LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Consultation Paper

Division of Pensions Upon Marriage Breakdown

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I. INTRODUCTION

The Law Commission of Ontario (LCO) is a partnership between the Attorney General, Ontario's six law schools, the Law Foundation of Ontario and the Law Society of Upper Canada. Its function is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and study areas that are underserved by other research. Pursuant to this mandate, the LCO has initiated a project on the division of pensions upon marriage breakdown, an area in respect of which there is seemingly unanimous agreement that the law is in a highly unsatisfactory state.[1]

The purpose of this Consultation Paper is to solicit input. It provides a brief overview of the problems that exist under the current state of the law, canvasses some possible legislative responses and notes some of the issues that will need to be addressed as part of any reform efforts. The Consultation Paper is not intended to be exhaustive, nor is it meant to preclude the advancement of potential solutions other than the ones discussed here; indeed, the LCO looks to the stakeholders and their expert knowledge to assist it in ensuring that all the relevant issues are identified and that the problems that now exist are resolved in the most appropriate way.

This Consultation Paper will be distributed to stakeholders for comment, as well as posted on the LCO website. Based on the LCO's independent research, including the responses to this Paper, the LCO will prepare recommendations for legislative action.

II. BACKGROUND

The fundamental premise of the "Family Property" provisions of Part I of Ontario's *Family Law Act*[2] ("FLA") is that marriage is an economic partnership, and that where that partnership breaks down, the spouses are entitled to share equally not only in the value of any assets that were acquired during the marriage, but also any growth in the value of previously-acquired assets that occurred during that time. In that regard, the Act establishes the concept of "net family property", comprising (subject to some exceptions) the value of all the property that a spouse owns on the "valuation date" (generally, the separation date)[3], less liabilities and the value of any property the spouse took into the marriage. Under the Act's equalization provisions, the spouse with the lower-valued net family property is accorded an entitlement to half of the difference between his or her net family property and that of the other spouse.[4] The word "property" is defined to include rights under a pension plan that have vested;[5]

thus, the value of such rights must be included in the calculation of a plan member spouse's net family property.

While the inclusion of the value of pension rights in the equalization process had the highly laudable goal of achieving greater fairness between the spouses following marriage breakdown, it is also, on the current state of the law, highly problematic insofar as defined benefit pensions[6] are concerned. The difficulties exist with respect to both valuation and settlement (*i.e.*, satisfying the equalization requirement); indeed, the problems are inter-related.

III. VALUATION

Where the pension plan in question is a defined contribution plan, valuation generally poses few problems; the value for net family property purposes is simply the aggregate of the contributions made during the marriage and the returns on investment of those contributions as of the valuation date. With a defined benefit plan, however, that sum plainly does not provide an appropriate value, because what the plan member ultimately receives by way of a pension has no immediate relation to the accumulated contributions and investment yield;[7] rather, the pension entitlement is determined by a formula, typically based on years of service multiplied by some specified percentage of an average of the member's salary in his or her highest earnings years.[8] To convert an entitlement of this nature into a figure that can be used for equalization purposes requires that a present value (also known as "commuted value")[9] be calculated for the anticipated future stream of pension payments. This is, as the Supreme Court of Canada has noted, "a matter of educated guesswork, undertaken by actuaries".[10]

A. Methods of Valuation

Unfortunately, neither the FLA nor the *Pension Benefits Act*[11] ("PBA") provide any guidance as to how a present value for pension rights under a defined benefit plan should be determined for purposes of computing net family property,[12] and so the question has been left to be answered by the parties, their lawyers and their actuaries (and ultimately, the courts). Two main approaches have been utilized (although there are variations on each); they are commonly referred to as, respectively, the "termination method" and the "retirement method".[13]

The retirement method assumes that the employee will continue in his or her employment with the plan sponsor until reaching some specified retirement age; accordingly, the basis on which value is assessed includes projections as to future salary increases and service credit accruals, as well as possible improvements to benefits offered by the plan. In contrast, under the termination

method, the amount of the future pension entitlement is assessed as if the pension plan member had terminated his or her employment on the valuation date. This means that only those service credits accrued to the valuation date are taken into account; it also means that no consideration is given to the possibility of salary increases or plan improvements that may occur after that date. Either method, however, involves the making of at least some assumptions concerning the future, such as the date on which the member spouse will retire and the pension comes into pay.[14] While this conjecture about future events has led some to argue that the method that is actually being used is not a true termination method and that the label "termination method" is accordingly not appropriate, the Supreme Court of Canada has used that terminology despite its awareness that the method does not strictly reflect a pure termination approach.[15] In the discussion that follows, reference will be made to the "termination method" without qualification, except where necessary for clarity.

B. Which Method is Preferable?

The termination method seems generally to have found more favour than the retirement method, although the view that it represents the better approach is by no means universal. (Indeed, the Supreme Court of Canada has raised the possibility that the retirement method might provide an appropriate result in at least some circumstances.[16]) Two main arguments have been advanced in support of the termination method. The first is that by projecting salary levels and service credits that are earned after separation, the retirement method gives the non-member spouse the "fruits" of the member spouse's post-separation labours and is in conflict with the FLA requirement that value be determined as of the valuation date.[17] How valid an objection this is can be debated; while the retirement method undeniably looks to post-separation events (or rather, assumptions about post-separation events), the "years of service" multiplier used in a defined benefit plan formula does not assign any greater weight to the final years of the member's time with the plan sponsor than to the early years,[18] (although the dollar multiplicand employed in the formula obviously would be based on projected post-separation salary levels).

The second principal objection to the retirement method concerns its highly speculative nature, resulting from the fact that it requires the making of assumptions as to what the member's salary and service credits will be when he or she does retire. These assumptions will virtually never have a perfect correspondence with future facts as they unfold and they may not even be close. However, valuation using the termination method also involves the making of many assumptions which may turn out to be wrong. In order to produce a present value, the termination method, like the retirement method, must employ assumptions about what future interest rates and tax rates will be, about when (and possibly if)[19] the member spouse will retire and about how long he or she will collect the pension. Any of those assumptions could turn out to be incorrect,

and in fact they will almost certainly prove to be so in any individual case, notwithstanding their validity from an actuarial point of view. And, if the assumptions made do turn out to be wrong, the actual value of the pension benefit in receipt and the value it had been considered to have had for equalization purposes could deviate quite dramatically, to the great disadvantage of one or the other spouse. For example, if the member spouse ends up collecting the pension for a longer period than that on which the valuation was based, the actual value of the pension rights may end up exceeding, perhaps by a quite considerable amount, that which was attributed to them as net family property.

C. Pre-Marriage Accruals

Another valuation issue that has arisen concerns the situation in which the member spouse joined the pension plan prior to the marriage; this requires setting a value on the pension rights not only for the valuation date but also for the date on which the spouses married, because the FLA requires that the value of property owned on the date of marriage be deducted in calculating net family property. Two approaches for addressing this situation have been put forward, the "*pro rata* approach" and the "value added approach". Under the former, the separation[20] date value is multiplied by the quotient obtained when the number of years of pensionable service during the marriage is divided by the number of years of pensionable service in total. In contrast, the value added approach involves separate actuarial valuations for the marriage date and the separation date. (In other words, the marriage date value is not simply a derivative of the separation date value.) The *pro rata* approach tends to produce a higher value as of the marriage date than the value added approach, which necessarily results in a lower value being attributed to the portion of the pension that accrued during the marriage, and some have argued that the failure to provide a separate actuarial valuation as of the marriage date is not in accord with what the FLA requires;[21] however, the *pro rata* method was approved by a majority of the Supreme Court of Canada as generally being the fairer approach in *Best v. Best.*[22]

IV. SETTLEMENT

If the value of one spouse's net family property exceeds the value of the other spouse's net family property, that other spouse will be entitled to an equalization payment amounting to half the difference. Where the spouse with the higher-valued net family property is in that position because of the value of his or her rights under a pension plan, there are, under Ontario law as it currently stands, essentially three options insofar as satisfaction of the equalization entitlement is concerned.

A. Valuation and Accounting

Under the first, formally labelled as "valuation and accounting", the member spouse, while including the value of the pension rights in his or her net family property, retains exclusive rights to the pension and defrays the equalization obligation with cash or other property. This option has some significant advantages over other approaches. It provides the spouses with a "clean break", which is generally desirable and particularly so where the marriage breakdown is accompanied by animosity;[23] it also avoids the administrative burdens imposed on pension plan administrators by some of the other options (as to which, see below). Generally, however, valuation and accounting is feasible as a solution only if the member spouse has sufficient money or other liquid assets to come up with the necessary payment. It is likely not an option if most of the value of his or her net family property resides in rights under a pension plan, for while the FLA treats those rights as property, it is property that the member spouse usually[24] has no ability to access prior to retirement—he or she may be "pension rich" but cash poor. The FLA does give a court the authority in cases of hardship to order that the equalization entitlement be paid in instalments over a period of not more than ten years or that all or part of the payment be delayed for such a period,[25] but there are problems associated with such a course of action. It will not be a practical solution if the member spouse does not have an adequate income unburdened by other obligations (such as, for example, support), to make the payments; in any event, the other spouse may have concerns about the security of his or her entitlement to the instalment payments or deferred payment over such a lengthy period. Further, postponing the achievement of equalization in this way can hardly be said to provide a clean break.

Another problem with the valuation and accounting approach stems from the possibility of "double dipping", wherein a non-member spouse who received an equalization payment as a result of the valuation of pension rights also looks to the pension in pay for support. The member spouse may feel that it is unfair for the non-member spouse to regard the pension on marriage breakdown as an asset whose value can be taken into account for equalization purposes and later to view that same pension as income that is available for support. In *Boston v. Boston,*[26] the Supreme Court of Canada held that, as a general matter, double dipping was inappropriate and that only that part of the pension earned after separation should be taken into account in determining the member spouse's support obligation. However, the Court also recognized exceptions to this principle, such as where a support order is rooted in need rather than compensation or where, despite the fact that the order is compensatory, the non-member spouse has made reasonable efforts to use his or her assets to produce income but still suffers from economic hardship as a result of the marriage breakdown. (Following the breakdown of a lengthy marriage, such grounds for spousal support are fairly common.)

B. The "If and When" Approach

Another option, involving what is commonly referred to as an "if and when" approach, defers satisfaction of the equalization requirement until the pension is actually in pay, utilizing a trust imposed through the vehicle of a domestic contract or court order.[27] The trust may be imposed on the plan member, requiring him or her to pay part of each pension payment received over to the non-member spouse; alternatively, it may imposed directly on the plan administrator, who is obligated to divide the pension payments at source. The latter option avoids some of the drawbacks of the former, in that contact between the former spouses is not required and potential enforcement difficulties inherent in a trust that is personal to the member spouse are avoided.[28] Unfortunately, however, there are numerous other problems attendant on both types of arrangement.

Inconsistency with the FLA?

To begin with, it is not clear that "if and when" orders[29] in the form in which they are usually made are entirely in accord with the intention behind the FLA equalization provisions.[30] The requirement to value net family property, including pension rights, suggests that where equalization is to be achieved based on a division of the value attributed to such rights, the division should be according to the ratio of the present value of the rights at separation[31] to the present value of the rights at retirement; however, what many if not most "if and when" orders (and agreements, though they do not raise a conflict with the FLA)[32] actually do is to give the non-member spouse an entitlement based on the ratio of pensionable time while the marriage was ongoing to total pensionable time. One would infer that such orders and agreements are often being used to avoid, for both spouses, the risks associated with equalization valuations, which, as previously noted, employ numerous speculative assumptions about the future which virtually ensure that the present value attributed to the pension rights will significantly and perhaps even wildly overstate or understate their ultimate real value. However, the difference in results that arise from the application of time-based ratios and the application of present value-based ratios can be quite substantial, with the ratio of present values approach tending to yield a much lower entitlement.[33] While the resulting smaller entitlement is, at least arguably, unfair to the non-member spouse, it does, presumably, reflect what the FLA intended, as otherwise the requirement to value rights under a pension plan as net family property would seem to serve no purpose.[34] In *Best v. Best*, a majority of the Supreme Court of Canada, in discussing the many difficulties associated with "if and when" arrangements, appeared to allude to the possibility that they do not truly comport with the FLA, but ultimately refrained from making any ruling on that point.[35]

Non-member Will Have to Wait

Another, obvious, problem with an "if and when" approach is that the non-member spouse loses the benefit of immediate settlement of his or her equalization entitlement. The view that this is necessarily unfair to the non-member spouse is perhaps not compelling, given that the "property" that led to the equalization entitlement itself is not immediately accessible and given as well that the FLA contemplates the possibility that equalization payments could be postponed for or spread out over as many as ten years in any event. Undeniably, however, the non-member spouse is disadvantaged by the fact that control as to when the entitlement is satisfied is outside of his or her control, for the pension will become payable only when the member spouse elects to receive it; he or she may decide to retire at "normal retirement date", but he or she might also decide to retire at an earlier or a later date. This may have an adverse impact on the income that is eventually received, and in any case it obviously can complicate financial planning for the non-member spouse.

The "Fifty Per Cent" Rule

A further difficulty stems from section 51 of the PBA, which provides that no more than fifty per cent of pension benefits that accrued during marriage can be assigned under a domestic contract or court order. For purposes of this limitation, a regulation under the PBA essentially prescribes a strict termination method of valuation;[36] this results in lower values than the retirement method or even the modified termination method usually employed for equalization purposes. Further, the non-member spouse's entitlement under "if and when" agreements and orders, at least where based on a time ratio, will clearly exceed what can be paid out to him or her under the PBA. As a consequence, pension plan administrators upon whom a trust was imposed by such an agreement or order may find themselves unable fully to carry out the trust obligation, leaving the parties to determine how to satisfy the portion of the non-member spouse's entitlement that exceeds the fifty per cent limit.[37]

Burden on Plan Administrators

This points to another problem with "if and when" arrangements; they not only have drawbacks for the parties, but they also impose burdens on those responsible for administering pension plans that are subject to such arrangements. Administrators are effectively required to calculate the value of the non-member spouse's share in accordance with the PBA regulation to determine whether the agreement or order creates a conflict with the PBA and, if it does, to advise the parties that they are bound to refuse to divide the pension payment in full conformity with what was agreed to or ordered.[38] Other problems faced by administrators include orders and agreements that are unclear or that fail to deal comprehensively with potential issues or that purport to divide benefits in a way that is not consistent with the provisions of the pension plan. Avoiding

or correcting these problems is likely to involve interaction with the spouses or their counsel, forcing administrators to expend time and often to incur legal expenses. Further, some "if and when" orders and agreements provide the non-member spouse with a right to continued payments only until a certain aggregate limit is reached,[39] which will necessitate the setting up of some sort of tracking mechanism that would otherwise not have been needed.[40]

Other "If and When" Problems

There are several other potential difficulties that have been identified with respect to "if and when" agreements and orders. The non-member spouse's entitlement to share in the pension payments will, of course, end when the member spouse dies; some suggest that if that occurs prior to retirement, the non-member spouse could be left with nothing.[41] There is also the risk that other possible future occurrences, such as winding up of the plan due to failure on the part of the plan sponsor to meet funding requirements, could significantly reduce the amount of pension benefits that both parties had assumed would be available (though payments from the Pension Benefits Guarantee Fund could somewhat mitigate the loss). Finally, there could be taxation issues; if the payments made to the non-member spouse come directly from the member spouse, they will be made from after-tax dollars; while adjustments could be made to reflect this, if the member spouse's marginal tax rate is higher than that of the non-member, the tax that is paid will be greater than if the payments made to the non-member came directly from the pension plan.

C. Lump Sum Transfer on Actual Termination

The only settlement option other than valuation and accounting and "if and when" arrangements that is currently available under Ontario law is one that can be accessed only where the employment of the member is terminated or the pension plan of which he or she is a member is wound up. Under section 42 of the PBA, the member can require the plan administrator to transfer an amount equal to the commuted value of the pension benefit out of the plan to the pension fund of another pension plan, to a locked-in retirement savings arrangement or to the vendor of a life annuity that will not commence payment prior to the earliest date on which the former member would have been entitled to receive pension benefits under the plan. Subsection 65(2) of the PBA voids any purported assignment of an interest in moneys thus to be transferred, but subsection 65(3) creates an exception where the assignment is pursuant to a domestic contract or court order under the FLA. While this allows for an immediate settlement, it availability is obviously quite limited, and it may in any case raise concerns for plan administrators.[42]

V. CPP CREDITS: A DIGRESSION

The *Canada Pension Plan*[43] ("CPP") requires a division of credits upon marriage breakdown, with credits earned during the marriage being divided equally between the spouses. While the CPP allows spouses to agree that the credits not be divided where a provincial statute expressly permits such agreements, Ontario has not enacted permissive legislation. This has led to a difficulty, at least in theory, in that CPP credits would appear to fall within the FLA definition of "family property", making them subject to that Act's equalization regime even though they are also subject to mandatory division under the federal statute. It appears that the difficulty is largely ignored in practice, with CPP credits simply being omitted from the calculation of net family property[44]. Nevertheless, this does raise the question of whether Ontario should enact legislation expressly excluding such credits from net family property[45], or at least allowing the parties to agree that they not be divided under the CPP[46].

VI. OPTIONS FOR REFORM

Obviously, the current situation is unsatisfactory; no one would disagree that it demands reform. But what form should reform take? Ideally, a pension division regime should treat parties to a broken marriage fairly, enable them to make a "clean break", recognize that pensions are family property, recognize as well that they are a very atypical form of property, meet the social objective of ensuring that individuals have a reasonable income if and when they retire, take account of the view that pensions represent deferred compensation for wage-earners, offer flexibility according to differing needs and circumstances, provide certainty to the parties and contain costs, obviate to the extent possible the need for litigation and minimize financial and other burdens that may be placed on pension plan administrators. These are a diverse set of objectives, raising the possibility that a reform proposal that meets some of them may not meet others.

If pension rights are to continue to be dealt with within the FLA equalization scheme, it would seem highly desirable that the legislation be amended so as to specify how such rights are to be valued. This requires not only that a choice be made as between the termination method and the retirement method (or at least that direction be given as to when one method rather than the other should be used); it also requires that the statute (or regulations made under it) be quite explicit and detailed in describing the method, given that there is some degree of ambiguity about these terms. If pension rights are to be kept within the equalization regime, the inadequacy of the current array of settlement options should also be addressed. In that regard, Ontario might look to the "Immediate Settlement Method" ("ISM") that has been adopted by several other provinces.[47]

Under the ISM, the non-member spouse's equalization entitlement would be satisfied by an immediate transfer from the member spouse's accrued pension; the transfer, however, would not be directly to the non-member spouse, but rather to some sort of vehicle for funding eventual retirement, such as a locked-in RRSP, another pension plan (if the other plan is willing to accept the transfer) or a deferred annuity.

An alternative model for reform might be to remove pension rights from the FLA equalization scheme and instead divide a member spouse's pension separately from other family property. Again, the ISM could be used; as a settlement method, it need not be tied to the equalization regime. However, excluding pensions from the FLA equalization provisions would also open the possibility of using an alternative approach, the Deferred Settlement Method ("DSM"), which has found favour in three provinces.[48] Under the DSM, the non-member spouse becomes a "kind of member"[49] of the pension plan, eligible to receive his or her own lifetime pension commencing, in the most straightforward case, when the member spouse retires. The non-member spouse's share of the total pension benefit (*i.e.*, the amount that would be payable to the member in the absence of division) would be equal to half of the quotient obtained when the number of years of pensionable service during marriage is divided by the total number of years of pensionable service. In this situation, actual valuation would not be required; the DSM essentially reproduces the result that is achieved under an "if and when" settlement based on a time ratio, except that the stream of benefits payable to the non-member spouse does not end if the member spouse predeceases him or her.[50] However, under some DSM models, the non-member spouse could elect to commence receiving his or her pension at some point other than retirement of the member spouse, or could elect to have a lump sum transferred to a locked-in vehicle instead of taking a pension from the member spouse's plan; where such an option was selected, valuation would still be required, albeit (in most cases other than lump sum transfers) at a later date than under the ISM.

On their face, both the ISM and the DSM enable spouses to cease to have dealings with each other, but otherwise they represent quite different solutions to the problems that exist under the current law. The ISM generally uses a strict termination method of valuation, which some critics argue is unfair to the non-member spouse and may result in a windfall to the pension plan; some ISM advocates, however, suggest that the termination method could be somewhat modified to produce a fairer result (while also asserting that whatever particular valuation approach is used, the same approach should be used for purposes of the fifty per cent rule under the PBA).[51] Undoubtedly, the ISM is clear and certain and "clean"; however, the need for an immediate valuation, possibly taking place many years before the pension comes into pay, means that there will continue to be discrepancies, possibly quite substantial, between what the pension is valued at and what the pension ultimately proves to be worth. That problem is much reduced in the case of the DSM, because valuation, where it is

required, generally would occur at a later date than under the ISM. Where the non-member spouse does not take a benefit until the member spouse retires, the problem is eliminated completely; in that case, obviously, the non-member spouse also has the advantage of being a member of the pension plan, which many individuals may prefer to having to make their own investment decisions. On the other hand, critics of the DSM argue that it allows the non-member spouse to share in the increase in value of the pension that accrues after marriage breakdown;[52] clearly it also imposes burdens on pension plan administrators that they would not have under the ISM, as they would have to administer two pensions instead of one.[53]

As was noted at the beginning of this section of the paper, a pension division regime should, ideally, satisfy a number of diverse objectives. It would seem that the ISM may do a better job of meeting some of those objectives than the DSM, while the DSM may do a better job of meeting others. The reform approach one favours likely depends on what one sees as the relative importance of the various objectives and on where one thinks trade-offs should be made when those objectives seem to point in opposite policy directions

VII. YOUR INPUT IS REQUESTED

The Commission asks for submissions on how best to address the current problems that exist with regard to the division of pensions upon marriage breakdown. We need your input on all of the following issues:

Which Approach is Essentially Fairer to the Parties?

We want to know which model you prefer, the ISM or the DSM (or some other model), and why. Implicit in this is the question of whether pensions should continue to be dealt with under the FLA valuation and equalization provisions or whether they should instead be divided outside that regime. The DSM does not seem compatible with the valuation and equalization regime[55] (although if it is simply made available as an option, pensions would not have to be excluded from the regime where the parties did not choose it). On the other hand, the ISM would seem to be workable either within the valuation and equalization regime or outside it. We want to know whether you think the ISM is unfair to the non-member spouse or creates a windfall for the pension plan, and if so, whether it can be modified in such a way as to alleviate these problems. Similarly, we seek your views on whether the DSM gives the non-member spouse a share in increases in pension plan value that truly are attributable solely to the post-breakdown period, and if so, whether it can be modified to reduce or eliminate any injustice to the member spouse.

To What Extent Should the Parties Be Bound by the Regime?

Whichever approach is favoured, a decision will have to be made as to the extent to which parties should be bound by it. Should there be a presumption that the approach will be used unless certain exceptional circumstances exist, and if so, what are those exceptional circumstances? (For example, if the DSM approach is chosen, should it generally be mandatory where the marriage exceeded a certain length or where the date on which the member spouse can take an early retirement pension without penalty is within a certain period of time?) Might it instead simply be a default regime, which applies only if the parties cannot agree to some other means of settling their affairs? Or should it apply in all cases, without exception?

Retroactive or Prospective Application

A decision will also have to be made about temporal application, *i.e.,* should the new regime apply where the valuation date under the FLA falls on or after the day on which the legislation creating the regime comes into force (even though, in the case of the DSM, pensions would no longer be subject to the equalization requirements), or should some other date be chosen?

Taxation Issues

Tax implications will have to be addressed. Since both the ISM and the DSM will result in the non-member spouse receiving a benefit at source, he or she will pay income tax on that benefit. This seems unfair in the case of the ISM if pensions are to remain subject to the FLA equalization regime, in that an equalization payment should be tax-free.[54] Is there a way to reduce or eliminate this unfairness? The DSM divides the pension outside of the equalization provisions, but does this mean that there is no unfairness in the non-member spouse being taxed on what he or she ultimately receives? In the case of either model, if there is a tax-related unfairness, is there a way that it can be reduced or eliminated?

ISM and Valuation

If the ISM approach is adopted, should a particular valuation method be required as a matter of law, and if so, what should that method be? Should the valuation be performed by the plan administrator, as under Quebec's *Supplemental Pension Plans Act*[55] (which essentially adopts an ISM approach), rather than by actuaries retained by the spouses, with the hope of reducing disagreement and litigation?[56]

DSM, Non-member Options and Valuation

If the DSM approach is adopted, should a non-member spouse who elects to take a pension from the member spouse's pension plan have the option of having his or her pension commence at a time other than actual retirement of the member spouse? Should the non-member spouse have the option of transferring his or her share to a retirement vehicle other than the member's plan? If the answer to either question is yes, should a particular valuation method be required as a matter of law, and if so, what should that method be? Where valuation is required under the DSM, should the valuation be performed by the plan administrator rather than by actuaries retained by the spouses?

The Fifty Per Cent Rule

Should the fifty per cent rule be changed or dropped entirely? If it is to be retained, should the currently-prescribed method of valuation be changed?

Reducing Burdens on Plan Administrators

Either approach, but particularly the DSM, would impose burdens on pension plan administrators. Are there ways of minimizing those burdens? Should administrators have the option of charging fees to member or non-member spouses so as to offset their additional costs?

DSM: Structuring Alternatives

If the DSM is adopted, are there ways to structure the division other than creation of a separate pension for the non-member spouse that would be more advantageous? If there are, should these be available as options, and if so, at whose option would they be?

Possibility of Subsequent Spouses

There is a possibility that the member spouse will have entered into spousal relationships with one or more individuals between the date of marriage breakdown and the date that the pension comes into pay. Does the DSM need modification so as to deal with this possibility?

Pre-Retirement Death Benefits

If the DSM is adopted, should the non-member spouse, in the event that the member spouse dies before retiring, be entitled to a pre-retirement death benefit (or to a share of it if the member spouse acquired another spouse or spouses following marriage breakdown)?

Pensions in Pay

What rules should apply where payment of pension benefits had already commenced before the spouses separated?

Plans other than Defined Benefit Plans

Is the current law satisfactory insofar as defined contribution plans, RRSP's and RRIF's are concerned? What about supplementary health plan benefits and dental plan benefits that an employer makes available to retirees? Are special rules needed in the case of pension plans that combine elements of a defined contribution plan and a defined benefit plan?

Where Both Spouses Have Pensions

Are special rules needed for this situation? What if one pension is a defined benefit pension and the other is a defined contribution pension?

CPP Credits

Should credits under the CPP be excluded from the definition of "family property" under the FLA? Is legislation needed to address whether and how such credits are to be taken into account under either the ISM or the DSM? Should Ontario enact legislation allowing spouses to agree to opt out of the equal division of credits provisions of the CPP?

VIII. HOW TO PARTICIPATE

The LCO invites your comments on the issues raised in this Consultation Paper. Your comments will be considered as the LCO develops the scope and content of its project on the division of pensions upon marriage breakdown.

Submissions must be received by **Friday, July 31, 2008.**
You can mail, fax, or e-mail your comments to:

Law Commission of Ontario
"Pension Division Project"
Computer Methods Building, Suite 201, 4850 Keele Street,
Toronto, ON, Canada, M3J 1P3
Fax: (416) 650-8418
E-mail: pensiondivision@lco-cdo.org

If you have questions regarding this consultation, please call (416) 650-8406 or use the e-mail address above.

IX. ENDNOTES

[1] We would note that the project complements a broader move to reform the law relating to pensions. The Ontario Expert Commission on Pensions is currently reviewing a number of issues relating to pensions and is expected to release a final report later this year. However, pension division upon marriage breakdown is not an issue within the Expert Commission's mandate.
[2] R.S.O. 1990, Chapter F.3.
[3] Section 4 of the FLA defines "valuation date" as the earliest of the separation date, the date of divorce, the date the marriage is declared a nullity, the date of an application based on improvident depletion and the day before the date of a spouse's death.
[4] It should be noted that Part I of the FLA, unlike some other matrimonial property regimes, does not create beneficial interests in property, but rather, a debtor-creditor relationship between the spouses.
[5] Despite the reference to vesting, pension rights that have not yet vested are also considered to be property for purposes of equalization under the FLA; see, for example, *Bascello v. Bascello*, [1995] O. J. No. 2989, 26 O. R. (3d) 342.
[6] There are two main types of pension plans, defined benefit plans and defined contribution plans. Under a defined benefit pension plan, the member's pension benefit is determined according to a set formula. Under a defined contribution plan, the member's benefit will be equal to the contributions made to the plan plus the yield on investment of those contributions.
[7] One expert suggests that a pension in a defined benefit plan is frequently worth two to two-and-one-half times the contributions; see Thomas G. Anderson, "Pensions" in *Federation of Law Societies of Canada 2006 National Family Law Program*, p. 32.
[8] Variations include using as multiplicands a flat dollar figure or career average earnings rather than a percentage of earnings in some limited period of years immediately prior to retirement.
[9] E. Diane Pask and Cheryl A. Hass suggest that the terms may be used interchangeably in *Division of Pensions* (Carswell, 1990), p. III-14. However, it would seem that "commuted value" is generally not used in a family law context in Ontario; see Ontario Law Reform Commission, *Report of Pensions as Family Property: Valuation and Division* (1995), p. 29.
[10] *Boston v. Boston*, [2001] 2 S.C.R. 413, at para. 32.
[11] R.S.O. 1990, Chapter P.8
[12] Section 56 of the *General* regulation under the PBA (Regulation 909 of R.R.O. 1990) prescribes a method of valuation for purposes of the "fifty per cent rule" in subsection 51(2) of the PBA, discussed below, but while this can be relevant to the question of how the equalization requirement is to be satisfied once the net family properties of the spouses have been determined, it is not prescribed as a method for determining value for net family property purposes and has generally not been used for such purposes.
[13] Unfortunately, the terminology employed in the case law has not always been consistent; one cannot always be sure, for example, what a court means when it says that it is using the "termination method". There is a discussion of this point in *Bascello v. Bascello*, note 4.
[14] Although the termination method assumes that the member terminates his or her employment on the valuation date, an assumption as to when the pension comes into pay is still required in order to determine value because the date of retirement is a factor in how long the pension benefits will be paid.
[15] *Best v. Best*, [1999] 2 S.C.R. 868, paras. 42 and 43.
[16] Note 14, paras. 88-93. In discussing the possibility that the retirement method might be used, the Court seemed to suggest that it would be appropriate where the likely retirement date was fairly close at the time of valuation, as the degree of speculation would be reduced.
[17] *Humphreys v. Humphreys* (1987), 7 R.F.L. (3d) 113 (Ont.HC.J.)
[18] This seems to be the point being made by certain judicial authorities and other sources cited in Berend Hovius and Timothy G. Youdan, *The Law of Family Property*, Carswell, 1991, p. 499 and p. 501.

[19] The member spouse may die without having retired. Pask and Hass (note 8), p. V-9 state that mortality can be ignored for valuation purposes if the pension plan in question provides a death benefit equal to 100 per cent of the commuted value of the pension to which the member is entitled. In that regard, section 48 of the PBA requires a pre-retirement death benefit equal to the commuted value of the pension, but requires the value to be determined as of the termination date; this of course means that it provides 100 per cent of the commuted value only if one is going by the termination method rather than the retirement method.
[20] The term "separation date" is used here in order to make the discussion more readily understandable. The proper term is, of course, "valuation date", which could in some cases be a date other than the separation date. See note 3.
[21] See James G. McLeod, *Annotation* of *Best v. Best* (1999), 49 R.F.L. (4th) 10, at 15. This view also formed part of the basis for the minority dissent.
[22] Note 15, para. 87.
[23] Pask and Hass, note 9, p. VII-7.
[24] There are some exceptions to this; see subsection 67(5) of the PBA.
[25] See section 9 of the FLA.
[26] *Boston v. Boston*, note 10.
[27] The PBA permits this subject to certain restrictions; see discussion below.
[28] Ontario Law Reform Commission, note 9, p. 37.
[29] "If and when" agreements, unlike orders, do not attract the same objection, as subsection 2(10) of the FLA provides that domestic contracts generally prevail over the FLA requirements.
[30] Julien D. Payne and Marilyn A. Payne have remarked (in *Canadian Family Law* [2nd ed.], 2006, p. 462), that

> [i]n theory, it remains open to question whether an "if and when" order for the sharing of pension benefits upon maturity is consistent with a strict interpretation of the express provisions of the *Family Law Act*. However, necessity is the mother of invention and an "if and when" approach may be essential in order to facilitate equitable and practical discharge of an equalization entitlement.

[31] Less, of course, the present value at marriage where the member spouse had joined the pension plan prior to marriage.
[32] See note 29.
[33] For a dramatic illustration of this, see Pask and Hass, note 9, pp. III-23 to III-28. The authors posit a hypothetical fact situation in which the marriage lasted for the first fifteen of the thirty years during which the member spouse was employed by the plan sponsor; if time ratios were used, the "if and when" approach would give the non-member spouse twenty-five per cent of the pension benefits when the pension came into pay, while use of value ratios would give the non-member spouse only a little over four per cent.
[34] See Neil Campbell, "Division of Pensions Under the Ontario Family Law Act: A Comment on *Marsham v Marsham* and *Humphreys v. Humphreys*" in (1988) 7 Can. J. Fam. L. 79-92, at 89. In *Marsham*, Walsh, J. of the Ontario High Court of Justice had held that an "if and when" approach that bypassed the valuation step was contrary to the FLA. Somewhat ironically, he ultimately ordered that the pension benefits be shared when the pension came into pay using a ratio of time rather than value; while he questioned whether this gave the non-member spouse a share of benefits that were earned after the marriage breakdown, he indicated that he was ordering as he did only because the member spouse had submitted that the other spouse's share should be calculated on the basis of a time ratio (which would have been less advantageous to the member).
[35] There was no need for the Court to do so since it agreed with the trial judge's decision that the equalization obligation should, in light of the particular facts of the case, be satisfied through payment by instalments. See para. 117.
[36] R.R.O. 1990, Reg. 909, s. 56. The prescribed approach departs from a strict termination approach only in allowing consideration of the possibility of future vesting where a benefit is not yet vested.

[37] Ontario Law Reform Commission, note 9, p. 44. This, of course, eliminates one of the advantages of an order or agreement that imposes a trust on the plan administrator rather than on the members spouse, that being that the spouses would not be required to have further dealings with each other on pension issues.
[38] Ontario Law Reform Commission, note 9, p. 44.
[39] These will, presumably, be agreements or orders where the non-member spouse's share is determined on the basis of a ratio of present values rather than a time ratio.
[40] This was pointed out by the Ontario Municipal Employees Retirement System in its *Submission to the Ministry of the Attorney General on the Ministry of Finance/Ministry of the Attorney General Discussion Document "Valuing and Dividing Pensions at Relationship Breakdown"*, April 5, 2006, pp. 3-4.
[41] This was asserted in *Submission of the Ontario Bar Association to the Ministry of the Attorney General on Pension Division Reform*, November 30th, 2007, p. 6. It clearly would be the case where the pension rights have not vested. However, while a former spouse as such is not entitled to a pre-retirement death benefit under section 48 of the PBA, he or she could be designated as a beneficiary if there is no subsequent spouse. (Even if the member spouse remarries, an agreement or order assigning part of the death benefit to the former spouse would seem to be enforceable and binding on the surviving current spouse: *Stairs v. Ontario Teachers' Pension Plan Board*, [2004] O.J. No. 331.)
[42] Ian J. McSweeney and Douglas Rienzo, *Pensions and the Family Law Act: Valuation and Settlement of Pensions and Similar Employee Benefits on Marriage Breakdown*, Law Society of Upper Canada (Bar Admission Course), 2005, p. 488.
[43] R.S.C. 1985, Chapter C-8.
[44] See Hovius and Youdan, note 18, p. 488; Ontario Law Reform Commission, note 9, p. 265.
[45] This was recommended by the Ontario Law Reform Commission, note 9, at p. 267.
[46] Hovius and Youdan, note 18, p. 492.
[47] Alberta, Manitoba, New Brunswick, Quebec and Saskatchewan have adopted some form of the ISM.
[48] British Columbia, Newfoundland and Nova Scotia have adopted some form of the DSM. Note that if the DSM is simply an option for the parties, pensions would not have to be excluded from the FLA equalization regime where the parties did not choose that option.
[49] Anderson, note 7, p. 5. British Columbia has adopted a DSM approach; that province's *Family Relations Act* uses the term "limited member" to describe the non-member spouse's status.
[50] Anderson, note 7, p. 26.
[51] OMERS, note 40, pp. 6 & 8.
[52] Gene C. Coleman, G. Edmond Burrows and Penny Hebert, "Pension Reform—Watch Out!" in *Money and Family Law*, Vol. 20, No. & (July, 2005), p. 4.
[53] Coleman, Burrows and Hebert, note 52, pp. 5-6.
[54] Coleman, Burrows and Hebert, note 52, p. 9.
[55] R.S.Q., c. R-15.1.
[56] Stephanie Santori-Sansfaçon, *Pension Evaluation upon Marriage Breakdown: A Quebec Approach* (unpublished paper, Winter 2008), p. 34.