



# **DIVISION OF PENSION BENEFITS UPON MARRIAGE BREAKDOWN**

## **Consultation Memorandum**

September 1995

## 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.

W.H. Hurlburt, Q.C. is a consultant to the Institute and a member of the Institute's Board. He has carriage of the project on Division of Pension Benefits.

### PREFACE AND INVITATION TO COMMENT

This is a Consultation Memorandum. The Institute's purpose in issuing a Consultation Memorandum at this time is to allow interested persons the opportunity to consider these issues and to make their views known to the Institute. Any comments sent to the Institute will be considered when the Institute determines what final recommendation, if any, it will make.

The reader's attention is drawn to the questions which are set out in highlight boxes. It would be helpful if comments would refer to these questions by number where practicable, but commentators should feel free to address any issues as they see fit.

It is just as important for interested persons to advise the Institute that they approve the proposals as it is to advise the Institute that they object to them, or that they believe that they need to be revised in whole or in part. The Institute often substantially revises tentative conclusions as a result of comments it receives. The proposals do not have the final approval of the Institute's Board of Directors. They have not been adopted, even provisionally, by the Alberta government.

Comments on this memorandum should be in the Institute's hands by **January 15, 1996**. Comments in writing are preferred. Our address is:

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**DIVISION OF PENSION BENEFITS  
UPON MARRIAGE BREAKDOWN  
Consultation Memorandum**

**I. INTRODUCTION**

**A. Purpose of Memorandum**

In 1986, ALRI issued its Report 48, *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown* ("Report 48"). We now propose to review the recommendations that we made in Report 48 in order to see whether and how they should be revised under present circumstances.

The purpose of this memorandum is to solicit comments and advice on the whole subject and, in particular, on the recommendations that we made in Report 48 and as to the recommendations that we might make now.

This memorandum is prepared by ALRI staff and the views expressed in it have not been considered or approved by the ALRI's Board. The results of our solicitation of comments and advice will be provided to the Board as the basis for its discussion of the issues raised.

**B. Reasons for Review**

It is settled policy and settled law that pension benefits which accrue to spouses during a marriage are part of the matrimonial property that is to be distributed between the spouses on marriage breakdown under the Matrimonial Property Act.<sup>1</sup>

Report 48 made recommendations for changes in the law to make the division process fairer, more efficient and less costly and to protect the interests of all concerned, including spouses, other beneficiaries, employers and plan administrators. We believe that, if they had been enacted, they would have achieved these purposes.

The Government has given active consideration on a number of occasions to the recommendations of Report 48. We are not aware of any dissatisfaction with the recommendations themselves, but they have never quite made it to the stage of legislation. One possible difficulty is that we recommended that they be

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<sup>1</sup> R.S.A. 1980, c. M-9.

implemented by amendments to the MPA, and opening that Act to amendment has the potential for raising unrelated controversial issues.

Much has happened since 1986, when we issued Report 48:

- Legislation enacted federally and in other provinces has provided working models of pension division which should be examined, though they fall generally within the pattern of Report 48.
- The Law Reform Commission of British Columbia has issued a report on the subject<sup>2</sup> and British Columbia legislation has substantially adopted the Commission's recommendations. While the methods of pension division available under the LRC's proposals are not on the whole very different from those recommended in Report 48, there is one significant policy difference, which affects some of them: under the LRC's proposals, the spouse who is not a pension plan member will share in post-division improvements in the pension benefit.
- The Ontario Law Reform Commission has also issued a report on the subject,<sup>3</sup> which would also allow the non-member spouse to share in the post-division benefits.
- Vested but unmatured pension benefits under Alberta pension legislation have, with some qualifications, become "portable", that is, a pension plan member who terminates their membership can have the present value of the pension benefit paid out from the pension plan to another registered pension vehicle in the name of the member. This provides machinery for the payment of a share of the present value to a non-member spouse's registered pension vehicle.

The immediate occasion for our review is the work of The Alberta Employment Pension Plans Administration Advisory Committee. This Committee, as its title indicates, is an advisory body to the Superintendent of Pensions for Alberta. It has identified as a major concern the problem of division of pensions on marriage breakdown. This concern arises because "unclear and contradictory

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<sup>2</sup> *Report on the Division of Pensions on Marriage Breakdown*, LRC 123, 1992 ("the BC Report").

<sup>3</sup> *Report on Pensions as Family Property: Valuation and Division*, 1995 ("the Ontario Report").

legislation combined with confusion about the issue in the legal community, has led to inappropriate costs and distress for all concerned".<sup>4</sup>

AEPPAAC has, in effect, urged ALRI to undertake the present review with a view to alleviating the costs and distress that the Committee has identified. Its suggestion is that, while the recommendations in Report 48 were a useful response to conditions that obtained in 1986, require review and some revision to make them appropriate to the conditions that obtain in 1995. The Committee's views are referred to in detail later in this Consultation Memorandum.

ALRI remains of the view that reform of the law relating to the sharing of pension benefits on marriage breakdown will serve the interests of all concerned—pension plan members, spouses of pension plan members, and pension plan administrators and sponsors. We have therefore undertaken to review our recommendations in order to see whether and how they should be revised in the light of changes in the legislative and pension environments since 1986.

### **C. Procedure**

Our first step in the review is the preparation of this Consultation Memorandum. The Memorandum will set out the relevant issues. It will set out the relevant considerations. It will ask readers to give us their comments and advice.

We will then circulate this Consultation Memorandum for review and comment by those affected by the division of pensions on marriage breakdown. If there are groups of pension members or spouses of pension members, we would like to get their views. We can and will consult the bar, both because of its special position, and because lawyers can give useful information and comment about the needs of their clients. We will obtain the views of pension plan administrators and Government administrators.

Having consulted those affected, we will prepare revised recommendations and issue a revised report, though we will consult further before doing so if necessary.

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<sup>4</sup> Letter, Elaine Noel-Bentley, chair of the Committee, to Alberta Law Reform Institute dated Jan. 5, 1995.

## **D. Structure of This Consultative Memorandum**

This Consultative Memorandum consists of a series of questions which we think are raised by post-Report 48 developments, including some important points raised by the LRC BC and OLRC reports, and including some suggestions that have been made to us. Under each question we will set out the considerations and arguments that we think are relevant to the question and state our present views. Then we will invite comment.

We intend the questions to provide a structure for consideration of the subject. A reader who thinks that we have not framed a question appropriately or that we have not asked the right questions should say so. Otherwise, we hope that readers will direct their comments to questions as framed.

Before setting out the questions, we state one premise. It is that a spouse's pension benefit accumulated during marriage is included in the property to be divided between spouses under the Matrimonial Property Act on marriage breakdown. This is a given. The project is about what is included in a pension benefit and how a pension benefit can most efficiently and fairly be divided between a plan member and a non-member spouse.

We have attached as an appendix the recommendations that we made in Report 48. A reader might find it useful to look through these recommendations with two purposes in mind. One is to get an overview of the subject as we perceive it. The second is to see whether any recommendations should be reviewed other than those covered by the questions we will pose.

## **E. Terminology**

In Report 48 we used some terms that are not in general use. We think that the path of least confusion is for us to continue to use them. We will explain them here.

### ***Valuation and accounting***

When matrimonial property is to be divided under the Matrimonial Property Act, the usual approach is to prepare a statement showing the value of the matrimonial property held by each spouse. The one with the greater share must then pay money or transfer property to the other so that each has the appropriate share (presumptively 50%). We have called this process "valuation and accounting". The LRC BC report uses the term "compensation payment" and the OLRC report uses the term "equalization payment".

### ***Valuation and division***

Report 48 recommended that a new form of pension division be made available. Under it, the pension benefit would be valued, and the non-member spouse's share would be transferred by the pension plan to a registered pension vehicle in the name of the non-member spouse. Note that this involves a division of the pension asset itself, though by means of a dollar transfer, so that the pension benefit would not be shown on the statement of account between the spouses in a valuation and accounting of other divisible matrimonial property. We called this "valuation and division". The LRC BC appear to include it as one alternative form of an "account split", though their "account split" is deferred until the plan member can retire.

The OLRC have proposed a form of division at source by transfer which resembles "valuation and division". It is, however, different, as it envisages the use of money paid out of the pension plan as part of the equalization payment required by a valuation and accounting. That is, the pension benefit would appear as an asset in the plan member's column, and the money from the plan would then make up part or all of the equalization payment. We discuss such a proposal later in this Consultation Memorandum.

### ***Provision of a separate pension***

Report 48 recommended that another new form of pension division be made available, which we called "provision of a separate pension". Under it, the non-member spouse's share of the pension benefit as it stood at the time of division of the matrimonial property would, at a time when the plan member could retire, be translated into a pension from the pension plan in the name of the non-member spouse and based on elections made by the non-member spouse. Here, the pension benefit would be divided in specie.

The LRC BC has included a similar proposal as the other alternative form of "account split". Its proposal is different in that it gives the non-member spouse the benefit of post-division improvements in the pension benefit up to at least the first time at which the member could retire.

### ***Division of proceeds***

This term is self-explanatory. Under "division of proceeds", money paid out from the pension plan under its terms, whether pension or other money benefits, would be divided between the plan member and the non-member spouse according to



their respective shares in the pension benefit. A court order that provides for this is sometimes called an "if and when" order.

## II. DISCUSSION OF ISSUES

### A. Premise

*A spouse's pension benefit accumulated during marriage is included in the property to be divided between spouses under the Matrimonial Property Act on marriage breakdown.*

It is settled policy that a pension benefit is divisible matrimonial property. It is also settled law. This project accepts it as a given.

### B. What is to be Paid for or Shared?

***Question 1: Post-division changes in pension benefit.***

***Where a plan-member spouse has a vested right to a deferred pension,***

***(a) should the prospect of post-division changes in the pension benefit be taken into account in valuing the non-member spouse's share of the pension benefit?***

***(b) should the non-member spouse share in post-division changes in a pension benefit which in fact occur?***

#### 1. ALRI's view

Essentially, ALRI's Report 48 recommended that a pension benefit that includes a vested right to a deferred pension<sup>5</sup> be valued or shared as it stood at the time of the division of matrimonial property. The prospect of post-division changes in the benefit, whether as a result of increases in the member's salary or because of improvements made to the plan, should not, in ALRI's view, be included in the valuation of the benefit, nor should actual changes affect the amount received by the non-member spouse under a separate pension or division of proceeds.

Of course, if, at the time of division, a member has a right to a post-division improvement, that right would be part of the pension benefit.

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<sup>5</sup> The valuation of an unvested right is discussed separately below.

Suppose, for example, that a defined benefit plan provides at "normal" retirement date a pension of 2% of the average of the plan member's last 5 years' salary for each year of pensionable service. Suppose further

- that at the time of division of matrimonial property the plan member has 10 years' pensionable service and their average salary for the last 5 years was \$30,000. At that time, the plan member would be entitled to a deferred pension of  $0.02 \times 10 \times 30,000$ , or \$6,000 for the marital years.
- that at the "normal" retirement date, the plan member has 20 years' pensionable service (including the 10 marital years and 10-post-marital years) and their average salary for the last 5 years was \$40,000. At that time, the plan member would be entitled to a deferred pension of  $0.02 \times 20 \times \$40,000$ , or \$16,000, of which, on the face of it \$8,000 was attributable to the marital years.

Post-division improvements to the plan might increase the deferred pension even more.

ALRI did not set out at length its reasons for recommending that post-division changes not be taken into account, saying merely that

the greater unfairness would be in allowing a non-employee spouse to share in increases in the pension benefit which arise and are paid for after the time of division of the matrimonial property.<sup>6</sup>

Since the time of Report 48, the Law Reform Commission of British Columbia and the Ontario Law Reform Commission have issued careful and thorough reports on the subject of pension division on marriage breakdown. The two Commissions, like ourselves, have tried to devise fair and efficient ways of dividing pension benefits on marriage breakdown, and there is much common ground between us. There is, however, an important divergence of view between the two Commissions and ALRI. The LRC BC and the OLRC are of the view that a non-member spouse should share in increases in a pension benefit that accrue after the division of matrimonial property because of post-division improvements made to the pension plan or because of post-division increases in the plan member's earnings. We are of the view that the non-member spouse should not share in such increases. However, we think that the fact that the two commissions

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<sup>6</sup> Report 48, at 13. A minority of ALRI's Board would have allowed post-division sharing in a case in which the plan member opposes a valuation and accounting and the non-member spouse is locked into a deferred pension or share of proceeds.

have come to the opposite conclusion makes it necessary to canvass the subject again and review that conclusion.<sup>7</sup>

Because of this divergence of view on an important policy issue we will set out at some considerable length the views of the LRC BC, the OLRC and ourselves. The discussion initially relates to the valuation of a pension benefit for the purposes of what is referred to by the LRC BC as a "compensation payment", by the OLRC as an "equalization payment", and by ourselves as "valuation and accounting". It goes on to deal briefly with valuation for valuation and division and with sharing by division of proceeds.

## **2. Valuation and accounting: The views of LRC BC and OLRC about valuation**

We will first set out the reasons of the British Columbia and Ontario Commissions for the view which they hold.

The British Columbia Report says at page 35:

We addressed the pros and cons of [the policy of dividing increases in a pension account that occur after marriage breakdown between spouse and member] fully in the Working Paper. We remain convinced that the correct policy is to protect the value of the divided pension.

The accompanying footnote says:

See particularly Appendix C to the Working Paper.

The passage in Appendix C to the British Columbia Working Paper that deals with sharing in post-valuation increases in value of a pension benefit is as follows (not including footnotes, which are references):

Four arguments are usually raised in this context:

1. In terms of principle, the court is dividing wealth at the time of marriage breakdown. This suggests that changes in the value of a pension after that time are irrelevant.
2. Moreover, it is less speculative to calculate the value of the pension as if retirement occurred on the valuation date (the "termination method") rather than the predicted retirement date (the "retirement method.")
3. On the other hand, it may be observed that, insofar as a "final or best average earnings" defined benefit plan is concerned, each year during which entitlement is earned should produce an equal percentage of the final or best average earnings, even if they have to be estimated. The first years in which entitlement is earned are of equal importance to the later years. The spouse is undercompensated if entitlement is determined by reference to an earlier salary level (or without reference to expected indexing or other future adjustments to the pension).

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<sup>7</sup> The arguments are discussed at greater length in Pask & Hass, *Division of Pensions*, (Carswell, 1990) III-18 to III-22.

















































































































