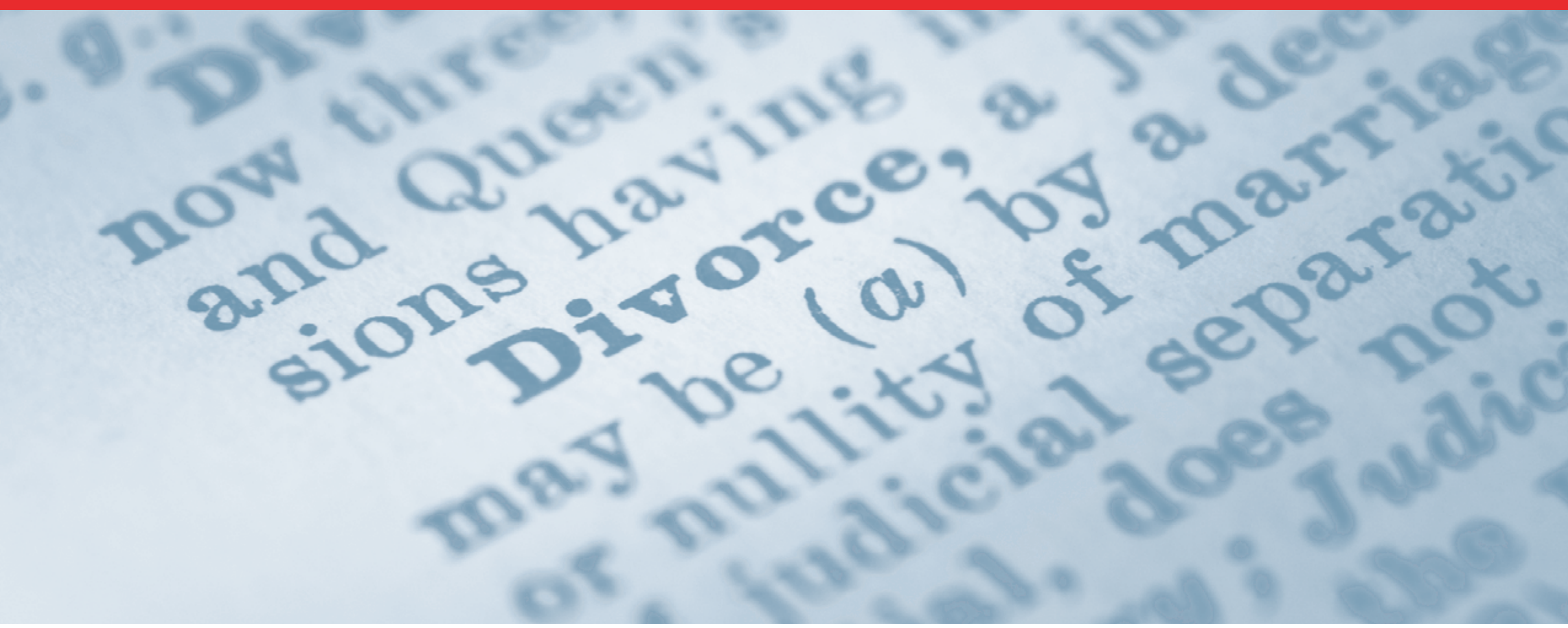
Division of Pensions Upon Marriage Breakdown

FINAL REPORT

December 2008



LCO
CDO

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Division of Pensions Upon Marriage Breakdown

FINAL REPORT

December 2008

Available online at www.lco-cdo.org
Disponible en français
ISBN: 978-0-9809738-9-1

ABOUT THE LAW COMMISSION OF ONTARIO

The LCO is a partnership established by the Ministry of the Attorney General, Osgoode Hall Law School, the Law Deans of Ontario's law schools, the Law Foundation of Ontario, and the Law Society of Upper Canada. Its Board of Governors comprises representatives of the founding partners and also members at large. The Board approves LCO policies, projects, consultation papers and reports. Its approval of these reflects its members' collective responsibility to manage and conduct the affairs of the LCO, and should not be considered an endorsement by individual members of the Board or by the organizations to which they belong.

The mandate of the LCO 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. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations, as well as to collaborate with other bodies and consult with affected groups and the public more generally.

Law Commission of Ontario
Computer Methods Building
Suite 201, 4850 Keele Street
Toronto, Ontario, Canada
M3J 1P3

Tel: (416) 650-8406
Fax: (416) 650-8418
General E-mail: LawCommission@lco-cdo.org
www.lco-cdo.org

FOREWORD

We are pleased to present our Final Report on the division of pensions upon marriage breakdown.

The LCO heard that clarifying how to divide pensions as part of the property equalization when a marriage ends was one of the highest priorities in family law reform. Family lawyers, pension administrators and couples found this one of the most frustrating aspects of an already often very difficult process. The Board of Governors therefore identified division of pensions on marital breakdown as one of the first projects it approved in November 2007. The LCO's recommendations are intended to bring greater certainty to this very technical and contentious aspect of separation and divorce.

Work on this project began in March of 2008. In May, we released a consultation paper which discussed a number of problems that exist in this area, including controversies over different methods of valuing interests under defined benefit pension plans and the lack of an efficient and effective settlement mechanism for parties who wished to resort to the pension of one of the spouses in order to settle equalization obligations under the *Family Law Act* [1] (FLA). More than 20 written submissions were made in response to the consultation paper. These were considered in preparing our recommendations, which were approved by the Board of Governors in late September and published on October 6.

On November 24, 2008, the Attorney General, The Hon. Chris Bentley, introduced Bill 133 in the Legislative Assembly, and it received First Reading. Bill 133 proposes numerous amendments to the FLA, including amendments dealing with pensions and marriage breakdown that are based on the LCO's work in this project.

The LOC Board of Governors approved this final report on December 22, 2008.

Patrick Monahan

Patrick J. Monahan
Chair, Board of Governors

P. Hughes

Patricia Hughes
Executive Director

The following individuals contributed to this project:

LCO STAFF

John D. T. Hill (Head of Project)
Julie Lassonde (Researcher)

STUDENT RESEARCHERS

Revital Goldhar (SJD student, University of Toronto)
Layla Hassan (LLB Student, University of Western Ontario)
Laila Said (JD Student, University of Maryland)

ACTUARIAL CONSULTANTS

J.M. Norton
Kelley McKeating

MEMBERS OF THE BOARD OF GOVERNORS

Patrick J. Monahan, Chair (Osgoode Hall Law School)
Christopher D. Bredt (Law Society of Upper Canada)
Neil Finkelstein (Law Society of Upper Canada, until February 29, 2008)
Neena Gupta (At-large)
Marie Henein (At-large)
Frank Iacobucci (Law Foundation of Ontario)
Russell Juriansz (Judiciary, commencing July 1, 2008)
Yves Le Bouthillier (Ontario Law Schools)
James C. MacPherson (Judiciary, until June 30, 2008)
Murray Segal (Ministry of the Attorney General)
Patricia Hughes (*ex officio* and Executive Director of the LCO)

MEMBERS OF THE RESEARCH ADVISORY BOARD

Patricia Hughes, Chair
Jeffrey B. Berryman (Faculty of Law, University of Windsor
Jamie Cameron (Osgoode Hall Law School, York University)
Brenda Cossman (Faculty of Law, University of Toronto, until October 14, 2008)
Anthony Duggan ((Faculty of Law, University of Toronto, commencing October 15, 2008)
Sébastien Grammond (University of Ottawa – Civil Law Section)
Kai Hildebrandt (Department of Communication Studies, University of Windsor)
Berend Hovius (Faculty of Law, University of Western Ontario, commencing June 16, 2008)
Erik S. Knutsen (Faculty of Law, Queen’s University)
James F. Leal (Law Society of Upper Canada)
Mark Perry (Faculty of Law, University of Western Ontario, until June 15, 2008)
Anne Marie Predko (Ministry of the Attorney General)
J. Anthony VanDuzer (University of Ottawa – Common Law Section)
Janice H. Vauthier (Representative of the Private Bar)

TABLE OF CONTENTS

EXECUTIVE SUMMARY

I. INTRODUCTION

Virtually everyone agrees that the confusion around the division of pensions upon marriage breakdown should be addressed legislatively, but unfortunately there is no unanimity as to the choice of solution.

Following a thorough review of the law and careful consideration of the policy issues and the submissions that were made to it, the LCO released recommendations in October of 2008. This report supplements those recommendations with background information, a detailed look at the problems surrounding pension division and a discussion of the issues and the reasons for our recommendations.

II. AN OVERVIEW OF PENSIONS IN ONTARIO

This section of the report covers types of pension plans, demographics, legal requirements, retirement age, death benefits, inflation, funding and plan wind-up.

III. ONTARIO'S FAMILY PROPERTY LIGISLATION

On marriage breakdown, spouses are entitled under Ontario's *Family Law Act* (FLA) to share equally in the value of all property acquired by either spouse during the marriage. Following determination of the total value of each spouse's assets (including pension rights) on the valuation date, the spouse with the assets of higher value must pay to the other spouse an equalization payment amounting to half the difference in value.

IV. VALUATION OF RIGHTS UNDER A PENSION PLAN

Under a defined contribution plan the value of rights is the aggregate of the contributions and investment yield as of the valuation date. With a defined benefit plan, however, one must determine the "present value" — the amount that would have to have been invested on valuation date in order for the original investment and accumulated earnings to be just adequate to fund the monthly benefits when the pension comes into pay.

There is some uncertainty regarding the methodology used to calculate a present value. The retirement method assumes that the employee will continue to be employed, while under the termination method, pension value is assessed as if the member had terminated her employment on the valuation date. In most court decisions a preference is expressed for the termination method over the retirement method, although it appears that most courts were actually using a hybrid method.

The assumption that is made concerning likely retirement age can have a very substantial impact on valuation. (Other assumptions relevant to determining present value include the member's date of death, future tax liability and future interest rates.) The Ontario Court of Appeal has held the retirement age is a question of fact, to be resolved on a balance of probabilities based on the evidence, an approach implicitly approved by the Supreme Court of Canada. While a statutory presumption of retirement at the mid-way point between the earliest date on which the member could take an unreduced pension and the normal retirement date might be seen as having some advantages, it does not appear feasible, given the complexity and diversity of pension plan options and the multitude of different scenarios that could arise.

If pensions are to remain within the equalization regime, they must be valued, and with that comes the risk (indeed, virtual inevitability) of post-equalization changes in value, as it does with any property.

V. SETTLEMENT

If one spouse owes the other an equalization payment and is in that position because of the value of her rights under a pension plan, there are essentially three options.

- **Trade of Cash or Other Assets**

The member spouse retains exclusive rights to the pension and defrays the equalization debt with cash or other property, if this is feasible.

A member who makes an asset trade may later encounter "double dipping"; after having paid the debt to keep her pension intact, she finds that the other spouse is looking to the pension income for support. However, this problem is not unique to pensions; it can occur with any income-producing asset, and therefore no recommendation concerning it is made in this report, the scope of which is limited to pensions.

- **"If and When" Arrangements**

Where an asset trade is not practical, the parties will likely have to enter into an "if and when" arrangement; equalization is deferred until the pension comes into pay, utilizing a trust imposed by a court order or domestic contract. There are several problems associated with these arrangements. The non-member spouse loses the benefit of immediate satisfaction of her entitlement and has no control over when it will be satisfied. Many "if and when" orders do not appear to be in accord with the intention behind the FLA, and both orders and agreements can run into conflict with the "50 per cent rule" under the *Pension Benefits Act* (PBA), which provides that no more than half of the pension benefits that accrued during marriage can be assigned in satisfaction of family property claims. Pension plan administrators also face problems arising from the drafting of "if and when" agreements and orders, which may be unclear or inadequate. Other potential difficulties include the ending of the non-member spouse's entitlement to share in the pension payments when the member spouse dies, reduction of the pension benefit because of the winding up of the plan and taxation issues.

- **Lump Sum Transfer on Termination**

Where the member's employment is terminated, 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 another pension plan or a locked-in retirement savings arrangement or to be applied to the purchase of a deferred life annuity; in that situation the PBA gives the non-member spouse parallel rights to a share of the commuted value.

- **Settlement: Proposals for Reform**

A majority of Canadian jurisdictions that have legislated in this area adopted the "Immediate Settlement Method" (ISM), in which there is an immediate transfer of a share of the value of the member's pension to a locked-in RRSP or other vehicle that will later provide retirement income for the non-member spouse. Three provinces adopted the Deferred Settlement Method (DSM); pension division occurs at a future point, at which time the non-member spouse receives a separate pension from the member's plan. The arguments favouring these different approaches are discussed in subsection C of section VII.

VI. OTHER ISSUES

The *Canada Pension Plan* (CPP) provides for a division of credits upon marriage breakdown unless the spouses have agreed otherwise and provincial legislation permits such agreements. Ontario has not enacted permissive legislation of this nature.

The FLA property provisions do not apply to common law couples, but they may face the same problem of a lack of good settlement options as married couples face.

VII. THE LCO'S ASSESSMENT OF THE ISSUES

A. Pensions and the FLA Equalization Regime

Removing pensions from the equalization regime could lead to unfairness between spouses who would be in the same net asset position if the pension were not excluded, as well as less flexibility in relation to other family property that remains within the regime. Other retirement vehicle assets, such as RRSPs, are not excluded.

Despite the wording of the FLA, the courts have held that unvested rights are property for purposes of the equalization regime and there is no good reason to reverse this.

B. Valuation of Rights under a Defined Benefit Plan

The hybrid method is the valuation method that strikes the fairest balance between the parties; any lingering uncertainty in this area should be eliminated.

C. Settlement: Defined Benefit Pension Not Yet in Pay

Many of the arguments made in support of or against the ISM or DSM overstate the case.

The ISM provides a "clean break", but under the DSM the former spouses would deal with the plan administrator, not each other.

The pro-DSM contention that the pension is paid for disproportionately through early-career contributions is not relevant in the case of defined benefit pensions. But ISM advocates are incorrect that no part of a post-separation increase in value can derive from the married years.

Although uniformity of the law is desirable, the contention that adoption of the ISM would contribute to uniformity is not convincing, given that there are three DSM provinces.

The argument that adoption of a DSM approach avoids the problems of ultimate actual value differing from valuation date value ignores the fact that the valuation date value of almost any property might be more or less than its value at some later point.

The anti-ISM argument that giving the non-member spouse a lump sum to invest could be problematic for those unsophisticated in financial matters is valid, but this same concern can arise where the pension is not divided because the member trades other assets; it can in any event be addressed through a new provincial retirement fund.

Many aspects of the pension and retirement system may be unfair to women, but neither the ISM nor the DSM is likely to have a particular impact on women.

Typically the ISM uses commuted value, which can produce an artificially low value for the pension and thus be unfair to the non-member spouse (whether that person be male or female). However, the DSM is much more complicated by comparison with the ISM and imposes greater burdens on plans and administrators. This has led us to make a recommendation that the ISM should be the main settlement mechanism (with a proviso that the equalization debt is satisfied only to the extent of the value transferred out of the plan), but that the DSM should also be available where the member is within ten years of normal retirement date or where the plan administrator consents.

The LCO considered other possibilities but concluded that ISM use of commuted value, with satisfaction of the equalization debt only to the extent of the amount transferred, was the best solution in most cases.

The settlement options being recommended should apply in respect of defined benefit plans registered under the PBA or supplementary unemployment plans that simply mirror such plans, and should also be available in the case of defined benefit plans registered in other jurisdictions where Ontario family property law or the substantive provisions of the PBA apply. For flexibility, there should be regulation-making authority to include other plans, to exclude otherwise-included plans and to deal with hybrid plans.

D. Defined Contribution Plans

The ISM should be available in the case of defined contribution plans.

E. A New Provincial Retirement Fund?

The LCO suggests that the government may wish to consider establishing a provincial retirement fund to receive ISM transfers on behalf of non-member spouses for whom other ISM transfer options are either not available or unattractive.

F. The 50 Per Cent Rule

The rule could in some cases prevent implementation of one or the other of the recommended settlement options. These options provide for a fair settlement and should be deemed to be in compliance.

G. *Canada Pension Plan* Credits

Allowing parties to agree to a CPP credit split waiver would eliminate an avenue for double dealing.

H. Common Law Relationships

Whether the FLA family property provisions should apply to common law relationships is a question extending well beyond pension interests and is not addressed here. However, there is no reason why common law partners who separate should not be able to access the recommended settlement mechanisms should they wish to do so.

VIII. RECOMMENDATIONS

The LCO recommends the following *(a full listing is provided at Part VIII of this report)*:

1. Vested pension rights continue to be considered "family property" under the FLA.

2. The FLA be amended to indicate that unvested pension rights are also "family property".

3. The FLA be amended to provide for use of the hybrid method in valuing rights under a defined benefit plan.

4. If a defined benefit plan member wishes to satisfy an equalization debt through pension division, generally the ISM applies. An amount not exceeding a *pro rata* share of the commuted value would be transferred to the other spouse's plan or other retirement savings arrangement (or provincial retirement fund, if such a fund is established) or used to establish a credit in the member's plan. The equalization debt is satisfied only to the extent of the transfer (or credit).

5. The *pro rata* share is one-half of the commuted value multiplied by the ratio of pensionable service during marriage to total pensionable service as of the separation date.

6. If the member is within ten years of normal retirement date, parties may agree to a DSM settlement, that is, the pension is divided with the non-member spouse receiving a separate pension from the plan when the member retires or at the member's normal retirement date. A portion of the member's service credits equal to one-half multiplied by the ratio of pensionable service during marriage to total pensionable service at retirement or at normal retirement age would be transferred to the credit of the non-member spouse, whose pension could be subject to actuarial adjustment. The member's equalization obligation would be deemed satisfied. Plan administrators could charge a fee to offset their costs.

7. Where the member is not yet within ten years of the normal retirement date, the parties may elect the DSM option if the plan administrator agrees.

8. Recommendations 4 to 7 apply to defined benefit plans (and subject to any regulations made by government, hybrid plans) not yet in pay if they are registered under the PBA, to supplementary plans that mirror a PBA-registered plan and to plans registered under the legislation of other jurisdictions if Ontario family property law or the substantive provisions of the PBA apply. Regulations could include other plans or exclude otherwise-included plans where the government felt it appropriate.

9. The ISM option also be available where a spouse is a member of a defined contribution plan.

10. Ontario may wish to consider establishing a retirement fund into which non-member spouses who are entitled to a transfer pursuant to a pension division may place the transferred amount.

11. A settlement in accord with the ISM or DSM options be deemed to comply with the 50 per cent rule.

12. Ontario enact legislation permitting parties to waive the right to a split of CPP credits.

13. Where a common law relationship ends, parties may agree to have pensions divided in accordance with the recommended settlement regime.

I. INTRODUCTION

...[W]hile almost everyone who has a view on the subject agrees that change is needed, there is no unanimity insofar as the choice of legislative solution is concerned....

Almost fourteen years have passed since the former Ontario Law Reform Commission (OLRC) released its *Report on Pensions as Family Property: Valuation and Division*.[2] In its *Report*, the OLRC reviewed the then state of the law concerning the treatment of pensions under the FLA equalization of family property regime; it explored the many problems that existed in this area and made several proposals for changes in the law. Those proposals were never acted upon, however, and the problems that the OLRC identified continue to this day. Indeed, matters appear to have reached a point where there is virtually unanimous agreement that the situation should be addressed legislatively, as it has in most other Canadian jurisdictions. However, while almost everyone who has a view on the subject agrees that change is needed, there is no unanimity insofar as the choice of legislative solution is concerned, either in Ontario or among the legislatures of the various provinces that have dealt with the matter. The jurisdictions that have acted have essentially chosen one or the other of two approaches to the division of pension interests, commonly denoted as the Immediate Settlement Method and the Deferred Settlement Method.

Following a thorough review of the law in this area and careful consideration of the policy issues raised and the submissions that were made to it, the OLC made several recommendations which were released, along with brief supporting reasons, in October, 2008. This final report provides background information on pension and family property law,[3] a detailed discussion of the problems that exist in relation to pensions and marriage breakdown and an analytical section setting out our assessment of the issues and explaining why we made the recommendations we did. (The recommendations, which are the same as those released in October, appear individually in the section entitled "The LCO's Assessment of the Issues" and again, grouped together, at the end of the report.)

II. AN OVERVIEW OF PENSIONS IN ONTARIO

Broadly speaking, the subject of this report is the treatment of a spouse's interest in a pension plan upon marriage breakdown. Our principal concern in that regard is with occupational pension plans that provide lifetime periodic (usually monthly) benefit payments to former employees following their retirement, with a particular focus on defined benefit plans, as it is in relation to interests under those types of plans that the main problems that have been identified arise. Generally, the report will not deal with other kinds of private arrangements aimed at providing an income on retirement, such as personal or group Registered Retirement Savings Plans (RRSPs), or with government-provided social welfare schemes, such as the federal Old Age Security program, although it will deal with certain matters related to the *Canada Pension Plan* (CPP). [4]

...[I]t is in relation to interests under [defined benefit] plans that the main problems that have been identified arise.

A. Types of Pension Plans and Employee Coverage

Occupational pension plans are most commonly established by an employer, although in some cases, a plan may be established jointly by one or more employers and one or more trade unions. In the construction industry, where employer-employee relationships tend to be transient, the plan might be established solely by a union.[5] Plans covering public sector employees are usually established by legislation.[6]

In terms of the nature of the benefit provided, there are two main types of occupational pension plan, the defined benefit plan and the defined contribution plan. Under both kinds of plan the employer is required to make contributions, but both may also require employees to make contributions (in which case the plan is labelled "contributory").

Under a defined contribution plan, the contributions made by the employer and by the employee, if any, are set at a fixed amount or rate; those contributions are invested and the sum of accumulated contributions and returns on their investment is used to purchase an annuity when the employee retires. (Because of this aspect, such plans are sometimes referred to as "money purchase plans".) In contrast, the amount of the pension benefit under a defined benefit plan has no immediate relation to the contributions and investment yield, but rather is determined according to a set formula.

Defined benefit plans are generally seen as being superior from the perspective of an employee, in that the amount of income that she will have in retirement is more predictable than in the case of defined contribution plans, while the degree of security for the employee is perceived to be greater and the risk posed for her by poor investment returns to the plan lower[7] (although any thought that the risks in the case of defined benefit plans are all borne by the employer is clearly erroneous[8]).

A typical defined benefit formula might provide that the annual pension amount is equal to the product obtained when the employee's number of years of service with the employer is multiplied by a specified percentage and then applied against the average salary earned by the employee during some specified number of years in which his employment income was the greatest or during some specified number of years immediately preceding retirement.[9] For example, a plan might provide that the yearly pension income would be equal to years of service times two per cent times the average salary of the employee during his five highest years of earnings. A member of such a plan who had 25 years of service at retirement and who earned an average of $80,000 during his most remunerative years would have an annual pension income of $40,000.

The type of defined benefit plan described in the preceding paragraph is often referred to as a "best average" or "final average" earnings plan. Other common types include the flat benefit plan and the career earnings plan. In a flat benefit plan, the formula does not refer to earnings or percentages; rather, the multiplier is simply the years of service and the multiplicand is a flat dollar amount. (For example, if the flat dollar amount is $80 a month, an employee who retired after thirty years' service would have a monthly pension of $2,400, or $28,800 annually.) Under a career earnings plan, the multiplier is a bare percentage (that is, it is not a function of years of service) and the multiplicand is the aggregate of the employee's earnings during the entire period of her membership in the pension plan. (For example, if the percentage in the benefit formula is two per cent and the retiring employee had earned $1,250,000 over the course of her career with the employer, her pension income would be $25,000 per year.)

Benefits under defined benefit plans are usually "integrated" with the CPP, meaning that the pension amount that was calculated using the basic defined benefit formula is reduced to reflect the assumed receipt of CPP benefits.[10] Effectively, in such cases, the basic formula indicates what the employee can expect to receive in total from both sources, the occupational pension and the CPP benefit.[11]

...[W]hile currently the number of males who are members of a pension plan (928,000) is slightly greater than the number of females (832,000), it appears that over the long term the number of males has not been growing, while the number of females has been increasing fairly dramatically; further, the percentage of pension plan members who are members of a defined benefit plan as opposed to some other type of plan is approximately 80% for both sexes.

There are some plans, called hybrid plans, which combine features of defined benefit and defined contribution plans. This type of plan may provide a retiring employee with a benefit equal to the greater of the amount determined under a defined benefit formula and the amount of contributions and investment yield, or it might provide a benefit equal to the total of the defined benefit amount and what was accumulated under the defined contribution part of the plan.[12] In some cases, an employer might convert a defined benefit plan into a defined contribution plan, with the employee's benefits earned up to the conversion date being determined under the defined benefit formula and benefits thereafter being the amount of subsequent contributions and returns on investment.[13]

A study prepared for the Ontario Expert Committee on Pensions (OECP) cited a report prepared by Statistics Canada indicating that roughly 34% of employees in Ontario jurisdiction were members of an occupational pension plan as of 2005.[14] Noteworthy, however, is the public sector-private sector divide on this score; while 80% of public sector employees were members of an occupational pension plan, only 25% of private sector employees had such coverage.[15] Also interesting is the fact that while the number of defined contribution plans is slightly greater than the number of defined benefit plans, defined benefit plans collectively have far more members,[16] although membership in defined contribution plans has been increasing at a much faster rate than membership in defined benefit plans.[17]

With respect to the demographics of pension plan membership, while currently the number of males who are members of a pension plan (928,000) is slightly greater than the number of females (832,000),[18] it appears that over the long term the number of males has not been growing, while the number of females has been increasing fairly dramatically;[19] further, the percentage of pension plan members who are members of a defined benefit plan as opposed to some other type of plan is approximately 80% for both sexes.[20]

This is not to suggest that a sanguine view of the position of women in our pensions and retirement income system is warranted. Occupational pensions are by their nature linked to income from employment, and women continue not only to have a lower labour market participation rate than men but also continue to earn less then men when they are employed.[21] In comparison to men they are over-represented in so-called "non-standard" working arrangements, such as part-time employment, temporary employment, casual and seasonal employment and agency employment,[22] where pay tends to be lesser and pension plans less likely to be on offer.[23] Women also tend to perform more unpaid work in the home and in care-giving than do men, which is, of course, a factor both in their labour market participation rate and their greater propensity to be involved in non-standard work situations. The result is that on average pension income for females is substantially lower than that for males.[24]

B. Jurisdictional and Legislative Framework

...[O]ccupational pensions, like other aspects of employment and labour law, are a matter of property and civil rights and so generally their regulation falls under provincial legislative jurisdiction.

Under the *Constitution Act, 1867*,[25] occupational pensions, like other aspects of employment and labour law, are a matter of property and civil rights and so generally their regulation falls under provincial legislative jurisdiction.[26] However, in the case of some industries, including atomic energy, banking, inter- and extra-provincial transportation on land or water, aviation and telecommunications, as well as the federal public service and employment in the three territories, Parliament has jurisdiction.[27] With respect to most employees who are employed in Ontario and who are members of a pension plan within provincial regulatory jurisdiction, the province's *Pension Benefits Act*[28] (PBA) requires the plan to be registered and establishes minimum standards relating to, among other things, entitlements under the plan and plan administration and funding. (Section 6 of the PBA makes it illegal to administer a plan that has not been registered.) The federal counterpart to the PBA is the *Pension Benefits Standards Act, 1985*[29] (PBSA), although it does not apply to employees of the federal government.[30]

In some cases, employers who carry on business in more than one province or territory have a single pension plan covering all of their employees rather than a separate plan for each jurisdiction, potentially making the pension benefits standards legislation of more than one jurisdiction applicable. Under subsection 95 of the PBA, the Financial Services Commission of Ontario (FSCO), which is responsible for the administration and enforcement of the PBA, may make agreements with the federal authorities or the authorities of another province to provide for the reciprocal application and enforcement of pension benefits legislation, and agreements relating to administration and enforcement were in fact entered into by the Pension Commission of Ontario (the predecessor body to FSCO) with the pension authorities of other provinces in 1968 and with the federal government in 1970. Subsection 23(1) of the *General* regulation[31] under the PBA designates all of the other provinces (except Prince Edward Island)[32] and the three territories as jurisdictions where "there is in force legislation substantially similar to [the PBA]", while subsection 23(2) provides that where an agreement is made between the Ontario authorities and the authorities of a designated jurisdiction, a pension plan is exempted from the PBA registration and audit requirements if a plurality of members of the plan are employed in a jurisdiction so designated.[33] It would appear, however, that provisions of the PBA other than those dealing with registration and audit requirements continue to apply in respect of Ontario members of a multi-jurisdictional plan even though the plan is registered in another jurisdiction and *vice versa*.[34]

Putting aside federal jurisdiction plans (where registration, if required, would be under the PBSA) and those multi-jurisdictional plans registered under another jurisdiction, most pension plans covering Ontario employees are required to be registered under the PBA. However, some such plans are not required to be registered at all because they are exempted from the PBA, either directly or through exclusion from the PBA definition of "pension plan". These include group RRSPs and the plans that cover members of the Legislative Assembly and the provincial judiciary, as well as plans that only provide benefits that exceed the maximum benefit limits applicable to plans registered under the federal *Income Tax Act*[35] (ITA) or that only permit contributions in excess of the contribution limits for plans registered under the ITA.[36] The latter type of plan is sometimes referred to as a "supplementary employee retirement plan" (SERP) because it supplements benefits provided for by another plan and membership in it is conditional on being a member of that other plan. Such plans are sometimes established by employers in order to provide relatively high income earners with a pension commensurate with the income they enjoyed before retirement, as the ITA limits mean that the plan to which the SERP is supplemental will pay a pension that is smaller than that which would otherwise result from the application of the basic defined benefit formula.

Registration of a pension plan under the ITA is not compulsory,[37] but it does confer certain advantages. Contributions made by employers and employees are deductible in calculating income subject to taxation; further, plan earnings are exempt from taxation and employees are not taxed on benefits until the pension is in pay.[38] However, as was alluded to in the preceding paragraph, there are limits on the quantum of benefits that can be provided and on the amount of contributions that can be made in the case of plans registered under the ITA.

C. Timing of Retirement

The PBA generally requires that a pension plan provide for a "normal retirement date" of not later than one year after the employee reaches the age of 65.[39] This does not mean that the employee must retire at that date; it simply means that the employee is entitled to retire and begin receiving a full pension at that date.[40] She could instead decide to continue working, although she could not both be in receipt of a pension and be continuing to accrue service credits under the same plan.[41]

Alternatively, an employee might decide to retire before reaching the normal retirement date. Under the PBA, an employee who is within 10 years of that date may, upon termination of employment, elect to begin receiving an early retirement pension.[42] The PBA implicitly permits the monthly amount payable under an early retirement pension to be reduced from the amount that would have been payable had the employee waited until normal retirement age to begin receiving the pension,[43] reflecting the fact that a pension taken earlier will likely be in pay longer.[44] Some plans, however, offer an unreduced early retirement pension to employees who meet a specified threshold based on age or years of service or some combination of the two. (For example, a plan might offer an unreduced early retirement option to an employee who satisfies a "factor 90" qualification, whereby the sum of his age and years of service equals at least 90.)

Because defined benefit plan pensions are typically integrated with CPP benefits and CPP benefits usually do not commence until age 65, it is not uncommon for defined benefit plans to offer so-called "bridging benefits" to employees who take an early retirement pension. These benefits supplement the pension being paid under the plan for a temporary period that ends when the employee begins to receive CPP benefits, with the effect that the total monthly amounts being received by the employee before age 65 and after remain roughly the same.[45]

D. Vesting, Locking-in and Portability

A pension benefit is said to be "vested" when the plan member has an enforceable right to receive a pension upon reaching retirement age; at the point at which the benefit is vested, it can no longer be lost, even if the employee's employment is terminated prior to his reaching retirement age (although where the termination is the result of death, the right to a pension is replaced by a death benefit, as to which, see below). The vesting rules under the PBA were changed as of January 1, 1987, but on a prospective basis only. As a result, vesting of benefits accrued prior to 1987 occurred once the individual was at least 45 years of age and had been a member of the pension plan for at least 10 years, while vesting for benefits accrued after 1986 occurs once the individual has been a member of the plan for two years.[46]

At the same point at which a pension benefit becomes vested, the member's benefits are "locked in". The locking-in rules have two aspects. The first is that even if the member resigns from employment or has her employment terminated, she cannot obtain a refund of contributions made to the pension plan in respect of her employment;[47] the contributions must remain in the plan fund, to be used to provide income in retirement. The second aspect is that during the member's lifetime the pension entitlement cannot be commuted or surrendered in return for an immediate lump sum payment;[48] even if her employment ends long before she is ready to retire, she cannot choose to withdraw the value of her accrued entitlement from the plan instead of taking it as a deferred pension payable when she reaches retirement age.[49] There are, however, certain "portability" exceptions to the locking-in rules that provide the former employee who is not entitled to an immediate pension with alternatives to a deferred pension from the plan. These exceptions, like the locking-in requirement itself, reflect the social policy concern that pension funds be used to provide an income for the employee in retirement; they allow an amount equal to the commuted value of the pension benefit to be transferred to another pension plan (if the other plan will accept the transfer) or "a prescribed retirement savings arrangement" (such as a locked-in retirement income fund) or to be applied to the purchase of a deferred life annuity.[50]

Among other exceptions to the locking-in rules are those that allow an employee to take the commuted value in cash if he suffers from a disability that shortens his remaining life expectancy to less than two years[51] and that allow the pension plan to pay an employee a lump sum equal to the commuted value of the pension if the amount of the pension that would otherwise be payable to the employee annually on retirement would not exceed two per cent of the "Year's Maximum Pensionable Earnings" under the CPP[52] in the year that employment is terminated.[53] These latter two exceptions are not necessarily inconsistent with the retirement income rationale, in that they apply where the individual concerned is unlikely to survive until retirement age or where the pension amount would be too meager to provide any significant support in retirement in any event (although the

...[T]he locking-in rules and the portability exceptions to them are based on the social policy concern that pension funds should be used to provide an income for the employee once he retires. The same rationale lies behind the rules that moneys payable under a pension plan cannot be assigned or attached....These prohibitions are subject to certain exceptions in the family law context....

main purpose of the so-called "small pension" commutation provision would seem to be to reduce costs for plan administrators[54]).

As was noted in the preceding two paragraphs, the locking-in rules and the portability exceptions to them are based on the social policy concern that pension funds should be used to provide an income for the employee once he retires. The same rationale lies behind the rules that moneys payable under a pension plan cannot be assigned or attached, set out in, respectively, sections 65 and 66 of the PBA. These prohibitions are subject to certain exceptions in the family law context; subsection 66(4) creates an exception to the prohibition on attachment in the case of support orders (to a maximum of 50 per cent of the amount payable under the plan), while subsection 65(3) establishes a broader exception covering any FLA court orders or "domestic contracts" (a term that would include a separation agreement following marriage breakdown).[55] However, while subsection 65(3) contains no limit on the amount of pension moneys that can be assigned, the exception must be read in conjunction with section 51,[56] which limits the reach of orders and contracts made under the family property provisions of Part I of the FLA.

E. Limits re: FLA Part I Domestic Contracts and Orders

Section 51 of the PBA, which specifically addresses marriage breakdown, imposes both temporal and quantitative restrictions on the effect of domestic contracts and orders made under Part I of the FLA insofar as pensions are concerned.

Subsection 51(1) provides that such a contract or order cannot require payment of a pension benefit before the date that the spouse who was a member of the pension plan in question actually begins to receive the benefit or the date on which she reaches the normal retirement date under the plan, whichever date is earliest. However, where the member's employment is terminated, subsection 51(5) gives the non-member spouse the same options in relation to his interests as established by the contract or order that are available to the member in relation to the member's interests (such as, for example, transfer of his share of the commuted value of her pension to a "prescribed retirement savings arrangement").

Under subsection 51(2), a domestic contract or Part I order cannot give the non-member spouse more than 50 per cent of the benefits accrued during the period when she and the member were spouses. Regulations under the PBA prescribe the manner in which the benefits so accrued are to be calculated.[57] This "50 per cent rule", like the locking-in rules and the prohibitions against assignment and attachment, is rooted in the view that a pension exists to provide retirement income for the pension plan member.[58] However, it has been seen as a potential obstacle to the full implementation of certain kinds of family property settlement arrangements involving pensions,[59] a point which is discussed in more detail below.

F. Death Benefits

Under section 48 of the PBA, pension plans must provide a pre-retirement death benefit where a plan member whose right to a pension has vested dies before reaching retirement. The entitlement, which is payable to the member's spouse provided that the member and the spouse were not living separate and apart at the date of death, is either a lump sum payment equal to the commuted value of the pension or a pension having an equivalent commuted value. A spouse may waive his right to the death benefit. In that case (as well as in the case where the member had no spouse with whom she was living at the date of death), if the member had designated a beneficiary, the beneficiary would be entitled to a lump sum payment; where no beneficiary had been designated, the lump sum would be paid to the member's estate.

It should be noted that under subsection 48(13), the entitlement to a death benefit is subject to the rights of a former spouse established by a domestic contract or order made under Part I of the FLA.[60]

If a former member in receipt of a pension has a spouse with whom he is cohabiting on the day the pension payments are due to commence, the PBA requires that the pension be a "joint and survivor pension".[61] Such a pension is payable during the joint lives of the spouses, as opposed to being payable only during the member's lifetime. The PBA implicitly permits the initial amount payable under a joint and survivor pension to be reduced from the amount that would have been payable had the pension been for the employee's life alone;[62] this is because of the possibility that the pension will be in pay for a longer period.[63] The amount payable to the surviving spouse of the former member must be at least 60 per cent of the amount that was being paid to the former member while both were alive.[64]

Section 46 of the PBA allows the member and the spouse, acting jointly, to waive the right to a joint and survivor pension prior to the commencement of the pension payments. Where such a waiver is given, the pension will be paid as a single life pension (that is, it will continue only for as long as the member lives).

G. Inflation and Indexing

Even relatively low levels of inflation...could have a very adverse effect on a pensioner who is afforded no inflation protection.

Even relatively low levels of inflation can have a profound impact on the real value of a given sum of money. An annual inflation rate of a mere two per cent would reduce the purchasing power of a dollar to just 75 cents in 15 years; such a reduction would occur in just 10 years at an inflation rate of three per cent.[65] Obviously this could have a very adverse effect on a pensioner who is afforded no inflation protection; if the pensioner lives for many years after retirement (as she surely hopes to do), her standard of living could be severely eroded in her later years.

On first impression, the PBA may seem to make inflation protection mandatory; subsection 53(1) provides that pensions

> ...shall be adjusted in accordance with the established formula or formulas...to provide inflation-related increases....

However, subsection 53(2) goes on to say that a formula can be established only by an amendment to the PBA, a stipulation that would seem to make subsection 53(1) meaningless, given that no such amendment has ever been enacted.

Fortunately, despite the lack of statutory compulsion many pension plans provide inflation protection in the form of indexing, whereby the monthly pension amount in adjusted annually to compensate, to some extent at least, for the effect of inflation. Such protection may be contractual, in the sense that indexation is a matter of entitlement under the pension plan, as is typically the case in the public sector.

With private sector plans, *ad hoc* indexing is more common; while the employer purportedly does not offer inflation protection as of right, the amounts of pensions in pay are occasionally adjusted upwards to preserve (or more precisely, perhaps, restore) their real value (or at least some of it).[66]

H. Funding

The PBA provides that a defined benefit pension plan must be funded; in other words, the plan's assets must be sufficient to pay for its liabilities, as determined by a triennial actuarial valuation.[67] The valuation must be done both on a solvency basis, under which assets and liabilities are valued as if the plan is terminated on the date of the valuation, and on a "going-concern" basis, under which valuation proceeds on the assumption that the plan will be continuing.[68] Where liabilities exceed assets under either type of valuation, "special payments" will be required; these are payments, additional to the employer's usual contributions, which are required to be made to the pension plan in order to eliminate the solvency deficiency or going-concern unfunded liability, as the case may be.[69] Under the PBA, a solvency deficiency can be amortized over a five-year period, while a going concern unfunded liability can be amortized over a 15-year period.[70]

Sometimes a valuation will show that the plan in fact has a surplus, a situation that may cause an employer who is not contractually committed to indexation of pension benefits to make an *ad hoc* adjustment to offset the effect of inflation;[71] alternatively, the employer may feel that the surplus justifies a "contribution holiday". (An employer generally cannot withdraw the surplus from an ongoing pension plan without obtaining the consent of all current and former members of the plan; this is so even if the plan provides that the employer is entitled to the surplus.)[72]

Whether the employer is entitled to forgo making contributions while the plan is in surplus will depend on whether the language of the pension plan in question explicitly or implicitly authorizes it.[73] Potentially, employees might also benefit from a surplus by being accorded a contribution holiday, but their right to one will likewise be a matter of interpretation of the plan wording.[74]

I. Wind-up of Pension Plans

Section 1 of the PBA defines "wind up" as the termination of a pension plan and the distribution of plan assets. A plan can be wound up at the instance of the employer or by order of the Superintendent of Financial Services.[75] However, while the employer can wind up a plan as of right for any reason,[76] the Superintendent may order a wind up only where certain grounds exist; these grounds include failure on the part of the employer to make required contributions to the plan, bankruptcy of the employer, the fact that a significant number of employees have lost their employment as a result of the reorganization or discontinuance of all or part of the employer's business or the fact that the employer has sold its business to a purchaser who does not provide a pension plan for the employees concerned.[77] A wind-up may be full or partial; in the case of a partial wind-up, the pension plan is effectively divided into two parts, with one part continuing as before and the other being terminated and its assets liquidated.[78]

On a wind-up, benefits of all employees in the plan or part of the plan concerned are immediately vested (that is, regardless of whether they would otherwise satisfy the requirements for vesting)[79] and the portability rights available in the case of the termination of employment of an individual who is not entitled to an immediate pension may be exercised by any employee who is entitled to a benefit, including one who is entitled to an immediate pension.[80]

A very important wind-up right for employees with long service is the "grow-in" right or "rule of 55", under which an employee whose years of service and age total at least 55 is entitled to receive an unreduced or reduced pension at the date on which she would have been entitled to such a pension under the plan had the plan not been wound up and had she continued in employment until that date.[81] For example, consider a plan with a normal retirement age of 65 that offers an unreduced early retirement pension for employees who meet a "factor 90" qualification (that is, the sum of the employee's years of service and her age is at least 90) and an employee who is 50 years old and has 20 years of service at the date at which the plan is wound up. Were it not for the grow-in right, the employee would not be entitled to receive an unreduced pension until she reached age 65, as the pension plan terminated before she could qualify under factor 90; however, because the employee satisfies the rule of 55, she will be entitled to receive an unreduced pension commencing at age 60 because that is the point at which she would have been eligible for it had the plan not been wound up and had she continued to be employed. (For employees who meet the rule of 55 and who have at least 10 years' service as of the wind-up date, there is additionally an entitlement to any early retirement bridging benefits for which they would have been eligible had the plan not been wound up and had their employment continued.)[82]

An actuarial valuation is required where a pension plan is to be wound up. If the valuation shows that the assets of the plan are more than sufficient to take care of all of the plan's liabilities, including those added by employees' wind-up rights, the resulting surplus in the plan will be distributed. If the plan does not address how surplus is to be distributed on wind-up, it must be distributed proportionately to "members, former members and any other persons entitled to payments under the pension plan".[83] Under current rules, the surplus may be paid to the employer if the agreement of at least two-thirds of the plan members (or their union) and an "appropriate" number of pensioners and other persons having an entitlement is obtained.[84]

If the valuation shows that the plan is in a deficit position, the employer is obliged to pay into the plan the amount necessary to ensure that the pension entitlements under the plan will be paid. It may be, however, that the employer is insolvent and not able to make the payment required. In that event, "subject to the application of the Guarantee Fund",[85] the PBA requires that the benefits under the plan be reduced in proportion to the wind-up deficiency.[86]

The Pension Benefits Guarantee Fund insures the pension benefits of Ontario employees who are members of defined benefit plans registered under the PBA or the legislation of a designated province, subject to certain exceptions and limits. Perhaps the most important limitation is that which excludes from coverage benefits that are in excess of $1,000 per month.[87] Some plans are excluded; among them are MEPPs and plans where the employer contribution is fixed by collective agreement (as is usually the case with JSPPs).[88]

III. ONTARIO'S FAMILY PROPERTY LEGISLATION

Undoubtedly the most important provincial statute insofar as family law matters in Ontario are concerned is the FLA. As stated in its preamble, its enactment was motivated by the perceived need

> …to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership….[89]

This section of the report provides an overview of the family property provisions of Part I of the FLA and in particular how those provisions effect the recognition of the spouses as equals in an economic partnership.

A. The Equalization Regime

The FLA family property provisions address the question of how, upon marriage breakdown, the assets that were accumulated by the spouses during their time together are to be divided. In terms that build upon the themes set out in the preamble, the purpose of these provisions is stated to be to recognize

…[C]hild care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities….

FLA

> …that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities….[90]

Part I fulfils this purpose by providing, presumptively, that on marriage breakdown the spouses are entitled to share equally not only in the value of all assets acquired by either spouse during the marriage but also in any post-nuptial growth in the value of any assets brought into the marriage. To that end, Part I establishes a set of equalization rules based on the "net family property" of each spouse.

Subject to some qualification, the amount of a spouse's net family property is calculated as follows. First the total value of all assets owned by him on the valuation date (generally, the date of separation)[91] is determined. From that figure two sums are deducted: the total amount of all of the spouse's debts and liabilities in existence on the valuation date, and the difference between the marriage-date value of assets he brought into the marriage and any debts and liabilities he had at the marriage date.[92] (Where these deductions would otherwise result in a negative amount, the net family property is deemed to be zero.)[93] On marriage breakdown, the spouse with the lower-valued net family property is accorded a monetary entitlement equal to half of the difference between his net family property and that of the other spouse. (It should be noted that the FLA, unlike the family property regimes of some other provinces,[94] does not give the spouses joint interests in the various family assets; rather, ownership remains separate, and the spouses are instead placed in a debtor-creditor relationship.)[95]

The fact that only one spouse provided the purchase moneys for an asset is not a basis on which its value can be disregarded for equalization purposes, because it is presumed that the spouses make an "equal contribution, whether financial or otherwise". Contributions can take many forms; some contributions may be indirect, some may even be intangible, but the view that informs Part I is that it is the combination of the contributions made by both spouses that makes the acquisition of property by the family unit possible.[96]

The FLA family property regime may in one sense be regarded as quite sweeping, in that it does not as a rule make distinctions between assets used for family purposes and other assets....The term "property" itself is defined very broadly....Most importantly, so far as the subject of this report is concerned, it includes rights under a pension plan....

The FLA family property regime may in one sense be regarded as quite sweeping, in that it does not as a rule make distinctions between assets used for family purposes and other assets, as its predecessor, the *Family Law Reform Act* (FLRA),[97] did.[98] The term "property" itself is defined very broadly; it includes future and contingent interests and even, in certain circumstances, property that a spouse does not own.[99] Most importantly, so far as the subject of this report is concerned, it includes rights under a pension plan,[100] as is discussed is more detail below. However, there are some significant limitations on the application of the equalization regime and its operation.

To begin with, it applies only to persons who are married to each other;[101] unlike most Ontario statutes that employ the term "spouse", including the PBA[102] and, indeed, some other parts of the FLA itself,[103] Part I does not apply to cohabiting persons in a conjugal relationship who have not married.[104] Further, spouses are largely free to contract out of Part I through the vehicle of a domestic contract;[105] a separation agreement that deals with family property will prevail over the FLA regime in the event of conflict, as will a marriage contract (except to the extent that it purports to limit possessory and related rights respecting the matrimonial home).[106] There are also numerous exceptions and special rules relating to the question of what is and what is not considered to be net family property. The FLA expressly excludes the value of some types of property from the calculation of net family property; generally, property that is attained through gift or inheritance from a third party after the marriage date is excluded. However, the value of a matrimonial home that is obtained as a result of a third-party gift or inheritance after the date of marriage is included.[107] Further, while in calculating net family property a spouse is generally entitled to deduct the value of property that she owned prior to getting married, that is not so in the case of a house acquired by one spouse before marriage that was being used as a matrimonial home at the time of separation.[108]

While the equalization entitlement is presumptively one-half of the difference between the net family properties of the two spouses, subsection 5(6) of the FLA does give a court jurisdiction to award a greater or lesser amount where it is of the opinion that equalization would be "unconscionable". The legislation enumerates a number of grounds to which a court may have regard in forming that opinion, including the failure of a spouse to disclose to the other spouse at the time of marriage the extent of his debts or liabilities,[109] the fact that debts or liabilities were incurred recklessly or in bad faith,[110] the fact that a spouse has incurred a disproportionately larger amount of debt or liabilities than the other spouse for the support of the family,[111] the fact that, in the case where the spouses cohabited for less than five years, a one-half equalization entitlement would be disproportionately large in relation to the period of cohabitation[112] or

> ...any other circumstances relating to the acquisition, disposition, preservation, maintenance or improvement of property... [113]

While this last ground may on first impression appear very broad, the references to "acquisition", "disposition" and similar verbal nouns seem to have been taken to suggest that the Legislature's intention was not to confer an open-ended discretion.[114]

In the event that the spouse who is liable to make an equalization payment fails to do so, section 9 of the FLA gives a court various powers to ensure that the liability is discharged. It can simply order that the equalization amount be paid over to the creditor spouse, or where full and immediate settlement would impose hardship on the debtor spouse it can order that payments be deferred for or made in instalments over a period of as long as ten years. It can also order that security, such as a charge on property, be given to ensure the performance of equalization obligations or that property be transferred to a spouse or made subject to a trust or be partitioned and sold.

B. Equalization and Death

The equalization regime applies not only upon the breakdown of a marriage, but also, potentially, in the event of termination of a marriage as a result of the death of one of the spouses (although equalization in that case is a "one-way" matter, in that the surviving spouse would not have a liability to the deceased spouse's estate in the event that he had the higher-valued net family property).[115]

Where a spouse dies, subsections 6(1) and (2) put the survivor to an election: he may choose to take his entitlement under Part I of the FLA or may instead choose to receive whatever is bequeathed or devised to him under the deceased's will, or, if the deceased died intestate, to receive his entitlement under Part II of the *Succession Law Reform Act* (SLRA).[116] (Under the SLRA, where a spouse dies intestate, the survivor is entitled to the entire estate if there are no children or a "preferential share" of the estate if there are children;[117] the amount of the preferential share is prescribed by regulation and is currently $200,000.[118] If the net value of the estate exceeds that amount, the surviving spouse is entitled to the preferential share plus one-half of the residue if there is a child or one-third the residue if there is more than one child.[119]) Where a surviving spouse who elects equalization is entitled to receive a lump sum payment under the deceased's pension plan, the amount of the lump sum is credited against the equalization entitlement unless the deceased had specifically directed otherwise.[120]

C. Pensions as Family Property

As was noted above, pension entitlements are treated as family property for equalization purposes. The term "property" is defined in subsection 4(1) of the FLA as including

> …in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons.[121]

The reference to vesting formed the basis for early decisions holding that rights that had not yet vested at the point of marriage breakdown were not included,[122] but "the weight of authority" now favours the view that unvested rights do constitute property,[123] although this may not have been the Legislature's intention.[124] The reference to contributions made by persons other than the member spouse appears to have been intended to ensure that employer contributions are taken into account in placing a value on the pension rights where the rights have vested;[125] however, while that is certainly appropriate in the case of a defined contribution plan, the amount of contributions, whether made by the employer or the employee, is generally not a relevant consideration in valuing rights under a defined benefit plan,[126] for reasons that are explained below.

The inclusion of the value of pension interests in the member spouse's net family property had the highly laudable goal of achieving greater fairness between the spouses following the collapse of their marriage, but it has also proven highly problematic insofar as rights under defined benefit pension plans are concerned.

The inclusion of the value of pension interests in the member spouse's net family property had the highly laudable goal of achieving greater fairness between the spouses following the collapse of their marriage, but it has also proven highly problematic insofar as rights under defined benefit pension plans are concerned.

IV. VALUATION OF RIGHTS UNDER A PENSION PLAN

Valuation of rights under a defined contribution plan 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, this "contributions approach" plainly does not provide an appropriate value, because what the plan member is entitled to by way of a pension has no immediate relation to the accumulated contributions and investment yield; rather, the pension entitlement is determined according to a set formula, typically based on years of service multiplied by some specified percentage of the average of the member's earnings in his final few years of employment. Equating the value of such an entitlement to the sum of contributions made plus the return on their investment is likely to understate considerably its true worth.[127] A different approach must be used.

A. Present Value

To produce a figure that can appropriately be attached to a defined benefit pension for equalization purposes requires that its "present value" (sometimes called "present-day capitalized value") be determined....Of course, this figure is necessarily the product of conjecture....As the Supreme Court of Canada has noted, ascertaining a present value is "a matter of educated guesswork...."

To produce a figure that can appropriately be attached to a defined benefit pension for equalization purposes requires that its "present value" (sometimes called "present-day capitalized value")[128] be determined. The present value of a stream of payments that are to begin at some point in the future may be thought of as the amount that one would have to invest today so that as of the date the payments begin the original investment plus accumulated earnings would be exactly sufficient to cover all of the payments that are to be made as they come due. In the particular context of marriage breakdown and defined benefit pensions, the present value as of the valuation date is the amount that would have to have been invested on that date in order for the original investment and accumulated earnings to be just adequate to fund the monthly benefits when the pension comes into pay.[129] Of course, this figure is necessarily the product of conjecture. On the valuation date, the person performing the valuation[130] does not know when the pension payments will begin (given that the date of retirement is unknown on that date) or even whether they ever will begin (given the possibility that the employee will die first) or if they do begin how long they will last (given that the date of death is unknown), nor does she know how much any given investment will ultimately earn (given that tomorrow's interest rates and inflation levels are unknown); lacking omniscience concerning the future, the valuator must make speculative assumptions about all of these variables. As the Supreme Court of Canada has noted, ascertaining a present value is "a matter of educated guesswork, undertaken by actuaries".[131]

B. Methods of Valuation

Although there seems to be little doubt today that the present value approach is to be preferred over the contributions approach in valuing rights under a defined benefit pension plan,[132] at least some uncertainty regarding the methodology used to calculate a present value continues to exist. Neither the FLA nor the PBA provide any guidance as to how pension rights should be valued for purposes of calculating net family property,[133] and so the question of how it should be done has been left to be answered by the parties, their lawyers, actuaries or other pension valuators and, ultimately, the courts. Debate on the issue has typically been framed as a matter of whether to use the “retirement method” or the “termination method”.[134] However, there is some considerable ambiguity in these terms, and it is not always clear what a court means when it declares that one or the other method is being utilized. Indeed, it has been suggested that in many cases in which the termination method was ostensibly used, the method that was actually being employed was the “real interest method” (also known as the “hybrid termination-retirement method”).

C. Retirement Method v. Termination Method

The retirement method assumes that the employee will continue in her employment with the plan sponsor until reaching some specified retirement age selected by the valuator. Accordingly, the basis on which value is calculated includes projections as to future salary increases, both those that are rooted in inflation and those that are based on promotion or productivity increases, as well as future service credit accruals and possible future enhancements to members’ rights under the plan. In contrast, under the termination method, the amount of the future pension entitlement is said to be assessed as if the pension plan member had terminated her employment on the valuation date. This means that only those service credits accrued to the valuation date are taken into account; it would also seem to imply that no consideration is given to the possibility of salary increases or plan improvements that may occur after that date.

If one goes strictly by the labels employed by Ontario courts to describe their preferences in valuation methodology, the termination method seems generally to have found much 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.)[135]

Two main arguments have been advanced in support of the termination method over the retirement method. The first is that by projecting salary levels and service credits that might be earned after the valuation date, the retirement method gives the non-member spouse the “fruits” of the member spouse’s post-separation labours and is therefore in conflict with the FLA requirement that value be determined as of the valuation date.[136] 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[137] (although the dollar multiplicand employed in the formula obviously would be based on 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 spouse’s salary and service credits will be and what plan improvements will have been made by the time he does retire.[138] These assumptions will virtually never have a perfect correspondence with future facts as they unfold and they may not even be close. Still, the termination method also involves the making of many assumptions that may not be borne out by subsequent developments. In order to produce a present value, the termination method, like the retirement method, must employ assumptions about when (and if)[139] the member spouse will retire and about how long he will collect the pension; assumptions are also made about future rates of interest and taxation. Any of these assumptions could turn out to be "incorrect", in the sense that events might unfold differently than was assumed, and in fact they will in that sense almost certainly prove to be incorrect in any individual case, notwithstanding their validity from an actuarial point of view. And, if subsequent events do diverge significantly from what was assumed, the actual value of the pension benefit 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 collects 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.

D. Do the Courts Really Favour the Termination Method?

In *Bascello v. Bascello*,[140] a number of previous decisions of Ontario courts purporting to apply the "termination method" were reviewed and the conclusion offered that most of those courts were not in fact using a true termination method but the "real interest method". Under this approach, while the valuation is based on the pension entitlement accrued to the valuation date, allowance is made for inflation (at least in the case of fully-indexed plans, as most public sector plans are);[141] it is only non-inflationary increases in salary, such as those stemming from promotions and productivity improvements, that are not taken into account. (The real interest method takes its name from the fact that it allows for inflation by employing a discount based on the difference between inflation rates and nominal interest rates, which over the long term has been relatively constant despite whatever fluctuations were occurring in the nominal rates.)[142]

Another feature of the approach typically employed by Ontario courts that *Bascello* identified as being inconsistent with a pure termination approach lies in the treatment of rights that an employee may have under the pension plan to take early retirement without any reduction in the defined benefit. While courts that purport to apply the termination method do not take into account any actual or assumed post-valuation date employment for purposes of calculating the amount of the pension, in the majority of cases that have dealt with pension plans having an unreduced early retirement option the courts did assume that the employee's employment would continue for the purpose of eligibility to exercise such an option in order to determine the date on which the employee would be most likely to retire.

The impact of this approach can be illustrated with the example of an employee who has twenty-one years of service and who is 45 years old as of the valuation date and whose pension plan establishes a normal retirement date of age 65 but also accords a right to take early retirement without penalty if the employee meets a "factor 90" qualification. A valuation based on a pure termination method would ignore the unreduced early retirement possibility, as the stated premise of the termination method is that the future pension entitlement is assessed as if the pension plan member had terminated her employment on the valuation date, and in that case the employee in our example would reach the normal retirement date before achieving factor 90.[143] Nevertheless, although the amount of her pension entitlement for valuation purposes will be based on her years of service as of the valuation date, most courts will posit continued employment after the valuation date and eventual qualification for an unreduced early retirement pension (in the case of the employee in this example, at age 57)[144] for the purpose of selecting the date on which the employee is most likely to retire.[145] (Objections that the member spouse's employment may terminate prior to retirement because of lay-off or other reasons are typically addressed by using a discount for that possibility.)[146] This can have a very substantial impact on the valuation, because where an employee retires before the normal retirement date, the pension is likely to be in pay for a longer period than it otherwise would, thereby increasing the value.[147]

The approach used in *Bascello* and in the majority of the other cases discussed in that decision appears to have become the dominant approach to pension valuation in Ontario. Although *Bascello* referred to this as the "real interest method", some commentators have labelled it the "hybrid termination-retirement method", as it combines elements of the termination method (in that termination at the valuation date is assumed in order to determine the amount of the accrued pension benefit) and the retirement method (in that inflation is recognized where the plan is indexed and continued employment is assumed for purposes of eventual eligibility to take early retirement on an unreduced pension).[148] The *Bascello* court was highly critical of this terminology, arguing that the expressions "termination method", "retirement method" and "hybrid termination-retirement method" did not adequately convey the actuarial assumptions being utilized; it recommended instead that the method of valuation be described in terms of whether allowance was being made for full, partial or no indexing prior to retirement.[149] With respect, however, a description of the sort espoused in *Bascello* is also inadequate, in that it fails to give any indication of how unvested unreduced early retirement rights are to be treated. Perhaps it is simply not possible to devise terms that are at once both reasonably concise and comprehensively significative. In any event, although the labels "termination method", "retirement method" and "hybrid termination-retirement method" may not be entirely satisfactory, they do at least impart some idea of the underlying principles, with "hybrid" suggesting a middle ground between two conflicting and more radical approaches. For that reason, those terms will be used in this report.

In its 1993 *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump Sum Equalization Payments*, the Canadian Institute of Actuaries referred to both the "termination method" and the "retirement method", indicating that the choice of method would depend on the jurisdiction in which the division or equalization of family property was taking place.[150] That terminology does not appear in section 4300 of the Institute's *Standards of Practice*, which superseded the original marriage breakdown standard, but it would appear that the choice of method continues to be left as a matter for the law of the jurisdiction concerned rather than a subject of professional prescription. The current standard indicates that an actuary might produce more than one figure in valuing a pension because of the treatment of possible future salary increases, both those that are inflation-based and those that are productivity-based;[151] it also states, insofar as the age of retirement is concerned, that an actuary would usually report a number of different values based on a range of retirement ages, including the normal retirement date, the earliest age at which the member could elect an unreduced pension assuming termination of employment at the valuation date and the earliest age at which the member could elect such a pension assuming that employment continues beyond the valuation date.[152] Obviously, the current standard is flexible enough to accommodate use of any of the termination method, the retirement method or the hybrid method.

...[T]his area of the law cannot be regarded as entirely settled....some uncertainty about how a defined benefit pension should be valued for family law purposes continues at a fundamental level.

Despite *Bascello* and a number of other cases that seem to reject, in substance if not in name, the termination method (at least in its pure form), this area of the law cannot be regarded as entirely settled. In *Salib v. Cross*,[153] decided after *Bascello*, the Ontario Court of Appeal approved the trial court's use of a quite stringent termination approach in which the member spouse's pension was valued on the basis that she would retire on a reduced pension, even though the retirement date was assumed to be the day on which she would first qualify for an unreduced pension;[154] approaches that would have resulted in a higher valuation were rejected on the basis that they were too speculative, given that on the facts before the court considerable post-valuation date service would have to be assumed. On the other hand, as was noted above, the Supreme Court of Canada in *Best v. Best* indicated that the retirement method might be appropriate in some circumstances. Thus, it appears that while the hybrid termination-retirement method is the most frequently used, a court has discretion to employ the termination method or the retirement method if it thinks that that method produces the fairest result in a particular case.[155] However, this means that some uncertainty about how a defined benefit pension should be valued for family law purposes continues at a fundamental level.

E. Pre-Marriage Accruals

One valuation issue in respect of which there is certainty 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 as of the date of separation but also as of the date on which the spouses married, because the FLA requires that the value of property owned on the marriage date 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[156] date value is multiplied by the quotient obtained when the number of years of pensionable service during the marriage is divided by the total number of years of pensionable service as of separation. 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 valuation as of the marriage date is not in accord with what the FLA requires;[157] 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*.[158]

F. Valuation Assumptions: the Age of Retirement

As has been noted, the assumption that is made concerning the age at which the employee is likely to retire can have a very substantial impact on the valuation of the member spouse's rights under a defined benefit plan; the earlier the retirement date, the longer the pension payments will continue to be made and hence the greater the value attributed to those rights. This leads to the possibility that the member spouse and the non-member spouse will put forward opposing, self-interested positions as to the likely retirement date. The member spouse, desiring a lower value, may assert that he does not plan to retire until the normal retirement date or later, while the non-member spouse, wanting a higher value, may contend that the member always intended to retire at the earliest date on which an unreduced pension could be taken.

In several cases decided soon after the coming-into-force of the FLA, it was held that where there is a conflict in the evidence that is presented in relation to the likely retirement date, it should be presumed that an employee will retire at the earliest date on which she would become eligible to take an unreduced pension.[159] In other early cases, courts ruled that in the event of such conflict valuation should proceed on the basis that the employee would retire at the mid-point between the earliest unreduced pension date and the normal retirement date.[160] However, in two 1996 decisions,[161] the Ontario Court of Appeal rejected these approaches, holding that a trial court must make a finding respecting the likely date of retirement on a balance of probabilities on the basis of the evidence before it. This stance appears to have been given implicit approval by the Supreme Court of Canada in the *Best* case;[162] that Court went on to hold that where the termination method[163] is used in valuing pension rights no consideration should be given to post-valuation date evidence in selecting a probable retirement date,[164] as the acceptance of such evidence might encourage "strategic behaviour"[165] (such as the member spouse purportedly resiling from a previously-announced intention to take retirement as soon as she qualified for an unreduced pension).

Given the complexity and diversity of pension plan options and the multitude of different factual circumstances that could arise, the LCO is not convinced of the merits of a presumption regarding retirement age....any issue as to when a member will retire should continue to be treated as a question of fact, resolved on the basis of the evidence according to the balance of probabilities.

There is no question, of course, that a court should retain a healthy skepticism where self-serving evidence is adduced by a party to a dispute. However, the fact that marriage breakdown generally carries with it adverse financial consequences means that plans regarding retirement may of necessity have to be postponed — query whether decisions to delay retirement in such circumstances should really be seen as a matter of post-valuation date evidence, even if not fully formed or articulated until some time after separation when those consequences have been made clear. (Looking at this another way, realistically speaking separation will in many cases have the *immediate* effect of making it difficult or impossible for the member to retire as early as he had originally planned, even though he might not yet have turned his mind to the issue on the day of separation.) To found a valuation on a presumed retirement date chosen on the basis of vague statements of intention made in the past when it would fall well before the date on which the employee actually is likely to retire means that the value of the pension rights will be significantly overstated at the expense of the member spouse. On the other hand, there is an obvious danger of unfairness to the non-member spouse in taking the member's post-separation evidence of his retirement plans at face value.

Such considerations may seem to favour the establishment of a statutory presumption based on the mid-way point between the earliest date on which the member can retire on an unreduced pension and the normal retirement date set out in the plan.[166] However, there are numerous situations in which such a presumption would not be workable or would produce inequitable results. Some plans do not have an unreduced early retirement option. Some plans offer such options, but attach conditions at some ages and not at others. Some plans put a limit on the accrual of service credits, leading to the possibility that the limit would be reached before the mid-point.[167] Some plans may to some extent subsidize early retirement at ages earlier than the "unreduced" age, imposing a reduction that is less than a full actuarial reduction, such that the value of the reduced pension could actually be greater than the pension that would be available when the member reaches the earliest age at which an unreduced pension can be taken. And in some cases the member may have joined the plan at a very late stage in her working life, making it virtually inconceivable that she would retire at the mid-way point. Given the complexity and diversity of pension plan options and the multitude of different factual circumstances that could arise, the LCO is not convinced of the merits of a presumption regarding retirement age. In our view, any issue as to when a member will retire should continue to be treated as a question of fact, resolved on the basis of the evidence according to the balance of probabilities.

G. Other Valuation Assumptions

Just as assumptions regarding the date on which the member spouse is likely to retire will affect the value attributed to the member's pension rights (in that the earlier the retirement date, the longer the pension is likely to be in pay and accordingly the higher its value), assumptions regarding the date on which the member spouse will die will also affect the value (in that the earlier the date of death, the shorter the period in which the pension will be in pay and accordingly the lower its value). However, pension valuators generally do not attempt to make individual-specific predictions about death;[168] rather, they rely on mortality tables, which purport to indicate the probability of death within one year at each age in the human life span for a large population (typically, 1,000 persons). Using such a table, the valuator takes into account the probability of the member surviving to any given year.

Some of the literature expresses criticism of various mortality tables that have been used.[169] The ones developed for life insurance purposes and annuity purposes are said, respectively, to overstate or understate the death rate in order to be conservative and allow a margin for profit;[170] using those tables would result in, respectively, a lower or higher value for the pension, thereby disadvantaging one or the other spouse. Statistics Canada tables are based on the general population, which, because that population includes persons not working because of health problems, may overstate the rate of death.[171] Paragraph 4330.02 of the Canadian Institute of Actuaries' *Standards of Practice* states that actuaries should assume death rates in accordance with a mortality table prescribed by the Institute's Practice Standards Council, modified where warranted if the member is in poor health. At the date of writing the prescribed table is a group annuity mortality table;[172] however, the LCO understands that the Institute is reviewing this matter.

Another assumption that a pension valuator might make concerns income tax. The fact that the pension will be subject to taxation when it comes into pay means that its actual worth to the member will be something less than its before-tax value,[173] and the Ontario Court of Appeal has held that valuation of a pension should reflect a deduction for the tax that is likely to be paid.[174] The Canadian Institute of Actuaries *Standards of Practice* specifies that where tax is to be taken into account, the deduction should be based on the member's average (as opposed to marginal) rate of tax, calculated on the basis of her anticipated income once retired but assuming continuation of the existing taxation rules as to rates, brackets and other matters.[175]

As was noted above, the present value of the member spouse's rights under a defined benefit plan as of the valuation date is the amount that would have to have been invested on that date in order for the original investment and accumulated earnings to be just adequate to fund the monthly benefits when the pension comes into pay. Determining this amount requires the making of assumptions respecting interest rates in order to project a notional investment yield. In that regard, the *Standards of Practice* prescribe different approaches for indexed and non-indexed pensions.

For indexed pensions, the assumed rate of interest for the first fifteen years following the valuation date is based on the interest rate offered on long-term Government of Canada real return bonds in the second month before the month in which the valuation date occurs; for subsequent years, the valuator assumes a rate of 3.25%, representing what might be viewed as the "real interest rate" or "net interest rate" (that is, the rate representing what historically has been the relatively constant spread between inflation rates and nominal interest rates). For pensions that are not indexed, the assumed interest rate for the first fifteen years is based on the rate offered on long-term Government of Canada conventional bonds; after fifteen years an interest rate of 6.25% is assumed, reflecting the average historical yield on long-term Government of Canada bonds that are not real return bonds.[176] In both cases, using a rate on offer around the time of valuation for the first fifteen years and thereafter a fixed rate based on historical data reflects a view that the impact of short-term market fluctuations should be recognized but that those fluctuations will tend to cancel out over the longer term. Other factors being equal, the differential treatment of indexed and non-indexed pensions insofar as interest rate assumptions are concerned will tend to produce a higher value for an indexed pension than a non-indexed pension, as obviously is appropriate.

In the case of some pension plans, members may not be entitled to have their pension benefits indexed, in that they have no contractual right to indexing, but the plan sponsor may nonetheless have a practice or policy of increasing benefit amounts from time to time to offset, to some extent at least, the impact of inflation on the real value of the pension income. Whether the pension is valued for equalization purposes as an indexed or non-indexed pension in such a case would appear to depend on how established or settled the practice or policy is.[177]

H. Do So Many Assumptions Rob Valuation of Its Legitimacy?

It is quite evident that valuation of a pension involves the making of many assumptions. As was noted above, any of these assumptions could turn out to be "incorrect", in the sense that events might unfold differently than was assumed; in fact they will in that sense almost certainly prove to be incorrect in any individual case, however sound the assumptions may have been from an actuarial standpoint. But does this make valuation illegitimate?

If subsequent events do diverge significantly from what was assumed, the ultimate real value of the pension benefit and the value it had been considered to have had for equalization purposes could deviate quite dramatically; understandably, this can cause resentment on the part of the "loser" spouse. However, if rights under defined benefit pension plans are to be considered property for purposes of the FLA equalization regime,

...[M]any assets, and not just rights under a pension plan, could ultimately prove to have a greater or lesser value than that which was attributed to them at equalization. The price of shares might plunge in a post-valuation day bear market; a matrimonial home might sell for much more than its equalization value if housing prices are bid up after valuation day....

they obviously must be valued, and given that the contributions method is plainly not an appropriate valuation method for such plans, it is difficult to see how these rights could be valued without resort to assumptions. (Indeed, the only way that one could obtain a value that is not based on assumptions and that matches exactly what the member ends up receiving from the plan would be to postpone valuation until the day the member dies — clearly not a useful approach for equalization purposes.)[178]

One should also keep in mind that many assets, and not just rights under a pension plan, could ultimately prove to have a greater or lesser value than that which was attributed to them at equalization. The price of shares might plunge in a post-valuation day bear market; a matrimonial home might sell for much more than its equalization value if housing prices are bid up after valuation day — though these possibilities (or their opposites) come to pass, the valuation day values are not thereby rendered illegitimate. If pensions are to remain within the equalization regime, they must be valued, and with valuation comes the risk (indeed, virtual inevitability) of post-equalization changes in value, as it does with any property. The real problem with equalization insofar as pensions are concerned lies not in their valuation, but with settlement.

V. 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 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. Trade of Cash or Other Assets

Under the first option, sometimes labeled as "valuation and accounting",[179] the member spouse retains exclusive rights to the pension and defrays the equalization obligation with cash or other property owned by her. This option, where it can be taken, has some significant advantages over other approaches. Usually it presents little or no risk to either of the spouses, and it provides them with a "clean break", which is generally desirable and particularly so where the marriage breakdown is accompanied by animosity;[180] it also avoids the administrative burdens imposed on pension plan administrators by some of the other options (as to which, see below). However, this will not be a viable solution if the member spouse has insufficient money or other liquid assets to satisfy the equalization debt, which means that it is probably not an option if most of the value of her net family property resides in rights under a pension plan. Someone who is "pension rich but cash poor" will likely not have enough in the way of non-pension assets to make an equalizing swap.

[A trade of cash or other assets] will not be a viable solution if the member spouse has insufficient money or other liquid assets to satisfy the equalization debt....Someone who is "pension rich but cash poor" will likely not have enough in the way of non-pension assets to make an equalizing swap.

As was noted above, 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,[181] but there are problems associated with such a course of action. It will not be viable if the member spouse does not have an adequate income unburdened by other obligations (such as, for example, support) to make the payments, and in any event, the other spouse may have concerns about the security of his 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, thus eliminating one of the primary benefits of the asset trade option.

Another problem with the valuation and accounting approach stems from the possibility of "double dipping". This refers to the situation in which the member spouse was the equalization debtor and traded cash or other assets to satisfy the debt, only to find later that the non-member spouse is looking to the pension in pay for support. (Double dipping could also be said to exist where no such trades occur at equalization because the net value of the member's pension and other family assets does not exceed the value of the non-member spouse's net family property and where the non-member spouse subsequently applies for support on the basis of the pension income.) Understandably, the member may find this unfair, feeling that the pension was already taken into account in the family property settlement and should not later be regarded as income available for support purposes.

A majority of the Supreme Court of Canada in *Boston v. Boston*[182] 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, it 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 assets to produce income but still suffers from economic hardship as a result of the marriage breakdown. Of course, following the breakdown of a lengthy marriage, such grounds for spousal support are fairly common, and while the Court may have felt that it was pronouncing a quite limited exception to the general rule that double dipping was inappropriate, one commentator observed that the dispensation was "wide enough to almost eat the rule itself".[183] It may be that the exception is too broad and should be narrowed. But perhaps one should first consider whether double dipping vis-à-vis a pension really is wrong in principle.

The Supreme Court's assertion that double dipping in respect of a pension, as opposed to other income-producing properties, should generally be avoided was based on its view that a pension is different from other assets, such as investments, because a pension, once it is in pay, is being "liquidated",[184] whereas an investment can pay out income without thereby causing depletion of the asset itself. The LCO respectfully suggests that this rationale is flawed. From an actuarial perspective it is true that a pension that is in pay is losing value, because at each payment the member is closer to death and so the present value of the pension is smaller. However, from the *member's* perspective, the pension is *not* being depleted, because she will continue receiving the pension payments as long as she lives — the declining actuarial value has no impact on its real value to her.[185] To say that the pension is being liquidated implies that there is a finite amount of capital which is getting smaller with every payment that is made, and that is simply not the case.

So far as double dipping is concerned, it is the LCO's view that there is no difference in principle between a member spouse giving cash to meet an equalization debt in hopes of keeping her pension income intact and a shareholder spouse giving cash to meet an equalization debt in hopes of keeping his dividend income intact.

So far as double dipping is concerned, it is the LCO's view that there is no difference in principle between a member spouse giving cash to meet an equalization debt in hopes of keeping her pension income intact and a shareholder spouse giving cash to meet an equalization debt in hopes of keeping his dividend income intact. It follows that the issue of double dipping is not unique to pensions; it is relevant in the case of any income-producing asset that has been taken into account in the equalization process. Accordingly, in this report the LCO will not be making recommendations as to whether double dipping should be prohibited or the exceptions to the "rule" against double dipping narrowed; these are issues for a project looking at generic family property law, and not one whose scope is limited to pensions.

B. "If and When" Arrangements

In most cases where an asset trade is not a practical solution, the parties will likely have to enter into what is commonly known as an "if and when" arrangement. Such an arrangement defers satisfaction of the equalization requirement until the pension is in pay, utilizing a trust imposed through the vehicle of a domestic contract or court order.[186] The trust may be imposed on the plan member, requiring him to pay part of each pension payment received over to the non-member spouse; alternatively, it may be imposed directly on the plan administrator, who is obligated to divide the pension payments at source. The latter course 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.[187] Unfortunately, however, there are numerous other problems attendant on both forms of an "if and when" arrangement.

…[T]he member may decide to retire at the "normal retirement date", but he 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 most obvious drawback to an "if and when" approach is that the non-member spouse loses the benefit of immediate satisfaction of 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 is itself 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 finally is satisfied is outside of her control, for the pension will become payable only when the member spouse elects to receive it; the member may decide to retire at the "normal retirement date", but he 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, as she does not know when the pension income (and thus her sharing of it) will commence.[188]

Another concern is that "if and when" orders in the form in which they are often made do not appear to be entirely in accord with the intention behind the FLA equalization provisions.[189] (The same concern does not arise with respect to domestic contracts requiring an "if and when" division, as parties are generally free to contract out of the FLA.)[190] The requirement to value net family property, including pension rights, implies that where equalization is to be achieved through resort to the member spouse's pension, payments to the non-member spouse should end once the equalization debt has been satisfied. But many "if and when" arrangements do not seem to do this, instead appearing to provide for indefinite sharing, dividing the pension according to the ratio of the present value of the rights at separation[191] to the present value of the rights at retirement or to the ratio of pensionable time while the marriage was ongoing to total pensionable time. One might infer that the latter type of division is 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 that 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, it bears noting that 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.[192] While the resulting smaller entitlement is, at least arguably, unfair to the non-member spouse, it is in some sense more consistent with what the FLA presumably intended, as otherwise the requirement to value rights under a pension plan as net family property would seem to serve no purpose at all.[193] 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.[194]

["If and when" arrangements] 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.

A further difficulty stems from section 51 of the PBA, which provides that no more than 50 per cent of pension benefits that accrued during marriage can be assigned under a domestic contract or court order. For purposes of this limitation, the *General* regulation under the PBA essentially prescribes a strict termination method of valuation;[195] this raises the possibility that a non-member spouse's entitlement under an "if and when" agreement or order, at least where based on a time ratio, will exceed what can be paid out to her under the PBA. As a consequence, pension plan administrators upon whom a trust is 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 50 per cent limit.[196]

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.[197] 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,[198] necessitating the setting up of some sort of tracking mechanism that would otherwise not have been needed.[199]

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;[200] some suggest that if that occurs prior to retirement, the non-member spouse could end up having received nothing.[201] There is also the risk that other possible future occurrences, such as the 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 mitigate the loss to some extent). 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 Termination

Generally speaking, there is under Ontario law at present no ability to effect an immediate transfer of a share of the member's interest under a pension plan to her spouse in order to achieve a family property settlement following marriage breakdown; currently, where an asset trade is not an option, the parties will usually have to resort to an "if and when" arrangement, with all its drawbacks. However, there is one situation in which such a transfer of a share of the member's interest to the non-member spouse can be effected — that being where the member's employment is terminated — because in that situation subsection 51(5) of the PBA gives the non-member spouse rights that parallel those of a member entitled to a deferred pension.

Section 42 of the PBA provides that where the employment of a member of a pension plan is terminated, 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 (if the other plan will accept the transfer) or to a locked-in retirement savings arrangement or to apply it to the purchase of a deferred[202] life annuity. In the case of marriage breakdown, if a domestic contract or court order requiring payment from the member's pension plan is served on the plan administrator, subsection 51(5) gives the spouse of a member whose employment is terminated the same options that the member has. However, while this does allow for an immediate settlement through transfer of a share of the member's interest, the availability of this option is obviously quite limited, as it can be accessed only where the employment of the member spouse has been terminated. Further, it may raise concerns for plan administrators,[203] and, with respect to the annuity purchase option, some feel that there is a potential for conflict with section 147.4 of the ITA.[204]

D. Settlement: Proposals for Reform

Obviously, the current situation is unsatisfactory; no one would disagree that it demands reform. But what form should reform take?

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.

Among the Canadian jurisdictions that have enacted legislation to divide pensions upon marriage breakdown, a majority have favoured an approach that is usually called the "Immediate Settlement Method" (ISM),[205] whereby there is an immediate (loosely speaking) determination of the non-member spouse's share of the value of the member's pension and an immediate transfer of an amount out of the fund of the member's pension to a locked-in RRSP or other vehicle that will eventually provide a retirement income (in other words, the sort of settlement that is currently possible in Ontario only where the member's employment is terminated).

Three provinces[206] have adopted an alternative approach, the Deferred Settlement Method (DSM).[207] Under this approach, the non-member spouse becomes a "kind of member"[208] of the member's pension plan, but actual division of the pension is postponed until some future point (generally, when the pension comes into pay), at which time the non-member spouse receives his share in the form of a separate pension from the plan.[209]

It bears noting that the former OLRC had recommended in its 1995 *Report on Pensions as Family Property: Valuation and Division* adoption of a "division-at-source" scheme that would have given parties a choice of settlement options that essentially reflected the ISM and DSM approaches;[210] however, the recommendation was not acted upon.

...[It is argued that] ISM represents a simple and easy-to-apply approach....

E. The Arguments: ISM v. DSM

Among the reasons offered in support of adopting the ISM approach are the following:

- the ISM provides a "clean break" between the parties, quickly and completely severing their affairs, whereas the DSM will require that the parties continue to have dealings with one another;
- the ISM represents a simple and easy-to-apply approach in comparison to the DSM;
- the ISM is much less burdensome and costly for pension plans than the DSM;
- as the majority of Canadian jurisdictions have adopted the ISM approach, its adoption by Ontario would promote uniformity in the law; and
- the DSM allows the non-member spouse to share in post-separation increases in the value of the member's pension.

On the other hand, those who favour the DSM argue that:

- it is appropriate that the non-member spouse share in post-separation increases in the value of the member's pension because the ultimate value of a pension is largely paid for by contributions made in the earlier part of the member's career;
- with the DSM, it is not necessary to calculate the present value of the member's pension; thus, the "guesswork" inherent in determining present value – and thus the risk of significantly overvaluing or undervaluing the pension as a result of assumptions that have to be made in order to arrive at a present value – is avoided;
- the ISM, as it exists in almost all other Canadian jurisdictions, uses a commuted value approach in valuing the member's pension entitlements, and hence produces a relatively low value for the transfer out of the fund for the non-member spouse;
- related to the preceding point, adoption of the ISM would exacerbate economic inequality as between the sexes; and
- the ISM typically results in the non-member spouse being given a lump sum to invest in a locked-in retirement vehicle, but very often the non-member spouse is unsophisticated and inexperienced in investment matters; this can cause stress and lead to the making of improvident decisions that may not produce enough income for support in old age.[211]

VI. OTHER ISSUES

A. *Canada Pension Plan* Credits

Credits under the CPP fall within the FLA definition of "family property", making them subject to the equalization regime, although it appears that the point is largely ignored in practice, with CPP credits simply being omitted from the calculation of net family property.[212] Therein, however, lies a trap for the unwary and the overtrusting.

The CPP provides for a division of credits upon marriage breakdown, with credits earned during the marriage by a spouse being divided equally between him and the other spouse; where an application for division is made, the federal authorities are required to divide the credits unless the two spouses have agreed that there should be no division and the family legislation of the province in question permits such agreements. While some other provinces have enacted permissive legislation of this nature,[213] Ontario has not done so. This has sometimes led to instances where a party agreed under an equalization settlement not to apply for a credit split, only to make such an application at a later date.

In *Albrecht v. Albrecht*,[214] the Ontario District Court was faced with this very situation. Striving to do justice, it held that a wife who had applied for a division of CPP credits despite having received consideration for waiving all claims to the other spouse's property was estopped from retaining for her own use any portion of the pension that was paid over to her by the federal authorities and ordered that she remit any such portion to him. The decision was reversed by the Ontario Divisional Court,[215] which ruled that there was had no authority to make such an order in light of the absence of provincial legislation allowing contracting out of the CPP credit division provisions.

Such disturbing cases raise the question of whether Ontario should enact legislation expressly excluding such credits from net family property[216] or allowing the parties to agree that they not be divided under the CPP.[217]

B. Common Law Spouses

As was noted above, Part I of the FLA does not apply to couples who are in a common law relationship. The LCO does not intend in this report to address the issue of whether they should be covered by Part I, as that is an issue that goes beyond pensions.[218] We would note, however, that common law couples who experience relationship breakdown may have property issues to deal with (as where a constructive trust is imposed in respect of an asset belonging to one partner in favour of the other) and that in any case some couples may wish to achieve (or at any rate, approach) equalization simply out of their own sense of what is fair. To the extent, however, that division of one partner's pension is contemplated, they would face the same problem stemming from a lack of good settlement options as married couples face, that is, there is no ability to effect an immediate transfer of a share of the member's interest under a pension plan to her former partner (except in the situation where the member's employment terminates), nor is a DSM type of solution available. (The member and former common law partner, like former parties to a marriage, could agree to an "if and when" arrangement, but such arrangements are highly problematic, as was explained above.)

VII. THE LCO'S ASSESSMENT OF THE ISSUES

A. Pensions and the FLA Equalization Regime

For purposes of this report, the LCO has assumed continuation of the main features of the family property provisions of the FLA....Whether these aspects of family property law should be changed is an issue with implications far beyond pensions....

1. Should Pensions Be Taken Out of the Equalization Regime?

For purposes of this report, the LCO has assumed continuation of the main features of the family property provisions of the FLA, including the exclusion of persons in common law relationships and adherence to the principles that the former spouses are presumed to have made an equal contribution to the assumption of household responsibilities, that on marriage breakdown they should share equally in the value of net family property (as opposed to each having a half interest in all items of family property) and that debt cannot reduce a spouse's net family property below zero. Whether these aspects of family property law should be changed is an issue with implications far beyond pensions and it would be inappropriate to address that issue in the context of this project, which is limited to pensions. Thus, we have looked into the question of whether pensions should continue to be subject to the FLA equalization regime based on the current generic features of that regime.

Removing pensions from the equalization regime could lead to unfairness between spouses who are in the same net asset position. Consider a pension plan member who has debts of $200,000, a pension valued at $150,000 and other assets valued at $50,000 and whose spouse has assets of $10,000 and debts totaling $10,000. If the pension is divided outside the equalization regime, the member would lose half the value of his pension to the non-member spouse, even though both parties are in the same position so far as net family property is concerned, whereas if the pension rights are included in the equalization process, he would retain the entire pension because his net family property would be zero.[219] (This is not to suggest that the non-member spouse, depending on the circumstances, may not have a valid claim for support. However, the purpose of Part I of the FLA is to put the spouses in an equal position with respect to family property, not to address support needs. Support is dealt with in Part III of the FLA.)

The LCO also notes that dividing a pension outside the equalization regime may result in the parties having less flexibility in relation to other family property. For example, it is not unusual for a couple to have only two substantial assets, an interest under a pension plan on the part of one spouse and a matrimonial home owned jointly. In such a situation, dividing the pension outside the equalization regime would likely necessitate sale of the matrimonial home, whereas dealing with all family property under the equalization regime may make it more likely that the non-member spouse can keep the matrimonial home if he feels that that is preferable to selling it and dividing the proceeds.

Finally, the LCO observes that it is difficult to see a policy justification for excluding pensions from the equalization regime when other retirement vehicle assets, such as RRSPs, are not excluded.

An amendment to the FLA definition to eliminate any implication that rights that have not vested are not included...would be desirable, as it would make the text of the Act consonant with the actual state of the law.

> **Accordingly, the LCO recommends as follows:**
>
> **1. The interest of a pension plan member whose rights have vested continue to be considered "family property" for purposes of the *Family Law Act* (FLA) and therefore subject to the FLA equalization regime.**

2. Should Rights that Have Not Vested Be Treated as Property?

For purposes of calculating a spouse's "net family property", the FLA defines "property" as including

> ...in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan....

As was noted above, while there appears to be some reason to think that the reference to rights under a pension plan that have vested was intended to indicate that unvested rights were not to be taken into account in determining the member spouse's net family property, the courts have in fact held that the value of such rights is included. Although this holding may be at odds with the original intention, the LCO sees no reason not to include unvested rights under a pension plan as "property" for purposes of the equalization regime — while such rights may be contingent, that does not mean that they do not have value.[220] An amendment to the FLA definition to eliminate any implication that rights that have not vested are not included (which could be achieved simply by deleting the words "that have vested") would be desirable, as it would make the text of the Act consonant with the actual state of the law.

> **Accordingly, the LCO recommends as follows:**
>
> **2. The FLA be amended to indicate that rights under a pension plan that have not vested are also "family property".**

B. Valuation of Rights Under a Defined Benefit Pension Plan

As was discussed above, there are three main methods of pension valuation for family law purposes: the termination method, the retirement method and the hybrid termination-retirement method (hereinafter referred to as the "hybrid method"). The termination method and the hybrid method both take *as a starting point* the dollar amount of the pension accrued to the valuation date (generally, the date of separation), that is, without assuming further service and without projection for future salary increases or plan improvements. However, the hybrid method, unlike the termination method, does provide for inflation (where benefits are indexed) and it assumes future service for purposes for rights to ancillary benefits that have not vested at the time of separation because the member has not accrued sufficient service but that will vest eventually if the member continues in employment. (An example would be a right to take early retirement on an unreduced pension if the member meets a "factor 90" qualification where, at the time of separation, the member's age and service credits do not yet add up to 90.) The retirement approach assumes future service for purposes of these rights, but also projects future salary increases, including those not related to inflation, such as those stemming from promotion, as well as enhancements to plan members' rights that might be made in the future. As was noted above, Ontario courts generally seem to favour the hybrid method (notwithstanding some inconsistency in the terminology used in many of the decisions), but as a matter of law the question cannot be regarded as entirely settled.

In its 1995 *Report*, the OLRC argued that the retirement method should be prescribed as the only approach to valuation of rights under a defined benefit pension plan for family law purposes.[221] However, the LCO observes that in doing so, the OLRC seems to have seen the choice as one solely between the termination method and the retirement method; the issuance of the *Report* appears to have preceded any general recognition of a third way,[222] and it certainly preceded the *Bascello* case, which demonstrated that most of the judicial decisions that purported to apply the termination method were in fact not actually doing so and were instead using the hybrid method (although the *Bascello* court did not favour that label). Given that the two aspects of the termination method that might be seen as being particularly unfair to the non-member spouse (namely, the failures to take into account rights to unvested ancillary benefits and to allow for inflation) are not present with the hybrid method, it may well be that the OLRC would have seen that method as the most fitting had the choice been conceived as one between the three alternatives. In any case, the LCO is of the view that the hybrid method is the most appropriate; moreover it recommends that the FLA be amended to provide that it be used in valuing rights under a pension plan for family law purposes, thereby eliminating any lingering uncertainty in this area.

...the LCO is of the view that the hybrid method [of evaluation] is the most appropriate; moreover it recommends that the FLA be amended to provide that it be used in valuing rights under a pension plan for family law purposes, thereby eliminating any lingering uncertainty in this area.

Although some might object that in considering future service for purposes of rights to ancillary benefits such as an unreduced early retirement pension, the hybrid method effectively gives the non-member spouse a share in post-separation increases in the value of the member's pension, the LCO notes that the accumulation of sufficient service credits to result in the vesting of such rights is in part the result of service credits that were earned during the period of marriage.[223] On the other hand, the retirement method plainly could result in the non-member spouse inappropriately sharing in post-separation increases in value, as is most obvious where it is assumed that there will be improvements to the pension plan or that the member will experience significant promotions subsequent to the marriage breakdown. With respect to the latter, while the LCO acknowledges the argument that post-separation career successes may, to some extent at least, have their genesis in decisions taken and roles assumed during the marriage, the retirement method makes no distinctions in that regard. Further, it is far more speculative than either of the other two methods; indeed, in projecting plan improvements and future promotions, the retirement method employs conjecture at a profound level. On balance, the LCO believes that the hybrid approach strikes the fairest balance as between the parties.

Accordingly, the LCO recommends as follows:

3. The FLA be amended to provide that for purposes of valuation, rights under a defined benefit pension plan should be assessed using the hybrid termination-retirement method.

C. Settlement: Defined Benefit Pension Not Yet in Pay

1. Assessing the Arguments

In the LCO's view, many of the arguments made in support of or against the ISM or DSM overstate the case.

In the LCO's view, many of the arguments made in support of or against the ISM or DSM overstate the case.

While there is no doubt that the ISM provides a "clean break", it is simply incorrect to suggest that the DSM would force the former spouses to continue to have dealings with each other. The DSM model presumes that the non-member spouse becomes a quasi-member of the member's pension plan; any communication regarding the plan in relation to this would be with the plan administrator — there would be absolutely no need for the former spouses to have contact with each other. Still, it must be acknowledged that with the DSM, the break is not complete. Obviously there would continue to be a financial link between parties, in that the amount of the pension received by the non-member or quasi-member spouse would be a function of the amount of the member's pension when it came into pay. The link may be a silent one, but it is still a link.

The arguments about post-separation increases in pension value are also overstated, on both sides. Proponents of the DSM who argue that the value of a pension is paid for disproportionately through contributions made in the early part of the member's career may be correct in that assertion, but this ignores the point that for family law purposes the value of a defined benefit plan pension (unlike that of a defined contribution plan pension) is not a matter of the amount of contributions and the yield on their investment. (That is why it is the present value method, rather than the contributions method, that is used to assess the worth of the member's rights.) On the other hand, it is surely incorrect to assert that no part of the post-separation increase in the value of the member's pension can ever be attributed to the married years. Simply looking at the matter from a mechanical perspective, eligibility to take an unreduced pension would in many cases never have been attained (and certainly not attained as early as it was) had the pensionable service earned during marriage not been counted. And the economic and other contributions made by the non-member spouse to the marital partnership may well have been the foundation on which the member's post-separation success was built.

One can, of course, devise scenarios in which the member only became an "achiever" after leaving the deadweight of her marriage behind, but one can equally devise other scenarios in which the member would never have become an achiever had it not been for material and other sacrifices made by her former spouse.

One can, of course, devise scenarios in which the member only became an "achiever" after leaving the deadweight of her marriage behind, but one can equally devise other scenarios in which the member would never have become an achiever had it not been for material and other sacrifices made by her former spouse. The reality is that, while there are undoubtedly exceptions, it is likely that in most cases the origin of at least some of the post-separation increase in the value of the member's pension lies in the period of marriage.

The contention that it would contribute to uniformity of the law if Ontario were to adopt the ISM is not convincing. While the ISM jurisdictions do outnumber the DSM jurisdictions, the fact that three provinces use the DSM obviously means that there is no national consensus in favour of the ISM. Further, there are numerous variations from jurisdiction to jurisdiction in the case of both the ISM and the DSM, and in some cases regimes that might be characterized principally as ISM or DSM offer alternative settlement options that exhibit elements of the other method.[224] Although uniformity is not an irrelevant consideration, the LCO believes that ultimately the choice of solution for Ontario must be based on the intrinsic merits of the contending approaches, and not on a quest for a pan-Canadian template.

With respect to the argument that adoption of a DSM approach means that determination of the pension's present value is rendered unnecessary, the LCO acknowledges that the assumptions used in determining present value will usually mean that the pension will turn out to have been undervalued or overvalued in comparison with what is ultimately paid out. However, we are also of the view that this ignores the fact that the value of virtually any property, as determined at the separation date, might turn out to be considerably more or less than its value at some subsequent point. While this may cause resentment on the part of one or the other spouse, the risk of its happening is inherent in a regime that requires family property to be valued for equalization purposes. Some DSM proponents might respond to this by arguing that pensions should in any event be removed from the equalization regime and dealt with separately, but for the reasons already given above, the LCO believes that rights under a pension plan should continue to be dealt with under that regime.

The LCO acknowledges the validity of the concern that that providing a lump sum to a non-member spouse for placement in an RRSP could be very daunting for someone untutored in investment matters (or perhaps, in light of recent events, even for individuals who consider themselves quite sophisticated when it comes to stocks and financial instruments). However, this same concern can arise in cases where resort to pension division is unnecessary because the member spouse is able to pay off his equalization debt by trading other assets — indeed, the concern may be all the greater, since in that scenario there is nothing that would require the non-member spouse to convert the asset that was traded into a vehicle that will provide income in later years. In our view, given that in most cases equalization is achieved through an asset swap rather than pension division,[225] the inexperienced investor concern, while not without validity, does not provide a compelling reason to reject the ISM. We note as well that the concern could in any event be addressed through the establishment of a new provincial retirement fund, as discussed in section E, below.

We are not persuaded that adoption of the ISM would exacerbate economic inequality as between the sexes. As was noted above (in section II, under the heading "Types of Pension Plans and Employee Coverage"), the number of males who are members of Ontario jurisdiction pension plans is only slightly greater than the number of female members, and male membership has not been growing while female membership has been increasing substantially; further, the percentage of pension plan members who are in a defined benefit plan is virtually the same for men and women. Choosing between the competing proposals for reform of the law relating to pension division upon marriage breakdown is thus unlikely to have a negative (or positive) effect on women particularly. This is not to say that other, broader aspects of the law relating to pensions and the Canadian retirement income system in general may not have an iniquitous impact. (In that regard, one might note the fact that pension income, whether from a private plan or the CPP, is largely a function of paid employment prior to retirement and that this tends disproportionately to disadvantage women.)[226] However, we are here concerned with the comparatively narrow question of how pensions should be divided where such division is required in order to resolve family property issues. In the LCO's view, the choice between the ISM and the DSM is not one between a change in the law that is likely to promote economic equality between the sexes and a change that is likely to perpetuate or worsen existing inequalities.

The LCO does agree with critics of the ISM that, as implemented in other Canadian jurisdictions, it tends to produce an artificially low value for the pension and is thus unfair to the non-member spouse (whether that person be male or female). However, we also agree with critics of the DSM that the DSM is much more complicated by comparison with the ISM and that it imposes burdens on pension plans and plan administrators that the ISM does not. (While arguably the weight of those burdens has been somewhat exaggerated, the problems posed for defined benefit plans by the current economic situation suggests a need to be very cautious about adding to the difficulties they face.) This has led us to make a twofold recommendation:

The ISM should be the main pension division settlement mechanism, available in all cases of marriage breakdown, but with a proviso that the member's equalization debt is satisfied only to the extent of the value transferred out of the plan to the benefit of the non-member spouse....

- The ISM should be the main pension division settlement mechanism, available in all cases of marriage breakdown, but with a proviso that the member's equalization debt is satisfied only to the extent of the value transferred out of the plan to the benefit of the non-member spouse;
- A DSM option should be available on a limited basis, namely,
  - where the member is within ten years of the normal retirement date in the plan and both the member and the non-member spouse agree; and
  - where, despite the fact that the member is not within ten years of the normal retirement date, the member, the non-member spouse and the pension plan administrator agree that the pension be divided using the DSM.

2. Some Alternative ISM Approaches

The reason that critics of the ISM argue that it is unfair to the non-member spouse is because it generally[227] uses the commuted value approach to value the member's pension, and thus the transfer-out for the benefit of the non-member spouse. The commuted value approach, in assuming immediate termination of plan membership, ascribes no value to unvested ancillary benefits, such as a right to take an unreduced early retirement pension where the eligibility requirements have not yet been met; this may produce a lower value – and thus a lower transfer amount for the benefit of the non-member spouse – than a valuation utilizing some other method, such as the hybrid method discussed above (in subsection IV.D). In that regard, the LCO did consider whether an ISM using the hybrid method of valuation rather than the commuted value method would be feasible. However, such an approach could result in plans paying out more by way of transfer for the benefit of the non-member spouse than would be justified by the value that the member's pension ultimately achieves (as where the member terminates employment shortly after separation without ever having qualified for an unreduced early retirement pension); the shortfall would either have to be absorbed by the plan or recovered from the member's already diminished future pension.

The LCO also considered whether it would be practical to require that a second commuted value calculation and transfer-out be undertaken at the time that the member reaches a "trigger date" (retirement or pre-retirement death or termination of employment), with the aim of supplementing the amount originally transferred to the benefit of the non-member spouse based on any subsequent increase in the value of the member's pension. However, we concluded that this approach would be overly complex and produce burdens for plan administrators, particularly in the case of members who ended up having more than one former spouse.

...[T]he commuted value does not always produce a lower value than the hybrid method...in any case under the LCO's proposal the member would remain liable for any difference between the amount transferred from the fund of the plan for the benefit of the non-member spouse and her equalization debt.

On balance, the LCO believes that the ISM with a transfer based on commuted value is the most appropriate solution. We also note that the commuted value does not always produce a lower value than the hybrid method, and we would point out that in any case under the LCO's proposal the member would remain liable for any difference between the amount transferred from the fund of the plan for the benefit of the non-member spouse and her equalization debt. Finally, we believe that our proposal that a DSM option be available on a limited basis will provide an appropriate settlement for parties who do not experience marriage breakdown until fairly late in the member's career. The DSM, which produces a financial result that is likely to be more in keeping with the expectations of both parties had they not separated, may be a particularly fitting solution (despite the burdens imposed on the plan administrator) when retirement is relatively close at hand, as that is when those expectations would be at their most definite and pronounced. (And the LCO sees no reason why the DSM should not be an option in other cases if the plan administrator is willing to shoulder the burdens that that approach involves.)

3. Transfer Destinations

The PBA gives a plan member who terminates employment and who is entitled to a deferred pension but who wishes to transfer his rights out of the plan three options: transfer to another pension plan (if the other plan is willing to accept the transfer), transfer to a "a prescribed retirement savings arrangement"[228] (essentially, a "locked-in" retirement vehicle) or purchase of a deferred annuity. The LCO believes that options corresponding to the first two of these should be available to the non-member spouse in the case of an ISM resolution. (The third option, purchase of a deferred annuity for someone who is not a pension plan member, may raise problems under section 147.4 of the ITA.)[229]

Transfer to a locked-in retirement vehicle may make sense for some non-member spouses who feel they have the expertise to manage their own investments....

Transfer to a locked-in retirement vehicle may make sense for some non-member spouses who feel they have the expertise to manage their own investments or who feel that they can readily access such expertise from other sources. However, many non-member spouses who do not have their own pension plans may be lacking in the investment knowledge and experience that is required to self-administer an RRSP or even to choose someone else who is suitably skilled to administer it for them. Creation of a new public fund into which transfer moneys could be paid might provide a good alternative for non-member spouses in that position, in that it would give them some advantages comparable to those enjoyed through membership in a large pension plan, namely, the pooling of resources and risk, the power of substantial investment capital and professional, expert fund management and administration. This is discussed further in subsection E, below.

Generally speaking, it seems unlikely that pension plan administrators would favour establishing a credit in the member's pension plan for the non-member spouse, essentially making him or her a member. However, there may be cases where the plan administrator is willing to do this, and there is no reason not to allow it where that is the case.

Accordingly, the LCO recommends as follows:

4. Subject to the other recommendations in this section, where a member of a defined benefit pension plan is an equalization debtor to his or her spouse and wishes to satisfy the equalization debt through resort to his or her interest in the pension plan, legislation provide that the immediate settlement method of division applies, under which the member could require the plan administrator to transfer a *pro rata* share of the commuted value of the member's pension as of the separation date from the fund of the member's plan to

(a) the fund of a plan of which the non-member spouse is a member, if the administrator of that plan agrees;

(b) a retirement savings arrangement of the type prescribed for purposes of clause 42(1)(b) of the *Pension Benefits Act*;

(c) the fund of the member's plan (that is, for credit to the non-member spouse's account), if the administrator of the member's plan agrees; or

(d) if the government considers it appropriate to establish a provincial retirement fund, that fund (see subsection E, below).[230]

Where the amount that would otherwise be transferred exceeds the member's equalization debt, the amount to be transferred shall be reduced to the amount of the equalization debt. If the amount that is transferred is less than the member's equalization debt, the member remains liable for the difference.

Under specified circumstances, the DSM would be available, as set out in Recommendations 6 and 7.

5. Where the immediate settlement method applies, the non-member spouse's *pro rata* share shall be based on the formula

$$\frac{1}{2} \times A/B \times CV$$

where A is the pensionable service accrued while the parties were married, B is the member's pensionable service and CV is the commuted value as of the separation date.

4. Limited Availability DSM Option

...[W]here the marriage breakdown occurs at a point when the member's retirement is likely to be fairly imminent, the LCO believes that the parties should have the option of sharing the pension when it comes into pay....

Because it poses greater burdens on pension plan administrators than the ISM by effectively creating two pensions to be administered, the LCO does not believe that a DSM solution should generally be available to the parties as of right.[231] However, where the marriage breakdown occurs at a point when the member's retirement is likely to be fairly imminent, the LCO believes that the parties should have the option of sharing the pension when it comes into pay, as it is much more likely in that case that both parties had formed assumptions about their financial future that were predicated very firmly and specifically on receipt of income from the member's pension. (The DSM would also be available in other cases if the pension administrator agrees, since in that case the administrator is obviously willing to take on the burdens.)

Strictly limiting the availability of this option would ensure that the imposition on plan administrators of the burden associated with having effectively to treat the non-member spouse as a member will be a relatively infrequent occurrence. The administrative burden can also be minimized by requiring the election of this option to be made using forms prescribed by regulation (or at any rate, provided by government) so that plan administrators would not have to bear the difficulties and risk involved in interpreting documents written in a wide variety of styles with a wide range of drafting skill. Administrators who acted in good faith in carrying out the direction given in the form could not be held liable for any resulting loss. Further, administrators would be allowed to charge a fee to the member and non-member spouse to offset the extra costs incurred as a result of the selection of the DSM option.[232]

Where the DSM option is selected, no survivor benefits should attach to the non-member's entitlement unless the plan chooses to offer such benefits; in other words, the non-member's "pension" would be a single life pension rather than a joint and survivor pension.

Generally, the non-member spouse's pension would commence when the member retires and takes his pension; the non-member spouse should not have a right to have the pension begin at any time, as this could be burdensome for the plan administrator. However, the LCO has a concern that in some cases the member (whether out of spite or perceived need) may delay retirement inordinately, and so we believe that the non-member should be able to require that her pension begin once the member has attained normal retirement age, even if the member continues to work.

Where the DSM option is elected, the sharing between the former spouses of the member's pension should be seen as having taken the place of the equalization debt.

The division of the pension would be according to a simple formula based on the ratio of the period of marriage to the period of pensionable service. More complicated methods of division, such as payment to the non-member spouse until an amount equal to the equalization debt has been met, pose burdens on the administrator; therefore, the member should not be able to insist on such other methods of division unless the administrator agrees.

Where the DSM option is elected, the sharing between the former spouses of the member's pension should be seen as having taken the place of the equalization debt. There is an inherent risk in this form of division that the total amount paid to the non-member spouse will prove either to be less than or in excess of what is owed to her as a result of the equalization obligation, and both parties should bear that risk equally.

Accordingly, the LCO recommends as follows:

6. If on the date of separation the member spouse is within ten years of the normal retirement date established under the plan, the parties may agree, as an alternative to settlement using the ISM, to have the member's pension entitlements divided between the member and the non-member spouse so that each is entitled to receive a separate pension. The non-member spouse would become a quasi-member of the plan, with an ability to enforce his or her entitlements under the plan and a right to receive from the plan administrator information concerning the member's pension and his or her share.

Generally, the non-member spouse would begin receiving a pension when the member retired and began receiving his or her pension, but where the member did not retire by the normal retirement date established under the plan, the non-member spouse would have the option of having his or her pension commence on the member's normal retirement date.

Where the non-member spouse will be commencing his or her pension at the same time as the member, the member's service credits shall be divided according to the formula

$$\frac{1}{2} \times A/B$$

where A is the pensionable service accrued while the parties were married and B is the member's total pensionable service at retirement. The member's pension would be calculated using the benefit formula provided by the plan and his or her service credits as reduced. To determine the amount of the non-member spouse's pension, there would be an initial calculation using the benefit formula provided by the plan and the service credits transferred to him or her; that amount would then be adjusted to ensure that the actuarial present value of his or her pension, when added to the actuarial present value of the member's pension, equals the actuarial present value of the member's total pension before adjustment.

Where the member does not retire or otherwise begin receiving his or her pension by the normal retirement date established under the plan and the non-member spouse elects to have his or her pension commence without further delay, the non-member spouse's pension shall be based on the accrued amount of pension computed as at the normal retirement date, using the formula

$$\frac{1}{2} \times A/C$$

where A is the pensionable service accrued while the parties were married and C is the member's pensionable service as of the normal retirement date. There could be an actuarial adjustment for the non-member's age.

> When the member retires, he or she will receive a pension based on the plan's benefit formula calculated at the actual retirement date less the dollar amount of the pension payable to the non-member spouse.[233]
>
> Where the DSM option is selected, no survivor pension shall attach to the non-member spouse's pension.
>
> The election of the DSM option (and any election by the non-member spouse to commence his or her pension before the member retires) shall be accomplished using forms prescribed in regulation or otherwise authorized by government. Plan administrators could not be held liable for any loss resulting from an action taken by them in good faith in reliance on a form submitted to them. They would also be allowed to charge a fee to offset the initial and ongoing costs incurred by them as a result of the election of these options.
>
> Legislation would provide that where this option is selected, the member's equalization obligation, to the extent that it was based on the value of the pension, is deemed to have been satisfied (that is, even if the total amount that is ultimately paid out to the non-member spouse is less than the member's equalization debt). It should also provide that the non-member spouse's estate will owe nothing to the member or his or her estate if the total amount ultimately paid out to the non-member spouse exceeds the member's equalization debt.

…[I]f otherwise ineligible parties wish to elect the DSM approach and the plan administrator is agreeable, there would seem to be no good reason not to allow it….

5. Where Administrator Agreeable to a Not-Otherwise-Available DSM Settlement

As was stated previously, the LCO is of the view that, because of the burdens that a DSM approach would impose on pension plan administrators, it should not be available as of right "across the board", but rather, only where the member is within ten years of the normal retirement date in the plan. However, if otherwise ineligible parties wish to elect the DSM approach and the plan administrator is agreeable, there would seem to be no good reason not to allow it.

> **Accordingly, the LCO recommends as follows:**
>
> **7. Where the member is not yet within ten years of the normal retirement date, the parties may elect the DSM option if the plan administrator agrees.**

6. Defined Benefit Plan Coverage

The above recommendations regarding settlement are intended to apply only to defined benefit plans. The LCO notes, however, there may be some atypical types of defined benefit plans in respect of which the settlement options being recommended may not be appropriate. Accordingly, legislation to implement the recommended settlement regime should authorize the making of regulations that exempt defined benefit plans having certain specified characteristics where the government is of the view that such an exemption would be appropriate. In a similar vein, there should also be regulation-making authority to deal with so-called "hybrid plans", that is, plans that combine features of defined benefit plans with features of defined contribution plans; the authority should make it clear that the rules that would otherwise apply in the case of a plan that is subject to the settlement regime can be varied.

Subject to some exceptions, the LCO recommends that the settlement options apply only in respect of plans that are registered under the PBA. However, they should be available as well in the case of private sector plans in the federal employment law jurisdiction, as the federal PBSA, which applies to such plans, makes provincial family property law apply in respect of the division of pensions on marriage breakdown. (The federal *Pension Benefits Division Act*,[234] which has its own pension division scheme, applies to federal public sector plans.) As well, some Ontario employees will be members of a plan established by an employer who operates in more than one province and who has registered the plan under the statute of a province other than Ontario; in that case, while the registration requirements of the PBA would not apply, the substantive provisions of Ontario pension legislation would, and the settlement options being recommended here should be available.

While generally the LCO does not regard it as feasible to make the settlement regime being recommended here apply to supplementary employment retirement plans, we see no reason not to cover such plans where they simply mirror a plan that is registered under the PBA (differing only in providing for benefits or permitting contributions in excess of the *Income Tax Act* limits) and where the plan would, if the PBA applied to it, not be ineligible for registration because of the manner in which benefits accrued or because the employer had a discretion to vary the pension benefits or the formula governing employer contributions.

Finally, the LCO recognizes that the possibility that there may be plans that do not fall within the scope of coverage outlined above where the settlement options being recommended would not be inappropriate. Where the existence of such a plan comes to the attention of government, it should be possible to extend the application of the settlement regime to that plan by regulation.

While generally the LCO does not regard it as feasible to make the settlement regime being recommended here apply to supplementary employment retirement plans, we see no reason not to cover such plans where they simply mirror a plan that is registered under the PBA....

Accordingly, the LCO recommends as follows:

8. Recommendations 4 to 7 apply to

(a) a defined benefit pension plan, other than any class of defined benefit plan that is prescribed by regulation;

(b) subject to the regulations, a hybrid plan, insofar as it provides a defined benefit;

if the pension is not in pay and

(c) the plan is registered under the *Pension Benefits Act* or the substantive provisions of that Act apply to it;

(d) the plan is registered under the federal *Pension Benefits Standards Act*;

(e) the plan is not registered under the *Pension Benefits Act* but it is supplemental to a plan that is so registered and

(i) it provides for the accrual of pension benefits in a gradual and uniform manner, and

(ii) neither the formula for the employer's contributions to the plan fund nor the pension benefit provided is at the discretion of the employer; or

(f) the plan is a member of such other class of defined benefit plan as is prescribed.

D. Settlement Options and Defined Contribution Plans

...[T]he LCO sees no reason why the ISM option it is recommending should not be available in the case of both types of plans.

While valuation of a member's interest in a defined contribution plan generally does not raise problems, some stakeholders suggested that Ontario law should provide for immediate division as a settlement option regardless of whether the pension plan is a defined benefit plan or a defined contribution plan, and the LCO sees no reason why the ISM option it is recommending should not be available in the case of both types of plans. However, there would seem to be no advantages for either party in the non-member spouse becoming a quasi-member of his spouse's defined contribution plan; given this, and the fact that a DSM approach does inevitably impose some burdens on plan administrators, the LCO is not recommending that the DSM option described in Recommendation 6 be available in the case of defined contribution plans.

Accordingly, the LCO recommends as follows

9. The ISM option discussed in Recommendations 4 and 5 also be available where a spouse is a member of a defined contribution plan, but the DSM option should not be available.

E. A New Provincial Retirement Fund?

As discussed in section C, the LCO is recommending in the case of ISM settlements three transfer options for non-member spouses who become entitled to a transfer following pension division, with a possible fourth option: transfer to a provincial retirement fund, if the government decides to establish such a fund. Where the non-member spouse has her own plan, or where the administrator of the member's plan is willing to establish a pension account in that plan for the non-member spouse, a transfer to (or within) the plan will likely be the preferred option. However, for many of those who do not have their own plan (or who will not be offered an account in the member's plan) transfer into an RRSP may not be attractive course, particularly for those who are unsophisticated or inexperienced in investment matters. For these persons, transfer to a large fund offering the pooling of resources and risk, the investment power of large amounts of capital and expert management may be preferable.

The LCO suggests that the government may wish to consider establishing a provincial retirement fund to receive transfers on behalf of non-member spouses who would choose that option if it were made available. The government would appoint the staff to administer the fund and make investments on behalf of fund members. We note that establishment of such a fund would also provide an opportunity to lessen burdens on pension plan administrators, in that the fund could also receive transfers in respect of "lost members" from other pension plans where the administrators wish to divest themselves of continuing responsibility for members with whom they have had no contact for some specified period despite reasonable efforts on their part to make contact. The government could charge administrative fees to the accounts of fund members (including transferred lost members). However, the LCO recognizes that even if fees are charged, establishment of a provincial retirement fund could be costly and may not be seen as a prudent measure at a time of economic uncertainty.

Accordingly, while the LCO makes no definitive recommendation, it suggests that:

10. Ontario may wish to consider establishing a retirement fund into which non-member spouses who are entitled to a transfer pursuant to a pension division (see Recommendation 4, above) may place the transferred amount. The plan could also receive transfers from pension plans that wish to divest themselves of their "lost members". The plan would be a capital accumulation fund, that is, the benefit ultimately paid out to the individual would be based on the amount originally paid into the fund plus the yield on the fund's investment of that amount.

F. The 50 Per Cent Rule

The LCO acknowledges that the rule that a court order or domestic contract dealing with family property cannot entitle the non-member spouse to more than 50 per cent of the member's pension benefits reflects a legitimate pension plan (and indeed, societal) objective, namely, to enhance the likelihood that plan members will have a reasonable income for retirement.[235] (We would note, however, that this objective is rather undermined by the fact that support orders can attach up to 50 per cent of the member's pension income; this could result in the member losing 100 per cent of his pension, half to equalization and half to support, as occurred in *Gauthier v. Gauthier*.)[236] While we are not recommending abolition of the rule, we are concerned about the possibility that its unqualified application could in some cases prevent implementation of one or the other of the settlement options being recommended in subsection C, even though (if the recommendations are adopted) the approach taken was in accordance with settlement mechanisms specifically made available to the parties by legislation. As the LCO believes that its recommendations concerning settlement will provide a fair method of dividing the pension asset where equalization cannot be achieved without resort to the pension, we believe that a settlement that is in accord with the legislated ISM or DSM approach should be deemed to be in compliance with the 50 per cent rule.

...[A] settlement that is in accord with the legislated ISM or DSM approach should be deemed to be in compliance with the 50 per cent rule.

Accordingly, the LCO recommends as follows:

11. A settlement that is in accord with the ISM or DSM settlement regime be deemed to comply with the 50 per cent rule.

G. *Canada Pension Plan* Credits

There is little doubt that, as a matter of law, CPP credits constitute "family property" under the FLA, although it seems, as was indicated above, that the point is often ignored in practice. While some stakeholders suggested that the definition of "family property" should accordingly be amended so as to exclude CPP credits, the LCO can see no justification in principle for holding that rights under an occupational pension plan are "family property" while CPP credits are not. However, the LCO is of the view that parties should be able to waive the right to a split of such credits.

The CPP, which is federal legislation, permits the provinces to enact legislation allowing such a waiver, but Ontario has not thus far seen fit to do so. The LCO has noted that there have been instances in which a party to an equalization settlement agreed, in return for other consideration, not to apply for a credit split, only to make such an application at a later date; in the absence of Ontario legislation permitting a waiver, the federal authorities have no choice but to carry out the split where such an application is made. The LCO sees no reason why Ontario should not eliminate this avenue for double dealing.

Accordingly, the LCO recommends as follows:

12. Ontario enact legislation permitting parties to waive the right to a split of CPP credits.

H. Common Law Relationships

The question of whether the family property provisions should apply to common law relationships is one that extends well beyond pension interests... the LCO believes that it would be inappropriate to address it in the context of a project that is limited to pensions.

The LCO has assumed, for purposes of this report, that the family property provisions of the FLA will generally continue not to apply common law relationships. In doing so, we offer no opinion as to whether the exclusion of such relationships from coverage under Part I of that Act should continue. The question of whether the family property provisions should apply to common law relationships is one that extends well beyond pension interests, and generally speaking the LCO believes that it would be inappropriate to address it in the context of a project that is limited to pensions.

Having said that, however, we see no reason why common law partners who separate should not be able to access the settlement mechanisms that we are recommending be made available to married couples should they wish to do so. They may have property issues to deal with, notwithstanding their exclusion from Part I of the FLA, and to the extent that they see pension division as part of an appropriate resolution of their affairs, they should be able to effect that division through the recommended ISM approach or, where the member is within ten years of normal retirement date (or where he is not but the pension plan administrator is agreeable), through the DSM alternative.

Accordingly, the LCO recommends as follows:

13. Where a common law relationship ends and one or both spouses is a member of a defined benefit pension plan, they may agree to have one or both pensions divided in accordance with the regime described in section C.

VIII. RECOMMENDATIONS

1. The interest of a pension plan member whose rights have vested continue to be considered "family property" for purposes of the *Family Law Act* (FLA) and therefore subject to the FLA equalization regime.

2. The FLA be amended to indicate that rights under a pension plan that have not vested are also "family property".

3. The FLA be amended to provide that for purposes of valuation, rights under a defined benefit pension plan should be assessed using the hybrid termination-retirement method.

4. Subject to the other recommendations in this section, where a member of a defined benefit pension plan is an equalization debtor to his or her spouse and wishes to satisfy the equalization debt through resort to his or her interest in the pension plan, legislation provide that the immediate settlement method of division applies, under which the member could require the plan administrator to transfer a *pro rata* share of the commuted value of the member's pension as of the separation date from the fund of the member's plan to

   (a) the fund of a plan of which the non-member spouse is a member, if the administrator of that plan agrees;

   (b) a retirement savings arrangement of the type prescribed for purposes of clause 42(1)(b) of the *Pension Benefits Act*;

   (c) the fund of the member's plan (that is, for credit to the non-member spouse's account), if the administrator of the member's plan agrees; or

   (d) if the government considers it appropriate to establish a provincial retirement fund, that fund (see Recommendation 10, below).

   Where the amount that would otherwise be transferred exceeds the member's equalization debt, the amount to be transferred shall be reduced to the amount of the equalization debt. If the amount that is transferred is less than the member's equalization debt, the member remains liable for the difference.

   Under specified circumstances, the DSM would be available, as set out in Recommendations 6 and 7.

5. Where the immediate settlement method applies, the non-member spouse's *pro rata* share shall be based on the formula

$$\frac{1}{2} \times A/B \times CV$$

   where A is the pensionable service accrued while the parties were married, B is the member's pensionable service and CV is the commuted value as of the separation date.

6. If on the date of separation the member spouse is within ten years of the normal retirement date established under the plan, the parties may agree, as an alternative to settlement using the ISM, to have the member's pension entitlements divided between the member and the non-member spouse so that each is entitled to receive a separate pension. The non-member spouse would become a quasi-member of the

plan, with an ability to enforce his or her entitlements under the plan and a right to receive from the plan administrator information concerning the member's pension and his or her share.

Generally, the non-member spouse would begin receiving a pension when the member retired and began receiving his or her pension, but where the member did not retire by the normal retirement date established under the plan, the non-member spouse would have the option of having his or her pension commence on the member's normal retirement date.

Where the non-member spouse will be commencing his or her pension at the same time as the member, the member's service credits shall be divided according to the formula

$$\frac{1}{2} \times A/B$$

where A is the pensionable service accrued while the parties were married and B is the member's total pensionable service at retirement. The member's pension would be calculated using the benefit formula provided by the plan and his or her service credits as reduced. To determine the amount of the non-member spouse's pension, there would be an initial calculation using the benefit formula provided by the plan and the service credits transferred to him or her; that amount would then be adjusted to ensure that the actuarial present value of his or her pension, when added to the actuarial present value of the member's pension, equals the actuarial present value of the member's total pension before adjustment.

Where the member does not retire or otherwise begin receiving his or her pension by the normal retirement date established under the plan and the non-member spouse elects to have his or her pension commence without further delay, the non-member spouse's pension shall be based on the accrued amount of pension computed as at the normal retirement date, using the formula

$$\frac{1}{2} \times A/C$$

where A is the pensionable service accrued while the parties were married and C is the member's pensionable service as of the normal retirement date. There could be an actuarial adjustment for the non-member's age. When the member retires, he or she will receive a pension based on the plan's benefit formula calculated at the actual retirement date less the dollar amount of the pension payable to the non-member spouse.

Where the DSM option is selected, no survivor pension shall attach to the non-member spouse's pension.

The election of the DSM option (and any election by the non-member spouse to commence his or her pension before the member retires) shall be accomplished using forms prescribed in regulation. Plan administrators could not be held liable for any loss resulting from an action taken by them in good faith in reliance on a form submitted to them. They would also be allowed to charge a fee to offset the initial and ongoing costs incurred by them as a result of the election of these options.

Legislation would provide that where this option is selected, the member's equalization obligation, to the extent that it was based on the value of the pension, is deemed to have been satisfied (that is, even if the total amount that is ultimately paid out to the non-member spouse is less than the member's equalization debt). It should also provide that the non-member spouse's estate will owe nothing to the member or his or her estate if the total amount ultimately paid out to the non-member spouse exceeds the member's equalization debt.

7. Where the member is not yet within ten years of the normal retirement date, the parties may elect the DSM option if the plan administrator agrees.

8. Recommendations 4 to 7 apply to

    (a) a defined benefit pension plan, other than any class of defined benefit plan that is prescribed by regulation;

    (b) subject to the regulations, a hybrid plan, insofar as it provides a defined benefit;

   if the pension is not in pay and

    (c) the plan is registered under the *Pension Benefits Act* or the substantive provisions of that Act apply to it;

    (d) the plan is registered under the federal *Pension Benefits Standards Act*;

    (e) the plan is not registered under the *Pension Benefits Act* but it is supplemental to a plan that is so registered and

      (i) it provides for the accrual of pension benefits in a gradual and uniform manner, and

      (ii) neither the formula for the employer's contributions to the plan fund nor the pension benefit provided is at the discretion of the employer; or

    (f) the plan is a member of such other class of defined benefit plan as is prescribed.

9. The ISM option discussed in Recommendations 4 and 5 also be available where a spouse is a member of a defined contribution plan, but the DSM option should not be available.

10. Ontario may wish to consider establishing a retirement fund into which non-member spouses who are entitled to a transfer pursuant to a pension division (see Recommendation 4, above) may place the transferred amount. The plan could also receive transfers from pension plans that wish to divest themselves of their "lost members". The plan would be a capital accumulation fund, that is, the benefit ultimately paid out to the individual would be based on the amount originally paid into the fund plus the yield on the fund's investment of that amount.

11. A settlement that is in accord with the ISM or DSM settlement regime be deemed to comply with the 50 per cent rule.

12. Ontario enact legislation permitting parties to waive the right to a split of CPP credits.

13. Where a common law relationship ends and one or both spouses is a member of a defined benefit pension plan, they may agree to have one or both pensions divided in accordance with the regime described in Recommendations 4 to 8.

ENDNOTES

1. R.S.O. 1990, c. F.3.
2. OLRC, Ministry of the Attorney General, Toronto, 1995.
3. References are to the law as of October 31, 2008.
4. R.S.C. 1985, c.C.8. The CPP is, of course, federal legislation, but section 55.2 of the CPP effectively authorizes provinces to enact legislation permitting parties to contract out of the CPP credit-splitting provisions that otherwise apply upon breakdown of the spousal relationship. Ontario, however, has not enacted such legislation. This is discussed in more detail, below, in section V ("Other Issues").
5. See Ari N. Kaplan, *Pension Law*, Irwin Law, Toronto, 2006, pp. 96-97.
6. Examples of such legislation include the *Teachers' Pension Act*, R.S.O. 1990, c. T.1 and the *Ontario Municipal Employees Retirement System Act, 2006*, S.O. 2006, c. 2. Strictly speaking, the plans in question were "continued" by these Acts, as the plans were established under predecessor legislation.
7. *Submission by the Canadian Institute of Actuaries to the Ontario Expert Commision on Pensions* (2007), pp. 6-7.
8. For example, the employer could become insolvent, as pointed out by Keith Ambachtsheer, "Cleaning Up The Pension Mess: Why it will take more than money" in *Backgrounder No. 78* (C.D.Howe Institute, Toronto, 2004), pp. 2-3. If insolvency occurs at a point when plan assets are insufficient to fund pension liabilities, employees may find their benefits reduced, perhaps quite substantially. (See discussion below, under heading *Wind-Up of Pension Plans*.)
9. Usually, of course, the years of highest earnings will be the employee's final years with the employer, but that is not always the case.
10. Jack Patterson, *Pension Division and Valuation: Family Lawyers Guide* (2nd ed.), Canada Law Book Inc., Aurora, 1995, p. 65.
11. Kaplan, note 5, p. 100.
12. The latter type of hybrid plan is sometimes referred to as a combination plan (OLRC, note 2, p. 13) or composite plan (Richard Shillington, *Occupational Pension Plan Coverage in Ontario*, statistical report prepared for the Ontario Expert Commission on Pensions, Infometrica Limited, 2007, p. 8).
13. Kaplan, note 5, p. 102.
14. Shillington, note 12, p. 14. It is not clear whether these figures exclude only Ontario employees in federal jurisdiction or whether they also exclude Ontario employees who are members of pension plans registered under the legislation of other provinces.
15. Shillington, note 12, pp. 14-15.
16. According to 2004 figures, over 80% of individuals who are members of a pension plan are in a defined benefit plan; see Kaplan, note 5, p. 3.
17. Shillington, note 12, p. 31, cites figures showing that in 1997 there were 1,112,000 members in defined benefit plans, 147,000 in defined contribution plans and 77,000 in combination plans, while the corresponding numbers in 2006 were 1,352,000, 268,000 and 102,000.
18. Shillington, note 12, p. 3. The numbers provided are for 2006.
19. According to Shillington (note 12, p. 3), there 955,000 men and 469,000 women enrolled in Ontario jurisdiction pension plans in 1985.
20. Shillington, note 12, pp. 10-12.
21. See Lynn MacDonald, "Gendered retirement: The welfare of women and the 'new' retirement" in *New Frontiers of Research on Retirement*, Leroy O. Stone (ed.), Statistics Canada, Ottawa, 2006, p. 157.
22. See Monica Townson, "The impact of precarious employment on financial security in retirement" in Stone (ed.), note 21, p. 364.
23. Part-time employees may be in a better position than other non-standard workers because of legislative protections that apply where the employer offers a pension plan that covers full-time employees; however, as Townson notes, such protections are of no avail where the employer does not offer any pension plan: Townson, note 22, p. 373.
24. Shillington (note 12, p. 45) cites Canada Revenue Agency figures showing that average reported pension income in 2004 for those aged 65 and over was $18,531 for males and $11,237 for females.
25. 30 & 31 Vict., c. 3 (U.K.).
26. Kaplan, note 5, p. 20.
27. Some Ontario jurisdiction pension plans are exempted from the PBA.
28. R.S.O. 1990, c. P.8.
29. R.S.C. 1985, c. 32 (2nd Supp). Interestingly, section 31 of the PBSA provides that provincial pension benefits legislation is deemed to apply to PBSA plans in relation to the payment of benefits and the designation of beneficiaries where the provincial legislation is not inconsistent with the PBSA. This provision has been held to make provincial legislation allowing the attachment of pension benefits to enforce arrears in support apply to benefits from a federally-regulated pension plan notwithstanding the absence of attachment provisions in the PBSA itself: *Vellow v. Vellow*, [1996] B.C.J. No. 904; 134 D.L.R. (4th) 657; [1996] 7 W.W.R. 96; 74 B.C.A.C. 284; 19 B.C.L.R. (3d) 322; 12 C.C.P.B. 1; 62 A.C.W.S. (3d) 750 (B.C.C.A.). Further, section 25 of the PBSA generally makes federally-regulated pensions subject to provincial matrimonial property laws. Despite this, it appears that some administrators of federally-regulated plans refuse to follow provincial law; see Thomas G. Anderson, "Pensions" in *Federation of Law Societies of Canada 2006 National Family Law Program*, p. 5.
30. See subsections 4(4) to (6) of the PBSA and section 4 of the *Pension Benefits Standards Regulations, 1985* (SOR/87-19) and Schedule I to the regulations. Pensions for federal public servants are provided under the *Public Service*

Superannuation Act (R.S.C. 1985, c. P-36). There are several other statutes providing pension plans for persons who might broadly be described as employees of the federal government, such as, for example, the *Royal Canadian Mounted Police Superannuation Act* (R.S.C. 1985, c. R-11).

31. R.R.O. 1990, Regulation 909.

32. Prince Edward Island has enacted pension benefits legislation (the *Pension Benefits Act*, S.P.E.I. 1990, c. 41) but the legislation has not been proclaimed in force.

33. Curiously, despite the 1970 agreement, there appears to be no corresponding exempting provision for plans in which a plurality of members falls under federal jurisdiction.

34. See Kaplan, note 5, p. 116. In July of 1993, the Canadian Association of Pension Supervisory Authorities (CAPSA) released a *Proposed Multilateral Agreement* (later revised) under which the pension legislation of the jurisdiction of registration would govern all matters related to pensions both for employees within the jurisdiction and those without; see Ian J. McSweeney, "Pension and Plan Member Relations" in *Pension and Plan Member Relations* (Tab 1), Emond Montgomery, 1997, p. 9. However, concerns were raised about that proposal, and more than fifteen years later efforts to replace the reciprocal agreements are still continuing. On October 21, 2008, CAPSA released a Consultation Document entitled *Proposed Agreement Respecting Multi-Jurisdictional Pension Plans*; the proposed agreement would see "plan matters" (matters affecting the plan as a whole, such as funding and registration) regulated by the jurisdiction having a plurality of plan members while the rules of the jurisdiction of the individual member would govern "entitlement matters" (matters dealing with individual rights, such as vesting and surplus distribution). If adopted, it would thus reflect what in any case seems to be the likely legal position. A multilateral agreement would presumably be implemented under section 93 of the PBA, which provides that the Minister of Finance may enter into agreements with authorities in such other jurisdictions as are "prescribed" that address the application of the PBA and the legislation of the other jurisdiction to "multi-jurisdiction pension plans" and the supervision and regulation of such plans. Where an agreement of this nature so specifies, subsection 95(5) goes on to provide that the legislation of one jurisdiction applies to the exclusion of the other to the extent specified in the agreement.

35. R.S.C. 1985, c. 1 (5th Supp.).

36. See paragraphs 6 and 7 of subsection 47(3) of the *General* regulation under the PBA.

37. Kaplan, note 5, p. 127.

38. Kaplan, note 5, p. 30.

39. Section 35.

40. In fact, the *Human Rights Code* (R.S.O. 1990, c. H.19) prohibits mandatory retirement, subject to certain exceptions.

41. Kaplan, note 5, p. 281.

42. PBA, s. 41.

43. Section 41 provides that the commuted value of the early retirement pension must not be less than the commuted value of the pension that would have been payable at the normal retirement date; in other words, the early retirement pension must be at least actuarially equivalent to the normal retirement date pension.

44. For example, where a full actuarial reduction is imposed, someone who retires at age 60 instead of age 65 would see a decrease of about 35 per cent (and this does not even reflect the impact of the forgone service credits and possible salary increases that would have been or may have been earned in the five extra years). See Jennifer Greenan, *Morneau Sobeco Handbook of Canadian Pension and Benefit Plans*, 12th ed., CCH Canadian Limited, 2002, pp. 38-39.

45. Kaplan, note 5, p. 283.

46. PBA, ss. 36-37. It should be noted that, although not stated explicitly in the PBA, the vesting rules in sections 36 and 37 apply only in respect of the basic pension benefit and not to "ancillary benefits" that can be offered under a pension plan in addition to the minimum benefits required under the PBA, such as disability pensions, unreduced early retirement pensions and other benefits enumerated in section 40. In the case of ancillary benefits, the benefit does not become vested until the employee meets the conditions for eligibility set out in the plan. See Kaplan, note 5, p. 269.

47. PBA. subsection 63(1).

48. PBA, subsections 67(1) and (2).

49. Subsection 50(2) creates a limited exception to this in the case of employees whose rights under a pension plan registered before 1988 vested under the pre-1987 vesting rules by allowing the employee to take 25 per cent of the commuted value of the deferred pension as an immediate cash payment.

50. PBA, s. 42.

51. PBA, s. 49 and s. 51.1 of the *General* regulation under the PBA.

52. The Canada Revenue Agency indicates on its web site that the YMPE amount for 2008 is $44,900. Two per cent of this amount would equal $898 or approximately $75 a month.

53. PBA, s. 50.

54. Kaplan, note 5, p. 248.

55. Section 51 of the FLA defines "domestic contract" as

> …a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement.

A "marriage contract" is effectively defined in section 52 as an agreement between married persons or persons intending to marry

> …in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including
>
> (a) ownership in or division of property;
>
> (b) support obligations;

> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs.

Section 54 refers to a "separation agreement" as agreement between persons who once cohabited but are living separately and apart

> …in which they agree on their respective rights and obligations, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children;
>
> (d) the right to custody of and access to their children; and
>
> (e) any other matter in the settlement of their affairs.

56. See *Trick v. Trick* (2006), 81 O. R. (3d) 241 (O.C.A.).
57. See section 56 of the *General* regulation under the PBA.
58. Anderson, note 29, p. 28.
59. OLRC, note 2, pp. 43-44.
60. This would appear to be the case even if the member remarried and the subsequent spouse had not waived her entitlement; see note 201.
61. Section 44.
62. Subsection 44(2) provides that the commuted value of the joint and survivor pension must not be less than the commuted value of the pension that would have been payable to the member as a single life pension.
63. Patterson, note 10, p. 44.
64. Section 44 of the PBA provides that

    > [t]he amount of the pension payable to the survivor of the former member and the spouse of the former member shall not be less than 60 per cent of the pension paid to the former member during the joint lives of the former member and his or her spouse.

    While this wording would seem to suggest that the pension could be reduced to the 60 per cent level if the spouse predeceases the former member, the common assumption seems to have been that the reduction occurs only where the former member predeceases the spouse. See, for example, David MacFarlane and Ian J. F. McSweeney, *Pension Benefits Law in Ontario*, Thomson Carswell, Toronto, 2003, p. PBA-144.11; OLRC, note 2, p. 15; Pension Valuators of Canada web site (http://www.pension.ca/), *Glossary of Terms*.
65. Ray Henry, "Public Sector Pension Plans: Current Challenges and Future Directions", presentation given as part of *Labor and Worklife Program*, Harvard Law School, October 27th-28th, 2005.
66. OLRC, note 2, p. 19.
67. Kaplan, note 5, p. 414. Subsection 14(0.1) of the *General* regulation under the PBA provides that this requirement does not apply where all benefits under a pension plan are defined contribution benefits.
68. Kaplan, note 5, pp. 412-413.
69. The PBA recognizes two categories of pension plan in respect of which the employer is not required by the PBA to make contributions in respect of a going concern liability or solvency deficiency; these are "multi-employer pension plans (MEPPs) and "jointly-sponsored pension plans" (JSPPs). A MEPP is a plan that covers employees of two or more employers that is established by agreement, statute or municipal by-law; if a plan is a MEPP, it must be administered by a board of trustees of whom at least half are representatives of the members. A JSPP could be a plan that covers employees of two or more employers, but it could also be a single employer plan. To be a JSPP the plan must, among other things, be contributory and provide defined benefits, be subject to joint decision-making by the employer or employers and plan members or their representatives regarding plan terms and administration and require that contributions in respect of any going concern unfunded liability or solvency deficiency be provided by plan members. (In the case of other pension plans, the latter responsibility would lie on the employer or employers.) A MEPP can be amended to reduce benefits; a JSPP, like other pension plans, cannot except in the case of a wind-up (as to which, see below). See Kaplan, note 5, pp. 96-98, 319-320 and 323-324, subsections 8(1) and (2), clause 8(1)(e) and sections 14 and 77 of the PBA and section 3.1 of the *General* regulation under the PBA.
70. Kaplan, note 5, pp. 417-418.
71. Kaplan, note 5, p. 268.
72. See Kaplan, note 5, p. 580 and pp. 582-583 and sections 10 and 10.1 of the *General* regulation under the PBA.
73. Kaplan, note 5, p. 407.
74. Kaplan, note 5, p. 410.
75. The Superintendent is the chief executive officer of the Financial Services Commission of Ontario. See section 5 of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28.
76. Kaplan, note 5, p. 504.
77. See section 69 of the PBA.
78. Kaplan, note 5, p. 511.
79. See clause 74(1)(b) of the PBA. Subject to some exceptions, their benefits are also locked in; see Kaplan, note 5, p. 533.
80. In the case of an individual termination, entitlement to an immediate pension would render the portability options unavailable. Even on wind-up, however, the portability options are not available to someone who is already in receipt of a pension. See Kaplan, note 5, pp. 533-534 and subsections 42(3) and 73(2) of the PBA.
81. Kaplan, note 5, pp. 535-536. Note, however, that the amount of the pension is still based on the actual years of service as of the wind-up date.
82. Kaplan, note 5, pp. 536-537.
83. Subsection 79(4).

84. Clause 8(1)(b) of the *General* regulation under the PBA. (Subsection 8(3) of the regulation provides that this provision ceases to apply after 2009; however, previous versions of the subsection provided for earlier "sunset" dates. At the time of writing it was not known whether the government would once again extend the application period.) What is appropriate is determined by the Superintendent; generally, two-thirds of the class has been considered to be appropriate, but the determination is made on a case-by-case basis and a lesser proportion may be considered appropriate in a particular case. See Kaplan, note 5, p. 579.

85. PBA, section 77.

86. Kaplan, note 5, p. 545.

87. PBA, section 85, paragraph 3.

88. PBA, section 85, paragraphs 4 and 5 and Kaplan, note 5, p. 549. For an explanation of MEPPs and JSPPs, see note 69.

89. Preamble to the FLA.

90. FLA, subsection 5(7).

91 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 an application is made for an order based on a danger of improvident depletion of family property under subsection 5(3) and the day before the date of a spouse's death.

92. See the definition of "net family property" in subsection 4(1) of the FLA.

93. FLA, subsection 4(5).

94. See, for example, section 56 of British Columbia's *Family Relations Act*, R.S.B.C. 1996, Chapter 128.

95. See *Boileau v. Boileau*, [2003] O. J. No. 607 (S.C.J.); *LeVan v. LeVan* (2008), 90 O.R. (3d) 1 (O.C.A.).

96. Berend Hovius and Timothy G. Youdan, *The Law of Family Property*, Carswell, Scarborough, 1991, p. 202.

97. R.S.O. 1980, c. 152.

98. Hovius and Youdan, note 96, p. 199-201.

99. FLA, subsection 4(1). The definition includes property over which a spouse has a power of appointment that could be exercised in her own favour and property disposed of a by a spouse who retains a power to revoke the disposition or to consume the property. Strictly speaking, a spouse with such a power does not own the property, but she clearly has control over it and the inclusion of such property is a necessary anti-avoidance measure. See Hovius and Youdan, note 96, p. 267.

100. See clause (c) of the "property" definition in subsection 4(1) of the FLA. In the legislation of four other provinces, the definitions of "family property" or similar terms expressly refer to rights under a pension plan; the provinces in question are British Columbia (*Family Relations Act*, note 94, s. 58); Manitoba (*The Family Property Act*, C.C.S.M. c. F25, s. 1); Prince Edward Island (*Family Law Act*, R.S.P.E.I. 1988, F.-2.1, s. 4); and Québec (*Civil Code of Québec*, S.Q., 1991, c. 64, a. 415). In the other five provinces, the courts have held that pensions constitute family property notwithstanding the lack of a reference to pensions in the relevant legislation; those provinces are Alberta (see *Herchuk v. Herchuk* (1983), 35 R.F.L. (2d) 327 [Alta.C.A.]); New Brunswick (see *Schwartz v. Schwartz* (1997), 188 N.B.R. (2d) 86 (N.B.C.A.); *Miller v. Miller*, (2003), 259 N.B.R. (2d) 132 (N.B.C.A.); Newfoundland and Labrador (see *Hierlihy v. Hierlihy* (1984), 48 Nfld. & P.E.I.R. 142; 142 A.P.R. 142 (Nfld.C.A.); Nova Scotia (see *Clarke v. Clarke* (1990), 73 D.L.R. (4th) 1 [S.C.C.]) and Saskatchewan (see *Tataryn v. Tataryn*, [1984] S.J. No. 205, 6 D.L.R. (4th) 77 [Sask.C.A.]).

101. See the definition of "spouse" in subsection 1(1) of the FLA. The definition creates an exception to the requirement of legal marriage where a person has entered into a voidable or void marriage in good faith. Subsection 1(2) provides that the reference to "marriage" in the subsection 1(1) definition includes a polygamous marriage if it occurred in a jurisdiction where such marriages are legally recognized as valid.

102. Subsection 1(1) of the PBA defines "spouse" as

> …either of two persons,
>
> (a) are married to each other, or
>
> (b) are not married to each other and are living together in a conjugal relationship,
>
> (i) continuously for a period of not less than three years, or
>
> (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child….

103. See the definition of "spouse" in section 29 of the FLA, which applies for purposes of Part III, dealing with support obligations, as well as the "cohabitation agreement" provisions in Part IV.

104. Only two provinces cover so-called "common law spouses" in their family property legislation, these being Manitoba (see *The Family Property Act* (note 100), subs. 2.1(1)) and Saskatchewan (see definition of "spouse" in subs. 2(1) of *The Family Property Act*, S.S. 1997, c. F-6.3). However, while Québec's matrimonial property rules do not apply to unmarried cohabitants generally, they do apply to those who have entered into a "civil union". (See article 521.6 of the *Civil Code of Québec*, S. Q., 1991, c. 64.) Prior to the Supreme Court of Canada decision in *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325; 221 D.L.R. (4th) 1, 32 R.F.L.(5th) 81, some had argued that the exclusion of so-called "common law spouses" was unconstitutional as being in conflict with the equality rights provisions of the *Canadian Charter of Rights and Freedoms* (the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11); see, for example, Gary S. Joseph, "Section 15 of the Charter—Equality Rights and Marital Status Discrimination: Rights of the Unmarried Cohabitant Upon Breakdown of the Relationship" (1990) 26 R.F.L. (3d) 235. However, in *Walsh*, that view was rejected. It should be noted that a common law spouse may nevertheless have a claim to share in property under the general law of unjust

enrichment; see Barbro E. Stalbecker-Pountney and Winifred H. Holland, *Cohabitation: The Law in Canada*, Carswell, Toronto, 1990, p. 2-6 and *Bigelow v. Bigelow*, [1995] O. J. No. 2395 (O.C.A.) where a constructive trust was imposed in respect of a pension. However, some consider that the law of unjust enrichment does not provide an adequate remedy (see the dissent of L'Heureux-Dubé, J., in *Walsh*, paras. 164-169), and in any case it certainly does not provide an entitlement in every case where common law spouses, one of whom is a member of a pension plan, separate. (For an example of a case in which the court found that there was no unjust enrichment and accordingly refused to impose a constructive trust on a common law spouse's pension entitlement, see *Janakowski v. Janakowski*, [2000] O. J. No. 2650 (O.S.C.).)

105. See note 55 for definitions of the terms "domestic contract", "marriage contract" and "separation agreement".

106. FLA, subsection 2 (10) and 52(2).

107. See paragraph 1 of subsection 4(2) of the FLA.

108 See clause (b) of the definition of "net family property" in subsection 4(1) of the FLA.

109. FLA, clause 5(6)(a).

110. FLA, clause 5(6)(b).

111. FLA, clause 5(6)(f).

112. FLA, clause 6(6)(e). An example of where this ground might apply would be in the case of a short-lived relationship where one spouse owned what became the matrimonial home prior to marriage, since the value of a property acquired by a spouse before marriage that becomes a matrimonial home, unlike other pre-nuptial property, cannot be deducted in determining that spouse's net family property; see Hovius and Youdan, note 96, p. 422. Hovius and Youdan also point out that clause 5(6)(e) refers to the "period of cohabitation" rather than the "period of marriage", suggesting that the entire time that the two parties lived together would be taken into account in determining whether the presumptive entitlement would be disproportionately large.

113. FLA, clause 5(6)(h).

114. It had been suggested that it might be appropriate for a court to award an amount greater or lesser than half the difference between the spouse's net family properties where an asset owned by one spouse undergoes a dramatic increase or decrease in value shortly after the valuation date; see Hovius and Youdan, note 96, pp. 446-447. However, it appears unlikely that the courts would make such an award where the cause of the change in value cannot be ascribed to the owning spouse; see *Serra v. Serra*, [2007] O .J. No. 446, 36 R.F.L. (6th) 66 (O.S.C.J.); *LeVan v. LeVan*, note 95.

115. FLA, subsection 5(2); Hovius and Youdan, note 96, p. 539.

116. R.S.O. 1990, c. S.26.

117. SLRA , section 45.

118. O. Reg. 54/95, s. 1.

119. SLRA, s. 46.

120. FLA, subsection 6(6).

121. The specific inclusion of pension rights in the FLA definition of "property" may be contrasted with the situation that had prevailed under the former FLRA, where pension rights were not mentioned in the definition of "family assets" and the courts had concluded that they were not subject to the FLRA provisions requiring equal division of such assets. (See, for example, *St. Germain v. St. Germain* (1980), 14 R.F.L. (2d) 186 (O.C.A.).) Whether the FLRA case law on this point was in fact sound seems very doubtful, however, in light of the later Supreme Court of Canada decision in *Clarke v. Clarke* (note 100), which held that a right under a pension plan was "matrimonial property" for purposes of Nova Scotia's family law legislation, even though that legislation did not expressly address the question of pensions.

122. See, for example, *Nix v. Nix* (1987), 11 R.F.L. (3d) 9 (O.H.C.).

123. James MacDonald and Ann Wilton, *The 2008 Annotated Ontario Family Law Act*, Thomson Carswell, Toronto, 2007, p. 71. See, for example, W*ard v. Ward* (1988) , 13 R.F.L. (3d) 173 (O.H.C.), *Flynn v. Flynn* (1989), 20 R.F.L. (3d) 173, *Bascello v. Bascello* (1995), 26 O.R. (3d) 342, [1995] O. J. No. 2989 (O.C.[G.D.]) and *Green v. Green* (2007), 38 R.F.L. (6th) 378, [2007] O.J. 454 (O.S.C.J.). Interestingly, the latter case shows that the question of whether unvested rights are property can still loom large despite the relatively short vesting period for post-1986 service provided for in the PBA, as *Green* dealt with a supplementary employee retirement plan that had vesting requirements that were much stricter than those set out in the PBA.

124. See Hovius and Youdan, note 96, p. 478, n. 34.

125. Where an employee terminates employment prior to vesting, she is not entitled to any employer contributions but only to a return of her own contributions with interest: see OLRC, note 2, p. 107.

126. Hovius and Youdan, note 96, pp. 494-495; 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.

127. One expert has suggested that a pension in a defined benefit plan is frequently worth two to two and one-half times the contributions; see Thomas G. Anderson, note 29, p. 32.

128. Patterson, note 10, p. 21.

129. Patterson, note 10, pp. 21-22.

130. This will usually be an actuary or someone with a mathematical background and training in property valuation.

131. *Boston v. Boston*, [2001] 2 S.C.R. 413, at para. 32. Although the Court seemed to assume that valuations are always carried out by actuaries, that it not the case; as indicated in note 130, the valuator may be a non-actuary with a mathematical background and training in property

valuation. It is true that solvency valuations of a defined benefit pension plan must be performed by a fellow of the Canadian Institute of Actuaries (see section 14 of the *General* regulation under the PBA and the definition of "actuary" in section 1 of the regulation); however, there is no requirement in Ontario that a valuation of a spouse's interest in a pension plan for family law purposes be performed by a fellow of the Institute, and many such valuations are in fact performed by non-actuaries.

132. Some cases decided shortly after the coming into force of the FLA used the contributions approach in valuing rights under a defined benefit plan, but expert opinion seems to be unanimous in holding that that approach is generally inappropriate; see Hovius and Youdan, note 96, pp. 494-497, McSweeney and Rienzo, note 126, p. 485, Patterson, note 10, p. 58. One may infer that the Supreme Court of Canada is of the view that the present value approach is the preferred approach for defined benefit pensions from the discussion of the differences between defined contribution plans and defined benefit plans at paragraphs 29 to 33 of the Court's decision in *Best v. Best*, [1999] 2 S.C.R. 868 and from its approval of the termination method and (as an alternative in some situations) the retirement method, both of which are present value approaches.

133. Section 56 of the *General* regulation under the PBA prescribes a method of valuation for purposes of the "50 per cent" rule in subsection 51(2) of the PBA, but while this can be relevant to the question of how the equalization requirement should be satisfied once the net family properties of the spouses have been determined, it is not prescribed as the method for determining value for net family property purposes and generally has not been used for such purposes.

134. See, for example, Kaplan, note 5, p. 305.

135. *Best v. Best*, note 132, paras. 88-93. In discussing the possibility that the retirement method might be used in some cases, the Court seemed to suggest that it would be appropriate where the likely retirement date was fairly close at the time of valuation, as there would be a lesser degree of speculation than in the case where retirement would probably only occur at a more remote date.

136. *Humphreys v. Humphreys* (1987), 7 R.F.L. (3d) 113, at p. 121 (O.H.C.J.).

137. This seems to be the point being made by certain judicial authorities and other sources cited in Hovius and Youdan, note 96, p. 501.

138. *Humphreys v. Humphreys*, note 136, at p. 121.

139. The member may die without having retired and come into receipt of a pension.

140. Note 123.

141. Ironically, the *Bascello* court used the real interest retirement method even though the case before it involved a private sector plan that was not indexed. The court's reasoning was that the plan sponsor would have to fund the plan at a level sufficient to ensure ability to pay pensions based on the plan members' highest years of earnings; however, as Patterson, note 10, p. 175 and p. 194, observes, actuarial valuation for plan funding purposes is not based on the same principles as valuation of the interest of an individual member for marriage breakdown purposes. In the case of the latter, for plans that are not indexed, actuaries would typically use a higher discount rate reflecting market rates rather than the real interest rate, which results in a lower value than a discount based on real interest rates; see Patterson, note 10, p. 173.

142. Patterson, note 10, pp. 127-128.

143. Her age and years of service at valuation date adding up only to 66, with her years of service treated as frozen, the employee would not achieve factor 90 for another 24 years, at which time she would be 69 years old, four years past the normal retirement date.

144. The employee's age and years of service at valuation date add up to 66; if she continues in her employment to age 57, she will at that time have 33 years of service and meet the factor 90 qualification.

145. See, for example, *Deroo v. Deroo* (1990), 28 R.F.L. (3d) 211 (O.S.C.).

146. See, for example, *Weise v. Weise* (1992), 99 D.L.R. (4th) 524, 12 O. R. (23d) 492 (O.C. [G.D.]. Such a discount might not be allowed where the possibility of pre-retirement termination is viewed as remote: *Alger v. Alger* (1989), 21 R. F. L. (3d) 211 (O.S.C.).

147. Patterson, note 10, p. 216.

148. .See James G. McLeod, Annotation to *Best v. Best* (1999) 49 R. F. L. (4th) 10, at 13.

149. At para. 168. Interestingly, in *Best v. Best*, note 132, paras. 43 and 44, the Supreme Court of Canada referred to the method used in that case as "a termination method", notwithstanding its awareness that it did not reflect a pure termination approach.

150. *Standard*, p. 4.

151. *Standards*, para. 4320.22.

152. *Standards*, para. 4330.07.

153. [1995] O. J. No. 4147, 27 O.R. (3d) 255, affirming [1993] O. J. No. 2093, 15 O. R. (3d) 521.

154. The seeming contradiction in selecting the date on which the employee would first qualify for an unreduced pension as the likely date of retirement but valuing the pension as if it were a reduced pension was not explained. The decision is strongly criticized as doing "a real disservice to the non-member spouse" by Catherine D. Aitkin in "An Overview of the Treatment of Pensions under Ontario Family Law" in Patterson, note 10, pp.277-355, at p. 309.

155. James G. McLeod, "Ontario" in James G. McLeod and Alfred A. Mamo, eds., *Matrimonial Property Law in Canada*, Thomson Carswell, Toronto, 1980, p. O-65.

156. 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 91.
157. See McLeod, note 148, p. 15. This view also formed part of the basis for the minority dissent in *Best*, note 132.
158. Note 132, para. 87.
159. See, for example, *Forster v. Forster* (1987), 38 D. L. R. (4th) 481, 59 O.R. (2d) 609, [1987] O. J. No. 1167 (O.H.C.J.).
160. See, for example, *Rezler v. Rezler*, [1992] O.J. No. 2438 (O.C. [G.D.]) The court in *Bascello* (note 123) recommended this approach where there was no independent evidence to support either spouse's testimony concerning the member's spouse's likely retirement date.
161. The Court rejected the use of a presumption of the earliest unreduced retirement date in *Kennedy v. Kennedy*, [1996] O. J. No. 1167 and the use of a mid-way point presumption in *Huisman v. Huisman*, [1996] O. J. No. 2128.
162. Note 132, para. 103-104.
163. The Court allowed that where the retirement method was used, resort to hindsight evidence as to the retirement age might be appropriate. Note 132, para. 105.
164. The arguably bizarre result in *Best* itself was that the employee was assumed to have retired at age 57.4 years, even though he did not in fact retire until approximately four years later and moreover while the case was still before the courts.
165. Note 132, para. 104.
166. The OLRC made a recommendation to similar effect, but appears to have conceived of it as a fixed rule, and not a mere presumption rebuttable on the basis of independent evidence; see OLRC (note 2), p. 130.
167. Consider a final average plan that limits the accrual of service credits to 35 years. If the member reaches this limit before attaining the age that lies at the mid-way point between the normal retirement date and the earliest unreduced retirement date, he is unlikely to continue in employment to the mid-way point, since otherwise he would be working for only a relatively small amount more than he would receive by way of a pension.
168. An exception may lie where there the individual concerned has a serious health problem that is likely to result in an early death; see E. Diane Pask and Cheryl A. Hass, *Division of Pensions* (Carswell, Toronto, 1990), p. V-13.
169. See, for example, Jack Patterson, "Determining a Realistically Low Value for Employee's Pension (in Spite of Unrealistically Large Claims Being Made by the Spouse)", (1987) 1 C.F.L.Q. 365-384, at 371.
170. As Pask and Hass (note 168, p. V-12) wryly note,

    > [a]ccording to the respective mortality tables, individuals who purchase life insurance have higher mortality rates than do annuity purchasers.

171. Pask and Hass, note 168, p. V-12.
172. This is the "GAM83" (1983 Group Annuity Mortality Table) published in *Transactions of the Society of Actuaries*, vol. XXXV, pp. 880-881.
173. McSweeney and Rienzo, note 126, p. 498.
174. *Best v. Best* , [1992] O. J. No. 1464, 9 O.R. (3d) 277.
175. *Standards*, para. 4320.27.
176. *Standards*, paras. 4330.10 to 4330.13. The LCO understands that, as in the case of the currently prescribed mortality table, the direction concerning interest rates is under review by the Institute.
177. The *Standards of Practice* direct an actuary to "assume continuance of the plan's established practice or current policy" with regard to *ad hoc* indexing; see para. 4320.24.
178. *Submission of the Canadian Institute of Actuaries to the Law Commission of Ontario*, August 2008, p. 8.
179. The reference to "valuation" may be somewhat misleading, in that the courts have held that the FLA requires that the pension rights must always be valued, even if settlement takes the form of an "if and when" arrangement (as to which, see below); see *Marsham v. Marsham* (1987), 59 O. R. (2d) 609, 7 R.F.L. (3d) 1 (H.C.J.).
180. Pask and Hass, note 168, p. VII-7.
181. See section 9 of the FLA.
182. Note 131.
183. Christine Davies, *The Ever-Changing Picture of Support and Other Developments* (2002-2003), 20 C.F.L.Q. 213-241, at 237.
184. *Boston v. Boston*, note 131, para. 57.
185. This point was made in *Walker v. Walker*, [2001] O. J. No. 4081 (Ont. Sup. Ct. Just.), discussed in G. Edmond Burrows, *Disability Benefits and Other Assets* (2004-2005), 23 C.F.L.Q. 145-198, at 173.
186. The PBA permits this subject to certain restrictions; see discussion below.
187. OLRC, note 2, p. 37.
188. It should be noted that subsection 51(1) of the PBA provides that a domestic contract or order made under Part I of the FLA is not effective to require payment of a pension benefit before the earlier of the member's normal retirement date and the date on which the pension commences, which would seem to suggest the possibility of an "if and when" arrangement requiring payment to the non-member spouse to begin at the member's normal retirement date if the member postpones retirement beyond that date; however, precisely how such an arrangement would be implemented is not clear, and such payment to the non-member spouse may in any case be prevented by the ITA. (See MacFarlane and Sweeney, note 64, p. 144.30.)
189. 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.

190. See subsection 2(10) of the FLA, which provides that a domestic contract generally prevails over FLA requirements.

191. Less, of course, the present value at marriage where the member spouse had joined the pension plan prior to marriage.

192. For a dramatic illustration of this, see Pask and Hass, note 168, 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.

193. 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* (note 179), 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 raised the question of 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).

194. 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. Interestingly, the Ontario Court of Appeal has firmly rejected an "if and when" approach in the context of the post-separation date exercise of stock options as being inconsistent with scheme of the FLA; see *Ross v. Ross*, [2006] O. J. No. 4916, 83 O.R. (3d) 1, 277 D.L.R. (4th) 478.

195. R.R.O. 1990, Reg. 909, s. 56.

196. OLRC, note 2, p. 44. The obvious solution would be for the member to make up the balance through monthly remittances to the non-member spouse, but 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 member-spouse, that being that the spouses would not be required to have further dealings with each other on pension issues. Further, as was noted by Sheryl Smolkin and Janet Downing,

> …the spouse would have no further recourse against the plan if the member retires out of the country and stops sending the top-up checks.

("Pension Credit-Splitting Pitfalls" in Canadian Bar Association – Ontario 1993 Institute of Continuing Legal Education Family Law: *Voodoo Economics for Women*, p. 30.)

197. OLRC, note 2, p. 44.

198. Presumably the limit would be set at the point at which the member spouse's equalization debt would be satisfied; however, while this type of arrangement is more consistent with what the FLA presumably intended than other types of "if and when" arrangements, it obviously could be more burdensome for plan administrators.

199. 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.

200. Pask and Hass, note 168, p. VII-20.

201. 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. However, while a former spouse as such is not entitled to a pre-retirement death benefit under section 48 of the PBA, a separation agreement or order could assign to her an interest in the benefit, at least where there was at the time the agreement or order was made no subsequent spouse; in that case, even if the member spouse later acquired another spouse, an agreement or order assigning part of the death benefit to the former spouse would be enforceable and binding on the plan and the surviving current spouse: *Stairs v. Ontario Teachers' Pension Plan Board*, [2004] O. J. NO. 331, 70 O.R. (3d) 61 (O.C.A.). (Query, whether an agreement or order to similar effect would be so enforceable and binding where the member had already acquired another spouse before the agreement or order was made. The case of *Suchotawsky v. Metropolitan Life Insurance Company*, [1993] O.J. No. 1650 (O.C.J. [G.D.]) suggests that it might. There, a court had, pursuant to a divorce judgment, ordered that the former wife should receive a share of the pre-retirement death benefit under the husband's pension plan in the event that he died prior to retirement; however, the member had previously designated as beneficiary another individual with whom he was cohabiting but who had not lived with him long enough to qualify as a "spouse" under the PBA definition. It was nevertheless held that the former spouse was entitled to the benefit. Of course, given the scheme of section 48, which accords precedence to spouses, it cannot be said with certainty that the same result would have obtained had the individual in question possessed spousal status under the PBA at the time of the order.)

202. The annuity payments must not begin before the earliest date on which the member would have been entitled to have his pension come into pay under the pension plan.

203. McSweeney and Rienzo, note 126, p. 488.

204. This possibility was raised in two submissions to the LCO: Ontario Bar Association, *OBA Submission to the Law Commission of Ontario on Division of Pensions Upon Marriage Breakdown*, August 15th, 2008, p. 25, and Ontario Teachers' Pension Plan, *Dividing pensions on marriage breakdown A fair and simple approach,* August 15th, 2008, p. 13.

205. Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick and the territories all use a version of the ISM; it is also the method used under the federal *Pension Benefits Division Act* (S.C. 1992, c. 46, Sch.II), which applies to federal government employees. Under the federal PBSA, which applies in respect of federal jurisdiction private sector employees, pension division is generally governed by the relevant provincial family property law; however, the PBSA does allow a member to make an assignment to a former spouse or common law partner that has the effect of making both ISM and DSM solutions accessible.

206. British Columbia, Nova Scotia and Newfoundland and Labrador use a DSM approach.

207. The term "Deferred Settlement Method" appears to have been conceived by the Canadian Institute of Actuaries Task Force on the Division of Pension Benefits Upon Marriage Breakdown, which presented draft papers on the subject in 1997 and 1998 and published a final report, *Division of Pension Benefits Upon Marriage Breakdown*, in 2003.

208. Anderson, note 29, p. 5. British Columbia's *Family Relations Act* uses the term "limited member" to describe the non-member spouse's status vis-à-vis the plan.

209. Arguably, it is somewhat misleading to characterize the various provincial regimes simply in terms of whether they have adopted the ISM or the DSM, for in some ostensibly ISM provinces the parties are offered a choice of options, some of which reflect elements of a DSM approach, and in some supposedly DSM provinces the parties are offered a choice of options, some of which reflect elements of an ISM approach. For example, in Alberta, which is usually identified as an ISM province, the parties can adopt a DSM solution (albeit only if the member is within ten years of pensionable age and the plan is willing to offer the non-member spouse a separate pension). And British Columbia, which is usually identified as a DSM province, offers in addition to the option of a separate pension for the limited member the option of a "transfer out" to another plan, a locked-in retirement vehicle or deferred annuity (albeit that the transfer does not occur until the member becomes eligible to retire or terminates his membership in the plan).

210. See OLRC, note 2, chapter 7.

211. See Thomas G. Anderson, Submission to the LCO re: Division of Pensions on Marriage Breakdown, pp. 9.

212. See Hovius and Youdan, note 96, p. 488; OLRC, note 9, p. 265.

213. The legislation of three provinces expressly provides that parties may contract out of the CPP division of credits provisions; they are Alberta (*Family Law Act*, S.A. 1993, c. F-4.5, 82.2), British Columbia (*Family Relations Act*, note 94, s. 62) and Saskatchewan (*The Family Property Act*, note 104, subs. 38(5)). Article 422 of the *Civil Code of Québec* (note 100) allows a court to order that there not be a partition of earnings registered under the Québec Pension Plan or "similar plans"; the section provides a non-exhaustive list of grounds to which the court may have regard in making such an order, and it has been suggested that, while not expressly mentioned in the section, the fact that the parties have agreed that there should not be a partition would be a ground that a court could consider. See Richard McConomy and Carolle Tremblay, "Québec" in James G. McLeod and Alfred A. Mamo, eds., *Matrimonial Property Law in Canada* (Thomson Carswell, Toronto, 1980), p. Q-19.

214. [1989] O.J. No. 1844.

215. [1990] O.J. No. 3101.

216. This was recommended by the OLRC, note 2, at p. 267.

217. Hovius and Youdan, note 96, p. 492.

218. The LCO notes that in its 1995 *Report on Pensions as Family Property: Valuation and Division* (note 2), the former OLRC recommended that its proposed pension division-at-source scheme apply to cohabiting opposite-sex and same-sex couples (although it acknowledged that coverage of the latter would have to await then-anticipated amendments to the PBA and the ITA, the spousal definitions of which did not at the time include same-sex couples). However, part of the background to this recommendation was the fact that in an earlier report, the 1993 *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Ministry of the Attorney General, Toronto), the OLRC had recommended that common law spouses be covered by the family property provisions of the FLA generally. As the instant LCO report is not concerned with family property generally, but only with pensions, we do not think it appropriate to address here the question of whether common law spouses should be covered by Part I of the FLA (although we are recommending that they should be able to access the ISM and DSM settlement mechanisms where they wish to settle their affairs and to resort to pension division in order to do so — see Recommendation 13 in section VI).

219. This example is a variation of an example provided by the OLRC, note 2, p. 170.

220. Hovius and Youdan, note 96, p. 478.

221. OLRC, note 2, pp. 104-106.

222. The Canadian Institute of Actuaries' 1993 *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump Sum Equalization Payments* referred only to the termination method and the retirement method.

223. Consider the example of a pension plan with a factor 90 unreduced early retirement option and a normal retirement date of age 65, and a member who joins the plan at age 30 at about the same time she married and who divorces at age

50. She will achieve factor 90 at age 60, but only because the service credits earned while she was married are counted; without those credits, she would not achieve factor 90 before reaching the normal retirement age in the plan.

224. See note 209.

225. One firm of actuaries estimated that in 95% of marriage breakdown cases in which a spouse's family property included rights under a pension plan, equalization was achieved without dividing the pension: Dilkes, Jeffery & Associates, Inc. *Submission to the LCO re: Division of Pensions on Marriage Breakdown*, p. 6.

226. Mary Condon, "Gendering the Pension Promise in Canada: Risk, Financial Markets and Neoliberalism" in *Social & Legal Studies* 10: 83-103, 85.

227. With one exception, pension division regimes in Canada that have adopted the ISM approach use commuted value. The exception is under the federal *Pension Benefits Division Act* [S.C. 1992, c. 46, Sch. II] (PBDA), which applies to employees of the federal government. One might speculate that the sponsor of plans to which the PBDA applies can afford the risks inherent in using a method of valuation more favourable to the non-member spouse than the commuted value approach.

228. The *General* regulation under the PBA currently prescribes the types of retirement vehicles that are permitted for transfer purposes.

229. As was noted above in Section V, under the heading "Lump Sum Transfer on Termination".

230. In some cases, the amount that would otherwise be transferred into one of the four vehicles described above may exceed the amount that is tax-sheltered under the ITA. In such cases, the excess would be paid directly to the non-member spouse in cash.

231. We note that the OLRC, in recommending that parties have a "benefit split" option, did not think it appropriate to limit its availability to cases in which the member was within ten years of normal retirement date, although it did suggest that the option be seen as a "last resort", to be utilized only where other settlement approaches were not feasible; see OLRC, note 2, p. 202.

232. We note that several provinces, including all three DSM provinces, provide for a fee to be paid to the plan administrator in cases of pension division on marriage breakdown. See the *Employment Pension Plans Regulation* (Alberta Regulation 35/2000, s. 61); the *Division of Pensions Regulation* (B.C. Reg. 77/95, s. 13); the *Pension Benefits Act Regulations* (N.L.R. 114/96, s. 28); the *Pension Benefits Regulation* (N.S. Reg. 352/2008, s. 80); and the *Supplementary Pension Plans Act* (R.S.Q., c. R-15.1, s. 110.1).

233. The member's pension might be subject to an adjustment for age, depending on the terms of the plan. Some plans might provide for an increase where the member retires after normal retirement date, while others might not.

234. Note 227.

235. Most of the provinces have a similar 50 per cent rule; see the *Employment Pension Plans Act* (R.S.A. 2000, c. E-8, s. 63; the *Family Relations Act* (note 94, s. 75.1); the *Pension Benefits Act* (S.N.B. 1987, c. P-5.1); the *Pension Benefits Act, 1997* (S.N.L.1996, c. P-4.01, s. 47); the P*ension Benefits Act* (R.S. [Nova Scotia], c. 340, s. 61; the *Supplemental Pension Plans Act* (note 232, s.110) and the *Regulation Respecting Supplemental Pension Plans* (R.Q., c. R-15.1, r. 1, s. 49); and the *Pension Benefits Act,* 1992 (S.S.1992, c. P-6.001, s. 46). In British Columbia and Quebec, a court order may allow the 50 per cent limit to be exceeded. The Quebec 50 per cent rule refers to the value of benefits accrued both during and before the member's marriage. Interestingly, while the 50 per cent rule in Nova Scotia, like that of most of the provinces, is based only on the pension benefit earned during marriage, under its *Matrimonial Property Act* (R.S., c. 275) the pre-marital portion of a pension (and not just the portion earned during marriage) is considered to be a matrimonial asset. (In *Morash v. Morash* (2004), 221 N.S.R. (2d) 115, the Nova Scotia Court of Appeal rejected the view that there was any conflict between the MPA and 50 per cent rule, holding that the MPA was concerned with the question of entitlement to a share in the value of matrimonial property while the rule simply limited the extent to which the entitlement could be satisfied through division of the pension.) The PBDA (note 227, s. 8), which applies to public sector pensions in federal jurisdiction contains a 50 per cent limit; in contrast, the PBSA (note 29, s. 25), which applies to private sector pensions in federal jurisdiction, explicitly permits the entire value of a member's pension to be assigned to a spouse.

236. [2003] O. J. No. 2098, 23 R.F.L. (6th) 94 (S.C.J.).

APPENDIX

ORGANIZATIONS AND INDIVIDUALS PROVIDING INPUT

The LCO wishes to recognize the following organizations and individuals, who either made submissions or provided substantial information during the course of this project:

1. Athos Sani
2. Canadian Institute of Actuaries
3. Canadian Life and Health Insurance Association Inc.
4. CAAT Pension Plan
5. Cynthia Crysler
6. Dale Montpetit
7. David Wolgelerenter
8. Dilkes, Jeffery & Associates, Inc.
9. Hospitals of Ontario Pension Plan
10. Imperial Oil Limited
11. Klotz Associates
12. Krofchick Valuation Partners
13. K-W Actuarial Services Inc.
14. OMERS
15. Ontario Bar Association
16. Ontario Pension Board
17. OPSEU Pension Trust
18. Pension Appraisal Solutions Inc.
19. Pension Valuators of Canada
20. Peter Martin
21. Sherry Cohen
22. Teachers' Pension Plan
23. The Association of Canadian Pension Management
24. Thomas G. Anderson
25. Wendela Napier

Law Commission of Ontario
Computer Methods Building
4850 Keele Street, Suite 201
Toronto, Ontario, Canada
M3J 1P3

T: (416) 650-8406
F: (416) 650-8418
E: LawCommission@lco-cdo.org
www.lco-cdo.org

LCO
CDO

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO