

# Should You Be Concerned?

**Pension Valuators of Canada**

## Should you be concerned about the Court of Appeal decision in *Morash v. Morash*?

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You should be if the pension involves a pre-marriage period.

Many lawyers in Nova Scotia routinely accept that the pension will be divided when the member retires. They neglect to determine whether or not this is good for their client. The decision in *Morash* clarifies that the non-member may have a right to either more or less than the amount they would receive in a division under the Pension Benefits Act (PBS). Only rarely would dividing the pension on retirement give both parties what they have a legal right to.

The Nova Scotia Matrimonial Property Act (MPA) gives the non-member the right to share in the full value of the pension earned from inception to the date of separation with no proration to carve out the portion earned before the marriage.

The Nova Scotia MPA does not deal with how much each member has a right to. This Act merely provides a means of satisfying the equalization amount owing (as does the PBSA and the PBDA). In fact the Nova Scotia MPA allows the member to share in the value of the pension earned after the date of separation.

In his lengthy comment on the case, Rollie Thompson says, "This will come as a shock to most Nova Scotia family law lawyers, who have become accustomed to the simple and tidy division of pensions under the Pension Benefits Act, a method of division that did not require much use of actuaries. After *Morash*, all that may have changed." He went on to say,

"the Court's solution has serious practical implications for family law lawyers and for the parties." Mr. Thompson says that the careful lawyer will now have to advise the client on the wisdom of having the pension valued. He points out that a proper valuation will be needed in at least every case where there was significant service before marriage.

In speaking for the Court of Appeal Justice Bateman explained that all pension benefits, whether earned before or during marriage, are "matrimonial assets," subject to a presumption of equal division. To exclude any portion of pre-marital service amount to an unequal division under S 13, which means that the party seeking that exclusion bears the onus of proving that equal division would be "unfair or unconscionable." Not an easy argument to win.

Rollie Thompson also explains that dividing the pension on retirement under the PBA allows the non-member to share in post-separation increases in the value of the pension.

Based on this Court of Appeal decision, the lawyer acting for the non-member spouse should be concerned about dividing the pension under the PBA when there is pre-marriage service involved. At the same time, the lawyer acting for the party with the pension should be concerned about dividing the pension under the PBA when there is post-separation service involved.

The only solution seems to be to have the pension properly valued. Then if the equalization amount is to be settled through the pension, enter into an "If and When" agreement as is done in Ontario.

For a complete copy of *Morash v. Morash*, please contact us at:

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