

PENSION DIVISION ON MARRIAGE BREAKDOWN

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A Ten Year Review
of Part 6 of the
Family Relations Act

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: <http://www.bcli.org>

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

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INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Pension Division On Marriage Breakdown - A Ten Year Review of Part 6 of the Family Relations Act

It has been over ten years since the enactment of what is now Part 6 of the *Family Relations Act*. Under that Act, a pension is a family asset that must be divided between the parties to a marriage on its breakdown. But a pension is a very complex form of asset which requires a sophisticated body of rules if it is to be divided fairly. In this context fairness must extend to not only the parties to the marriage, but also to those who must administer pension plans and to other plan members. The function of Part 6 of the *Family Relations Act*, and its supporting regulations, is to provide a legal framework for pension division that achieves this goal.

Part 6 is based on recommendations made by the former British Columbia Law Reform Commission in its 1992 Report on Pension Division on Marriage Breakdown. Since those recommendations were developed, and the implementing legislation enacted, a number of developments have occurred. The background of law and practice against which Part 6 operates has not remained constant. There have been important changes to pension benefit standards legislation as well as the growth and acceptance of non-traditional relationships to which pension division legislation is potentially applicable. Practices within the pension industry itself have evolved with certain kinds of benefits assuming an increased importance while the significance of others has waned. All of these factors make a ten year review of Part 6 most appropriate and we were pleased to accept the invitation of the Attorney General to carry out such a review.

Pension division on marriage breakdown has been the subject of much attention by both the Law Reform Commission and the Law Institute. Before it was dissolved the Commission issued a major publication: "Questions and Answers on Pension Division on Marriage Breakdown" which became a key tool in assisting the public, the legal profession and the pension industry in their understanding of the operation of the legislation. A second edition of "Questions and Answers" was prepared and issued by the Law Institute in 2001 and remains available on the Institute's website.

The Institute is grateful to the distinguished members of the Project Committee on Pension Division, who volunteered their time and whose expertise and hard work is evident in the detailed recommendations they have made. Pensions are often the most valuable asset acquired by spouses during their relationship. The matters addressed in this report are of vital importance to the people of British Columbia and, for that reason, the Institute urges government to act speedily on these recommendations.

Ann McLean
Chair,
British Columbia Law Institute
May, 2006

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I. INTRODUCTION

A. Part 6 of the FRA

In 1979, B.C. enacted the Family Relations Act (now R.S.B.C. 1996, c. 128). It provided that family assets were divisible between spouses when their marriage ended. It also specified that a pension was a family asset. While there was little difficulty in dividing most assets, such as bank accounts, automobiles or the family residence, many problems quickly arose in trying to somehow give both spouses the benefit of the pension that accrued during the relationship, but would not be payable until perhaps years later.

The B.C. Court of Appeal sorted things out in *Rutherford v. Rutherford* (1981), 30 B.C.L.R. 145 (C.A.). It held that the member was a trustee for the spouse of the pension benefits and, when the pension commenced, the member must pay the spouse a specified fraction of each payment on receipt. The Court of Appeal also set out the formula for determining the spouse's share of the pension (often since then referred to as the "Rutherford Formula"). Essentially, the spouse was entitled to a share determined by the formula $\frac{1}{2} \frac{A}{B}$ where A = pensionable service during the marriage and B = all pensionable service accrued to the date of pension commencement.

The Rutherford Order solved many, but not all, of the problems that arose with respect to dividing pensions. For example, the order was expressly not binding on the plan administrator. The division had to be carried out by the parties themselves. When the member died, the pension would, in most cases, terminate so that there was often no way to secure retirement income for the spouse's lifetime. There was also a conflict between the financial interests of the parties as to when the pension should commence being paid. The member, who would have to give up employment to receive the pension, was often better off financially in deferring retirement. The spouse, on the other hand, was usually better off the sooner the pension commenced being paid.

Starting in the 1980's, various Canadian provinces enacted pension division legislation that required the assistance of the plan administrator in dividing the benefits. B.C. enacted pension division legislation in 1995, which was largely based on the recommendations of the B.C. Law Reform Commission in its *Report on Division of Pensions on Marriage Breakdown* (LRC123, 1992). The legislation was enacted as Part 3.1 of the *Family Relations Act*. Subsequent technical amendments were made in 1997. After the 1996 statutory revision, it became what is now Part 6 of the FRA.

B. The Pension Division Committee

In July, 2005, on the 10th anniversary of Part 6 coming into force, the Ministry of Attorney General asked the British Columbia Law Institute to constitute a committee to review the operation of Part 6 and to make recommendations by March 31st, 2006, concerning legisla-

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tive amendments that may be necessary for its improvement. The Pension Division Committee was constituted effective as of October, 2005 and consisted of persons with wide backgrounds in pension administration, pension law and family law. The Committee members were:

Thomas G. Anderson, Q.C., Chair (Anderson Pension Law Consulting)
Wayne Arnold (formerly with the Financial Institutions Commission of BC)
Diane Bell (Clark Wilson LLP)
Judith Brown-Rudersdorfer (IWA-Forest Industry Pension Plan)
Murray Campbell (Lawson Lundell)
Paul Daykin (Aaron Gordon Daykin)
Elizabeth Gorman (Leong & Associates)
Stephanie Griffith (Mercer Human Resource Consulting)
Kim Kenyon (Pension Corporation)
Brenda Petrie (Teck Cominco Limited)
Gregory K. Steel, Q.C. (Steele Urquhart Payne)

C. Process

Although the Committee was well balanced in terms of representing the various stakeholder interests involved, the Committee also wished to consult more broadly. The Committee recognized, however, that there would be difficulties in concluding its work and carrying out consultation at the same time, given the short deadline for submitting its report. It was decided, therefore, to invite comment on an Issues List (set out in Appendix A), highlighting the matters the Committee had identified for review.

The Issues List was circulated as widely as possible. It was posted on the BCLI website. It was given prominence in both the printed and electronic versions of BarTalk, a publication of the Canadian Bar Association. With the assistance of the Financial Institutions Commission of B.C., an e-mail notice was also distributed widely among pension plan administrators and their advisors.

The result was a number of detailed and thoughtful submissions that were of immense value to the Committee in carrying out its work. Discussions were also held with the Canadian Bar Association Vancouver Family Law Subsection, Victoria Family Law Subsection, and Pension and Benefits Subsection. Eventually, the Committee requested an additional 6 weeks to complete its work, to give it time to consider the submissions that were received. The Committee wishes to record its gratitude to those who took the time to consider and comment on the Issues List. A list of correspondents is set out in Appendix E to this Report.

D. The Operation of Part 6

Committee members were, for the most part, in agreement that Part 6 works extremely well. There were some areas noted where the legislation was ambiguous and serious issues had arisen (such as with respect to making beneficiary designations and the rules governing the division of preretirement survivor benefits).

Perhaps the area that attracted the most concern was the exposure of plan administrators to liability in circumstances where they had reason to believe that a marriage breakdown had occurred, but the parties had failed to either finalize the pension division arrangements or, having done so, did not think it necessary to notify the plan administrator. There was unanimous agreement that plan administrators should not be at risk in these circumstances, and there was a need to develop procedures to protect all of the parties.

It was also recognized that for most spouses involved in sorting out the financial issues arising from the breakdown of their relationship, and for most family lawyers, it was not realistic to expect them to be pension experts. They were not well placed to address the array of various technical issues that might arise because of plan design, or future events. It was desirable to make Part 6, as much as possible, operate independently as a complete code that could be triggered by the parties making an agreement, or the court making an order, that (a) sufficiently identified the pension in question, (b) specified the period subject to division, and (c) provided that the pension be divided “in accordance with Part 6.”

The most fundamental question, however, concerned whether the basic approach adopted under Part 6 should be maintained, or a different model of pension division adopted.

E. Basis of Pension Division - the Fundamental Issue

Pension division legislation in Canada falls into two broad types: (1) an immediate settlement approach, and (2) a deferred settlement approach.

Immediate Settlement Approach

Under an immediate settlement approach, the spouse’s share of the pension is valued as of marriage breakdown (usually the date the parties separate) assuming the member terminates employment on that date and retires (usually at age 65). This value is then transferred to the credit of the spouse, usually to an RRSP. The transferred funds are typically “locked-in”, meaning that the RRSP can’t be cashed out, but must be used to provide the owner with a life income (by, for example, purchasing an annuity--often not the best financial choice--or transferring the funds to a Life Income Fund which is subject to statutory minimum and maximum amounts that may be withdrawn over the lifetime of the owner).

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The immediate settlement approach has the virtue of simplicity, but it often places the lowest possible value on the spouse's share of the pension. Manitoba, Quebec, Alberta, and Saskatchewan have pension division schemes based on the immediate settlement approach. It is also endorsed under the federal *Pension Benefits Standards Act, 1987*, and is the basis of the legislation that governs the division of most federal public service pensions (the federal *Pension Benefits Division Act*).

Deferred Settlement Approach

In contrast, under a deferred settlement approach, the spouse's interest in the pension is identified by a formula (similar to the Rutherford Formula discussed above). When the member elects to have the pension commence, the spouse is entitled to receive the spouse's share, based on the value the pension then has.

The Rutherford Order is a classic example of the deferred settlement approach, and the principles of pension division adopted in Part 6 are also based on this model. The deferred settlement approach places a higher value on the spouse's interest in the pension than does the immediate settlement approach, but it is also the more complicated of the two systems. The B.C. legislation incorporates a deferred settlement approach for certain types of pension plans. Other Canadian jurisdictions adopting the deferred settlement approach include Newfoundland and Nova Scotia. Elements of the Alberta and Saskatchewan models can be characterized as incorporating this model. It is also the basis of the division of Canada Pension Plan credits between spouses (and common law partners) when their relationship ends. Looking further afield, it is also the model endorsed under the U.S. legislation (the *Employee Retirement Income Security Act*) that governs the division on marriage breakdown of pensions in most U.S. private occupational plans. It is also worth noting that a task force established by the Canadian Institute of Actuaries to consider Canadian pension division legislation and make recommendations for a uniform model, endorsed the deferred settlement model as being the fairest of the identified approaches (see *Report of the Task Force on the Division of Pension Benefits Upon Marriage Breakdown* (Feb. 2003, Canadian Institute of Actuaries)).

There was much sympathy on the Committee for the immediate settlement model. Similarly, a number of the submissions received, from persons with substantial experience in the area, strongly recommended an immediate settlement model. It was noted that spouses themselves often want an immediate transfer of benefits and, moreover, need the funds for current expenses. It was also forcefully argued that the immediate settlement model provided a clean break between the parties, avoided substantial administrative expense, and adopting it in B.C. would promote uniformity across Canada, all desirable goals.

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The Committee, however, has concluded that, while some amendments are called for in detail, the deferred settlement method must be retained in B.C. It is necessary to set out the reasons that led the Committee to this conclusion. This analysis is set out in Appendix D.

F. A Note About Technical Concepts and Some Abbreviations

Pensions are exceptionally technical, and this brief report cannot possibly serve as a primer for the concepts involved. The reader who requires more assistance in basic pension concepts should refer to some of the following sources:

Q&A About Pension Division in B.C. (BCLI, 2nd ed., 2001)
Report on Division of Pensions on Marriage Breakdown (BCLRC, Report 123, 1992)
Pension Division For Family Lawyers (B.C. CLE, 2003)
Family Law Agreements Annotated Precedents (B.C. CLE, 2005)
Family Law Sourcebook (B.C. CLE, 2005)

Some abbreviations have been adopted in the Report. Here is a list:

CRA - means the Canada Revenue Agency
DBP - means, depending on context, Defined Benefit Pension or Defined Benefit Plan
DCP - means, depending on context, Defined Contribution Pension or Defined Contribution Plan
FRA - means the *Family Relations Act*
PBSA - means the B.C. *Pension Benefits Standards Act*
SPP - means supplemental pension plan

A reference to a spouse means the spouse of the member (and will usually include a former spouse).

G. Summary of B.C. Pension Division Legislation

Part 6 of the FRA adopts different rules for pension division depending on the kind of plan involved and whether the pension is matured. (Before pension commencement, the pension is said to be “unmatured.” After payments begin, it is referred to as “matured.”)

1. An unmatured pension in a DCP is divided by an immediate transfer of the spouse’s interest to a prescribed pension vehicle (such as an RRSP).

Comment: A DCP is similar to an RRSP in that its value consists solely of contributions made to the plan, plus net investment returns on those contributions. When the member retires, the funds in the account are usually used to

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purchase an annuity for the member (for this reason DCP's are often referred to as "money purchase plans"). Because of the way a DCP is structured, an immediate settlement model is the fairest method of dividing the pension on marriage breakdown.

2. An unmatured pension in a DBP is divided by the spouse becoming a kind of member of the plan (called a "limited member"). Unless the parties otherwise agree, or the court otherwise orders, the spouse's interest in the pension is determined by a formula set out in the Division of Pensions Regulation. This formula is based on the classic Rutherford Formula. As the member accrues additional pensionable service and the pension becomes more valuable, the spouse's share of the pension decreases. This is referred to as a *pro rata* approach for determining the value of the pension that accrued during the parties' relationship (see Appendix D for an explanation of the *pro rata* approach). The spouse may either:
 - (a) wait until the member elects to have the pension commence, and take the spouse's share in the form of a separate pension payable for the spouse's lifetime, or
 - (b) at any time after the member becomes eligible to retire, elect to have the commuted value of the spouse's share transferred to a prescribed pension vehicle (such as an RRSP).

Comment: the unmatured DCP rules cannot be used here because a pension in a DBP is determined by a formula. The value of the pension is based on the future income stream, and not directly on current contributions plus net investment returns. Various future events can affect the pension (termination of employment, date elected for pension commencement, death of the member before retirement, changes in the formula for determining the pension, increases in income--where the formula is based on income, and so on). Because of the way the pension is structured, an immediate settlement model does not produce a fair result. A deferred settlement model avoids guesswork and allows the shares of the pension of both parties to be determined on the same basis.

3. A matured pension (whether DCP or DBP) is divided by the spouse becoming a limited member of the plan and dividing the pension income stream between the parties. The plan administrator is required to pay the spouse the spouse's share of each payment made under the pension, after making separate withholdings for income tax.

This is the basic model adopted under Part 6. There are further refinements for dealing with, for example, pensions in hybrid plans (a plan that consists of DCP and DBP compo-

nents) and pensions in plans that are not registered in B.C. and that have no B.C. members (referred to in Part 6 as “extraprovincial plans”). There are also detailed rules for dividing benefits when the member dies before retirement and the pension is replaced by a pre-retirement death benefit.

H. Major Recommendations and Housekeeping changes

The recommendations of the Committee are set out in the next Chapter. They are intended to follow a logical scheme, so that recommendations dealing with, for example, DCP’s are collected together, and those affecting DBP’s are likewise discussed in a group as well. As a result, the reader will encounter some matters that are relatively uncontentious and, right next to them, recommendations for substantial change upon which opinions may vary. The recommendations have been marked to distinguish between important changes and other, technical, matters according to the following classification scheme:

- (a) **[MR]**: “Major Recommendation”: a necessary change, addressing fundamental questions of policy, or technical problems with the mechanics of pension division, and
- (b) **[HK]**: “Housekeeping”: clarifying an ambiguity, confirming current practice, or correcting an oversight in the original legislation, but where the recommendation is consistent with current policy.

Opinions may well vary concerning what is an important change--particularly among those who disagree with the policy being advanced. This classification scheme is certainly not intended to mislead, or to divert attention from any recommendation we have made, but to provide some help in focusing attention on those recommendations that the Committee members considered to be the most important.

I. Implementing the Recommendations

Because pensions represent complex financial structures, legislation providing for their division must deal with complex issues. Under the current legislation, the basic structure of pension division is set out in Part 6, and many of the technical issues that must be addressed are dealt with in the Division of Pensions Regulation. The result is that, for most people wishing to understand the elements of pension division, it is enough to review the requirements of Part 6, leaving the technical matters set out in the regulations to those who must implement pension division.

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It is the Committee's conclusion that government, in implementing its recommendations, should adopt this same guiding principle and, to the extent possible, address the detailed mechanics of pension division in the regulations.

It may therefore be necessary to revise the regulation-making power in the FRA, but this is a question that should be left to Legislative Counsel.

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II. RECOMMENDATIONS OF THE COMMITTEE

Recommendation 1 [MR] - Plan Liability and Notice

Part 6 be revised to provide to plan administrators greater protection from liability by providing that:

- (a) a plan administrator owes no duty to a spouse, nor does any liability arise from any action or failure to act, unless the required forms are completed and delivered to the plan administrator,
- (b) either the member or the spouse may submit the required forms for the spouse to become a limited member,
- (c) a spouse who becomes a limited member of an unmatured defined benefit plan is deemed to elect a separate pension that will commence when the member's pension commences unless the spouse delivers to the plan administrator a Form 4 to the contrary,
- (d) even if the plan administrator has express or constructive notice that a spouse of the member who has not become a limited member may have an interest in the pension, the plan administrator owes no duty, and will incur no liability, to the spouse provided the plan administrator does one of the following:
 - (i) requires the member to file the prescribed forms to register the former spouse as a limited member,
 - (ii) requires the member to produce satisfactory evidence that the spouse has no interest in the pension, or
 - (iii) having a current address for the spouse of the member, in good faith and with the reasonable expectation it will be received, sends the spouse the same notice that would have been required if a Form 1 had been filed.

Comment: Part 5 of the FRA vests in each spouse a half interest as tenant in common in family assets on the occurrence of a "triggering event" (making a separation agreement, a s. 57 declaration of irreconcilability or an order of divorce or nullity). Since a pension is a family asset by definition, there will be circumstances where a spouse has an interest in a pension by operation of law even where the parties have not yet formalized (by order or agreement) the terms by which their assets are to be divided. This legal position may place a plan administrator at some possibility of risk, if the plan administrator is aware that a member is going, or has gone, through marriage breakdown. The policy of Part 6 is not to create situations in which a plan administrator can be exposed to liability while acting in good faith [FRA, s. 85]. Recommendation 1 is aimed at providing the plan administrator

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with additional protection, including specifying a procedure by which the plan administrator may avoid any possibility of liability for failing to protect a spouse's interest in the pension.

Another situation where a plan administrator may have some potential risk is where there is an agreement or court order dividing the pension, but neither party has seen fit to deliver it to the plan administrator. Anecdotal evidence suggests this happens surprisingly often. The procedure described by Recommendation 1 would also serve to provide protection for all of the parties in these circumstances.

The "same notice" required if a spouse files a Form 1 refers to the obligation on a plan administrator to give the spouse, by mail, 30 days advance notice of the member's directions respecting the pension, using a Form 6 and attaching relevant documents. Form 6 will have to be modified somewhat to be used under the new recommended procedure. See Recommendation 27.

Recommendation 2 [HK] - Basic Requirements of Order or Agreement

Part 6 be revised to provide that

- (a) any order or agreement dividing a pension is sufficient if it identifies the employment under which the member accrued the pension, but
- (b) the plan administrator is not required to administer the division unless the member and limited member provide the plan administrator with sufficient information to identify the pension to be divided in: the order or agreement, the Forms delivered to the plan administrator, or joint written instructions of the parties.

Comment: the parties (or their lawyers) do not always have the full name of the pension to be divided, and there are a number of reasons for this. In some cases, it is because the member knows the plan by some short form designation. In other cases, the plan name may have changed as a result of plan amendment, merger with another plan, change of sponsor and so on. Comment received by the Committee on this issue expressed a variety of views. Some correspondents said that the order or agreement must use the plan's proper name. Others felt that this was an area where some flexibility would be permissible.

As a practical matter, simply identifying the member, or the member's employment, in the agreement or court order will be sufficient to identify the pension plan in most cases. Recommendation 2 provides that, where there is any doubt on this head, the plan administrator can request the parties to be more precise, using the Forms or providing joint written instructions.

Recommendation 3 [HK] - Agreement or Order Must Provide for Division

Part 6 be revised to confirm that a pension cannot be divided without an order or agreement expressly providing for division.

Comment: Part 6 provides that if a spouse has an interest in a member's pension, it must

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be divided under Part 6 (FRA, s. 71(1)). Some have argued that this means that an agreement or order that is silent about pension division is sufficient to trigger the operation of Part 6. Plan administrators have reported situations where a former spouse has produced a divorce order that is silent about the division of any asset, let alone the pension, and insisted the pension be divided. As a practical matter, the spouse may not claim an interest in any family assets in the name of the other spouse without an agreement or order that expressly makes that provision. The question should be put beyond doubt by a simple amendment to Part 6.

Recommendation 4 [HK] - Agreement or Order Effective 30 Days from Delivery

- (1) Part 6 be revised to confirm that, subject to subsection (2) and Recommendation 12 [*retroactive division*], if a pension is matured, an order or agreement dividing the pension is sufficient to require the plan administrator to divide only those benefits that become payable from the date 30 days after the required forms are received, and not any benefits paid before that date.
- (2) Subsection (1) does not relieve a plan administrator from any obligation to pay benefits, or compensate for benefits, that were not paid through the fault of the plan.

Comment: the current legislation is silent concerning when a plan administrator must implement a pension division. As a practical matter, the plan administrator cannot be expected to act instantly, and there will be circumstances where questions will arise concerning entitlement to payments that are made under the pension while the plan administrator is trying to give effect to the pension division arrangements. Comment received on the Issues List suggests that a 30 day rule is practical. The Committee was particularly assisted on this issue by detailed information provided by the Canadian Life and Health Insurance Association Inc. concerning reasonable settlement dates in current practice, depending on the nature of the asset involved.

If payments are made to the member before the division is implemented, and the spouse has an interest in these payments, the member would be required to pay the spouse's share to the spouse. See Recommendation 31, confirming that the member is under a trust obligation to the spouse. Of course, the agreement or order could over-ride this obligation in appropriate circumstances.

Recommendation 5 [HK] - Proportionate Share Includes Cohabitation Accruals

- (1) For the purposes of determining a spouse's share of a member's pension under Part 5 of the *Family Relations Act*, if the parties cohabited before marrying, the limited member's share of the pension includes the prior period of cohabitation, unless the parties otherwise agree or the court otherwise orders.
- (2) Notwithstanding Recommendation 5(1) and cohabitation of the parties before marriage, if the agreement or court order does not expressly set out the commencement date for determining the period subject to division, "A" in the formula in Section 6 of the Division of Pensions Regulation for calculating a limited member's

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proportionate share of the pension includes only service from the date the parties married to the spouse's Entitlement Date.

Comment: although Part 5 applies to only married spouses, pension benefits are divisible between unmarried spouses in other ways, often based on principles of unjust enrichment using a constructive trust. If benefits are divisible in those circumstances, a policy that excludes pension accruals accruing during a period of prior cohabitation where the parties marry would operate perversely. In *Moore v. Moore*, 2005 BCSC 7, however, it was held that the structure of Parts 5 and 6 of the FRA meant that such benefits could be included in the division only if their exclusion would be unfair having regard to the principles under s. 65. The amendment proposed in Recommendation 5 would result in reversing this position, so that pensionable service accruing during prior cohabitation would be included, unless that would be unfair having regard to the factors listed under s. 65 of the FRA. Essentially, it moves the onus from the spouse claiming an interest to the member wishing to exclude the benefits from division.

It is important, however, that the amendment not place third parties, such as plan administrators, at risk. It would be extremely difficult for a third party to determine the spouse's entitlement without guidance concerning the date the parties were considered to commence cohabitation. For that reason, unless the agreement or court order provides to the contrary, if no dates defining the period subject to division are included, the plan administrator would be required to interpret the order as basing the spouse's share on pensionable service accruing from the date of marriage to the spouse's Entitlement Date. ("Entitlement Date" is a defined term under the Division of Pensions Regulation, and marks the end of the period subject to division. It is usually determined by reference to the date the spouse's entitlement to a share of family assets arises under the FRA: the date the parties make a separation agreement or the date a court makes a s. 57 declaration of irreconcilability, or an order of divorce or nullity. However, it is open to the parties to agree, or the court to order, that the Entitlement Date be determined on some other basis).

A change to the Forms is recommended to allow the parties to set out a commencement date for the period subject to division. See Recommendation 27.

Recommendation 6 [MR] - Share if Member Dies Before Retirement

- (1) Part 6 be revised to provide that if the member dies before the limited member receives the limited member's share of the pension, the limited member's share of the pension must be the commuted value of the limited member's share of the pension calculated the day before the member died.
- (2) Section 8 of the Division of Pensions Regulation [*adjustment of member's pension after division*] be revised to provide that in the circumstances addressed in Recommendation 6(1), the preretirement survivor benefit payable be adjusted by the formula

$$(A - B) + C$$

provided that (A - B) must not be less than zero, where

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- A = the preretirement survivor benefit calculated in accordance with the terms of the plan and applicable legislation based on the pension that accrued during the period subject to division, determined on a *pro rata* basis,
- B = the commuted value of the limited member's share, and
- C = the preretirement survivor benefit calculated in accordance with the terms of the plan and applicable legislation based on the pension that accrued other than during the period subject to division, determined on a *pro rata* basis.
- (3) Recommendations 6(1) and (2) apply in any case where the member dies after the revision comes into force.

Comment: under the current law, unless the parties otherwise agree or the court otherwise orders, a limited member is entitled to a share of the pension determined by the $\frac{1}{2}$ A/B formula. If, however, the member dies before the limited member otherwise receives the share of the pension, the Pension Division Regulation provides that the spouse's share is determined by the formula 100% A/B (see para. 6(3) of the Division of Pensions Regulation). The reason for this difference is to protect the spouse's share where, as is often the case, preretirement survivor benefits are worth less than the value the pension had during the member's lifetime. For example, the B.C. PBSA stipulates that the minimum preretirement survivor benefit plans are required to provide is 60% of the commuted value of the pension (PBSA, s. 34).

Many pension plans, however, exceed the minimum standards and provide that preretirement survivor benefits equal the commuted value of the pension. For those plans, the default rules give the limited member too generous a share of benefits where the member dies before retirement.

Dealing with the division in terms of a share of preretirement survivor benefits makes sense where there is a preretirement survivor benefit, but matters become complicated where the FRA rules must apply to pensions regulated under other legislation. For example, if the pension in question is regulated under the federal PBSA, 1987, and the member is not survived by a spouse, the minimum preretirement survivor benefit is a return of contributions. If the plan is non-contributory, this means that the preretirement survivor benefits would be nil.

The reason for deferring the division of the pension is not to place the spouse in jeopardy, but to wait until all information necessary for valuing the pension can be determined. If the member dies, the reason for the deferral vanishes, and the spouse's share can then be satisfied. The simplest way of dealing with this issue is to provide for the division of the spouse's share as of the day before the member's death (as proposed in Recommendation 6(1)).

The instances where the formula proposed in Recommendation 6(2) would result in increased liability for a plan subject to B.C. law are expected to be so few that the actual costs would be relatively minor. For example, if the plan determines the preretirement survivor benefit based on the minimum 60% of the pension's commuted value, and the limited member receives a share of the pension based on the $\frac{1}{2}$ A/B formula, a regulation incorporating the policy of Recommendation 6(2) would result in the plan paying to the

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designated beneficiary (or member's estate):

- (a) 60% of the commuted value of the pension that accrued before or after the period subject to division, and
- (b) 10% of the commuted value of the pension that accrued during the period subject to division.

There are two exceptional circumstances where the plan might end up paying more than if it were just required to pay the preretirement survivor benefit: (a) where the plan pays a preretirement survivor benefit that is less than 50% of the commuted value of the pension that accrued during the period subject to division (which might occur for plans regulated outside B.C., or where the preretirement survivor benefit is low because of a transition rule), and (b) where a court has ordered that the limited member's proportionate share of the pension is greater than 50% of the pension that accrued in the period subject to division.

Note that, although the recommendation refers to the preretirement survivor benefit by reference to different periods of pension accrual, the intention is not to change the current approach, under which entitlement to shares of the preretirement survivor benefit is determined on a *pro rata* basis.

Recommendation 7 [MR] - Limited Member Has Same Options as Member

- (1) Part 6 be revised to provide that, after a member becomes eligible for pension commencement, a limited member may elect to receive the share of the pension as of a specified date by any of the options available to the member had the member elected to have the pension commence on that date.
- (2) For greater certainty, a limited member may not elect to receive the limited member's share of the pension by a transfer of commuted value unless that option is otherwise available to members of the plan who have become eligible for pension commencement.
- (3) The limited member may not elect to defer taking a separate pension past the date the member elects to have the pension commence.
- (4) If the member terminates membership in the plan and elects to have contributions or the commuted value of the pension transferred from the plan, as the case may be, unless the plan administrator otherwise consents, the limited member must receive the limited member's share of the pension at that time by a transfer from the plan.
- (5) Legislation enacting Recommendation 7(1) should apply in any case where the limited member has not delivered a Form 4 to the plan administrator electing to receive the limited member's share by a transfer of the commuted value within 12 months after the date the revision comes into force.

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Comment: under the current law, the limited member is entitled to choose between receiving the share by (a) a lump sum transfer to a prescribed pension vehicle at any date after the member becomes eligible to retire, or (b) waiting until the member elects to have the pension commence and taking a separate pension payable for the limited member's lifetime. Many people commenting on Part 6 were troubled by the fact that the spouse has an option that is usually not available to the member (the lump sum transfer). From the limited member's perspective, it is often a difficult decision to choose between these two options, since the lump sum transfer requires the limited member, who may have no experience investing money, to invest what may be extremely large sums to provide a life income. Various other complexities may also arise in administering the division (such as calculating the value of the lump sum--see further Recommendation 9).

The Committee concluded that Part 6 would be much improved by allowing a spouse to receive the share of the pension by the same options available to the member, at any date after the member becomes eligible to have the pension commence. In most cases, this will mean that the limited member will receive the share in the form of a separate pension payable for the limited member's lifetime. This is consistent with the original recommendations of the BC Law Reform Commission.

Recommendation 8 [MR] - Adjusting Value of Early Retirement Pension

- (1) Section 10 of the Division of Pensions Regulation be revised to provide that, if the limited member elects to have the separate pension commence before the member's actual pension commencement, the limited member's separate pension must be based on a proportionate share of the pension the member would have received had
 - (a) there been no division under the Act,
 - (b) the member's pension been determined by reference only to the pension accrued to the date elected by the limited member for pension commencement, and
 - (c) the member elected a pension in the unadjusted normal form provided under the plan commencing at the later of
 - (i) the date the limited member's election is effective, or
 - (ii) subject to Recommendation 9(3), the date the member would reach the average age of retirement for the plan as determined by the most recent statement filed with the relevant regulatory authority, and the commuted value of the income stream commencing at that date then be discounted on an actuarial basis to reflect early payment to the spouse.
- (2) The plan administrator may elect to use a specific age, rather than the average age, for the assumed retirement of members provided that

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- (a) any such election is binding unless and until the Superintendent of Pensions otherwise consents, and
 - (b) the age selected may not exceed the average age of retirement of members of the plan as of the date of the election, as determined by the most recent statement filed with the relevant regulatory authority.
- (3) The approach under Recommendation 8(1) would apply equally in the following circumstances:
- (a) if subsidized early retirement is available only with trustee consent. In that case, trustee consent could be withheld only if trustee consent would be withheld had the member applied for early retirement,
 - (b) when calculating the amount to transfer to the estate of a limited member under s. 78(3) of the FRA [*limited member predeceases member*], and
 - (c) when calculating a compensation payment under Section 11 of the Division of Pensions Regulation.
- (4) Subject to subparagraph (5), legislation based on this Recommendation would apply to any application received by the plan administrator after the legislation enacting the Recommendation comes into force.
- (5) Legislation based on this Recommendation would not apply to any application by a limited member for a transfer of the limited member's proportionate share of the commuted value of the pension to a prescribed pension vehicle that was received by the plan administrator before the legislation comes into force. Any such application would be determined under the prior law and any quotation provided by the plan administrator respecting the value of the lump sum to be transferred to the credit of the limited member would be valid for 180 days from the date of the quotation, or such shorter period specified in the quotation if in accordance with the practice of the plan administrator under the prior law.

Comment: under the current law, if the limited member elects to receive the share of the pension after the member becomes eligible to have the pension commence but before the member retires, the limited member's share is valued assuming the pension commenced on the date of the election. Many plans subsidize the value of an early retirement pension. Although the cost of the early retirement pension is increased, there is usually a corresponding saving to the plan sponsor who no longer has to pay a senior employee a salary. But there is no corresponding saving to a plan sponsor where the issue arises as a result of pension division, since the member continues in employment.

The Committee concluded that providing a spouse with flexibility in receiving benefits should not be at the cost of the pension plan. Wherever possible, and to the extent possi-

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ble, the results must be neutral to all parties. Amending the legislation to base the limited member's separate pension on the pension payable to the member at the average age of retirement brings the cost to the plan within its underlying funding assumptions (which will have taken into account plan experience concerning when members take retirement).

Section 10 of the Division of Pensions Regulation also requires the limited member's separate pension to be adjusted to take into account differences in the parties' life expectancies, again so that the cost to the plan from the division is neutral.

In some cases, subsidized early retirement is available only with trustee consent. Anecdotal evidence suggests that some plans have adopted a policy of granting consent where the application is by a member, but never granting consent where the application is by a limited member. The recommendation of the Committee is that the question of consent must be determined on a non-discriminatory basis, and that consent to an application by a limited member can be refused only where that would be the case if the application was brought by a member. This issue, however, becomes much less serious because of the Committee's recommendations for adjusting the value of the limited member's interest in the pension to remove much, if not all, of the subsidized value.

Recommendation 9 [MR] - Beneficiary Designation by Member

Part 6 be revised to provide that a member may designate as beneficiary any person or persons the member wishes, as permitted by law and the terms of the plan text, for the portion of any preretirement survivor benefit under the pension in excess of the limited member's proportionate share.

Comment: under the current law, there is a question concerning the extent to which a member may change a beneficiary designation. S. 72(3) of the FRA provides that a beneficiary designation in favour of a limited member may not be changed without the limited member's consent. The policy under s. 72(3) is to provide the limited member with security for the limited member's share of the pension, not a windfall in the event that the member predeceases the limited member. Any ambiguity in this respect must be corrected. The member must be entitled to designate a beneficiary with respect to the preretirement survivor benefits accruing under the member's share of the pension. The issue here is simplified by the approach adopted in Recommendation 6, which restates the limited member's entitlement in these circumstances.

A related issue the Committee considered was whether there was a need to provide a statutory presumption concerning an unchanged beneficiary designation in favour of a limited member. For example, legislation could provide that any beneficiary designation in favour of a person is void upon that person becoming a limited member. Or, legislation could provide that any beneficiary designation in favour of a limited member is presumed to be for security only, and any portion in excess of the limited member's share under Part 6 must be held in trust by the limited member for the member's estate.

The Committee concluded that, as well-meaning as these kinds of provisions might be, they would likely cause confusion and create administrative difficulties for plan administrators. Moreover, the B.C. PBSA requires the member be sent an annual statement concerning the pension which clearly sets out the person designated as beneficiary. The onus should be on the member to change the designation. Most of the comment on the Issues List argued strongly in favour of adopting this policy.

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Recommendation 10 [HK] - Waiver of Benefits

- (1) Part 6 be revised to provide that before the limited member's proportionate share of the pension is transferred to the limited member or the limited member's estate, the limited member, or if the limited member has died, the limited member's personal representative, may waive the division of the pension using a prescribed form, in which case the member will be entitled to the undivided pension.

Comment: since the limited member's share of the pension is subject to deferred division, there is no problem in permitting a waiver before any substantive steps have been taken in the division. One situation where waiver may be in everyone's best interests is where the limited member dies before the division takes place. In that case, Part 6 provides that the limited member's estate is entitled to receive the share as of the date of the death. Often the beneficiaries of the estate will be the children of the plan member, and they may very well wish their parent to have the use of the pension benefits. Part 6 currently permits a division of a pension to be waived (s. 80(1)(b)). Some questions have arisen, however, concerning whether s. 80(1)(b) applies generally, or only before the spouse becomes a limited member, so it would be desirable to clear up any ambiguity.

Waiver of benefits in this situation is a serious matter. Policy adopted under the B.C. PBSA already provides for formal waivers where a spouse elects to forego preretirement or postretirement survivor benefits. The same formalities should be required for a waiver of benefits after becoming a limited member. A new form should be developed for this purpose, based on the PBSA prescribed waivers. See further Recommendation 27.

The Committee considered whether an administrative fee should be chargeable by a plan administrator for carrying out the waiver and decided against it. The waiver would likely save the plan expense and inconvenience. However, neither should the plan administrator be required to refund an administrative fee that was paid when the spouse became a limited member.

It should be noted that nothing prevents the parties from addressing this situation in advance, in the pension division order or agreement (by providing that no division will take place if the limited member predeceases the member before otherwise receiving a share of the pension - see FRA s. 80(1)(b)). In that case, the recommended prescribed waiver would not be needed to achieve such a result.

- (2) Part 6 be revised to provide that if, on pension commencement, the member elected a joint annuity providing a postretirement survivor benefit in favour of the spouse or limited member,
 - (a) the postretirement survivor benefit is deemed to be the property of the spouse or limited member,
 - (b) the spouse or limited member may waive the postretirement survivor benefit using a prescribed form,

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- (c) if there is a waiver of the postretirement survivor benefit using the prescribed form, it does not affect the duration of the payments, but the plan administrator must pay them to the person designated by the member or, if none, to the member's estate, and
- (d) if the parties fail to use the prescribed waiver, but provide for a waiver of post-retirement survivor benefits in the agreement or court order, the court may, if satisfied that the spouse or limited member made a voluntary and informed decision, give effect to the waiver, as provided for under subparagraph (c).

Comment: one of our correspondents recommended that Part 6 deal with the issues that arise when the marriage breaks down after the member has begun receiving the pension and there is a survivor benefit in favour of the spouse under the pension. The Committee agreed that problems in this area frequently recur that require attention.

Anecdotal evidence suggests that spouses not infrequently enter into agreements to waive any interest in matured pensions that have survivorship benefits without actually addressing the survivorship benefit. Perhaps the reason is that the marriage was a short one, and most if not all of the pension contributions were made before the parties' relationship commenced. Or perhaps the spouse has been compensated in some other way. Whatever the reason for making such an agreement, the scope of the waiver is uncertain because the survivor benefit actually belongs to the spouse, not the member. When the member dies, the beneficiaries of the estate sometimes argue that the spouse is not entitled to the survivor benefit on the basis of the waiver. Problems arise here because the parties often don't understand their rights under the pension. If they think of the survivor benefits at all, the member often mistakenly believes he can appoint another beneficiary of them. While there are certainly many who believe that the spouse's general waiver should be given effect, this would be contrary to the policy adopted under the B.C. PBSA, which provides that a member having a spouse must elect a survivor benefit for the spouse, unless the spouse signs a prescribed waiver.

If the parties do address this issue, it is completely possible for them today to make an agreement, or obtain an order, under which the spouse would hold the benefits in trust for a person designated by the member, or for the member's estate. The Committee's proposal is that a similar situation should be achievable under Part 6 if the spouse legitimately wishes to waive the survivor benefits. In most cases, however, a well advised spouse would not do so, unless receiving compensation for the value of those benefits in some other way.

Recommendation 10(2)(d) permits the court to give effect to a waiver that is not in the prescribed form. In contrast, no similar saving provision is recommended with respect to the prescribed waiver under 10(1). The reason is that, in the case under 10(1), the waiver has immediate effect but, under 10(2), the defective nature of the waiver of the survivor benefits may not come to anyone's attention until years later, after the member has died. If there is sound evidence that the waiver was intended to be effective, and everyone understood the consequences of the waiver, then the court should have the power to give effect to it even if it is not in prescribed form. For example, before the spouse signed the waiver, the parties may have obtained an actuarial valuation of both the pension and the survivor benefits and expressly took those values into account in dividing other property. Where the

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spouse has been adequately compensated for the interest in the survivor benefits, there can be no objection to enforcing the waiver.

If there is any possibility that the waiver offends s. 63 of the PBSA (which prohibits assignments), then legislation based on Recommendations 10(1) and (2) should expressly exclude the operation of s. 63.

Recommendation 11 [HK] - Misc. Benefit and Proportionate Share Issues

The Regulations be revised to set out the following rules for determining the limited member's share of the pension that will apply unless the agreement or order dividing the pension expressly provides to the contrary:

Comment: since Part 6 came into force, various technical issues have emerged concerning how a deferred pension division is to operate where there are special features of a plan, or additional benefits are provided at some later date. Many of these are addressed in the *Q&A About Pension Division On Marriage Breakdown in B.C.* As useful as that publication may be, it has no official status. The Committee concluded, therefore, that it was desirable to confirm the policy to be applied in these various circumstances by enacting appropriate regulations. By doing so, this relieves the burden on the parties (and on their lawyers) of having to address in the agreement or court order numerous difficult technical issues that will arise only rarely. One correspondent, as a matter of general principal, thought that the onus should be entirely on the spouse and member, and their advisors, to address the details of pension division in the order or agreement. Many would agree with this as a general principal of law. The Committee's conclusion, however, is that pension issues are so complex that, to the extent possible, division of the pension should be as standardized as possible.

Benefits transferred from another plan

- (a) the limited member is entitled to a share of pension benefits transferred from another plan, or otherwise credited to the pension, that is allocated to the period subject to division,

Comment: before the deferred division takes place, the limited member is entitled to a share of any benefits attributable to the period subject to division. The equally important point is that, after the division is effected, the limited member would no longer be entitled to any further share of the pension, including benefits subsequently transferred to the plan and allocated to the period subject to division. This principle (that the limited member's entitlement to share under the pension ends after the division is effected) applies generally (see Recommendation 32).

Cap on service

- (b) the limited member's proportionate share must be determined taking into account the actual service credited to the member,

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Comment: some plans permit a member to accrue unlimited service. Most plans, however, cap service at 35 years. Implicit in the current legislation is that only service taken into account in determining the value of the pension is counted when calculating the limited member's share of the pension. It is the Committee's recommendation that this implicit policy be stated expressly.

Additional benefits

- (c) the limited member is entitled to a share of additional pension benefits that have accrued from the member's employment, whether the additional pension benefits are provided under a plan created before or after the limited member's Entitlement Date, to the extent that the additional pension benefits are integrated with the pension, or based on pensionable service accruing during the parties' relationship,

Comment: subparagraph (c) confirms the current legal position. See, e.g., *Thoburn v. Thoburn* (1993), 46 R.F.L. (3d) 265 (B.C.S.C.). The policy is consistent with the position described and adopted under subparagraph (a). Subparagraph (c) would catch, for example, unregistered supplementary benefits if they were not otherwise addressed in the court order or agreement.

Substituted benefits

- (d) the limited member is entitled to a proportionate share of any benefits paid in substitution for benefits payable pursuant to the Pension,

Clawback of benefits

- (e) if there is a clawback or reduction of benefits (for example, as a result of the state of the plan's solvency) the respective shares of the pension of the member and the limited member must be reduced proportionately,

Comment: since the limited member's share is based on the actual pension accrued by the member, the policy must be that just as any increase in benefits is shared, so must any reduction. This is an important issue in the current economic climate, where many pension plans are no longer considered to be fully funded.

Flex benefits

- (f) if the plan is part of a flexible benefits package, unless the agreement or court order provides to the contrary, the division is of the basic pension before the election of any enhancements, but the limited member is also entitled to a share of the flexible benefits package that accrued during the period subject to division,

Comment: employer's recognize that different employees have different needs. An able bodied young employee without family may consider certain benefits of little use, such as

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extended medical benefits, that an older family man would regard as being extremely important. To address the differing needs of employees, some employers have created flexible benefit plans and, in some cases, these plans permit the employee to make elections to enhance pension benefits. It is therefore important to have a rule for dealing with these issues in the context of pension division. The policy here is consistent with the policy recommended under subparagraph (c).

Voluntary contributions

- (g) the limited member is entitled to an immediate transfer of the limited member's share of any voluntary contributions to the pension,

Comment: at one time, before changes to the *Income Tax Act*, it was common to find members making voluntary contributions to a pension plan. Many of these voluntary contribution accounts still exist. Unless the parties expressly address entitlement to voluntary contributions by agreement or court order, in the absence of this rule the limited member would be entitled to a *pro rata* share that reduces over time even though the benefits themselves would remain unchanged, apart from net investment returns: *Srivastava v. Srivastava*, (1997) 40 B.C.L.R. (3d) 358 (C.A.)

Plan conversion

- (h) if there is a plan conversion of a defined benefit plan by
- (i) converting the accrued benefit under a defined benefit arrangement to a defined contribution entitlement, or
 - (ii) amending the plan so that all future accruals of pension entitlement are on a defined contribution basis as opposed to a defined benefit basis,

the limited member is entitled to the share determined as of the effective date of the conversion, or plan amendment, as the case may be, and

Comment: in recent years, a number of pension plans have gone through a conversion, raising the question of whether a deferred division arrangement should come to an end when the nature of the plan changes. Under this recommendation, if the DBP is converted to a defined contribution entitlement (subparagraph (i)), the limited member would be entitled to an immediate transfer of the benefits to a prescribed pension vehicle. If the DBP is capped (subparagraph (ii)), then the limited member's proportionate share would be fixed at that date, but would still be subject to the DBP rules for receiving the share.

Purchased service

- (i) if the agreement or order sets out a formula for determining the spouse's proportionate share based on pensionable service that does not address how purchased service is to be dealt with,

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- (i) service purchased after the commencement date of the period subject to division, but before the Entitlement Date, provided it is fully paid for at the date the party becomes a limited member, is included in both the numerator and denominator of the formula, and
- (ii) all other purchased service is included in the denominator, but not in the numerator, of the formula.

Comment: the concern is that Section 6(2) of the Division of Pensions Regulation expressly sets out in the formula how purchased service is to be dealt with. If the parties set out a different formula in an agreement or court order, a question arises concerning whether the rules under the Regulation respecting purchased service continue to apply. The Committee's recommendation is that the current policy should apply to a formula set out in an agreement or court order (unless, of course, the agreement or court order expressly addresses the issue).

Recommendation 12 [HK] - Restraining Order and Retroactive Division

- (1) Part 6 be revised to provide that, subject to paragraph (2), if pension commencement is delayed pending resolution of the pension division issues, then after a pension division agreement or order is made, both the member and the limited member are entitled to receive their respective share of benefits retroactively from the date elected for pension commencement.
- (2) For the retroactive application of an agreement or court order dividing a pension under paragraph (1) to apply, the following conditions must be satisfied:
 - (a) the member must have elected in advance the date for pension commencement in accordance with the requirements of the plan text and governing legislation,
 - (b) before the date elected for pension commencement, a written agreement of the spouse and member, or a court order, restraining the member from dealing with the pension specifically or with family assets generally must be delivered to the plan administrator,
 - (c) the agreement or order dividing the pension, together with the necessary documents lifting the agreement or order that restrained the member from dealing with the pension or the family assets, must be delivered to the plan administrator no later than December 1st of the year following the year in which the member elected to have the pension commence, and
 - (d) if the approval of the Canada Revenue Agency is required to make the retroactive payments, it must be first obtained and responsibility for applying for the approval is on the plan administrator.

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Comment: Under Part 6, the rights of a spouse change if the pension matures before the agreement or order dividing the pension is delivered to the plan. If the pension is in an unmatured DBP, the spouse is entitled to a separate pension payable for the spouse's lifetime. If the pension is in an unmatured DCP, the spouse is entitled to an immediate transfer of the spouse's share to a prescribed pension vehicle, such as an RRSP. In either case, the spouse is fully secured as to the share.

If the division takes place after the pension matures, however, the spouse is then entitled to only a share of each monthly payment made under the pension. In many cases the spouse's share divided in this way will cease when the member dies (and there are few, if any, options for providing the spouse with security for retirement income for the spouse's lifetime).

Because of this, if marriage breakdown occurs when the member's retirement is imminent, the spouse's lawyer will usually seek a court order restraining the member from dealing with family assets (including the pension), in order to preserve rights pending resolution of family property issues.

Unless the pension division arrangements are retroactive to the date the member elected to have the benefits commence, both member and spouse will be deprived of any payments that would have been made from between the date originally elected by the member and the date the restraining order is lifted. Depending on the period of delay, these could be substantial.

The Committee's recommendation is for this issue to be addressed directly in the legislation, and to permit retroactive division provided certain preconditions (summarized in Recommendation 12(2)) are satisfied. It was concluded that this approach best balanced the competing interests of plan administrators and spouses. From the plan administrator's perspective, any postponement of pension commencement causes difficulties, so the period must be as short as possible. From the viewpoint of the spouses, it only takes one party to be unreasonable for there to be considerable delay in finalizing matters. Of the various options considered, it was concluded that preserving a period during which the pension division order or agreement could be settled, but that was subject to a clear cut-off date, appropriately balanced the interests and needs of the parties.

The CRA will permit retroactive division, but there are administrative steps that have to be taken in some cases to obtain the CRA's permission. If, for any reason, CRA approval is required and not forthcoming, then one of the preconditions for retroactive division would not be satisfied. The Committee recommends permitting the plan administrator to charge an additional fee to offset the costs of these administrative steps. See Recommendation 28.

The CRA procedure is as follows:

1. A letter is faxed to the Registered Plans Directorate of the CRA (a) explaining the circumstances that led to the delay in payment of the pension, (b) setting out the amount of the payment owing to the member, and (c) requesting approval to make a retroactive payment.
2. Once the CRA responds approving the retroactive payment, instructions are issued to the fund holder to commence the pension and make the appropriate retroactive payment. Typically the response from the CRA is timely (within 2 months).

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3. The limited member and member may file CRA T1198 forms with their tax returns for the year in which they receive a retroactive payment. The CRA T1198 forms must be obtained from the plan administrator who must complete and sign the forms. If the amount of the retroactive payment is greater than \$3,000, the CRA will perform a special tax calculation which may decrease the amount of taxes owed on the retroactive payment. The form is posted on the CRA website at

<http://www.cra-arc.gc.ca/E/pbg/tf/t1198/README.html>

Recommendation 13 [HK] - Defined Contribution Pensions

- (1) S. 73 be revised to confirm that division of a DCP must take place within 30 days of the agreement or order and Form 3 being delivered to the plan administrator, unless there are valid grounds for deferring the transfer, such as waiting until net investment returns referable to the spouse's share of the pension are allocated to the pension, or where waiting may avoid or reduce transaction costs.

Comment: anecdotal evidence suggests that some plans delay in administering the division of a DCP. In most cases, this probably does not cause problems, but there is the possibility of difficulties arising, for example, (a) if the member dies before the transfer is completed, or (b) where the member is permitted to make investment directions which turn out to be unsuccessful. Issues may also arise concerning responsibility for administrative expenses.

One correspondent noted that there may be circumstances where delay would be valid. For example, immediate division might prevent the spouse from being credited with unallocated payments of net investment returns, or prevent timing the division to take into account transaction costs (such as where postponing division could avoid incurring back end sales charges, which are waived if the investment is held for a specified period.) The Committee's recommendation was revised to take these considerations into account.

- (2) S. 73 be revised to permit the plan administrator to offer the spouse the option of the spouse becoming a limited member of the plan and transferring the spouse's share to a separate account in the plan in the name of the spouse.

Comment: a correspondent noted that sometimes the spouse wishes to postpone the transfer from the DCP because the plan has a good reputation for successful investing. In the Committee's view, however, this is not a valid reason to justify transitory delay. To the extent that this is a relevant consideration, the best way of recognizing the plans' track record in investing would be to allow the spouse to elect to retain the spouse's share in a separate account in the plan. While the Committee did not think the legislation should require a plan administrator to make such an arrangement available, there was agreement that the plan administrator should be able to consent to retaining the spouse's share.

- (3) S. 76 be revised to provide that where a matured DCP is not used to purchase an annuity, but the member instead receives benefits by making withdrawals, the pension is divided by a transfer of the spouse's share to a prescribed pension vehicle. Unless the amount to be transferred is specified by agreement or order, it must be determined on a *pro rata* basis, using the 1/2 A/B formula.

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Comment: it was pointed out in one submission that the current rule did not address the particular features of all DCP's. The current rule is that, after maturity of a DCP, the spouse receives a share of the monthly payments made under the pension, on the assumption that the member is receiving benefits under an annuity. In some cases, however, the terms of the plan do not provide for purchasing an annuity, but require the balance of a matured DCP to be retained for the benefit of the member, who makes withdrawals from the account. In those cases, it would still be possible, and fairest, to divide the pension account directly, rather than restricting the spouse to an interest in the withdrawals made from the pension at the member's election. The fact that withdrawals have been made before division, however, means that it is not possible to apply the usual formula for determining the spouse's share of a DCP. For example, if the spouse derived no benefit from prior withdrawals, it is possible that the spouse's share should be determined allocating all past withdrawal's to the member's share. In contrast, if the member has, for many years, been supporting the parties on withdrawals from the matured DCP, fairness might well require the withdrawals to be allocated equally to each party's share. Unless the parties otherwise agree, or the court otherwise orders, a sensible approach for determining the spouse's share is to use the $\frac{1}{2}$ A/B formula. The parties will have to address the question of withdrawals themselves (although legislation based on Recommendation 31(3) will define the default position: the spouse is entitled to a share of any withdrawal made after the spouse's entitlement date).

Recommendation 14 [HK] - pro rata Estimate If Records Inadequate

The Division of Pensions Regulation be revised to provide that in any situation where plan records are insufficient to determine the value of a DCP at an earlier date necessary for calculating the former spouse's share, the value at the earlier date must be determined on a *pro rata* basis, unless the parties otherwise agree or a court otherwise orders.

Comment: Currently the Division of Pensions Regulation allows such an approach only where the marriage took place before the legislation came into effect in July, 1995. Anecdotal evidence suggests that there are other cases where plan records are inadequate for calculating a value as of a previous date and a *pro rata* approach for determining value would be equally helpful, such as where there have been a series of different plan administrators and records are difficult to track down. One comment received on the Issues List was that this is a reasonable approach for determining the value of the pension as of a prior date, but that keeping historical records is not unduly burdensome. Perhaps legislation based on this recommendation will have only limited utility. Even so, if it will occasionally assist the parties and the plan administrator, that is sufficient justification for enacting legislation endorsing this policy.

Recommendation 15 [HK] - Old Orders and Agreements

- (1) Part 6 be revised by adding a new subs. 80(2.1)(e) modifying the template for bringing an old order or agreement dividing a pension under Part 6 so that it addresses issues that arise with respect to DCPs.

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- (2) The new subsection should provide that the spouse's share must be determined using the formula set out in the agreement or court order to the extent possible.
- (3) If, however, the formula is predicated on deferred division when the member dies, terminates employment or retires, or some similar arrangement, and does not contemplate a transfer of the spouse's share at an earlier date, the formula for determining the spouse's share must be modified as necessary in the circumstances, such as by calculating the spouse's share as of the date the order or agreement is delivered to the plan administrator with a Form 3 by reference to the value of the pension, and service accrued, to the date the division is implemented.

Comment: the problem identified by the Committee is that many old orders and agreements provide for dividing DC pensions by a Rutherford Formula that is applied as of the date of plan termination, the member's death or pension commencement. Such a formula would not, therefore, apply without modification to the new situation of an immediate transfer of the share. Adding the recommended subs. 80(2.1)(e) would allow the plan administrator to modify the formula so that it also applies as of the date the order or agreement is brought under Part 6. Typically, this would result in capping the denominator of the *pro rata* formula ($\frac{1}{2} A/B$) as of that date.

Recommendation 16 [HK] - Some Hybrid Plans Divisible As DCP

S. 75(1)(b) be revised to provide that a spouse may elect, with the consent of the plan administrator, to have a pension in a hybrid plan divided as if it were in a defined benefit plan or in a defined contribution plan.

Comment: under Part 6, the usual rule for the division of a pension in a hybrid plan is that the portion determined by defined contribution principles is subject to an immediate division and the part determined by defined benefit principles is subject to deferred division.

Some hybrid plans are structured so that the main benefit is determined as a DBP and there is an additional portion based on DCP principles. In those cases, Part 6 currently allows the plan administrator to consent to dividing the whole of the pension using only the unmatured DBP rules (deferred division).

One correspondent noted that there are some hybrid plans that have the reverse of this structure: the main benefit is determined by DCP principles, but an additional portion may be payable based on the unmatured DBP rules. For these types of plans, the Committee agreed that Part 6 should permit the plan administrator to consent to dividing the whole of the pension using only the unmatured DCP rules (immediate division).

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Recommendation 17 [MR] - Detailed Rules For Dividing SPP

Part 6 be revised to

- (a) include a definition of SPP that is separate from extraprovincial pensions, and set out express rules for dividing SPP's,
- (b) provide that, unless expressly excluded in the agreement or order dividing the member's pension benefits, a limited member who is entitled to a proportionate share of the member's pension is entitled to a proportionate share of any benefits a member has or may acquire at some future date under an SPP
 - (i) that is integrated with the pension that is expressly subject to division under the agreement or order, or
 - (ii) whose benefits are based on service that accrued during the parties' relationship,
- (c) subject to (d), provide that the following rules govern the division of an unmatured SPP:
 - (i) if the unmatured SPP is structured as a DBP, the former spouse may elect to receive a separate pension, payable for the spouse's lifetime, when the member elects to have the pension commence, determined on the same basis as the separate pension option for an unmatured DBP in a local plan,
 - (ii) whether the unmatured SPP is structured as a DBP or a DCP, the former spouse may elect to receive the share of the SPP when the member elects to have the pension commence, by any of the options available to plan members, and
 - (iii) if the member dies before retirement and before the spouse receives the share of the SPP, the spouse is entitled to receive the spouse's share of the preretirement survivor benefit payable under the SPP, up to a maximum of the commuted value of the spouse's share of the SPP calculated the day before the member died,
- (d) provide that the spouse's share of the SPP is subject to the same rules that apply to the payment of the SPP to other members under the terms of the plan, such as, for example, the possibility of reduction or clawback if company revenues are insufficient to pay the SPP, or if there is a provision for commutation of small amounts, and

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- (e) provide that, if the spouse's share of the SPP is detrimentally affected by the member's action or omission, such as forfeiture because of breach of a non-competition clause, the court may determine whether, in the circumstances, the spouse is entitled to a remedy from the member for the diminished value of the former spouse's share of the SPP, having regard to
 - (i) whether the member acted reasonably and in good faith,
 - (ii) any advantages obtained by the member as a result of the action which led to the forfeiture, and
 - (iii) the financial arrangements and property division made by the parties when the relationship ended.

Comment: the current rules under Part 6 for dividing an SPP are rudimentary at best. Part 6 provides that the spouse is entitled to receive a share of the pension by the rules that apply to matured pensions: by receiving a specified share of each payment made under the plan. As discussed before in the context of Recommendation 12 [*retroactive division*], the problem with this approach is that it is usually not possible to provide the spouse with security for a lifetime income. In most cases, the pension will end when the member dies.

There is no reason why, if the SPP is structured as a DBP, the spouse should not be entitled to a separate pension payable for the spouse's lifetime, determined when the member elects to have the pension commence. The value of the separate pension must be determined taking into account the differing life expectancies of the spouse and the member. The plan is protected by providing that the spouse's separate pension is determined on an actuarial basis, using the same principles required for determining the separate pension under an unmatured DBP in a local plan under the FRA. If legislation is enacted based on Recommendation 17(c)(i) this would mean that all aspects of the current rules for determining the separate pension (including using unisex mortality tables) would apply.

As an alternative to a lifetime annuity, an SPP often allows members to elect to receive benefits by instalment payments (over, for example, a 5, 10 or 15 year period). As with the policy adopted for RPP's, the spouse of the member should be entitled to any of the options available to other members. This approach will also be useful for those SPP's that are structured as DCP's.

If the member dies before the spouse receives the share of the SPP, the spouse is entitled to a share of any preretirement survivor benefits payable under the SPP (see Recommendation 6 with respect to the rules that apply to RPP's).

Under these recommendations, the only differences between dividing an unmatured RPP and an SPP would be that: (a) under an SPP, a spouse who predeceases the member would lose any entitlement to share in the SPP (in contrast to the position with respect to unmatured RPP's, where the spouse's share is paid to the spouse's estate. Because the SPP is usually not funded, requiring payment by the plan in these circumstances was not regarded by the Committee as a fair result from the plan's perspective), and (b) under an SPP, the spouse must wait until the member elects to have the pension commence before

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receiving a share in the form of a separate pension (in contrast to the position with respect to unmatured RPP's, where the spouse would be entitled to elect to take the separate pension at any date after the member became eligible to elect to have the pension commence, another decision based on the fact that SPP's are typically not funded).

It should also be noted that the spouse's right to share in the SPP does not depend upon the agreement or court order expressly conferring that right. The right arises whenever a pension is subject to division, and there is an SPP, whether expressly referred to or not, that is integrated with the pension that is subject to division, or that is based on pensionable service that accrued during the parties' relationship.

Two additional features of the recommendation are that: (a) the spouse's share would be subject to the same factors that could at some future date affect the member's pension (such as plan solvency deficiencies, or forfeiture on breach of a non-competition clause), and (b) where the member's actions deprive the spouse of any part of the share of the SPP, the court would have jurisdiction to award compensation in appropriate circumstances. This would not necessarily mean a complete indemnity, nor compensation in every case. The court should be able, for example, to distinguish between a member who quits work for health reasons before becoming entitled to benefits under an SPP, and one who forfeits pension benefits to work for a competitor where the salary would more than compensate the member for the loss. In the first case, a court might conclude that the spouse was not entitled to compensation for the loss of benefits. In the second case, it may well be that the spouse should be entitled to compensation based on the commuted value of the spouse's share of the benefits that were lost.

The Forms must be revised to deal with SPP's. See Recommendation 27(9).

Recommendation 18 [HK] - Unmarried Spouses

The FRA be revised to allow the mechanics of pension division under Part 6 to be available if the court holds that an unmarried spouse is entitled to a share of a pension on principles of unjust enrichment.

Comment: currently, this is the position if unmarried spouses enter into an agreement (see FRA, s. 120.1) and is probably the current position if there is a court order, but the issue should be put beyond doubt.

Recommendation 19 [HK] - If Parties No Longer "Spouses" Under FRA

S. 71(2) of the FRA be revised to permit the mechanics of pension division under Part 6 to be available in any case where a pension is divided between persons who once qualified as spouses under Part 5 of the FRA, or under s. 120.1 of the FRA, provided that

- (a) the pension is being divided as a result of the end of the relationship of those persons, and

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- (b) enforcement of the order or agreement dividing the pension is not barred by expiration of a limitation period.

Comment: the question of who is entitled to seek rights under the FRA is controlled by the definition of “spouse” in s. 1 of the Act: see, e.g., *Suckau v Suckau*, 2002 BCCA 300 (as to Part 5), and *Harris v. Quattrin*, 2004 BCSC 1571 (as to s. 120.1). With respect to married spouses, Part 5 is closed to them after 2 years from divorce, a decree of nullity or an order of judicial separation. With respect to unmarried spouses who make an agreement under s. 120.1 that Parts 5 and 6 apply, *Harris* holds that such an agreement may be made for up to only 1 year after they separate, and after that date Part 5 would be closed to them. These definitions are clearly crafted for different purposes and allowing them to limit the application of the mechanics of pension division would typically produce wholly unjust consequences. S. 71(2) of the FRA provides that the mechanics of pension division under Part 6 require the spouse to be entitled to a share of the pension under Part 5. Because of the way the FRA definitions operate, this is too narrow an approach. It is the Committee’s recommendation that Part 6 of the FRA should be available for dividing a pension at any date, provided that the pension is being divided as a result of the end of the parties’ relationship, and the parties’ obtain a valid order, or make an agreement, recognizing the former spouse’s interest in the pension.

The Committee also noted that s. 120.1, as interpreted by the court in the *Harris* case, would have very limited application generally, even apart from pensions, and there is a need to reconsider whether it should be so restricted. However, because s. 120.1 deals with issues other than pension division, we have made no recommendations in that respect.

On a related issue, one correspondent recommended amending the definition of “spouse” under the PBSA for all purposes under that legislation. Under the PBSA, a married spouse ceases to be a spouse after having been separated from the member for two years. The suggestion was that this definition be changed so that

- (a) a legally married spouse will qualify as a spouse for pension purposes, notwithstanding a two year separation, until divorce, unless in the meantime the member forms a marriage-like relationship, and
- (b) if a marriage-like relationship terminates, the spousal status of a legally married but separated spouse, for pension purposes, should revive.

The Committee concluded that this was outside of its terms of reference, since the definition of spouse is a matter of more general application under the PBSA. The Committee also noted that legislation based on the suggestion would mean that the parties must in every case obtain a divorce, which would be inconsistent with the approach for determining when spousal status ends that has been adopted for other purposes under B.C. legislation: i.e., that separation alone of specified duration is usually sufficient to terminate automatic rights arising from spousal status (such as on an intestacy under the *Estate Administration Act*). Even under the FRA, while a separated spouse has status to apply for a share of family assets, one of the factors expressly referred to under s. 65 for determining fair shares is the duration the parties have been separated. While there may be arguments against the current PBSA definition, it was the Committee’s understanding that it was adopted to deal with a relatively common problem: parties who had been separated for many years, but never obtained a divorce. In those circumstances, it was considered to be unfair for the former spouse to claim a share of preretirement survivor benefits in priority to

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the beneficiaries designated by the member. Moreover, a definition that continues spousal status for any prolonged period after separation is likely to cause problems for the plan administrator and member (such as when a member elects to have the pension commence and is unable to locate a spouse after decades of separation). Any attempt to recognize the end of spousal status as a result of separation can probably be criticized for being imperfect. It strikes us, however, that the current definition draws an appropriate cut-off point for conferring benefits that arise solely by reason of spousal status.

Recommendation 20 [HK] - Division of Annuities

Part 6 be revised to confirm that “matured pension” includes an “annuity” that has been purchased using funds from a pension plan, or that has been privately purchased by the owner.

Comment: the current legislation applies to any annuity purchased by a plan administrator on behalf of a member, but there is some doubt concerning whether it would apply to an annuity privately purchased by a spouse. In terms of principle, there is no reason why the mechanics of pension division set out under Part 6 should not be equally available, whether the owner of the annuity is a plan member or a private purchaser. Similarly, from the perspective of the annuity issuer, there is no difference in substance depending on whether the owner of the annuity purchased it directly using personal funds, or it was acquired on behalf of the owner using pension funds. The Committee, therefore, recommends that the policy apply generally to annuities.

The Forms will have to be modified slightly to deal with privately purchased annuities. See Recommendation 27(3).

The Committee notes, however, that this policy received substantial, but not universal, support from our correspondents.

Recommendation 21 [HK] - RRSPs

Part 5 and the PBSA be revised to provide that a provision in a group RRSP arrangement or otherwise that purports to prevent the transfer of benefits under an RRSP, or similar registered plan, by assignment, charge, alienation or anticipation, does not prevent the transfer of vested benefits in the RRSP under any of the following:

- (i) a separation agreement;
- (ii) a declaratory judgment under section 57 of the *Family Relations Act*;
- (iii) an order for dissolution of marriage or judicial separation;
- (iv) an order declaring a marriage void.

Comment: the drafting is patterned after s. 63 of the PBSA. Part 6 does not currently apply to RRSPs or other similar registered plans, such as RRIFs and LIFs. It is the Commit-

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tee's conclusion that there are no grounds for applying the Part 6 rules to these plans, and we received submissions to that effect as well.

Even so, an aspect of the law governing the division of RRSPs must be addressed. In *Cook v. Cook*, 2002 BCCA 232, the BCCA held that a provision in a group RRSP plan that prohibited the transfer or use of RRSP benefits by the employee until a specified age prevented the benefits from being divided between the spouses on marriage breakdown. Such a provision is ineffective to prevent the division of a pension and similarly, should not be able to prevent division of an RRSP.

Part 6 does not otherwise deal with RRSPs, so it would not be an appropriate location for enacting legislation to deal with this issue. The recommendation is to add this provision to Part 5 and to the PBSA (which regulates RRSPs and LIFs to the extent that money is transferred to them from pension plans).

The recommendation applies to only vested benefits. If some portion of the benefits (such as employer contributions) are not yet vested, it would be open to the parties to wait to apply for the transfer. An alternative would be for the court to award compensation under s. 66 of the FRA. Even so, as between the spouse and the plan administrator, the spouse's entitlement would be limited to only those benefits to which the member was entitled as of the date the agreement or order is delivered to the plan. The same approach is adopted under Part 6 with respect to DCP's.

Recommendation 22 [HK] - Information Provided by Plan Administrator

- (1) Section 14 of the Division of Pensions Regulation be revised to provide that if a plan administrator must provide information to a spouse or a limited member about the pension, at a minimum the plan administrator must provide the following information:
 - (a) subject to Recommendation 22(2), the same information required under Para 11 of the Pension Benefits Standards Regulation, B.C. Reg. 433/93, as amended,
 - (b) if the spouse or limited member is the beneficiary under the pension, confirmation of that designation, and
 - (c) if benefits under the pension are based on the member's income for any period, the member's income for that period.
- (2) Unless the member consents in writing, the plan administrator must not provide the member's address, telephone number or marital status or the identity of any beneficiary nominated by the member.
- (3) A plan administrator acting in good faith who accidentally discloses any information listed under subparagraph (2) should not be under any liability to the member or any other party to pay damages arising from the disclosure.

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Comment: a recurring suggestion among correspondents on the operation of the current legislation is that more guidance is required concerning the information a plan administrator is required to disclose and, equally, the information that a plan administrator must withhold on grounds of privacy rights or principles of confidentiality. Recommendation 22, therefore, is intended to define minimum standards of disclosure, as well as to protect specified personal information. The overriding duty under Section 14 of the Division of Pensions Regulation, however, is to provide sufficient information for the spouse to have the interest in the pension valued. If the minimum information required does not meet that standard, the plan administrator would be required to provide additional information.

Recommendation 23 [HK] - Plan Administrator's Notice Obligation

- (1) Section 15 of the Division of Pensions Regulation be revised to provide that the commencement of the 30 days notice a plan administrator is required to give a spouse or limited member of various transactions affecting the pension after receiving a Form 1 is calculated from 3 days after the notice is posted.
- (2) Section 15 of the Division of Pensions Regulation be revised to provide that the plan administrator must give a spouse, or limited member, who is a beneficiary of the pension notice of any direction by the member to change the beneficiary designation.
- (3) Recommendation 15 be revised to provide:
 - (a) subject to (b), the direction from the member is effective from the date it is given (or so soon thereafter as is required by law), and
 - (b) the effective date of the direction does not prejudice such rights as the spouse may have, or acquire, under the FRA or otherwise at law, before or within the 30 day notice period, nor restrict the ability of a court to grant an order restraining any activity with respect to the pension, including action on the direction given by the member.

Comment: The object of giving the spouse advance notice is to allow the spouse to take steps to protect an interest in the pension. At the same time, the legislation should not prejudice the member where there is a need for prompt action. Recommendation 23(3) defines how rights are adjusted during the notice period. The intention here is not to address what happens after the 30 day notice period. In many cases, the spouse may continue to be able to assert rights, notwithstanding action on the member's direction. Recommendation 23(1) addresses a current ambiguity concerning the date from when the 30 day notice period is to run. Recommendation 23(2) requires notice to a spouse or limited member of a change in beneficiary designation if the spouse or limited member is a designated beneficiary. In any other case, this is information that would have no relevance to the rights or interests of the spouse or limited member.

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Recommendation 24 [HK] - Privacy Legislation

The regulations be revised to provide that any obligation under the FRA on the plan administrator to give notice or provide information to the spouse or limited member exempts the plan administrator to that extent from the operation of privacy legislation and the plan administrator is permitted to provide the required information, edited to the extent necessary to protect the member's privacy.

Comment: the general dimensions of privacy legislation are still somewhat unquantified, and plan administrators are rightly concerned about whether compliance with pension division legislation has the potential to breach privacy legislation. Enacting legislation endorsing the policy of Recommendation 24 would therefore provide much comfort to those under a statutory obligation to disclose information. The thrust of Recommendation 23 is to define the obligation to disclose in more certain terms, which will also promote the same policy.

Recommendation 25 [MR] - Adjusting Member's Pension After Division

The Regulations should be changed to require that the adjustment to a member's pension after division be made on an actuarial basis, so that the end result, determined as of the date of the division, is neutral from the plan's perspective.

Comment: currently the Regulations provide that the adjustment is on service. This approach was originally recommended by the BCLRC on the basis of simplicity of application, and was seen as an approach that would be easier for smaller plans to use. Comment we received on this issue was mixed, and some correspondents favoured retaining the current rule. However, if legislation based on Recommendation 8 is enacted [*adjusting separate pension to reflect early retirement*], the only option for ensuring a neutral result for all parties (member, spouse and plan) is to require the adjustment to be made on an actuarial basis. The Committee also observed that a requirement for an actuarial adjustment is the norm in Canadian pension division legislation.

Recommendation 26 [HK] - Division of Disability Benefits

Part 6 be revised to provide that where disability benefits are divisible between the parties under an order or agreement,

- (a) the division is to be administered by the provider of the benefits, and
- (b) the division must commence as of the later of the date stipulated in the agreement or court order and 30 days after the agreement or court order is delivered to the plan administrator.

Comment: under B.C. law, disability benefits (with a few exceptions, such as WCB benefits) are considered to be a pension and therefore divisible as a family asset (see, e.g.,

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Webb v. Webb (1985), 39 R.F.L. 280 (S.C.)). The current rules provide for division of the income stream provided by disability benefits when the member reaches age 60. However, this is relatively meaningless in the current legal environment, where courts typically reapportion entitlement to disability benefits 100% to the disabled party and, in the few cases where disability benefits are being divided, the division is to be effective immediately. The rule proposed by the Committee would still be subject to the reapportionment rules under s. 65 of the FRA, so that typically the disabled spouse will continue to be entitled to 100% of the benefits. However, in those cases where the parties agree, or the court orders, that the disability benefits are divisible, the division could take place immediately, without regard to the age of the member.

The Committee was concerned that legislation based on Recommendation 26 not tilt the current balance struck by the courts. It is not the intention of the Committee that disability benefits be routinely divided between former spouses. The Committee's sole concern in this respect is that, where such a division is appropriate having regard to principles currently worked out by the courts, there is no reason to restrict the mechanics of pension division by reference to the member attaining some arbitrary age.

Recommendation 27 [HK] - Changes to Forms

- (1) Form 1 should include an optional section that specifically authorizes the plan administrator to communicate with the designated lawyer of the person filing the form (in which case the plan administrator would send the information to both the lawyer and the spouse) until the authorization is revoked in writing.

Comment: plan administrators typically require the spouse to provide an express written authorization to communicate with the spouse's lawyer. It would be efficient to provide for this on the prescribed forms.

- (2) Forms 1 to 5 be revised to set out an express warning that the address being provided by the spouse will be used by the plan administrator to deliver information or advance notice as required under Part 6, until the spouse advises the plan administrator in writing of a change of address.

Comment: anecdotal evidence suggests that spouses filing forms with the plan administrator are sometimes careless about keeping their contact information current. Providing a warning on the Forms may not change matters much, but it is difficult to identify any other means of at least attempting to make the spouses aware of the importance of the issue.

- (3) Forms 1 to 5 be revised to address cases where they are used to claim an interest in a privately purchased annuity.

Comment: see Recommendation 20.

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- (4) Forms 2, 3 and 5 be revised to delete the reference to “date of marriage” and substitute the phrase “commencement of period subject to division” and explain that, unless the agreement or court order otherwise provides, the plan administrator is required to use the date of marriage as the commencement date.

Comment: see Recommendation 5.

- (5) Form 6 be revised to allow it to be used by the plan administrator to give notice to a spouse or former spouse who has not filed a Form 1 or become a limited member that failure to act by pension commencement will restrict pension division options available to the spouse or former spouse.

Comment: see Recommendation 1.

- (6) Form 4 be revised to remove the lump sum transfer option and provide for the limited member to elect when the limited member’s share, in the form of a separate pension, will commence.

Comment: see Recommendation 7(2).

- (7) A new form be added permitting a limited member to waive pension division in accordance with Recommendation 10(1), patterned after the formalities required for waiving preretirement and postretirement survivor benefits under the B.C. PBSA.

Comment: see Recommendation 10(1).

- (8) A new form be added permitting waiver of postretirement survivor benefits in accordance with Recommendation 10(2), patterned after the formalities required for waiving preretirement and postretirement survivor benefits under the B.C. PBSA.

Comment: see Recommendation 10(2). The difference between this waiver of postretirement survivor benefits, and the current waiver under the B.C. PBSA, is this: the current B.C. PBSA waiver is used at the time the member elects the optional form of pension. The proposed waiver would be used after the pension has commenced. Perhaps it would be possible to revise the current form to deal with both situations.

- (9) Forms 1, 2 and 4 be revised so they can also be used for dividing pensions in supplementary pension plans.

Comment: see Recommendation 17.

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- (10) The Forms be revised to provide instructions for filling in the Forms.

Comment: the Canadian Life and Health Insurance Association Inc. recommended providing instructions for filling in the Forms, which the Committee agreed was an excellent idea.

Recommendation 28 [HK] - Increasing Administrative Fees

- (1) Regulation 13 be revised to provide for the following maximum administrative fees to be levied:

- (a) an administrative fee up to \$750 may be levied for dividing an unmatured pension in a DBP or any matured pension (including an SPP), other than a matured pension referred to in subparagraph (b),
- (b) an administrative fee up to \$175 may be levied for dividing an unmatured pension in a DCP, or a matured pension in a DCP which provides the member benefits by making withdrawals,
- (c) for pensions in a hybrid plan
 - (i) subject to (ii) and (iii), an administrative fee up to \$925 may be levied for dividing an unmatured pension in a hybrid plan,
 - (ii) an administrative fee up to \$750 may be levied for dividing an unmatured pension in a hybrid plan as a DBP, and
 - (iii) an administrative fee up to \$175 may be levied for dividing an unmatured pension in a hybrid plan as a DCP.

Comment: the administrative fees have not been changed since Part 6 first came into force, so they are overdue for adjustment. Our correspondents were virtually unanimous concerning the need to increase the administrative fees. The Committee recognized, however, that the administrative fees were never intended to be a full indemnity for the costs of administering pension division arrangements. The increases recommended by the Committee are designed to bring the administrative fees up to a level that constitutes a realistic contribution towards those expenses, but not a complete indemnity.

The current administrative fees permitted under the Division of Pensions Regulation were based solely on the kind of pension plan involved, and not the method of pension division required under Part 6. With respect to matured pensions, for example, the current fees for administering a division of a matured DCP are substantially less than those for dividing a matured DBP. The Committee's recommendations are intended to rationalize the administrative fees by reference to the method of pension division required.

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A plan administering the division of a matured DBP and SPP would be entitled to charge only a single administrative fee of \$750.

The fact that administrative fees are permitted to be charged up to a specified ceiling does not mean that the plan administrator must charge an administrative fee.

With respect to Recommendation 28(1)(c), see Recommendation 16.

(d) an administrative fee up to \$250 may be levied for dividing an unmatured pension on a retroactive basis.

Comment: see Recommendation 12.

(2) S. 63(3) of the PBSA be revised by adding a new subparagraph (c) as follows:

(c) the payment of an administrative fee permitted under Part 6 of the *Family Relations Act* to administer a transfer referred to under subparagraph (b) in a single amount that is, or by installments that are, set-off against benefits paid under the pension plan.

Comment: a number of comments were received noting that parties often find the administrative fees prohibitive, which may be one of the reasons for the situation observed in the comment to Recommendation 1 of parties failing to notify plan administrators promptly of pension division arrangements. It was suggested that permitting the fees to be deducted from future pension payments would be helpful for the parties. The Committee agrees. An amendment to the anti-alienation provision in the B.C. PBSA, however, is required to permit administrative fees to be paid from the pension when it commences.

Recommendation 29 [HK] - Tax Indemnity

Part 6 be revised to provide that each party is responsible for income tax on that party's share of the Pension and must make such elections as may be necessary for that purpose and a party required to pay income tax on the benefits of the other party is entitled to be indemnified by the other in respect of the tax paid.

Comment: this is a common provision in pension division orders and agreements. Setting it out in the legislation (or regulations) would simplify the drafting of such orders and agreements.

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Recommendation 30 [HK] - Further Orders

S. 75.1 be revised to provide that

- (a) a court may make an order under s. 75.1 before or after a spouse becomes a limited member of the plan, to address any issue in which the division will operate in a manner that was unanticipated by the parties and which is unfair having regard to the terms of the plan as they existed at the date of division, or with respect to any subsequent change in the plan, and
- (b) either party is at liberty to apply to a court of competent jurisdiction for such directions and orders as may be necessary to facilitate and enforce the division of the pension in accordance with the pension division agreement or order.

Comment: Recommendation 30(b) is another common feature of pension division agreements and court orders, so there is no reason not to expressly incorporate it in pension division legislation.

With respect to Recommendation 30(a), s. 75.1 of the FRA is intended to empower the courts to tailor pension division arrangements having regard to peculiarities of the plan. Although Part 6 and the Division of Pensions Regulation attempt to deal comprehensively with the nuances that might arise in pension division, as a practical matter anomalies will arise from time to time that cannot be anticipated in advance. A question has arisen as to whether s. 75.1 is available at any date, or only before a spouse becomes a limited member of the plan. It is the Committee's conclusion that, as with Recommendation 30(b), there is a need for the court to be able to review pension division arrangements at any time that an issue arises with respect to the application of the default rules under Part 6 and the Division of Pensions Regulation.

For example, an area where this jurisdiction may prove useful has emerged in the last year or so. Various plans, because of poor investment performance, are faced with rolling back benefits or requiring increased contributions. In some cases, the increase in contributions required from members is substantial, and there may be circumstances where the limited member who expects to enjoy the value of the pension benefits preserved in this way should contribute on a *pro rata* basis. It is not possible to set out a general rule for dealing with this issue and it is one that it would be appropriate for the parties to sort out by agreement or, failing agreement, with the assistance of the court.

Another situation that sometimes arises is where the member is offered increased benefits to encourage early retirement. In some cases, the member will receive enhanced pension benefits plus a separate severance payment that is primarily intended as compensation in lieu of notice, or compensation for lost future income. Under B.C. law, such severance benefits would not ordinarily be divisible with the former spouse, or only divisible in part. However, sometimes the early retirement enhancements are provided directly through the pension and, if pension division arrangements were in place, these would automatically be caught in the division. It would be appropriate for a court to retain jurisdiction to determine whether any part of those enhancements should be excluded from division on the ground that, notwithstanding the form in which they are delivered, functionally they are compensation for lost future income.

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Because of the flexibility (and ingenuity) reflected in pension plan design, it is likely that a continuing jurisdiction by the court to adjust pension division arrangements to take into account unexpected circumstances, although rarely invoked, would provide a valuable level of protection to both of the parties.

Recommendation 31 [HK] - Trust

- (1) S. 83 of the FRA be revised to provide that a member, or any person claiming through the member, who receives benefits under a pension in which a spouse or limited member has an interest under Part 6 of the FRA, holds the benefits in trust for the spouse or limited member and must immediately upon receiving notice of the interest pay the benefits to the spouse or limited member.
- (2) A new subsection be added to s. 83 of the FRA that provides that a spouse or limited member who receives benefits under a pension that exceed the entitlement of the spouse or limited member, must hold the excess in trust for the member, or a person claiming through the member, and must immediately pay the benefits to the member or person entitled.
- (3) For the purposes of Recommendation 31(1), unless the agreement or court order otherwise provides, a spouse or limited member who is entitled to a share of the pension under an order or agreement is deemed to have an interest in any payment made under the pension on or after the Entitlement Date of the spouse or limited member.

Comment: a trust provision is common in agreements or court orders. Part 6 currently provides that there is a trust for preretirement survivor benefits, but in practice the need for a trust will also arise in circumstances beyond that scenario.

Recommendation 31(3) deals with an issue that commonly arises when dividing a matured pension. While the parties are sorting out the terms of the pension division, the member will have been receiving payments in which the spouse may be entitled to an interest. The Committee's recommendation is to adopt as the usual rule that in these cases the member must hold a share of any of those prior payments made after the spouse's Entitlement Date in trust for the spouse (unless the agreement or order provides to the contrary).

Recommendation 32 [HK] - No Further Rights After Pension Division

- (1) Part 6 and the B.C. PBSA be revised to provide that with respect to a pension in a plan that is regulated under the B.C. PBSA, after a spouse or limited member receives the share of the member's pension, the spouse or limited member has no further entitlement to any share of the member's pension under Part 6 or any other statute that arises solely by virtue of spousal status.

Comment: this is the current policy under both Part 6 and the B.C. PBSA (see FRA, s. 72(5), and PBSA, ss. 34(12) and 35(6)) in specified circumstances, although none of these sections provides for the general application of this policy.

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As a general principle, the Committee concluded that further rights in a pension, following division, should exist only if the member expressly confers those rights (such as by maintaining, or making, a beneficiary designation in favour of the former spouse).

Federal legislation may, however, confer benefits on a party, notwithstanding that the pension has been divided, if the party still remains a spouse under the relevant legislation. It is not open to the province to affect the operation of federal legislation, so the ambit of the recommendation is necessarily restricted to benefits conferred under B.C. legislation where entitlement is determined by reference to spousal status.

- (2) Part 6 and the PBSA be revised to provide that if the former spouse qualifies as a spouse under the PBSA at the relevant date and
- (a) a court order or agreement provides that the pension is to be divided under Part 6, or
 - (b) the former spouse is a limited member of the plan, even if the pension has not yet been divided,

there is no requirement on the member to elect a joint and 60% survivor benefit with the former spouse, nor any need to obtain the former spouse's express waiver.

Comment: Recommendation 32(2) and (3) deal with the circumstances that arise when the pension division is deferred, and the spouse has alternative rights by virtue of spousal status. For example, an issue that has arisen in litigation is: what is a court to order if the member is on the eve of pension commencement, but the question of pension division has not yet been decided? In these circumstances, the spouse is theoretically entitled to insist upon the member electing a pension that provides the spouse with a survivor benefit, which may have a value all out of proportion to the spouse's entitlement under Part 6. It is the Committee's recommendation that the same policy adopted under Recommendation 32(1) should apply equally in these circumstances. If the alternative is between ordering pension division, or enforcing rights that apply where the marriage is still subsisting, the choice must be in favour of pension division.

- (3) For the purposes of paragraphs (1) and (2), unless the agreement or order otherwise provides, an agreement or order that provides that the spouse has no share of the pension, or satisfies the share of the spouse by some other means, should be treated the same as an agreement or order that has divided the pension under Part 6.

Comment: the same policy should apply, whether the pension is divided under Part 6, the spouse is found to have no interest in the pension, or the spouse's interest in a pension is addressed outside of the FRA (such as by the spouse receiving a compensation payment in exchange for waiving the interest, or is allocated other assets in the division).

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Recommendation 33 [HK] - Support

Part 6 be revised to provide that, unless the parties otherwise agree or the court otherwise orders, if there is an obligation on one party to pay support to the other, and the obligation has not otherwise terminated, the agreement or court order creating the support obligation is reviewable on the occurrence of the following events:

- (a) the supporting party commences to receive benefits under a pension, or
- (b) the supported party becomes eligible to receive benefits under
 - (1) the supporting party's pension, or
 - (2) another pension or government program.

Comment: this recommendation is directed at a relatively common problem: parties agree on pension division and support obligations without necessarily taking into account what is to happen after the pension is divided and each has an independent stream of income. The current principles governing when an agreement or order about spousal support may be varied are quite strict and provide that foreseeable events are usually not valid grounds for varying support. Since retirement is foreseeable, there have been a number of cases where courts have held that the support obligation could not be varied. Endorsing the policy of Recommendation 33 in legislation would be helpful in many cases. As a practical matter, however, provincial legislation cannot affect the jurisdiction of a court under federal legislation. So it is possible that legislation based on this recommendation would be applicable if support is being determined under the FRA, but not under the Divorce Act. The Committee further concluded that this policy should apply only where support is still payable at the relevant date, and should not be available to revive a terminated support obligation.

Recommendation 34 [HK] - Part 5 of the Family Relations Act

Section 56 (2) of the *Family Relations Act* be amended by adding the words “or, if the family asset is a pension, a share as determined under Part 6.”

Comment: this amendment is intended to harmonize a current conflict in principle between Parts 5 and 6.

Recommendation 35 [HK] - Information Materials

- (1) The *Q&A about Pension Division on Marriage Breakdown in British Columbia* should be kept regularly updated, no less frequently than every 5 years.

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- (2) After the review of Part 6 is completed, the Pension Division Committee will supervise the production of a new Q&A, provided funding can be found to publish it.
- (3) Information materials should be posted on the internet setting out in plain language the basic principles of pension division as they affect: (a) division of matured pensions, (b) division of unmatured DB pensions, (c) division of unmatured DC pensions, (d) division of unmatured hybrid pensions, and (d) entitlement when a member or spouse dies. This would be useful for spouses whose relationships are ending, and for plan administrators as a means of responding to inquiries made to them.

Comment: comments received on the Issues List suggested that many plan administrators (and their advisors) find the Q&A helpful in dealing with day to day administrative problems. The recommendations of the Committee are far reaching and it would be desirable to amend the Q&A to help plan administrators deal with the law when it is revised. A suggestion was received that government establish a for-cost department to advise plans of their pension division obligations and a no-cost service to handle issues not clearly addressed by current information sources. This suggestion struck the Committee as having merit, but also financial implications that government would have to consider before acting on such a suggestion.

Recommendation 36 [HK] - Transition and Application

Unless otherwise provided for under the Recommendations, legislation enacting a recommendation should apply prospectively from the date it comes into force to any agreement or court order dividing a pension, whether the pension division order or agreement is made before that date, or a spouse becomes a limited member before that date.

Comment: various special transition rules have been recommended with respect to particular issues. However, the usual rule is that legislation applies prospectively.

III. Acknowledgments

The Committee would like to acknowledge the help provided by Nadja Rence, a legal research officer with the British Columbia Law Institute, who kept detailed minutes of the lengthy and involved debate of the Committee as it delved into the complexities of pensions and pension division, helped track the evolving policy decisions of the Committee, and provided other valuable assistance in completing this project.

The Committee would also like to thank the firm of Lawson, Lundell for graciously hosting the meetings of the Committee.

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Appendix A List of “Issues under Consideration” Circulated by the Pension Division Committee on December 3rd, 2005

[This is the Issues List circulated by the Committee as a focus for comment by stakeholders]

A note about some abbreviations:

DBP - means, depending on context, Defined Benefit Pension or Defined Benefit Plan

DCP - means, Defined Contribution Pension or Defined Contribution Plan

FRA - means the *Family Relations Act*

PBSA - means the B.C. *Pension Benefits Standards Act*

SPP - means supplemental pension plan

Administrative issues

1. Are pension plans being exposed to unnecessary liability, and administrative inconvenience by the pension division legislation? If so, what options are available for limiting liability and easing the administrative burden? Would it help, for example, if procedures were developed to deal with situations where the administrator has notice of marriage breakdown, but neither party has filed the prescribed forms? if either party were permitted to submit the Forms to divide the pension? if a limited member were deemed to elect a separate pension in the absence of another election?
2. It is not reasonable to expect a plan administrator to be able to divide the pension the day the required documents are received. What is a reasonable period for accomplishing that?

Identifying the benefits subject to division

3. What level of detail is required in specifying the pension that is subject to division? Must this be in the agreement or court order? Or is it sufficient if the prescribed forms provide enough information to identify the pension benefits that are being divided?
4. It is implicit in the legislation that a pension cannot be divided without an order or agreement expressly providing for division. Should that be stated expressly?

Calculating the spouse's share

5. Currently, unless the parties otherwise agree or the court otherwise orders, the spouse's share is based on the pension that accrued from the date of marriage to the date the spouse becomes entitled to property rights under the FRA (when a declaration of irreconcilability is made, the parties make a separation agreement, or the court makes an order of divorce or nullity). Does this approach need to be modified? For example, should the portion subject to division also include any prior period of cohabitation? Should the cut-off date be the date of separation?
6. Should Part 6 set out additional rules for determining the spouse's share of the pension in various situations? For example,

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- (a) benefits are transferred from another plan to the pension subject to division.
- (b) there is a cap on pensionable service that may be earned by the member, but the member continues to work after the cap is exceeded.
- (c) the plan provides the member with additional benefits (either by enhancing the pension, or creating another supplementary plan that is integrated with the pension).
- (d) benefits are paid to the member in substitution for benefits payable pursuant to the pension.
- (e) there is a clawback or reduction of benefits (for example, as a result of plan solvency).
- (f) the pension plan is part of a flexible benefits package under which the member may elect to enhance the pension, or take the basic pension and receive alternative benefits.
- (g) the member made voluntary contributions to the pension.
- (h) there is a plan conversion (from defined benefit to defined contribution).

Methods of division

7. A spouse entitled to a share of a pension in an unmatured defined benefit plan may receive the share by (a) a transfer of the commuted value at any date after the member becomes eligible to have the pension commence or (b) wait until the member receives the pension and take the share in the form of a separate pension for the spouse's lifetime. Are these methods adequate or should they be changed? Should the spouse only be entitled to a share of the pension when the member elects to receive the benefits? Or should the spouse be entitled to elect a separate pension even if the member wishes to defer retirement?
8. If the spouse elects to receive the share by a transfer of the commuted value (usually to a locked-in RRSP) questions sometimes arise concerning how to value the amount to transfer. The policy under Part 6 is that it should be valued assuming the member commenced receiving the pension on the date of transfer. Some plans, however, interpret the legislation as allowing them to treat the spouse as a terminated employee entitled to a deferred pension at a later date (e.g., age 65). This places a much lower value on the spouse's share. How should the commuted value of the spouse's share be calculated?

When a party dies

9. Part 6 provides that a limited member is entitled to 50% of the pension that accrued during the period subject to division. However, if the member dies, and the pension is replaced by preretirement survivor benefits, Part 6 provides that the limited member is entitled to 100% of the preretirement survivor benefits that accrued during the period subject to division, on the theory that these benefits are often worth less than the pension. This provides something of a windfall where the preretirement survivor benefits equal the value of the pension. Should the legislation set out a more specific rule that takes into account the value of the preretirement survivor benefits?
10. The Pension Benefits Standards Act ("PBSA") sets out rules for beneficiary designations when a member has a spouse. Part 6 sets out rules protecting a designation in favour of the former spouse. Do these conflict and is there a need to restate the beneficiary designation rules? Is there any need for a former spouse to be designated beneficiary of preretirement survivor benefits when Part 6 already gives the former spouse a prior right to a share of those benefits upon becoming a limited member of the plan?

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11. If the member forgets to change a beneficiary designation in favour of the former spouse, should the legislation nevertheless restrict the spouse's share to the entitlement arising from the division? Or should the spouse receive the whole of the preretirement survivor benefits pursuant to the beneficiary designation?
12. Should a limited member (or the personal representative of the limited member) be able to waive division at any time before the share is transferred to the limited member?
13. The PBSA requires a member who elects to have the pension commence to elect at least a 60% survivor benefit for a spouse, unless the spouse waives that right. Should this right end once there is a division of the pension before pension commencement? What should happen if there is a marriage breakdown and the parties elect not to divide the pension under Part 6?
14. Should Part 6 permit division of a pension to be effective as of a date before the agreement or order is made in certain circumstances? For example, where the marriage breaks down shortly before the member plans on having the pension commence, and the parties need time to figure out how to divide their assets, it would probably be helpful to them if the division were effective as of the date the member elected to have the pension commence.

Defined Contribution Plans

15. If the pension is in a defined contribution plan ("DCP"), the Part 6 rules contemplate the spouse will receive a transfer of the share (to, e.g., a locked-in RRSP) immediately, although this is not always the case in practice. Should Part 6 expressly require an immediate transfer?
16. The method of dividing a pension in a DCP requires the plan to keep historical records to determine the value of the plan at the date of marriage. Is this causing problems? Should a plan be able to estimate the value at marriage on a *pro rata* basis in specified circumstances? (Currently the legislation allows such an approach only where the marriage took place before the legislation came into effect).

Old Orders and Agreements

17. Pension division orders and agreements made before July, 1995 can be automatically brought under Part 6 if the order or agreement expressly provides for the spouse's share to be severed. There is a template for translating the terms of the order or agreement (s. 80(2.3)), but it seems to work best for pensions in defined benefit plans. Is there a need for a revised set of rules for pensions in defined contribution plans?

Supplementary Pension Plans

18. Are more detailed rules needed for dividing pensions in unregistered supplementary pension plans? Currently, Part 6 provides that they are divided when the member elects to have the pension commence and in the same way as matured pensions (by dividing the monthly pension payment between the parties). Is there any reason that the former spouse should not be entitled to receive the share in the form of a separate pension payable for the former spouse's lifetime calculated in the same way as the separate pension option for pensions in registered plans? Should Part 6 set out detailed rules for dividing benefits if the member dies before pension commencement (and, if so, is there any reason for not using the rules that apply to registered pensions)?

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Unmarried spouses

19. Should Part 6 expressly provide that it applies if a court finds that an unmarried spouse is entitled to a share of a pension on principles of unjust enrichment?

Annuities

20. Is it necessary to expressly state that Part 6 applies to “annuities” as well as “pensions”? If so, should it also apply to privately purchased annuities?

RRSPs

21. Should other types of registered plans set up to provide retirement benefits (such as Group RRSPs) be subject to division on marriage breakdown?

Notice requirements

22. A plan is required to give advance notice of various transactions affecting a pension to a spouse who has filed a Form 1, or a limited member. Is the notice requirement causing any problems? Regulation 15 provides for 30 days notice. Is there any need to revise the rule to take into account the delays of mailing notice? Would it help to provide, for example, that the 30 days should be calculated from, e.g., 3 days after the notice is posted?

Privacy legislation

23. With respect to the obligations placed on plans to disclose information to a former spouse or limited member, is there any need to expressly override the general protections of privacy legislation? If so, what needs to be addressed?

Adjusting the member's pension after division

24. Part 6 provides that after a pension in an unmatured defined benefit plan is divided, the member's share of the pension is adjusted by deleting service. Is this approach adequate? Or should the adjustment be made on an actuarial basis, so that the end result is neutral from the plan's perspective?

Disability Benefits

25. Should Part 6 be dealing with the division of disability benefits? If so, are the present rules adequate (they provide that the monthly benefits are divisible between the parties when the member reaches age 60)? If not, what rules should be adopted?

Forms

26. Do any of the Forms need to be revised? For example, should Form 1 include an additional optional section which specifically authorizes the plan administrator to communicate with the designated lawyer of the person filing the form? Is there a need for warnings or additional information (such as advice that the address being provided by the spouse can be used by the plan administrator to deliver information so must be kept up to date)?

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Administrative fees

27. Do the permitted administrative fees need to be reconsidered?

Tax

28. Should Part 6 address tax issues (such as including an express indemnity if one party is required to pay tax on the other party's benefits)?

Effect of division

29. Should Part 6 expressly provide that any further rights to the pension terminate after pension division (or a waiver of pension division)?

Further orders

30. It is common to find in pension division orders and agreements a provision that permits either party liberty to apply for such directions and orders as may be necessary to facilitate and enforce the division of the pension in accordance with the pension division agreement or order. Should this right arise automatically under Part 6?

Integration with support obligations

31. There is an obvious link between the division of pensions and entitlement to support but, even so, parties often overlook what is to happen to the support obligation when each party begins receiving their respective shares of the divided pension. Should Part 6 provide that events respecting entitlement to pension benefits should trigger a review of an existing support obligation (such as when the member elects to have the pension commence? or when the former spouse becomes eligible to receive the benefits?)

Additional sources of information

32. Currently, the source for information about B.C. pension division legislation is the publication: Q&A about Pension Division on Marriage Breakdown in B.C., which is also available on-line on the BCLI website (www.bcli.org). Are these sources adequate? What other materials would be useful? The most recent edition of the Q&A was published in 2001. How often should the Q&A be updated?

Please send your comments on these, and any other aspect of Part 6 to the BCLI Pension Division Project Committee by no later than January 31, 2006.

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Appendix B

Selected Provisions of the *Family Relations Act* *R.S.B.C. 1996, Chapter 128*

Part 1 -- Definitions and Jurisdiction

Part 5 -- Matrimonial Property

- 56 Equality of entitlement to family assets on marriage breakup
- 57 Declaratory judgment

Part 6 -- Division of Pension Entitlement

- 70 Definitions for Part
- 71 Application of Part
- 72 Local plans: limited members
- 73 Local plans: division of an unmatured defined contribution plan
- 74 Local plans: division of an unmatured defined benefit plan
- 75 Local plans: division of an unmatured hybrid plan
- 75.1 Supreme Court retains a discretion
- 76 Local plans: benefit split of a matured pension
- 77 Division of an extraprovincial plan
- 78 Death of a member or limited member
- 79 Transfer of the commuted value of a separate pension or a share of a pension
- 80 Agreements
- 81 Administrative costs
- 82 Information from plan
- 83 Trust of survivor benefits
- 84 Adjustment of member's pension
- 85 Plan and administrator not liable
- 86 Power to make regulations

PART 1 -- Definitions and Jurisdiction

Definitions

1 (1) In this Act ...

“spouse” means a person who

- (a) is married to another person,
- (b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,
- (c) applies for an order under this Act within 2 years of the making of an order
 - (i) for dissolution of the person's marriage,

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- (ii) for judicial separation, or
- (iii) declaring the person's marriage to be null and void, or
- (d) is a former spouse for the purpose of proceedings to enforce or vary an order;

...

Part 5 -- Matrimonial Property

Equality of entitlement to family assets on marriage breakup

- 56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void
- respecting the marriage is first made.
- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to
- (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.
- (4) This section applies to a marriage entered into before or after March 31, 1979.

Declaratory judgment

- 57 On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

...

PART 6 -- Division of Pension Entitlement

Definitions for Part

- 70 (1) In this Part:
- “beneficiary” means a person, or the estate of a member, entitled under the terms of a plan to receive preretirement survivor benefits or postretirement survivor benefits on the death of the member;

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“commuted value” means the value of a benefit determined in accordance with the *Pension Benefits Standards Act*;

“defined benefit plan” means a plan that is not a defined contribution plan or a hybrid plan;

“disability pension” means a benefit paid to a member under a plan as a consequence of a member’s disability;

“extraprovincial plan” means a plan that is not a local plan and includes

- (a) a supplemental pension plan to a local plan or extraprovincial plan, or
- (b) a plan whose only members are “specified individuals” as defined in the regulations under the *Income Tax Act (Canada)*;

“hybrid plan” means a plan under which

- (a) some benefits, but not all of the benefits, are determined as if the plan were a defined contribution plan, and
- (b) some benefits, but not all of the benefits, are determined by a defined benefit formula;

“limited member” means a person designated as a limited member of a local plan under section 72 (1);

“local plan” means one of the following:

- (a) a plan that is established by the government;
- (b) a plan that must be registered under the *Pension Benefits Standards Act*;
- (c) a plan that is subject to this Part
 - (i) by the terms of the plan,
 - (ii) by the operation of legislation that regulates the plan, or
 - (iii) by reason of a reciprocal agreement under the *Pension Benefits Standards Act*;

“matured pension”, or “matured” with reference to a pension, means a pension under which benefits are being paid to a retired member or a beneficiary and includes a payment of a disability pension when the member reaches a prescribed age;

“pension” means a series of payments that continue for the life of a member, whether or not it is afterward continued to any other person;

“plan” means a plan, scheme or arrangement organized and administered to provide pensions for members;

“postretirement survivor benefit” means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies after the pension matures;

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“preretirement survivor benefit” means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies before the pension matures;

“proportionate share” means a fraction calculated in accordance with the regulations, the agreement of the spouse and member under section 80 or a court order;

“retirement” or “retire” means the date a member begins to receive a pension under a plan, whether or not the receipt of benefits has been deferred;

“separate pension” means the share of a member’s pension that is established in a separate account in favour of a spouse;

“transfer” means, when referring to the payment of a proportionate share of the commuted value of a pension to the credit of a spouse, a transfer made in accordance with the regulations.

(2) In this Part:

- (a) “administrator”, “benefit”, “defined contribution plan”, “former member”, “member” and “supplemental pension plan” have the same meaning as they have in section 1 (1) of the *Pension Benefits Standards Act*,
- (b) “member” includes a former member, and
- (c) “spouse” includes a former spouse of a member.

Application of Part

71 (1) Subject to subsection (2), if a spouse is entitled under Part 5 to an interest in a pension,

- (a) the spouse’s share of the pension, and
- (b) the manner in which the spouse’s entitlement in the pension is to be satisfied

must be determined in accordance with this Part.

(2) This Part applies only if a spouse

- (a) was entitled under Part 5 to an interest in a pension before July 1, 1995 and on July 1, 1995 there is no allocation of the pension by agreement between the spouse and the member or by court order, or
 - (b) becomes entitled under Part 5 to an interest in a pension after June 30, 1995.
- (3) An agreement between a spouse and member, or a court order, that is silent on pension entitlement but that represents a final settlement and separation of the financial affairs of the spouse and member in recognition of the end of their marriage is, for the purposes of this part, an allocation of the entire pension to the member by agreement or court order but nothing in this subsection affects a court’s jurisdiction under Part 5 to review such an agreement or order.

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Local plans: limited members

72 (1) If a pension to be divided is

- (a) an unmatured pension in a local plan that is a defined benefit plan, or
- (b) a matured pension in a local plan,

a spouse may be designated a limited member of the local plan by delivering a notice in the prescribed form to the administrator.

(2) A limited member has the following rights:

- (a) to receive from the plan direct payment of a separate pension or a proportionate share of benefits paid under the pension, as the case may be, as determined under this Part;
 - (b) to enforce rights against the plan and recover damages for losses suffered as a result of a breach of a duty owed by the plan to the limited member;
 - (c) except as modified by this Part, all of the rights of a member under the *Pension Benefits Standards Act*;
 - (d) the additional rights that are set out in this Part.
- (3) Subject to an order of the Supreme Court, a designation of preretirement survivor benefits or postretirement survivor benefits under the member's pension in favour of a limited member may not be changed without the limited member's consent.
- (4) Subsection (3) applies until the limited member ceases to be a limited member or becomes entitled to a separate pension.
- (5) If the commuted value of the spouse's share in the pension is transferred under this Part to the credit of the spouse, the spouse ceases to be a limited member of the plan.

Local plans: division of an unmatured defined contribution plan

73 If a pension to be divided is in a local plan and has not matured and the plan is a defined contribution plan, a spouse, by delivering a notice in the prescribed form to the administrator, is entitled to have a prescribed portion of the member's account balance transferred from the plan in accordance with the regulations.

Local plans: division of an unmatured defined benefit plan

- 74 If a pension to be divided is in a local plan and has not matured and the plan is a defined benefit plan, a spouse, by delivering a notice in the prescribed form to the administrator,
- (a) is entitled to have, before the member retires, a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse when the member
 - (i) is eligible to retire, or

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- (ii) terminates his or her membership in the pension plan, or
- (b) is entitled to receive, when the member retires, a separate pension from the plan determined in accordance with the regulations.

Local plans: division of an unmatured hybrid plan

- 75 (1) If a pension to be divided is in a local plan and has not matured and the plan is a hybrid plan,
- (a) to the extent that the pension in the hybrid plan is based on, or the member may choose to have it based on, principles applicable to a defined contribution plan, the pension must be divided in accordance with this Part and the regulations as if it were in a defined contribution plan, and
 - (b) the remainder of the pension must be divided in accordance with this Part and the regulations as if the pension were in a defined benefit plan.
- (2) Despite subsection (1), a spouse may elect, with the consent of the administrator, to have the pension divided as if it were in a defined benefit plan.

Supreme Court retains a discretion

- 75.1 (1) If, in the circumstances, the method of division required under this Part and the regulations is inappropriate because of the terms of the plan, the Supreme Court, despite the *Pension Benefits Standards Act* or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting pension entitlement of the member and the spouse on marriage breakdown, may direct an appropriate method of division of the pension and the order of the court is binding on the plan.
- (2) Unless the application of section 65 requires the share to the spouse to be larger, an order under subsection (1) must leave the member with at least half of
- (a) the value the pension would have had, or
 - (b) the periodic benefits that would have been paid under the pension on retirement
- had there been no division of the pension between the member and the spouse.

Local plans: benefit split of a matured pension

- 76 (1) If a pension to be divided is in a local plan and has matured, a spouse, by delivering a notice in the prescribed form under section 72 (1), is entitled to receive from the plan a proportionate share of benefits paid under the pension until
- (a) the death of the spouse, or
 - (b) the termination of the pension,
- whichever occurs first.

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- (2) Despite subsection (1), if no other spouse is entitled to receive a proportionate share of benefits paid under the pension, the spouse who is the designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.
- (3) A local plan that pays a proportionate share of benefits to a spouse must make separate source deductions with respect to deductions required under the *Income Tax Act (Canada)* for the spouse's share and the member's share of the benefits.
- (4) Despite section 71 (2), a spouse who, before July 1, 1995, is entitled to receive from a member payment of a proportionate share of benefits paid under a matured pension, may, by delivering a notice in the prescribed form to the administrator, require the plan to administer the division in accordance with this section.

Division of an extraprovincial plan

- 77 (1) If a pension to be divided is in an extraprovincial plan, a spouse is entitled to receive from the plan a proportionate share of benefits paid under the pension until
- (a) the death of the spouse, or
 - (b) the termination of the pension,
- whichever occurs first, and the member is a trustee of the proportionate share of benefits for the spouse.
- (2) Despite subsection (1), if no other spouse is entitled to receive a proportionate share of benefits paid under the pension, the spouse who is the designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.
 - (3) Subject to subsection (4), subsection (1) does not apply if the plan, or legislation establishing or regulating the plan, provides an alternative method of satisfying the interest of the spouse in the pension.
 - (4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the spouse's share in the pension be satisfied under subsection (1).

Death of a member or limited member

- 78 (1) If a member dies before the limited member receives a share of the pension under section 74, and the limited member is not entitled to the whole of any preretirement survivor benefit payable under the member's pension, then the limited member is entitled to a proportionate share of that preretirement survivor benefit in the form of
- (a) a separate benefit, or
 - (b) if the preretirement survivor benefit is in the form of an annuity, a separate pension determined in accordance with the regulations.

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- (2) If a member dies after the limited member receives a share of the pension under section 74, the limited member is entitled to no further share of the member's pension except to the extent that the member has designated the limited member to be a beneficiary of the pension.
- (3) If a limited member dies before the member and before receiving a share of the pension under section 74, the plan must transfer to the credit of the limited member's estate a proportionate share of the commuted value of the pension.

Transfer of the commuted value of a separate pension or a share of a pension

- 79 If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the pension, a plan may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share of the benefits, as the case may be, in the same manner that a plan can require a member to do so under section 33(5) or 40 (1) of the *Pension Benefits Standards Act*.

Agreements

- 80 (1) A spouse may enter into a written agreement with a member respecting one or more of the following:
- (a) if there has been no division of a pension between the member and spouse, an arrangement for sharing the pension that departs from the proportionate shares required under this Act so long as the share to the spouse leaves the member with at least half of
 - (i) the value the pension would have had, or (ii) the periodic benefits that would have been paid under the pension on retirementhad there been no division of the pension between the member and spouse;
 - (b) a waiver by the spouse of any right to or interest in a member's pension or any benefit under it;
 - (c) a waiver by the spouse under section 62 of any right to or interest in a division of the unadjusted pensionable earnings under the *Canada Pension Plan*;
 - (d) the satisfaction of the spouse's interest in the pension by the payment of compensation in money or money's worth by the member to the spouse.
- (2) Despite section 71 (2), if
- (a) a spouse became entitled under Part 5 to an interest in family assets before July 1, 1995,
 - (b) the pension is to be divided by having the member pay the spouse a proportionate share of benefits payable under the pension, and
 - (c) the member has not yet retired or the spouse is not yet receiving benefits,
- the spouse and member may agree to divide the pension in accordance with this Part and, in that case, a notice in the prescribed form issued under section 72 (1) or 73 is as valid as if entitlement to an interest in family assets arose after June 30, 1995.

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- (2.1) If the spouse and member agree under subsection (2) to divide the pension in accordance with this Part, then, unless the spouse and member otherwise agree, for the purposes of this Part
- (a) the original agreement or order dividing the pension applies as if it were made as of the date of the agreement under subsection (2),
 - (b) despite paragraph (c), subsection (1) or section 75.1, the spouse's proportionate share of the pension is determined by the share or formula set out in the original agreement or order,
 - (c) the original agreement or order dividing the pension is of no further effect to the extent that it contains provisions that are inconsistent with division under this Part because they
 - (i) provide for a different method of pension division, or
 - (ii) are inapplicable because of changed circumstances, and
 - (d) to the extent that the original agreement or order dividing the pension contains provisions that clarify, supplement or are collateral to division under this Part, those provisions continue in effect.
- (2.2) A term in an order or agreement, whenever made, that requires the member to sever, or to assist the spouse in severing, the spouse's share from the member's pension as soon as it becomes possible to do so is conclusively deemed to be an agreement referred to in subsection (2), unless the parties otherwise agree or the court otherwise orders, made as of the date the plan receives notice in the prescribed form under subsection (2).
- (3) If the spouse and member agree, or the Supreme Court makes an order under section 66, that the member must pay compensation to the spouse in satisfaction of part or all of the spouse's interest in the pension, the compensation payment must be calculated in accordance with the regulations unless the spouse and member otherwise agree or the court otherwise orders.
- (4) If the plan and a spouse enter into an agreement under which the spouse accepts from the plan compensation, or a transfer of a share of the pension, in satisfaction of the spouse's interest in any circumstances not specifically dealt with under this Part, the compensation payment or amount transferred must be calculated in accordance with the regulations unless the Supreme Court otherwise orders.
- (5) If, for the purposes of this Part, a form of notice or waiver is prescribed by the regulations, the notice or waiver is of no effect unless it is in the prescribed form.

Administrative costs

- 81 (1) The spouse and member are responsible for paying to the plan a prescribed amount to offset administrative costs incurred by the plan in satisfying the share of the spouse under this Part.
- (2) A spouse or member who pays more than a half share of the administrative costs may recover from the other the additional amount paid.

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Information from plan

- 82 (1) A limited member, or a spouse claiming an interest in a pension who has delivered to the plan a notice in the prescribed form, is entitled to receive from the administrator
- (a) at the time of marriage breakdown, and
 - (b) on an annual basis,
- prescribed information in respect of the plan.
- (2) Despite subsection (1), the Supreme Court may order that an administrator provide some or all of the information required by subsection (1) at any time.

Trust of survivor benefits

- 83 If a spouse is entitled to a share of preretirement survivor benefits or postretirement survivor benefits paid to another person, the recipient holds them in trust for the spouse.

Adjustment of member's pension

- 84 If under this Act a spouse or the spouse's estate receives a share of a member's pension directly from a plan, the interest in the pension of the member, or of any person claiming an interest through the member, must be adjusted in accordance with the regulations.

Plan and administrator not liable

- 85 No plan or administrator of a plan is liable for loss or damage suffered by any person because of anything done or omitted to be done by an administrator who relies and acts in good faith on
- (a) a notice or waiver given under this Part, or
 - (b) a court order or separation agreement attached to a notice given under this Part.

Power to make regulations

- 86 The Lieutenant Governor in Council may make regulations for the following purposes and respecting the following matters:
- (a) the methods and assumptions to be followed for the valuation, division and transfer of a pension and benefits, or the calculation of any compensation payment or commuted value, at the end of a marriage;
 - (b) the procedures to be followed by a spouse, member and plan when dividing a pension or satisfying a spouse's entitlement to a pension;
 - (c) the kinds of information a plan must make available to a spouse or limited member about a plan or pension entitlement and when the information must be provided, and requiring that different information be provided at different times;
 - (d) the form, content and manner of giving any notice or waiver under this Part;

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- (e) the procedures to be followed for failing to give or failing to comply with a notice under this Part;
- (f) the method of calculating the proportionate share of benefits under a plan;
- (g) the method of calculating a compensation payment or a transfer of a share of a pension for the purposes of section 80 (4);
- (h) the prescribing of any age requirement under this Part;
- (i) the prescribing of the amount of any administrative cost.

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APPENDIX C

DIVISION OF PENSIONS REGULATION to Part 6 of the Family Relations Act B.C. Reg. 77/95

The British Columbia Gazette, Part II,
Vol. 38, No. 6, March 14, 1995

B.C. Reg. 77/95, deposited March 3, 1995, pursuant to the *FAMILY RELATIONS ACT* [Section 86] and the *FAMILY RELATIONS AMENDMENT ACT, 1994* [Section 18]. Order in Council 196/95, approved and ordered March 2, 1995.

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that, effective July 1, 1995,

- (a) the *Family Relations Amendment Act, 1994*, S.B.C. 1994, c. 6, comes into force, and
- (b) the *Division of Pensions Regulation*, as set out in the attached appendix is made.

C. GABELMANN, Attorney General;

M. HARCOURT, Presiding Member of the Executive Council.

DIVISION OF PENSIONS REGULATION

Definitions

1. In this regulation:

“Act” means the *Family Relations Act*;

“Entitlement Date” means, in relation to a spouse, the date on which the spouse became entitled to an interest in family assets in accordance with section 56 (1) [*entitlement to family assets on marriage break down*] of the Act;

“net investment returns” means interest, dividends and realized and unrealized capital gains and losses, less related investment expenses normally charged to investment earnings;

“pensionable service” means the months or parts of months in respect of which pension entitlement in favour of a member accrues, and includes pension entitlement earned by a member under another plan that has been transferred to the credit of the member;

“vested pension” means a pension under which a member has an unrestricted entitlement, or option of an entitlement, to the payment of benefits that will become payable in accordance with the plan or applicable legislation.

Application and interpretation of regulation

2. (1) This regulation applies to the division of a pension under Part 6 of the Act, except as modified directly or indirectly by an order of the Supreme Court under the Act or by an agreement between the spouse and the member in accordance with section 80 [*written agreements between member and spouse*] of the Act.

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- (2) In this regulation, if a reference to a provision of the Act is followed by italicized words in square brackets that are or purport to be descriptive of the subject matter of the referenced provision, the words in brackets are provided for convenience of reference only and are not to be interpreted as forming part of the provision in which the reference is made.

Requirements for giving notice to a plan

3. (1) Notices under the following sections of the Act must be in the specified form set out in the Schedule to this regulation:
- (a) notice under section 82 [*information from plan*] must be given in Form 1: Claim of Spouse to Interest in Member's Pension;
 - (b) notice under section 72 (1) [*limited members*] must be given in Form 2: Request for Designation as Limited Member of Pension Plan;
 - (c) notice under section 73 [*division of unmatured defined contribution plan*] must be given in Form 3: Request for Transfer from Unmatured Defined Contribution Plan;
 - (d) notice under section 74 [*division of unmatured defined benefit plan*] must be given in Form 4: Request by Limited Member for Transfer or Pension;
 - (e) notice under section 76(4) [*benefit split of previously divided matured pension*] must be given in Form 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995 for Designation as Limited Member and for Payment of Benefits.
- (2) On receipt of a notice referred to in subsection (1), the administrator must send to the member a notice in Form 6: Notice of Receipt.
- (3) If a plan does not comply with a notice referred to in subsection (1) because it is incomplete, or because it fails to provide sufficient information for the plan to act on it, within 30 days after receiving the notice the administrator must give written notice of the inability to comply to both the spouse and the member.
- (4) The obligation under subsection (3) is satisfied if the written notice is mailed to the spouse and member at their addresses given on the applicable notice referred to in subsection (1).

Failure of a plan to comply with a notice

4. (1) If a plan fails to act on a notice referred to in section 3 of this regulation within 30 days of its delivery to the administrator, in proceedings under Part 6 of the Act or on application by the spouse under section 66 [*determination of ownership, possession or division of property*] of the Act, the Supreme Court may make orders as follows:
- (a) in the case of a defined contribution plan that has not matured, directing the administrator to pay out the spouse's share from the plan in accordance with section 73 [*division of unmatured defined contribution plan*] of the Act;
 - (b) in the case of a defined benefit plan that has not matured, directing the administrator to

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- (i) pay out the commuted value of the spouse's share from the plan in accordance with section 74 (a) [*transfer of proportionate share*] of the Act, or
 - (ii) create a separate pension from the plan in favour of the spouse in accordance with section 74 (b) [*separate pension*] of the Act;
- (c) in the case of a matured pension, directing the administrator to pay to the spouse, as applicable,
- (i) a proportionate share of benefits paid under the pension in accordance with section 76(1) [*benefit split of matured pension*] of the Act, or
 - (ii) a postretirement survivor benefit in accordance with section 76(2) [*designated beneficiary of postretirement survivor benefit*] of the Act;
- (d) otherwise requiring compliance with the Act.
- (2) The administrator is a party to proceedings under subsection (1) and the petition or notice of motion must be served on the administrator.

Calculation of commuted value

5. (1) If the calculation of the commuted value of a pension or a portion of a pension is required, for the purposes of determining that value in accordance with the *Pension Benefits Standards Act*, the time in question is whichever of the following dates is applicable, as if the member terminated employment of that date:
- (a) in the case of a transfer under section 74 (a) [*transfer of share of unmatured defined benefit plan*] of the Act, the date for which the spouse requests in accordance with that section the transfer of a share of an unmatured defined benefit plan;
 - (b) in the case of a transfer under section 78(1) [*death of member*] of the Act, the date of death of the member;
 - (c) in the case of a transfer under section 78(3) [*death of limited member*] of the Act, the date of death of the limited member;
 - (d) in the case of a transfer required by a plan under section 79 [*transfer required by plan*] of the Act, the date on which the plan notifies the spouse that it is requiring the transfer.
- (2) For certainty, a request by a spouse under subsection (1) applies whether or not the member would be entitled to request a transfer on the applicable date.

Calculation of proportionate share

6. (1) This section applies if the calculation of a proportionate share of a pension, benefit or commuted value is required under this regulation or under any of the following sections of the Act:
- (a) section 74 (a) [*transfer share of unmatured defined benefit plan*];
 - (b) section 76(1) [*benefit split of matured pension*];

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- (c) section 77(1) [division of extraprovincial plan];
- (d) section 78(3) [death of limited member];
- (e) section 79 [transfer required by plan].

- (2) Subject to subsection (3), the proportionate share must be determined in accordance with the following formula:

$$\text{proportionate share} = \frac{1}{2} (A / B)$$

where

- A = the pensionable service accumulated by the member from the date of marriage to the Entitlement Date for the spouse, excluding any pensionable service for that period purchased by and credited to the member after that Entitlement Date;
- B = the total pensionable service accumulated by the member to the date that
 - (a) the spouse's share is transferred from the plan,
 - (b) the spouse begins to receive a separate pension, or
 - (c) the spouse begins to receive a payment of benefits from the member or the plan.

- (3) If the determination of a proportionate share of a preretirement survivor benefit is required under section 78(1) [death of member] of the Act, the proportionate share must be determined in accordance with the following formula:

$$\text{proportionate share} = A / B$$

where

- A = the pensionable service accumulated by the member from the date of marriage to the Entitlement Date for the spouse, excluding any pensionable service for that period purchased by and credited to the member after that Entitlement Date;
- B = the total pensionable service accumulated by the member to the date of the member's death.

Transfer from plan to locked in retirement plan

7. If the Act requires or authorizes a plan to transfer an amount to the credit of a spouse, the transfer must be made either
- (a) in accordance with section 33 (2) of the *Pension Benefits Standards Act*, or
 - (b) to another account in the plan, either existing or created to receive the transfer, on the same basis as a transfer to another plan under section 33 (2) of the *Pension Benefits Standards Act*.

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Adjustment of a member's pension under defined benefit plan

8. (1) A member's pension or benefits in a defined benefit plan subject to a division to which Part 6 of the Act applies must be adjusted in accordance with this section.
- (2) The plan must adjust the member's pension or benefits under it in accordance with subsection (3) to reflect the transfer of the value to the spouse or the spouse's estate if, under the Act, a spouse or a spouse's estate receives from a defined benefit plan
- (a) a separate pension, or
- (b) a transfer of a proportionate share of the commuted value of a pension.
- (3) An adjustment under subsection (2) must be on a neutral basis to the plan and the member as follows:
- (a) if all of the member's pension is vested, the adjustment must be done reducing the member's pensionable service;
- (b) in other cases, the adjustment must be done by deducting from the pension or benefits the present value, at the time of adjustment, of the amount paid or transferred to the credit of the spouse or the spouse's estate.
- (4) As an example of the application of subsection (3) (a), if the spouse's share of the member's pension is calculated using the proportionate share determined under section 6 (2) of this regulation and the proportionate share has not been modified by court order or agreement, the member's pensionable service is to be reduced by one-half of the pensionable service accumulated by the member from the date of marriage to the Entitlement Date for the spouse.
- (5) A reduction under subsection (3) (a) is only for the purposes of an adjustment under this section and does not affect the member's eligibility in relation to the pension or benefits.
- (6) If a spouse receives from a defined benefit plan a proportionate share of benefits under a pension, including pre-retirement survivor benefits, the person entitled to the benefits, but for the operation of Part 6 of the Act, receives the remainder of the benefits after the payment of the proportionate share.

Transfer of share from a defined contribution plan that is unmaturred

9. (1) If, under section 73 [*division of unmaturred defined contribution plan*] of the Act, a local plan that is a defined contribution plan is required to transfer an amount to the credit of a spouse of a member, the amount must be calculated in accordance with the following formula:

$$\text{transfer amount} = \frac{1}{2} (A-B)$$

where

A = the total of

- (a) the contributions to the plan to the credit of the member on the Entitlement Date for the spouse, and

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(b) the net investment returns allocated, or that are to be allocated, in respect of those contributions to the date the spouse's share is transferred by the plan;

B = the total of

(a) the contributions, if any, to the credit of the member on the date of marriage for the member and spouse, and

(b) the net investment returns allocated, or that are to be allocated, in respect of those contributions to the date the spouse's share is transferred by the plan.

(2) If an administrator cannot otherwise make the calculation under subsection (1) for contributions made to a plan before Part 6 of the Act came into force, the administrator must determine the amount in relation to those contributions in accordance with the following formula and calculate the amount, if any, in relation to other contributions in accordance with subsection (1):

$$\text{transfer amount} = \frac{1}{2} A/B \times C$$

where

A = the months and parts of months from the date of marriage for the member and spouse or the date on which the member entered the plan, whichever is later, until the date on which Part 6 came into force;

B = the months and parts of months for which contributions to the plan are credited to the member until the date on which Part 6 came into force;

C = the total of

(a) the contributions to the plan to the credit of the member on the date Part 6 came into force, and

(b) the net investment returns allocated, or that are to be allocated, in respect of those contributions to the date the spouse's share is transferred by the plan.

Limited member's separate pension in a local defined benefit plan

10. A separate pension in favour of a spouse as a limited member under section 74 (b) [division of un-matured defined benefit plan] of the Act must be

(a) based on a proportionate share of the pension the member would have received had there been no division under the Act and had the member elected a pension in the unadjusted normal form provided under the plan,

(b) converted into

(i) a single life pension, or

(ii) another form or combination of forms of pension that members of the plan may elect,

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such that the total actuarial present value of the separate pension is not less than the actuarial present value of the proportionate share credited to the spouse of the member's pension as if that share was a pension in the unadjusted normal form provided under the plan, and

- (c) adjusted in accordance with actuarial principles to take into account any difference between the age of the spouse and the member.

Calculation of a compensation payment

11. (1) This section applies if provision is made for satisfaction of pension entitlement by any of the following:
 - (a) a compensation payment under section 66 [*determination of ownership, possession or division of property*] of the Act;
 - (b) a compensation payment under section 80(1)(d) [*written agreements between member and spouse*] of the Act;
 - (c) a compensation payment or amount transferred under section 80(4) [*agreement between plan and spouse*] of the Act.
- (2) A compensation payment or transfer referred to in subsection (1) must be determined as a proportionate share of an amount equal to the present value of the future pension benefits payable to the member.
- (3) Without limiting the contingencies that may be considered in making a determination under subsection (2), the determination must make reasonable provision for the following contingencies:
 - (a) the possibility that the member may terminate employment or die before retirement;
 - (b) the possibility that the member may retire at an early, late or normal retirement date;
 - (c) the possibility that benefits being divided as family assets and paid under the plan will increase, whether by an automatic formula or on an ad hoc basis, after the date selected for valuing the benefits;
 - (d) to the extent that benefits being divided as family assets are related to future salary levels, the possibility that salary levels will increase after the date selected for valuing the benefits.
- (4) If the pension is not a vested pension at the date of valuation, the spouse may elect to
 - (a) postpone valuation until it is ascertained whether the pension vests, or
 - (b) have the valuation proceed assuming the pension will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.

Age at which disability pensions to be dealt with as matured pension

12. The payment of a disability pension to a member after the member reaches age 60 is a matured pension for the purposes of Part 6 of the Act and this regulation.

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Administrative costs

13. The amount to be paid to a plan by the spouse and member under section 81(1) [*administrative costs*] of the Act must not exceed whichever of the following is applicable:
- (a) \$500 for a defined benefit plan;
 - (b) \$150 for a defined contribution plan;
 - (c) \$650 for a hybrid plan.

Information to be provided by plan

14. (1) Within 60 days after receipt of a written request from a spouse who is entitled to information under section 81(1) [*information from plan*] of the Act, the plan must provide the spouse with any information necessary to value the interest of the applicable member in the pension, subject to the limit that, after the information is provided once to the spouse,
- (a) the plan is only required to provide the spouse with information that updates the information previously provided under this subsection, and
 - (b) the plan is only required to provide information referred to in paragraph (a) once in each calendar year.
- (2) At least once in each calendar year, a plan must provide the following information to a limited member:
- (a) any information or notice available to members of the plan;
 - (b) to the extent that it is not provided under paragraph (a), information on options available to and elections that may be made by the member with respect to the pension;
 - (c) to the extent that it is not provided under paragraph (a), information on options available to and elections that may be made by a limited member with respect to the pension.
- (3) As an exception to subsection (2), after a limited member is in receipt of a separate pension under the Act, the limited member is entitled to information from the plan only in respect of the separate pension.
- (4) On written request of a spouse who
- (a) has delivered a notice under section 82(1) [*information from plan*] of the Act, and
 - (b) continues to have an interest in the pension,
- a plan must provide to the spouse the information referred to in subsection (2), subject to the limit that the plan is not required to provide the information more than once in any calendar year.
- (5) If information or notice is required to be given under this section, it must be given by ordinary mail sent to the last address provided by the person entitled to receive it.

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Plan must give notice to spouse if member's interest may be affected

15. A plan must give a spouse who is entitled to information under section 82(1) [*information from plan*] of the Act, either as a limited member or as a spouse who has delivered a notice under that section, 30 days advance notice of any transaction relating to the applicable member's interest in the pension by reason of
- (a) the death of the member,
 - (b) retirement of the member, or
 - (c) direction given to the plan by the member.

Note:

- These forms substantially follow the Forms to the regulations published in Volume 38, No. 6 pp. 95 - 100 of the printed version of Part II of the British Columbia Gazette, although there may be some variation in formatting.

The *Interpretation Act*, R.S.B.C. 1996, 238 provides:

28 (1) Where a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

FORM 1: Claim of Spouse to Interest in Member's Pension

Family Relations Act, section 82

To: Administrator of pension plan

Name of Plan: _____

Address of Plan: _____

(please print) _____

From: Spouse of member *(Note: "spouse" includes a former spouse.)*

Name: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance No.: _____

In relation to: Plan member

Name of member: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

Declaration of Spouse Claiming Interest

I, _____ *(name of spouse)* declare that

(a) I was married to the member named above on _____ *(date)*,

(b) I was separated from the member on _____ *(date)*, and

(c) I am claiming an interest in the member's pension based on section 56 (1) of the *Family Relations Act (see below)*.

Signed *(spouse)*

Date of declaration

Signed *(Witness to signature of Spouse)*

Name of Witness: _____

Address of Witness: _____

Family Relations Act, section 56:

(1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when

(a) a separation agreement, (c) an order for dissolution of marriage or judicial

(b) a declaratory judgment under section 57, separation, or

(d) an order declaring the marriage null and void

respecting the marriage is first made.

FORM 2: Request for Designation as Limited Member of Pension Plan

Family Relations Act,

section 72 (Note: This form is for use in relation to ! a matured pension; ! an unmatured pension in a defined benefit plan; ! an agreement under s. 80(2) of the *Family Relations Act*.)

To: Administrator of pension plan

Name of Plan: _____

Address of Plan: _____

(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)

Name: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance No.: _____ Date of Birth: _____

In relation to: Plan member

Name of member: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

Other required information:

! Date of marriage _____ ! Entitlement Date* for Spouse: _____

*(Note: This is the date on which the spouse became entitled to an interest in the member's pension in accordance with s. 56 (1) of the *Family Relations Act* (see below).)

! A copy of the separation agreement or court order on which the Entitlement Date is based**

** (Note: to be attached to or enclosed with this Form.)

Request: I request that I be designated as a limited member of your pension plan.

(If the pension is matured on the date of this request, this will also act as a request for the Plan to administer a benefit split of the pension in accordance with s. 76 (1) of the *Family Relations Act*.)

Signed (*Spouse*)

Date

Signed (*Witness to signature of Spouse*)

Name of Witness: _____

Address of Witness: _____

Family Relations Act, section 56:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void respecting the marriage is first made.

FORM 3: Request for Transfer from Unmatured Defined Contribution Plan

Family Relations Act, section 73

To: Administrator of pension plan

Name of Plan: _____

Address of Plan: _____

(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)

Name: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance No.: _____

In relation to: Plan member

Name of member: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

Other required information:

! Date of marriage _____ ! Entitlement Date* for Spouse: _____

*(Note: This is the date on which the spouse became entitled to an interest in the member's pension in accordance with s. 56 (1) of the *Family Relations Act* (see below).)

! A copy of the separation agreement or court order on which the Entitlement Date is based**

**(Note: to be attached to or enclosed with this Form.)

Request: I request that you

- (a) transfer my share of the member's account balance by a transfer that is permitted by s. 33 (2) of the *Pension Benefits Standards Act*, and
- (b) advise me in writing of the information that you require in order to do this.

_____ Signed (*Spouse*) _____ Date _____

_____ Signed (*Witness to signature of Spouse*) _____

Name of Witness: _____

Address of Witness: _____

Family Relations Act, section 56:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void respecting the marriage is first made.

FORM 4: Request by Limited Member

Family Relations Act, **for Transfer or Pension**
section 74 (Note: This form is for use in relation to an unmatured pension in a defined benefit Plan.)

To: Administrator of pension plan

Name of Plan: _____

Address of Plan: _____

(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)

Name: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance No.: _____ Date of Birth: _____

In relation to: Plan member

Name of member: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

Request:

As the limited member named above, I request: (check the applicable request)

that you

(a) transfer my share of the member's pension value by a transfer that is permitted under section 33 (2) of the *Pension Benefits Standards Act*, and

(b) advise me in writing of the information that you require in order to do this.

*(Note: This option is only available if the member is eligible to retire but has not retired.)

that you provide me with a separate pension from the plan when the member retires.

Signed (Limited Member)

Date

Signed (Witness to signature of Limited Member)

Name of Witness: _____

Address of Witness: _____

FORM 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995

! for Designation as Limited Member, and

Family Relations Act, section 76 (4)

! for Payment of Benefits

To: Administrator of pension plan

Name of Plan: _____

Address of Plan: _____

(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)

Name: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance No.: _____ Date of Birth: _____

In relation to: Plan member

Name of member: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

Other required information:

! Date of marriage _____ ! Entitlement Date* for Spouse: _____

*(Note: This is the date on which the spouse became entitled to an interest in the member's pension in accordance with s. 56 (1) of the Family Relations Act (see below).)

! A copy of the separation agreement or court order on which the Entitlement Date is based**

** (Note: to be attached to or enclosed with this Form.)

Request: I request that

- (a) I be designated as a limited member of your pension Plan, and
- (b) you administer the division of the member's matured pension by providing me with separate payment of benefits in accordance with s. 76 (4) of the *Family Relations Act*.

Signed (Spouse) Date

Signed (Witness to signature of Spouse)

Name of Witness: _____

Address of Witness: _____

Family Relations Act, section 56:

(1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when

(a) a separation agreement, (c) an order for dissolution of marriage or judicial separation, or

(b) a declaratory judgment under section 57, (d) an order declaring the marriage null and void respecting the marriage is first made.

Form 6: Notice of Receipt

Family Relations Act, Part 6

To: Plan Member

Name of Member: _____

Address: _____

(please print) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

From: Pension Plan

Name of Pension Plan: _____

Address of Plan: _____

Contact Person: _____

Telephone: _____

Receipt of Notice:

We have received the following notice under the *Family Relations Act* in relation to your membership in our pension Plan:

Form 1: Claim of Spouse to Interest in Member's Pension

Form 2: Request for Designation as Limited Member of Pension Plan

Form 3: Request for Transfer from Unmatured Defined Contribution Plan

Form 4: Request by Limited Member for Transfer or Pension

Form 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995 for Designation as Limited Member and for Payment of Benefits

From: _____

(name as shown on notice)

Dated: _____

(date of notice)

Appendix D
**Comparison of Immediate Settlement
and the Deferred Settlement Model**

As mentioned in the Report, a relatively common theme in submissions received by the Committee was that B.C. should change from a deferred settlement model to an immediate settlement model. Reasons advanced in support of this included: (a) the simplicity of the model, and (b) the fact that a number of Canadian jurisdictions have adopted an immediate settlement model. It is necessary, therefore, to set out in some detail the Committee's reasons for concluding that the deferred settlement model for dividing unmaturing DBP's be retained.

Pensions are difficult to deal with because they represent a future asset: eventually, if the member lives long enough, the member will become entitled to a stream of income payable for the member's lifetime.

A deferred settlement model is based on the view that it is not necessary to guess at future events. If the spouse waits until the member retires (or until the member is eligible to have the pension commence), all of the information to determine the spouse's share at that date is then available. There are certainly disadvantages to this method. But its chief advantage is that it provides the spouse with a share of the pension determined on precisely the same basis as the member's pension. Each of the parties benefits equally from the pension that accrued during the relationship.

An immediate settlement model achieves division simply and expeditiously, but does so by placing the lowest possible value on the spouse's share (usually by assuming the member terminates employment at separation and then elects to have the pension commence at age 65).

The difference in result between the two Canadian models is substantial. A survey of Canadian jurisdictions reviewed by the Committee offered an example of the differences achieved by various pension settlement models, and demonstrated that the immediate settlement model typically gives the spouse less than half of the value that would be allocated under the deferred settlement model. For a similar analysis, see the *Report of the Task Force On the Division of Pension Benefits Upon Marriage Breakdown* (Feb., 2003, Canadian Institute of Actuaries) at p. 12-3, which shows the immediate settlement model producing results of between about half to a third of the value allocated under the deferred settlement model.

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In the opinion of the Committee, the simplicity of one model over others is not in itself reason enough to adopt it, if it does not also place a fair value on the spouse's share of the pension.

The first question then is: why is there such a substantial difference in the values achieved? The second is: what criteria is available for assessing the relative fairness of the two approaches (ignoring for the moment the administrative advantages and challenges associated with each)?

The pro rata approach

In the Report, we have referred several times to the fact that the method of determining the pension that accrues during the relationship by using the formula $\frac{1}{2} A/B$ (or in other words, the "Rutherford Formula" discussed in Chapter 1 of this Report) is a *pro rata* approach. It is worth spending a moment describing what that means.

Example

Member joins plan Jan 1, 1981
Member marries Spouse Jan 1, 1991
Member divorces Spouse Dec. 31, 2000
Member retires at age 60 Dec. 31, 2010

How should the value of the member's pension be determined at various time periods, such as: (1) the pre-marriage period, (2) the marriage period and (3) the post-marriage period? For the sake of the example, when the member retires, assume that the present value of the pension is \$150,000.

Under a *pro rata* approach, because the periods are each the same length, the same value would be placed on all three periods. In this case, the pension having a present value of \$150,000 as of Dec. 31, 2010, the pro-rata approach would hold that \$50,000 of it accrued in each of the three periods. Under B.C. law, the spouse's share of the pension is determined in this way. In the example, if only the marriage period is being divided, the spouse's share would be $\frac{1}{2} * \frac{1}{3} * \$150,000 = \$25,000$.

The *pro rata* approach assumes that the accrual of value of the pension is constant. But it is more likely that the value did not accrue evenly. If it is necessary to value precisely accumulations for these periods at different dates, it might well be something like this:

- (1) accruals during the pre-marriage period, valued at Jan. 1, 1991 assuming the member terminated employment at that date will be (say) \$5,000

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- (2) accruals during the marriage period, valued at Dec. 31, 2000 assuming the member terminated employment at that date will be \$30,000, and
- (3) accruals during the post-marriage period, valued at Dec. 31, 2010, will be \$115,000.

An approach that is based on the fact that rates of accrual vary over these different periods (often called “Value Added”) would give the spouse in the example pension entitlement worth half of \$30,000 = \$15,000.

This matter has been considered by Canadian courts numerous times and the *pro rata* approach has been held to be the fairest method for determining the spouse’s share of the pension (as, e.g., in the Rutherford case).

Why does the deferred settlement model place a higher value on the spouse’s share than the immediate settlement model?

The deferred settlement model bases the spouse’s share on the value of the pension as of the date at which it is eventually divided. By deferring the division, the spouse’s share of the pension is based on the plan member’s actual employment history, pensionable service and earnings. For example, if the value of the pension is based on the member’s final average earnings, and these have increased since the parties’ relationship ended, the spouse’s fractional interest in the pension will include post-separation increases in the value of the pension.

In contrast, under the immediate settlement model, the spouse’s share is determined as of the breakdown of the relationship: (a) assuming that the member would not have any further salary increases, thereby capping the value of the pension, and (b) assuming that the pension commenced at age 65 (which, in the example, would remove 5 years of pension payments from the equation).

For these reasons, the immediate settlement model for valuing the spouse’s share places a substantially lower share on the spouse’s share than the deferred settlement model.

It is often argued that there is no other way to value the pension using the immediate settlement model, since any projections as to future events would place all of the risk on the member if those future projections did not come to pass. That is true enough, but the argument is only valid with respect to how to use the immediate settlement model. The deferred settlement model completely avoids the need to make future projections. Everything is based on events as they actually turn out at the date of division.

Fairness of the Immediate Settlement model

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It is often argued that the immediate settlement model is fair because the spouse should not be entitled to a share of benefits that accrue after the marriage ends. Any increase in value after the parties separate, it is argued, is due solely to the member's post-separation contributions and the member, therefore, should be entitled to the whole of the benefit of those contributions. It is important to examine this proposition to determine whether it is, in fact, true.

Argument that all post-separation increases are earned or paid for after the separation

There are at least three situations where it is clearly not true that post-separation increases in the value of the pension are paid for by the member after separation:

- (a) contributions to a pension made during the marriage are usually determined with an eye on the amount that the plan must finally pay out. That means that the greater value a pension has later on is usually paid for (in whole or in part) from the contributions made during the marriage, plus the net investment returns on those contributions.

If a significant part of future increases are paid for by the use of contributions made during the marriage, any scheme of pension division that does not take this into account when determining the spouse's share places an unfairly low value on the spouse's share.

- (b) some post division ad hoc increases in a pension are paid for during the marriage, or attributable to the investment of contributions made during the marriage

The main reason plans adjust pension benefits by increasing them on an ad hoc basis is because the original benefits and contribution levels were based on conservative estimates about plan investment performance. When plan performance outstrips those estimates (which, for many years, was typical) the plan often increases the benefits payable (or declares a contribution holiday, or seeks to have the surplus transferred from the plan). Where benefits are increased in this situation, the increase is "paid for" from contributions made during the marriage (or at least, is not solely attributable to contributions made after the pension is divided).

Any scheme of pension division that does not take this into account when determining the spouse's share places an unfairly low value on the spouse's share.

In today's financial climate, it is more common to find that benefits are being cut back rather than increased. The deferred settlement model, however, automatically addresses both of these possibilities.

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- (c) some benefits paid for after the division are not paid for by the member and, therefore, should be equally shareable by the spouse.

In some plans, particularly multi-employer, union plans, current workers will agree to make higher contributions so that retired workers' pensions will be protected. Inflation erodes the value of a non-indexed pension. It is sometimes argued that this benefit should go only to the member. But here again is a very common example of enhanced pension entitlement that a member receives but doesn't have to pay for after the separation.

An example

The following is a useful example to consider by anyone who maintains that the value of the pension that accrues during the marriage is subsidized by post-separation contributions:

Member (X) and spouse divorce January 1, 1996. They divide the pension, which is in a final average defined benefit plan. The spouse's share is valued assuming that X terminates employment as of January 1, 1996 and enjoys no further salary increases.

At the date of division X is making \$50,000 a year and makes contributions based on that level of salary.

Member Y joins the plan January 1, 1996 and also makes \$50,000 a year and makes contributions to the pension based on that level of salary.

For the rest of their careers, X and Y enjoy the same salary increases, make the same contributions and retire at the same time, each then making \$100,000 a year.

The pension X has that was earned after the divorce will be exactly the same as Y's. At the same time, however, pension entitlement earned before the divorce will have increased in value by operation of the pension formula.

Clearly, the plan doesn't charge X more than Y, even though X has more units of pension entitlement than Y (that is, those units that were earned during the marriage). But the units of pension entitlement that X holds from before the divorce are somehow worth more than the value placed on the spouse's share. If X doesn't pay more than Y for the post-divorce pension, what extra contributions has X made that have enhanced the value of the marriage portion of the pension?

In summary, the fairness of the immediate settlement approach to determining the spouse's share is not supported by the argument that all subsequent increases in pension value are earned or paid for after the division.

Reasons for dividing post-separation increases regardless of when they are earned or paid for

There are a number of reasons for dividing post-separation increases in pensions regardless of when they are earned or paid for.

(a) The National Consensus

The national consensus argument is often put forward. A number of provinces have adopted pension division legislation that provides for an immediate settlement model. Some people take that fact as suggesting that there is a national consensus in favour of an immediate settlement model.

Such an observation about provincial legislation, however, overlooks the fact that before pension division legislation was enacted, the “national consensus” favoured the so-called Rutherford Order, which divides post separation increases associated with marriage accruals between the member and spouse on a *pro rata* basis. This was certainly the standard in B.C. before Part 6 was enacted, (and most other Canadian jurisdictions independently adopted formulas similar to the Rutherford Order). B.C. law in this respect was heavily influenced by American developments so that, if we look further afield, we will continue to see a consensus not in favour of immediate division, but of deferred division.

(b) Inflation Protection

The current B.C. legislation is based on the idea that both spouse and member should have a share of the pension that functions like a pension. But an immediate settlement model of pension division usually strips out most, if not all, of the inflation protection from the spouse’s share so that the value credited to the spouse will be inadequate to provide a realistic retirement income.

If a pension is not protected from inflation, its value is severely eroded over time (even in these days of very moderate inflation).

Public pensions are usually indexed and therefore protected. Private occupation pensions are usually not indexed: but they are still protected through ad hoc increases, or by operation of the benefit formula. Career average and final average pensions, for example, tend to be protected from inflation by the component of the benefit formula based on salary.

If the legislative scheme of pension division leaves out the inflation protection, the law makes sure the spouse’s share of the pension is inadequate. While the immediate settlement model strips out any inflation protection, the deferred settlement model provides the spouse with a share of the inflation protection component.

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In Pask and Hass, *Division of Pensions* [E. Diane Pask, Cheryl A. Hass, Keith L. McComb, Division of Pensions, Toronto: Carswell, 1990-1996] (at III-20), for example, the authors make the following observations:

Employer contributions are calculated based on the expectation that employees will ultimately receive a pension that reflects the cost of living at retirement: pensions are not funded on an expectation of premature termination. Valuation of the benefit based on a hypothetical termination “does not give the spouse the correct share of the amount actually funded to date by the employer.” [footnotes omitted]

(c) The Spouse’s Property Interest in the Pension

In B.C., the basis of family property division is that it is the asset itself that is being divided, not its value.

An unmatured pension is a collection of intangible units of potential. If we suppose the pension that accrued during the marriage consists of 4 of these units, then, if the asset is being divided equally when the marriage breaks down, the spouse and member should each be entitled to 2 pension units.

Under the current B.C. approach, the units are worth the same whether they are held by the spouse or the member. Under an immediate settlement model, the spouse’s 2 units will usually be worth much less than the member’s. In many cases, part of the potential value of the 2 units the spouse is allocated is actually kept by the member. The member benefits by the fact that the spouse cannot make full use of the units. In other cases, there is the possibility that the plan benefits by undervaluing the spouse’s share of the pension.

Pask and Hass, in *Division of Pensions*, make the following observations in a general review of arguments (pro and con) about the immediate settlement model (referred to as the “termination method”) (at III-20):

Indeed, it may be argued that the “termination method” of valuation does not, in fact, share the property rights or interests accrued during the marriage when applied to the “final or best earnings” plan. This is because a final or best earnings plan is structured so as to provide an annuity for each year of pensionable service, the amount of which depends upon the employee’s final or best earnings. The pension benefit accrued under this type of plan has as its foundation the accruals made during the marriage. Each year of service, including the years during the marriage, qualifies for the same share of the pension benefit upon retirement. Why is it that the years of marriage are not worth the same amount of retirement benefit to each spouse? The unreality of utilizing the “termination method” where

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the member spouse does not, in fact, terminate employment but intends to draw the pension at retirement may be compared to the way some cases have reduced the non-member's share because of hypothetical tax applied in the context of a hypothetical termination and refund of the pension value. The unreality of the latter situation has been noted judicially. *[footnotes omitted]*

(d) Expectation of Retirement Security

Pask and Hass, in *Division of Pensions*, (at III-21) further say:

...the argument in favour of using the "retirement value" may be seen as being based on the underlying expectations of the spouses during the marriage concerning their retirement security...

Essentially, the argument would go something like this: family resources were committed to earning a pension that was to be based on retirement date values. For legislation to base it on termination date values is contrary to that expectation.

Pask and Hass also observe (at III-20):

...It may be argued that the "termination method" is particularly unfair to the older, non-member spouse who has accepted the traditional homemaking role and who, as an older, newly employed or unemployed person, will not be able to accrue long-term benefits similar to those accrued by the member spouse during the marriage. The differences in value which arise when the member spouse enters his peak earning years are so extreme that cynics have wondered whether troubled marriages will tend, in future, to break up when the spouse with the defined benefit plan reaches age 53 (that being the approximate age at which benefit values start to climb). *[footnotes omitted]*

(e) Compensation for Economic Prejudice

To further develop the last point, one of the most significant developments in the separation of the economic interests of spouses on marriage breakdown is represented by the decision of the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813. In that case, it was recognized that the homemaker spouse suffers an economic loss from the marriage--from deferring a career--that must be recognized when an order for maintenance is made. This principle has been recognized in B.C. as a factor to be considered either when awarding support or when dividing property between the spouses (in *Lodge v. Lodge* (1993), 48 R.F.L. (3d) 365 (B.C.C.A.), for example, as well as in many other cases).

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The same prejudice to a homemaker spouse's economic interests arising from deferring a career also arises from the homemaker spouse's lost opportunity to acquire pension benefits. The peak years of pension accrual for a member that follow marriage breakdown exist because of the platform created by the marriage. Consequently, to truly recognize the spouse's interest in the pension in accordance with the Moge principles, then post-separation increases in the value of the marriage accruals must be recognized when the pension is divided.

Why not give the parties a choice?

Even if the deferred settlement model is maintained for B.C. legislation, why shouldn't the spouse be given the choice of taking the benefits under an immediate settlement model? We were advised by plan administrators that frequently the spouse wants the money as soon as possible and it is difficult to explain to the spouse the rationale underlying the deferred settlement model.

The Committee considered this suggestion at length, and finally rejected it for several reasons.

First, even if the transfer is immediate, the funds typically aren't available until a future date. They are usually "locked-in" which means that they must be transferred to a locked-in RRSP and can't be cashed out, but must be used to produce a life income, by purchasing an annuity or transferring them to a Life Income Fund ("LIF"). If they are transferred to a LIF, the spouse is permitted to make regular monthly withdrawals subject to specified minimum and maximum levels. Therefore, permitting the spouse to transfer benefits from the plan immediately on the ground that funds are needed now would in no sense further that objective.

It is also worth observing that the maximum amounts that may be withdrawn under the LIF tables are set quite low. Even if the spouse is given a fair value for the interest in the pension, and is able to invest the funds successfully to equal the commuted value of the pension that would otherwise be payable under the plan, the amount that can be withdrawn when the spouse turns 55 (the usual age at which benefits can be accessed) will be substantially less than the payments that would be made under the pension because of how the LIF tables operate.

It should also be observed that, even if it were possible to make pension funds available to a spouse for current needs, permitting that would be fundamentally contrary to pension policy. The rationale for pensions, for providing tax advantages for contributions and sheltering investment returns on them from tax, for the locking-in rules, and so on, is, to the extent possible, to encourage (or require) people to save for their retirement. A spouse who needs money now for current needs may not be considering that money will also be needed

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when the spouse is 60, 70 or 80. It is also worth noting that a plan member's immediate need for money is not a valid ground for unlocking funds from the pension.

In jurisdictions where the spouse has a choice between an immediate division and a deferred division, evidence suggests that the parties frequently do not have sufficient information to make a wise decision, or choose to make the decision based on immediate interests rather than long term needs. In Ontario, for example, pensions are usually divided through an immediate equalization payment paid by the member to the spouse. Information provided by lawyers practicing in Ontario is that the spouse usually wants the cash immediately (for current needs), while the member usually wants the pension divided by using the "if and when" model (what in B.C. would be referred to as a Rutherford Order). It would be interesting to know what the positions of the parties would be if they received sufficient information comparing the values of the two options. Typically, however, the only information available to the parties is an actuarial valuation showing the current value of the pension, calculated on the termination model, and each party makes their decisions based solely on the current situation: the spouse wants the money now. The member doesn't want to pay the money now. A comparison with the future value of the benefits is not part of the equation.

For all of these reasons, it is the Committee's conclusion that pension division legislation should not give the spouse the option of choosing between an immediate and a deferred settlement of the spouse's interest in the pension.

Isn't this paternalistic?

Yes it is. But that is true of all legislation dealing with pensions.

Shouldn't an immediate settlement model be adopted because it is consistent with B.C. law for dividing other assets?

It is true that, under B.C. law, most family assets are divided immediately. But this is only true of assets that do not have a future value component. B.C. law adopts other methods for dividing assets that do not have a true current fair market value, and that will mature, if at all, only at some future date (such as patents, or stock options). Typically, these types of assets are divided by creating a trust in favour of the spouse, who is permitted to share in the true value of the asset when it is realized in the future.

Having considered all of the above, the Committee's decision, therefore, is that: an immediate settlement model for dividing unmaturing DBP's is an inadequate response. Only a deferred settlement method of pension division produces a fair result for all parties.

Appendix E

List of Persons and Groups Commenting on the Issues List

Bell Actuarial Consulting (Jeremy Bell, FSA, FCIA, CFA)
Canadian Life and Health Insurance Association Inc. (Ron Sanderson, Director, Policy holder
Taxation and Pensions)
Employee Benefit Plan Services Ltd. (Ingrid Ochodek, CEBS, Consultant and Executive
Administrator)
Heath Benefits Consulting Inc. (Greg Hurst, Manager, Pensions)
Hewitt Associates (Susan K. Danzer)
Mercer Human Resource Consulting (Charlie Pazdor, FSA, FCIA)
Towers Perrin (Ashley W. Witt, FCIA, Principal; David K. Morton, FCIA, Senior Consultant)
University of Victoria - Pensions and Investments (Susan Service, Director)

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