

## Office of the Superintendent - Pension Commission

### Policy Bulletin #5

### Pension Benefit Division

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**Please note that the provisions in this Bulletin came into force on May 31, 2010. It has been updated to reflect the regulatory changes effective January 1, 2012.**

**Reference:** *The Pension Benefits Act Sections 31(2) to 31(9), and the Pension Benefits Regulation Part 11*

#### **I. JURISDICTION**

In order to determine the legislative requirements applicable to pension earned by an individual covered by a **registered pension plan**, as well as the pension plan itself, the jurisdiction applicable to each must be determined. A **member's** jurisdiction of employment is independent of the jurisdiction of a plan's registration.

##### **A. Jurisdiction of Registration**

In Canada, the federal-provincial division of legislative powers is set out in the *Constitution Act, 1867* (formerly the *British North America Act, 1867*), which defines the scope of the power of the federal government and the powers of provincial governments. As a result of this constitutional division of powers, the responsibility for regulating pension plans in Canada is shared between the federal and provincial governments.

Provincial pension legislation applies to pension plans with members employed in a particular province. Federal pension legislation applies to plans covering members employed in sectors that fall within federal areas of constitutional authority.

Multi-jurisdictional pension plans (plans with members in more than one jurisdiction) can fall within both provincial and federal regulators' jurisdictions. Under a reciprocal enforcement agreement, the jurisdiction of the plan's registration is the regulatory authority of the jurisdiction with the plurality of active members of the plan are employed (major authority).

The pension legislation of the major authority's jurisdiction applies to the plan's administrative matters instead of the corresponding provisions of the pension legislation of any other jurisdiction in which there are members employed (minor authority).

However, all matters respecting **benefits** and rights accrued to plan members are generally subject to the pension standards legislation of the minor authority.

## **B. Jurisdiction of Employment**

An **employee** is deemed to be employed in the province in which the establishment of the **employer** is located, and to which the person is required to report to work. A person who is not required to report to work at an establishment of the employer is deemed to be employed in the province in which the establishment of the employer is located from which the person's remuneration is paid.

Provincial pension legislation applies to members employed in a particular province. Federal pension legislation applies to members employed in sectors that fall within federal areas of constitutional authority (e.g., the federal public service, or the banking and telecommunications sectors), regardless of the province in which members are employed.

A member's pension will therefore fall under the legislation of one of three jurisdictions. The jurisdiction of the plan member's employment can be confirmed by the **administrator**.

## **II. FEDERAL PUBLIC SERVICE PENSION ACTS**

Employees of the federal public service, and certain corporations, participate in pension plans that are constituted under acts of the federal government. Aside from the *Income Tax Act (Canada)*, these plans are not bound by provincial pension standards legislation. Some of these pension plans include:

*The Public Service Superannuation Act and Supplementary Retirement Benefit Act*  
*The Canadian Forces Superannuation Act*  
*The Members of Parliament Retiring Allowances Act*  
*The Royal Canadian Mounted Police Superannuation Act*

For information concerning these and other federal public service plans, Public Works and Government Services Canada should be contacted.

Public Works and Government Services Canada  
P.O. Box 5010  
Shediac NB E4P 9B4

Telephone (800) 883-1411  
Facsimile (506) 533-5989  
E-mail [pensionandbenefits@pwgsc.gc.ca](mailto:pensionandbenefits@pwgsc.gc.ca)  
Website [www.pensionandbenefits.gc.ca](http://www.pensionandbenefits.gc.ca)

The pension benefits of these employees are divisible according to the requirements of the *Pension Benefits Division Act (PBDA)*. Active plan members can obtain information at <http://www.pensionetavantages-pensionandbenefits.gc.ca/act/evnvie-lfevnt/divorce-eng.html>. Retired plan members can obtain information at <http://www.pensionetavantages-pensionandbenefits.gc.ca/rtr/evnvie-lfevnt/divorce-eng.html>.

## **III. THE PENSION BENEFITS STANDARDS ACT**

Federal pension standards legislation applies to members employed in sectors that fall within federal areas of constitutional authority which include, but are not limited to, aviation and airlines, banks, broadcasting and telecommunications, interprovincial transportation, marine navigation,

shipping and rail, i.e. “included employment”. Members who work and reside in the Yukon, Northwest Territories or Nunavut are covered by the *Pension Benefits Standards Act, 1985*, R.S.C. 1985 (2nd supp.), c. 32 (PBSA).

The PBSA is administered by the Office of the Superintendent of Financial Institutions (OSFI). To determine if a particular pension plan falls under the PBSA, OSFI’s database of federally regulated pension plans can be accessed at [http://www.osfi-bsif.gc.ca/osfi/index\\_e.aspx?DetailID=568](http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?DetailID=568)

Alternatively, OSFI may be contacted at:

Office of the Superintendent of Financial Institutions  
Pension Benefits Division  
255 Albert Street  
Ottawa ON K1A 0H2

Telephone (800) 943-3980  
Facsimile (613) 990-5591  
E-mail [information@osfi-bsif.gc.ca](mailto:information@osfi-bsif.gc.ca)  
Website [http://www.osfi-bsif.gc.ca/osfi/index\\_e.aspx?ArticleID=216](http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?ArticleID=216)

The pensions of members in “included employment” are divisible on the breakup of a marriage or common-law relationship according to the requirements of s. 25, Distribution of Pension Benefits and Pension Benefit Credits on Divorce, Annulment or Separation, of the PBSA. Section 25 states that applicable provincial property law will apply to members’ pensions and pension benefit credits. Further, OSFI advises that provincial property law may include provincial pension legislation where that legislation relates to the distribution of property on the breakdown of a marriage or common-law partnership.

#### **IV. PROVINCIAL PENSION BENEFIT STANDARDS ACTS**

Unless a member is in the federal public service, or in “included employment”, a member reports to work, or is deemed to report to work in a particular province, the provincial pension standards legislation of that province applies to that member. The provincial pension standards statutes are as follows:

Alberta  
Employment Pension Plans Act, R.S.A. 2000, c. E-8.

British Columbia  
Pension Benefits Standards Act, R.S.B.C. 1996, c. 352.

Manitoba  
Pension Benefits Act, R.S.M. 1987, c. P32.

New Brunswick  
Pension Benefits Act, S.N.B. 1987, c. P-5.1.

Newfoundland and Labrador  
Pension Benefits Act, 1997, S.N.L. 1996, c. P-4.01.

Nova Scotia  
Pension Benefits Act, R.S.N.S. 1989, c. 340.

Ontario

Pension Benefits Act, R.S.O. 1990, c. P.8.

Quebec

Supplemental Pension Plans Act, R.S.Q., c. R-15.1.

Saskatchewan

Pension Benefits Act, 1992, S.S. 1992, c. P-6.001.

## **V. FEDERAL TAX LEGISLATION**

The federal government controls the tax shelter provided to all registered pension plans through the *Income Tax Act* (Canada) and its regulations, as well as various information circulars and interpretative bulletins.

## **VI. THE PENSION BENEFITS ACT OF MANITOBA**

If a member reports to work in Manitoba, or is deemed to be employed in Manitoba under section 2 of *The Pension Benefits Act* of Manitoba (Act), his or her pension and/or pension benefit credit is subject to the Act and Pension Benefits Regulations (regulations).

The Office of the Superintendent - Pension Commission (OSPC) is responsible for the day-to-day administration of the Act and the regulations.

To determine if a particular pension plan falls under the Act, the OSPC may be contacted.

The Office of the Superintendent - Pension Commission  
1004 - 401 York Avenue  
Winnipeg MB R3C 0P8

Telephone (204) 945-2740  
Facsimile (204) 948-2375  
E-mail [pensions@gov.mb.ca](mailto:pensions@gov.mb.ca)  
Website <http://www.gov.mb.ca/finance/pension/>

While *The Family Property Act* of Manitoba gives spouses and common-law partners the right to apply at any time to the court for an accounting and equalization of family property, including rights under a pension or superannuation scheme or plan, *The Pension Benefits Act* provides for a specific valuation and manner of the division of the pension benefit to be shared between the parties, as well as the options for its transfer or payment to the spouse, former spouse or common-law partner, substantively s. 31(2) to 31(9) of the Act and Part 11 of the regulations.

### **A. Relevant Terms Defined (Act s. 1(1), Reg. 1.1, 10.2(1), 11.2)**

The Act defines certain terms that are relevant to these provisions. For purposes of this paper, most of these terms are paraphrased below.

**"administrator"** means

(a) in relation to a pension plan, the person or body of persons that is responsible for administering the plan, and

(b) in relation to a prescribed plan or to a registered retirement income fund as in the Act, the financial institution responsible for administering the plan or fund;

**“common-law partner”** of a member or former member as

- (a) a person who, with the member or former member, registered a common-law relationship under section 13.1 of *The Vital Statistics Act*, or
- (b) a person who, not being married to the member or former member, cohabited with him or her in a conjugal relationship
  - (i) for a period of at least three years, if either of them is married, or
  - (ii) for a period of at least one year, if neither of them is married;

**"common-law relationship"** means the relationship between two persons who are common-law partners of each other.

**"member"** of a pension plan means an employee or former employee who is accruing, entitled to or receiving a pension under the plan.

**"pension"** means a benefit in the form of a series of periodic payments that continues for the life of a member, whether or not it is continued to another person after the member's death, and includes a future entitlement to such payments but does not include ancillary benefits until they become part of the pension under subsection 21.1(2).

**"pension benefit credit"**

- (a) of a person in relation to a pension plan means the value at a particular time of the pension and other benefits to which the person is then entitled, and (member)
- (b) of an owner of a prescribed plan means the value at a particular time of the assets in the plan. (former member)

The regulations contain additional terms and further distinguish the types of “members” with the definitions of **“member-owner”** and **“owner”**.

**"common-law partner"** of an owner includes a former common-law partner of the owner.

**"member-owner"** is the owner of a LIRA or LIF who transferred to that vehicle an amount that is directly or indirectly attributable to a pension benefit credit earned by the owner as a member of a pension plan (former member).

**"owner"** means

- (a) the member whose pension or pension benefit credit is to be divided (aka member); or
- (b) the member-owner whose pension or pension benefit credit is to be divided.

**“prescribed plan”** means a Locked-in Retirement Account (LIRA) or Life Income Fund (LIF).

**"separation date"** in relation to a division of an owner's pension or pension benefit credit means the date that the owner and the person entitled to the division of it began living separate and apart because of a breakdown of their relationship.

"**spouse**" of an owner means the individual who is married to that person and includes a former spouse of the owner.

**NOTE:** For purposes of the balance of this paper, the terms "**owner**" and "**member-owner**" will be used. The above definitions for "**spouse**" and "**common-law partner**" will also be used.

## **B. Preconditions for Division (Act s. 31(2))**

The Act applies to the pension or pension benefit credit of an owner where the owner was employed or deemed to be employed in Manitoba according to subsection 2(1).

Subsection 31(2) of the Act requires that the pension of an owner and the pension benefit credit of an owner and member-owner must be divided in accordance with the regulations. Effective May 31<sup>st</sup>, 2010, the division is triggered if:

- a) according to an order of the Court of Queen's Bench made under *The Family Property Act*, family assets of the owner or member-owner or his or her spouse or common-law partner are required to be divided,
- b) according to a written agreement between the owner or member-owner and his or her spouse or common-law partner, their family assets are divided, or
- c) a division of the pension or the pension benefit credit, as the case may be, is required by an order of a court of competent jurisdiction in another province or territory of Canada., or an order of the Court of Queen's Bench made under the Act.

The entitlement to share in the pension or pension benefit credits acquired during a relationship flows from the provisions of the applicable provincial property law. Married persons or common-law partners who have either registered their relationship under s. 13.1 of *The Vital Statistics Act*, or live together in a conjugal relationship for at least three years, fall under *The Family Property Act* of Manitoba if they live in Manitoba or Manitoba was the last place they lived together.

As not all married persons or common-law partners fall under *The Family Property Act* of Manitoba, clause 31(2)(c) extends the pre-conditions to include parties who separate outside Manitoba, by allowing family property division orders made elsewhere in Canada that *require* division of a pension or pension benefit credits to trigger a division under the Act.

## **C. Parties Subject to Mandatory Division (Act s. 31(3))**

Subsection 31(3) limits the application of s. 31(2) to the following parties:

- a) spouses who began living separate and apart after 1983;
- b) common-law parties who
  - i. began living separate and apart on and after June 30, 2004,
  - ii. began living separate and apart on and after 1983 but before June 30, 2004, if the relationship had been declared according to s. 31(5) of the Act as it read before June 30, 2004, or
  - iii. were living separate and apart on June 30, 2004, but resumed cohabitation after June 30, 2004 for at least 90 days.

Evidencing a common-law relationship for purposes of the Act is dependent upon the parties' ability to establish the existence of the relationship to the satisfaction of the administrator or provide proof to the administrator of its registration under *The Vital Statistics Act*.

Although parties who separate before January 1, 1984 or June 30, 2004, as applicable, are not subject to the requirements of the Act, some have entered into written agreements which provide for the division of pensions or pension benefit credits expressly as set out in the Act despite that it would not otherwise apply. The Office of the Superintendent has not taken a position contrary to such an agreement. However, it is incumbent on the parties to seek the concurrence of the administrator in order that the administrator can determine if, from its perspective, there is any impediment to such a division.

#### **D. Orders made under *The Pension Benefits Act* (Act s. 31(3.2) – (3.4))**

As the definition of “common-law partner” in the Act differs from that in *The Family Property Act*, the Act provides a mechanism for those parties who meet the cohabitation criteria in the Act, but not *The Family Property Act*, to obtain an order to trigger a division under s. 31(2). Without this provision, this group of common-law partners could only effect a division if they entered into an agreement.

The parties must have cohabited with each other for at least one year but less than three years while neither of them was married. Further, their relationship was never registered under s. 13.1 of *The Vital Statistics Act*, and their last common habitual residence or the last place they lived together was in Manitoba.

An application must be made within three years after the common-law partner and the owner or member-owner last began to live separate and apart; or within six months after the grant of letters probate of the owner's or member-owner's will or of letters of administration, whichever occurs first.

The court may order the division if it is satisfied that the requirements of the Act have been met.

#### **E. Portion to be Divided (Accrual Period) (Act s. 31(2.1), Reg. s. 11.3)**

A division under s. 31(2) must be made in accordance with the regulations regardless of any agreement reached between the parties or any terms in a court order.

The portion of a pension or pension benefit credit to be divided between an owner or member-owner and his or her spouse or common-law partner is the pension benefit credit or pension that accrued:

- a) in the case of a common-law relationship, from the first day of the period in which the parties cohabited with each other in a conjugal relationship and that continued until they became common-law partners to their separation date;
- b) in the case of a marriage, from the date of the marriage or, if there was a period in which the parties cohabited in with each other in a conjugal relationship and which continued until they were married, from the first day of that period to their separation date;  
or
- c) in the case of spouses who began living separate and apart before June 30, 2004, the date of marriage to their separation date.

**F. Method of Valuing a Pension or Pension Benefit Credit (Pro rata Method) (Act s. 21.1(2), Reg. s. 5.7(1), s. 11.4(1)-(4))**

1. Pension or Pension Benefit Credit (Defined Benefit Plan)

The division of a pension benefit credit or pension must be on an equal basis between the spouses or common-law partners.

For purposes of a pension benefit credit or pension under a **defined benefit plan**, the spouse or common-law partner's share is to be calculated according to the following formula:

$$A = .5 \times [B \times (C/D)]$$

In this formula,

A is spouse or common-law partner's share of the total pension benefit credit or pension;

B is the total pension benefit credit or pension accrued to the owner as of the separation date;

C is the accrual period determined according to the regulations;

D is the period during which the total benefit in B accrued.

The pension benefit credit of an owner who:

a) is an **active member**, is the value on the separation date of the pension and any other benefits to which he or she has an unconditional or **vested** entitlement under the plan, including **ancillary benefits** as a result of satisfying any age or service requirements as of the separation date, determined as if the owner had ceased to be an active member on the separation date, or

b) is a **former member**, is the value on the separation date of the pension and any other benefits to which he or she had an unconditional or vested entitlement under the plan, including ancillary benefits as a result of satisfying any age or service requirements as of the date he or she ceased to be an active member.

The pension benefit credit or **commuted value** to be shared is determined on the basis of actuarial assumptions and methods that are adequate and appropriate and in accordance with generally accepted actuarial principles, and in a manner acceptable to the Office of the Superintendent.

Presently, the Canadian Institute of Actuaries Revised Standards of Practice for Pension Commuted Values (Section 3800) adopted December 8, 2008 and effective April 1, 2009, is used for this purpose.

2. Excess contributions (Reg. s. 5.10, s. 11.4(7))

Under a defined benefit plan the employer must pay at least 50 percent of the pension benefit credit. If the owner has made required contributions in excess of 50 percent of the pension benefit credit, the owner is entitled to his or her excess contributions. Any excess contributions determined as of the date of separation must be included in the owner's pension benefit credit as of the date of separation.



## **G. Method of Valuing a Pension Benefit Credit (Value added Method) (Reg. s. 11.4(1), s. 11.4(5))**

### 1. Valuation (Defined Contribution Plan)

The division of a pension benefit credit must be on an equal basis between the spouses or common-law partners.

For purposes of a pension benefit credit under a **defined contribution plan**, the spouse or common-law partner's share is to be calculated according to the following formula:

$$A = .5 \times (B - C)$$

In this formula,

A is the spouse or common-law partner's share of the total pension benefit credit;

B is the total contributions to the plan to the credit of the owner, with interest calculated according to the regulations, as of the separation date;

C is the total contributions to the plan to the credit of the member, with interest calculated according to the regulations, as of the date the relationship began according to the regulations.

### 2. Optional Ancillary Contributions (Defined Benefit Plan) and Voluntary Additional Contributions (All Plans) (Reg. s. 11.4(6))

To the extent that the owner's pension benefit credit is attributable to **optional ancillary contributions** made under a defined benefit plan that have not been converted into **optional ancillary benefits** or to **voluntary additional contributions**, these contributions must be divided and the spouse's or partner's share determined using the value added method.

## **H. Disclosure**

### 1. Statement for Division under Pension Plan (Reg. s. 11.11(1)-(3), s. 11.13)

If a spouse or common-law partner is entitled to a division under s. 31(2) of the Act of an owner's pension or pension benefit credit, the spouse or common-law partner or the owner may request in writing that the administrator provide a statement that must set out:

(a) the date specified in the request as the date as of which the accrual period began and ended;

(b) the value of the spouse or common-law partner's total entitlement under s. 31(2) of the Act as of the date specified under clause (a), as calculated under the regulations, including interest to the date of the statement;

(c) an explanation of their options, and for each option, a summary of the benefits to which each of them would be entitled on exercising the option;

(d) the date on which the owner became a member; and

(e) if the owner is no longer an active member, the date on which he or she ceased to be an active member.

The administrator is not required to provide a statement if the request was received within 12 months after providing a statement in respect of the same division of a owner's pension or pension benefit credit unless, after the statement was provided, the spouse or common-law partner became entitled under subsection 31(2) of the Act to a division of the pension benefit credit.

The administrator must provide the statement at no charge to the owner and the spouse or common-law partner within 60 days after receiving the request.

## 2. Statement for Division of Prescribed Plan (Reg. s. 11.12, s. 11.13)

If a spouse or common-law partner is entitled to a division under s. 31(2) of the Act of a member-owner's pension benefit credit under a prescribed plan, the spouse or common-law partner or the member-owner may request in writing that the financial institution provide a statement that must set out:

- (a) the date specified in the request as the date as of which the accrual period began and ended;
- (b) the value of the spouse or common-law partner's total entitlement under s. 31(2) of the Act as of the date specified under clause (a), as calculated under the regulations, including interest to the date of the statement; and
- (c) an explanation of their options and, for each option, a summary of the benefits to which each of them would be entitled on exercising the option.

The administrator is not required to provide a statement if the request was received within 12 months after providing a statement in respect of the same division of a member-owner's pension or pension benefit credit unless, after the statement was provided, the spouse or common-law partner became entitled under subsection 31(2) of the Act to a division of the pension benefit credit.

The administrator must provide the statement at no charge to the member-owner and the spouse or common-law partner within 60 days after receiving the request.

### **I. Settlement of Spouse's or Partner's Share**

#### 1. Options for Transfer of Pension Benefit Credit from Pension Plan (Act s. 31(4), Reg. Part 10)

On division of a pension benefit credit under a pension plan, the spouse or common-law partner has the option of transferring his or her share of the pension benefit credit to:

- a) a LIRA,
- b) a LIF,
- c) a registered pension plan in which the spouse or partner is a member, if the plan so permits,
- d) an immediate or deferred life **annuity** purchased through a life insurance company, if the plan so permits, or

- e) a pooled registered pension plan (PRPP).

In general, the purpose of a LIRA is to provide a financial vehicle for the holding and investment of pension monies that are subject to locking in until it is all transferred to another vehicle for the purpose of securing a pension at **retirement** in a form and manner required or permitted by the Act. If the spouse or common-law partner should wish to defer retirement to a later date, a transfer of his or her share of the pension benefit credit could be made to a LIRA, his or her own pension plan, if that plan permits or a PRPP.

In general, the purpose of a LIF is to provide a financial vehicle for the holding and investment of pension monies that are subject to locking in and for the provision of retirement income in a form and manner required or permitted by the Act. Should the spouse or common-law partner wish to commence receiving retirement income, a transfer may be made to a LIF, a life annuity purchased through a life insurance company or a PRPP if they have reached the age of 55.

The Superintendent, Office of the Superintendent – Pension Commission keeps a list (or register) of institutions authorized to issue LIRAs and LIF's. In Manitoba, pension monies subject to **locking in** can only be transferred to a LIRA or LIF if the financial institution issuing the LIRA or LIF has been registered and appears on the Superintendent's Register of Authorized Institutions (Superintendent's Register). The Superintendent's Register may be accessed at [www.manitoba.ca/asset\\_library/en/pension/pdf/suptregister.pdf](http://www.manitoba.ca/asset_library/en/pension/pdf/suptregister.pdf)

## 2. Options for Optional Ancillary Contributions, Voluntary Additional Contributions and Excess Contributions (Reg. s. 11.4(8))

The spouse or common-law partner has the same rights in relation to these contributions as the owner would have had if the owner had ceased to be an active member on the separation date. The spouse or partner can elect from the following options:

- (a) received as a refund;
- (b) if permitted under the terms of the plan, used to increase the amount of the pension;
- (c) transferred to a registered retirement savings plan or registered retirement income fund as defined in the *Income Tax Act* (Canada), to the extent permitted by that Act.

## **J. Division of Pension (pension-in-pay) (Act s. 31(4), Reg. s. 11.8)**

When a spouse or common-law partner becomes entitled to receive a portion of a retired owner's pension or pension-in-pay as determined by the formula (Part F 1.), if the parties do not opt out, the pension is divided and the spouse's or partner's share portion is paid from the income stream. The **form of pension** that was elected by the owner at retirement is not affected by the division.

For example, if the owner elected a joint and survivor 60% pension at retirement, the joint and survivor pension will continue to be paid however, payments will be divided between the owner, spouse or partner, and their respective designated beneficiaries or estates in the proportion required by the Act and regulations and until they are both deceased.

However, if the plan so provides, and the parties agree in writing, the regulations now permit:

- a) in the case of a joint and survivor pension, it may, be paid as two separate lifetime pensions without joint and survivor benefits, one to the owner, and the other to the spouse or common-law partner, and

b) in the case of any other form of pension, the form must not be changed, but the pension may be adjusted so that it becomes payable as two separate lifetime pensions: one to the owner and one to the spouse or common-law partner.

The total of the actuarial present values of the two pensions as of the separation date must be equal to the actuarial present value of the pension as of that date.

See the Appendix for examples of a joint and survivor 60% pension, as well as a life pension guaranteed ten years where, after division, the form is not changed and where it changes.

This provision does not apply to a life annuity payable under an insurance contract that prohibits the annuity from being commuted.

#### **K. Adjustment of Pension Benefit Credit for Interest (Reg. s. 5.21(3), s. 5.22, s. 11.5)**

The spouse's or common-law partner's share of the pension benefit credit is to be credited with interest for the period up to the end of the month preceding the month in which the spouse's or partner's share is transferred or paid from the pension plan.

For purposes of a defined benefit plan, the pension benefit credit or commuted value must be updated with interest at a rate equal to the rate of return of the pension fund for the period from the separation date to a date no earlier than the end of the month preceding the month in which the transfer of the pension benefit is made. The pension benefit credit or commuted value is not re-computed at a subsequent date.

If the pension benefit credit is in respect of optional ancillary contributions, and excess contributions, the rate of interest must be either of the following rates:

- (a) a rate equal to the rate of return of the pension fund, and
- (b) the average of the CANSIM Series V 122515 rates published by the Bank of Canada (long term Canada Bond rate),

from the later of the separation date or the date that interest was last credited, to a date no earlier than the end of the month preceding the month in which the transfer is made.

An administrator who chooses a rate of interest in respect of optional ancillary contributions and excess member contributions must use that rate for all divisions of pension benefit credits made within a fiscal year.

If the pension benefit credit is in respect of voluntary additional contributions, the pension benefit credit is to be credited with interest at a rate equal to the rate of return of the pension fund, from the later of the separation date or the date interest was last credited, to a date no earlier than the end of the month preceding the month in which the transfer is made.

If the pension benefit credit is in respect of a defined contribution provision, the pension benefit credit is to be credited with interest at a rate equal to the rate of return that can reasonably be attributed to the operation of the pension fund, from the later of the separation date or the date interest was last credited, to a date no earlier than the end of the month preceding the month in which the transfer is made.

## L. Division of LIRAs or LIFs (Reg. s. 11.1, s. 11.4(1)) and 11.4(9)

### 1. Valuation (Value added Method)

Should the parties have a prescribed plan such as a LIRA or LIF, these plans are also subject to the requirements on the breakdown of a marriage or common-law relationship. On accepting pension monies that are subject to locking-in, the financial institution took the place of the administrator and is responsible for administering the plan according to the Act and regulations.

If a portion of the member-owner's pension benefit credit was earned before the date of marriage or the first day the parties cohabited with each other in a conjugal relationship, as the case may be, where possible the former pension plan administrator should be contacted to calculate the spouse's or common-law partner's share of the pension benefit credit that was transferred from the pension plan to the member-owner's prescribed plan as of the date the owner ceased to be an active member of the pension plan.

The division of a pension benefit credit must be on an equal basis between the spouses or common-law partners.

For purposes of a pension benefit credit under a **Locked-in Retirement Account (LIRA) or Life Income Fund (LIF)**, the spouse or common-law partner's share is to be calculated according to the following formula:

$$A = .5 \times B \times C/D$$

In this formula,

A is the spouse or common-law partner's share of the total pension benefit credit;

B is the total pension benefit credit as of the date of calculation;

C is

(a) the portion of the pension benefit credit transferred to the prescribed plan that accrued during the accrual period determined under section 11.3, or

(b) if that portion cannot be determined, the pension benefit credit transferred to the prescribed plan;

D is the pension benefit credit transferred to the prescribed plan.

It should be noted that the member-owner may have split his or her pension benefit credit under the pension plan and transferred portions of it to two or more institutions.

Where the former pension plan administrator calculates the spouse's or partner's share of the pension benefit credit that was transferred from the pension plan to the member-owner's prescribed plan, the financial institution should calculate the spouse's or partner's share of the balance of the prescribed plan by prorating the balance of the plan by the amount determined by the former pension plan administrator to be the spouse or partner's share of the credit that was transferred from the pension plan to the member-owner's prescribed plan as of the date the owner ceased to be an active member.

However, if the pension plan administrator cannot be located or is unable to calculate the spouse's or common-law partner's share of the pension benefit credit, the spouse's or partner's

share of the pension benefit credit should be assumed to be 50% of the balance of the prescribed plan.

Alternatively, the parties may wish to retain an actuary, at their expense, to calculate the spouse's or partner's share of the pension benefit credit that was transferred to the prescribed plan in the manner prescribed by the Act and regulations.

## 2. Options for Transfer of Pension Benefit Credit from Prescribed Plan (Act s. 31(4), Reg. Part 10)

On division of a pension benefit credit under a prescribed plan, the spouse or common-law partner has the option of transferring his or her share to:

- a) a LIRA,
- b) a LIF,
- c) a registered pension plan in which the spouse or partner is a member, if the plan so permits,
- d) an immediate or deferred life annuity purchased through a life insurance company, or
- e) a PRPP.

### **M. Equalization (Reg. s.11.6)**

Where an owner or member-owner and spouse or common-law partner each has pensions or pension benefit credits, they can agree in writing to divide equally the difference. This is intended to preserve, to the greatest extent possible, the integrity of the pensions or pension benefit credits of the parties.

Note the following example.

Terry's pension benefits and Kelly's pension benefits must be divided between them. They have agreed in writing to divide the difference on a 50/50 basis.

If Terry's pension benefits are valued at \$70,000 and Kelly's pension benefits are valued at \$40,000, the difference of \$30,000 will be divided on a 50/50 basis. Terry's administrator will transfer  $\$30,000 \div 2$  or \$15,000 to Kelly's LIRA, LIF or pension plan, if that plan allows it.

### **N. Opting out (Act s. 31(6), Reg. s. 11.9)**

An owner or member-owner and the spouse or partner who is entitled to a division of the owner's or member-owner's pension or pension benefit credit, as the case may be, may, after each have received the following:

- (a) independent legal advice; and
- (b) the statement required under regulations;

enter into a written agreement, containing the terms set out in the regulations, not to divide the pension or pension benefit credit between them, and file that agreement with the administrator or financial institution.

An agreement not to divide the pension or pension benefit credit must acknowledge that each of the parties

- (a) is entering into the agreement voluntarily and without duress, coercion or compulsion of any kind,
- (b) has received independent legal advice with respect to the effect of the agreement, and
- (c) has received a statement from the pension plan administrator or financial institution, as the case may be, in accordance with regulations.

Pension plan administrators and financial institutions should be requiring proof from the parties that they have received independent legal advice.

**O. Adjusting owner's pension benefit credit after division (Defined benefit plan) (Reg. s. 11.7)**

The pension plan administrator must ensure that the owner's pension under a defined benefit provision after a division is adjusted in a manner that

- (a) does not result in a gain or loss to the plan, and
- (b) follows generally accepted actuarial principles.

The following is an example of one method that may be used to adjustment of the owner's pension following a division.

The owner and spouse separate in 2004. The owner had a pension benefit credit under her defined benefit pension plan equal to \$100,000 at the separation date. The spouse share was 50% or \$50,000.

The owner remained an active member of the pension plan until her retirement. In 2010 the owner retired by which time her pension benefit credit would have been \$200,000 had it not been divided due to the separation. So, to reflect the division, the plan administrator adjusted the owner's pension by the amount of the credit transferred to the spouse [\$200,000 minus \$50,000 = \$150,000]. After the adjustment, the owner's pension benefit credit had a value of \$150,000.

**P. Addressing Spouse's or Partner's Interest in Pension Arrears (Defined benefit plan)**

In the event of a division after an owner has retired and is receiving pension payments, the spouse or common-law partner has an interest in the pension payments made after the date of separation.

While timely advice to the pension plan administrator is important, in some instances, the administrator will not be aware that the parties have separated, and may not receive a copy of the necessary order or agreement for some time. As a result, full pension payments may continue to be made to the member-owner after the separation date.

If the parties do not opt out under s. 31(6) of the Act, the administrator must address the matter of the spouse's or partner's interest in the full pension payments which were made to the owner from the date of separation until the pension payments were divided. The spouse's or partner's interest is referred to as the arrears and may be addressed as follows.

Under one method, the owner may make a lump sum payment to the spouse or common-law partner, outside the pension plan, which must be equal to the actuarial present value of the arrears. The amount paid to the spouse or partner may take into consideration the tax implications for each of the parties. The administrator should satisfy itself that the spouse or partner received the payment in satisfaction of their full interest in these arrears.

A second method involves the administrator authorizing a lump sum payment from the pension plan to the spouse or partner in an amount equal to the actuarial present value of the arrears. The owner's post-division pension payments must then be further adjusted to reflect the lump sum payment made to the spouse or partner.

A third method requires a temporary reduction of the owner's post-division pension payments. The amount by which the owner's pension payments are further reduced, would be used to provide a corresponding increase to the spouse's or partner's pension payments in order to liquidate the arrears. Once the arrears to the spouse or partner are fully addressed, the owner's pension payments would then return to the post-division level. The repayment period should take into account the life expectancy of the owner. However, there is still a risk to the spouse or partner that the owner may die during the repayment period, and that pension payments will cease. The spouse or partner would then have to seek whatever remedies are available.

The lump sum payment from the pension plan to the spouse or common-law partner may be preferable, as the arrears represent payments that the spouse or partner should have received. Further, under this method the impact on the owner's post-division pension payments is lessened, as this value is spread over the owner's remaining lifetime, and the spouse or partner is not exposed to the mortality risk. It should be noted however, that it may be possible that under either of the latter two methods, there may be a temporary or permanent reduction of the owner's post-division pension payments to zero.

Lastly, if the actuarial present value of spouse's or common-law partner's share of the pension (including the value of the arrears) exceeds the actuarial present actuarial value of the owner's remaining post-division pension (excluding the value of the arrears), but is a matter the parties must address outside the plan.

The administrator should provide the owner and spouse or partner with a statement, including the amount of arrears, and as applicable, the amount of post-division pension payments and the effects to that amount of the option(s) to address the arrears, the repayment period, if applicable, as well as any risks to the parties as outlined above. The administrator should also obtain a written agreement between the parties regarding the method that will be used to address the arrears.

#### **Q. Relevant Case Law**

The following court cases are based on the legislation in force prior to May 31, 2010.

#### **Sader v. Sader, [1988] M.J. No. 605**

In the Sader case, the parties contended that no property order existed pursuant to The Marital Property Act and they both had sworn affidavits declaring they had not agreed to any division of family asset. The court looked at affidavit evidence to determine if the pension required division according to the Act. Therefore, the administrator may wish to consider obtaining such evidence from the parties as it and its legal counsel consider appropriate to determine if the pre-conditions under the Act have been met. Such evidence may, but is not necessarily limited to, include affidavits from the parties. Alternatively, the administrator may refer the parties to the courts for a determination.



**Campbell v. Campbell, [1995] M.J. No. 466**

In this case the Court of Appeal ruled upon the validity of a 1986 separation agreement in which the parties had waived any interest in each other's pension benefits and the effect of the 1992 amendments to s. 31 of Act on such an agreement. The Court of Appeal found that the parties were bound by the 1986 separation agreement and that the pension benefits did not have to be divided. The facts of this case were as follows:

1. The parties had married March 12, 1955 and separated January 15, 1986. They were divorced on March 2, 1987.
2. On April 22, 1986, Mr. Campbell and Mrs. Campbell entered into a Separation Agreement. Mr. and Mrs. Campbell each received independent legal advice prior to signing the Separation Agreement; however, no formal financial disclosure was exchanged prior to the signing of the Agreement.
3. The Separation Agreement acknowledged each party had a pension plan and that each party released the other from any claims that he or she may have to the other's pension plan and that neither party would make a claim to these pension plans.
4. At the time of signing the Separation Agreement, each party was aware of s. 27 (now s. 31(2)) of the Act pertaining to the division of pension benefit credit and each party was aware that the value of Mrs. Campbell's pension was greater than that of Mr. Campbell.
5. Notwithstanding the Separation Agreement, Mr. Campbell made claim to Mrs. Campbell's pension and relied upon s. 31(2) of the Act in support of his right to a division of the pension benefit. Mr. Campbell alleged that the parties had failed at the time of executing the Separation Agreement to comply with the subsequently enacted provisions of s. 31(6). That is that the parties had not received independent legal advice after the passage of the 1992 amendment and that he had not received a statement of the commuted value of the pension benefit.

The Court of Appeal ruled that the Agreement not to split pension benefits was binding on the parties.

Since the Campbell decision, plan sponsors and administrators have been approaching the OSPC to ascertain what, if any, effect this decision has on them. Specifically, plan sponsors and administrators want to know the effect the decision has on parties who have entered into agreements prior to June 24, 1992 under which they have agreed not to divide pension benefits.

Administrators have also asked what steps, if any, the owner or member-owner and former spouse or common-law partner must take to give effect to the Separation Agreement or written agreement not to divide pension benefits.

The OSPC is of the view that if administrators are provided with a Separation Agreement which predates June 24, 1992, they are wise to consult with their legal counsel to determine if they can rely on the Campbell decision to not divide pension benefits.

Administrators could suggest that the member or former member and spouse or former spouse or common-law partner execute the agreement in accordance with s. 31(6) of the Act to waive the division of pension benefits under s. 31(2).

In the event the administrator cannot determine if Campbell applies, or the parties are not prepared to execute the agreement in accordance with s. 31(6) of the Act, recourse to the Courts for a determination is advisable.

**Foster v. Foster, [2007] M.J. No. 298**

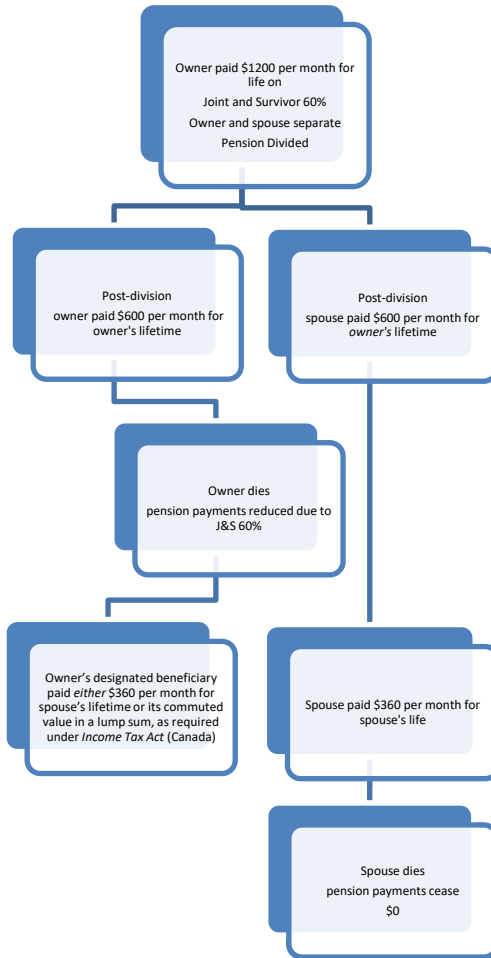
In the Foster case, the parties separated after an 11-year marriage and at the time of marriage, the husband had been contributing to a defined contribution plan for 20 years. The wife sought to share in the interest accrued during the marriage on contributions made prior to the marriage. In 2006, the Court of Queen's Bench found that because the husband's pension benefit was a defined contribution benefit, the wife was entitled to an equal share of the entire accumulation of the pension benefit credit accrued during the marriage.

On appeal, the Manitoba Court of Appeal recently affirmed the Court of Queen's Bench decision indicating that the regulations are consistent with *The Family Property Act* which stipulates that the appreciation in the value of family property (which includes pension), during the marriage, of an asset acquired before marriage, is shareable.

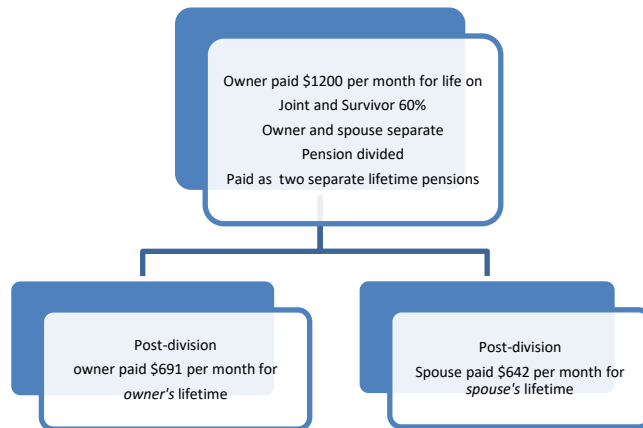
Therefore, in respect of a defined contribution or money purchase benefit the pension benefit credit as of the date of marriage and the pension benefit credit as of the date of separation are to be calculated as if the owner's employment had been terminated as of each of those dates, and the difference between the two amounts is shareable.

## APPENDIX

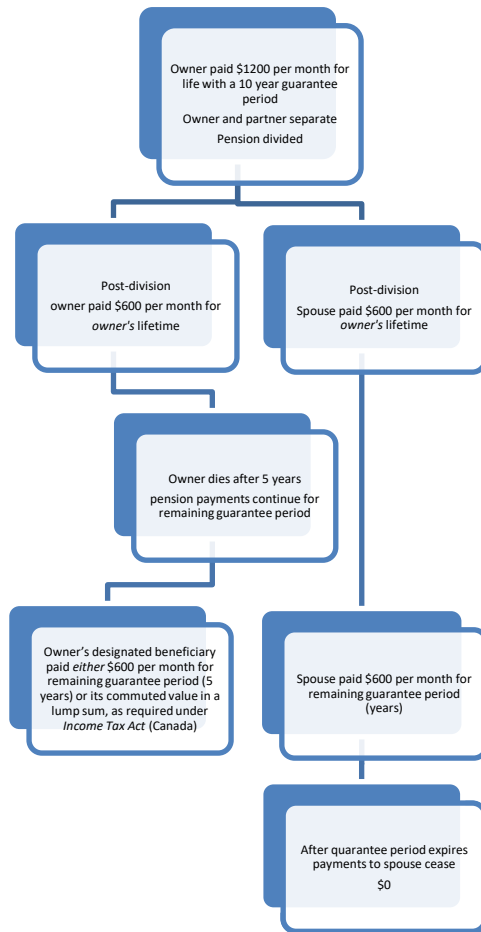
### JOINT AND SURVIVOR 60% PENSION FORM UNCHANGED



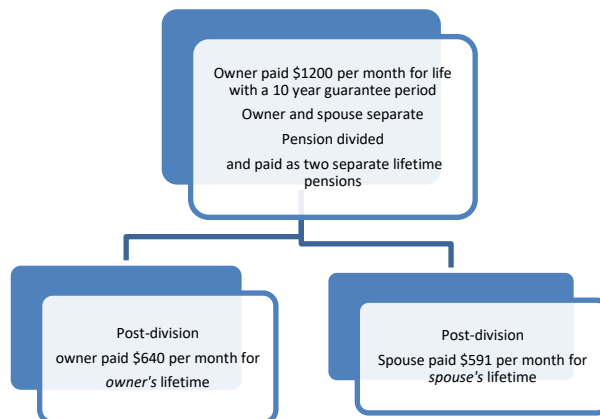
### JOINT AND SURVIVOR 60% PENSION CHANGED TO TWO SEPARATE LIFE PENSIONS



### LIFE PENSION GUARANTEED 10 YEARS FORM UNCHANGED



## LIFE PENSION GUARANTEED 10 YEARS CHANGED TO TWO SEPARATE LIFE PENSIONS



## GLOSSARY

### **Accrued**

Earned by an owner according to service, earnings, etc., up to a given date.

### **Active member**

Member of the plan who is accruing a pension under the plan, or would be accruing a pension if it were not for a temporary interruption in employment

### **Administrator**

The person or persons who administer the pension plan. They arrange for pension payments, funding of the plan, etc. For most plans, the employer is responsible for administration (although the employer may hire a third party to administer the plan on its behalf). Some plans are administered by a board of trustees or similar body.

### **Ancillary Benefits**

Benefits in addition to regular pension benefits and survivor benefits. These include bridging benefits and enriched early retirement benefits.

### **Benefit**

Generally, any form of payment to which a person may become entitled under the terms of a plan.

### **Bridging Benefits**

A temporary benefit provided to members who retire prior to the age when Canada Pension Plan benefits are normally payable (age 65) in order to supplement pension income until the CPP benefits are payable.

### **Commuted Value**

The amount of a lump sum payment payable today estimated to be equal in value to a future series of payments.

### **Continuous Service or Membership or Employment**

Period where an employee is continuously employed by the same employer or continuously participates in his or her employer's pension plan, including periods of temporary absence or suspension or periods of layoff.

### **Defined Benefit Plan**

A plan that provides a pension based on service, average earnings, etc. but not the total contributions. If the plan is contributory, the rate of employee contributions may be specified, with the employer contribution paying the balance of the cost of the pension benefit. To be distinguished from a defined contribution plan.

### **Defined Contribution Plan**

A plan that provides a pension determined with reference to and provided by the accumulated contributions and the return on the investment of the contributions paid by or for the credit of a member and made to the member's individual account. Also known as money purchase plan.

### **Designated Beneficiary**

A person who on the death of an owner or member-owner, may become entitled to a benefit under the plan.

**Employee**

An individual, employed to do work or to provide a service, who is in receipt of or entitled to remuneration for the work or service.

**Employer**

The person or organization from whom an employee receives remuneration. This includes any or all of the employers that are required to contribute to a multi-unit pension plan or multi-employer pension plan.

**Enriched Early Retirement Benefits**

An ancillary benefit paid on retirement prior to the normal retirement date, which is not reduced to the extent it should be to fully account for the longer period of time over which the pension is likely to be paid.

**Former Member**

A person whose membership in a plan has terminated, transferred his or her pension monies that are subject to locking in to a prescribed plan, a life annuity or another plan, and no longer retains an entitlement under the plan.

**Joint and Survivor 60% Pension**

A form of pension that pays a pension to the spouse or common-law partner for his or her life after the owner's death of at least 60% of the pension that the owner was receiving when he or she died. Spouse or partner can waive this entitlement using the form required by the superintendent.

**Life Annuity**

Periodic payments (usually monthly) provided by the terms of a contract for the lifetime of an individual (the annuitant) or the individual and his or her designated beneficiary. An annuity may be a fixed or varying amount, and may continue to be paid for a period after the annuitant's death.

**Life Income Fund (LIF)**

A prescribed pension arrangement that can be purchased with pension monies subject to locking in under pension legislation. The key characteristics of the LIF include:

- the LIF contract must be registered as a retirement income fund (RRIF) in accordance with the *Income Tax Act* (Canada);
- monies in the contract are subject to locking in;
- the owner of the contract must be paid a retirement income each year (except for the first year of the contract);
- the owner determines the amount of income to be paid each year at the beginning of the year, subject to certain minimum and maximum withdrawal rules;
- at any time the owner of the contract may purchase a life annuity with the balance of the LIF, but the owner is never required to purchase an annuity; and
- the owner determines how the balance of the LIF is to be invested.

**Locking In**

Legislative requirement that pension benefits cannot be withdrawn as a lump sum and must provide retirement income to the owner for his or her life.

**Locked-In Retirement Account (LIRA)**

A prescribed savings arrangement that can be purchased with pension monies subject to locking in under pension legislation:

- the LIRA contract must be registered as a retirement savings plan (RRSP) in accordance with the *Income Tax Act* (Canada);

- monies in the contract are subject to locking in;
- non-assignable and exempt from seizure; and
- is administered as a deferred life annuity under the Act and regulations.

### **Form of Pension**

Subject to spouse's or partner's right to a joint and survivor 60% pension, elected by a member at retirement, the distribution of pension payments from the pension plan. Forms of pension may include joint and survivor 50%, 75% or 100% pension, life pension guaranteed 5, 10 or 15 years, life only pension. Once pension payments commence, the form of pension can generally not be changed.

### **Member**

An employee or former employee who is accruing, entitled to or receiving a pension under the plan.

### **Normal Retirement Date**

The date at which the member becomes entitled to retirement benefits without reduction or increase according to the terms of the pension plan.

### **Optional Ancillary Benefits (OABs) (Flexible Benefits/Plan)**

Provided under a defined benefit pension plan. Members can make optional ancillary contribution to purchase optional ancillary or "add-on" benefits to augment their basic pensions as calculated under the basic formula. OABs can include enriched early retirement benefits, cost-of-living adjustments, bridging benefits or other specified benefits. The employer does not contribute to OABs. Also known as flexible benefits.

### **Optional Ancillary Contributions (OACs)**

Additional contributions made by an owner under a "flexible benefit" provision of a defined benefit pension plan to buy ancillary benefits of the owner's choice. OACs are not locked-in.

### **Pension**

The aggregate annual, monthly or other periodic amounts payable to a member during their lifetime to which he or she will become entitled at the normal retirement age. The pension may also refer to the amount to which any other person is entitled upon the death of the member.

### **Pension Benefit Credit**

The value at a particular time of the pension benefits and any other benefits provided under the pension plan to which the employee has become entitled as of that time;

### **Pooled Registered Pension Plan (PRPP)**

A PRPP is a defined contribution-style plan that is set up and administered by a licensed provider and administered by the financial institution.

### **Prescribed**

As prescribed in the legislation; act or regulations.

### **Prescribed Plan**

A Locked-in Retirement Account (LIRA) or Life Income Fund (LIF).

### **Prescribed Registered Retirement Income Fund (Prescribed RIFF)**

A prescribed RRIF is a retirement income fund as defined in the *Income Tax Act* (Canada) that

it is also subject to certain rules set out in the regulations. Monies in a prescribe RRIF are not subject to locking in.

**Registered Pension Plan (Pension Plan)**

A pension plan offered by an employer or supported by a group of employers for the benefit of employees. The term includes plans covering employees of governments and the private sector, but does not include the Canada Pension Plan or other public programs.

**Regulations**

The Pension Benefits Regulations under *The Pension Benefits Act* of Manitoba.

**Registered Retirement Income Fund (RRIF)**

A personal retirement income fund as defined by the *Income Tax Act* (Canada).

**Registered Retirement Savings Plan (RRSP)**

A personal retirement savings plan as defined by the *Income Tax Act* (Canada).

**Retirement**

Commencement of retirement income because of age. It may also be used in the sense of permanent withdrawal from the labour force for any reason, including disability.

**Retirement Income**

Income from pension and other sources to which a retired person is entitled. Term may include both private and public pension payments, income from personal savings, government income supplements and certain other sources of income.

**Vested (Vesting)**

When a member has unconditional entitlement under the plan as a result of any satisfying age or service requirements.

**Voluntary Additional Contributions**

In addition to any required contributions, employees may make voluntary contributions to increase retirement savings. Extra or additional pension is bought by these voluntary additional contributions at retirement but no additional cost is borne by the employer. Voluntary additional contributions are not subject to locking-in under the Act.

If you have any questions regarding this bulletin you may contact us at:

Office of the Superintendent - Pension  
Commission  
500 – 400 St. Mary Avenue  
Winnipeg MB R3C 4K5  
Tel: 204-945-2740  
Email: [pensions@gov.mb.ca](mailto:pensions@gov.mb.ca)  
Website: [www.gov.mb.ca/finance/pension](http://www.gov.mb.ca/finance/pension)

*This bulletin has no legal authority. The Pension Benefits Act of Manitoba and the Pension Benefits Regulation should be used to determine specific requirements.*