not included in the statement of family law value);
- non-guaranteed (ad hoc) indexing (to be disclosed for the three years prior to separation, but not included in value);
- Supplementary Pension Plans (SERPs), which are not governed by the PBA.

Each of the above requires individual attention, and sometimes expert advice.

There will still be a need for certain interests (such as SERPs) to be valued by an independent expert such as an actuary.

There is some question as to whether administrators of non-PBA regulated pensions will produce the relevant information to enable valuation pursuant to the new PBA rules (they cannot be compelled to). In any event, the new section 10.1(2) requires all non-PBA interests to be valued in accordance with the PBA although the section does make reference to “where reasonably possible” and “with necessary modifications”. If such a plan does not provide a value in accordance with the regulations, an actuary must be retained to prepare a valuation unless the administrator is prepared to value the plan using the PBA formulae.

Remember as well that each spouse is entitled to a deduction for contingent tax liabilities (see the revised definition of NFP in s. 4(1)(a) of the FLA). These will have to be individually determined based on projected future income tax rates for the spouse with the pension.

Shortened Life Expectancy

One highly debated aspect of the new Regulations is that only very limited account will be taken in determining the value of a pension of a person with health issues that affect normal life expectancy. Only when the Shortened Life Expectancy (SLE) provisions of the PBA are engaged will this affect value. SLE is only available where a pension member files medical proof that death will occur within two years. A plan member who qualifies can apply to withdraw the commuted value of the pension.

SLE will affect the pension valuation only if an application for SLE is filed prior to separation, or if the application is filed within six months of separation *but before* the administrator receives an application for a statement of value. In this case, the physician must offer an opinion that the SLE circumstances existed on the date of separation.

This is a significant departure from the former practice whereby any spouse with a life expectancy that was significantly reduced by a health issue could make an argument, based on medical evidence, to discount the value of a pension to reflect the fact that he or she will not live to collect the full value.

Given the limited time frame of eligibility for taking into account SLE, lawyers seeing a client for the first time must immediately enquire as to whether such circumstances exist for the client or the spouse. The ill client with a pension must understand how making the SLE application might affect the spouse’s equalization entitlement. The client whose spouse is ill must be aware of the effect of the timing of the request for the pension statement.

For all other parties with significant health issues, lawyers must creatively argue the settlement options to strive for fairness of outcome.

Pension Plan Changes or Deficiencies in Funding

Special rules exist in a number of circumstances.

If a pension plan is being wound up in whole or in part effective prior to the date of separation, the value will be the commuted value on date of wind up, with interest to the date of separation.

If, before separation, a surplus properly qualifies for payment to members of a pension plan (and the payment has not been made by then), the value of the member's interest in the surplus is included in the value of the pension interest.

The new rules determining value do not take account of whether a pension plan is underfunded. Underfunding may be a factor for either or both spouses or a court in determining whether or not to settle the equalization payment by a transfer of a lump sum out of the pension plan. The financial health of a pension plan can be determined by reviewing the "Transfer Ratio", which must be disclosed in the statement of value. A Transfer Ratio is a figure that every pension plan must report to the Superintendent of Financial Institutions every three years. It may be necessary to seek professional assistance in understanding the significance of a Transfer Ratio.

Particulars of a wind up or surplus, as well of details of the Transfer Ratio, must be disclosed in the statement.

Advising the Client on Value Issues

The expectation underlying the new legislation was that spouses attempting to resolve the equalization of their net family properties would now be spared the costs of dueling actuaries and prolonged debates over which assumptions (e.g. date of retirement, indexation, etc.) should apply in determining the correct value to assign to the pension. These issues had frequently prevented early settlement and lead to costly trials at which each side would present expert evidence (usually the testimony of an actuary).

Under the new regime, the value of a pension is now statute mandated, and not an issue over which a judge retains the power of determination. Parties are entitled to rely on the SFLV (the statement produced by a pension plan administrator). The administrator is obliged by the PBA to calculate all of the (PBA regulated) components to value in accordance with the prescribed

regulations (Regulation 287/11). The guesswork involved has been removed and replaced with a uniform method of determining value. This will inevitably lead to concerns on some clients' parts that the value is less advantageous than they would have expected previously (some, of course, will find it more so). For example, men might claim to be disadvantaged by the fact that unisex mortality tables are now employed, since the male mortality tables used under the previous regime had resulted in lower values (this was so because statistically they do not live as long as women). Nevertheless, this does not provide a ground to challenge the SFLV.

As lawyers, most of us are not equipped to determine if a SFLV has been prepared accurately and in accordance with the regulations. Many lawyers are therefore unsure about how to advise clients. Is there room for debate as to how pension administrators ought to interpret and apply the regulations? Should the lawyer suggest a professional critique of the SFLV? Certainly in the case of high end pensions which contain components of value (e.g. Supplementary Plans) that are not regulated under the PBA, an actuary would need to be retained in any event. But for the vast majority of bread and butter pension interests, should the client be put to the expense of retaining an actuary, on top of the already hefty fee charged by the pension plan?

This choice must be put to the client, who should receive an explanation of the nature of the new mandated valuation scheme and be told that the lawyer cannot comment on the accuracy of the calculation (although the lawyer should ensure that the correct historical information – dates of birth, marriage and separation, etc. – has been imported into the report, and presumably the calculation). Not every client will wish to expend further funds on retaining an actuary to critique their own or their spouse's SFLV, but some may.

If an actuary believes that a SFLV is not correctly calculated, the lawyer could submit that information to the pension plan, or, if that proves unsuccessful, to the pension industry regulator, the Financial Services Commission of Ontario (FSCO). This scenario is unlikely to be common, especially with the large pension plans, all of which have made considerable investment in developing sophisticated programs and systems, and in training their staff. While error is not unheard of, one would expect most of the problems to be have been detected in the first year of implementing the new law.

The value of a pension must technically be included as an asset in a party's NFP. However, for practical reasons, it is not uncommon to remove it from the calculation where parties have agreed to divide the pension interest fully, either by means of a lump sum transfer or division of income. The remaining assets and liabilities can then be calculated to determine what other equalization entitlement exists between the parties.

Allowing for Income Tax

When including the value of the pension in NFP, a corresponding deduction must be inserted for the assumed future income tax liability the pensioner will incur when the pension goes into pay. Determining the rate of tax involves a projection of what the pensioner's income from all sources is likely to be after retirement. This, of course, involves much guesswork (since future levels of income producing assets and income tax rates cannot be known with accuracy), so commonly parties negotiate a rate which is a best estimate. Again, the client should instruct as to whether to seek a professional opinion on the issue, or calculate this themselves. Depending on the lawyer's experience, it may or may not be difficult for the lawyer to assist in estimating a rate, or the parties can simply agree. This is no different than coming up with a rate of tax for other income producing property such as RRSP's. The greater the income disparity and the more complicated a party's tax situation is, the more likely that professional help is warranted.

The spouse who will receive a lump sum transfer must have it deposited into a prescribed arrangement, where it is inaccessible until the spouse reaches the age permitted by the Income Tax Act. That Act imposes on the lump sum transfer the same restrictions for converting it into income as apply to the pension itself. The provisions of the pension plan for taking early retirement apply to the ability of the spouse to draw from the "prescribed arrangement" selected by the spouse, unless the funds have been used to buy an annuity. Usually, this could not be possible until at least age 55. Then, when the funds are withdrawn, they become subject to income tax. Therefore, a gross up allowance must also be made for this future tax liability on the part of the spouse receiving the lump sum transfer.

If you are grossing up the lump sum transfer, you must be sure that any such adjustment does not bring the transfer into contravention of the 50% rule. Usually, if a deduction for the member's tax consequences is made from the pension value first, before adjusting for the spouse's tax consequences, this can be avoided. However, a problem might arise if the spouse's tax rate is significantly higher than the member's.

If the pension value is being fully divided by lump sum transfer and the parties' future tax rates are not expected to differ greatly, it is not unreasonable for them to omit any tax adjustment for either spouse.

PROCEDURE FOR OBTAINING ADMINISTRATOR'S STATEMENT

- Either spouse may apply for the Statement of Family Law Value.
- The Administrator may charge a fee of $600 for valuing a Defined Benefit Plan, $200 for a Defined Contribution Plan or $800 for a hybrid plan

consisting of both types of plans *(some pension plans have indicated they will waive the fees, at least initially).*

- The administrator must produce the statement within 60 days and it must be sent to both spouses.
- Where there is a dispute as to the date of separation, the Administrator may send statements for two different dates, but may charge separate fees for each.

SETTLEMENT OF EQUALIZATION ENTITLEMENTS

With certain limitations, parties remain free to settle their equalization differences by means of domestic contract. Failing this they may be resolved by court order or family arbitration award. The available options differ depending on whether or not the pension is being received on the date of separation.

The options available are as follows:

A. When the spouse with a pension interest has not retired before the date of separation, the equalization payment (EP) can be satisfied in one of the following ways:

   1. a payment made in cash or by instalments of cash, or for other consideration (e.g. transfer of property) as was previously the case;

   2. a **transfer of a lump sum** from the member's pension to a prescribed (retirement) investment in the name of the spouse;

   3. a combination of part cash and part lump sum transfer from the pension plan (as in 1 & 2 above);

B. Where a pension is in pay at the date of separation, the EP may be satisfied in one of the following ways:

   1. a payment made in cash or by instalments of cash, or for other consideration (e.g. transfer of property) as was previously the case

   2. a **division of the pension income**

   3. a combination of part cash and pension income division (as in 1 & 2 above);

A transfer of a lump sum is not available when the pension is in pay on the date of separation and a division of pension income is not available *unless* the pension is in pay on the date of separation.

Note that income divisions must follow the prescribed rules under the Regulations. No further "if and when" divisions, as took place under the FLA prior to the amendments, are permitted for orders or agreements dated after December 31, 2011.

No settlement option involving the pension can be implemented without first obtaining the Statement of Family Law Value. Even when agreeing to divide the pension income, obtaining the SFLV first is a prerequisite.

DISCRETION TO DETERMINE THE METHOD OF PAYMENT

Lump Sum Transfer for Pensions not in pay

The broadest area of discretion in the entire new regime lies in how to settle an equalization entitlement. This may be the area which generates the most uncertainty and hence conflict at least until some guidance is developed in the caselaw.

Section 10.1(4) of the FLA lays out the following five governing factors regarding when to employ a lump sum transfer:

1. the nature of the assets available to each spouse at the time of the hearing;

2. the proportion of the spouse's net family property that consists of the imputed value, for family law purposes, of his or her interest in the pension plan;

3. the liquidity of the lump sum in the hands of the spouse to whom it would be transferred;

4. any contingent tax liabilities in respect of the lump sum that would be transferred;

5. the resources available to each spouse to meet his or her needs in retirement and the desirability of maintaining those resources.

This list is not exhaustive as the section specifically allows for consideration of "such other matters as the court considers appropriate".

This section allows much room for debate and delivers new tools to ensure certain policy considerations become a factor. For example, it is clear that a spouse does not have to be stripped of all liquid assets to make an EP, and that,

where a pension's value makes up a significant proportion of a spouse's NFP, there should be a proportional funding of the EP out of the pension.

This new settlement tool places behind us the era during which a pension holding spouse must give up substantial liquid assets (often including a share of a matrimonial home) in order to meet the obligations that arise from the value of a pension. It is no longer the case that a cash EP is the default rule. In fact, it would be fair and in keeping with the language of s. 10.1(4) to assume that the pension's value should routinely be shared using a lump sum transfer, unless unusual circumstances exist. Most spouses in an intact marriage view a pension as a source of future income security when the couple retires. Now that the pension itself can be more easily shared, there is no reason that each of them should not treat the resulting divided asset (the diminished pension for the pension holder and the locked in retirement vehicle for the spouse) as being earmarked for the same purpose, their individual sources of retirement income. While many spouses are leery of anything except a cash payment, they can come to appreciate the benefits of this future planning. From a public policy perspective, the news has been full of the concerns that Canadians do not save adequately for their retirements and that many face poverty when they leave the workforce. Furthermore, the pressures of demographic change are expected to leave the state increasingly unable to meet the needs of older citizens. The caselaw relating to the exercise of discretion in pension division will hopefully evolve to make a small but positive difference to the lives of individual spouses as well as the country's fiscal health.

Furthermore, the lump sum transfer can be used to ensure rational retirement planning for both spouses, which is a particularly important factor where there is a prospect of spousal support continuing beyond retirement. This may be a useful tool to avoid a future double dipping dispute.

If there is a concern that the value assigned to the pension is not fair, for any of the reasons mentioned earlier in this paper, there is ample support in the language of this section for an insistence on payment by lump sum transfer in proportion to the pension value as it relates to the total NFP.

The Pension Benefits Act sets out the requirements for a lump sum transfer, which can be made pursuant to an order, domestic contract or arbitration agreement.

The amount to be paid must be set out as either a dollar amount or described as a proportion of the value of the pension interest.

Under s. 67.3(2) of the PBA and s. 27 of the Regulations, the lump sum must go into one of the following:

1. another pension plan;

2. a life income fund (LIRA);
3. a locked-in retirement account (RSP).

The Act contemplated a further option, that the lump sum could in fact be retained in the pension plan to the credit of the spouse, if the administrator agreed and the circumstances were prescribed by regulation. Unfortunately, the Regulation has not yet prescribed such circumstances. It can only be hoped that a revised regulation does follow in the near future, as it is likely that spouses will be able to generate a higher retirement income from a well managed pension plan than options 2 & 3 above.
A spouse will want to know when it is that he or she will be able to draw funds from the locked in retirement asset to which the lump sum transfer has been paid. The pension plan administrator will be able to provide this information, since the terms of the pension plan will affect this and it may differ from case to case.

Division of Pension Income for Pensions in Pay

Where spouses separate *after* the retirement of a spouse holding an interest in a pension, no lump sum payment out of the pension plan is available. Instead, pursuant to Sections 10.1(5) of the FLA and 67.4 of the PBA, the parties may divide the income stream into two pensions.

Section 10.1(5) does not include the discretion structuring provisions which are found in Section 10.1(4) for lump sum transfers. Discretion is implied in Section 10.1(5) by the use of the term "may", but there is no guidance as to when, in what circumstances or why. Presumably, one can make reference to the same policy considerations as prompted the 10.1(4) provisions (which support sensible retirement planning for both spouses and tie the settlement to the assets which underlie the equalization obligation). In other words, a spouse with a pension interest should be able to meet an equalization obligation out of the pension itself before being required to liquidate another asset.

Bill 133 was enacted to remedy (among other problems) the dilemma faced by the pension holder who must pay a cash EP, where that obligation is directly connected to the value of a pension interest, notwithstanding the fact that the pension asset itself cannot be converted into cash to enable the payment to be made. Since a lump sum transfer is not available as a method of settlement with a pension in pay, the default settlement method for sharing the value of a pension in pay should be the division of the pension income, except in exceptional circumstances.

The pension income to be diverted to the spouse can be described as a dollar amount or as a proportion of the regular pension income instalments which the

member is receiving. Either way the resulting amount must comply with the 50% rule which creates a cap on the amount of income that can be diverted.

The pension will be paid in two income streams, one to the member and one to the spouse, of their respective interests, until the member dies. Thereafter, the spouse will receive the survivor benefit, unless the spouse has chosen to waive it (a possible component of an EP settlement in a separation agreement).

NOTE: In the absence of a clear provision to the contrary, the pension plan administrator will automatically adjust to credit the spouse of the pension member for the pension payments that were not divided in the period between the date of separation and the date the final settlement is eventually implemented. Caution must be taken in drafting agreements and orders in those situations where spousal support has been paid after separation and up to the pension income division, to ensure that the member does not effectively pay twice during this period of time.

It is an option for the parties to enter into an agreement which involves a spouse waiving the joint and survivor benefit and merge that interest with the spouse's share of the member's interest into a single pension which continues for the spouse's lifetime (it does not end when the member dies). This option cannot be employed without the consent of the plan administrator.

Revaluation of Pension after Transfer or Division

Upon a transfer or division being made, the administrator must adjust the value of the pension payable to the member. If a lump sum transfer or an income division is made, the pension value and hence future pension income of the member is adjusted following prescribed rules.

DIVISION OF PENSION INTERESTS ACCRUING OUTSIDE OF MARRIAGE

Where unmarried spouses consent by domestic contract, the spouse without a pension may apply for a lump sum transfer out of the member's pension or, if the pension is already in pay, for a division of the pension income.

This will occur only in those limited circumstances in which unmarried spouses choose to share pension value even though this cannot be compelled against the wishes of a spouse with a pension interest. For example, a common law spouse who faces an indefinite spousal support obligation, may chose to divert pension income under the PBA provisions. Or a spouse facing a strong trust claim may choose to settle it by either lump sum transfer or pension division, as the case may be.

The parties would, in their agreement, designate the dates for the commencement and end of their cohabitation. Only the member may apply for a statement of value.

Married spouses can also avail themselves of the PBA provisions to expand the period of accrual of pension value so as to include a period of cohabitation prior to marriage, but they cannot be compelled to do so.

TRANSITION ISSUES

Existing “If and When” Provisions

Since January 1, 2012, pension plans no longer are obliged to implement any new “if and when” agreements or orders. Existing agreements and orders (made before 2012) continue to be honoured. However, some old “if and when” agreements or orders contained poorly drafted provisions that made them difficult to put into force. To address these problems, section 67.6 of the PBA was created. It permits an amendment or variation to be made after January 1, 2012 “to facilitate or effect the division of the party’s interest” in a pension. Such an amendment or variation does not bring the old agreement or order into the new regime, such that the new methods of valuation or settlement can apply. It is not possible to convert an old “if and when” into a lump sum transfer from the pension.

IN CONCLUSION

The Bill 133 reforms have introduced some welcome changes to this vexing aspect of property division on marriage breakdown, particularly in widening the options for settlement of an equalization entitlement. However, there is still uncertainty as to the application of discretion rules in selecting a method of settlement, and that is likely to persist until caselaw clarifies the rules. In the meantime, many spouses are receiving divergent opinions from their lawyers and this creates obstacles to settlement.

The codification of the method of determining the value of pensions is also helpful, but is not the very simple, all inclusive determination that was hoped for, or that might have come with a completely different model (Deferred Settlement, i.e. division if and only when in pay). Valuation of pensions remains a process that may involve considerable costs in ascertaining those components of value that fall outside of the PBA.

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