



**Topic:** "CPP Division on Marriage Break-Down"  
**Opinion by:** Justice Doug Campbell

**Date:** January 21, 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:**

- For the last couple of dozen years, we seem to have accepted the notion that the Canada Pension Plan (CPP) benefit must, without exception, be divided equally at Divorce or Separation time.
- The standard form of Divorce Order says so and is routinely used. (This standard form exists in no other province of which I am aware.)
- However, there are many circumstances, three of which come to my mind, when the equal division of CPP operates to the detriment of one spouse without a corresponding benefit to the other Spouse and therefore perhaps should not be done from the perspective of those Spouses.
- The rules for dividing CPP on Relationship Breakdown (often called "Pension Splitting") are very different from those that govern CPP divisions in an intact relationship (often called "Pension Sharing". See for example: [http://www.esdc.gc.ca/en/cpp/credit\\_splitting.page](http://www.esdc.gc.ca/en/cpp/credit_splitting.page) and [Tax\\_Matters\\_Toolkit\\_Lawyers\\_Eng.pdf](#)

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**Discussion:**

Those three circumstances are:

1. **When one of the spouses has a known terminal illness.** Morbid as it may be to speak about this, a division of CPP here will mean that the terminally ill spouse will receive the benefit of the CPP division for the short period of his remaining life and the "healthy"

spouse will endure the detriment of the division of the CPP for the many years left in her life expectancy. It might have been preferable to have negotiated for the healthy

spouse to pay Spousal Support (or extra Spousal Support, as the case may be, or some other testamentary or *inter vivos* compensation) to the other Spouse in an amount equal to or greater than the divided CPP value (the tax treatment can be the same either way). That way, the healthy spouse would keep that CPP money for the rest of her longer life expectancy with no loss of benefit to the transferee Spouse.

**2. When the Spouses are dramatically different in age and the Older Spouse has the larger CPP entitlement.** Dividing the CPP in this situation means that the transferor spouse loses money at a time when she needs it because of her age and often at a time when the much younger spouse would not need it because of his ability to be employed, **for example**. By the time the younger spouse needs the money (say, at age 65), the older spouse is either dead, in a nursing home or otherwise does not need the money. It may have been preferable to have negotiated for the transferor Spouse to keep her entire CPP and make some kind of secured testamentary or *inter vivos* gift or transfer (“a settlement”) to benefit the younger Spouse.

**3. When the "transferor spouse" has a "stacked employment pension" (which means that he will receive his CPP in addition to his employment pension) but the "transferee spouse" has a so-called "blended employment pension" (which means that she will lose an amount from her employment pension which includes her enhanced CPP pension.** A division of the CPP for that described couple means that the transferor spouse loses the divided amount while the transferee spouse gains nothing once her employment pension becomes payable because the amount received is subtracted from her employment pension. [If both spouses have a blended employment pension, the division is a “wash” for both spouses.]

**4. Dare I say that there is a fourth (after saying that I think of 3 situations?) The fourth may be this:** When these adult persons mutually agree that they do not want the division to occur for a multitude of reasons that are personal to them. These may or may not relate to the way they think about their former mutual finances or how they have divided their other assets. Or should Judges, lawyers and self-represented litigants insist on dividing CPP regardless of the Spouses’ mutual and independently formed wishes?

**Problem:** The Canada Pension Act provides that nothing stated in a Separation Agreement or Court order binds the Minister or interferes with the discretion to divide the CPP.

See section 55.2(2) of the CPP Act which confirms that fact but subject to section 55.2(3) which provides that an agreement can be binding on the Minister if an existing Provincial Law authorizes agreement not to divide CPP.

## 55.2

### Agreement or court order not binding on Minister

(2) Except as provided in subsection (3), where, on or after June 4, 1986, a written agreement between persons subject to a division under [section 55](#) or [55.1](#) was entered into, or a court order was made, the provisions of that agreement or court order are not binding on the Minister for the purposes of a division of unadjusted pensionable earnings under [section 55](#) or [55.1](#).

### Agreement binding on Minister

(3) Where

(a) a written agreement between persons subject to a division under [section 55](#) or [55.1](#) entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under [section 55](#) or [55.1](#),

(b) that provision of the agreement is expressly permitted under the provincial law that governs such agreements,

(c) the agreement was entered into

(i) in the case of a division under [section 55](#) or [paragraph 55.1\(1\)\(b\)](#) or (c), before the day of the application for the division, or

(ii) in the case of a division under [paragraph 55.1\(1\)\(a\)](#), before the rendering of the judgment granting a divorce or the judgment of nullity of the marriage, as the case may be, and

(d) that provision of the agreement has not been invalidated by a court order,

that provision of the agreement is binding on the Minister and, consequently, the Minister shall not make a division under [section 55](#) or [55.1](#)

**Solution (if there needs to be one):** The Minister's discretion is triggered by an application by one of the Spouses. Therefore, *and subject to a due process etc. argument*, it might be possible to provide in a Separation Agreement or Court order that the relevant spouse **shall not apply** for the division of CPP and that a breach of that promise would trigger liquidated damages calculated in an amount equal to the CPP division per month for the rest of the transferor Spouse's life. Obviously, this would usually be done when the “conceding” spouse receives compensation as called for above (eg. when a secured Testamentary or *inter vivos* transfer/settlement is made). That fact would go some distance toward adopting a “Can’t have your cake and eat it too” defense by the other Spouse. However, it would have been preferable for the Nova Scotia Legislature to join with the 4 other provinces (B.C., Alta., Sask. and Quebec) where the above mentioned enabling legislation exists. Perhaps the Law Reform Commission could expand its Matrimonial Property Act review mandate to potentially include this change.

**Conclusion:** Whatever might be the legal outcome of creative draftsmanship and even without legislative change, the automatic prescribed form of Divorce Order by which CPP must **always** be divided is not known to be followed in any other province and its efficacy should be questioned, in my opinion.

**Aside:** Two or three dozen years ago, when CPP division was enacted, many recipient spouses were not aware of their rights to that division and therefore lost those rights forever by not applying for it before the Divorce was processed! The federal government **later remedied** this unfortunate outcome by implementing a practice of sending a notice at the time when the Divorce "Clearance Certificate" was issued by the Central Registry in Ottawa which notice advises all divorcing parties of their right to apply for a division of CPP. Thus the information gap was closed. Problem solved! Even without this third party notice, a modern spouse would be made aware of the right to apply if the Agreement or Order requires or denies a CPP division.