

**The Family Lawyer's Survival Guide to Pensions
in the Post-January 1, 2012 World**

November 1, 2012 Version

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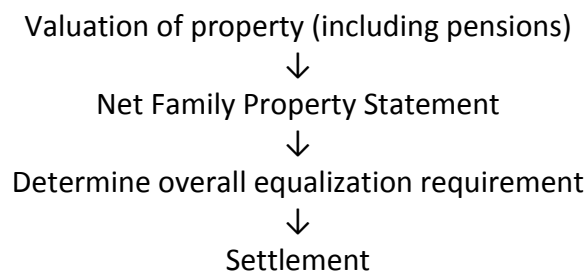
Key Features of the New Ontario Rules

- Single one-size-fits-all value (all plans)
- Administrator must determine value, if asked (Ontario plans)
- Value determined, usually, by an independent actuary (other plans)
- Simpler at-source division (Ontario plans only)

Incorrect Perception: Division is Automatic

Under the new rules, division is neither automatic, nor mandatory, nor the default resolution.

No Essential Change to the Proper Legal Process



Methods of Settlement

1. "Other" property (cash, home, cottage, RRSPs, etc.)
 - Member's pension not touched, not affected
2. "At-source" pension transfer/division
 - Important note: neither automatic, nor mandatory, nor default
 - Lump sum to a locked-in RRSP, not cash (if not retired at separation)
 - Share of monthly pension (if retired at separation)
 - Maximum 50% of imputed value (transfer) or 50% of monthly pension accrued during the marriage (division)

3. Combination of the above
 - Pension transfer/division to maximum transferable/divisible amount, up to amount required to complete the equalization

Important Note

For Ontario plans, if you decide to short-circuit the above process by leaving the pension out of the equalization calculations and going straight to at-source division of the pension, remember that:

- Proper prescribed forms have to be used and proper processes have to be followed.
- Valuation is a mandatory first step before a transfer or division can be implemented (apply for the valuation using FSCO Forms 1 and 2, with Form 3 optional). The plan administrator of an Ontario plan is not permitted to implement a pension transfer or division until after the administrator has prepared a valuation (FSCO Form 4)
- Agreement on the separation date is required (FSCO Form 2).
- Written agreement from both spouses, or a court order, is required for a division to be implemented (FSCO Form 5 or 6).
- Only the spouse can apply for a pension division (FSCO Form 5 or 6).
- A clearly worded separation agreement must accompany the application.
- Dealing with one asset (like the pension) in isolation may result in calculation errors in the NFP statement in some instances.
- If the member was retired at separation (Statement of Family Law Value is on Form 4E), a division of the member's pension at the maximum allowable amount will usually result in an unfair division if the value of the spousal survivor benefit is excluded from the NFP statement.

The essential changes for Ontario-registered plans are:

1. Valuation will be performed by the plan administrator
 - Will provide single "Imputed Value" (a.k.a. "Family Law Value") on a prescribed form
 - Regardless of fact situation (one size fits all)
 - Not adjusted for income tax
2. At-source division much easier (lump-sum transfer unless retired at separation)
3. After December 31, 2011, new if-and-when arrangements are prohibited
4. Depending on the wording of the separation agreement, amounts transferred from the pension plan may be automatically adjusted for interest from the separation date to the transfer date

Who will prepare the valuation?

1. The plan administrator

- Prescribed forms and processes must be followed
- Will take time (up to 60 days, or more – turnaround is improving as time passes)
- Fee payable in advance: up to \$600 plus HST (defined benefit) or \$200 plus HST (defined contribution) for each separation date
- Most private sector plans are charging the maximum fee
- Most public sector plans are providing valuations at no charge (OMERS is the exception, charging the maximum fee)

Ontario-registered plans (PBA)

- Ontario Teachers', OMERS, HOOPP, OPSEU, Ontario Public Service, Hydro One, Ontario Power Generation, CAAT, CAW and other auto industry plans, insurance companies, universities, most union-sponsored plans, most smaller businesses

Plans registered in other provinces (but with Ontario operations)

- Usually a midsize to large company with employees across the country and a head office outside of Ontario, or an employer with operations only in another province
- Sobeys, Wawanesa Insurance, as examples

2. Your friendly neighbourhood actuary

Federally-registered plans (PBSA)

- For example: Air Canada, CN, CP, Bell Canada, Bruce Power, Canada Post, the big banks
- Beware of any values from a federally-registered plan that are not on the official FSCO forms (Forms 4A, 4B, 4C, 4D, or 4E). Such values will almost certainly not be in accordance with the new regime.
- The independent actuary's valuation report should state that the valuation is in accordance with the new regime.

Non-registered plans

- Supplemental plans (mostly highly-paid – \$150,000+ – executives where benefits from the base registered plan are capped by the Income Tax Act, also highly-paid public sector employees), sometimes called RCAs or SERPs
- Partnership agreements (accountants, lawyers)
- Provincial judges
- Beware of any values from a non-registered plan that are not on the official FSCO forms (Forms 4A, 4B, 4C, 4D, or 4E). Such values will almost certainly not be in accordance with the new regime.
- The independent actuary's valuation report should state that the valuation is in accordance with the new regime.

Federal government employees ("Superannuation Acts")

- Canadian Public Service, RCMP, Armed Forces, federal judges, members of parliament
 - For these plans, the Pension Benefits Division Act (PBDA) applies
 - The PBDA value ("maximum transferable amount") is determined on a different basis from Ontario imputed value rules
 - The PBDA value (on this different basis) is the "spouse's portion" (50% of "total") and is not adjusted for income tax
 - PBDA value may be significantly different from Ontario imputed value
 - If the member is retired, a PBDA transfer results in the spousal survivor benefit being cancelled
 - Again, beware of any values not provided on the official FSCO forms (Forms 4A, 4B, 4C, 4D, or 4E)!

Foreign pensions

- From employment or residence in a foreign country

Watch Out for these Common Non-trivial Valuation Issues

1. Income tax adjustment

- Up to you to guesstimate, or get an expert opinion
- Member's solicitor may typically guess high
- Spouse's solicitor may wish to challenge, where values warrant
- Accountant's opinion likely to focus on current marginal tax rates, resulting in a high rate not consistent with established legal precedent

2. "Missing" components of value

- "30 and out", etc. – CAW (GM), Brewers' Retail, Labatt Wage, etc.
- Bridge benefits – if plan's normal retirement age is prior to 65
- Non-guaranteed indexing – Ontario Teachers' (!), CAAT (!), CAW, large private sector companies (banks, insurance companies), etc.
- "Excess" member contributions – Ontario Teachers', OMERS, HOOPP, OPSEU, Ontario Public Service, OPG, TTC, CAAT (most common when separation occurs during the first few years of plan membership)
- AVCs – Additional Voluntary Contributions are shown in Form 4, but not included in the Family Law Value (should be added to NFP Statement as a separate item, apply income tax adjustment)
- Ancillary Flex Contributions – defined contribution account balance may not be disclosed
- For all of these components, good argument for valuation as family property even though excluded from administrator's determination of imputed value
 - Should be considered a separate contingent asset

3. Inclusion of Spousal Survivor Benefits

- Property that may crystallize as the property of a future spouse is included as a (valuable) element of the member's pension property!

4. Less than full disclosure

- Supplementary executive plans, optional defined contribution plans, ancillary flex accounts, etc.
- Predecessor plans (hourly to salaried, divestments, government restructuring, corporate mergers and acquisitions, etc.)
- If you represent the spouse, you should insist that the plan member obtain from the employer a list of the names of all the registered and non-registered pension and savings plans that the member belongs to, including plans where benefits are frozen and predecessor plans from other employers where applicable.

5. “Deemed arrears”

- Automatic retroactive application of division of a retired member’s pension, even if the member has been dividing the pension himself prior to time of settlement

6. Buybacks

- Buybacks of pre-marriage service
- Any buybacks not fully paid for at separation
- No guidance in regulations
- Inconsistency in how administrators are handling

7. “Hybrid” or combination plans

- Arcelor Mittal/Dofasco, many university plans
- Regulations incomplete
- Not clear how administrators are handling

8. Transcription Errors – Law Firms

- The “Family Law Value” on page 2 of Form 4 (A, B, C, or D) should be adjusted for income tax, and then inserted into the NFP statement as the member’s property.
- For retired members, the Family Law Value of the member’s pension (member’s property) and the Family Law Value of the spouse’s survivor benefit (spouse’s property) are on page 2 of Form 4E. Both should be adjusted for income tax, and then inserted into the correct column of the NFP statement.

9. Transcription Errors – Administrator

- You may wish to confirm that the Family Law Value on page 2 of Form 4 is the same as the Family Law Value in the worksheet pages at the end of the Form.
- For a spousal survivor benefit, you may wish to confirm that the Family Law Value on the last page of Form 4E is equal to the Preliminary Value on the same page.
- If you believe there is an error, an independent actuary can review/critique the Form or you can ask the administrator to confirm their calculations.

10. Calculation Errors

- Most administrator errors will not be apparent to the member or the lawyer, because they pertain to a misapplication of the regulations in the context of the specific pension plan provisions.
- May benefit the plan member or the non-member spouse, depending on the plan provisions and the type of error made

Unusual (Sometimes Unconscionable?) Situations

1. Shortened life expectancy

- Standard mortality (normal life expectancy) is the required assumption
- Especially unfair for a retired member
- Double-whammy effect on both member's pension and spousal survivor benefit

2. "Crystallized" fact situation

- Member retires shortly after separation
- Member terminates employment shortly after separation
- Member expected to work past, or is already at or past, normal retirement age
- Pension fully vests shortly after separation

3. Application of non-vested 50% discount rule to supplementary plans, partnership retirement arrangements, and other non-registered plans

- Senior executives, accountants, lawyers, Air Canada pilots, provincial judges, etc.

4. Pro-rata portion during marriage seriously unfair

- Union plans based on hours of work
- Plans where the benefit formula changed during marriage (GM Salaried, NOVA, etc.)

5. Disability pension in pay at separation

- Pre-normal retirement portion of the disability pension included in Imputed Value
- Not consistent with established legal precedent (Hamilton v. Hamilton)

6. Arguable Interpretations of the Regulations

- To date, these have arisen mostly in the auto industry plans.
- Examples include confusion over the correct age for "Value C" and exclusion of contractually-guaranteed indexing
- The inclusion of the value of spousal survivor benefits as the member's property may fall into this category (although common to almost all valuations, rather than unusual)

Procedural and Other Implications for Family Law Lawyers

Clients will need considerable assistance with the burden of complex and extensive paperwork to request the valuation and, if applicable, the transfer or division.

- The member or the spouse will obtain forms from payroll office, human resources department, or pension administrator (possibly on the Internet or the company Intranet)
- FYI, forms and frequently-asked questions can be reviewed and accessed at <http://fsco.gov.on.ca/en/pensions/Family-Law/Pages/familylawforms.aspx>
- Completion of Form 3 will permit one or both lawyers to contact the administrator directly, if needed
- The parties may wish to seek expert retirement counselling advice before deciding whether or not to proceed with a transfer or division.

Both parties must agree on the separation date (or on 2 dates, for 2 times the fee) before applying for a valuation from the plan administrator.

- Where one party is not co-operating with the process, a court order confirming the separation date must accompany the application for valuation

Implementation of an at-source division requires agreement from both parties or a court order.

- Only the spouse can apply for an at-source division

Regulations allow the administrator 60 days to produce the valuation after paperwork is completely and correctly submitted, and the fee paid.

- Expect significant elapsed time, and very low likelihood of special or rush service
- Smaller plans may not be ready for the new rules

Second calculations (for example, a mistake in the marriage or separation date) may involve a second full valuation fee of up to \$600 + HST = \$678.

Beware of any values that are not provided in the official prescribed format (FSCO Forms 4A, 4B, 4C, 4D, or 4E) or by an expert independent actuary.

Experts in pensions for FLA purposes may be harder to find, significantly more expensive than in the past, and less inclined to give pro-bono advice over the telephone.

Experts are unlikely to be interested in assisting the parties or their lawyers with paperwork or interpretation of results unless they are reasonably compensated for their time.

Continuing Need for Expert Actuarial Assistance

1. Plans other than Ontario-registered (see above)
2. Income tax adjustments (see above)
3. “At source” divisions where member was retired at separation
 - 50/50 division of member pension not fair: spousal survivor pension
 - “Deemed arrears” adjustments
4. “Absolutely can’t wait” for the regular plan administrator process to play out
 - Faster, but more expensive
 - Recall that transfer/division is not possible unless the administrator has completed a Form 4 valuation
5. Privacy considerations, or preliminary estimates for planning purposes only
 - Do not wish employer or spouse to be made aware
6. “Boston” calculations
7. Pre-marriage deduction when member terminated employment during the marriage prior to separation
8. Unusual, special, or unconscionable situations (see above)
9. Verifications or challenges of the plan administrators valuation
10. Expert (and unbiased) court testimony
11. Optimizing the client’s situation vis à vis option to divide at source
 - Consequence of one-size-fits-all valuation is potential to “game the system”
 - Consider implications of:
 - Member’s retirement age intentions
 - Non-guaranteed indexing
 - Shortened (or lengthened) life expectancy
 - Disability situations
 - Income tax situation
 - Loss of investment, indexing, and longevity guarantees (can’t lose or outlive a pension)
 - Adjustment formula for member’s pension after division
 - Availability of option for lifetime pension for spouse
12. Lump-sum spousal support calculations

Summary

The process has not changed. You will request a pension valuation. The after-tax value of the pension will be inserted into the Net Family Property statement. The new regime provides welcome new flexibility to access pension funds to assist with property equalization, if desired. However, pension splitting is NOT required, nor is it the default resolution.

Type of Pension	Who will perform the valuation?
Ontario-registered	Plan administrator
Registered in another province (reciprocity with Ontario)	Plan administrator
Federally-registered	Usually an independent actuary
Federal gov't plan (civil servant, RCMP, military, etc.)	Independent actuary
Non-registered top-up (highly paid individual)	Possibly the plan administrator
Foreign	Independent actuary

The new process requires that valuations be requested using prescribed forms. The forms can be found at <http://www.fSCO.gov.on.ca/en/pensions/Family-Law/Pages/familylawforms.aspx>. This Web site also has a Questions and Answers section that you may find helpful.

Glossary

Family Law Value – term used in the FSCO-prescribed forms to mean “Imputed Value”

FSCO – Financial Services Commission of Ontario, the regulator of Ontario-registered pension plans, part of the provincial Ministry of Finance

Imputed Value – pre-tax value of a pension for FLA equalization purposes after January 1, 2012

OSFI – Office of the Superintendent of Financial Institutions, the federal government regulator of federally-registered pension plans (but of not federal government employee pension plans)

PBA – Ontario Pension Benefits Act, which governs Ontario-registered pension plans

PBDA – Pension Benefits Division Act, which provides rules for the division (not the valuation) of pensions of federal government employees (Canadian Public Service, RCMP, Armed Forces, federal judges, members of parliament), has no jurisdiction over any other pension plans

PBSA – Pension Benefits Standards Act, which governs federally-registered plans (but not federal government employee pension plans)

Relevant Legislation

- Family Law Act – Section 10.1
- Ontario Pension Benefits Act – Sections 67.1, 67.2, 67.3, 67.4, 67.5
- Ontario Regulation 287/11 made under the Pension Benefits Act

Federally-registered (PBSA) Plans and Federal Government Plans

These are the major plans that must still be valued by an independent actuary:

- Air Canada
- Armed Forces (regular)
- Armed Forces (reserves)
- Bank of Montreal
- Bell Canada
- Bruce Power
- Business Development Bank of Canada
- Canada Mortgage and Housing Corporation (CMHC)
- Canada Post
- Canadian Civil Service (CPSPP/PSSA)
- CBC
- CIBC (Canadian Imperial Bank of Commerce)
- CN Rail
- CP Rail
- Eastern Canada Car Carriers
- Greater Toronto Airport Authority
- Greyhound
- HSBC Bank
- Judges
- Members of Parliament
- NAV Canada (administrator may provide a Form 4 valuation – ask)
- Purolator
- Royal Canadian Mounted Police
- Royal Bank of Canada
- Scotiabank (administrator may provide a Form 4 valuation – ask)
- TD Bank
- UPS
- VIA Rail

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