
PENSION VALUATORS OF CANADA

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Attention: Family Law Lawyers

Bulletin No. 108

AVOIDING POSSIBLE NEGLIGENCE CHARGES

The dramatic rise in the number of negligence charges against lawyers in the area of family law has become a matter of serious concerns (as stated by Phillip M. Epstein, Q.C. At the lectures by the Law Society of Upper Canada in September, 1988). This should be carefully considered when deciding whether or not to obtain a valuation of pension benefits on a marriage breakdown.

If a spouse's pension payments are to be used to settle a portion of an equalization claim it is very important to ensure the enforceability of the settlement by testing the amount of the pension division against the 50% rule in section 52 of the Pension Benefits Act and the Ontario regulations. If the settlement calls for more than 50% of the member spouse's pension benefits accrued during the marriage to be redirected to the non-member spouse, the settlement may be challenged and the excess payments struck down (leaving the lawyer open to a negligence charge).

In several cases the courts determined the non-member spouse's share of payments on an "if, as, and when" basis by the formula:

Months of Active Plan Membership During Married Cohabitation		Pension Benefits <u>When Payable</u>
Total months of active plan memberships	X	2



It is arguable that this offends the 50% rule as it allocates the amount of pension earned during the marriage period on the basis of credited service only. In most pension plans the amount of pension is based on both credited service and pensionable earnings. Since pensionable earnings will normally be higher at retirement date, this formula confers upon the non-member spouse a portion of the member spouse's pension accrued outside the marriage period and that excess is unenforceable.

Any settlement that does not take into account the value of pension benefits accrued during the marriage period only could be unenforceable and could lead to a negligence charge.

For further information or a copy of our extensive brief about any or all of these please call Pension Valuers of Canada at **1-800-891-9122** or fax us at 1-705-749-6762.

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