Citation: Dundas v. Schafer, 2014 MBCA 92 Date: 20141008
Docket: AF 12-30-07898

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Alan D. MacInnes
Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron

B E T W E E N :

	)	***D. C. Yale***
JENNIFER LYNNE DUNDAS	)	*for the Appellant*
	)	
(Petitioner) Appellant	)	***E. Hirsch***
	)	*for the Respondent*
- and -	)	
	)	
	)	*Appeal heard:*
ARTHUR MELVIN SCHAFER	)	***January 21, 2014***
	)	
(Respondent) Respondent	)	*Judgment delivered:*
	)	***October 8, 2014***

MONNIN J.A.

[1] The fundamental issue on this appeal is whether the petitioner is deprived of an equal sharing of the respondent's provincially regulated pension by reason of a prenuptial agreement whereby she waived her entitlement. It requires an assessment of the interplay between *The Family Property Act*, C.C.S.M., c. F25 (the *FPA*), and *The Pension Benefits Act*, C.C.S.M., c. P32 (the *PBA*). A second issue to be determined is whether the finding by the trial judge that a clause in the same agreement requiring the petitioner to repay the respondent the sum of $20,000, together with interest if she challenged the agreement, is enforceable. Finally, the issue of costs

Appeal from: 2012 MBQB 87, 277 Man.R. (2d) 268; and 2012 MBQB 200, 281 Man.R. (2d) 111
See: 2011 MBQB 152, 266 Man.R. (2d) 180; and 2012 MBCA 22, 275 Man.R. (2d) 283

was raised by cross appeal; specifically, whether the respondent was entitled to costs indemnifying him for the challenge brought by the petitioner.

Factual Background

[2] As noted by the trial judge, for the most part, the facts surrounding the parties' relationship and the signing of the prenuptial agreement are undisputed.

[3] The parties met in early September of 1994. They commenced cohabitation in May of 1995. By the beginning of December of 1997, they had set December 31, 1997, as their wedding date. Near the middle of December, after some discussions, they exchanged draft proposals for a prenuptial agreement. At the time of exchanging these proposals, the petitioner advised the respondent that she had consulted a lawyer. He decided to do so as well. He took the two proposals to his own lawyer who then drafted an agreement combining the two. Upon receiving the draft agreement on December 23rd, the petitioner made arrangements to meet with her lawyer on December 29th. At that time, she was provided with a final draft of the agreement which she reviewed with her counsel, an experienced family law lawyer. A few handwritten changes were made and the prenuptial agreement (the agreement) was signed on December 30th in advance of the wedding on December 31st.

[4] It was conceded by the petitioner, and found by the trial judge, that the petitioner was aware of the respondent's unwillingness to risk a future sharing of his university pension. The respondent had previously been divorced, as a result of which a share of his pension had been divided

between him and his former spouse. He was adamant that he would not get married again if a further sharing of his pension was a potential risk. The trial judge found that the petitioner had said to the respondent that she had no claim upon his pension, nor did she wish to have any claim to it in the future. The agreement reflected that mutual understanding. It contained an acknowledgement that the respondent had a pension plan with the University of Manitoba and that the petitioner released him from any and all claims or rights that she may have, presently or in the future, to the pension. She also agreed to execute any documents that were required to give effect to this intention.

[5] The parties separated on August 4, 2005, and were divorced by divorce judgment granted in January of 2011.

The Prenuptial Agreement

[6] For ease of reference, the relevant portions of the agreement necessary for consideration on this appeal have been attached as Appendix A to these reasons. For our purposes at this time, it is sufficient to highlight some of the relevant provisions:

i. A term recognizing that the parties intended to maintain the assets they had acquired prior to cohabitation as separate property except as varied by the terms of the agreement (cl. 1.04);

ii. A term indicating that the parties wished to provide for a scheme of property ownership governing their assets, debts and liabilities which existed or which may exist in the future

(cl. 1.13);

iii. An acknowledgment that the agreement was a "spousal agreement" as that term was defined in *The Marital Property Act*, R.S.M. 1987, c. M45 (the *MPA*); the agreement further provided that references to the *MPA* meant that *Act* and any successor legislation thereto (cl. 1.15);

iv. An acknowledgment by the parties that they had fully disclosed property of any significant value in which they had an interest and that each party was acknowledging the sufficiency of such disclosure as to form and substance (cl. 5.01);

v. A recognition that the *MPA*, and amendments thereto, were inapplicable to the parties' assets and that where there was a conflict between the statute or the agreement, the agreement was to prevail (cl. 6.01);

vi. A mutual acknowledgment of financial independence and a release from any demands or claims for maintenance or support (cls. 9.01-9.02);

vii. A release of any obligation to pay child support (cls. 10.01-10.02);

viii. A recognition that the respondent had been contributing to a pension plan and a release of any rights or claims that the

petitioner may have with respect to that plan under the *Pension Benefits Division Act* and the *PBA* (cl. 11.01);

ix. A covenant by the petitioner that if she were to receive a portion of these pension benefit credits, she would reimburse the respondent and be responsible for all "solicitor costs and disbursements necessary to defend or negotiate the actions brought by [the respondent]" to recover these benefits; as well, the petitioner agreed to do such things and sign all documents necessary to enforce the spirit and intent of that term (cls. 11.01-11.02); a similar undertaking was given on the part of the respondent with respect to the petitioner's pension at the Canadian Broadcasting Corporation, where she was employed at the time of the agreement (cls. 11.03-11.04);

x. An agreement by the respondent to pay the petitioner $20,000 within 31 days of the marriage and a term whereby the petitioner agreed to immediately repay to the respondent that sum plus interest at the rate of six per cent compounded annually from the date of payment if she were to challenge the validity of the agreement in any manner whatsoever (cls. 12.01-12.02);

xi. Waiver and releases for claims of equitable remedies as well as claims under various marital and property legislation (cls. 15.01-15.02);

xii. An agreement of indemnification to save each other harmless with respect to any breaches of the agreement including, but not restricted to, defending or prosecuting any action (cl. 18.01); and

xiii. An acknowledgement that the parties had received independent legal advice and had reviewed and understood the terms of the agreement; that the agreement was entered into voluntarily and without undue influence, duress, fraud, coercion or misrepresentation (cl. 23.01).

[7] It is agreed that the respondent paid the $20,000 amount stipulated in cl. 12.01 to the petitioner within 31 days of the marriage.

Trial Judgment

[8] The matter proceeded to trial at which both the petitioner and respondent testified. The essence of the petitioner's position at trial was that the agreement was void for statutory illegality. More particularly, the agreement infringed s. 31(2) of the *PBA* which mandated an equal division of the respondent's pension benefits unless an agreement was entered into after separation and in accordance with the requirements set out in s. 31(6) of the same *Act*.

[9] The trial judge disagreed. In her view, there was an interrelationship between the *FPA* (the successor to the *MPA*) and the *PBA*. She held that the *FPA* determined entitlement to the pension benefits. It allowed for a party to waive their rights to existing and future assets of their partner. More specifically, since pensions were family assets within the

meaning of the *FPA*, that *Act* expressly contemplated the possibility of spousal agreements, including prenuptial agreements, whereby waivers were allowed.

[10] Relying upon this court's decision in *Foster v. Foster et al.*, 2007 MBCA 96, 220 Man.R. (2d) 25, she concluded there was a requirement to interpret both statutes in a manner which allowed for a "cohesive scheme" by the legislature to address family property rights. The *FPA* did not preclude spouses from waiving their rights to provincially regulated pensions by a prenuptial agreement and, therefore, the mechanism provided by s. 31(2) did not come into play where there was no entitlement in the first place. Her conclusion on this issue was as follows (2012 MBQB 87 at paras. 42, 44):

> The provisions of the **Family Property Act** and the **Pension Benefits Act** can be read as a cohesive scheme by recognizing that where individuals have no current entitlement pursuant to the **Family Property Act** and are therefore not entitled to a portion of a party's provincially-regulated pension, they may enter into a spousal agreement pursuant to which they will have no interest in the other's pension benefit credits provided they receive independent legal advice.
>
> The pension release executed by the petitioner was not void ab initio and is not precluded by operation of the provisions of the **Pension Benefits Act** when considered with the provisions of the **Family Property Act**. She is not entitled to a division of the respondent's pension benefit credits pursuant to the **Pension Benefits Act**.

[11] As to the allegation that the respondent had failed to disclose or misrepresented his assets, she found that the petitioner was sufficiently aware of the existence of the pension, had obtained independent legal advice

and any information not disclosed was not of a material nature.

[12] The trial judge also found that the written agreements after separation did not amount to agreements contemplated in s. 31(2) of the *PBA* as they were not agreements "to divide family assets."

[13] On the issue of whether the respondent was entitled to the repayment of the $20,000 paid by virtue of the agreement, she concluded that he was. She found the terms of the agreement clear and unambiguous and that the petitioner's action seeking to invalidate the release amounted to challenging the agreement. She expressed no comment as to whether it was a penalty.

[14] When it came to costs and the petitioner's request to be allowed solicitor-client costs, based in part upon the indemnification clause (cl. 18.01) of the agreement, she concluded that that clause did not fetter the court's discretion. With respect to costs, the respondent argued that an offer to settle was more favourable to the petitioner than the order made. However, the trial judge concluded that, as it included matters outside the scope of the proceedings, Queen's Bench Rule 49 (Man. Reg. 553/88) with respect to increased costs where offers to settle have not been accepted did not apply. She fixed costs in the amount of $13,000 plus disbursements and taxes in favour of the respondent, stating as follows (2012 MBQB 200 at para. 25):

> In exercising my discretion in making this Order of costs, I am taking into account the factors set forth in Queen's Bench Rule 57.01(1), the former and new Tariff amounts and the relief pled and ultimately pursued by each of the parties, including the withdrawal by the Respondent of a number of claims for relief in

> equity after the commencement of the trial. I have also considered the written arguments submitted by each party subsequent to the trial, the Respondent's success at trial, the positions advanced by each party respecting costs and the Respondent's draft Bill of Costs including disbursements sought.

Issues

[15] The issues on this appeal are as follows:

1. Does s. 31(2) of the *PBA* override prenuptial agreements that seek to avoid its provisions for mandatory division of pensions after separation?

2. Did the trial judge err by finding that, in the alternative, the parties substantially complied with the opting-out mechanism in s. 31(6) of the *PBA*?

3. Did the trial judge err in granting the respondent relief under the repayment clause in the agreement?

On the cross appeal, one issue was raised, namely:

4. Did the trial judge err in failing to award the respondent solicitor and his own client costs in light of the indemnification clause in the agreement, the petitioner's conduct in the litigation and a formal offer to settle?

Standard of Review

[16] With respect to the first issue, the relationship between prenuptial agreements and s. 31(2) of the *PBA*, the parties agree that the standard of

review is correctness, and I agree.

[17] As to the second issue with respect to s. 31(6), the parties suggest that it is correctness which is the standard of review. I disagree. The application of s. 31(6) required a determination of whether the agreements in question amounted to agreements contemplated by the section. It is a question of mixed fact and law and, unless there is an extricable question of law involved, the standard to be applied is one of palpable and overriding error. As well, any findings of fact regarding the negotiation of the agreement involved in the determination of whether s. 31(6) was substantially complied with would require a finding of palpable and overriding error before they could be overturned.

[18] As to issue three, the repayment clause, I disagree with the parties that the issue must be determined on the basis of correctness. The issue requires an assessment of whether the trial judge applied the appropriate legal test to facts, a question of mixed fact and law to be reviewed on a standard of palpable and overriding error.

[19] Finally, as to the issue of costs, the awarding of costs is the review of a discretionary decision. Absent an error in principle, such a review must be undertaken using a very deferential standard.

Issue 1 - Section 31(2) of The Pension Benefits Act

[20] On this issue, the relevant sections of the *FPA* are s. 5 and the definition of spousal agreement in s. 1(1), which, for our purposes, are similar to previous sections of the *MPA*. The relevant provisions of the *PBA* are ss. 2, 31(2) and 31(6) (see Appendix B).

[21] The petitioner's argument, in a nutshell, is that the *PBA* mandates a fresh agreement after separation and that any agreements executed prior to separation are, by necessity, non-compliant and unenforceable. The only ability for a party to opt out of the provisions of the *PBA* is as provided in s. 31(6) and requires an agreement after separation. The petitioner strongly argues that the *PBA* is a public policy statute and requires that individuals not contract out of, around, or otherwise avoid, its mandatory provisions. Its protections should be read broadly and applied firmly in order to achieve the legislative policy of protecting vulnerable parties involved in negotiations upon marriage breakdown.

[22] She submits that prenuptial agreements are a subspecies of spousal agreements, which are, in turn, a subspecies of written agreements. The plain reading of the statute provides that agreements executed prior to separation are non-compliant and cannot be enforced since it would be impossible, prior to separation occurring, for a party to provide the other with a statement setting out the commuted value of the pension benefit credit in the plan or the amount of the payments to which each would be entitled under s. 31(2).

[23] On appeal, a matter which was not apparently argued before the trial judge, the petitioner refers to s. 3.2 of the *PBA*, which stipulates that no waiver or contracting out of the requirement of the *PBA* or regulations is allowed, except as permitted by that *Act* or its regulations. Attempts to do so are void, reinforcing her argument that the mandatory provisions of s. 31(2) apply unless a party abides by the specific requirements of s. 31(6).

[24] The petitioner argues that the trial judge erred by placing undue

reliance on a comment in *Foster* that a spouse's entitlement to share in a pension is created by the *FPA*, arguing that this was mere *obiter dicta*. She also argues that *Foster* was solely concerned with valuation and, as noted by the Supreme Court of Canada in *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, the *FPA* cannot vest title in one spouse's property, given that it is merely a "debtor-creditor statute." In her submission, the scheme of the two *Acts* is that the legislature subordinated the right to an equalization payment to the right to share in pension benefits. The *FPA* responds to the property rights created by the *PBA*.

Analysis

[25] A brief review of the history of s. 31(2) of the *PBA* will be of help. In *Foster*, Hamilton J.A. wrote (at paras. 40-41):

> …. Historically, given the importance of pension benefits in providing retirement security for many workers, such benefits were inalienable and inexigible. As a result, in **Isbister v. Isbister** (1981), 11 Man.R. (2d) 353 (C.A.), this court refused to include any value for pension plans held by the husband in the parties' marital property accounting.
>
> The problems identified by the court in **Isbister** were subsequently addressed by amendments to the then **Marital Property Act**. In **George v. George** (1983), 23 Man.R. (2d) 89 (C.A.), this court reconsidered its decision in **Isbister** in light of the statutory amendments and examined ways of dividing the husband's pension. The court crafted a mechanism for *in specie* division of pensions in marital property proceedings. After **George**, the legislature passed the amendments to the **PBA**, resulting in s. 31(2), which is at issue here.

[26] Several trial decisions followed the introduction of s. 31(2) of the

PBA, many of them critical of the rigidity of the legislation. However, they all spoke of the parties "dividing the pension" and all did so in fact situations involving either separation agreements or no agreements at all (see *Huppe v. Huppe*, (1990), 66 Man.R. (2d) 241 (Q.B.); and *Sader v. Sader* (1988), 57 Man.R. (2d) 302 (Q.B.)). The legislature responded to the criticism by amending the *PBA* in 1990 to allow for some slight flexibility (see James G. McLeod & Alfred A. Mamo, *Matrimonial Property Law in Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 1993) at M-69). Section 31(6) was enacted in 1992 and spoke of a written agreement between the parties to the effect that the pension credits shall not be divided between them.

[27] The focus of both the legislature and the courts appears to be on the "division" of family assets on breakup. This, of course, begs the question of what happens when a party, in an agreement, waives entitlement to what would be a family asset at the outset and before any entitlement to that asset accrues, such that there is nothing to divide later on. An investigation of the legislative history of s. 31(2) of the *PBA* from its original enactment in 1984, including the applicable Hansard and Standing Committee Reports, reveals no specific discussion of prenuptial agreements nor of the relationship between that section and s. 5(1) of the *FPA*. Accordingly, as noted by the litigants, this case is one of first impression.

[28] The issue must be determined on the basis of a statutory interpretation. It must commence with the principle of the presumption of coherence between statutes. In Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Ltd.,

2011), he states (at p. 365):

> Different enactments of the same legislature are deemed to be as consistent as the provisions of a single enactment. All the legislation of a legislature is deemed to make up a coherent system. Thus, interpretations favouring harmony between statutes should prevail over those favouring conflict, because the former are presumed to better represent the thought of the legislature.
>
> This presumption of coherence in enactments of the same legislature is even stronger when they relate to the same subject matter, *in pari materia*. When conflicts between statutes do arise, however, they should be resolved in such a way as to re-establish the desired harmony.

[29] In *Foster*, Hamilton J.A. confirmed the above presumption as applicable to the interrelationship between the *FPA* and the *PBA*. She made important comments as to how the relationship operates, in practice, to divide pensions.

[30] In that case, the husband appealed from the trial decision concluding that interest accrued on his pension during marriage on contributions he made before the marriage was shareable with his wife. There was no spousal agreement as regards the pension. On the presumption of coherence, Hamilton J.A. wrote (at paras. 37, 42-43):

> … [B]oth the **PBA** and the **FPA** have provisions that address the sharing of pension benefits upon marriage breakdown. Therefore, in my view, the court must strive to interpret these two pieces of legislation as part of a coherent, uniform and harmonious whole. This makes sense because both **Acts** are motivated by a policy rationale of equitable sharing.
>
> What is important to remember is that s. 31(2) of the **PBA** is only

> engaged once a court order is made under the **FPA** (or an agreement regarding the division of assets is reached by the parties). This, in my view, combined with the fact that the pension division scheme of the **PBA** was originally implemented in order to allow for a division of pension benefits in accordance with the **Marital Property Act**, supports the conclusion reached by the judge that the **PBA** is only the vehicle by which the equalization mandated by the **FPA** is accomplished.
>
> The **FPA** provides that a right to receive a pension is an asset subject to division in accordance with that legislation. ….

[31] The petitioner argues that the comments in *Foster* as to the interrelationship between the two *Acts* are not determinative of the issue. In her submission, *Foster* was a valuation case, unlike this case which deals with the correct interpretation to be given to s. 31(2) of the *PBA*, and is not binding on us. While I agree with the petitioner that the *Foster* case does not determine the issues that are before us, the comments of the court with respect to the interrelationship of the two *Acts*, in my view, have as much application to the facts of this case and are apt if we are to presume a coherent scheme.

[32] I now turn to the recognition of what is intended by a prenuptial agreement. As noted by the Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550, by an agreement, the parties seek to substitute a consensual regime for the matrimonial property regime that would otherwise apply upon separation. As Bastarache J. writes for the majority (at para. 1):

> Domestic contracts are explicitly permitted by the matrimonial property regime in British Columbia. They allow spouses to substitute a consensual regime for the statutory regime that

> would otherwise be imposed on them. ….

[33] This substitution occurs before rights are vested and before any entitlement arises. As noted again by Bastarache J. (at para. 39):

> …. Marriage agreements define the parties' expectations from the outset, usually before any rights are vested and before any entitlement arises. …. Separation agreements, by contrast, purport to deal with existing or vested rights and obligations … ….

See as well *Rosenstock v. Karakeeva*, 2010 MBQB 176, 254 Man.R. (2d) 293, where Allen J. wrote (at para. 46):

> ….
>
> • Marital agreements are different than separation agreements as they define rights and obligations before the rights are vested and before any entitlement arises;
>
> ….

And *Lasby-Gamble v. Gamble*, 2006 SKQB 160, 280 Sask.R. 226 (at para. 39):

> …. What is at issue here is a pre-nuptial agreement, made in contemplation of marriage, as opposed to an agreement addressing the distribution of family property upon separation. As observed in **Hartshorne**, supra, at para. 39 a pre-nuptial agreement (called a marriage agreement in **Hartshorne**) defines expectations prior to marriage …. A separation agreement deals with existing or vested rights and whether someone is giving up something to which he or she is entitled. Speaking generally, the pre-nuptial agreement may focus on whether a person contemplating marriage is prepared, if they do marry, to give up or modify rights they would otherwise acquire upon marriage.

> On the other hand, the focus of a separation agreement is a comparison of one's entitlement under the **Act**, to the distribution of family property that is proposed in the separation agreement. ….

[34] A prenuptial agreement, therefore, creates a situation where the spouses have "no entitlement" under the primary marital property regime, in this case, the *FPA*. This was noted by the trial judge when she distinguished between entitlement and effect. This occurs at a time when the parties are not subject, in most cases, to the pressure and vulnerabilities existing at the time of a separation.

[35] At the time of the signing of this agreement, the petitioner had no rights to the pension. By substituting a separate regime, no entitlement ever arose and, as found by the trial judge, that which never vested cannot be divided.

[36] As to the concerns that the public policy set out in the *PBA* are worthy of protection, I fully agree with the petitioner's position. There is no doubt that pension legislation serves a salutary public purpose. That the provisions of s. 31(6) require strict compliance stems from the vulnerability of spouses upon marriage breakup. The legislation seeks to protect individuals from bad bargains made in the chaos of separation. However, the courts have recognized the difference between spousal agreements prior to marriage and separation agreements following marriage breakdowns. It is the uniqueness of the negotiating environment at breakup which makes those latter contracts subject to particular scrutiny (see *Rick v. Brandsema*, 2009 SCC 10 at para. 40, [2009] 1 S.C.R. 295; and *Miglin v. Miglin*, 2003 SCC 24 at para. 74, [2003] 1 S.C.R. 303). On the other hand, the Supreme Court of

Canada has recognized that prenuptial contracts should generally be respected (see *Hartshorne* at para. 67).

[37] The literal interpretation of the provisions of the *PBA*, as suggested by the petitioner, as opposed to a purposive interpretation, leads to the conclusion that any prenuptial agreement in existence would be ineffective with respect to Manitoba pension plan benefits and became so upon the coming into effect of s. 31(2). I do not read the statute as having that purpose or effect.

[38] As to the argument that s. 3.2 of the *PBA* prevents a waiver and a contracting out, I note that s. 3.2 received royal assent on April 19, 2005, but only came into force by proclamation on May 31, 2010, well after the signing of the agreement between the parties. By that time, rights had vested by virtue of the agreement and the presumption against interference with vested rights would apply.

[39] I am of the view that the trial judge was correct in concluding that there being no entitlement to a sharing of pension benefits by virtue of the waiver in the agreement meant that the provisions of ss. 31(2) and 31(6) of the *PBA* were not applicable to the facts before the court. For the same reasons, s. 3 would not come into play. As there is no conflict between the *FPA* and the *PBA*, there is no need to have recourse to s. 3 of the *PBA* (see *Foster* at para. 45).

[40] The petitioner's position is that there were three written agreements between the parties which triggered the application of s. 31(2) of the *PBA*. They were:

a) the 1997 agreement;

b) an agreement executed in July 2010 whereby the parties divided a bed, a futon, a bench and Aeroplan points; and

c) an agreement relating to a motor vehicle dated sometime in 2011.

[41] The trial judge concluded that none of those agreements were agreements contemplated under s. 31(2) of the *PBA* dealing with the division of family assets. As to the agreement, it was not an agreement with respect to the division of assets, but with respect to entitlement under the *FPA* and other statutes. As to the other two written agreements, they were not agreements relating to pension benefits, or a division thereof, which is what is contemplated by s. 31(2) of the *PBA*. I agree with the trial judge that none of the three agreements would be agreements triggering the provisions of s. 31(2) of the *PBA* requiring a division of the pension assets.

Issue 2 – Was Section 31(6) of the PBA Substantially Complied With?

[42] After finding that the *FPA* was not triggered, the trial judge went on to consider whether, if it was, the requirements of s. 31(6) were met. That section requires the disclosure of financial information relating to the pension and a requirement for the parties to receive independent legal advice premised on that information.

[43] As a separate issue, the petitioner challenges the trial judge's findings of fact regarding the negotiation of the agreement on the grounds that the trial judge erred by refusing to admit relevant evidence regarding the

broader negotiation of the agreement. The petitioner's position is that, having failed to do so, she lost jurisdiction to determine the issue of substantial compliance. The ruling in question is the trial judge's direction that evidence not be led with respect to the agreement other than as it related to the release of pension benefits. This was a result of petitioner's counsel's position at trial that the only issue was the statutory illegality of the release.

[44] The petitioner submits that the respondent's disclosure at the time of entering into the agreement was inaccurate and incomplete as he failed to disclose the commuted value of his pension or to disclose that he held a hybrid plan with benefits accruing under both a defined benefit and a defined contribution formula. He only provided verbal disclosure of his defined benefit entitlement.

[45] As to the legal advice, the petitioner's position is that she had limited legal representation as she was only able to meet with her lawyer on one occasion and was under "intense pressure" through the period in question.

[46] In her reasons for judgment, the trial judge noted that, while the agreement was executed only a day before the parties' marriage, the parties had been together for some two and one-half years and had discussed their marriage for a considerable period of time, including the agreement. The choice of not proceeding with the agreement, although placing the marriage in jeopardy, was open to the petitioner. The trial judge also found as a fact that the petitioner was aware of the pension and its general terms. In her estimation, the intention expressed by the respondent after the marriage to buy back pension benefit credits and thereby enhance his pension benefits

was not a material non-disclosure given the petitioner's evidence with respect to her motivation with respect to the pension; namely, that she had no intention of seeking any of it. I see no error in the trial judge's findings on that score.

[47] In summary, I fail to see that the trial judge made an error in principle in her ruling or that, if the error did occur, it was of an overriding nature with respect to the outcome of the case.

[48] The petitioner's position is that the trial judge erred in finding that substantial compliance would have been sufficient to meet the requirements of s. 31(6) of the *PBA*, for the reasons set out in the analysis herein under issue number one. In her submission, there must be strict compliance with the requirements of s. 31(6) to achieve the purpose of the statute.

[49] After a careful reading of the trial judge's reasons, I do not find that she determined that there was substantial compliance with s. 31(6). Rather, I find that she concluded that the requirements of the *PBA* were not mandatory by virtue of the fact that the agreement was not an agreement contemplated by s. 31(2) and, hence, there was no reason to consider whether the s. 31(6) requirements had been met. She noted that, as admitted by the petitioner, it would have been impossible for the respondent to comply with a strict interpretation of s. 31(6) at the time of the entering of the agreement. As the petitioner had no entitlement to any portion of the pension, all that would have been indicated would be the nature of the respondent's interest in the pension at the time, of which she had a general knowledge.

[50] I agree with the petitioner that if strict compliance with s. 31(6) was required, it would not have been possible in the context of the agreement. However, the fact that I have concluded that the requirements of the *PBA* were displaced by the lack of entitlement of the petitioner means that it has no effect on the outcome of this appeal.

Issue 3 – Clause 12.02

[51] Relying upon cl. 12.02 of the agreement, the respondent sought repayment of the $20,000 he paid to the petitioner after their marriage. The trial judge concluded that the agreement was clear and unambiguous and that it had been breached by the petitioner when she challenged its validity relating to her release of her interest in the respondent's pension. The trial judge awarded the respondent $20,000 with interest at six per cent compounded annually from the date of payment of the amount to her.

[52] The petitioner appeals that determination on a number of grounds. Firstly, she challenges it on the basis that, since the release was statutorily illegal, it could not be recognized at law and could not afford the respondent a remedy. Secondly, she argues that the clause was triggered because of the contents of the petitioner's pleadings challenging the validity of the agreement. She argues that this would allow the respondent to use pleadings in an inappropriate manner. Since the pleadings are subject to absolute privilege, she argues, they could not be the basis of the suit. Thirdly, she argues that because the clause would discourage her from having recourse to the courts, it was ousting the jurisdiction of the courts and was, therefore, unlawful. Fourthly, she argued that the clause was an unenforceable penalty clause.

[53] In my view, only the fourth ground has any merit.

[54] The trial judge's reasons do not indicate that she considered whether the clause was a penalty clause. As described in *Dunlop Pneumatic Tyre Company v. New Garage and Motor Company*, [1915] A.C. 79 (H.L.E.), the essence of a penalty is the requirement of a payment to compel performance as opposed to a genuine pre-estimate of the liquidated damages which are likely to be actually suffered as a result of the breach. In *Bobrowski v. Canadian Fire Insurance Co. et al.* (1962), 35 D.L.R. (2d) 127 (Man. C.A.), Guy J.A. described the nature of an *in terrorem* clause as (at pp. 133-34):

> …. … [T]o be a penalty in law, the amount to be charged must be "*in terrorem*". This is defined as "a condition . . . which is intended to frighten or intimidate". ….

[55] At common law, the question of whether a clause is a penalty depends on its construction and on the circumstances at the time of contracting. As noted by Robertson J.A. in *Mortgage Makers Inc. et al. v. McKeen*, 2009 NBCA 61, 349 N.B.R. (2d) 115, there are four rules of construction (at para. 20):

> …. … Lord Dunedin formulated four rules of construction: (1) the clause will be declared a penalty if the sum stipulated is "extravagant and unconscionable in amount when compared with the greatest loss that could conceivably be proved to have followed from the breach" (p. 87); (2) if the contractual obligation is to pay a fixed sum of money by a fixed date and there is default, the obligation to pay a larger sum will be deemed a penalty; (3) there is presumption that a clause is penal when "a single lump sum is payable on the occurrence of one or more events some of which may occasion serious and others but

> trifling damage" (p. 87, citing Lord Watson in **Elphinstone (Lord) v. Monkland Iron and Coal Co.** (1886), 11 App. Cas. 332); (4) "it is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of breach are such as to make precise pre-estimation almost an impossibility" (pp. 87–88). ….

[56] In the case at bar, any challenge to the agreement can lead to a claim under the clause and would fall under the third category referred to by Lord Dunedin in *Dunlop*.

[57] While the leading cases arise from commercial situations, clauses have been found to be penalty clauses in the family law context. (See *Bear v. Romanow*, 2010 MBQB 9, 248 Man.R. (2d) 233; *Herskovits v. Herskovits*, [2001] O.T.C. 447 (S.C.); *Heslop v. Heslop* (1984), 52 B.C.L.R. 355 (S.C.); and *Church v. Church* (2003), 40 R.F.L. (5th) 43 (Ont. S.C.J.).)

[58] In this case, there is no relationship between the breach and the amount that is being sought under the clause. It cannot be seen as a true pre-estimate of damages for a challenge of the agreement, let alone a challenge of the specific clause with respect to the pension benefit credit.

[59] While the claim against the respondent's pension is not an insignificant matter, the clause is not limited to an attempt to set aside the agreement on that point alone. As stated in Harvey McGregor, Q.C., *McGregor on Damages*, 18th ed. (London: Thomson Reuters (Legal) Limited, 2009) (at para. 13-015):

> The same sum cannot, in the same agreement, be treated as a penalty for some purposes and as liquidated damages for others. For if the same sum is extravagant and unconscionable in relation

> to one breach to which it applies it cannot be a genuine pre-estimate, and the sum becomes branded as having a penal nature which it cannot lose in relation to other more serious breaches to which it also applies. It adds nothing to say that it would not have been a penalty as to the other breach or breaches, or that it is the other breach or breaches that have in the event occurred. ….

[60] I am, therefore, of the view that the trial judge erred in not considering that cl. 12.02, seeking the payment of $20,000, was a penalty clause and as such, unenforceable. On that issue, the petitioner should succeed on her appeal.

Issue 4 – Cross Appeal on Costs

[61] In her reasons for judgment on the main action, the trial judge dealt with the respondent's request to be reimbursed for all his legal costs drawing upon the indemnification provisions of cls. 11.02 and 18.01 of the agreement. Clause 11.02 specifically addressed reimbursement if the petitioner obtained a portion of the respondent's pension, which is not the case. Therefore, the trial judge correctly found that cl. 11 did not apply in the circumstances.

[62] Clause 18.01 was a general indemnification clause that applied to breaches by applications to invalidate or set aside the provisions of the agreement. In the trial judge's view, s. 96(1) of *The Court of Queen's Bench Act*, C.C.S.M., c. C280, provided her with jurisdiction to exercise her discretion notwithstanding the contents of the agreement. She acknowledged that the agreement was a factor to be considered, but it did not override her discretion with respect to costs.

[63] In her decision on costs, the trial judge considered the factors set out in Queen's Bench Rule 57.01 as well as cl. 18.01 of the agreement. She concluded that the petitioner's conduct in the proceedings was short of conduct which warranted an award of costs on a solicitor-client basis. She declined to order costs on that basis notwithstanding the indemnification clause of the agreement.

[64] The respondent raised the fact that he had made an offer to settle prior to trial and argued that the outcome of the trial was less favourable to the petitioner than the terms of the offer to settle. He sought additional costs to be awarded in accordance with Queen's Bench Rule 49. However, the trial judge noted that the offer to settle referred to matters outside the scope of the proceeding; namely, the settlement of a parallel civil proceeding which was not before her. In her view, Rule 49 did not apply.

[65] She then proceeded to consider the argument of the petitioner that she was a public interest litigant who was seeking to clarify the issue of the application of the interrelationship between the *FPA* and the *PBA* and, in particular, the application of s. 31 of the *PBA*. The trial judge was of the view that, since the petitioner has a significant financial interest in the outcome, she had pursued the action because of a potential benefit to her and not as a public interest litigant.

[66] As well, she considered the extent of proceedings taken, the lengthy written arguments, the respondent's success at trial and the positions advanced by each party. She ordered that the petitioner pay costs to the respondent in the amount of $13,000, plus disbursements and PST.

[67] The respondent seeks to appeal that order. He argues that the trial judge erred in failing to hold the petitioner bound by the contractual obligation in the indemnification clause and, therefore, did not exercise her discretion judicially. As well, the respondent argues that the trial judge erred by failing to find that the petitioner's conduct amounted to "reprehensible, scandalous or outrageous conduct" of a nature that would warrant an award of costs of that nature in accordance with *Young v. Young*, [1993] 4 S.C.R. 3.

[68] The respondent refers to the number of proceedings taken by the petitioner as an indication of conduct which should have been considered by the trial judge in her assessment of whether solicitor-client costs were warranted. He points to parallel proceedings in the general division of the Court of Queen's Bench by way of counterclaim seeking to set aside the entire agreement and seeking to consolidate those proceedings with the family matters; the launching of appeals and their subsequent abandonment; changing the nature of claims in the proceedings and in written arguments; raising grounds not claimed; dealing with the respondent directly although he was represented by counsel and then seeking to take legal advantage of matters arising from those meetings.

[69] I note that for the most part, the proceedings for which the respondent complains of having been launched and then abandoned were all the subject of cost orders, including some substantial ones by motion court judges. They were not solicitor-client costs and to now impose solicitor-client costs based upon matters which have been decided and disposed of is problematic. The respondent also raises the delay in the proceedings, the

many pre-trials and the length of the trial itself. He argues that the trial judge has misapprehended the evidence and erred by refusing to consider the effect of a formal offer to settle which, in his estimation, fell within Queen's Bench Rule 49.10(1). The respondent raises the fact that the trial judge failed to consider this as a Class 4 proceeding, notwithstanding that the accrued interest on the pension from the time of separation would have brought its value to an amount in excess of $500,000. The trial judge was also was in error, according to the respondent, by failing to consider the bill of costs under the new Tariff A and instead reviewing it on the basis of the previous lower tariff.

[70] As is well understood, an appellate court will only interfere with an order of costs in very limited circumstances. In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, the Supreme Court of Canada confirmed the standard of review for costs where it stated (at para. 247):

> In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[71] In my view, it was not an error in principle for the trial judge to conclude that she retained a discretion which was not displaced by the indemnification clause in the agreement. Nor did she err in principle when concluding that Rule 49.10(1) was not engaged. It was within her discretion to conclude that the rule did not apply because of the attempt to settle

proceedings not before her as part of the settlement offer.

[72] In my view, the conduct of the petitioner and the handling of this litigation, while at times aggressive and bordering on the extreme, did not necessarily lead the trial judge to find that it was of a nature warranting solicitor-client costs. In reaching a conclusion as to the amount to be fixed, she took into consideration the appropriate factors and it cannot be said that the cost award is plainly wrong. For these reasons, I would dismiss the cross appeal.

Costs in this Court

[73] After hearing the appeal, the court was asked by the petitioner to consider decisions rendered by the Supreme Court of Canada at a later time. The first case sought to reinforce the petitioner's submissions on the importance of pension legislation. The second was on the issue of *stare decisis* as it related to the argument on the relevance of certain statements in the *Foster* decision of our court.

[74] It is entirely appropriate for counsel to bring to the court's attention a case of significant importance which was rendered after the hearing of the appeal and prior to its disposition. However, it should not be used as an occasion to reargue the case or to shore up areas where counsel believe the court could stand further submissions. I hesitate to conclude that this was the situation here, but neither case submitted was of the significant importance which would normally motivate sending it to the court.

[75] Given that the parties have had mixed success on the appeal and cross appeal, no costs will be awarded in this court. However, as I am of the

view that the fundamental issue at trial and on appeal, namely pension entitlement, was decided in the respondent's favour, the order as to costs made by the trial judge remains in place notwithstanding the success of the petitioner on her appeal.

Monnin J.A.

I agree: MacInnes J.A.

I agree: Cameron J.A.

Appendix A

The relevant portions of the Prenuptial Agreement dated the 30th day of December, 1997:

> 1.04 Each of the parties is the owner of certain assets which have been acquired prior to the cohabitation and intended marriage and each party intends to maintain all of their assets as their sole and separate property, free from any claim thereon by the other now and in the future, except as may be varied by the terms of this Agreement.
>
> 1.13 The parties wish to provide by this Agreement for a scheme of property ownership, disposition, sharing and entitlement governing each of their assets, debts and liabilities which presently exist or which may exist in the future, and to settle by agreement their financial rights and obligations with respect to each other and with respect to the rights that will accrue to each party in the property and estate of the other by reason of their cohabitation and/or marriage, and to waive and release their rights that exist pursuant to various statutes and at common law, and to accept in lieu of and in full satisfaction and discharge of all such rights the provisions of the within Agreement.
>
> 1.15 The parties acknowledge that this Agreement is a "spousal agreement" as that term is defined in *The Marital Property Act*.
>
> 5.01 The parties acknowledge and agree that each has fully disclosed to the other the real and personal property of any significant value in which he or she has any interest and each party acknowledges the sufficiency of such disclosure, both as to form and as to substance.
>
> 6.01 *The Marital Property Act* and amendments thereto and specifically each provision therein shall be inapplicable to Arthur's and to Jennifer's assets and separate assets, debts and liabilities and, further, wherever there is a conflict between the statute and this Agreement, this Agreement shall prevail. The parties intend that this Agreement shall be and be deemed to be a

spousal agreement as defined in *The Marital Property Act*.

9.01 Arthur acknowledges that he is not substantially dependent upon Jennifer and is self-supporting and is able to support himself now and in the future, and hereby covenants and agrees that there shall be no obligation on Jennifer to pay maintenance or financial support to Arthur presently or at any time in the future. Arthur releases Jennifer from any demands or claims whatsoever in respect of his rights as husband to maintenance and support by Jennifer, whether such rights arise by common-law or pursuant to any legislation presently in force or which may come into force at any time in the future and in particular under *The Family Maintenance Act* or *The Divorce Act*, 1985. Arthur acknowledges that this waiver forever bars any application for alimony, maintenance or support at any future time, notwithstanding any subsequent change in the circumstances of either party, no matter how catastrophic or unforeseen.

9.02 Jennifer acknowledges that she is not substantially dependent upon Arthur and is self-supporting and is able to support herself now and in the future, and hereby covenants and agrees that there shall be no obligation on Arthur to pay maintenance or financial support to Jennifer presently or at any time in the future. Jennifer releases Arthur from any demands or claims whatsoever in respect of her rights as wife to maintenance and support by Arthur, whether such rights arise by common-law or pursuant to any legislation presently in force or which may come into force at any time in the future. Jennifer acknowledges that this waiver forever bars any application for alimony, maintenance or support at any future time, notwithstanding any subsequent change in the circumstances of either party, no matter how catastrophic or unforeseen.

10.01 The parties agree that Arthur shall not be responsible for the support of Jennifer's child, Alexander Dundas, nor shall Arthur stand in *loco parentis* to the said child in any circumstance whatsoever.

10.02 The parties acknowledge and agree that Jennifer is hereby forever and absolutely barred and estopped from bringing any application or claim against Arthur for child support for

Alexander under *The Divorce Act, 1985* (including an application under Section 17 for a variation of support) or *The Family Maintenance Act* or any other similar legislation, whether Federal and Provincial, or any successor legislation and that this Agreement may be pleaded and shall be accepted as a complete bar and defense to any such claim that may be advanced contrary to this provision.

11.01 The parties acknowledge that Arthur has been contributing to a pension plan through his employment with the University of Manitoba. Jennifer releases Arthur from any and all claims and rights that she may have, have had or afterwards may acquire in Arthur's pension plan(s) or benefits, whether the plan is administered federally or within a province, and will execute such documents as are required to give effect to this intention pursuant to *The Pension Benefits Division Act* or *The Pension Benefits Act*.

11.02 Jennifer covenants and agrees that should she at any time receive a portion of the pension benefit credits accumulated by Arthur pursuant to his employment with the University of Manitoba, she shall reimburse Arthur for any and all sums received by her. If, as a result of any application, legislation, Court Order or other reason whatsoever, Jennifer receives any payment or benefit either directly, indirectly or otherwise from Aurthur's pension plan, Jennifer shall immediately repay to Arthur the entire payment or benefit received and shall, if needed in order to give effect to the intent of this and the preceding paragraphs hereof, consent to a Judgment against her in any amount equivalent to the future benefits or payments to be received and shall in addition reimburse Arthur for any and all costs incurred in his enforcement of this provision. If the said payments or benefits arise as a result of any action or application by Jennifer to alter the intent of this and the preceding paragraphs hereof, these costs shall include all solicitor costs and disbursements necessary to defend or negotiate the actions brought by Arthur. Jennifer agrees that she shall do all such things and sign all such documents as may be necessary to enforce the spirit and intent of this provision and to ensure that Arthur shall retain intact any and all pension plan as if they had never cohabited.

11.03 The parties acknowledge that Jennifer has been contributing to a pension plan through her employment with the Canadian Broadcasting Corporation. Arthur releases Jennifer from any and all claims and rights that he may have, have had or afterwards may acquire in Jennifer's pension plan(s) or benefits, whether the plan is administered federally or within a province, and will execute such documents as are required to give effect to this intention pursuant to *The Pension Benefits Division Act* or *The Pension Benefits Act*.

11.04 Arthur covenants and agrees that should he at any time receive a portion of the pension benefit credits accumulated by Jennifer pursuant to her employment with the Canadian Broadcasting Corporation, he shall reimburse Jennifer for any and all sums received by him. If, as a result of any application, legislation, Court Order or other reason whatsoever, Arthur receives any payment or benefit either directly, indirectly or otherwise from Jennifer's pension plan, Arthur shall immediately repay to Jennifer the entire payment or benefit received and shall, if needed in order to give effect to the intent of this and the preceding paragraphs hereof, consent to a Judgment against him in any amount equivalent to the future benefits or payments to be received and shall in addition reimburse Jennifer for any and all costs incurred in his enforcement of this provision. If the said payments or benefits arise as a result of any action or application by Arthur to alter the intent of this and the preceding paragraphs hereof, these costs shall include all solicitor costs and disbursements necessary to defend or negotiate the actions brought by Jennifer. Arthur agrees that he shall do all such things and sign all such documents as may be necessary to enforce the spirit and intent of this provision and to ensure that Jennifer shall retain intact any and all pension plan as if they had never cohabited.

12.01 Arthur agrees to pay to Jennifer the sum of $20,000.00 within thirty-one (31) days of the date of the marriage.

12.02 In the event that Jennifer challenges the validity of this agreement in any manner whatsoever, Jennifer agrees that she shall immediately repay to Arthur the sum of $20,000.00 plus interest at the rate of 6%, compounded annually, the calculation

of the interest to commence on the date upon which Arthur paid to Jennifer the sum of $20,000.00.

15.01 Each party hereby waives and renounces any and all rights and claims which he or she may have now or in the future, to advance a claim in equity against the assets of the other, and more particularly, each party hereby waives and renounces the right to advance a claim by way of constructive trust, resulting trust, unjust enrichment, quantum meruit or other equitable remedy as against the other. This provision may be plead as a specific bar and complete defense to any such action.

15.02 The parties specifically intend and agree that *The Marital Property Act* including Part IV, *The Homesteads Act*, *The Dependents Relief Act*, *The Homesteads*, *The Marital Property Amendment* and *Consequential Amendments Act*, *The Intestate Succession Act*, *The Family Maintenance Act*, *The Married Women's Property Act*, and corollary relief under *The Divorce Act* or any like legislation or law of Manitoba or the Government of Canada shall not apply to them, their estates and their property, except as specifically provided herein.

18.01 The parties hereto mutually covenant and agree each with the other that each shall save harmless and shall indemnify the other with respect to all and/or any breach or breaches of this Agreement including but not restricted to any fees, costs or disbursements incurred by the other party in defending or prosecuting any action resulting from the action of the other inconsistent with the provisions hereof, including any attempts to set aside, invalidate or vary any of the provisions herein, except where mutually agreed to in writing and executed with the same formality as this Agreement, and with independent legal advice.

23.01 The parties each acknowledge that:

(a) Arthur and Jennifer have each had independent legal advice and each has full knowledge as to the significant assets, debts and liabilities of the other;

(b) Each has read this Agreement in its entirety and has full knowledge and understanding of the contents hereof and signs the Agreement and accepts the same

to be a satisfactory and fair settlement of the rights of the parties;

(c) Each understands their respective rights and obligations under this Agreement, the nature of this Agreement and the consequences of this Agreement;

(d) In signing this Agreement, each does so voluntarily and without undue influence, duress, fraud, coercion or misrepresentation;

(e) Each party represents that they are not suffering from any psychiatric, psychological or emotional impairment that would impact upon their ability to understand the nature, meaning or consequences of this Agreement.

Appendix B

The relevant sections of *The Family Property Act*, C.C.S.M., c. F25, are:

Definitions
1(1) In this Act,

….

"spousal agreement" means
(a) any marriage contract or marital agreement, or

(b) any separation agreement, or

(c) release or quit claim deed,

in writing, or any other written agreement or other writing between spouses, made within Manitoba or elsewhere before or after the coming into force of this Act and either during marriage or contemplation of marriage, affecting all or any of the assets of the spouses in a manner described in section 5;

Assets disposed of by agreement
5(1) This Act does not apply to any asset disposed of by a spousal agreement or common-law relationship agreement or as to which the Act is made inapplicable by the terms of a spousal agreement or common-law relationship agreement, but where a spousal agreement or common-law relationship agreement is silent as to an asset this Act if otherwise applicable to the asset applies as if the spousal agreement or common-law relationship agreement did not exist.

Provision of Act made inapplicable by agreement
5(2) Where a spousal agreement or common-law relationship agreement by its terms makes a provision of this Act inapplicable to an asset, that provision does not apply to the asset but the remaining provisions of the Act if otherwise applicable to the asset apply as if the spousal agreement or common-law relationship agreement did not exist.

Provision of Act varied by agreement
5(3) Where a spousal agreement or common-law relationship agreement by its terms varies any provision of this Act in its application to an asset, that provision if otherwise applicable to the asset applies as varied and the remaining provisions of the Act if otherwise applicable to the asset apply in unaltered form.

The relevant sections of *The Pension Benefits Act*, C.C.S.M., c. P32, are:

Province of employment
2 For the purposes of this Act, a person shall be deemed to be employed in the province in which the establishment of his employer to which he reports for work is situated, and, where the employee is not required to report for work at any establishment of his employer, he shall be deemed to be employed in the province in which the establishment of his employer from which his remuneration is paid is situated.

Conflict with other Acts
3 In the event of conflict between any provision of this Act and any provision of any other Act other than *The Garnishment Act*, the provision of this Act prevails.

No waiver or contracting out
3.2 Except as expressly permitted by this Act or the regulations, no person may waive or contract out of any requirement of this Act or the regulations, and any attempt to do so is void.

Division of pension on breakdown of relationship
31(2) Subject to subsections (3), (4) and (6), a member's pension or, if the pension has not commenced, the member's or former member's pension benefit credit must be divided in accordance with the regulations if

(a) pursuant to an order of the Court of Queen's Bench made under *The Family Property Act*, family assets of the member or former member or his or her spouse, former spouse or common-law partner are required to be divided;

(b) pursuant to a written agreement between the member or former member and his or her spouse, former 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

(i) an order of a court of competent jurisdiction in another province or territory of Canada, or

(ii) an order of the Court of Queen's Bench made under subsection (3.4).

Opting out
31(6) A member or former member of a pension plan and a person who is entitled to a division of the member's pension or the member's or former member's pension benefit credit may, after each has received

(a) independent legal advice; and

(b) prescribed information in accordance with the regulations;

enter into a written agreement, containing prescribed terms, not to divide the pension or pension benefit credit between them. Subsection (2) no longer applies to require that division when the agreement is filed with the administrator who would otherwise be required to give effect to the division.