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Pensions as Matrimonial Assets in Nova Scotia: Issues and Considerations for Valuation and Division

Kelley McKeating, FSA, FCIA
McKeating Actuarial Services, Inc.
London, Ontario

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Is the separation date, the trial date, or some other date the most appropriate valuation date? Is the administrator's "maximum transferable amount" ever the proper value of the pension for matrimonial property purposes? How do division options and rules vary from pension plan to pension plan? How exactly does pension division work under the Nova Scotia Pension Benefits Act? What are the rules of thumb? What are the key elements to include in a pension division agreement?

Overview

Pensions are not explicitly mentioned in the **Nova Scotia Matrimonial Property Act** (MPA), except in **Section 13** which pertains to the unequal division of matrimonial assets or the potential division of property that is not a matrimonial asset.

Section 4(1) of the MPA defines "matrimonial assets" as "… property acquired by either or both spouses before or during their marriage…" with certain exceptions.

According to **Section 12(1)** of the MPA, either spouse is "entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division."

It is well-established that pensions are matrimonial property in Nova Scotia. This would include:

- Pensions in pay and pensions not yet in pay,
- Registered and non-registered pensions, and
- Pensions registered in Nova Scotia and those registered in other jurisdictions

Based on **Sections 13 and 15** of the MPA, a division (or partition) of individual matrimonial assets appears to be contemplated. As lawyers know, pension division is an accepted, relatively common approach to the sharing of matrimonial assets after marriage breakdown in Nova Scotia. However, there can be financial risks to the plan member and/or the non-member spouse if the pension is divided without a clear understanding of the reasonableness of the lump-sum value that is being divided or periodic payments that are being divided.

Section 74(1) of the **Nova Scotia Pension Benefits Act** (PBA) provides for the pension benefit earned during the period of marriage or cohabitation to be divided in accordance with the PBA Regulations "by an order of the Supreme Court of Nova Scotia, by a written agreement that provides for the division of a pension benefit, deferred pension or pension, or in such other manner as is prescribed." The maximum amount that can be received by the non-member spouse is one-half of the pension that was earned during the marriage or common-law relationship.

There is no requirement in the PBA to divide the pension, nor is division automatic. **Part 7 (Sections 234 to 253) of Regulation 200/2015 under the PBA** sets out the details pertaining to implementation of a pension division that may be ordered or agreed to. These regulations apply to defined contribution pensions (Section 247), Locked-in Retirement Accounts (LIRAs) and Life Income Funds (LIFs) (Section 248), and defined benefit pensions (Section 249).

Only **Nova Scotia-registered pension plans** are governed by the provisions of the PBA. Pension plans registered in other jurisdictions and non-registered pension plans are not subject to the PBA. Thus, the above division provisions apply only to Nova Scotia-registered pension plans. The division provisions in the PBA apply to both pensions in pay and pensions not yet in pay, and to both defined contribution and defined benefit plans – as well as to LIRAs and LIFs containing funds that originated in Nova Scotia-registered pension plans.

Although it is reasonable to conclude that all pensions are to be treated as matrimonial property in Nova Scotia, it is important to remember that different division options are available in respect of:

- Pensions registered in Nova Scotia,
- Pensions registered in other jurisdictions, and
- Non-registered pensions

Fair Value of a Pension

At any point in time, a house may have a number of different "values":

- Sale price
- Insured or "replacement" value
- Appraised value for property tax purposes
- Appraised value for mortgage lending purposes

Pensions are no different. Although it may be tempting to rely on a pension value provided by the pension administrator (at no cost!), one of the parties will be disadvantaged if the relied-on value is significantly greater than or less than the fair value of that pension.

If an administrator provides a pension value, that amount typically pertains to the "maximum transferable amount" under the applicable pension legislation. This is the maximum amount that pension legislation would allow the member to assign to their former spouse from the pension plan after a marriage breakdown. These amounts can differ significantly based on the governing pension legislation. Regardless of the jurisdiction, they were never intended to serve as proxies to the fair value of a pension.

The pension value determined by an administrator will never be in accordance with the Canadian Institute of Actuaries Standard of Practice for Determining the Capitalized Value of a Pension Benefit on Marriage Breakdown. Values determined in accordance with this actuarial standard of practice would be considered by actuaries to most fairly represent the appropriate value of a pension for matrimonial property purposes.

Defined Benefit versus Defined Contribution Pension Plans

The focus of this paper is defined benefit (DB) pension plans. In a DB plan, the pension promise is a monthly amount payable for the plan member's lifetime – beginning on their retirement date. The monthly amount is typically determined based on a formula that takes the member's salary and years of employment into account.

In contrast, the pension promise in a defined contribution (DC) pension plan is that the employer will make specified periodic deposits to the credit of the plan member during the time that the plan member is employed by the employer. DC plans are very much like RRSPs.

What is a Commuted Value?

This is a term used by actuaries and pension administrators. It almost always refers to the lump-sum amount that is available to a pension plan member who terminates employment and wishes to cash out their DB pension entitlement in favour of a lump-sum transfer to a Locked-in Retirement Account (LIRA) or locked-in Registered Retirement Savings Plan (locked-in RRSP).

When an individual terminates employment, they may give up certain rights in the pension plan. Examples include:

- Entitlement to contractual or ad hoc post-retirement indexing increases,
- Entitlement to receive an unreduced pension on early retirement, and/or
- Entitlement to temporary bridge pension or other ancillary benefits.

The commuted value will exclude any aspect of the pension that is not fully guaranteed and vested on the calculation date. Thus, the commuted value of a pension is generally (but not always) less than the amount that an actuary would consider to fairly represent the value of the pension asset.

Commuted Value versus Fair Value of the Pension

The portion of the commuted value that pertains to the period subject to division will often, but not always, understate the fair value of the pension for matrimonial property purposes. For example:

CV May Understate Fair Value	CV May Overstate Fair Value
Separation occurs prior to vesting of basic or ancillary benefits	Member has a life threatening illness
Plan regularly grants ad hoc indexing increases to pensions in pay	Plan provides generous spousal death benefits
Plan provides unreduced early retirement pensions	

If there is concern about the fairness of the value provided by the plan administrator, it can be difficult for lawyers to recognize which pension plans and which situations merit scrutiny.

Key Issues in Nova Scotia

Some of the issues that frequently arise in Nova Scotia involve:

- What valuation date to use
- The start and end dates for a pension division
- The amount of monthly pension that is subject to division
- Whether or not interest should be paid on a lump sum from the valuation date to the settlement date

There is significant overlap in these items, and there is no correct "default" or "automatic" approach to handling them. As settlement negotiations progress, it may be helpful to keep in mind that:

- It is up to the parties, through the provisions of their separation agreement, to provide clear instructions to the pension administrator in respect of an agreed-on pension division.
- If the agreement is vague or ambiguous, the pension administrator should (but may not) ask the parties to clarify their intent and revise the agreement.
- The pension administrator is unlikely to be willing to offer advice to the plan member or the non-member spouse regarding the pros and cons of pension division.
- As will be discussed later, the available division options will depend on the legislation that governs the pension plan in question. Neither a separation agreement nor a court order can require the pension administrator to implement a pension division that is prohibited by the governing pension legislation.

Generally speaking, the courts have ruled that assets such as RRSPs (and presumably DC pension plans) should be valued as of the **division date**, with appropriate adjustments for contributions (if any) that were made after the separation date.

When it comes to DB pension plans, the accepted practice is that the pension should be valued as of the **separation date**. The practical outcome of this practice will differ based on whether the pension is to be divided or whether its value is to be offset on a lump-sum basis by other assets, and by the jurisdiction that governs the pension plan in question.

Here is an example (male plan member):

- As of separation, the member has accrued a pension of 2.0% x 10 years x $50,000 = $10,000 per annum
- This is the amount of pension, beginning at age 65 and continuing for his lifetime, that the member would receive if he had terminated employment on the separation date
- All of this pension was accrued during the marriage
- $50,000 is the member's salary in the year of separation

- If an actuary were asked to determine the lump-sum value of this pension as of the separation date for purposes of an asset offset, they could easily do so. Half of this amount, the lump-sum value of a pension of **$5,000 per annum**, is the amount that the member would have to pay the spouse in lieu of a pension division. It is up to the parties to decide whether or not interest should be granted from the valuation date to the settlement date. The details of the agreed-on approach would be specified in the separation agreement.

- When the member retires 15 years after separation, his accrued pension has increased to 2.0% x 25 years x $70,000 = $35,000 per annum
- $70,000 is the member's salary in the year of retirement

- If the parties had agreed to a division of the pension under the **Nova Scotia PBA** and that the spouse would receive a proportionate share of the member's pension equal to 50% of the pension accrued during the marriage, then the plan administrator would pay the spouse a lifetime pension equivalent in value to 50% x $35,000 x (10 / 25) = **$7,000 per annum** payable for the member's lifetime. The spouse's pension would begin on the same date that the member's pension begins. The actual annual pension payable to the spouse would be more or less than $7,000 because it would depend spouse's age.

- If the parties had agreed to a division of the pension under the **federal Pension Benefits Standards Act** and that the spouse would receive 50% of the pension accrued during the marriage, then the plan administrator would pay the spouse a pension equivalent to 50% x $10,000 = **$5,000 per annum**. Depending on the wording of the separation agreement, the spouse would receive $5,000 per annum beginning on the member's retirement date and continuing for the member's lifetime (not for the spouse's lifetime) or the spouse would receive a different annual pension (more or less than $5,000 per annum, but equivalent in value) that commences on a date of the spouse's choosing and continues for the spouse's lifetime.

- Under the **Nova Scotia PBA**, the spouse will share in the benefit of the member's increased salary after separation if the pension benefit formula is of the "final average earnings" or "career average salary" type and if the parties opt for pension division. However, the same is not true if the pension is governed by the federal **Pension Benefits Standards Act**.

In the above example, if the intent of the parties is to divide the pension so that the spouse will receive a proportionate share equivalent to $5,000 per annum (and not $7,000 per annum) when the member retires, then the separation agreement should be carefully worded to ensure this outcome. A checklist for separation agreements can be found later in this paper.

Regardless of the jurisdiction that governs the pension plan, the parties may divide the pension based on either the **cohabitation date** or the **marriage date**. The agreed-on start date should be specified in the separation agreement.

Nova Scotia-registered Private Sector Plans

a. Defined Contribution Plans

The administrator would be able, if asked, to provide the exact account balance as of the marriage or cohabitation date and as of the separation date.

For example:

- The member married 2 years after joining the pension plan (account balance at marriage = $5,000) and separated 18 years after marriage which is 20 years after joining the plan (account balance at separation = $140,000).
- The parties may agree that the pension asset subject to division will exclude the pension accrued prior to the marriage.
- Thus, the parties may agree that the spouse's "portion" of the pension asset should be 50% x ($140,000 - $5,000) = **$67,500** (lump-sum value as of the separation date).

However, the spouse's "proportionate share" of the pension under Section 247 of the PBA Regulations does not take the account balance at marriage into account. Instead, the account balance at separation is prorated based on pensionable service:

50% x (18 years during the marriage / 20 total years) x $140,000 = **$63,000**
(lump-sum value as of the separation date)

The **wording of the separation agreement** will determine whether the spouse receives $67,500 or $63,000. It should be understood that $63,000 is the maximum that the plan administrator would be permitted to transfer from the pension to the spouse's Locked-in Retirement Account (LIRA) as of the separation date.

The PBA permits a plan administrator to charge up to $250 + HST to implement a division of a DC plan.

b. Defined Benefit Plans

For Nova Scotia-registered DB pension plans, the only pension division option available involves the spouse receiving a **monthly "separate pension" amount** from the pension plan **beginning at the member's retirement** and continuing for the **spouse's remaining lifetime**. This "separate pension" would usually be payable on a "life only" basis as if the spouse was an unmarried plan member.

The pension administrator determines the "proportionate share" of the member's pension as a percentage (as specified in the separation agreement, often 50%) of the ratio of credited service during the marriage (or common law relationship, as specified in the separation agreement) to total credited service, multiplied by the member's "normal form" pension at retirement. This "proportionate share" of the member's pension is then adjusted, based on the spouse's age, to determine the amount of the spouse's "separate pension".

As a result of the above prescribed formula, the spouse will not know the amount of his or her annual pension until the member retires. However, the spouse (as a "limited member" of the plan) will receive an annual pension statement which provides some information.

If the pension benefit formula uses the member's final average salary or career average salary, then the spouse shares in the increased amount of the pension earned due to salary increases after the separation date. The practical result of the PBA division rule is that the **retirement date** becomes the **valuation date**.

If the plan member terminates employment prior to retirement and is eligible to elect to receive a lump-sum LIRA transfer in lieu of an annual pension, then the spouse is automatically eligible to make the same election (or not) in respect of the "proportionate share" of the member's pension.

The plan is not required to determine the lump-sum value of the pension at separation for matrimonial property purposes. In the rare instance where the plan does provide the parties with a lump-sum value of the pension, it will almost certainly NOT be a fair value for matrimonial property purposes.

The PBA permits a plan administrator to charge up to $500 + HST to implement a division of a DB plan.

Nova Scotia Public Sector Pension Plans

The two largest public sector pension plans in Nova Scotia are the Public Service Superannuation Act plan and the Teachers' Pension Act plan. These plans are not governed by the PBA. The "Nova Scotia public sector" discussion in this paper pertains only to these two plans.

The pension division rules that apply under the **Teachers' Pension Act** are **similar to** the rules that apply to **private sector** DB plans under the PBA. However, the Teachers' pension plan does not apply an adjustment to the spouse's "proportionate share" based on the spouse's age.

The division rules for the **Public Service plan** are different. As of January 1, 2017, for members who are **NOT retired**, the only division option available to the spouse is a **lump-sum LIRA transfer** (Section 3.7 of the new plan text, Section 12 of the Regulations under the Public Service Superannuation Act). For members who **ARE retired**, the only division option available to the spouse is a **monthly pension payable for the spouse's lifetime**.

For the **Public Service plan**, it is the status (retired or not retired) on the date that the plan receives the court order that determines which division option is available. The above rules apply to any court order received by the administrator on or after January 1, 2017 – regardless of the date of separation and the date of the order. If the order was received by the Public Service plan administrator prior to January 1, 2017 and the member is not retired, the spouse can opt (at any time up until the member retires) to elect a lump-sum LIRA transfer or a pension payable for the spouse's lifetime. The default option, for orders received by the administrator prior to 2017, is that a pension would be paid.

The period subject to division must be specified in the court order. It can begin on the date of cohabitation or the date of marriage, and it ends on the date of separation.

Federal Government Plans

The three largest federal government pensions plans are the Canadian Public Service Pension Plan (CPSPP – covers federal civil servants), the Canadian Forces Superannuation Act pension plan (CFSA), and the RCMP Superannuation Act pension plan.

The lump-sum value that is provided by the administrators of these three plans is the **Pension Benefits Division Act (PBDA)** maximum transferable amount estimate.

The PBDA is the legislation that outlines how federal government employee pensions can be divided on marriage breakdown. Under the PBDA, a maximum of 50% of the "value" of the pension earned during the marriage may be transferred to the former spouse's Locked-in Retirement Account (LIRA). It may therefore be tempting to double this PBDA amount and assume that it is a reasonable estimate of the fair value to use. However, this is frequently an incorrect assumption.

The "PBDA x 2" amount will almost certainly differ from the fair value of the pension because it is calculated differently. The key differences are as follows:

	PBDA Values (federal gov't employees)	**Value Determined in Accordance with Actuarial Standard of Practice for Pensions on Marriage Breakdown**
Valuation Date	Current date	Separation date or other agreed-on valuation date
Mortality Assumption	As of current date, sex-distinct	As of separation, sex-distinct (uses the actual sex of the member)
Economic Assumptions	As of current date	As of separation
Commencement Age for the Pension	Commencement at the retirement age used for termination of employment purposes	One to four retirement age scenarios typically illustrated, to permit the parties to select the scenario that most closely reflects the member's retirement intentions
Portion of Pension Included	Accrued during the marriage	Accrued prior to separation (in accordance with the MPA) and/or accrued during the marriage (if the parties agree)

General rule of thumb: The discrepancy in value increases with the length of time since separation. If the separation occurred more than one year prior to the PBDA calculation date, the PBDA value may merit scrutiny.

Federally-registered Plans

The lump-sum value provided by the administrators of federally-registered plans is the maximum transferable amount specified by the **Pension Benefits Standards Act** (PBSA) or by the plan's own provisions if less "generous".

The PBSA is federal legislation that governs federally-registered pension plans. The PBSA permits the plan member to assign their entire pension entitlement to a former spouse. In other words, the PBSA permits a maximum of 100% of the member's entire pension (including the portion that was earned prior to the marriage) to be transferred to a former spouse. This "maximum transferable amount" will almost certainly differ from the fair value of the pension because it is calculated differently. The discrepancy can be significant. The key differences are as follows:

	PBSA Administrator Values (federally-registered plans)	**Value Determined in Accordance with Actuarial Standard of Practice for Pensions on Marriage Breakdown**
Valuation Date	Current date	Separation date or other agreed-on valuation date
Mortality Assumption	As of current date, unisex (assumes that the plan member is a composite – partly male, partly female)	As of separation, sex-distinct (uses the actual sex of the member)
Economic Assumptions	As of current date	As of separation
Commencement Age for the Pension	The retirement age used for termination of employment purposes	One to four retirement age scenarios typically illustrated, to permit the parties to select the scenario that most closely reflects the member's retirement intentions
Value of spousal survivor pension (property of future spouse)	Included (in the member value)	Excluded
Ad hoc Indexing	Always excluded	Usually included
Other Non-guaranteed Elements	Always excluded	Often included
Portion of Pension Included	Total pension (including the pre-marriage portion)	Accrued prior to separation (in accordance with the MPA) and/or accrued during the marriage (if the parties agree)

General rule of thumb: Values provided by the administrators of federally-registered plans almost always merit scrutiny due to the nature of the underlying legislation that governs pension division options.

Federally-registered pension plans are easy to identify. Most fall into one of these categories:

- Employer is in the transportation, communication, or banking sector
- Employer is a crown corporation or other government spin-off (Canada Post, etc.)

Supplemental (Non-registered) Pension Plans

The federal Income Tax Act (ITA) caps the amount of monthly pension that can be paid from a registered pension plan. Public sector and large private sector employers frequently provide a non-registered supplemental "top-up" plan that provides for payment of the pension benefits that cannot be paid from the registered plan due to these ITA restrictions.

As a rough rule of thumb, any individual earning more than about $150,000 per annum may have a supplemental plan entitlement.

Supplemental pension plans are "non-registered". This means that they are not subject to pension legislation (either provincial or federal). Division of a supplemental pension entitlement is often, but not always, prohibited by the plan provisions.

There is also no requirement for the employer or the administrator to disclose the existence of the supplemental plan, unless specifically asked. Sometimes the supplemental plan is administered by the employer while the associated registered plan is administered by an external service provider. If this is the case, it is possible that the administrator of the registered plan may not be aware of the supplemental plan.

General rule of thumb: If a party earns $150,000 or more per annum, ask that the employer to provide a list of all the registered and non-registered pension, investment, and retirement savings plans that the individual belongs to.

A supplemental plan entitlement will not normally be valued for matrimonial property purposes unless an independent actuary is retained. The value of a supplemental pension entitlement can be <u>significant</u>.

Foreign Pension Plans

Foreign pension entitlements (based on current or past employment in the US, UK, or another country) are subject to the pension division rules of the applicable legislation in the pension plan's home country.

A **US pension plan** entitlement cannot be divided except by order of a US court. If the parties are dividing their family assets in accordance with Nova Scotia matrimonial property law, a US

pension must be valued by an actuary because it cannot (from a practical perspective) be divided.

UK pensions are more easily divided. However, the permitted division may not be consistent with Nova Scotia matrimonial property law.

Income Tax Adjustments

Any value provided by an administrator will be a before-tax amount. If the parties adopt the administrator value as the proper value of the pension and decide that the matrimonial property will be dealt with in a manner that does not involve pension division, then an income tax adjustment should be applied in order to convert the agreed-on value of the pension to an "after-tax" value for matrimonial property purposes. This ensures a fair offset of the pension against non-registered family assets such as the matrimonial home or cash in a bank account. It also ensures a fair offset of the pension against another pension (or RRSP) if the parties' relative tax situations in retirement are expected to be significantly different.

In deciding what income tax adjustment to apply and whether or not to retain an actuary, here are some considerations:

- Generally speaking, an arbitrary income tax adjustment selected by a lawyer will be higher than the income tax adjustment that an actuary would recommend.

- If one party has registered (pension, RRSP, etc.) assets worth considerably more than the other party, then it would usually not be reasonable to use the same income tax adjustment for both.

- If an independent actuary determines the value of the pension, they will almost certainly provide an opinion as to the appropriate income tax adjustment to apply.

The income tax adjustments that have been commonly used and accepted by the courts for many years are based on the average expected income tax rate in retirement. It is usual to use the same income tax adjustment for all registered retirement savings vehicles (pension, RRSP, etc.) owned by a specific individual.

The most common of these "registered" or before-tax assets are as follows:

- Pension plans
- Registered Retirement Savings Plans (RRSPs)
- Locked-in Retirement Accounts (LIRAs)
- Deferred Profit Sharing Plans (DPSPs)

Tax-free Savings Accounts (TFSAs) are not before-tax assets, nor are most (but not all) employee savings plans (EPSPs, ESPs, etc.). Income tax adjustments would not be applied.

Pension Division Options and Restrictions

The table at the end of this paper presents a summary of what division options are available for different categories of pension plans.

As noted earlier, there is no requirement to divide a pension for matrimonial property sharing purposes. In fact, the default is for no division to occur.

There are three major approaches to pension division. Each approach is not necessarily always available to the parties (see the table at the end of the paper).

a. LIRA Transfers

LIRA transfers may be the least understood of the division options. They have been available for years in respect of federal government employee plans, federally-registered private sector plans, and Nova Scotia-registered DC plans (but not DB plans).

LIRA stands for Locked-in Retirement Account. LIRAs are RRSPs with strings attached. The non-member spouse should understand that locked-in means locked-in. With few exceptions, the LIRA can only be accessed in one's retirement years, and never as a lump sum.

The greatest challenge of managing a LIRA is the drawdown decision. Draw down the balance too slowly, and the non-member spouse's heirs will be basking on a beach in the Cayman Islands after his or her death. Draw down too quickly, and the non-member spouse will run out of money before he or she dies.

The other difficulty with LIRAs is the challenge of replicating the investment return results of the professional pension fund managers. Pension plans pay "institutional" investment management fees which are substantially lower than the "retail" investment management fees that most individuals pay when they invest in mutual funds. Will the non-member spouse be able to make the astute investment decisions necessary to replicate the amount of pension the member gave up in order to implement the LIRA transfer? Will the non-member spouse be able to continue to make astute investment decisions as they age into their 80s and 90s and beyond?

In a DB pension plan, the employer takes on the longevity risk (the risk of outliving one's assets) and the investment risk. In a LIRA, the account holder must shoulder both the longevity risk and the investment risk.

A LIRA transfer is sometimes the only pension division option available. This is true for **non-retired members** of the **Nova Scotia Public Service plan** and **all members** of **federal government employee plans**. In these instances, a LIRA transfer may be appealing to the plan member because it defers the pain of equalization. But, the transfer will require the member to give up some pension and once it's gone, it's gone forever. And the non-member spouse does not receive a pension. He or she instead receives a "locked-in" lump sum that is subject to the above-mentioned longevity and investment risks.

In my opinion, a LIRA transfer (when available) should be viewed as the equalization solution of last resort in most instances. One exception to the caveat against LIRA transfers is when the plan member is seriously and terminally ill. If this is the case, a LIRA transfer may actually be the optimal equalization strategy.

A LIRA transfer is the only division option available for federal government pension plans (regardless of whether the separation occurs before or after retirement). It is also the only division option available for the Nova Scotia Public Service pension plan. If the financial circumstances of the parties is such that matrimonial property could be shared equally without a defined benefit pension having to be divided by means of a LIRA transfer, in my opinion the "no division, no LIRA transfer" approach merits serious consideration.

b. "Separate Pension" or Lump-sum Transfer within the Plan

Many **federally-registered pension plans** permit a lump-sum transfer within the plan. With this type of pension division, there is a lump-sum transfer (akin to a LIRA transfer) but the lump sum is used to establish a separate monthly pension in the non-member spouse's name. That pension would be for a pre-determined monthly amount. It would commence at the retirement age of the spouse's choosing (subject to some conditions) and would continue for the spouse's entire lifetime. Thus, the pension plan continues to shoulder both the longevity risk and the investment risk.

The pension division option for **Nova Scotia-registered DB plans** and **Nova Scotia public sector plans** is presented differently, but results in a similar benefit to the spouse: a pension payable for the spouse's lifetime. The differences are as follows:

- For **all Nova Scotia plans**, the spouse cannot choose the commencement date. The pension commences when the member retires or on the member's normal retirement date if earlier.

- For **Nova Scotia-registered plans**, the "proportionate share" of the member's monthly pension is what is assigned to the spouse. The administrator converts this monthly amount (which is payable for the member's lifetime, beginning on the member's retirement) to a monthly amount known as the "separate pension" that is payable for the spouse's lifetime (beginning on the member's retirement). The conversion is

calculated so that the value of the "proportionate share" and the value of the "separate pension" are the same, using the retirement date as the valuation date. If the spouse is younger than the member, the "separate pension" payments will be lower than the "proportionate share" payments. The spouse is expected to live longer, so each monthly payments must be lower. If the spouse is older than the member, the opposite is true.

- For **Nova Scotia public sector plans**, the "proportionate share" of the member's monthly pension is what is assigned to the spouse. This amount, without adjustment upwards or downwards for the spouse's age, would be payable for the spouse's lifetime (beginning on the earlier of the member's retirement date and normal retirement date).

c. Division at Source

"Division at source" is an option that is available if the plan is **federally-registered**. A division at source involves dividing each monthly pension payment "if and when" it is made. The member's pension (which ends on the member's death) is divided. The division ends when the pension ends. If the former spouse is entitled to a spousal survivor pension, the survivor pension would commence on the member's death and continue for the spouse's remaining lifetime. Taken together, the divided pension and the spousal survivor pension provide the spouse with monthly payments throughout their remaining lifetime. The entitlement to a spousal survivor pension protects the spouse from the risk of the plan member dying prematurely.

If the former spouse is <u>not</u> entitled to a spousal survivor pension, their income stream would cease on the member's death even if death occurs shortly after retirement.

A Note about Life Expectancy

Life expectancy is the <u>average</u> expected future lifetime (in years) of a large group of individuals of a given age, according to a specific mortality table. Some of this group may die in a few days. Others will live to beyond age 100. The life expectancy is the average of all the times until death.

The following table shows the probability that an individual who is 45 years old at separation will survive to specific ages (based on the most recent pensioner mortality table published by the Canadian Institute of Actuaries):

Future Age	65	75	85	95
Probability of Surviving to Future Age				
- Male	93%	85%	65%	21%
- Female	96%	90%	74%	32%

Pension-related Sections of a Separation Agreement

If the pension-related paragraphs of a separation agreement or court order are incomplete or ambiguous, the administrator may send the agreement or court order back because it cannot be implemented as written (bad) or they may decide to guess the intent of the parties (worse).

Example 1:

"The parties agree that the pension will be divided".

- Is this intended to be an at-source division, a proportionate share/separate pension division, or a lump-sum LIRA transfer? The desired division option may not be available, depending on the jurisdiction that governs the plan.
- In what proportions? 50%/50%? 80/20%?
- What is the start date (marriage date? cohabitation date?) and end date (separation date?) for the portion of the pension that is to be divided?
- If an at-source division (applicable to federally-registered plans):
    - Starting when?
    - If the spouse predeceases the member, will the division continue (with the spouse's payments going to the spouse's estate) or will the division cease (with the spouse's payments reverting to the plan member)?
    - If there are indexing increases, are they shared proportionately?
- What specific instructions are the parties giving to the administrator?
- Whose job is it to tell the administrator about the agreement?

Example 2:

"The parties agree that 50% of the value of the pension will be transferred to the spouse's Locked-in Retirement Account."

- When is this transfer to occur?
- Will interest be paid from the date of separation to the date of transfer?
- Whose job is it to tell the administrator about the agreement?
- If the plan is federally-registered, the unintended consequence of this agreement may be that 50% of the entire value of the pension is transferred to the spouse, even if the marriage lasted for only two of the thirty years that the member belonged to the pension plan (for example). In this example, if the entire pension is worth $500,000, then the spouse would receive $250,000. However, the parties may have intended that the spouse receive only 50% x (2 years/ 30 years) x $500,000 = $16,667.

Example 3:

"The parties agree that Sally will be named as the beneficiary for pre-retirement and post-retirement death benefits under Joe's pension plan."

- In general, the pension plan member can name anyone of their choosing as beneficiary. However, the person who satisfies the legislation's (and the plan's) definition of "spouse" will always take precedence over a named beneficiary. So, if Joe acquires a new spouse (common-law or legally-married) and then dies, the new spouse would receive the pre- or post-retirement death benefits despite Sally being the named beneficiary.
- The separation agreement or court order cannot require the administrator to provide benefits in a manner that is contrary to the pension plan provisions and/or the governing legislation.

Example 4:

"Sally will receive 50% of the portion of Joe's pension that accumulated between the date of cohabitation and the date of separation, divided at source, pursuant to the Pension Benefits Division Act (PBDA)."

- Unless Joe is a member of one of the federal government plans (public service, RCMP, or Armed Forces), the PBDA does not apply.
- Under the PBDA, the only form of permitted pension division is a lump-sum LIRA transfer. An at-source pension division is not permitted.

Checklist for Separation Agreements and Orders

It is advisable to always provide the administrator with a draft copy of the separation agreement or court order, and to obtain their comments, prior to finalizing and executing the agreement or submitting the order for approval.

If there is to be a division by **LIRA transfer or lump-sum transfer within the plan**, the agreement or order would specify details such as:

- The exact lump sum to be transferred (for example: $150,000), or the formula that the administrator should use to determine the exact lump sum to be transferred (for example: 40% of the value of the pension accrued from date x to date y)
- The effective "as of" date for the transfer (separation date? current date?)
- Whether or not interest is to be paid from the "as of" date to the date of actual transfer
- The party who is responsible for informing the pension administrator of the agreement
- The deadline for informing the pension administrator
- The remedies if the administrator is not informed in a timely manner

The "lump-sum transfer within the plan" option is only available if the plan is federally-registered.

The "LIRA transfer" option is available if the plan is:

- Federally-registered
- A federal government plan
- A Nova Scotia-registered DC plan
- The Nova Scotia public service plan (if the member is not retired)

If the administrator is not advised of an agreed-on pension division in a timely manner, complications may arise. These could extend to the funds no longer being available for division as a result of the member's termination of employment, retirement, or death.

If there is to be a **division at source** of the pension (an option only available if the plan is federally-registered, and only advisable if the member retired prior to separation and the spouse is irrevocably entitled to a spousal survivor pension), the agreement or order would specify details such as:

- The proportion of the member's pension that will be payable to each party (in percentages)
- Whether the proportion is a percentage of the total pension at retirement or a percentage of the pension accrued during the period of cohabitation or marriage (if the latter, state the start date and end date)
- A numerical example of the agreed-on division terms based on the member's current pension (to clarify and confirm the intent of the parties)
- The start date of the division. This should be approximately two to three months in the future to allow time for the administrator review and then the processing of the division after the agreement is finalized.
- In order for the asset to be properly shared, the division should commence at separation. The parties may wish to consider if and how any pension amounts received by the member between separation and settlement might be retroactively "shared". Whatever is agreed on should be included in the agreement.
- Whether the spouse's portion will revert to the member or continue to the spouse's estate if the spouse predeceases the member. The latter is the proper approach for an equalization of matrimonial property. If the parties prefer the reversion approach, then it would be equitable to increase the amount the spouse receives while alive to compensate for the fact that the division will not continue for the member's entire lifetime.
- Whether any ad hoc or contractual indexing increases will be shared proportionately by the parties

- If the member has not yet retired, what happens if the member dies or terminates employment prior to retirement?
- The party who is responsible for informing the pension administrator of the agreement
- The deadline for providing the agreement to the pension administrator
- The remedies if the administrator is not informed in a timely manner

If there is to be a **"proportionate share" division** of a Nova-Scotia-registered DB plan, the agreement or order would specify details such as:

- Whether the period of cohabitation or the period of marriage is to be used (and specify the agreed-on start date and end date)
- The percentage, P, to be applied (maximum 50%) to determine the "proportionate share" – The PBA requires that this percentage be applied in the following formula:
  P% x (service during marriage or cohab / total service to retirement)
  x pension at retirement
- The administrator will use the instructions in the agreement or order to determine the amount of the spouse's monthly "separate pension".
- The party who is responsible for informing the pension administrator of the agreement
- The deadline for informing the pension administrator
- The remedies if the administrator is not informed in a timely manner

If there is more than one pension, the separation agreement or order should deal with each pension in a separate section.

Unless the plan is federally-registered, it will not be possible for the administrator to directly divide the **pension accrued prior to marriage**. The separation agreement should specify if and how the value of the pension accrued prior to marriage will be dealt with in the sharing of matrimonial assets.

Order or Agreement?

Nova Scotia's public sector plans require a **court order**, and that the parties be divorced, in order to implement a pension division.

Other plans, including Nova Scotia-registered plans, federally-registered plans, and federal government plans, can be divided pursuant to either a **separation agreement or** a **court order**.

Nova Scotia Pension Membership Overview

According to the 2016 census, the population of Nova Scotia aged over 19 and under 65 years of age is approximately 555,000. A further 184,000 Nova Scotians are age 65 or older.

According to the March 31, 2017 report of the Nova Scotia Superintendent of Pensions, approximately **98,000** Nova Scotians are members of a **Nova-Scotia-registered** pension plan.

According to the plan administrator, there are about **66,000** members in the two largest **Nova Scotia public sector** pension plans:

	Active	**Deferred Vested/ Inactive**	**Retired**
Public Service	12,000	6,000	13,000
Teachers	17,000	2,000	16,000

According to Statistics Canada, about **14,000** Nova Scotians are members of a **federally-registered** pension plan.

In addition, an unknown number of Nova Scotia residents belong to one of the **federal government plans** because they work as civil servants, or serve in the RCMP or Armed Forces.

Waiving a Spousal Survivor Pension

It is rarely, if ever, sensible for an eligible spouse to waive entitlement to a spousal survivor pension without compensation.

Under many public sector and private sector pension plans, it is the employer and not the plan member who "pays" for the spousal survivor pension. In most instances, if the spouse waives entitlement to a survivor pension the amount of the member's pension will not change.

Spousal survivor pensions are payable to the person who meets the pension plan's definition of "spouse". These survivor pensions commence on the member's death and continue for the remaining lifetime of the "spouse". If nobody meets the plan's definition of spouse, then no spousal survivor benefits would be paid.

Sometimes the plan member asks the former spouse to waive their entitlement to the spousal survivor pension because the member wants a new spouse to receive those benefits on his or her death. It should be understood that the new spouse cannot receive the spousal survivor pension unless they satisfy the plan's definition of "spouse". Thus, the former spouse's waiver may not benefit the new spouse as had been intended.

More about Spousal Survivor Pensions

Spousal survivor pensions commence on the death of the plan member and are paid for the remaining lifetime of the eligible spouse. The spousal survivor pension is paid to the person, if any, who meets the plan's definition of "spouse". Because the payments are made only after the member has died, a spousal survivor pension is not divisible.

The two most common definitions of "spouse" are:

- Spouse at retirement: The person to whom the member is married (legal or common-law) on the date of retirement is irrevocably vested in the right to receive a spousal survivor pension on the member's death. Subsequent separation and/or divorce have no effect on the right to receive the spousal survivor pension.

- Spouse at death: The person to whom the member is married (legal or common-law) on the date of death will receive a spousal survivor pension on the member's death.

Usually the plan requires that the spouses not be living separate and apart on the date of determination (retirement or death), but some plans will allow a separated spouse to receive the spousal survivor pension if there is no other (more eligible) spouse.

In the **federal government** plans, the right to a spousal survivor pension is extinguished by either divorce or a pension division (LIRA transfer). For this reason, if the parties do not intend to divorce, an asset-sharing agreement that does not involve a LIRA transfer may merit consideration.

For **Nova Scotia-registered** private sector plans, the "spouse at retirement" definition is the one that is specified in the PBA.

The definition of spouse under the **Nova Scotia public service** plan is "spouse at death". The definition of spouse under the **Nova Scotia Teachers'** plan is "spouse at retirement". However, the "spouse at death" definition can apply if the "spouse at retirement" predeceases the member and the member subsequently acquires a new spouse.

In the above two Nova Scotia public sector plans, the right to a spousal survivor pension is extinguished by divorce.

Under most **federally-registered plans**, the member may choose either the "spouse at retirement" or the "spouse at death" definition at the time of retirement.

In general, if the parties separate prior to retirement, the spouse will not be entitled to a spousal survivor pension because they would not meet the plan's definition of spouse. However, this is not universally true. Each pension plan contains a definition of "spouse". Often, but not always, the definition requires that the parties not be living separate and apart on the relevant date for determination of status.

A spousal survivor pension can have significant value, usually from 5% to 20% of the value of the member's pension. Sometimes the spousal survivor pension is worth more than the member's pension. The administrator will never provide a value for the spousal survivor pension because it is not divisible.

General rules of thumb:

- If the parties separate after the member has retired, it may be advisable to retain an independent actuary to determine the value of the spousal survivor pension.

- If the marriage (prior to retirement) was short and/or if the spouse is much younger than the plan member, the value of the spousal survivor pension may exceed the value of the member's pension.

- If the parties separate after the member has retired, the retirement statement provided at retirement will specify whether it is the spouse at retirement or the spouse at death who will be eligible to receive a spousal survivor pension.

Spouses versus Beneficiaries

A plan member is free to name anyone as his or her beneficiary for pre-retirement or post-retirement death benefits. However, it should be understood that the death benefits payable to a beneficiary would normally only be paid if there is no "spouse".

If someone satisfies the plan's definition of "spouse" on the date of determination (which could be the member's retirement date or the member's date of death), then the identity of the beneficiary is irrelevant. Spousal survivor benefits would be paid to the spouse and no benefits would be paid to the beneficiary.

If there is no spouse on the date of determination (the date of the member's retirement and/or death), then death benefits (if any) would be paid to the designated beneficiary.

Final Word

Pensions are complicated and they are often one of the most valuable family assets.

Just as spouses are well-advised to obtain expert legal advice when their marriage ends, their lawyers may wish to consult with an independent actuary to ensure that their clients' pension-related interests are being properly dealt with in the context of the equal sharing of matrimonial assets.

Author's Contact Information

Kelley McKeating
McKeating Actuarial Services, Inc.
2 – 165 Oxford Street East
London, Ontario N6A 1T4

Tel: (519) 857-3305
Fax: (519) 858-3300
Email: kelley@mckeating-actuarial.com

McKeating Actuarial Services, Inc.
www.mckeating-actuarial.com

Pension Division Settlement Options – Nova Scotia – See Paper for Detailed Discussion

Member NOT Retired at Separation

Type of pension plan	Nova Scotia (private sector and Teachers' plan)	Nova Scotia Public Service	Federal Gov't Employee	Federally-registered	Non-registered or Foreign
Available forms of division	Separate pension on member's retirement	Lump sum to LIRA	Lump sum to LIRA	a. LS to LIRA b. LS within plan c. At source	Depends on plan (often not possible)
Amount assignable to spouse	0 → 50% of pension at retirement attributable to marriage	0 → 50% of commuted value at separation attributable to marriage	0 → MTA in PBDA estimate statement	Depends on plan, often full value of the pension (including portion accrued pre-marriage)	Depends on plan (often 0)

Member IS Retired at Separation

Type of pension plan	Nova Scotia (private sector and Teachers' plan)	Nova Scotia Public Service	Federal Gov't Employee	Federally-registered	Non-registered or Foreign
Available forms of division	Separate pension on member's retirement	Separate pension on member's retirement	Lump sum to LIRA, spousal survivor pension is cancelled	a. At source, spouse keeps survivor pension b. Establish 2 lifetime pensions	Depends on plan (often not possible)
Amount assignable to spouse	0 → 50% of pension at retirement attributable to marriage	0 → 50% of pension at retirement attributable to marriage	0 → MTA in PBDA estimate statement	Depends on plan, often full value of the pension (including portion accrued pre-marriage)	Depends on plan (often 0)

- For federally-registered plans and the Nova Scotia Public Service plan, the member's status at the settlement date determines the division options. For other plans, the status on the separation date is the determinant (when relevant).
- LS = lump sum
- MTA = maximum transferable amount = 50% of the maximum amount divisible