



Topic: Pension Division on Marriage Breakdown

Opinion by: Justice Doug Campbell

Date: February 29, 2016

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*This memorandum was prepared by Justice Doug Campbell in reply to the request of ACJ O'Neil as outlined in his Notice to the Bar dated November 6, 2014. It represents Justice Campbell's personal viewpoint and may or may not require some adjustment to conform to the preferences or practices of individual Judges. That will be left up to the Judge and the lawyer, if any, involved. Readers who make use of the within material do so therefore at their own discretion and subject to their own judgment.*

### Formulation:

- (A) Pensions are Matrimonial Assets and are therefore subject to *prima facie* equal division at Marriage Breakdown, *but Statutory Division may not always be the best way to do it.*
- (B) There are 2 types of pensions: Defined Contributions plans and Defined Benefits plans.
- (C) There are 2 ways to give effect to a division (usually equal) of either type of plan:

- (1) The more simple, but sometimes undesirable method, is to create a division of that pension entitlement "**at source**" (**a Statutory Division**). This means that the Pension (*the pension that is already in pay*) or Pension Benefit (*the future entitlement to a pension*) or the deferred pension will be divided by the pension plan administrator. The non-member spouse will thereafter **own the divided amount afforded precisely** by the terms of the pension plan or the relevant statute or both. This can only be done where there is an enabling Statute.

There are 3 enabling statutes (actually there are more). Each statute has Regulations that will apply. The Statutes and respective Regulations are complicated and so the within discussion is intended to be general and somewhat simplified. The reader should refer to those documents and the plan Administrator when dealing with specific cases.

- (2) The more complicated but sometimes desired method is to create an "**asset trade off**" (which means that the Pension owner will keep the pension...usually all of it...in exchange for an arrangement whereby the other spouse will receive other assets or spousal support of a value accepted as being equal to half of the value of that pension entitlement). The complicating factor is that the pension entitlement must be valued either by Actuarial input or by negotiation in order to make a fair trade;

Lawyers, self-reps (and sometimes Judges) will decide which method to use and this involves a judgement call.

**Discussion:**

**“Defined Contributions Pension Plans”:** A defined contributions pension plan is one in which the eventual pension is a function of how much money was contributed (by the employee and employer). For example, if the total contributions were \$200,000, the pension member will have options at retirement time that will pay out whatever **monthly sum** \$200,000 will buy for the term chosen. In this sense, it is just like an RRSP. It is already a lump sum. Its value is \$200,000. The spouse should expect to receive \$100,000 (less tax and a present value discount, if applicable – see below).

**“Defined Benefits Pension Plans”:** A defined benefits pension plan is one in which the benefit is defined in the pension plan by way of some formula such as 2% x years of service x average final salary. There is **often** a 35 year maximum on the years of service and the percentage is not always 2%. “Final salary” has a definition. So, the annual pension may be 70% (2% x 35 years) of final salary (as defined). The pension bears no inherent relation to the amount of contributions. But the plan will usually provide for contributions **intended** to be sufficient to appropriately fund the pension; and it may not be the correct amount. More importantly, contributions do not dictate the eventual pension amount. The pension entitlement is not a lump sum. It is not like an RRSP. It is a contractual right to an **income stream**. Valuation of it is a complicated analysis.

**(Now, pursuant to PBA, a LIRA and a LIF can be the subject of a statutory division.)**

It is crucial to the process of choosing the method for an equalization of the pension (as between asset trade-off and statutory division) that the type of plan be identified. **A lump sum rollover creates investment management chores but provides a clean break as to retirement date planning.** Many PBDA and PBSA’s are defined benefits plans but they provide for **only** a commuted value lump sum rollover to equalize. By contrast, the PBA provides for only an income stream to equalize **a defined benefits plan**.

**(1) Division at source (a “Statutory Division”):** There are 3 main statutes which provide the mechanism **or both the mechanism and the access to the court** by which pension entitlements are divided at source. Almost all potential pensioners and their spouses in Canada are governed by one of those Statutes (which was not historically true) or other Statutes.

The attached charts provide a Summary of them.

Notes:

1. All 3 statutes define “spouse” to include a common law spouse.
2. They respectively require the following number of years of cohabitation to meet that definition:
  - a) PBA [section 2 (ax)]: 3 years, if at least one of them is married and 1 year otherwise; (The definition includes parties to a registered domestic contract regardless of duration of cohabitation, apparently);
  - b) PBDA: 1 year (section 2);
  - c) PBSA: 1 year (section 2).

3. In Nova Scotia, there are specialized statutes for dividing pensions for teachers, Members of the Legislature, Provincial Court Judges, certain former employees of Sydney Steel Corporation, employees of New Page and others who meet particular criteria. See regulation 19 (1) of the regulations pursuant to PBA.
4. The federal Judges Act provides for division of the Judges' annuity paid on retirement to federally appointed judges. **It contains an often applicable upper limit on the transfer.** Imagine the complications that arise from that fact!

**(2) Asset Trade-Off:** In order to trade hard assets against a pension entitlement, the member's entitlement pursuant to the pension plan must be valued. But, the **defined benefits pension** will be an income stream when it is divided pursuant to the PBA while the asset to be taken as settlement is not an income stream. Thus we need to understand capitalization. So, (except when their refund is the only available option due to a short history of membership in the plan, for example, or when the plan is a defined contributions plan) contributions, even after including the employer contributions, are not in my opinion a suitable value because they do not determine the amount of the entitled income stream.

If the plan is a **defined contributions plan**, the value for asset trade-off purposes will simply be the amount of the contributions less income tax if applicable (and less present value discount, if applicable), because the spouse can use 50% of those net contributions to invest in whatever vehicle she or he chooses in the same way that the member spouse would have done. However, if the plan is a **defined benefits plan**, a different conclusion applies.

If a spouse is to give up a PBA based entitlement to a division of pensions, the pension needs to be valued so that she or he receives an asset trade off that compensates for what was given up. Where applicable, this calls for a **defined benefits** income stream to be "**capitalized**" which is a very theoretical exercise. ("Commuted value" is the same concept except that the plan dictates the methodology.)

My simplified definition of capitalizing an income stream, i.e. converting it to an equivalent lump sum, is to ask the Actuarial Question (**usually answered in an Expert Report by an Actuary which is often contentious**):

"What lump sum of money would it take, invested at a specified and reasonable interest rate so that it will grow to the member spouse's presumed retirement date, to be sufficient to then be invested at a specified and reasonable interest rate so as to provide an income stream that is equal to the expected pension for the expected lifetime of the member spouse (discounted for the difference in tax treatment of the 2 alternatives, if any, and discounted for the time value of money, if applicable)?"

So, capitalization usually involves 6 theoretical and contentious assumptions any one of which may be attacked by the contesting spouse:

1. The choice of interest rate for the time period until retirement;
2. The choice of interest rate after retirement for the life of the Member Spouse;

3. The presumed retirement date of the Member Spouse;
4. The Member Spouse's Life Expectancy;
5. The difference in tax treatments for the 2 alternatives, if any.
6. The time value of money, if applicable ("present Value").

These assumptions will often need to be adjudicated.

If the capitalized value is transferred tax free (ie when the receiving spouse trades for tax free assets such as the Matrimonial Home), that pension value should be discounted to reflect the Income tax that the recipient spouse (not the member spouse, in my opinion) would have paid on a divided pension...say 35%, but see my FLPT's No. 14 for a deviation from that norm.

If the asset trade-off is payable before the pension income stream division would have been payable, it is my opinion that the above capitalized value should be further discounted to represent the time value of money (a present value discount) to recognize that the spouse is receiving the asset trade-off earlier than the **defined pension benefit** would have been payable pursuant to PBA. (Not so with PBDA or PBSA, where a lump sum occurs necessarily and immediately)

It should be noted that many pensions governed by PBSA and PBDA are defined Benefits pensions and yet they are equalized by a lump sum rollover of a commuted value paid immediately into a locked-in investment vehicle.

### Practice Suggestions:

1. Start by deciding whether there is an advantage or preference for **an Asset Division** instead of a **Statutory Division** or *vice versa* from the viewpoint of either litigant. Theoretically, the two can be made to be equal but perhaps, for example, that litigant **does or does not** want to have the management responsibility of investing that follows a Statutory lump sum division as required by PBDA or PBSA. (The PBA offers an income stream or in some cases a lump sum- see the Charts that follow). Maybe she or he wants a particular asset such as the Matrimonial Home and so a trade-off of the pension division will allow for that to happen. Maybe there is an age or life expectancy difference based on an actual terminal illness which has a serious impact on choice of method.
2. Do not take the easier route necessarily. (I am aware of case law that says that when conflict applies, the Statutory Division should govern. I disagree. The arrangement that makes sense for that couple should apply.)
3. Consider the impact of age differences or shorter-than-standard life expectancy as discussed in relation to CPP in my FLPT's No. 19 re: terminal illness. Consider leaving the pension intact while making an Asset Trade-off or paying time-limited spousal support thereby avoiding the loss of the pension in the event of the early death of the non-member spouse.

4. When both spouses have pensions, it is tempting to divide them both at source **because it is so simple**. But especially when there is a large age difference between the spouses or when one spouse has a terminal illness **or who wants the flexibility to retire without regard to her ex-spouse's retirement date planning**, a division of both pensions means that **early retirement** for one spouse will have to be done without the benefit of the money that comes from the division when the other spouse retires **if that spouse's pension division is an income stream governed by PBA**. (not so if PBDA or PBSA applies or if a lump sum is called for under PBA so long as the lump sum rollover will be "unlocked" by the desired early retirement date of that transferee). In other words, the division of both pensions is not necessarily a clean break. **Retirement date planning** may be seriously impaired by mutual division of the 2 pensions if at least one spouse has an income stream entitlement.
5. Be prepared in a settlement conference to pay something for the method that suits the litigant's interest when the other spouse resists.
6. **Actual (real life) example:** Two school teachers divorce while owning respective pension entitlements. On the advice of lawyers, they divide **both** pensions by way of Statutory Division, equally. **It seemed to be so simple and fair**. However, years later the wife retired from teaching at age 55 or so. After retiring, she learned that she would receive her divided (let's say 50%) pension; but she could not get access to her eventual 50% entitlement to her ex-husband's pension because he did not retire (remember, her access to his pension happens only when **he** retires). So, she hired a lawyer to see if the problem could be fixed.

Can the husband be forced to retire? No!

Can the wife get half of the husband's pension when she needs it? No!

Will the husband get ½ of the wife's pension immediately (when he does not need it).  
Yes!

The only obvious solution is that the wife must find a job, while "retired" as a teacher (or sue her former lawyer for her hard to quantify loss).

Moral of the Story: the two pensions should not have been divided by statute: Each spouse should have kept her/his pension. If there is an inequality of value between the two pensions, an asset transfer or spousal support should have been arranged by agreement or with the assistance of an Actuarial Report.

**Do not fall into this trap!!**

**Also, read the attached charts and their footnotes carefully.**

Chart A

Statute	Applies to:	Exemptions	When Paid	How Paid	Triggering Event
<b>Pension Benefits Act S.N.S 2011, C. 41 "PBA"</b>	<p>Sec.4: "...every pension plan that is provided for persons employed in the province".</p> <p>[Section 3(1)], ie where the "establishment of the employer is located and to which the person is required to report for work."</p> <p>So, it applies to all NS employees in pension plans, where the person is employed in NS except exempted plan persons and except those covered by PBDA and PBSA</p>	<p>Members governed by the following NS Statutes:</p> <ol style="list-style-type: none"> <li>1. the Public Service Superannuation Act</li> <li>2. Teacher's Pension Act</li> <li>3. Member's Retiring Allowances Act</li> <li>4. Provincial Court Act</li> <li>5. various Sydney Steel Pension Plans &amp; New Page</li> <li>6. various others: see Reg. 19 (2) &amp; (3)&amp;(5)</li> </ol>	<p>when the member Retires or ceases to be a member, but lump sums are payable forthwith</p>	<p>Reg. 247(1): for defined contributions plans: lump sum</p> <p>Reg. 248(1): for LIRA or LIF: lump sum</p> <p>Reg. 249(1): for defined benefit Plans: monthly Income stream</p>	<p>"Where a member... Is entitled to a pension benefit.... and the member....and that person' s spouse have been living separate and apart and there is no reasonable prospect of a resumptiion of cohabitation,..... [section 74 (1)]</p> <p>There can be a Supreme Court order, a written agreement creating the division or other prescribed method.</p> <p>74(2): It can not be more than 50%</p>
<p>Notes:</p> <ol style="list-style-type: none"> <li>1. Reg. 236: A division in unequal proportions under section 13 of the MPA may be made but doing so negates the operation of this statute.</li> <li>2. Reg. 237: The separation date must be specified in the Order or agreement.</li> <li>3. Reg. 238: A spouse is entitled to receive information necessary to determine the value of the pension benefit, etc.</li> <li>4. Reg. 243: A separate pension resulting from a division of a defined benefit must be equal to their proportionate share of the pension and be converted to a pension payable for the lifetime of the spouse and <b>must begin at the members retirement date.</b></li> <li>5. Reg. 244: A spouse is entitled to be paid the proportionate share of the pension until the earlier of the date when the spouse dies or the pension ceases to be payable. In other words it is for the spouse's lifetime.</li> <li>6. Reg. 245: If a member dies after the spouse obtains their proportionate share of the defined benefit, no death benefit is payable unless the member has designated the spouse as beneficiary.</li> </ol>					

Statute	Applies to:	Exemptions	When Paid	How Paid	Triggering Event
<b>Pension Benefits Division Act</b> <b>S.C.1992 C. 46 Sch II</b> <b>"PBDA"</b>	short answer: Armed Forces, RCMP, diplomats, Gov. General, Members of Parliament, et al.	none	(see next)	Sec. 7: short answer when the application is made  short answer: a lump sum rollover to a locked in vehicle	sec. 4: "pension benefits" where a court makes an order in divorce proceedings etc, or where separatoin has occurred for 1 year or more and there is an order or agreement

## Notes:

1. The division is effected by calculating a commuted or capitalized value of the pension earned during the period specified in the order which lump sum is then transferred to a vehicle specified by the transferee spouse such as a locked-in LIRA or LIF which means it cannot be accessed until the transferee reaches a certain age, usually age 55.
2. So, the statute does not provide access to the Court; it just provides a mechanism to divide the pension as agreed or ordered.

Pension Benefits Standards Act, 1985 R.S. 1985, c.32 (2nd Supp.) "PBSA"	see sec. 4(1)(2)(3)&(4) short answer: pension members employed by employers regulated federally in industries such as shipping, railway, ferry services, airlines, banks, radio broadcasting, telephone, etc. including Federal public service employees	employees excluded by regulation	(see next)	short answer: when the application is made, a lump sum is transferred to a locked-in vehicle	application supported by a court order or by assignment by a member  see sec. 25 "subject to provincial property law."
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2. So, the statute does not provide access to the Court; it just provides a mechanism to divide the pension as agreed or ordered, "according to provincial property law."