DIVISION
OF
MATRIMONIAL PROPERTY

Tentative Proposals for Reform of Matrimonial Property Law

Third Working Paper

LAW REFORM COMMISSION OF SASKATCHEWAN
SASKATOON, SASKATCHEWAN

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This paper is being circulated by the Commission for purposes of public information, comment and discussion.
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DIVISION OF MATRIMONIAL PROPERTY

INTRODUCTION

The Law Reform Commission of Saskatchewan has issued two mini-working papers dealing with matrimonial property laws. The first, which appeared in June, explored the law in Saskatchewan relating to ownership and division of matrimonial property. Under our separate property system, husband and wife each have the right to own and control his or her own property. Property purchased with the wife's money belongs to her, and property purchased with the husband's money belongs to him. As well, they may own property jointly.

This system has come under attack in recent years. Many people feel that the system results in great injustice between the spouses, especially upon breakdown of the marriage. Some of the problems and injustices arising from the system were considered. Actual court cases and hypothetical examples were examined to show how the law is working in practice. The present law was seen as unfair and uncertain in its operation. It was pointed out that the present situation does not seem to reflect the desires or expectations of most people.

A second mini-paper was issued by the Commission in mid-September. The paper raised some questions which are basic to the consideration of any approach to the distribution of matrimonial property. Should the economic or moral conduct of the parties have a bearing on the sharing or division? Accepting that each spouse should receive some share of the property, which property should be shared, and when should the sharing take place? If a new approach were adopted, when and how should it take effect? Should people be allowed to contract out of the new regime, and if so, how? How should the economic interests of children best be safeguarded?
Some of the possible approaches or methods by which a sharing could be accomplished were examined. The first considered were discretionary approaches, which involve giving power to the court to divide property between the spouses as the judge sees fit. These provide a great deal of flexibility, but provide little certainty of result. Fixed approaches, which would divide the property between the spouses according to stated proportions, regardless of the circumstances of any given case, were examined. These would give certainty of result, but no flexibility to take into account varying circumstances of each case. Composite approaches, which involve attempts to combine some features of each of these methods, were discussed. These would allow a blending of some certainty with some flexibility.

We have considered approaches adopted or proposed in other provinces and elsewhere. The Commission has, in a preliminary way, drawn certain tentative conclusions. We are now putting forward for consideration a plan for proposed legislation based on those conclusions. This third paper sets out the tentative views and proposals of the Commission.

We emphasize that the views and proposals set out are only tentative and do not, at this point, constitute a report to the Attorney General. Rather, they are proposals put before the people of Saskatchewan for their information, and to stimulate discussion, and to act as a basis for communication between the Commission and the public — ultimately to determine the reaction of the public. If our proposals are found to be sound and generally acceptable to the people of Saskatchewan, the Commission will formulate its report to the Attorney General along these lines. If public reaction is negative, it may be necessary for the Commission to
rethink certain aspects of our proposals, or indeed, to begin afresh. We therefore invite comments and opinions on the contents of this paper.

SUMMARY OF BASIC PROPOSALS

The Commission is of the opinion that marriage is a partnership of equals. The partnership is founded on both status and the contributions of the husband and wife. The contribution of each may be as material as money or as ethereal as love and understanding. It will be different in each case. It will vary from time to time and from marriage to marriage. Because we see marriage as a partnership of equals, founded on both status and contribution, we see the solution to the problems inherent in distribution of matrimonial property as requiring a combination of certainty and flexibility of approach. Our proposals for reform attempt to meet this objective.

The Commission is firmly convinced that any proposal for reform must attempt to be fair and just to those people whom it would affect. How and when any proposed legislation should take effect, therefore, becomes a most important consideration in the overall scheme. It is also most difficult to resolve in a satisfactory manner. The new legislation might be retroactive. This means that once proclaimed, it would apply to all marriages, existing and future, and to all property accumulated by each couple, whether in the past or in the future. On the other hand, the new legislation might be prospective. This means that the new regime would apply only to those marriages solemnized after its adoption.

There are good arguments for both the prospective and retroactive
application of the new legislation. Those favouring retroactive application rely upon the following points. First, because the present law is so unfair, it should be repealed and replaced by a law which will produce more justice in the individual case. Second, public opinion supports a division of property between the spouses and, therefore, sharing under any new regime should apply to all marriages. Third, if a new regime does not apply to existing marriages, presently married people will not be assisted by the new law and, therefore, the effect of reform would only be felt ten or twenty years hence.

Those favouring prospective application argue that making any new system applicable to existing marriages changes the ground rules after the initiation of the marriage. Some people object to the adoption of such a major change during the on-going marriage. They argue that if people have ordered their lives according to the law as it exists, it is unfair to arbitrarily change that law.

The Commission sees the advantages of both points of view. We also see this question as one of the most important issues in the revision of the law relating to the division of matrimonial property. In the combination of approaches set out below, we have attempted to maintain some balance between changing the law retroactively and prospectively. If public response indicates that retroactive application of a new regime is acceptable, then our first proposal (judicial discretion) could be withdrawn once another regime is adopted retroactively. We particularly request public response on this issue.

The Commission is proposing, as the first and immediate step in the reform of laws relating to matrimonial property, that legislation be passed giving the
courts, upon application, a wide discretion (power) to order division of all property between spouses. This power would be exercised regardless of how title to the property may be held, and regardless of when the property was acquired. The courts would be guided by the circumstances of the individual case.

To provide some measure of security for both spouses, we are further proposing that legislation be passed at a later date to provide for co-ownership of the matrimonial home. This legislation should apply retroactively; that is, to the matrimonial home in any marriage. It would entitle the husband and wife to immediate equal shares in the home, together with equal rights of occupation and control. The home would be enjoyed jointly and disposed of or otherwise dealt with only with the consent of both spouses, or by court order.

In addition, the Commission is proposing legislation adopting a scheme of deferred participation. It would apply only to the property of any couple married after the adoption of the scheme (except when the spouses have defined their property rights by mutual agreement). This new system would allow each spouse to own and control his or her own property (other than the matrimonial home) during the marriage, but would also entitle each to an equal share of the value of the property acquired during the marriage. The sharing might take place upon termination of the marriage by death or divorce or upon certain other circumstances arising during the marriage.

Because there may be a need for some flexibility in any scheme, we think both of the latter approaches might be underwritten by a small measure of judicial discretion. Such a discretion should only be applied in certain fairly defined instances, pursuant to clear and certain guidelines. It should
only be available (if at all) where the result would otherwise be unconscionable or very unfair.

Thus, we are proposing:

(a) that legislation providing for the exercise of judicial discretion be passed immediately to apply to property in any marriage solemnized prior to the adoption of a deferred participation scheme;

(b) that subsequently, and in addition, legislation providing for co-ownership of the matrimonial home be passed to apply to the matrimonial home in any marriage;

(c) that legislation establishing a scheme of deferred participation be passed to apply to matrimonial property (other than the home) in any marriage solemnized after adoption of such legislation.
A. Judicial Discretion

The Commission is proposing that legislation be passed giving the court wide power to order division of matrimonial property between spouses upon application to the court. The court should be empowered to divide the property as it sees fit in order to provide a fair and just division, according to the circumstances of each case, regardless of how title to that property is held or when it was acquired.

(a) When and how can a spouse apply for exercise of judicial discretion?

The matter of the division of property could be brought before the court by a simple application by either spouse. The application would usually be made at the time of legal termination of the marriage -- divorce. It would also be necessary to allow a division to take place when the marriage is in serious difficulties or upon actual separation. Application during the marriage could be allowed under other circumstances, but ordinarily there should be only one application in any marriage. Although it would be desirable to resolve property issues at the time of divorce, an application should be allowed within a period of two years after a divorce, or within such longer period as the court may consider reasonable.

Two members of the Commission take the view that the new legislation should not allow a person divorced prior to its enactment to seek a property division under it. To allow applications by persons divorced prior to the enactment would have the effect of unsettling property and maintenance arrangements which have been made (often by the court) and acted upon. To allow those original settlements to be reopened would encourage litigation in regard to matters which have been settled.
One member of the Commission thinks that those divorced prior to the new legislation should, at least in some instances, be allowed to make application for a property division. Tentatively, he would suggest that those divorced within two years prior to the new enactment should be allowed to apply. Also, if the court considered it reasonable, the period might be extended in light of the circumstances of the individual case. In his view, the risk of unsettling earlier property arrangements is over-balanced by the need to have property divided fairly.

In view of this difference of opinion, we specifically invite public response to these views.

The Commission is of the opinion that an application should also be allowed upon the death of one of the parties. Problems involved in disposition of property at the time of death may largely be resolved under a will, the laws of intestate succession or dependants' relief. However, The Dependants' Relief Act provides for maintenance of dependants only, and is not a vehicle for division of property. As well, The Intestate Succession Act and The Dependents' Relief Act may need revision to more accurately reflect the concept of marriage as a partnership. The Commission thinks there would still be instances where an application under the judicial discretion legislation would provide a more equitable result because the surviving spouse is entitled to a portion of the property acquired during the marriage. In addition, the survivor should be allowed to apply under The Dependents' Relief Act where the share received under judicial discretion is insufficient for his or her maintenance.

While the survivor would be allowed to make such an application, the Commission is of the view that the estate of the deceased spouse
should not be allowed to claim from the survivor. This is because the purpose of judicial discretion is primarily to divide property accumulated by spouses between the spouses and not to assist others. If the parties have lived in harmony until the death of one, we should assume that the couple had intended the survivor to have whatever property he or she held upon death, and that the estate should not make a claim against it. The survivor will normally take the major portion of the estate, large or small, in any event. As well, he or she may be left with children to raise and may need the property to do so. To allow the estate to make a claim might divert the property to others.

(b) Which property should be subject to sharing?

The Commission proposes that all property owned by the spouses at the time of the application should be available for redistribution by the court. We see no reason to exclude any property from the court's consideration, whether it was acquired before the marriage, by way of gift, or after separation of the parties. There seems to be no justification for limiting the court's power by saying that certain property is not subject to sharing. Under this approach, we think that business assets as well as family assets should be considered potentially sharable. The court should be free to consider all property and make whatever distribution it considers fair and just.

We suggest that property acquired by married couples prior to the enactment of the new judicial discretion scheme should be subject to division under that regime. In doing this, we are following the example of England, New Zealand and British Columbia. In our view, to do otherwise would be to leave those presently married without a satisfactory system.
for the division of their property.

(a) How wide should the discretion be? How should it be exercised?

The Commission thinks that any legislation introducing judicial discretion should contain specific guidelines governing the exercise of the court's power. These would, in effect, be 'ground rules' setting out the intention of the legislature and reflecting as closely as possible the wishes of the people of Saskatchewan.

The Commission considers that moral conduct, as distinct from economic conduct, should not be a factor in the division of property between spouses. When we use the term "moral conduct", we are referring generally to sexual misconduct, cruelty and related kinds of behaviour. It seems that to deny or limit the share of either spouse because of such misconduct is an attempt to punish the 'guilty one', rather than to provide a fair division of property between spouses.

If moral conduct is to be considered at all, we prefer the approach taken in New Zealand whereby the court "shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value". We specifically invite public opinion on this point.

If, contrary to our views, moral conduct is deemed relevant, then it should be given the same effect for each spouse. Many of our present laws discriminate between husbands and wives in this regard. Such discrimination is no longer acceptable.

The Commission thinks that contributions made by either spouse in looking after the home and caring for the family are very relevant to the distribution of property. Other matters which we would suggest for
consideration are the origin of the property, how title is held, numbers, ages, health and custody of children, means of the spouses, loss of potential pension or insurance benefits, and any other circumstances which the court thinks relevant.

Insofar as the distribution may take place at the time of divorce, the court should consider the question of distribution of property and maintenance as interrelated. In the interest of reducing expense, confusion and duplication, we would allow the court to deal with all of the economic problems of the couple at the same time. This approach would provide flexibility and enable the court to provide for the individual needs and circumstances of the parties. In many cases, there would be advantages to granting a substantial property settlement with a reduction or elimination of support payments.

(d) What kinds of orders should the court be allowed to make?

The Commission recommends that the court be given the power to make any order that seems to be most appropriate in the circumstances of the particular case. In some instances, it might order actual physical division of the property. In others, it might order transfer of the property from one spouse to the other. It could order sale of the property and division of the proceeds or payment of a money settlement. In the latter case, the court might order payments to be made by installments, with interest at current rates. It could also order that the claim be secured if it saw fit to do so.

The Commission thinks that the court should be able to delay the actual division of the matrimonial home or its value. It may wish to order exclusive possession to one spouse for either a fixed or undetermined
Consider the case where the only property of any value is the home. To order its sale at the time of the application would force the spouse with custody to find a new home for the children. This may be financially disastrous if the family is large. As well, the emotional and psychological hardships which may be caused to children by uprooting them at a time when they are already losing a parent should be avoided if at all possible. The Commission feels that in this situation the welfare of the children must be the court's first consideration. In order that the court be able to assist the children, it should have power to order exclusive possession of the home to one parent, and to delay its ultimate disposition.

(e) Should couples be permitted to enter into agreements which would prevent the exercise of judicial discretion?

While one member does not agree, the majority of the Commission thinks that the parties to a marriage should be free to enter into agreements to regulate how their property will be held during the marriage and how it should be divided on the breakdown of the marriage. Such agreements could be entered into before or after marriage. Accordingly, we recommend that the court should not exercise its power with respect to the property in dispute if it will defeat a common intention expressed in an agreement of the spouses.

In order that an agreement be recognized as valid by the court, it must be in writing. Any agreement signed after judicial discretion legislation has been passed should contain a certificate stating that each of the parties has had independent legal advice, fully understands
the effect of the agreement, and freely consents to it. While the Commission supports the right of individual couples to tailor the law to their own needs, we strongly urge that there be limitations on this right. Thus, couples could not hinder the court in its awarding of maintenance to the spouses or children. Also, spouses should not be allowed to contract away their rights to apply under The Dependants' Relief Act.
B. Co-ownership of the Matrimonial Home

Our view is that the law should be changed to provide for equal co-ownership of the matrimonial home by the spouses by operation of law. Both spouses would own equal shares in the home. Both would have equal management, control, and occupational rights in the home. The home could only be sold, mortgaged, or otherwise dealt with by the spouses upon their mutual consent or upon a court order. We think that the co-ownership of the matrimonial home principle should be applied on a retroactive basis. With some exceptions, it should apply to all matrimonial homes regardless of how or when the home was acquired. The principle should apply regardless of which spouse holds title and even if one of the spouses has made no financial contribution toward the purchase or upkeep of the home. Under this approach, in the usual course of events, there would be no inquiry into contributions, intentions, conduct, or the merits of the individual circumstances.

We think that three exceptions to the general co-ownership principle might be allowed. First, the principle should not apply where the spouses either before or after marriage have by written contract expressed their mutual agreement that their home or future home should not be subject to the co-ownership principle. The parties should be allowed to define their property rights by mutual agreement, subject only to specified limitations and safeguards.

Second, where the matrimonial home has been received by one of the spouses as a gift or inheritance, and the donor or testator has expressed an intention that the home is given to that spouse
only, the co-ownership principle should not apply. The expressed intention of the donor or testator is entitled to respect and, in our opinion, should prevail.

Third, the co-ownership principle may not apply in certain instances where unusual circumstances would make the co-ownership of the home unconscionable. Therefore, we favour the adoption of a judicial discretion under which the courts could vary the shares held by the spouses under the co-ownership principle. For example, if one of the spouses owned a home at the time of marriage, it may be unconscionable to allow the other spouse to have a one-half interest in the home if the marriage lasts only a few weeks or months.

To assist the court in deciding whether to exercise this judicial discretion, examples of unusual circumstances should be set out in the legislation. A marriage of short duration should be a basis for the exercise of this discretion. With some reservations, we also think that the extreme economic misconduct of a spouse might be another basis for the exercise of discretion. Examples of extreme economic misconduct might include situations where one spouse has 'cleaned out' the chequing or savings account without the knowledge or consent of the other or where one spouse has squandered large amounts of money in 'high living' or by buying unnecessary things. As indicated earlier, we do not think that moral conduct should be considered. However, we specifically invite public comment on this issue.

Subject to the types of exceptions discussed above, we think that ownership of the family home should be shared in every case.
We think that the vast majority of people in Saskatchewan regard the home as "ours" or "theirs" and that the co-ownership principle would, therefore, reflect public attitudes. In almost all cases, both spouses will have made substantial contributions to the home; therefore, it should be shared equally. It would also provide some degree of security for the economically dependent spouse both during the marriage and in the event of marriage breakdown. The adoption of co-ownership of the home would eliminate most of the problems of the present law with respect to the home, and it would provide equal ownership of one of the most important capital assets owned by many couples.

The following are some of the many questions which must be considered before legislation setting out such an approach can be drafted.

(a) How is the matrimonial home to be defined and identified?

Borrowing to some extent from the Report on Family Property Law by the Ontario Law Reform Commission, we think that in general terms "the matrimonial home" might be defined as that portion of the dwelling and the area immediately surrounding it which is owned by either of the spouses and is or was occupied by them during the marriage as their principal family residence. Such a definition does raise certain problems. It would exclude any parts of an apartment house or block which are normally rented to others and not occupied as the family residence. It would also exclude any part of the premises, other than the residence itself, which is used primarily by one spouse in connection with his or her business. In the case of a rural home,
the dwelling and other buildings surrounding it, together with up to 160 acres of land, should be considered the matrimonial home. If it is located on a piece of land less than 160 acres in size, but other land is owned in Saskatchewan, either the parties or the court could decide which additional land would be added to bring the combined pieces to approximately 160 acres.

We think that the co-ownership principle should apply to only one home at a time. Where two or more homes are owned and used as residences at the same time, or where two or more homes have been used consecutively as residences, problems may arise in deciding which of the homes is co-owned. In deciding such cases, the courts should consider a variety of factors, including the following: where the family has actually lived longest, the value of the homes, whether the homes were acquired during the marriage, which one best serves the housing needs of any dependent children.

When spouses have owned two or more homes consecutively, the last one purchased will normally be the most valuable and, in such situations, there should be few problems in applying the co-ownership principle to the presently owned home. Where the value of the equity in the present home is less than the amount received for a previously owned home or where couples have sold their home and have not purchased another, we think that the surplus or the sales price should be paid equally to the spouses.

(b) Upon family discord, separation or divorce, how should the court deal with the home which is co-owned?

Even though the home is co-owned, this does not mean that upon
family discord, separation or divorce the home will always be sold immediately and its value divided between the spouses. Because circumstances will vary from case to case, we think the courts should have power to make a variety of orders respecting the home. In some cases, one spouse may wish to 'buy out' the other spouse's share. The court should be able to decide whether to allow this, and if so, upon what terms and whether any security should be given to insure payment of the unpaid balance.

There will be times when it may be best to sell the home and divide the proceeds. But in other cases, it will be better to postpone the sale. The court may decide that one spouse should have possession until the home can be sold or purchased by one of the spouses. In this situation, the court should consider the housing needs of the dependent children and would probably give possession to the spouse who has custody of the children until they reach a certain age. When such an order as to possession has been made, the court should have power to change this original order in light of changed circumstances. For example, the spouse having custody of the children may have moved. The court should then be able to order the sale of the home and division of the proceeds.

While orders of this kind might have the effect of postponing the actual division of the value of the home, they would not of themselves change the fact that the spouses own the home together equally. However, where orders or directions of the court postpone the sale and a spouse fails to make ordered payments either on the house or by way of support, the Commission thinks that the court
should be allowed to take this into account when ordering the final division of the home. This may result in such a spouse receiving less than he or she could have received if the payments had been made.

Where the sale or final disposition of the home is postponed and in the meantime the value of the home changes, the question arises as to what will finally be shared. Is it the value of the home at the time of the original possession order or is it the value of the home at the time of the final sale or other disposition which is to be shared? How is the increase or decrease in the value of the home during the interval to be treated? Again, because the circumstances of individual cases will vary so greatly, we hesitate to choose either of these alternative values and apply it in every case. Unless the value of the home declined during the period, each spouse would be entitled to at least one-half of the value of the home at the time of the original order. The court, after reviewing the facts of the individual case, should determine how any increase in value should be divided. Where the value of the home declined during this interval, both spouses should share the loss.

(c) How does the co-ownership of the matrimonial home affect creditors?

Our proposal for co-ownership of the matrimonial home is put forward as part of the overall solution to the division of matrimonial property and is intended to provide a fair, just, and equitable distribution of part of the property of many married persons -- not to benefit or to prejudice the rights of creditors. Accordingly, the existing interests and rights of secured creditors, execution creditors and statutory lien creditors as of the effective date of this proposed legislation will not
be changed. The spouses will co-own only the value of their home which
is over and above the claims of these kinds of creditors. Following
the adoption of the co-ownership of the matrimonial home principle,
mortgage companies and persons selling homes may wish to have both
spouses responsible for payments on the home. Even if one spouse is
not required to make such payments (e.g., either because that spouse
did not sign or because the couple was not married when the home was
mortgaged or bought), we agree with the recommendations made by other
law reform bodies that either spouse should be allowed to make the
payments and go forward under the mortgage or agreement for sale. In
legal proceedings in relation to the home both spouses should receive
notice of the action if the person bringing the action knows or should know
of the existence of the non-title-holding spouse.

The position of unsecured creditors has been canvassed by the
Commission. This matter will be dealt with in the Commission's Final
Report to the Attorney General.

(i) To what extent would the co-ownership principle affect existing and
future titles to matrimonial homes?

If title to the matrimonial home is held by the spouses either in
joint tenancy or in tenancy in common, it may be suggested that they
have agreed that their interests are 50/50 and that upon any legal
action in regard to the home, the courts should divide the value of
the home equally. We see no compelling reason to look behind the
title where spouses own the home in joint tenancy or tenancy in common.

Where the spouses have taken title in joint tenancy, upon death the
surviving spouse takes the entire property. Under tenancy in common, the deceased spouse's share passes either under his or her will or by the law of intestate succession. In regard to these aspects, we see no reason to change the existing law.

Where title is held in the name of one spouse only, the question arises as to whether the co-ownership principle should impose a joint tenancy or a tenancy in common. There are sound arguments on both sides. Joint tenancy would allow the surviving spouse, who may have the care of dependent children, a greater share. In most cases, it would be fair for the survivor to have the home. Presumably, applications for maintenance under The Dependants' Relief Act would be reduced if the surviving spouse received the home upon the death of the other spouse. However, it may be argued that it is enough that the surviving spouse receives one-half of the home. Death should not automatically give him or her a greater share than he or she might have obtained upon application to divide the property during the lives of the spouses. On balance, we are inclined to say that the home should be held in joint tenancy.

(e) How may the ownership interest of the spouse whose name does not appear on the title be protected?

The non-title-holding spouse should be allowed to protect his or her interest in the matrimonial home by filing a caveat. This would prevent others from dealing with the title-holding spouse in the belief that he or she alone could sell or mortgage the home. However, we are reluctant to require the non-title-holder to file a caveat to protect his or her interest. This creates the problem: what happens if the
Co-ownership...

Title-holding spouse sells or encumbers the matrimonial home without the consent of the other spouse? (For example, the title-holder may take an affidavit stating that the property is not and never has been a matrimonial home, or that he or she is not a married person.) Penalties for so doing might include a fine and imprisonment as well as a right to sue for damages by the non-consenting spouse. Ordinarily, the damages would be one-half of the value of the matrimonial home at the time of its disposition.

We have given thought to a concept found in Alberta's dower legislation for those instances where damages for selling without the consent of one spouse cannot be collected from the other spouse. Under that legislation, if a judgment cannot be collected, the non-consenting spouse may seek payment out of the assurance fund created by The Land Titles Act. If payment is made out of that fund, the provincial government steps into the shoes of the judgment holder and attempts to collect from the spouse who disposed of the property without obtaining the necessary consent. Although we have not worked through all the details of this concept, we think this general approach gives the non-title-holder a substantial measure of protection against unauthorized dealings with the matrimonial home by the title-holding spouse.
C. Deferred Participation

As outlined in our Second Mini-Working Paper on the Division of Matrimonial Property, deferred participation (also called deferred sharing) is a scheme whereby the value of most property accumulated by the spouses during marriage will be equally shared by them at the end of the marriage. However, during the marriage each spouse has freedom to buy, own, control, and dispose of property as he or she sees fit, subject only to certain controls which are designed to protect the other spouse and children and, of course, except for transactions involving the matrimonial home which will be co-owned. We think this scheme provides a good blend of economic freedom for each of the spouses during the marriage and economic fairness in the ultimate division of the property accumulated during the marriage.

In our view, the deferred sharing regime more accurately reflects the present-day concept of marriage as a social, psychological, physical, and economic sharing of the lives of two people. Accordingly, we favour the adoption of a deferred sharing approach as part of the solution to the problems under the present law. The deferred sharing regime recognizes both financial and non-financial contributions made by both partners and it avoids most of the unfairness of the separate property system. Such a scheme should provide a much higher degree of certainty of result than presently exists. Couples should be able to fairly accurately assess their economic positions in the event of marriage breakdown. Deferred sharing is a legal recognition of the proposition that marriage is a 50/50 partnership.

Under a deferred sharing system, the total sharable gain of the marriage is determined by the use of three property values for each spouse: the net worth at the time of the sharing, less the net worth at the time of marriage,
and, less the value of any non-sharable property received during the marriage.

Adjustments are then made by means of a balancing claim so that each spouse obtains half of the total sharable gain of the marriage. To illustrate, let us repeat the illustration from Mini-Working Paper No. 2.

Let us suppose that at the end of the marriage, A has $45,000 worth of property and owes $15,000 in debts. B has $10,000 worth of property and no debts. At the time of the marriage Spouse A had property valued at $5,000. Spouse B had $2,000 worth of property. Neither had any debts. During the marriage, A inherited $5,000 from an uncle. The calculation of the division of their property would be done as follows:

<table>
<thead>
<tr>
<th>Spouse A</th>
<th>Spouse B</th>
</tr>
</thead>
<tbody>
<tr>
<td>$45,000.</td>
<td>$10,000.</td>
</tr>
<tr>
<td>- 15,000.</td>
<td></td>
</tr>
<tr>
<td>30,000.</td>
<td>10,000.</td>
</tr>
<tr>
<td>- 5,000.</td>
<td>- 2,000.</td>
</tr>
<tr>
<td>25,000.</td>
<td>8,000.</td>
</tr>
<tr>
<td>- 5,000.</td>
<td></td>
</tr>
<tr>
<td>20,000.</td>
<td>8,000.</td>
</tr>
</tbody>
</table>

Value of property at end of marriage

Less debts at end of marriage

Net worth at end of marriage

Less net worth at date of marriage

Individual gain (or loss) during the marriage before deduction of non-sharables

Less non-sharable property (gifts, inheritances received during the marriage)

Individual gain (or loss) during the marriage

Total sharable gain of the marriage

The total sharable gain of the marriage, $28,000, is divided equally. Thus, each spouse should have $14,000 worth of property at the end of the
marriage. Now subtract B's gain during the marriage, $8,000, from $14,000 and the resulting $6,000 is the amount that A must transfer to B in order that each spouse has an equal share.

There are several questions which require consideration. They relate both to the basic operation of deferred sharing and to the overall regime. We wish to put forward our present thinking in regard to these questions. However, we are most interested in public response to our views.

(a) To which marriages should the deferred sharing system apply? Should it apply only to marriages which take place after its adoption?

We think that a deferred sharing system should be adopted as the basic legal regime applicable to marriages celebrated after its adoption, unless the spouses have defined (set out) their property rights in a mutual agreement. There would be certain practical difficulties in the application of a deferred sharing regime to marriages celebrated prior to its enactment; e.g., the net worth of each spouse at the time of marriage might be more difficult to establish. The new judicial discretion system, which we have outlined above in regard to prior marriages, should prevent a repetition of cases of the Murdoch and Rathwell type, and at the same time, should not be subject to objection as retroactive legislation.

At the same time, we must admit that there are good arguments for retroactive application of this regime. First, in most cases, evidence can be introduced to establish net worth of each spouse at the time of the marriage. To the extent that net worth at the time of the marriage cannot be established, all property would be sharable. Secondly, to adopt both judicial discretion and deferred sharing would be to have two regimes at the same time -- with the possibility of differing results, depending upon
the scheme applied. We are again asking for public comment.

Spouses, including those married after the adoption of deferred sharing, should be free to tailor their economic affairs according to their own desires by mutual agreement, either before or after marriage, subject only to specified limitations and safeguards. The safeguards would relate primarily to the formalities surrounding the signing of such agreements and would insure that both spouses have understood the terms of the agreement and have freely consented to it. Statutory limits on such agreements might prevent the parties from attempting to remove the court's jurisdiction to award maintenance and from waiving certain rights conferred upon them by provincial statutes. We think that provision should also be made for couples, married prior to the adoption of the new regime, to opt into it by simply filing a form signed by both. These agreements and forms should be filed in a provincial registry for safekeeping and in order to allow creditors and others to learn how the property of the couple may be divided upon the termination of their marriage.

We would further suggest that marriage licenses and marriage certificates might state on their reverse sides an outline of the new legal system. They might also state that the spouses may define their property rights by mutual agreement.

(b) Which property should be shared?

There may be property acquired during the marriage which should not be subject to sharing. The categories of such non-sharable property will be influenced by policy considerations and could be modified over a period of time to reflect changing values of society. Several kinds of assets presently raise classification problems and we will deal with the most common. We welcome
comments on this issue.

The value of gifts, inheritances, trusts and settlements received by either spouse from third persons are excluded from division in most deferred sharing schemes. It is said that such property is usually not directly attributable to the efforts of the spouses and therefore should not be sharable. Also, it may be observed that the intention of the donor or testator is usually to benefit only the spouse to whom the gift or inheritance is given. We think that such an intention should be implied where the gift or inheritance is to only one of the spouses unless by express terms the donor or testator stated a desire that both spouses should share the gift or inheritance. For these reasons we would classify such items as non-sharable. One member of the Commission thinks that gifts and inheritances received by one spouse should be included in the sharable property because he feels that the probable intent of the donor or testator was to benefit both spouses.

Policy issues arise with respect to whether or not the interest and income from all non-sharable property acquired during the marriage, and from property brought into the marriage, should be sharable. To the extent that such interest and income may be identified and traced, they could be either expressly included or excluded from the sharing. Our tentative view is that such interest and income should be subject to the sharing. They are received during the marriage and should be treated in the same way as any other earnings during the marriage. This approach avoids the tracing and accounting problems which would be encountered if these earnings were not sharable. While it might be possible for spouses not to commingle their funds and to be able to
trace all of their earnings to specific sources, we feel that most couples do not and would not keep such detailed and accurate accounts.

If our present view is accepted, the calculation of interest and income from non-sharable property and from property brought into the marriage should pose few problems. The value of such property at the time of the marriage, or in the case of non-sharable property its value at the time of acquisition, would need to be estimated. It would then be deducted from the net worth of each spouse at the time of division. There may be differences of opinion as to whether such interest and income should be included in the sharing and we welcome public comment on this matter.

Whether the accumulated value or benefits received under insurance policies are sharable might depend upon who has paid for the policies. For example, to the extent that a third party has paid for the policy, its value or the benefits under it should be treated as non-sharable property because it is similar to a gift received from a third party. To avoid accounting and tracing problems, we are of the opinion that the value and benefits of any insurance policy resulting from premiums paid by a spouse during the marriage should be sharable property regardless of the source of the funds used to pay the premiums.

Pension plans also give rise to special difficulties. The value of rights and benefits under pension plans arise from contributions made by an employee and the employer and from any interest or equity that those contributions earn. The increase of the monetary value of a pension plan during the marriage can be fairly accurately estimated. The question is: how are these increases in value to be treated — should they be sharable or
non-sharable? Presently, the non-contributing spouse has very few rights in the pension plan of the other spouse, particularly after divorce. We, therefore, think that the increased value of pension plans during the marriage should be included in the sharable property.

If the value of pension plans is included in the sharable property, certain difficulties will arise. They arise primarily because it may be difficult or impossible to cash the pension plan and, even if it is possible, substantial amounts of tax may become payable because of an early withdrawal of pension contributions or benefits. Furthermore, the cashing of the plan may leave the contributing spouse with little security for old age. These hardships may largely be avoided by the debtor-spouse paying the balancing claim out of other income or property over a period of time. However, there may be spouses close to retirement age whose only valuable property is the pension plan which has been built up over the years of marriage and which does not give a divorced spouse any benefits -- in such cases, any immediate payment of the balancing claim would have to be made out of money from the pension scheme. In such a case the court might be able to delay payments and perhaps secure those payments as a lien against the pension benefits. We believe that sharing of the value of pension plans accumulated during the marriage is consistent with sharing of other property acquired during the marriage. The problems incurred in such a sharing can be resolved.

Damages for personal injury recovered by one of the spouses during the marriage are sharable in some property division systems. In other systems damages are not sharable. The spouse who has suffered the injury is entitled to keep the money awarded. It is said that compensation for pain and suffering, loss of amenities, loss of life expectancy, disfigurement, etc.,
is of a very personal nature and should be kept by the person suffering such losses. On the other hand, health care, special home care, and medicine, etc., are usually paid for with money that would otherwise have been sharable. Also, it is suggested that amounts received for loss of earnings should be included because, if the accident had not occurred, the injured spouse's earnings would have been sharable. Both points of view have merit. However, damage awards are not usually broken down into detailed categories. It would be very difficult to divide the damages according to the specific type of loss suffered and to share some and not to share others.

There are at least four possible choices. First, all damages could be non-sharable. Second, all damages could be sharable. Third, all damages might be sharable but the court should be given power to exclude all or part of the damages where including them would be unfair. Fourth, if the courts specifically state the amount of damages awarded for each type of loss, some of the damages might be shared and others not shared. We think that the third alternative is preferable, although we realize that this gives further discretion to the courts.

Winnings from sweepstakes or lotteries and prizes which have been received during the marriage also raise classification problems. We think that they should be sharable property on the rationale that their origin is luck. They are distinguishable from gifts from third parties where the origin is love.

(c) How is the balancing claim calculated?

As indicated above, the total sharable gain of the marriage is calculated by using three property values for each spouse: the net worth at the time of
the sharing, less the net worth at the time of marriage, and less the value of any non-sharable property received during the marriage.

Under any system providing for division of property between spouses the value of property owned at the time of division must be assessed. Certain types of property may prove difficult to value. For example, complications may arise in setting exact values for pension schemes, for shares of a privately held corporation and for intangibles such as patents. However, problems of this type are common to all systems which provide for division of property between spouses.

The calculation of net worth at the time of marriage raises certain problems. Although in many cases the spouses will have brought little or no property into the marriage, there will be instances where either or both have brought substantial assets into the marriage. In these circumstances, it seems reasonable to require the parties to establish the value of their assets at the time of the marriage if they wish these assets to be excluded from sharing.

In most cases, valuation of non-sharable property acquired during the marriage should not be too difficult because there will often be records or the spouses will recall its value. For example, any property acquired from an estate will usually have had a value placed upon it.

While there may be substantial accounting and valuation problems under a deferred sharing scheme patterned along the lines suggested, there should be few situations where significant issues will arise -- and where they do arise, the courts can resolve these issues. To assist in the settling of disputes, we suggest that there be a presumption that all property is sharable. Under this presumption, any spouse claiming that certain property
was not sharable would have to establish that he or she owned it before marriage or that it fell within one of the types of non-sharable property. He or she would also be required to establish the value of the property in question.

Given the present state of the law under which there is no automatic sharing of assets between spouses, we foresee some initial increase in litigation when a deferred sharing scheme is adopted. In general, however, the deferred sharing scheme, being based primarily on fixed rights, should reduce the need for litigation between the spouses respecting their property rights.

(d) As of what date should the balancing claim be calculated?

If spouses have been separated for a considerable period of time before requesting a division of their property, the problem of selecting an appropriate date for determination of their rights and obligations arises. Property will usually have been acquired between the separation and the request for division. Should this property be shared or not? We might say that the balancing claim should be calculated as of the date of separation and therefore all property acquired after that date is not sharable. However, in our view, it is better to say that the balancing claim will be calculated as of the date of the application for division (the property is therefore sharable) -- but if it seems more appropriate, the court should be allowed to select an earlier date so as to exclude such property. Also, this would allow the court to select an earlier date for calculating the balancing claim where one spouse has intentionally squandered his or her property in order to defeat the other.
(Deferred Participation)

(e) How should the equalization payments be made?

Once a balancing claim has been calculated, questions arise as to the powers which the court should exercise in enforcing the rights and obligations of the spouses. In view of the variety of economic circumstances of spouses at the time of division, no one method of handling the payment of equalization claims seems practical. Therefore, the courts should be given flexibility to decide which method of payment is best in each case. In some cases, the equalization payment might be paid in cash; in other cases, payment might be made by instalments over a period of time, with or without security being given to guarantee payment; in still other cases the transfer or sale of specific property might be ordered. Where the claim is paid by instalments, it should bear interest. The claim could be paid over a period of perhaps ten years or more. Thus, in the vast majority of cases the wealthier spouse would not be forced to sell his or her business or farm to pay the balancing claim.

(f) Should spouses be permitted to opt-out of the deferred sharing regime?

If the regime applies to future marriages only, should previously married couples be allowed to adopt it?

In our view, if spouses do not wish to have deferred sharing apply to them they should be permitted to define (set out) their property rights by mutual agreement, either before or after marriage, subject only to specified limitations and safeguards. In the absence of any agreement, the deferred sharing regime would apply. The right to opt-out is recognized under the present law. It should be permitted because of the different circumstances in which couples may find themselves; a general deferred sharing scheme -- or perhaps any other regime -- will not necessarily lend itself to their particular desires, expectations and aspirations.
As stated earlier, we believe also that those couples who were married prior to the enactment of the new regime should be allowed to adopt the new regime by simply filing a form.

The role of the state in our view should not be to impose a universal property regime which must be rigidly applied to every married couple, regardless of their wishes. It should be confined to providing a fair, simple, known, certain regime which will apply to those couples who have not made their own agreement concerning property. The closer the basic legal regime is to the normal desires and expectations of people, the fewer private agreements there will be. However, even if a significant percentage of couples chose to regulate their affairs by agreement, this would not necessarily reflect adversely upon the basic legal regime, but would only reflect the fact that those couples wish to tailor their affairs in accordance with their own desires. One member of the Commission does not support the proposition that spouses ought to be allowed to opt-out.

(g) How can dissipation (squandering, wasting) of property by one spouse to the prejudice of the other spouse be controlled?

Under deferred sharing, each spouse is largely free to control and dispose of his or her own property during the marriage. One spouse could take advantage of this freedom by reducing his or her assets without the consent of the other and thereby deprive the other spouse of a fair sharing. This might take several forms; e.g., excessive gifts to third parties; sale of property to a relative or friend at a price substantially less than market value; transfer of assets into a trust or secret account; destruction of property or wasting of money on unwarranted luxuries or on riotous living.
The making of excessive gifts and the sale of property at unrealistically low prices raises many problems. Although it is possible to require the consent of both spouses to the sale of certain real property (e.g., the consent of the wife is required for the sale of a homestead under the present Homesteads Act and similar consents would also be required under the new co-ownership of the home approach), it seems impractical to require the formal consent of both spouses to all sales and gifts.

In some situations, a spouse may know about excessive gifts or sales for less than market value made by the other spouse. If a spouse discovered that either transaction were about to take place, he or she should be entitled to apply to the court in order to stop it. To aid in the discovery of any improper gift or sale at the time of the division of property, it might be desirable to require each of the spouses to make a statutory declaration of his or her property and also to give details of any substantial gift or sale made without the mutual consent of the spouses. If the court finds that there has been an excessive gift or improper sale, the value of the gift or sale of the property sold (either at the time of the transfer or at the time of division, whichever is higher) may be added to the property of the spouse who transferred it. The division would thus take into account the improper gift or sale and the non-consenting spouse would be protected.

The same general approach could be used where one spouse dissipated property during the marriage. To discourage such conduct, the court might require the spouse guilty of such conduct to pay a premium to the other spouse. This premium might be calculated on the basis of a set percentage of the value of the property in question.

Fraudulent excessive spending by a spouse is much more difficult to deal
with because the line between deliberate wasting of assets and simple bad management is difficult to draw. It may also be extremely difficult to ascertain whether only one spouse is responsible for the excessive spending. Also, the life style, economic circumstances, and habits of married persons vary greatly. It would, therefore, be very difficult to give precise guidelines to assist in determining whether expenditures were fraudulent. Upon finding of a fraudulent intention, however, the court should be allowed to rectify the situation.

\( \text{(h) Will the scheme apply on death?} \)

Although our consideration of deferred sharing has focused primarily upon the marriage breakdown situation, we shall comment briefly upon how a deferred sharing system might operate upon the death of a spouse. Generally, the dissolution of a marriage by death should not produce markedly different results than marriage breakdown. To the extent that there are differences, they must have a logical reason. The widow or widower should receive at least the same protection and benefits under any property regime as the divorced person.

\( \text{(i) If one spouse has a loss during the marriage, to what extent should that loss be shared by the other spouse?} \)

Some complexity arises if one of the spouses has not prospered during the marriage. Consider the case where at the time of division Spouse X has $10,000 worth of assets but has debts of $15,000 and Spouse Y has assets worth $5,000 but has debts totalling $2,000. At the time of marriage, X had a net worth of $1,000 but Y had no assets at the time of marriage. During the marriage, X received a gift of $5,000 from a relative. The initial
calculation works out:

<table>
<thead>
<tr>
<th>Spouse X</th>
<th>Spouse Y</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>$10,000.</td>
<td>$ 5,000.</td>
<td>Value of all property held at time of division</td>
</tr>
<tr>
<td>- 15,000.</td>
<td>- 2,000.</td>
<td>Less outstanding debts at time of division</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Net worth at time of division</td>
</tr>
<tr>
<td>- 5,000.</td>
<td>3,000.</td>
<td>Less net worth at time of marriage</td>
</tr>
<tr>
<td></td>
<td>--</td>
<td>Individual gain (or loss) during the marriage before deduction of non-sharable property (gifts, inheritances, etc.)</td>
</tr>
<tr>
<td>- 1,000.</td>
<td></td>
<td>Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)</td>
</tr>
<tr>
<td>- 6,000.</td>
<td>3,000.</td>
<td>Individual gain (or loss) during the marriage</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- 5,000.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- 11,000.</td>
<td>3,000.</td>
<td></td>
</tr>
</tbody>
</table>

At this point there are several alternative calculations possible. We would state two of them.

**Alternative I**

Following the method used where both spouses experienced gains during the marriage, the following calculation could be made:

- 11,000.       | X's individual loss during the marriage |
| 3,000.         | Y's individual gain during the marriage |
| - 8,000.       | Total sharable loss during the marriage |
| - 4,000.       | Each spouse's share of the loss during the marriage |
The total sharable loss (-8,000) is divided between the spouses with each to have $4,000 loss during the marriage. This, in turn, would result in X having to claim against Y in the amount of $7,000 as charted above.

Although this alternative has a certain symmetry in the complete sharing of losses as well as gains, the result may seem unduly harsh to the solvent spouse (Y) in that while Y's total net worth at the time of the division is $3,000, he or she would owe X $7,000. On the collection of the $7,000 by X, his or her present negative net worth (-5,000) would be eliminated and X would have a net worth of $2,000.

Alternative II

The study paper of the Ontario Law Reform Commission suggested that the losses should not enter into the calculation and that a "Nil" balance only be added. Under this system, the calculation would be as follows:

<table>
<thead>
<tr>
<th></th>
<th>X's individual loss during the marriage</th>
<th>Y's individual gain during the marriage</th>
<th>Total sharable gain during the marriage</th>
<th>Each spouse's share of the gain during the marriage</th>
<th>Actual gain or loss (for calculation purposes) during the marriage</th>
<th>Amount required to equalize the gain during the marriage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nil</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3,000.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3,000.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1,500.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nil</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3,000.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>+ 1,500. ←</td>
<td>- 1,500.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1,500.</td>
<td>1,500.</td>
<td></td>
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</tr>
</tbody>
</table>

Using this alternative, Y owes X $1,500.
As illustrated above, this alternative would usually result in the spouse who has a gain during the marriage sharing part of his or her assets with the spouse who has a loss during the marriage. The spouse with the gain during the marriage should not be required to become insolvent to pay the balancing claim. He or she would only be required to divide his or her actual gain during the marriage with the other spouse.

The Commission is of the present view that Alternative II should be followed.

(j) What role, if any, should judicial discretion play under the deferred sharing system?

It may be argued that under the system of deferred sharing there should be no power in the court to vary the normal 50/50 sharing of the total sharable gain of the marriage. Those supporting this view suggest that the sharable gain should be divided equally between the spouses regardless of the circumstances of the individual case. (Subject to an exception where one of the spouses has wilfully or fraudulently dissipated his or her assets and the court makes adjustments in the balancing claim.) If spouses wish to tailor their economic affairs in some other way, they may by mutual agreement set out their own approach subject only to the kinds of safeguards and limitations we have discussed elsewhere in this paper. If spouses have not defined their property rights in some other way, the sharable gain would be divided equally according to the deferred sharing system with no general judicial discretion to vary the normal shares.

In isolated situations the rigid application of the regime might result in an unfair distribution of the sharable property. Upon marital
discord it might cause some spouses to seek a division of the property or a
divorce because remaining under the system would force the automatic division
of property subsequently acquired.

Thus, it may be argued that the courts should be allowed to exercise
judicial discretion and to alter the final results of the deferred sharing
regime because the circumstances of some cases may be so extreme that it
would be very unfair to allow an equal division of the total sharable gain
during the marriage. However, it may be difficult to agree upon the factors
which would permit the court to exercise its discretion to vary the normal
results. Economic misconduct of either of the spouses might be one basis for
allowing the court to vary the normal division of sharable property. Other
bases might be articulated. Under such an approach, the courts would exercise
their discretion in only certain well-defined situations. However, once the
door is opened to allow judicial discretion to vary the results of the
defered sharing regime, there is a likelihood that in most cases, one of the
spouses would seek to have the court exercise that discretion in an attempt
to obtain more than one-half of the sharable property. The Commission has not
resolved this question and therefore specifically invites public opinion on
this important issue.

(k) How will the public learn of the changes in the law?

When a new property regime is adopted as law, we think that special
efforts must be made to inform the public, particularly those about to
be married, as to how the legal property regime will operate, and how they
may deal with their property by agreement. These efforts might take several
forms. Booklets on the subject might be prepared and distributed; discussion
should take place through the media; school courses should be structured to
include information about marriage and divorce and the accompanying legal rights and obligations; and voluntary pre-marriage courses should include such information.

One criticism often levelled at the deferred sharing regime is that it does not give a non-earning spouse any present ownership interest or management rights in the assets of the other spouse. The forced sharing comes into effect only at the end of the marriage and there is no provision for the continuous sharing of assets or for joint management during the marriage. We take the tentative position that the state should not regulate the economic affairs of on-going marriages. It should confine its attention to regulating economic factors when the marriage has ended. We believe that the parties to an on-going marriage will and should govern their own economic affairs. Any attempted state intervention in day-to-day household economics or management would not materially change the way in which most couples handle their finances. The state should not attempt to establish a general system of co-ownership and joint management during the marriage.
Matrimonial property law is closely interrelated with many other areas of the law. Therefore, it cannot be considered in isolation, nor can legislation making changes in this field of law be proclaimed without passing amendments in related areas. In some cases, existing legislation will need to be repealed. In others, it will have to be amended to dovetail with the new approach to distribution of matrimonial property.

The enactment of even the least disruptive approach, judicial discretion, will have an effect on the taxation of those individuals whose property rights are affected by the court's decision. Questions involving income tax, capital gains and gift tax are immediately raised. Approaches involving co-ownership of the home and a scheme of deferred participation may have a more profound and far-reaching effect in the area of taxation.

It is very difficult to articulate a scheme which will provide justice and equal division of property between spouses even in the absence of tax considerations. But can we say that a scheme provides justice or equal division if one spouse ends up paying thousands of dollars in taxes because of the type of property transferred, or because of the timing of the transfer and ends up in a substantially disadvantaged position overall?

We do not mean to say that tax problems are insurmountable. Quebec has a type of deferred sharing plan which has been in operation for three years. We merely emphasize that there is a need to consider tax implications before enacting legislation.

The effect of the proposed scheme at the time of the death of a spouse will be affected by the provisions of The Succession Duty Act
in proportion to the wealth of the deceased. The proposed scheme should not result in increased taxation upon death. Therefore, this Act must be considered as it affects the proposed scheme.

At present, the Commission is of the opinion that legislation providing for division of matrimonial property by exercise of judicial discretion could be passed as an amendment to The Married Women's Property Act. That Act would require total review to ensure that it is in harmony with all proposed legislation.

It is apparent that matrimonial property division and maintenance obligations to the spouse and children are closely interrelated. Any change in division of property should necessarily affect our support laws. With a partial removal of economic dependence, wives will have to accept more responsibility for their own support upon marriage breakdown. They will likely be required to contribute more financially to children of the marriage. This means that The Deserted Wives' and Children's Maintenance Act must be reviewed.

As mentioned earlier, the provisions of The Dependents' Relief Act and The Intestate Succession Act may require amendment. Possibly The Devolution of Real Property Act will require change in order to remain compatible with the passage of property from one spouse to another upon death.

If the recommendations of the Commission are accepted and passed into legislation, certain provisions of The Homesteads Act may well become unnecessary insofar as it attempts to protect the wife from undesired dealings with the home. The adoption of co-ownership of the matrimonial home would seem to offer better protection to both spouses.
The Land Titles Act will need review and change in order to ensure that our registry system is adequate to deal with the practical considerations inherent in introduction of co-ownership of the matrimonial home. Possibly, introduction of the deferred participation approach may require amendment of this Act as well.

Debtor-creditor legislation must be carefully considered in order that the proposed scheme will not interfere with the rights of third parties. The aim of the proposed legislation is to effect a more equitable distribution of property between the spouses and not to give advantages or disadvantages to creditors of the spouses. Insofar as bankruptcy legislation is a Federal matter, our proposed scheme must be dovetailed into the present law.

The Queen's Bench Act, which establishes the Court of Queen's Bench for Saskatchewan, contains certain sections dealing with matrimonial problems, such as judicial separation and alimony. Insofar as they relate to the financial affairs of spouses upon separation or divorce, they must be reviewed at this time with a view to proposals for amendment. Insofar as the Commission proposes that any court application for the distribution of marital property which may be made at the time of divorce may be joined with the divorce petition and dealt with at the same time as the divorce, the Rules of Court will require amendment.

There may well be other substantive or procedural rules of law which will require consideration before the proposed scheme can be enacted and made operative. However, the preceding paragraphs indicate at least some of the ramifications of the introduction of a proposed new approach to the distribution of matrimonial property.
The Commission stresses that this working paper contains only tentative proposals. It is preliminary to a Final Report recommending changes in the law which will be submitted to the Attorney General. It is most important that, before the Final Report is prepared, interested organizations, professional associations and members of the public generally, consider these proposals and their implications with care. All persons and groups are strongly encouraged to submit their response to the Commission at the earliest possible date.

The Commission is engaging accountants, tax lawyers, sociologists, social psychologists and others with professional, practical and academic expertise to consider these proposals from their own particular perspective and to advise the Commission. We are interested in obtaining the widest possible spectrum of opinion before any proposals are finalized in our Report to the Attorney General.

Written memoranda or briefs may be submitted to the Commission offices at Suite 403, 402 - 21st Street East, Saskatoon, Saskatchewan, S7K 0C3.