ALBERTA LAW REFORM INSTITUTE

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DIVISION OF CANADA PENSION PLAN CREDITS IN ALBERTA

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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ACKNOWLEDGEMENTS

This report was one of a number of smaller topics identified by the Institute for the issue of brief final reports. The others were the *Bulk Sales Act* and *Section 16 of the Matrimonial Property Act*. As might be expected, even a small discrete area of the law requires careful setting of the context and delineation of the precise issues which are being reviewed.

This particular area, the division of Canada Pension Plan credits, has raised difficult questions relating to the policy behind the *Canada Pension Plan Act*, the impact of that policy on persons of differing means and different sexes, and the current practices under the *Matrimonial Property Act*. This relatively narrow topic nevertheless raises complex issues of policy and practice.

Christina Gauk is the Institute Counsel who has been responsible for guiding the research and coordinating the consultation with the necessary parties. This has included surveys and questionnaires administered to members of the Northern and Southern Family Law Sections of the Canadian Bar Association and extensive correspondence with representatives from other provinces and from the federal government. Ms. Gauk has led the Board to what it believes is a proper balance between the competing principles of the different areas of provincial and federal law bound up in the division of Pension Plan Benefits.

The proposals contained in this report are also consistent with the recommendations previously made by the Institute in its Report No. 48, *Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown*. Both reports could be enacted simultaneously.

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DIVISION OF CANADA PENSION PLAN CREDITS IN ALBERTA

PART I - EXECUTIVE SUMMARY

Background

The Alberta Law Reform Institute has considered the implications for Alberta law of the 1987 amendments to the credit-splitting provisions of the *Canada Pension Plan Act*. Under the old law, a divorcing spouse was entitled to a half-share of the total CPP credits accumulated by both spouses during the marriage, but had to apply for the division of credits to take place. The amendments remove the requirement for application. Division is now to take place when the Minister receives notification of the fact of divorce and other information necessary to effect the split. The new provisions also allow the provinces to pass legislation that would permit spouses to make spousal agreements to opt out of the division of credits.

The Canada Pension Plan is a contributory, partially-funded plan, which requires contributions throughout an employee's working life. The amount of pension resulting from these contributions is based on the number of months of employment, and on average earnings. Coverage extends to the spouse of the contributor: in an enduring marriage the non-contributing spouse is entitled to a share of the benefits; in case of the death of the contributor the spouse receives a survivor's pension; and on matrimonial breakdown the spouse is entitled to a half-share of the total credits.

Unlike provincial employment pensions, which are a form of optional, tax-sheltered savings and may sometimes be refundable on termination of employment, the CPP is mandatory and non-refundable. It is designed to further social policy by providing a basis for a retirement income for all working people and their spouses. The purpose of mandatory division of credits within that scheme is to ensure that retirement income will be available to women, who (because of past family commitments or generally lower earnings) suffer disproportionately from poverty in retirement.

The scheme created by the CPP Act for sharing of pension credits is essentially different from the method of property division specified by the provincial *Matrimonial Property Act*. The Institute asked whether in light of this basic difference, credit-splitting is an acceptable mechanism for dealing with the asset.

Alberta does not now have the legislation that would allow spouses to opt out of credit-splitting. The Institute considered whether Alberta should enact such legislation.

The 1987 CPP amendments have created two points of uncertainty. First, there is confusion among the legal profession and in the case law about the current status of opting-out clauses in spousal agreements. Though opting-out legislation has not been passed, spousal agreements are still commonly written to include a waiver of the CPP rights of the non-contributing spouse. Can these agreements be upheld? Second, does CPP credit-splitting have the effect of removing CPP credits from the pool of matrimonial property and the domain of matrimonial property law?

Institute Recommendations

In this report, the Institute makes the following recommendations to answer these questions and to resolve the uncertainty about CPP credit-splitting as it applies in Alberta:

Recommendation 1:

We recommend that the provisions for credit-splitting on matrimonial breakdown under the CPP Act be recognized as an acceptable mechanism for achieving the policy goal of the legislation, regardless of any conflict in principle with the scheme for property division on matrimonial breakdown under our provincial law.

The Institute recognized the importance of the goal of reducing the poverty of women in retirement, and regarded credit-splitting as one acceptable, if imperfect, method for achieving this goal. The Institute concluded that although credit-splitting imposes a method of dealing with accumulated assets different from that provided for under the *Matrimonial Property Act*, there is no constitutional conflict between the two sets of provisions: each can operate in its own sphere. The social purpose of the CPP scheme justifies the special treatment.

Recommendation 2:

We recommend that provincial legislation contemplated in section 55.2(3) of the CPP Act, which would permit spouses to agree that there is to be no division of CPP credits, not be enacted.

The Institute rejected a number of possible justifications for taking up the legislative option. It rejected the idea that a conflict exists between credit-splitting and existing provincial matrimonial property law. Other arguments in favour of allowing opting-out (consistency with the treatment of other assets; allowing spouses greater flexibility) were similarly rejected. None seemed to outweigh the social value of assuring the income security of non-contributing spouses. Inalienability was seen as an essential element of the CPP scheme.

Recommendation 3:

We recommend eliminating uncertainty in the existing law by enacting legislation that declares that provisions in spousal agreements that purport to waive or alienate a spouse's share of CPP credits or benefits are void.

At present, waivers of the non-contributor spouse's right to CPP credits are commonly included in separation and settlement agreements. The effect of these waivers made in the absence of provincial opting-out legislation is not clear. Even when a spouse has agreed to waive a right to the credits, he or she may later apply to the Minister for credit-splitting, and unless the province has passed opting-out legislation, the Minister will divide. If the contributor spouse attempts to recover the value of the credits by a court action to enforce the agreement, the outcome is uncertain.

The Institute pointed out that the only certain course at present is to negotiate property agreements anticipating that division will take place. The Institute's recommendation that any waiver by the non-contributor spouse of the right to CPP credits or benefits be declared void would make this the only course.

Recommendation 4:

We recommend that credit-splitting under the CPP Act is not to be interpreted as removing CPP pensions from the reach of provincial matrimonial property law. Though the right to credits is to be inalienable, the fact of equal division may be taken into account in determining the division of the remaining property.

Matrimonial property law covers all accumulation of property or economic gains during the marriage. Thus CPP pensions are within the scope of the *Matrimonial Property Act*. Where, as in most cases, division of matrimonial property is equal, including CPP would have no impact on the division of the remaining property. However, where division is unequal, the equal division of CPP benefits would be a factor to be taken into account in the division of the remaining property.

Making Credit-Splitting Automatic

In preparing this report to answer these questions, the Institute's research revealed that although the recent amendments were designed to make splitting automatic, this is not yet happening. At present, one or both of the parties must notify the Minister of the marriage breakdown and supply the information necessary to calculate the credit split. Ignorance or apathy of spouses about their rights may be the factor that is most significant to the existing low rate of requests for credit-splitting. The Institute points out the need for a mechanism to be created by the federal authority for routinely notifying the Minister of the fact of divorce and related information. Only then will non-contributing spouses receive the credits to which they are entitled in all cases of divorce (except where they had agreed otherwise in provinces with opting-out legislation).

PART II - REPORT

CHAPTER 1 - INTRODUCTION

A. Reason for the Report

The *Canada Pension Plan Act* contains provisions dealing with the division of CPP credits on matrimonial breakdown. The Act provides for a pooling and equal division of the credits that have been accumulated by both spouses. However, the Act contemplates that the provinces might pass legislation that permits spouses to opt out of this division by mutual agreement.

The first question we considered in preparing this report was whether Alberta should enact the opting-out legislation contemplated by the CPP, or other legislation related to this issue.

A second question arose from uncertainty in the law in relation to CPP credit splitting. Alberta has not enacted the opting-out legislation. The research undertaken for this report revealed confusion in the profession and in the case law about the effect of spousal agreements containing opting-out clauses under the present law. A related area of uncertainty is about whether CPP credit splitting removes CPP pensions from the pool of matrimonial property and the domain of matrimonial property law. The report contains proposals for resolving these uncertainties.

In the course of discussing these issues, the Institute also considered a more basic question. The CPP Act creates a scheme for division of a particular asset - CPP pension - that is essentially different from the method that the province has chosen for dividing matrimonial property generally. The question we asked is whether in light of this basic difference, CPP credit splitting is an acceptable mechanism for dealing with CPP pensions on matrimonial breakdown. The report summarizes this discussion, and the conclusion we reached.

The research also revealed certain weaknesses in the federal credit-splitting legislation. We note these, and the federal action that is called for if the provisions are to function effectively.

The Institute has recently issued its Report No. 48, *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*. This Report (which does not deal with CPP) recommends that a greater number of methods by which to divide

employment pensions under provincial jurisdiction on matrimonial breakdown should be made available to the courts. It would be convenient to enact the legislation proposed here at the same time as the changes concerning pensions proposed in Report No. 48 were being implemented.

B. Summary of Recommendations

The Institute's recommendations respecting the foregoing issues are as follow:

We answer the broad question - whether CPP pension credits ought to be split in the way provided for in the CPP Act - affirmatively. The predominant view was that the policy goals of the legislation justify the particular mechanism that was chosen. We recommend that this mechanism be recognized as a legitimate method of furthering the policy.

The remaining recommendations are: first, the province should not take up the option to permit spouses to contract out of the right to credit splitting; second, efforts by spouses to achieve this result in the absence of the contemplated legislation should be declared ineffective and void; and third, CPP credits, evenly divided and inalienable in the hands of each spouse should be included in the pool of matrimonial property (accordingly the fact of equal division could be taken into account in the balancing and distribution of the remaining property).

C. Form of the Report

The main body of the report consists of five chapters. Chapter 1 is the Introduction. Chapter 2 describes the legislation and the way that it operates, and the problems that have arisen in its operation. Chapter 3 considers the relationship between the credit-splitting provisions and provincial matrimonial property law. Chapter 4 contains a number of items of background information that helped the Institute to reach its conclusions. Chapter 5 outlines the choices for action that we considered, and the reasoning that led to our conclusions.

D. Abbreviations and Explanation of Terms

CPP Act refers to the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8, as amended. "CPP pensions" are pensions that are created under this Act.

"CPP credits" refers to unadjusted pensionable earnings, a phrase that describes total pensionable earnings averaged over a person's contributory period. The quantity of CPP benefits is based on this calculation.

"Non-contributor spouse" is used throughout to refer to a spouse to whom additional credits are attributed when the total credits earned by both spouses are added and divided. Such a spouse may in fact have earned credits through employment, but in that case, has earned fewer credits than the other spouse. "Non-contributor" thus encompasses both spouses who have earned no credits, and those who have earned fewer credits. For the sake of convenience the same phrase is used in either case.

MPA refers to the Alberta *Matrimonial Property Act*, R.S.A. 1980, c. M-9, as amended.

CHAPTER 2 - THE CPP LEGISLATION

A. The Purpose and Policy of the Act

CPP pensions are one component of Canada's income security system. Together with Old Age Security and Guaranteed Income Supplement, they are designed to provide a minimal level of income security in retirement. However, unlike OAS (a flat-rate payment) and GIS (a variable means-tested payment), both of which are financed by general tax revenues, the CPP is a contributory, partially funded plan. The Act requires participants to make direct contributions throughout employment to their own future income security. The quantity of benefits ultimately received relates to earnings and years of work. CPP thus complements the other pension payments by ensuring replacement of a certain proportion of pre-retirement earnings.

The coverage of the CPP Act extends to the spouse of the contributor. Under the terms of the Act, the contributions of each of the partners of a marriage give rise to benefits for both of them. In an enduring marriage, the non-contributor spouse may formalize this sharing by applying for an assignment of benefits.[1] In the case of death of the contributor spouse in an enduring marriage, the non-contributor is entitled to a survivor's pension. If the marriage breaks down, the mechanism by which the non-contributor spouse maintains the entitlement to a share of pension benefits is credit splitting - the equal division of the credits of both spouses accumulated during the marriage.

The policy base for the provisions in the Act that create a direct entitlement to a share of credits arising from the contributions of one's spouse, was expressed before the House of Commons by government officials.[2] It has two aspects. One is the idea that the contribution of a spouse working inside the home to the well-being of the family is as important or valuable as that of the contributor spouse, and should be equally compensated in retirement. Alternatively CPP credits can be thought of as representing deferral of income consumption until retirement by both spouses. The idea is that both spouses equally earn or save for the pension entitlement; to provide

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1 CPP Act, s. 65.1.

2 See Appendix B for excerpts from Commons Debates of May 9, 1977 and June 11, 1986. These excerpts cover the introduction for discussion of the motion for second reading of the original credit-splitting provisions, and of the recently-amended version of the legislation.

equal compensation for both, the legislation in effect requires that each spouse make CPP contributions on behalf of both him or herself and his or her spouse.

The second aspect is that income security in retirement is as important for non-contributor spouses as for contributors. The need for additional income in retirement is especially great for women. Women earn fewer CPP credits directly, and participate to a much lesser degree in employment pension plans.[3] Statistics show that women, particularly unattached women, suffer disproportionately from

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[3] Statistics reported in Labour Canada, "Women in the Labour Force" (1985-86) reveal the following: in December of 1984, 38.7% of women (and 54% of men) in the paid labour force participated in a pension plan. 36.8% of private pension plan members were women. Women constituted 35.9% of all CPP recipients.

A Pension Primer, a 1989 report by the National Council of Welfare, makes the following statements concerning women as CPP beneficiaries:

> Because there are proportionately fewer women than men in the paid labour force, proportionately fewer women wind up with their own CPP or QPP retirement pensions. Women who are members of the labour force are paid much lower wages than men on average, and they have proportionately more part-time jobs than men and fewer full-time jobs.
>
> The long-standing disparity between CPP and QPP benefits paid to men and women seems to be getting worse rather than better.

Referring to a graph showing the distribution of CPP benefits for men and women who started getting pensions in 1977 at age 65, and for those who started a decade later in 1987, the report continues:

> The graph for 1977 shows that most men but relatively few women retired with CPP pensions of 80 percent or more of the maximum possible pension. On the other hand, proportionately more women than men wound up with pensions of less than 20 percent of the maximum.
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> By 1987, the number of women starting to claim CPP retirement benefits was up sharply, but most of them wound up with meagre pensions because of low earnings or relatively few years in the paid labour force. The graph for 1987 shows large numbers of women getting pensions of less than 40 percent of the maximum. Meanwhile, many more men than women were getting pensions of 80 percent or more of the maximum.

poverty in their senior years.[4] The legislated sharing of CPP with spouses makes the plan more comprehensive in its coverage, and helps to alleviate poverty where this is needed.

Credit splitting on marriage breakdown is a response both to entitlement (the idea that spouses - usually women - who are homemakers have indirectly earned or saved pension credits) and to need.[5]

B. The Credit-Splitting Mechanism

The credit-splitting mechanism operates as follows: when notified of the fact of divorce and other information necessary to effect a split, the Minister adds the pension credits earned by both spouses during the period of marriage, divides them

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4 In the recent statistical publication by the Government's National Council of Welfare, *1989 Poverty Lines*, it is stated at page 7 that:

> "Unattached elderly women (ie., those who live alone or in a household where they are not related to other members) run a very high risk of poverty: 40.3 percent were poor at last count."

A 1984 publication of the same organization, *Sixty-five and Older*, reported that of the estimated 422,000 low income unattached elderly in 1982, 337,00, or 80%, were women. See also *Women and Poverty Revisited*, National Council of Welfare, Summer, 1990.

The main reasons for the poverty of elderly women are said to be that they were not engaged in paid employment during their working years, that those who were employed earned low income, and that few of those employed had access to a pension plan. (See D. Pask, "Pensions and the Elderly: Selected Legislative Issues Concerning Pension Splitting", in Hughes and Pask, eds., *National Themes in Family Law* (Toronto, Carswell, 1988) 117 at 121.)

5 There are obviously many marriages in which either only one or neither of the rationales for credit splitting would apply. For example, the rationale that non-contributing spouses earn their entitlement would not apply to marriages in which both spouses make equal contributions both to CPP and in the home, or where one spouse makes no actual contribution to either. The rationale that the legislated entitlement is based on need would not apply where there are adequate alternate sources of income. The purpose of the legislation is to cover the situations in which the rationales do apply.

equally, and attributes one-half to the account of each spouse.[6] However, division is not to take place under certain conditions. If provincial law expressly permits spousal agreements that there is to be no division of pension credits, such an agreement binds the Minister, and the Minister is not to make a division.

The federal legislation also gives provinces the option to enact legislation that would make spousal agreements that there is to be no division of credits binding on the Minister (section 55.2(3)). According to officials, the reason for creating this option was to avoid conflict with provincial matrimonial property law.[7]

C. The Effect of the Legislation in Practice

As the following pages will show, credit splitting has not been a successful mechanism for providing CPP pensions for spouses of contributors.

First, credit splitting is not happening. There was and continues to be even after the recent amendments to the legislation, a very low rate of division. In most cases of matrimonial breakdown, contributor spouses are keeping their pension credits. Two factors may account for this. One is ignorance or apathy on the part of spouses as to their entitlement to share credits. The other is the existence of the practice of spouses of privately negotiating waivers by the non-contributor of the share of credits accumulated by the contributor.

A second problem is that the credit-splitting provisions - both the original ones, and the recent amendments to them - leave the law and practice in relation to spousal agreements concerning credit splitting in a troubling state of uncertainty and confusion.

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6 On separation, or death of a partner, with respect to either married or common law partners, the Act requires that an application for division be brought by one of the partners, and the Minister has discretion whether to approve such an application.

7 This explanation was given in a letter to Institute Counsel dated August 23, 1989 from Mr. P. Fortier, Director General, Programs Policy, Appeals and Legislation, Income Security Programs, Health and Welfare Canada.

(1) The Take-Up Rate Under Voluntary Credit Splitting

Under the pre-amendment legislation, credit splitting on divorce was voluntary in the sense that application was expressly required.[8] Under these provisions, the take up rate (the percentage of applications for division) was very low: fewer than 3% of couples applied for division.[9] In most cases, therefore, contributor spouses were retaining all of the pension credits they had accumulated, and their spouses were not receiving benefits.

(2) Deletion of the Requirement for Application: the Effect on the Take-Up Rate

The provision for credit splitting was changed by amendments proclaimed on January 1, 1987. Government officials described the 1987 amendments as making credit splitting on divorce "automatic".[10] The provisions deleted the requirement for application on divorce and for Ministerial approval of the application.[11] This has opened the way for credit splitting to *become* automatic on divorce. However, it is not automatic in fact. At present there is no mechanism for routinely communicating to the Minister the fact of divorce and the information that is required to effect the

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8 The application had to be within three years of the date of divorce.

9 These statistics were set out in a letter to Institute Counsel from Eileen Hornby, Status of Women Canada, as follows: "Between 1978, when credit-splitting was first introduced, and December 1986 (the last year from which data on divorce are available) there were only 13,310 requests for credit-splitting. During this period, there were 590,634 divorces; credit-splitting has thus been requested in only 2.3 per cent of all divorces".

10 See statements by Dr. Derek Maasland, Assistant Deputy Minister, Income Security programs, Health and Welfare Canada in Minutes of Proceedings of the Standing Committee of National Health and Welfare, June 13, 1986, at 6:22, 6:23.

11 Division remains elective for separation. There is no longer a time limit following divorce within which division must take place. Section 55.1(5) constitutes an exception to division. The Minister may refuse to divide if satisfied that the division would be to the detriment of both spouses.

split.[12] The initiative must still be taken by the parties, or one of them. Credit splitting is "automatic" only in the event that the Minister is notified.

The existing low rate of take up is very likely attributable in large measure to ignorance or apathy of spouses about their rights.[13] To the extent that this factor contributes to the low rate, the amendments could not and cannot improve it. Only if routine notification were put in place would non-contributors receive the credits to which they are entitled on divorce as a matter of course, whether or not they were aware of their rights and made the necessary application. If this step were taken, credit splitting would take place in fact in all cases of divorce excepting those in which the spouses had mutually agreed otherwise (and the province had enacted the legislation permitting such agreements).

However, without this mechanism, the deletion of the requirement for application has been ineffective to significantly increase the rate of credit splitting. As of September, 1990, only 24,781 applications for splitting under the CPP had been approved since the option became available in 1978, 3,514 of these in 1989. Since the institution of credit splitting, there have been approximately half a million divorces in which splitting could have taken place. The recent statistics show that the take-up

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12 The information which is required is as follows: Social Insurance Numbers of both spouses; whether the spouses continuously cohabited for at least one year; the number of months of cohabitation (the dates of any periods of separation); whether any of the conditions of s. 55.2(8) are met (whether benefits under the CPP or *Old Age Security Act* have ever been applied for or received); and whether there has been a spousal agreement or court order as to CPP credits.

13 Without empirical research, it cannot be said to what degree spousal agreements that there be no division account for the low take-up rate. The take-up rate has not significantly increased since enactment of the amendments made the Minister immune from such agreements. This might suggest that the practice of contracting out of division is not an important factor in the low rate. (Had it been, an increase could have been expected: as couples who would formerly have contracted out would have notified the Minister instead, thus increasing the rate.) However, a survey of the profession undertaken by the Institute shows that the practice of including such clauses continues despite the amendments. (See note 21, *infra*.) Thus the steady rate may not be a reliable indicator of the degree to which the low rate is referable to contracting out.

rate has risen slightly, to something over 4 percent.[14] There is clearly room for more improvement.

There is some prospect that a mechanism for routine notification will be instituted in the future.[15] If the legislation is to create an effective mechanism for the provision of pensions for both spouses, this federal action is called for.[16]

(3) Spousal Agreements Respecting CPP Under the Old Legislation

Under the pre-amendment legislation, agreements between spouses that there would be no application for division were binding on the Minister. This had been settled in a 1983 decision of the Pension Appeals Board, *Minister of National Health and Welfare v. Preece*.[17] The Board had ruled that a spousal agreement that the non-contributor would have no further claim on the property of the contributor by implication included an agreement not to apply for division of credits; as the contract

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14 The number of divorces in Canada for 1988 was 79,872 and for 1987 86,985. The number of applications for division for September 1988 to September 1989 was 3,396, and for the most recent year was 3,514. The dates for the divorce and credit-splitting statistics do not coincide precisely. However, assuming that the rate of applications for 1988 was no greater than 3,500, the proportion of applications to divorces for 1988 was approximately 4.4 percent.

15 See statements by Michael Hatfield, Policy Advisor on Federal-Provincial Transfers and Pensions, Office of the Minister of National Health and Welfare, in the Minutes of Proceedings of the Standing Committee on National Health and Welfare, June 13, 1986, at 6:31. Mr. Hatfield said that the government intended to obtain direct access to the information from the appropriate registries. In a letter to Institute Counsel dated Dec. 18, 1989, Mr. P. Fortier, Director General, Programs Policy, Appeals and Legislation, Income Security Programs, Health and Welfare Canada, stated that obtaining the requisite information through the federal divorce registry has proven to be inoperative, but that the Department was "exploring other administrative options in an effort to implement, to the greatest extent possible, an automatic division of credits on divorce".

16 The institution of such a mechanism might require provincial cooperation, but is not a matter of provincial responsibility.

17 June 30, 1983, 1983 CCH Canadian Employment Benefits and Pension Guide Reports, para. 8914.

precluded application for division, the Minister could not divide.[18] The existence of a spousal choice not to have credit splitting contributed to the low take-up rate for division, and detracted from the success of the scheme.

(4) The 1987 Amendments - the Effect on CPP Waiver Agreements

The purpose of the amending section 55 was to nullify the Pension Appeals Board's decision - to make spousal agreements such as that in the *Preece* case ineffective to determine whether or not the Minister divides (unless a province expressly permits such agreements).[19] According to officials, credit splitting became "mandatory".[20] Presumably it was anticipated that spouses, no longer having the power to direct the Minister not to divide, would no longer include waiver clauses in their spousal agreements.

If the aim of the amendments was as just described, it has not been achieved for Alberta. In this province the amendments have not eliminated spousal agreements concerning CPP. A survey of lawyers practising matrimonial law in the province revealed that clauses of various forms are still routinely included in settlement agreements.[21] Further, the amendments have given rise to two areas of uncertainty.

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18 This decision has been applied in a large number of subsequent cases dealing with the pre-amendment legislation.

19 The underlying motive for this legislation was explained by Mr. P. Fortier, Director General, Programs Policy, Appeals and Legislation, Income Security Programs, Health and Welfare Canada, in a letter to Institute Counsel dated Aug. 23, 1989. This was to preclude bargaining with CPP credits - to ensure that spouses will "retain, as a matter of right, a fair share of the credits towards which both contributed during the marriage".

20 The marginal note for s. 55.1 is "When mandatory division to take place". However, this term is not wholly apt. Credit splitting is mandatory in the sense that spouses do not have the power to opt out (unless the province allows it). However, it is not mandatory in the sense that the legislation decrees that it shall happen. As just discussed, most often it does not happen.

21 The survey sample was too small to be regarded as statistically significant, and the results have for the most part a merely impressionistic value. Nevertheless they do indicate what actually happens *some of the time*. The results respecting the practice of including clauses concerning CPP were as follow: more than half the respondents said that when acting for the spouse with the larger number of CPP credits, they normally seek the inclusion of

(continued...)

First, there is some question whether the Alberta MPA already satisfies the condition of section 55.2(3)(b) of the CPP Act that provincial legislation expressly permit spousal waivers. If it does, the legislation makes no meaningful change in Alberta. The better view is that it does not,[22] and that spousal agreements respecting CPP do not bind the Minister.

The second area of uncertainty is more profound. As just noted, in spite of the amendments removing the requirement for application, and though the contemplated opting-out legislation has not been passed in Alberta, non-contributing spouses continue to waive their entitlement to CPP in sposal agreements.[23] The effect of such clauses under the present law, and the advisability of continuing to include them in spousal agreements, is the subject of much confusion. Decisions from other provinces ruling that mutual releases of property impliedly constitute waivers of the right to share CPP benefits add to the uncertainty.

Each of these problem areas will be considered in turn.

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[21](...continued)
such clauses, while one-third sometimes seek them. Of those seeking agreement, two-thirds said they are normally successful, and one-third said they are sometimes successful. With respect to the situation where the practitioner is acting for the spouse with fewer or no CPP credits, just under two-thirds said they never agree to waiver, and just over a third said they sometimes agree. In response to a question as to what proportion of property settlement agreements with which respondents had dealt over the preceding year contained clauses either that there was to be no division of CPP credits, or that the contributor spouse would be indemnified in the event that division was effected, more than half the respondents said that between 50 and 100% of agreements contained the former type of clause and more than one-third said that between 50 and 100% contained the latter type. Only one-third of respondents said that 5% or fewer agreements contained the former type of clause, while one-half said that 5% or fewer contained the latter type.

An observation by James McLeod of the University of Western Ontario in a note to the *Fredette* case accords with this view of the current practice. See 16 R.F.L. (3d) 250, at 251.

[22] See the discussion at pages 17-18, *infra*.

[23] The clauses can take various forms - clauses that there is to be no division of credits, that there is to be no application for division, or that in the event of division the non-contributor spouse will hold the benefits paid in trust for the contributor.

(a) The MPA and section 55.2(3)(b) of the CPP Act

The provision that conceivably satisfies the condition of section 55.2(3)(b) of the CPP Act - that provincial law expressly permit spousal agreements showing an intention that there be no division - is section 37 of the MPA. Section 37 provides that the court's jurisdiction over matrimonial property does not extend to property, the status, ownership and division of which has been made the subject of a written agreement between the spouses.[24]

The argument proceeds on the basis that CPP credits are divisible matrimonial property. In Alberta, "matrimonial property" in the context of the MPA has been interpreted as including a right to a pension.[25] Insofar as section 37 gives the spouses power to make their own arrangements respecting matrimonial property, it gives them power over pensions - including CPP pensions. On this basis, section 37 is said to expressly permit spousal agreements showing an intention that there be no division. On this view, the CPP Act does not require that the governing matrimonial property law expressly permit spouses to deal with CPP pensions specifically. It is enough that provincial law expressly permits contracts as to matrimonial property. As CPP credits fall within this category, the legislation permits contracts as to CPP pensions.[26]

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24 Section 38 imposes certain formal requirements which must be met to make the agreement enforceable.

25 *Herchuk v. Herchuk* [1983] 35 R.F.L. (2d) 327 (Alta. C.A.). "Pensions" have been declared to be matrimonial property in most jurisdictions, either by specific mention in the statute, or by the courts' interpretation of "matrimonial property" in the context of the matrimonial property legislation.

26 The suggestion that provincial provisions allowing spouses to deal with their own property meet the requirements of the CPP Act was raised and analyzed by Diane Pask of the University of Calgary. In an article entitled "Pensions and the Elderly: Selected Legislative Issues Concerning Pension Splitting" (in Hughes and Pask, eds., *National Themes in Family Law* (Toronto, Carswell, 1988) 117 at 121), the author suggests three interpretations of s. 55.2(3)(b). Under the first interpretation, a provision such as s. 37 of the Alberta MPA is adequate. Under the second "narrow" or "stringent" interpretation, the provincial provision must expressly mention the CPP Act. Under the final, "moderate" interpretation, it is enough that provincial law permit the spouses to deal with "pensions"; CPP pensions need not be specifically mentioned. In Ms. Pask's view, the requirement in the CPP Act is ambiguously worded; there is an argument

(continued...)

This argument involves a unconvincing reading of the words of s. 55.2(3)(b). The phrase "that provision" in the section seems to refer naturally to the provision described in the immediately proceeding paragraph - that is, to a provision dealing with the division of CPP credits. The word "expressly" adds to this sense of the meaning of (b). Further, the reading suggested would mean that the amendment gives rise to no significant change to existing law in all the jurisdictions in which pensions are matrimonial property. The statements of policy by government officials clearly suggest that the intention was otherwise.

Finally, section 37 of the MPA is best described as preserving the spouses' powers to enter into contracts as against the power of the court to deal with the property. This section should not be interpreted as creating new powers over the property that the spouses would not otherwise have. Nothing in section 37 itself justifies interpreting it as giving spouses the power to direct the Minister whether to divide CPP credits. The provincial legislation that the CPP Act contemplates would give the spouses precisely this power. Provincial legislation that does not even mention CPP should not be regarded as satisfying the condition of section 55.2(3)(b), and giving rise to such a power.[27]

(b) Spousal agreements under the present law[28]

Formerly, because application was a prerequisite to division, spouses could agree not to apply for division, and, as in the *Preece* case, such agreements were enforced directly: if an agreement existed, the Minister did not divide credits.

Under the amended legislation, agreements will not be enforced directly. If the information is received, the Minister will divide the credits regardless of the intention of the parties and regardless whether the remaining property was settled on the basis that division was not to take place.

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[26](...continued)
that clearer words are required to deprive the parties of the fundamental right to contract.

[27] Provisions which more obviously meet the conditions of s. 55.2(3)(b) have been enacted in Saskatchewan. See pages 37-8, *infra*.

[28] It will be assumed for the purpose of the following discussion that the requirements of s. 55.2(3)(b) have not been met in Alberta, for the reasons discussed in the foregoing section.

In view of the amendments it is now inadvisable to settle property anticipating that division will not take place. As the cases reveal, spouses do apply for division even where they have agreed not to do so. Even if the parties themselves adhere to the agreement and do not inform the Minister, a mechanism for routine notification may yet be put in place, or the Minister may receive the requisite information from some other source in individual cases. There is therefore a likelihood that the result will be other than that to which the parties agreed.

In the event that division takes place though the parties had agreed that this was not to happen, the contributor spouse may bring an action to enforce the agreement.[29] However, the outcome of such an action is by no means certain, especially in Alberta, where the issue has not yet come before the courts. Further, whatever result does follow where an action is taken is likely to be less than satisfactory.

(i) Compensating the non-contributor

One possibility is that the court will compensate the contributor for the unanticipated result by imposing a trust on the non-contributor. This was the course taken at the District Court level in Ontario in the *Albrecht* case.[30] The court had reasoned that an agreement that the wife released the husband from future claims or interest in his property constituted an agreement not to apply for division of CPP credits. A request by the wife that the Minister divide credits was said to be a breach of this contract. The court imposed a trust on the wife, commenting that she should not be allowed to profit from "breaking the contract". This decision was subsequently followed by the British Columbia Supreme Court in *Coe v. Coe*.[31]

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29 Such an action may be based on breach of the express or implied agreement that there be no division or no application for division. There may also be a clause in the agreement to the effect that in the event division occurs despite the agreement that there is not to be division, there is to be a trust in favour of the contributor. The same considerations as to likely outcome apply in either case.

30 *Albrecht v. Albrecht* (1989) 23 R.F.L. (3d) 8 (Ont. Dist. Ct.).

31 *Coe v. Coe* was a March 1990 decision of the B.C. Supreme Court. In this case the agreement was to be a settlement of all rights against the other with respect to the other's property, including "all claims which either may bring pursuant to any statute, whether Federal or Provincial". The court imposed a trust on the non-contributor spouse following the District Court

(continued...)

The *Albrecht* decision has now been overturned by the Divisional Court of the Ontario Court of Justice, General Division. The appeal court did not give written reasons, but endorsed the record with a brief statement of its conclusions that "save for the specific conditions in what is now section 55.2(3) there may not be any contracting out of the obligatory pension division arrangements provided in what is now section 55.1" and that "no court order may produce a result contrary to these arrangements".

The words of the endorsement read together with the result show that the Divisional Court regarded the trust arrangement which had been imposed by the court below to be a result contrary to the statutory pension division arrangements. The District Court had treated the provisions as limiting the conditions under which spouses could direct the Minister, but not otherwise affecting the arrangements spouses may make between themselves. The Divisional Court took a different view - that the new legislation governs the enforceability of CPP-related terms in spousal agreements. So far as the endorsement discloses the court's reasoning, it suggests that the court was refusing to assist the spouses to do indirectly what the legislation does not allow them to do directly. This conclusion assumes that the new legislation was intended to stop the spouses from trading in CPP pensions in the absence of the requisite conditions.

In addition to the point that seemed to persuade the Divisional Court in *Albrecht* - that spouses should not be permitted to trade in CPP pensions indirectly where they are not allowed to do so directly - there are a number of other powerful arguments against the conclusion reached by the lower court. Some of these are as follows:

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[31](...continued)
in *Albrecht*. (A similar conclusion had been reached earlier by the B.C.S.C. in *Fredette v. Fredette*, (1988) 16 R.F.L.(3d) 250. However, the latter decision is of limited utility because of its peculiar facts - ignorance of only one of the parties as to the state of the law and deliberate deceit on the part of the other (of which the court refused to allow the wife to take advantage) - and also because the court itself seems to have been in error about the preconditions under the recent amendments for a waiver agreement to be valid. As to the latter, the court seemed to suggest that the spouses could have contracted out of division by expressly mentioning the CPP, even though no express provincial legislation permitting such agreements had been enacted. (See para. 2, at 256.))

-- The amendments removed the requirement for application as a prerequisite to division, with the effect that agreements not to apply no longer bear any meaningful relation to the legislation. It is therefore wrong to infer such agreements, and if express, they should be ignored.[32]

-- The non-contributor's share of credits is not the property of the contributor; each spouse is equally entitled to a half-share of the total credits. Hence the entitlement is not waived by a waiver to future claims on the other spouse's property.

-- The CPP Act prohibits the assignment of benefits. Section 65(1) of the Act provides generally that benefits are not to be assigned, charged, attached, anticipated, or given as security, and that any transaction purporting to have such affect is void. Arguably a trust as to benefits purports to have the same effect as an assignment, and therefore is void.

-- The judgment involves a wrong assumption - that where the non-contributor waives the share of credits, he or she has been compensated with some other property, and therefore division when effected involves a loss to the contributor. The survey of practitioners in the province revealed that often spouses waive their right to CPP credits without receiving anything of tangible

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32 To reach its conclusion the court inferred that the spouses had agreed that division would not be applied for, and that they contemplated that consequently division would not take place. However, under the present law, it is not reasonable for couples to proceed on this basis. Therefore it is wrong for the court to infer that they had done so. Under existing law, application is not a precondition to division, and agreements not to apply, even where adhered to, are no guarantee that division will not be effected. The requisite information may reach the Minister from other sources (may indeed become automatic), and in the event that it does, the agreement will not preclude division. Spouses should now be presumed to have known this, and to have acted accordingly. It is unreasonable for the court to imply a term in a contract - that there would be no application for CPP division - where such a term can no longer be determinative of whether division takes place. It is similarly wrong for the court to infer that the spouses settled the remaining property in anticipation of non-division.

Even where there is an express agreement not to apply, it no longer makes sense for a court to give effect to such an agreement by imposing a trust. Application is not a precondition to division; therefore an agreement not to apply should be treated as simply irrelevant to the question of what becomes of the CPP pension.

value in exchange.[33] Thus the assumption that the contributor suffers a loss when division takes place though the spouses have agreed otherwise is unwarranted in many cases.[34]

There is also an argument based on the equality provisions of the Charter of Rights. The argument is that the legislative purpose of the credit-splitting provisions is the promotion of women's equality. Section 55 of the CPP Act must be interpreted, in accordance with the Charter, as protecting the right to division of CPP credits. This argument was put forward by the Women's Legal Education and Action Fund in its intervention in the *Albrecht* appeal.

It is suggested that the arguments against compensating the contributor where division of credits takes place despite a spousal agreement to the contrary are stronger than those in favour of such a course.

(ii) Denying the claim

The other possible outcome of an action by the contributor is that the court would treat agreements that there is to be no division as meaningless and irrelevant under the new legislation, or as contrary to its policy and unenforceable. The court would accordingly deny the claim for compensation. The arguments in favour of this result under the amended law are very persuasive. If it is to obtain, it is preferable if couples settle their remaining property anticipating division rather than the converse.

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33 See note 52, *infra*, for a fuller discussion of these results.

34 Another problem with the District Court's conclusion depends on its intended scope. The case involved an implied agreement not to apply for division, and a request for division by the non-contributor. It is not clear whether the result was meant to be limited to such cases of a "broken agreement", or whether it was intended to apply in any case in which division was effected despite agreement that there was to be no division - on the ground that the contributor must be compensated because the settlement of the remaining property was in contemplation of non-division. If the decision were also intended to apply in the event that notification to the Minister were to come by way of a routine mechanism or from some source other than the spouse, then if such a mechanism were instituted, the decision would allow claims for trusts in all cases in which there had been releases of future property claims. Non-contributors agreeing to releases would inadvertently be taking on the risk of becoming trustees of CPP benefits for the lives of their spouses.

Similar questions arise in respect of agreements that anticipate division, but provide for trusts in favour of the contributor.[35] Whether such agreements would be enforceable would depend on some of the same considerations as were raised with respect to the *Albrecht* case. One is the policy intent of the amendments (that is, whether they were intended to preclude alienation of benefits by the non-contributor). A second is the effect of the non-assignability provision of the CPP Act (section 65(1)).

(iii) Certainty under existing law

Under existing law, the consequence of including a CPP waiver clause in a spousal agreement is unpredictable. Even though such a clause is included, the information that triggers division may reach the Minister (whether by the non-contributor in breach of the agreement, by institution of an automatic mechanism, or through some other source), and the Minister will divide regardless of the clause. Should this happen, an action by the contributor to enforce the agreement may or may not be successful. The only course with a predictable outcome under existing law is to settle property in anticipation of division. (This course also avoids the inconvenience of the continuing interaction between spouses necessitated by the imposition of a compensating trust.)

(c) Legislating certainty

One of the objects of this report is to propose legislation that would eliminate the existing uncertainties in the law and practice.

One way of introducing certainty is to enact the legislation contemplated in the CPP Act. If this were done, the effect of an agreement that there is to be no division would be certain: the Minister would not divide. The other solution is to enact legislation that would expressly make waiver and trust agreements as to CPP benefits void and unenforceable. The only course available to parties would then be to settle the remaining property assuming or anticipating division. The reasons for the Institute's choice of the latter solution are the subject of Chapter 5.

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35 Such agreements are unlikely given the inconvenience of continuing trusts. However, conceivably they might be entered into as a way of avoiding the effect of credit splitting where it is seen as especially desirable that the contributor receive all the pension benefits.

CHAPTER 3 - THE RELATIONSHIP BETWEEN THE CREDIT SPLITTING PROVISIONS AND PROVINCIAL MATRIMONIAL PROPERTY LAW

According to government officials, the opting-out clause (section 55.2(3)) was included in the recent amendments to the CPP Act to avoid a constitutional conflict between credit splitting and provincial matrimonial property laws.[36]

The Alberta legislation provides for division of matrimonial property on matrimonial breakdown by the court or by spousal agreement.[37] The legislation does not create any rights in spouses to particular assets or categories of assets owned by the other. The final ownership of assets of the marriage is a matter either that the spouses themselves may decide, or that the court decides according to the principles

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[36] See note 7, *supra*. The constitutional jurisdiction in this area is as follows: CPP legislation is enacted under s. 94(A) of the *Constitution Act*, a 1964 amendment to the Act. This provision gives the federal government and the provinces concurrent jurisdiction over old age pensions, with paramountcy going to the provinces. Matrimonial property legislation is under provincial jurisdiction as in relation to "property and civil rights", (though there is also a federal power over some aspects of matrimonial property which is ancillary to the divorce power).

[37] Property division under the *Matrimonial Property Act* can be briefly described as follows:

There are two mechanisms under which matrimonial property can be divided. The first is by the court. On application by a spouse, the court divides matrimonial property according to the principles contained in Part 1 of the Act. As a general rule the court is to make an equal division, but it may divide unequally if this is justified by particular circumstances. The court is given no statutory guidance as to the manner of division of particular assets. However, the recommendations of the Institute's Report No. 48 would guide the court as to how to divide employment pensions (as defined at 15-16 of the Report).

The second mechanism for division is by mutual agreement between the spouses. Under sections 37 and 38 of the Act, spouses have the option of making their own arrangements as to division of property. If their agreement meets the formal requirements of the Act, the court's jurisdiction as to the property covered by the agreement is ousted. There is no requirement for judicial approval of agreements, nor any express requirement that the private arrangements be just or equitable.

set out in sections 7 and 8 of the Act. The Alberta MPA applies to pensions.[38] Thus the Act provides a method by which CPP pension - as a type of pension - may be dealt with on matrimonial breakdown.[39]

The credit-splitting provisions of the CPP Act bear upon the way CPP pension is to be treated in the division of matrimonial property that occurs, under provincial law, on matrimonial breakdown. The CPP Act creates an entitlement in the non-contributor spouse to a share of the credits created by the contributions of the contributor. On or after matrimonial breakdown, this entitlement may be realized through credit splitting, and if it is, the credits are transferred directly to the non-contributor's account.

Do these two sets of provisions conflict? If they do, which scheme for dealing with CPP pensions is preferable, and what action follows from the choice between them?

A. Constitutional Conflict with Provincial Matrimonial Property Law?

The question of conflict between provincial and federal legislation in relation to the same or similar subject matters was discussed by the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*.[40] Dickson J. (as he then was) stated at 191:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are

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38 See note 25, *supra*, and accompanying text.

39 There are no Alberta cases dealing with whether CPP pensions specifically are matrimonial property. In an Ontario High Court decision, *Payne v. Payne* (1988) 16 R.F.L. (3d) 8, the court held CPP benefits fall within the definition of "property" under the *Family Law Act*, but that pensions are not to be included in the calculation of net family property. The court summarized the CPP provisions for division, and commented that to include CPP would give the wife applicant "a greater entitlement than the Family Law Act gives her". However, the reasons for the court's conclusion are not clear from the judgment. As is discussed further at pages 49-50, *infra*, notwithstanding the CPP provisions for division, we see no reason to treat CPP pensions as beyond the reach of matrimonial property law.

40 [1982] 2 S.C.R. 161.

> being told to do inconsistent things"; compliance with one is defiance of the other.

In *Lamb v. Lamb*,[41] the Supreme Court applied this test to two statutes, one federal and the other provincial, that both contained provisions for dealing with matrimonial property. A wife sought an ancillary order for maintenance under the *Divorce Act* and an order for exclusive possession of the matrimonial home under the Ontario *Family Law Reform Act*. Even though an order under one Act would affect the outcome in the application under the other (the possessory order would affect the quantum of support required), the court concluded that the statutes were not mutually exclusive.

This test may be applied to credit splitting under the CPP and distribution of property under the Alberta MPA. Is it possible for both sets of provisions to function, or are they mutually exclusive?

If the MPA contained a provision that the Minister was to allocate CPP credits to the contributor spouse only, the two sets of provisions would clearly be mutually exclusive. If credit splitting had the effect of removing CPP pensions from the pool of matrimonial property, the two sets of provisions could, again, be said to be incompatible.[42]

However, the MPA is silent on the subject of CPP pensions. Further, there is nothing on which to base a conclusion that credit splitting does or ought to remove CPP pensions from the pool of matrimonial property. Credit splitting is the calculation and allocation of the quantity of benefits that the non-contributor will receive from the Plan (based on his or her own contributions and those made on his or her behalf by the spouse). The fact that this is done is not a reason for excluding the credits, so calculated and allocated, from the sum of total property that has been accumulated during the marriage.[43] Though divided, CPP credits are, no less, a part of that accumulated property. Even if the purpose of the recent amendments was to

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41 [1985] 1 S.C.R. 851.

42 The MPA provides a mechanism for the division of all property accumulated during the marriage. If the CPP Act were to take over this function in relation to this particular asset, this would arguably be a "compliance with one, defiance of the other" situation.

43 There is a contrary view, that the CPP scheme is a social program and that benefits, as the proceeds of the social program, should not be treated as matrimonial property at all. However, this argument does not deal satisfactorily with the contributory and accumulative nature of the scheme.

ensure that each spouse *retains* the share of credits and corresponding benefits to which each is entitled under the Act[44], this does not argue for the conclusion that they are no longer matrimonial property. It is not essential to the functioning of the MPA (whether of the provisions for court distribution or of those pertaining to spousal agreements) that all items of property that fall within the scope of the MPA must be freely alienable or transferable. More particularly, it is not essential that spouses should have the power to alienate their pension rights as between themselves,[45] or to decide that pension credits shall be allotted to the contributor

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44 The idea that the intention of the amendments was to stop non-contributing spouses from bargaining away their share of credits, and to make attempts to so bargain ineffective, was discussed earlier at note 19, *supra*, and at page 20. The argument is that the amendments show the intention of ensuring that both spouses have and retain the right to a pension.

45 Employment pensions under provincial jurisdiction have been held to fall within the Alberta MPA even though they are non-assignable (*Employment Pensions Act*, s. 59(1); see also s. 60). The asset may be dealt with in two ways. One is to compensate the non-contributor with other property. The courts have also allowed the exception that trusts for part of the pension may be created in favour of a spouse. (See *Moravcik v. Moravcik* (1984) 37 R.F.L. (2d) 102, in which Stevenson J.A. said: "For good policy reasons many pensions are, by statute, incapable of assignment. I pause to note that while there was no such policy argument put forward here, an order made under matrimonial property legislation which has the effect of diverting the pension [to the wife] does not appear to me to run counter to any principle of public policy because the order would be in fulfilment of the policy of preserving that pension for the contributor and his family." (at 107) See also *Fairall v. Fairall* (1990) 106 A.R. 277.) Such trusts constitute an exception to inalienability of employment pensions. However, this feature - the possibility of creating a trust - is not essential in order that such pensions may be dealt with under the Act.

The conclusion that assignability is not a precondition to inclusion of an asset as matrimonial property has been reached in other jurisdictions. In *Day v. Day* (1989) 20 R.F.L. (3d) (Sask. Q.B.), Matheson J. stated at 413: "Any statutory prohibitions against alienation of pension benefits should also not be determinative of the question whether the benefits are, or are not, matrimonial property. As is pointed out by Allastair Bisset-Johnson in an annotation to the *Clarke v. Clarke* decision [(1986) 1 R.F.L. (3d) 29 (N.S.C.A.)], in many cases a wife 'will only be asking for an accounting rather than alienation of her husband's pension'. The point has been conclusively decided very recently by the Supreme Court of Canada in *Clarke v. Clarke* [1990] S.C.J. No. 97, October 4, 1990. Deciding whether an inalienable pension under the *Canadian Forces Superannuation Act*

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only. Inalienable property can form part of the pool of property as a factor to be taken into account in the final division equation. Inalienability of CPP does limit both what the court may order and spouses may agree to, insofar as credits and benefits may not be transferred or given up. However, it remains possible for the court to take the fact of equal division of this asset into account in its distribution of the remaining property; spouses may do the same in setting the terms of their agreement with respect to the remaining property. The assets may form part of the pool even though they cannot be moved within it.

According to this reasoning, the credit-splitting provisions do not occupy the field of matrimonial property division with respect to CPP pensions. CPP pensions are part of the total of property accumulated during marriage, no less so by virtue of credit splitting. Arguably the amendments were intended to make credits inalienable once divided. However, the MPA can operate - the courts can make orders or the spouses can make agreements - that take inalienable assets into account. Accordingly there is no constitutional conflict between the two sets of provisions.[46]

There is another argument for the conclusion that the two sets of provisions do not conflict. This is that credit splitting does not involve the pooling and division of two items of property - the credits accumulated by each of the spouses. Rather, credit splitting is the calculation of the quantity of credits that each spouse is entitled to receive from the Plan (based on the contributions of both). On this view, the payment of a half-share of the credits to the non-contributor does not involve a

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[45](...continued)
constituted matrimonial property, Madame Justice Wilson concluded that it did, for the following reason (among others): "... it is clear that when a court does order a division of assets, equal or otherwise, it is not necessarily dealing with the assets in specie. The process of ordering a division of assets is in the nature of an accounting. The court does not order that the pension be divided, but rather that each partner to the marriage should share in the value of the assets accumulated during the union."

[46] Even if an argument could be made that credit splitting does occupy the field which is also covered by the MPA, enacting the opting-out clause would not resolve such a conflict. The clause would merely allow the non-contributor to waive his or her entitlement to a share of credits in favour of the contributor. It would not give the court the same power over this asset as it has over others, or allow spouses to deal with it in ways other than that specified.

transfer to him or her of the property of the contributor.[47] The non-contributors entitlement is not against the property of his or her spouse, but against the Plan itself. For this reason, credit splitting under the CPP is not property division at all: it is the calculation of the amount of benefit that each spouse is to receive from a state program. Therefore it does not conflict with provincial property-division legislation.

B. Conflict in Principle

Even if it is possible for the two sets of provisions to operate together, there is still the objection that credit splitting is anomalous. It creates an entitlement in one spouse to a half-share of a particular asset. In contrast, under the scheme adopted by the province, the legislature gives no instructions as to the final ownership of particular assets or categories of assets. On this view there is no reason, or no adequate reason, why the spouse of a contributor should be entitled to a share of the CPP credits accumulated by the contributor any more than to a share of, for example, his or her earnings, employment pension, or registered retirement savings plan. This argument points to the fact that Alberta matrimonial property law has rejected the "immediate community of property" approach to matrimonial assets, in which every asset is jointly owned from the time of acquisition. The CPP Act is seen to be anomalous in adopting more of an "immediate community of property" type of approach in relation to CPP credits. Consistency would require treating CPP credits in the same manner as all other assets are treated under our matrimonial property law. Final ownership of assets is decided on matrimonial breakdown by the courts according to the provisions of the MPA or by the mutual agreement of the spouses. According to this view the same rule should apply to CPP.

What action would follow if this objection were to prevail? Enacting the opting-out clause would not resolve the conflict: this objection is to the direct entitlement to a share of a particular asset, rather than to the inability to trade in it. The appropriate recommendation would be that credit splitting be done away with altogether, and that CPP credits once more be assigned to the contributor spouse only. The asset would form part of the pool of matrimonial property, to be

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47 At the moment, if there is no application for division, all of the benefits will be paid to the contributor on retirement. However, this is because of the failure of the legislation, described earlier, to fulfil its own purpose. The object of the Act as amended is to provide pensions for contributors and their spouses equally.

distributed by the court or according to spousal agreement, but it would be found there assigned to the CPP account of the contributor spouse.[48]

Whether the objection ought to prevail depends on whether the unique treatment accorded CPP pensions under the CPP Act is justified by reference to its purpose. CPP credit splitting is a mechanism for ensuring that non-contributing spouses will have a pension, or the right to a pension, in retirement. Assigning the asset to the contributor spouse and leaving it to be distributed by the court or by spousal agreement would not achieve this purpose. There is no guarantee, nor even any likelihood, that under the resulting division the asset would be used to create a retirement income for both spouses.[49] If non-contributors are to have a right to receive pensions, credit splitting must be retained or some equivalent substituted. The choice is between consistency of treatment for CPP pensions and other types of property on the one hand, and pensions for non-contributors on the other. The reasons for our choice - in favour of the latter - are set out in Chapter 5(A).

C. Inconsistency With the Treatment of Employment Pensions

A final point is that credit splitting under the CPP Act results in a different treatment for CPP pensions than for provincial employment pensions. In Alberta, there is no provision for splitting of credits earned in employment pension plans.[50] Employment pension credits are divisible matrimonial property, but form part of the

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48 It would be necessary to decide whether or not the court would have power to direct the Minister to divide credits. If it did, it would be a difficult matter to work out the criteria upon which this power was to be exercised: would the court be required to take into account the social benefit of giving pensions to non-contributors? If not, on what basis would it order splitting?

49 The court could be directed to order division to create separate pensions, but in that case the result would be the same as under the existing CPP provisions. Unless so directed, there would be no reason for the court to concern itself with the non-contributor's retirement income.

50 In contrast, legislation in Manitoba requires division of employment pensions on divorce. Where family assets are divided, either by court order or pursuant to a spousal agreement, the pension benefit credit accumulated by the spouses during marriage is to be divided equally between them. This is to happen notwithstanding that the order or agreement requires that the division is to be made in a different manner. (See the *Pension Benefits Act*, R.S.M. 1987, c. P32.) However, there is much dissatisfaction with this legislation.

pool of property as the asset of the contributor. There are at present two methods to effect sharing of this asset - valuing the pension and compensating the other spouse with some other asset, or imposing a trust in relation to a share of the benefits.[51]

Complete consistency of treatment for the two types of pensions would require the elimination of credit splitting under the CPP. However, the opting-out clause contemplated by the CPP Act offers a choice for provincial action that would seem to bring the treatment of the two types of pensions to some degree more in line. The law permits the contributor to keep the entire employment pension in his or her own account. This option is not at present available for CPP pensions. Enactment of the opting-out clause would allow spouses to bring about this result. This would make the two schemes somewhat more alike.

Greater consistency of treatment for the two types of pensions is important only so far as both pension schemes are similar or the same in their purpose. A comparison between CPP pensions and employment pensions reveals important differences between them. Do these differences support the different positions as to whether retention is available to the contributor spouse?

The distinguishing features may be summarized as follows:

-- The CPP is a legislative scheme universally applicable to working people and their spouses. The social policy of the scheme is to provide a basis for a living income for those who are no longer able to earn income, by requiring employed people to make contributions to ensure their own retirement income security. The purpose of mandatory division of credits within that scheme is to ensure that the retirement income will be available to retired women, who suffer disproportionately from poverty. In contrast, provincial employment pensions are not universal but are part of a private contract of employment. Though perhaps intended to encourage saving, they do not require it. They are not a social security scheme so much as a vehicle for sheltering income from taxation and deferring it for retirement.

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51 Under existing law neither spouses nor the court have power to direct pension administrators in the event that it is desirable to divide an employment pension. They cannot, for example, direct the creation of separate pension accounts. Report No. 48 contains proposals for giving the court power to give directions such as these to plan administrators.

-- The CPP scheme does not permit withdrawal of contributions at any time. An employee's employment pension contribution is sometimes refundable on termination of employment.

-- Provincial employment pensions are routinely valued, and if the contributor spouse retains the pension, the other spouse is usually given value in exchange. In contrast, CPP credits are almost never valued, and the right to receive them is often waived though no financial benefit is received in exchange.[52] The former spouse who forfeits them often gains nothing at all, in the sense that his or (more often) her share of the division of property is no greater than it would have been had the CPP credits been unavailable for trading. Thus the policy that pensions are divisible matrimonial property is often realized only with respect to provincial employment pensions.

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52 This was indicated in the survey of the profession mentioned earlier. The questions about *valuation* of CPP benefits were answered as follows: All the respondents said that the value of the CPP is *never* formally valued by an actuary. More than half said that CPP is never valued *in*formally either, while those who said that informal valuation sometimes occurs said that this happens half or less than half of the time. The answers to the part of the Questionnaire which asked what the entitlement to a share of CPP benefits is *traded for* were as follow: All the respondents said that CPP is *never* valued formally and traded for money. Two-thirds said that benefits are *never* valued informally and traded for money either. Those who said this happens sometimes said (with a single exception) that it happens only 5-10% of the time. More than one third said that the CPP is never recognized as having a monetary value and accordingly traded in exchange for a *financial* benefit, more than one third said it is recognized as having a monetary value and traded for a financial benefit only 5-30% of the time, and fewer than a third said that it is recognized as having a monetary value and traded for a financial benefit 40-60% of the time. None said that it was traded for a financial benefit more than 60% of the time. One-third said that CPP benefits were never traded for concessions other than money or property. More than one third said that this happens 5-30% of the time, and fewer than one third said this happens 40-80% of the time. One half said that CPP benefits are not valued or traded for other specific benefits, but are just regarded as part of the "overall package" whenever they are included in the settlement, and half said this happens 0-33% of the time. A key question, whether a spouse waiving the right to a share of CPP is able to obtain a *better property settlement* than might have been obtained had the credits not been available for negotiation, was answered as follows: more than one half the respondents said this rarely or never happens; fewer than one third said it happens 30-50% of the time, and just over 10% said this normally happens.

-- Private employment assets often constitute one of the major assets of the marriage. CPP pensions are usually a much smaller asset. Retention of the entire employment pension by the contributor may be one method by which to avoid an undesired sale of the matrimonial home, or some similarly undesirable course of action. The smaller size of CPP pension means that CPP splitting is less likely to place undesirable constraints on arrangements as to other property.

The factors that must be balanced under this head are a greater consistency between employment and CPP pensions on the one hand, and the purpose served by the unique treatment of CPP on the other. Does making the two schemes somewhat more consistent justify allowing spouses to override the purpose of credit splitting in particular cases? The basic question is, again, whether it is important to provide a minimal level of retirement income to spouses of contributors as well as to contributors themselves.

CHAPTER 4 - ADDITIONAL BACKGROUND INFORMATION

A. The Value of CPP Benefits

The survey of the members of the provincial Matrimonial Law Section of the Canadian Bar Association suggests that CPP benefits are never valued formally in Alberta. Informal valuation (a value is approximated or guessed at) happens only infrequently.[53] Only one respondent to the questionnaire ventured to answer the question about the possible range of capitalized value of CPP credits, and another offered a possible method of calculation.

The maximum benefit of CPP pension that pensioners receive at present is $577.08. This maximum benefit level can be attained only by a contributor who has made the maximum allowable contributions throughout his or her working lifetime. For a man, this is a period of forty years.[54] The capitalized value of any pension is difficult to determine because there are various interest rates at which it could be calculated. For CPP pension it is also hard to calculate the value of elements such as the right to a disability benefit, and eligibility for survivorship. One-half of this maximum amount of benefit if received over a period of 25 years (from ages 65 to 80), calculated at an interest rate of 10%, is $25,000.00.

In the Ontario case of *Payne* v. *Payne*,[55] the capital value of the husband's CPP entitlement was set at $33,300. The period of the marriage was 27 years, and the husband was employed full-time (as a chartered accountant) for most of that period. Even considering that a significantly lower figure could result were a different method of calculation used, the figure seems much higher than the value of CPP credits, even at the maximum level, is generally perceived to be in Alberta.

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53 Those respondents (fewer than half) who indicated that this sometimes happens in their practices, said that it happens half the time or less.

54 The benefit paid is calculated as "25% of the average monthly pensionable earnings, averaged over the contributory period expressed in months". The period from age eighteen to sixty-five is forty-seven years, but the contributor may drop out from the calculation of benefits on retirement the seven years of his lowest earnings. Thus only forty years are actually involved in the calculation. Women may also drop out any years which they spent raising children under age seven. Earnings are adjusted to current dollars at the time of calculation, and once the pension is received, it is adjusted annually to cost of living increases.

55 (1988) 16 R.F.L. (3d) 8.

However, levels of entitlement such as that in *Payne* represent a maximum accumulation of credits, and only credits accumulated during the period of the marriage must be shared. Thus such figures for shareable CPP pension would not obtain where divorce occurred soon after, or within several years of, the marriage. In that case the loss of benefits associated with waiver would be considerably less.

Further, at low income levels - those of special concern - the contributor spouse would likely be making annual CPP contributions at less than the maximum level.

Thus the greatest loss for waiver would be in the following circumstances: the divorce occurs after a lengthy marriage during which only one spouse has worked steadily outside the home, at a salary level at which contributions were at maximum; the other spouse has worked as homemaker, and has earned no pension credits.[56]

The loss for waiver would be less in the circumstance of a shorter period of marriage, where the accumulation of credits is relatively low, and the wife has an opportunity to work and earn her own credits in future. Nevertheless, whatever CPP credits are waived diminish the pension benefit that is ultimately paid.

B. The Relation of CPP to Other Sources of Retirement Income Paid by Government

As noted earlier, one of the purposes of CPP is to alleviate poverty. A factor to consider in relation to this point is that at low income levels, the waiver of CPP benefits does not result in a proportionate loss of income. At the lowest end of the income scale, every dollar that is paid to a pensioner out of CPP benefits reduces by 50 cents the amount paid out of the federal Guaranteed Income Supplement, and by 25 cents the amount paid by the Alberta Assured Income Program. The real loss at this level may be illustrated as follows:

The minimum income of any Albertan whose sole source of income is from social security schemes is $856.41 monthly, comprised of Old-Age Security, Guaranteed Income Supplement, and Alberta Assured Income Program. If a person receiving this income only were to receive a one-half share in the maximum amount of CPP benefits that are payable ($577.08 monthly), the GIS and AAIP benefits

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[56] In such a situation the non-contributor might have no job experience, thus little prospect for paid employment, and little potential for earning pension credits.

would be reduced proportionately, as described. The resulting total of monthly income would be $928.55. Thus the loss experienced by the recipient for waiver would be $72.14 monthly (rather than $288.54).

The fact that GIS and AAIP are reduced by a proportion of the value of CPP benefits supports arguments both for, and against, permitting waiver of benefits. The argument against waiver is that one spouse should not be permitted to retain the full share of credits if a proportion of the waived share must then be paid to the other spouse out of the public purse (in the form of GIS an AAIP). The contrary view considers what would be most beneficial to the needy non-pensioner spouse. At the lowest end of the income scale, a large proportion of the sum of monthly benefits waived will be paid by GIS and AAIP. If a significant immediate benefit can be derived from waiver, the non-contributor spouse will gain overall. Contracting out should therefore be allowed. On this view, at the income level at which GIS is likely to be paid, whatever benefits are possible should be allowed. (This argument assumes that CPP credits can be traded for value, though this assumption is often unwarranted.)

However, if there is income from other sources to the level of that provided by the GIS, then the CPP benefits do add more considerable real income. In that case, a spouse who waives the right to CPP benefits will suffer a proportionate reduction of total retirement income. In such circumstances, however, the "alleviation of poverty" argument has less force.

C. The Federal-Provincial Agreement

A Department of Finance Press Release of December 13, 1985, which followed the annual federal-provincial meeting of Ministers of Finance, indicated that the Ministers had reached agreement on "Credit Splitting and Pension Splitting", as follows:

> --Upon divorce, CPP pension credits earned during marriage would be automatically split between the former spouses.

As discussed earlier, division is not automatic, the less so were provinces to enact provisions allowing contracting out. Ms. L. Dulude of the National Action Committee on the Status of Women argued before the Standing Committee on National Health and Welfare that the then-proposed legislation (now enacted) failed, on this account, to live up to this agreement.

Ms. Linda Hansen, Chief of Legislation, Income Security Programs Branch, Department of Health and Welfare indicated in an interview that the Department had been disappointed with Saskatchewan's decision to allow agreements not to divide. According to Ms. Hanson the primary purpose of including section 55.2(3) was to deal with the constitutional problem that the provinces have powers over property and civil rights. The exercise of the legislative option created by the section was contrary to the spirit of the 1985 federal-provincial agreement.

The enactment of a provision permitting contracting out in Alberta would arguably be contrary to intent of the 1985 agreement.

D. The Position in Other Jurisdictions

(1) Saskatchewan

Saskatchewan has enacted a provision in its *Matrimonial Property Act* permitting contracting out of division of CPP credits. This is as follows:

> **38**(1) Where spouses have entered into an interspousal contract:
>
> > (a) that deals with the possession, status, ownership, disposition or distribution of matrimonial property, including future matrimonial property;
> >
> > (b) that is in writing and signed by each spouse in the presence of a witness; and
> >
> > (c) in which each spouse has acknowledged, in writing, apart from the other spouse:
> >
> > > (i) that he is aware of the nature and the effect of the contract; and
> > >
> > > (ii) that he is aware of the possible future claims to property he may have under this Act and that he intends to give up those claims to the extent necessary to give effect to the contract;
>
> the terms of the contract mentioned in subsection (4) are, subject to section 24, binding between the spouses whether or not there is valuable consideration for the contract.

> (4) An interspousal contract may:
>
> > (a) provide for the possession, ownership, management or distribution of matrimonial property between the spouses at any time, including, but not limited to, the time of separation of the spouses, the dissolution of the marriage, or a declaration of nullity of marriage;
> >
> > (b) apply to matrimonial property owned by both spouses and by each of them at or after the time the contract is made; and
> >
> > (c) be entered into by two persons in contemplation of their marriage to each other, but is unenforceable until after the marriage.
>
> (4.1) Without limiting the generality of subsection (4), an interspousal contract entered into on or after June 4, 1986 may provide that, notwithstanding the *Canada Pension Plan*, as amended from time to time, there may be no division between the parties of unadjusted pensionable earnings pursuant to that Act.

A request was made for reports or documents that would show the reasons for this change, but none were available. The legislative counsel's office advised that the change was in response to letters received from practitioners setting out instances of injustice arising from mandatory division.[57]

(2) Manitoba

The Manitoba Family Law Section of the Canadian Bar Association struck a Committee to look at the question. The Committee concluded that there are important differences in principle between employment pensions and CPP pensions. The former are "essentially private savings vehicles". They are terms of the contract of employment and are not universal. The legislation pertaining to these should be changed to allow the parties to contract out of division. With regard to CPP pensions, the Canada Pension Plan "has a social and public policy objective". It is a universal

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57 The example given was the forced sale of a matrimonial home. In the case described, had contracting out been allowed, the pensioner spouse could have retained the pension and permitted the wife to retain the matrimonial home. However, as the pension had to be divided, the home had to be sold and the proceeds divided. This fact situation does not seem likely to arise given the relative values of the two types of assets.

social insurance scheme designed to "provide a basis for a living income for Canadians who, through age or disability, are unable to earn an income through paid employment". Contracting out detracts from the success of this scheme, and should not be allowed. The Family Law Section accordingly passed a resolution against permitting contracting out in Manitoba.[58]

The Family Law Branch of the Manitoba Department of Justice has advised that the government is not considering enacting the opting-out clause, for the same reasons as those just stated.

(3) Ontario

Officials in the Ontario Ministry of the Attorney General indicated that the Department had received some letters from women's groups stating opposition to the introduction of a provision permitting contracting out. The Policy Development Division of the Department has advised that there are no plans in Ontario at this time to introduce legislation allowing spousal agreements that waive the division of CPP credits on divorce.

E. Cases of Injustice Arising Out of Division

None of the respondents to the survey reported being aware of any cases of injustice arising out of mandatory splitting.

Reference was made in the preceding section to reports of injustice in Saskatchewan, concerning the forced sale of a matrimonial home, but this does not seem to be a likely scenario.

The possibility of injustice is reduced by CPP section 55.1(5). This provides that the Minister may refuse to divide if satisfied that division will be to the detriment of *both* spouses.

F. The Views of Women's Organizations

A number of women's organizations responded to requests for their views on the issue. These were The National Action Committee on the Status of Women, The

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[58] The Section adopted the conclusions of a report prepared by Ms. Joy Cooper. The quotations are from the text of this report.

National Association of Women and the Law, Status of Women Canada, and The Ontario Women's Directorate. These groups were all strongly of the view that to permit contracting out of CPP benefits is contrary to the interests of women.

G. Data on the Financial Position of Women on Divorce

The survey of the profession referred to earlier revealed that where the parties choose to deal with CPP pension themselves, there is a possibility that this asset will be given away rather than traded for value.[59] One reason that this may happen is that generally speaking women are less able than their husbands to pay the costs of litigation.[60] Many women have no independent source of income, and those who do on average have much lower income than their spouses. Further, statistics show that on divorce, the income of women tends to drop substantially, whereas that of their husbands tends to rise.[61] Women who lack the resources to bring an action

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[59] See note 52, *supra*. In some cases the waiver may be in exchange for some unquantifiable but real benefit. However, the results showed that often nothing is gained which would not have been gained had CPP not been subject to negotiations.

[60] Where there is a substantial amount of property which the other spouse is refusing to share fairly, the costs of litigation will be worth paying. However, there are many cases where the assets are insufficiently substantial to justify the cost of bringing an action. An action which goes to trial is likely to cost several thousand dollars.

[61] The relative incomes of Canadian men and women who are employed were reported in a federal Department of Justice evaluation of the *Divorce Act*, 1985 dated May 1990, at page 72. According to this report, "divorced or divorcing women have incomes which are 62 percent of the incomes of men".

With respect to the consequences of divorce, an American survey reported in 1985 reached the following conclusion:

> Divorce has radically different consequences for men and women. While most divorced men find that their standard of living improves after divorce, most divorced women and the minor children in their households find that their standard of living plummets. This chapter shows that when income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline. (L. Weitzman, *The Divorce*

(continued...)

may be in a weaker bargaining position during settlement negotiations. This fact may cause them to accept the husband's terms for property division even though these

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[61](...continued)

Revolution (New York, Free Press, 1985) Chapter 10, "The Economic Consequences of Divorce", at 323.)

There is little direct empirical data available concerning the economic consequences of divorce in Canada. However, Carol Rogerson of the University of Toronto has suggested that inferences may be drawn from correlations of general income data with household form. She reports that:

> Statistics Canada data for 1982 shows that the average income of female-headed families was only half that of families headed by males and, in addition, that 45% of female-headed families had low income, compared with 10% of male-headed families. There is some evidence that the number of female-headed families living below the poverty level may be increasing. A report recently released by the Social Planning Council of Metro Toronto indicates that in 1984 in Ontario 60.5% of children in female-headed families lived below the poverty line. Furthermore, Ontario welfare statistics suggest that a significant number of women who have experienced marriage breakdown receive social welfare assistance. (C. Rogerson, "The Plight of the Custodial Mother" in Hughes & Pask, eds. *National Themes in Family Law* (Toronto: Carswell, 1988) 21 at 26.)

terms are not equitable.[62] One of these terms - to which, as the survey shows, many readily agree - is waiver of their share of CPP credits.

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[62] This point was made by L. Weitzman in *The Divorce Revolution*. The research study revealed that women often agreed to inadequate settlements despite having legal representation. A variety of reasons were cited for this at 310-16. The final reason was as follows:

> In fact, one may look at a woman's agreement to a low support award as a *realistic economic calculus*. The costs of bargaining may in fact be greater than the pay-off she can expect. For example, if her husband is aggressive, persistent and uncompromising, she can expect to pay dearly in terms of time and energy (and money) for any extra dollar she might obtain. Thus she may realistically calculate that she cannot bear what economists call the *transaction costs* of fighting him. These costs include the direct costs of litigation, (such as filing fees, court costs, the cost of taking depositions, hiring expert witnesses, and most important, attorneys' fees), as well as the indirect costs - the costs of not being able to use property and money while the issues are being resolved, and the emotional costs of negotiating, litigating, and living with uncertainty. ... If a woman has not been employed during marriage and has no income of her own, she may be especially vulnerable. Her financial situation may be so precarious ... that she is willing to agree to a ridiculously low award just to have some money on which to live.

In "The Plight of the Custodial Mother" (see note 61, *supra*) Carol Rogerson says at page 47: "Reported case law suggests that the economic settlements reached through contract often offer women and children less than they would have received had the matter been litigated, particularly where limited-term spousal support is agreed upon."

CHAPTER 5 - CHOICES FOR ACTION

The original question that we raised in this report was whether Alberta should enact the opting-out clause contemplated in the amendments to the CPP Act. Additional questions arose in the course of discussion. One was the broader and more basic question: does the purpose of credit splitting - to provide CPP pensions for non-contributing spouses - justify the exceptional treatment of CPP pensions relative to the usual manner of dealing with property under the MPA, and to the treatment of employment pensions by provincial law? A second question was how to eliminate the uncertainty in the law about the status of agreements concerning CPP pensions that are entered into in the absence of the opting-out legislation. A third was whether credit splitting under the CPP takes CPP pensions outside the scope of the MPA. This chapter outlines our discussion of these questions, our conclusions, and the choice of action that follows from the answers.

The low take-up rate for credit splitting was also a matter of concern. To some extent our proposals address it. The failure of non-contributing spouses to assert their entitlement to a share of credits is due in part to the practice of negotiating waivers. Our proposal to make waivers void should eliminate this practice and raise the take-up rate in Alberta to some degree. However, the fact that spouses are unaware of their right to a share of credits, or unwilling to take the necessary steps to assert it, may well be the more significant cause for the low take-up rate. Action to address this problem must be taken to make the CPP legislation effective to provide pensions for non-contributing spouses. The action that is called for is institution of an automatic communication to the Minister of the fact of divorce and related information. Public education about the non-contributor's entitlement to share credits would also be helpful. However, these steps to make the federal program more effective are matters that must be left to the federal authority.

A. The Desirability of Credit Splitting

The question whether credit splitting is desirable at all gave rise to considerable discussion.

Credit splitting has the effect that the share of benefits derived by the non-contributor from the CPP contributions of his or her spouse *will take the form of a CPP pension*. If CPP credits, allocated to the contributor only, were to form part of

the pool of property, the non-contributor's share, if any, would take some other form.[63] Whether we want credit splitting at all therefore depends on whether it is better to ensure that the non-contributor has the right to a pension, or better to leave the entire pension with the contributor, and possibly compensate the non-contributor with some other asset.

The latter view - that it is preferable to leave the CPP pension with the contributor - begins with the premise that it is wrong to regard CPP as a social program, the goal of which is the mandatory provision of pensions. It is seen instead as a government-sponsored savings vehicle. On this theory, benefits are property that should be no different in character from alienable property generally.

The view that ultimately prevailed recognizes CPP as a social program. Credit splitting imposes a method of dealing with property accumulated during the course of a marriage that is unique to this particular asset and anomalous in the context of a regime that does not create rights on matrimonial breakdown to particular types of property. However, the social purpose of the CPP scheme justifies this special treatment. We saw no reason to reject the purpose of providing pensions for non-contributing spouses.

A key consideration for our conclusion was the data showing the poverty of elderly women in retirement, and the recognition that credit splitting was a response to this social problem. Another factor in favour of preserving credit splitting was the existence of the Federal-Provincial Agreement of December, 1985, which adopted the principle of credit splitting. We also considered the degree to which instituting "no credit splitting" would involve a departure from the existing legislation.

B. The Opting-Out Clause

Whether to take up the option to permit non-contributing spouses to waive the entitlement to a share of CPP pension credits involves a choice between two positions: one that there be a pension, or the right to a pension preserved, for non-contributors in every case; the other, that exceptions to the fulfilment of this goal be permitted where the spouses so agree. Either the policy of providing access to pensions for spouses of contributors will be uniformly upheld, or spouses will be permitted to override it in individual cases.

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63 The idea of giving the court power to order splitting was raised earlier at notes 48 and 49, *supra*. The problem with this idea is that of developing criteria for the exercise of this power.

(1) Reasons for Taking up the Option

The Institute discussed a number of points that might justify taking up the option. These were as follow:

a) that the clause would resolve a constitutional conflict with provincial matrimonial property law;

b) that the clause would allow a greater degree of flexibility for the spouses in settling their own financial affairs;

c) that the clause would make the law respecting CPP pensions more like the law in relation to employment pensions.

(a) Constitutional conflict

We did not think that the point about constitutional conflict could decide the issue. There does not seem to be any conflict between credit splitting and existing matrimonial property law. The allocation of CPP credits, evenly divided, into separate accounts for each of the spouses, need not be taken to remove CPP pensions from the pool of matrimonial property.[64] Provincial matrimonial property law does not require matrimonial property to be freely alienable as between spouses.[65] Even if it did, the opting-out clause would not make CPP pensions freely alienable; it would only allow one spouse to waive his or her right to a share of credits. Therefore, we did not regard the constitutional point as a reason to take up the option.

(b) Greater flexibility

It is conceded that enacting the clause would give the spouses a choice of action respecting CPP pensions that they would not otherwise have. Thus it would allow spouses a greater degree of flexibility in making their own arrangements under sections 37 and 38 of the MPA.

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64 As argued earlier, it is possible to regard credit splitting as simply the calculation of the amount of social benefit due to each spouse from the Plan, rather than as an imposed sharing of the contributor's property with the non-contributor spouse.

65 See the discussion at note 45, *supra.*

The reason for allowing spouses to make their own arrangements under the MPA is that this is the most efficient method for settling the property. The spouses themselves are best able to decide how to resolve their financial affairs to their mutual satisfaction. However, the survey of practitioners revealed that where the CPP pension is made the subject of spousal agreements, the goal of efficiency may not be met. In many cases in which spouses make their own arrangements, the non-contributor waives the right to CPP without receiving value in exchange. Nothing more is gained than would have been had the asset not been available for trading.[66] Where the result of bargaining with this asset is likely to be unsatisfactory from the standpoint of one of the spouses, the goal of efficiency is not met. The Institute also considered that for those who are in a financial position such that the non-contributor spouse has effective bargaining power (hence trading for value is more likely), the CPP pension is likely to be a relatively insignificant asset.

We concluded that the somewhat greater flexibility that taking up the clause would afford did not warrant allowing exceptions to fulfilment of the social purpose of credit splitting.

(c) Consistency with the treatment of employment pensions

The Institute considered that the differences, listed earlier,[67] between the two types of pensions justify the different modes of sharing on marriage breakdown.

(2) Points Against Enactment

As well as rejecting the preceding reasons for enacting the opting-out clause, the Institute also considered the following points against enactment:

a) Taking up the option would place the contributor and non-contributor on an uneven footing with respect to the ability to alienate the share of CPP benefits. The provision of a pension is necessarily achieved in relation to the

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66 There are a number of possible reasons for this practice. One already discussed is that the non-contributor spouse may be in a weaker bargaining position than the contributor - financially unable to achieve a fair resolution by taking court action. Others are that the cost of valuation - a prerequisite to fair bargaining - may not be justified by the size of the asset, and that CPP commonly has a future rather than a present value and may on this account be dismissed as unimportant.

67 See pages 31-3, *supra*.

contributor spouse, who does not have the option to exchange future pension entitlement for immediate financial benefit, or to give it away. Inalienability is an essential element in the scheme. Without it, the purpose of the program could be readily defeated. There must be a good reason to treat the non-contributor differently from the contributor with respect to the power to alienate the share of pension. The idea that they should be different seems to treat the pension as really belonging to the contributor, as though the non-contributor's entitlement were less substantive or important. However, the statistics suggest that the non-contributor's pension may be even more important from the standpoint of social policy. If pensions are to be provided for spouses as certainly as for contributors, the spouse's share of credits must also be inalienable.

b) At the lower end of the income scale, trading away of CPP credits will often mean that on retirement, old age security will have to be supplemented by GIS.

c) The asset is likely to be insufficiently valuable to justify the cost of valuation of the pension, and thus bargaining for this asset fairly may be impractical.

d) The response to the question by other jurisdictions, and the views of women's groups, and department officials, cited earlier.[68]

C. Uncertainty as to the Status of Waivers in the Absence of the Opting-Out Clause

A choice not to enact the opting-out clause does not eliminate the confusion about the effect of waivers made in the absence of provincial legislation specifically allowing them. A recent example of such confusion is the *Albrecht* case. At the District Court level, an implied waiver of CPP benefits (a release of future claims to property) was upheld even though Ontario had not taken up the contracting-out option.

The *Albrecht* decision was very recently overturned, and there are strong arguments against the conclusion reached by the District Court. It is nevertheless possible that the same result could be reached in this jurisdiction. If it were, so long

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[68] See pages 37-40, *supra*.

as it remained good authority, the court would be empowered to impose trusts of benefits in favour of the contributor where there had been a release of future claims on property. A similar result would likely obtain in cases where spouses had expressly agreed that there was to be no division, or had expressly created a trust. Should this happen it would be possible to defeat the social goal of credit splitting - a right to CPP pensions for non-contributors - in individual cases, even though the province had chosen not to enact the legislation permitting waiver of the right to credits.

The solution proposed by the Institute is to declare that any waiver by the non-contributor spouse of the right to CPP credits or benefits is void. This would apply to words in spousal agreements that purport to achieve such a waiver expressly - agreements not to apply for division, agreements expressly settling property in anticipation of non-division, or express trusts as to benefits. It would also apply to words that might be interpreted as waivers - clauses in which spouses agree to make no further claim on one another's property. Such words could not constitute effective waivers of CPP pension. It would follow that the courts would have no power to give effect to such express or implied agreements by imposing trusts as to benefits.[69]

It is arguable that waivers of CPP benefits are void in any case by reference to the intention of the recent amendments. The argument is that by making it unnecessary to apply for division, and impossible to direct the Minister as to allocation of credits unless the province allows this, Parliament intended to ensure *retention* of credits, and by implication, of benefits as well. It is also arguable that section 65(1) of the CPP Act makes waivers of CPP benefits by way of trust or any other means void.[70] Interpretation of the existing legislation might thus lead to the

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69 It is anticipated that making purported waivers void would discourage spouses from making such agreements. However, such clauses might still be included occasionally where spouses or their lawyers were ignorant of the law. This proposal is not intended to prevent the court from ordering compensation to the contributor spouse where fairness requires it. If spouses who were unaware of the law entered into a contract anticipating non-division, and the non-contributor spouse actually received other matrimonial property in exchange for the purported waiver of the share of credits, division by the Minister would cause an inequitable result. Though our proposal would preclude giving effect to the waiver by creating a trust as to benefits, justice might require a readjustment of the division of the remaining property.

70 Employment pensions in Alberta are not assignable, yet the court has created trusts in favour of the spouse when dealing with these. However, according to our Court of Appeal in the *Moravcik* case (see *supra*, note 45)

(continued...)

same result as would arise from the proposals. However, the proposed provincial legislation would eliminate the existing uncertainties.

D. Credit Splitting and the MPA

The final issue is whether credit splitting is to be taken to remove CPP pensions from the reach of provincial matrimonial property law.

There is a view that CPP benefits are the proceeds of a social program that addresses need. It is therefore more in the nature of maintenance than matrimonial property. Accordingly it should be outside the pool of matrimonial property and the reach of matrimonial property law. This analysis is supported to some degree by the Ontario case of *Payne v. Payne*.[71] In that case, citing the provisions for division under the CPP Act, the court held that CPP pensions are not to be included in the calculation of net family property.[72]

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[70](...continued)
this exception is justified because there is no violation of the principle of preserving the pension for the contributor and his or her family. Where, as in relation to CPP credits, the credits have been divided for the social purpose of providing pension for the non-contributor, a parallel exception to inalienability which would allow a trust of CPP credits in favour of the contributor is not justifiable on the same ground. With respect to CPP pensions, the inalienability rule ought to prevail. (There is a suggestion by Madame Justice Wilson in the very recent decision in *Clarke v. Clarke* [1990] S.C.J. No. 97, October 4, 1990, that the imposition of a trust *in favour of the non-contributor* does not alienate a pension because it does not actually attach the pension payments. Conceivably, this point could be made in support of a trust of CPP pension in favour of a contributor if section 65(1) were raised against it. If such trusts are to be void, therefore, it would be better to make them void expressly.)

[71] (1988) 16 R.F.L. (3d) 8.

[72] See note 39, *supra*, for a summary of the reasons that were given. The court reached this conclusion even though it also stated that CPP pensions are "property" under the *Family Law Act*. Perhaps the court did not consider that CPP could be included in the calculation of net property even though it had already been or was to be allocated into separate accounts. (See also a recent decision of the Pension Appeals Board, *Minister of National Health and Welfare v. MacNeil*, Dec. 29, 1988, 1989 CCH Canadian Employment Benefits and Pension Guide Reports, para. 8552. CPP pension was held not to constitute a divisible marital asset under the Nova Scotia MPA. However, in that province it had been held that pension
(continued...)

There is also a suggestion that inclusion of CPP in the final property division equation might circumvent the object of the CPP Act of creating an absolute entitlement to a half-share of this asset.

The contrary view is that matrimonial property law covers all accumulations of property or economic gains during the marriage, and this includes CPP pensions. (The same rationale applies to including pensions within the ambit of matrimonial property generally.)

In our view there is no reason to exclude CPP pensions, though divisible on a mandatory basis, and inalienable in the hands of both spouses, from the pool of matrimonial property and the reach of matrimonial property law. CPP pensions are to be regarded as matrimonial property, within the scope of the MPA.

Where, as in most cases, division is equal, including CPP would have no impact on the division of the remaining property. CPP is likewise equally divided. However, where division is unequal, the fact that CPP is or is to be equally divided would be a factor to be taken into account in determining the proportion of division of the remaining property.

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[72](...continued)
rights generally do not constitute divisible family assets, (though they are to be treated as income in the hands of the recipients in deciding the issue of maintenance). This aspect of Nova Scotia law has now been overruled by the Supreme Court of Canada in *Clarke v. Clarke* [1990] S.C.J. No. 97, October 4, 1990.) The decision of the Ontario District Court in the *Albrecht* case appears to take the opposite view on the matter of whether CPP pensions are matrimonial property. In this judgment the court dealt with CPP pension as included by implication, and presumably properly included, in the minutes of settlement, thus treating it as matrimonial property.

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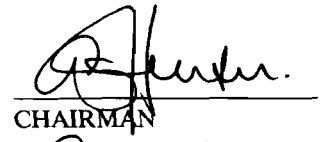

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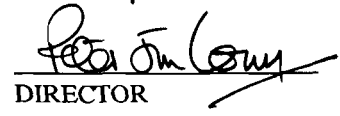

DIRECTOR

November 1990

PART III - LIST OF RECOMMENDATIONS

Recommendation 1

We recommend that the provisions for credit splitting on matrimonial breakdown under the CPP Act be recognized as an acceptable mechanism for achieving the policy goal of the legislation, regardless of any conflict in principle with the scheme for property division on matrimonial breakdown under our provincial law.

Recommendation 2

We recommend that provincial legislation contemplated in section 55.2(3) of the CPP Act, which would permit spouses to agree that there is to be no division of CPP credits, not be enacted.

Recommendation 3

We recommend eliminating uncertainty in the existing law by enacting legislation which declares that provisions in spousal agreements that purport to waive or alienate a spouse's share of CPP credits or benefits are void. Waivers implied in releases of future claims against property of the other would likewise be void.

Recommendation 4

We recommend that credit splitting under the CPP Act is not to be interpreted as removing CPP pensions from the reach of provincial matrimonial property law. Though the right to credits is to be inalienable, the fact of equal division may be taken into account in determining the division of the remaining property.

APPENDIX A - CPP ACT SECTIONS 55.1, 55.2

The relevant provisions of the CPP Act are as follows:

55.1(1) Subject to this section and section 55.2, a division of unadjusted pensionable earnings shall take place in the following circumstances:

(a) following the issuance of a decree absolute of divorce, a judgment granting a divorce under the *Divorce Act* or a judgment of nullity of a marriage on the Minister's being informed of the decree or judgment, as the case may be, and receiving the prescribed information relating to the marriage in question;

(b) following the approval by the Minister of an application made by or on behalf of either spouse or his estate, if

(i) the spouses have been living separate and apart for a period of one year or more, and

(ii) in the event of the death of one of the spouses after they have been living separate and apart for a period of one year or more, the application is made within three years after the death; and

(c) following the approval by the Minister of an application made by or on behalf of either former spouse, within the meaning of subparagraph (a)(ii) of the definition "spouse" in subsection 2(1), or his estate, if

(i) the former spouses have been living separate and apart for a period of one year or more, or

(ii) one of the former spouses has died during that period,

and the application is made within four years after the day on which the former spouses commenced to live separate and apart.

(2) For the purposes of this section,

(a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and

(b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

(i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the Minister that the separation would probably have continued if the spouse had not become so incapable, or

(ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

(3) For the purposes of this section, the spouses or former spouses must have cohabited for a continuous period of at least one year in order for a division of unadjusted pensionable earnings to take place, and, for the purposes of this subsection, a continuous period of at least one year shall be determined in a manner prescribed by regulation.

(4) In determining the period during which the unadjusted pensionable earnings of the spouses or former spouses shall be divided, only those months during which the spouses or former spouses cohabited shall be considered, and, for the purposes of this subsection, months during which the spouses or former spouses cohabited shall be determined in a manner prescribed by regulation.

(5) Before a division of unadjusted pensionable earnings is made under this section, or within the prescribed time period after such a division has been made, the Minister may refuse to make the division or may cancel the division, as the case may be, if he is satisfied that the division would be, or is, as the case may be, to the detriment of both spouses or former spouses.

(6) This section applies

(a) in respect of decrees absolute of divorce, judgments granting a divorce under the *Divorce Act* and judgments of nullity of a marriage, issued after the coming into force of this section; and

(b) in respect of spouses and former spouses who commence to live separate and apart after the coming into force of this section.

55.2(1) In this section, "spousal agreement" means

(a) a pre-marriage agreement between spouses-to-be, which agreement is to take effect on marriage; or

(b) an agreement between spouses or former spouses, including a separation agreement, entered into

(i) before the day of any application made under section 55 or 55.1, or

(ii) for the purpose of a division under paragraph 55.1(1)(a), before the issuance of the decree absolute of divorce, judgment granting a divorce under the *Divorce Act* or judgment of nullity of the marriage, as the case may be.

(2) Except as provided in subsection (3), where a spousal agreement was entered into or a court order was made on or after June 4, 1986, the provisions of that spousal 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.

(3) Where

(a) a spousal agreement entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the spouses or former spouses that there be no division of unadjusted pensionable earnings under section 55 or 55.1,

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

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

the Minister shall not make a division under section 55 or 55.1.

(4) The Minister shall, forthwith after being informed of a decree absolute of divorce, a judgment granting a divorce under the *Divorce Act* or a judgment of nullity of a marriage or after receiving an application under section 55 or 55.1, notify each of the spouses or former spouses, in prescribed manner, of the periods of unadjusted pensionable earnings to be divided, and of such other information as the Minister deems necessary.

(5) On approval by the Minister of a division under section 55.1, the unadjusted pensionable earnings for each spouse or former spouse for the period of cohabitation attributable to contributions made under this Act, determined in the same manner as the total pensionable earnings attributable to contributions made under this Act are determined in section 78, shall be added and then divided equally, and the unadjusted

pensionable earnings so divided shall be attributed to each spouse or former spouse.

(6) Where there is a division under section 55.1 and under a provincial pension plan, for the purposes of benefit calculation and payment under this Act, the total unadjusted pensionable earnings of a contributor for a year of division shall be the aggregate of his unadjusted pensionable earnings attributed under subsection (5) and his unadjusted pensionable earnings attributed under a provincial pension plan.

(7) No division shall take place under section 55.1 where one or both spouses or former spouses contributed to a provincial pension plan in any month during which they cohabited (and, for the purposes of this subsection, months during which the spouses or former spouses cohabited shall be determined in a manner prescribed by regulation), unless that provincial pension plan provides for a division, in respect of those spouses or former spouses, in a manner substantially similar to that described in this section and section 55.1.

(8) No division under section 55.1 for a period of cohabitation shall be made

(a) where the total unadjusted pensionable earnings of the spouses or former spouses in a year does not exceed twice the Year's Basic Exemption;

(b) for the period before which one of the spouses or former spouses reached eighteen years of age or after which a spouse or former spouse reached seventy years of age;

(c) for the period in which one of the spouses or former spouses was a beneficiary of a retirement pension under this Act or under a provincial pension plan; and

(d) for any month that is excluded from one of the spouse's or former spouse's contributory period under this Act or a provincial pension plan by reason of disability.

(9) Where the Minister has approved a division under section 55.1 and a benefit is payable under this Act to or in respect of either of the spouses or former spouses for any month commencing on or before the day on which the division is approved, the basic amount of the benefit shall be calculated and adjusted in accordance with section 46 and adjusted in accordance with subsection 45(2) but subject to the division of unadjusted pensionable earnings made under section 55.1, and the adjusted benefit shall be paid effective the month following the month in which the division is approved.

(10) On approval by the Minister of a division under section 55.1, both spouses or former spouses or their respective estates shall be notified in prescribed manner and, where either spouse or former spouse or his estate is

dissatisfied with the division or the result thereof, the right of appeal as set out in this Part applies.

(11) The Governor in Council may make regulations prescribing

(a) the time, manner and form of making applications for a division of unadjusted pensionable earnings or withdrawal of applications for such division;

(b) the procedures to be followed in dealing with and approving such applications and the information and evidence to be furnished in connection therewith; and

(c) the effective date of the attribution of pensionable earnings following a division.

[emphasis added]

APPENDIX B - EXCERPTS FROM COMMONS DEBATES, MAY 9, 1977 AND JUNE 11, 1986

Bill C-49 created the original credit splitting provisions. In motion of May 9, 1977, that the Bill be read a second time and referred to the Standing Committee on Health, Welfare and Social Affairs, Paul McRae, Secretary to the Minister of National Health and Welfare, began the discussion as follows:

> For some time now, various groups and governmental bodies have been putting forward proposals to provide Canada Pension Plan benefits for spouses who work in the home. During the course of the federal-provincial social security review a number of these proposals were examined in some depth. Our aim and that of most of the groups to which I have just referred, was to provide, under the CPP, both **recognition and financial security** for spouses who work in the home while at the same time retaining the basic, compulsory earnings-related and contributory characteristics of the plan. ....
>
> The first amendment will allow the splitting, upon divorce or annulment, of the CPP pension credits which were earned by both spouses during their marriage. In part, of course, the Canada Pension Plan already recognizes the economic partnership aspect of marriage by providing benefits to a surviving spouse where the death of the other spouse terminates the family's income from either employment or pension benefits. However, the protection offered by survivor benefits ceases to exist when the marriage is terminated by divorce or annulment. Thus, there is at present no further recognition of the fact that **both spouses contributed to the accumulation of CPP pension credits during their marriage, either directly by virtue of their both earning credits in their own right or indirectly by one contributing through work in the home.**
>
> **Of course, work in the home really does contribute to family income and, therefore, to the CPP credits accumulated by the spouse who is in the labour force. Thus, by permitting the splitting of these credits, this amendment will assure to each spouse a fair share of an asset to which they have both, in reality, contributed. Further, it will provide this recognition and some measure of financial security to the spouses and to their dependent children** at no significant additional cost to the plan. [emphasis added]
> (Canada, House of Commons, Debates at 5411 (9 May, 1977))

Bill C-116 included the recent amendments to the credit splitting provisions of the CPP Act. In a motion of June 11, 1986 that the Bill be read a second time and referred to the Standing Committee on National Health and Welfare, Minister Jake Epp's comments included the following:

> In preparing this package of benefit enrichments, the federal and provincial government representatives have been concerned with the need for improvement in the various forms of pension coverage that are available to women. **Traditionally, women in Canada have experienced a greater degree of financial hardship during their senior years than men, and I am especially pleased that several features in the Government's legislation to modify the Canada Pension Plan particularly addressed the needs of women in retirement.**
>
> The improvements in survivor benefits, which I have just mentioned, are one part of these provisions. Another is the amendment which will ensure that, upon divorce, Canada Pension Plan credits earned by both partners in a marriage will be subject to sharing between the former spouses, without application, as soon as the necessary information is received by the plan administration. Similarly, when married couples separate or when common-law couples part, the division of the pension credits earned during the marriage or relationship will be mandatory upon application by one spouse. As well, Canada Pension Plan credits earned during a marriage will be shared equally between spouses upon retirement if one of the spouses so requests.
> [emphasis added]
> (Canada, House of Commons, Debates at 14252, (11 June, 1986))