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Monday 23 March 2009

Standing Committee on Social Policy

Family Statute Law Amendment Act, 2009

Chair: Shafiq Qaadri
Clerk: Katch Koch

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Comité permanent de la politique sociale

Loi de 2009 modifiant des lois en ce qui concerne le droit de la famille

Président : Shafiq Qaadri
Greffier : Katch Koch

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON SOCIAL POLICY

Monday 23 March 2009

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

COMITÉ PERMANENT DE LA POLITIQUE SOCIALE

Lundi 23 mars 2009

The committee met at 1432 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr. Shafiq Qaadri): Ladies and gentlemen, colleagues, I'd like to welcome you to the Standing Committee on Social Policy for consideration of Bill 133, An Act to amend various Acts in relation to certain family law matters and to repeal the Domestic Violence Protection Act, 2000.

The first order of business is the entering into the record of the recent subcommittee report, for which purpose I'll call Mr. Zimmer.

Mr. David Zimmer: Your subcommittee on committee business met on Tuesday, March 3, 2009, and Wednesday, March 4, 2009, to consider the method of proceeding on Bill 133, An Act to amend various Acts in relation to certain family law matters and to repeal the Domestic Violence Protection Act, 2000, and recommends the following:

(1) That the committee meet for the purpose of holding public hearings on Monday, March 23 and Tuesday, March 24, 2009, in Toronto.

(2) That the clerk of the committee, with the authority of the Chair, place an advertisement for one day about the public hearings in the major English and French newspapers across the province.

(3) That the clerk of the committee post information regarding the hearings on the Ontario parliamentary channel and the Legislative Assembly website.

(4) That interested people who wish to be considered to make an oral presentation on Bill 133 should contact the clerk of the committee by Tuesday, March 17, 2009, at 5 p.m.

(5) That the clerk of the committee provide a list of all interested presenters to the subcommittee following the deadline for requests.

(6) That the deadline for written submissions be Thursday, March 19, 2009, at 5 p.m.

(7) That the research officer provide information on the following:

—the proposed amendments to the Pension Benefits Act;

—the backgrounder on the Domestic Violence Protection Act, 2000; and

—a summary of the recommendations.

(8) That clause-by-clause consideration of the bill be tentatively scheduled for Monday, March 30, 2009.

(9) That the clerk of the committee, in consultation with the Chair, be authorized prior to the adoption of the report of the subcommittee to commence making any preliminary arrangements to facilitate the committee's proceedings.

The Chair (Mr. Shafiq Qaadri): Are there any questions or comments or amendments to be suggested? Mr. Zimmer.

Mr. David Zimmer: Yes, Chair, I have—

Mr. Peter Kormos: I bet you Mr. Zimmer has three amendments.

Mr. David Zimmer: Chair, I have three amendments.

The Chair (Mr. Shafiq Qaadri): One per lawyer. Go ahead.

Mr. David Zimmer: Thank you, Chair. I move that paragraph 1 of the report of the subcommittee be amended by adding the date "Monday, March 30, 2009" for the purpose of public hearings.

The Chair (Mr. Shafiq Qaadri): Any further discussion?

Amendment carried as is? Carried.

Next amendment, Mr. Zimmer.

Mr. David Zimmer: I move that paragraph 8 of the report of the subcommittee be amended by striking out "Monday, March 30, 2009" and replacing it with "Monday, April 6, 2009" for clause-by-clause consideration of the bill.

The Chair (Mr. Shafiq Qaadri): Any questions, comments?

Carried as is? Carried.

Mr. Zimmer.

Mr. David Zimmer: I move that paragraph 8 of the report of the subcommittee be amended by adding the following:

"That the administrative deadline for filing amendments to the bill with the clerk of the committee be April 2, 2009, at 12 noon."

The Chair (Mr. Shafiq Qaadri): Any further questions, comments?

Carried as is? Carried.

Thank you, Mr. Zimmer, for the amendments. Thank you for reading the subcommittee report into the record.

Shall the subcommittee report, as amended, carry? Carried.

FAMILY STATUTE LAW AMENDMENT ACT, 2009

LOI DE 2009 MODIFIANT DES LOIS EN CE QUI CONCERNE LE DROIT DE LA FAMILLE

Consideration of Bill 133, An Act to amend various Acts in relation to certain family law matters and to repeal the Domestic Violence Protection Act, 2000 / Projet de loi 133, Loi modifiant diverses lois en ce qui concerne des questions de droit de la famille et abrogeant la Loi de 2000 sur la protection contre la violence familiale.

WOMEN'S CENTRE FOR SOCIAL JUSTICE

The Chair (Mr. Shafiq Qaadri): We'll now move to our order of business, inviting our first presenter of the day, Nneka MacGregor, the executive director of the Women's Centre for Social Justice.

I invite you to please come forward and have a seat. Just to remind you and everyone else of the protocol, organizations will have 20 minutes in which to make their presentations; for individuals, it will be 15 minutes. You have 20, Ms. MacGregor, and any time remaining after your formal remarks will be distributed evenly amongst the parties for questions, comments and cross-examination. We now invite you to begin.

Ms. Nneka MacGregor: My name is Nneka MacGregor. I'm the executive director of the Women's Centre for Social Justice, also known as the Women at the Centre.

We're a unique organization that was developed by women survivors of gender-based violence for women survivors of gender-based violence and their families. I'm proud to say that we played a small role in getting these proposed amendments here today. My submission before you is being given in the hopes of giving context and adding depth, to help you understand why these changes are so crucial not just to the victims of domestic violence, but to society as a whole, as we work to eradicate violence and woman abuse.

On November 24, 2008, Michael Bryant, the Attorney General, as he then was, introduced Bill 133, which we believe contains a number of very important law reform initiatives that will help women transition on after the breakdown of intimate relationships.

We want you to know that we wholeheartedly support all the reforms outlined in Bill 133, but for want of time, we're going to focus on the reforms that we know have direct bearing on the safety and well-being of women and children who are victims of abuse.

We're pleased to note and support that Bill 133 introduces new interim order provisions to limit inappropriate behaviour by people involved in Family Court proceedings. We believe that when this is enacted, it would be of great benefit not just to the women whose partners use Family Court proceedings as an opportunity to engage in ongoing legal bullying, but to the system as a whole in reducing the tremendous amount of financial and human resources spent annually in the disposition, or not, of these drawn-out proceedings.

We're also happy to note that Bill 133 introduces much-needed reforms relating to custody and access under the Children's Law Reform Act, in response to the 2008 murder of little Katelynn Sampson after custody had been awarded to a non-parent. As we saw, even though the custody order was made with the consent of Katelynn's mother, no due diligence was done to speak of to speak to the competence and suitability of Donna Irving and her common-law partner, Warren Johnson, before they were given guardianship of the child. The inclusion of something as simple as a police and child protection check will definitely go a long way to ensuring that sort of thing does not happen again. Taken together, these changes will increase the safety of children, particularly in those cases where non-parents are seeking custody.

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However, our focus here today is, in particular, on the amendments relating to restraining orders, because we know that for women leaving abusive relationships these restraining orders can sometimes mean the difference between living lives free or living lives with continued criminal harassment; living lives where they regain control or lives where their abusers use the system as an extension of his control over her. As we've seen too many times, restraining orders can mean the difference between life and death.

Over the years, we've spoken to many women like us to determine ways of making systems more responsive to the needs of women fleeing, or who have fled, abusive relationships. They or we are the experts—and I say this sincerely. We are the experts because we're the people with the lived experience and, therefore, best placed to inform the community and lawmakers on effective ways to keep women and children safe and hold abusers accountable for their actions.

I want to commend the Ministry of the Attorney General for the manner and extent of engagement with community stakeholders leading up to these proposed changes. We, the voices of the survivors, were included in the discussions, development and formulation of these amendments. For those reasons, we have before us changes which, if enacted into law and implemented, will go a long way to achieve these objectives.

I had said in my introduction that I wanted to provide context to these amendments. I will start by putting restraining orders in their social context. We cannot know whether any of you here have had personal experiences with restraining orders, whether directly or vicariously through family members, friends or neighbours, but in case you do not, we ask that you follow along, not through the lens of an abused woman but as concerned citizens who are willing to do your part.

I'm going to begin by putting this in three question buckets. The first is, we're going to ask ourselves, what's the purpose of restraining orders? Under that general

question we're looking at, what's it for? And the "What's it for?" is not like asking the question to a first-year law student. It's really asking: What is it for when a woman who's experiencing violence goes and makes an application? What does she need it for, and what is she hoping this restraining order will do for her?

The second set of questions is around what the circumstances are. What's happening in her life at that particular point in time when she goes before a judge to get a restraining order? And what does she actually have to do in order to get a restraining order?

Then the third set of questions I'm going to look at are: What are the consequences; i.e., what would happen if she doesn't get it and what would happen when she does get it?

I want you to think about what leads a woman to appear before a judge seeking an order that sets out the parameters under which her former partner shall be allowed to communicate with her and, often in cases where there are children involved, communicate with the children as well.

I want to say that the breakdown of any intimate relationship, no matter how long or how short its duration, is never easy. I want you to factor into that relationship when you have physical, financial, verbal and psychological abuse from one partner to the other; factor in feelings of fear for one's life or the lives of your children, fear that comes about from having your partner tell you that he will make you suffer or that he will kill you or your children. The question to you all is: What would you do, where would you go and how would you actually get the courage to do something about this?

I'm going to start with the purpose of restraining orders. For an abused woman, she sees this restraining order as a promise. For her, it's the justice system's promise to protect her. She needs it because it's the way for her to get the message across to her abuser that he is simply not allowed to interfere in her life anymore. What's more important is, this message is being delivered by somebody who has more power than him. It's a judge. She's hoping that, having been told, he will abide by the terms and conditions set out, thereby keeping her physically safe and free from continued abuse. We think that's quite a reasonable assumption.

What are the circumstances that lead an abused woman to seek such an order? We want you to understand what's going on in her life at that time. For some women, they become involved in the criminal justice system as their intimate partners may have been charged with offences against them under the Criminal Code. For many more, as they navigate the family law system increasingly as unrepresented participants, they're suffering from the trauma and stresses arising from their own lived experiences. This is compounded by the unenviable process of trying to find and retain a lawyer who understands issues of woman abuse, then add a layer where she has to recount and thereby relive her abuse with the real fear and possibility that she may not be believed.

I had mentioned the fact that we are seeing an increase in the number of women who are unrepresented in Family Court, so let's add on the nightmarish ordeal of finding out about filing and serving him with court papers. That's not an easy task, I can assure you, even for those with legal training, much less when you consider women for whom English and French are not their first language. Next, we'll add another layer to address her need to take care of the children, yet another layer to address the impact on her health, yet another to address the hours she has taken off work and to address the issue of the financial toll that it takes. Constantly underlying all of these is the real and immediate fear for her safety, and uncertainty about the system's ability to protect her from him.

So in answer to the question, "What does she have to do to get a restraining order?": simply a lot; too much. Recognize the fact that even under these new amendments, she will still have to travel with these layers; however, we're pleased to note that the process at least will be easier.

The third issue around the consequences really leads us to the crux of these proposed amendments, not merely in answering the question, "What happens when she gets the restraining order?" but in the broader framework of what would happen if these amendments are not passed. For that, we'll go to the amendments themselves.

Restraining orders are generally seen by abused women as a tool that can help keep them safe. After all, as I said before, it's a direct order from a judge, it addresses the scope and extent to which her abuser can interact with her, and, as a court order, any breach of its conditions would carry with it adverse consequences.

All that makes perfect sense until we look at the reality for the women. Women have been saying for years that under the present system the orders are not worth the paper that they're written on because they're either not being enforced or not enforced with any degree of consistency, allowing for the abuser to act with impunity, confident that he will not be brought to account for his breaches.

And breaches do occur constantly, as abusers take what we've been calling incremental liberties. Where there is a no-contact condition, he, his friends or his family will call her. Where it prohibits him from being near her home or workplace, he shows up. What does she do? What she's supposed to do: She calls the police. What do they do? What they're supposed to do: They file a report. But what happens after that is of really no consequence. What does he learn from that? Simply that he can breach a judge's order with no accountability. Only the next time, his actions become more bold and brazen, and, as we have seen from far too many inquests, he may end up killing her and her children, in breach of the conditions explicitly stated. By then, it's too late.

At the present time, a breach of a restraining order is punishable under the Provincial Offences Act, but this bill would make it an offence punishable under the Criminal Code, so that a man who breaches a restraining order could be arrested by the police, charged with a criminal offence and held for a criminal bail hearing. His case

would then proceed in criminal court, and if he's found guilty, he would be liable to potentially more serious penalties. This sends a clear and decisive message to everybody that society as a whole will not tolerate such behaviour. It is not her responsibility to keep him away; it is the responsibility of law enforcement and the courts.

I put in an excerpt of section 127 of the Criminal Code, which I'm not going to read for you.

We believe that this provision will go a long way to stemming those incremental liberties we referred to earlier. If you comply with the terms and conditions of the restraining order, you will not be in a position where section 127 applies to you. If however, without lawful excuse, you disobey, you're guilty of an indictable offence and liable to imprisonment.

This puts everyone on notice and explicitly informs of the consequences of a breach. It also gives women more confidence that the police will follow through on a reported breach and that the legal system will not tolerate the kinds of habitual abuses that abusive men have been able to get away with, to the detriment of women survivors and their children.

Bill 133 also requires restraining orders to be made "in the form prescribed by the rules of court." We know that by requiring a standard form order, it will make it more easily understood by women and will simplify enforcement by police and ensure a degree of consistency in interpretation and application across the province.

We're also happy to note that Bill 133 expands the category of people who can apply for a restraining order to include "a person other than a spouse or former spouse of the applicant" because this obviously addresses the issue where a woman, no matter how short-lived their cohabitation arrangement, can have access to the safety intended to be conferred by the restraining order.

We submit that the amendments under Bill 133 are very reasonable and actually common sense. They are not intended, nor are they drafted, to point fingers, apportion blame or punish any party, but merely seek to ensure safety for those who truly need it and ensure accountability by those who otherwise show that they are willing to be unaccountable.

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We end our submission by answering the age-old question: Why does she not just leave? The answer is to tell you that it is not so easy. It is a multi-layered situation, and fear of sustaining grievous bodily harm from him is ever-present. Women have been saying and research has shown, across the globe, that for many women the time up to and after separation is a time when she is at most risk of harm from her abuser. It is precisely at this time that restraining orders get served and, in many instances, ignite a rage she cannot contain alone. By implementing these proposed amendments, we'd be moving a long way in the right direction to keep her safe. Not to do so will simply perpetuate her suffering and is, quite frankly, allowing for a continuation of abuse.

The Chair (Mr. Shafiq Qaadri): Thank you. We have about two minutes per side, beginning with Mrs. Elliott.

Mrs. Christine Elliott: Thank you very much for your presentation. It certainly speaks to the need for further protection for victims of domestic violence.

I just had one question with respect to the Domestic Violence Protection Act and why that needs to be repealed in order for Bill 133 to replace it. It would seem to me that it's complementary rather than being in conflict with Bill 133, in that it also allows for emergency intervention orders. Did you consider that in the course of your deliberations?

Ms. Nneka MacGregor: We did, and at the end of the day, our issues were really around how practical and how implementable these issues are. We found the Bill 133 provisions were more realistic and more readily available to be applied. So for us it was about implementation and application.

The Chair (Mr. Shafiq Qaadri): Mr. Kormos.

Mr. Peter Kormos: Of course we support the criminalization of the breach of a restraining order. That protects people from the police saying, "Well, this is a civil matter. I'm not going to get involved." It's clear that it's a policing function.

What observations have you made about the inconsistency, be it within a community or from community to community across the province, in how police respond to women who already have restraining orders of one sort or another?

Ms. Nneka MacGregor: This is really one of the critical areas we've identified from speaking to women across the province. There are some police districts where the police will come every time a woman calls and will actually follow up. They don't just file the report and leave it. Police show up; they follow up. But this is not something that is seen across the province, and we find too many areas where the police come, take a report and don't follow through. They don't go forward; they don't contact the abuser.

We found that part of the problem is because the restraining orders are not consistent in the way they are written, and it isn't—actually, it's another problem around training. The police officers are not trained effectively in how to actually implement. So for us, Bill 133 produces consistency in what a judge can put in the restraining order, and it actually requires the police to follow through. We're hoping that having it written out in this manner is one way to make everybody pay attention, follow through and be more consistent.

Mr. Peter Kormos: Thank you kindly.

The Chair (Mr. Shafiq Qaadri): The government side. Mr. Zimmer.

Mr. David Zimmer: You've obviously given this a great deal of study, and I know you've been a great help to the government and members of the committee who have been sorting this through. We shall pay close attention to what you've said in a very articulate way.

Ms. Nneka MacGregor: Thank you.

The Chair (Mr. Shafiq Qaadri): On behalf of the committee, Ms. MacGregor, thank you for your presence, written deputation and submission.

DONNA BABBS

The Chair (Mr. Shafiq Qaadri): I now invite our next presenter, Ms. Donna Babbs, to please come forward.

Ms. Babbs, as you'll have seen, you have 15 minutes' total time to make your presentation. I invite you to begin now.

Ms. Donna Babbs: Thank you. I'm just distributing my updated submission. I sent a written submission ahead of time.

I'm a family law lawyer. I have been practising family law for 21 years and have been volunteering in domestic violence issues for the past 22 years. I'm a former part-time assistant crown attorney and former panel lawyer for the Office of the Children's Lawyer. I've spoken at an international conference on children exposed to domestic violence, and last month I had the privilege of being asked by the federal Department of Justice to speak at a family violence symposium.

Front and centre in my submissions is section 7 of the charter: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Just a few statistics to open up: Brian Vallée wrote, in The War on Women, that in a seven-year study between 2000 and 2006, there were about 101 Canadian soldiers and policemen killed, and there were 500 women killed. We all know what it feels like when we hear in the news about a Canadian soldier being killed, but I think it helps to put it in context that there are five times more women killed annually in Canada.

I'm here today also to say, really, three things to this group: one, my complete sense of outrage about how this issue is being dealt with; secondly, my ongoing sense of helplessness as I deal with victims of violence when I'm in court; and thirdly, my sense of hope, that I hope you will listen to and seriously consider what I have to say so that you can learn from what I've been dealing with for the last 20 years.

My main submission is this: Ontario needs a domestic violence protection act. Bill 133, while it's an improvement, doesn't go far enough. It's beyond debate that women especially need urgent orders to deal with their safety issues. We've had several inquests here and, of course, we've had the Ontario Domestic Violence Death Review Committee reports. There are more than 30 years of research on this issue. A statute needs to be devoted exclusively to protecting victims of domestic violence.

Bill 133 is deficient, in my view, for four reasons:

(1) It restricts who can apply to court—I'll get through all these submissions hopefully in the time allotted.

(2) It does not specify the full range of orders that ought to be open to women and victims of violence.

(3) It doesn't allow for a hearing to be held where people actually testify.

(4) It does not give any emergency access to the court.

Our current court rules and our court procedures put a roadblock in front of women trying to get into court to get emergency orders. I'm going to refer mainly to women, because that's what the statistics show. Of course, we know there are male victims of domestic violence as well.

In my respectful view, the failure of this government and previous Liberal and Conservative governments to pass the Domestic Violence Protection Act or some similar statute is a neglect of the responsibility to the victims and our communities.

First of all, going to the research: It's impossible to talk about the research in 15 minutes, but we have two experts in Ontario that everyone must know about—Dr. Peter Jaffe and Nicholas Bala. They're internationally renowned experts, but they don't seem to have made their way to the provincial Legislature's understanding of what needs to be dealt with here.

The Ontario Domestic Violence Death Review Committee reports are your own government's reports. I've attached some of the excerpts from there. In 2007, they reported that they tracked the various risk factors and they decided that if there are at least seven risk factors present, the case is predictable and potentially preventable. In other words, deaths in this province are preventable if we understand the risk factors and do something about them.

I've attached the risk factors there at the end; one is on page 10. You'll see that one of the huge risk factors for women is an actual or pending separation. That's the number one risk factor for women, because they're trying to leave an abusive relationship. History of domestic violence, mental health issues, possession of weapons, custody and access disputes—they're all there.

So what women need when they leave violent homes is, they need access to a court. Not all these issues, you'll realize, are crimes. Criminal law does not protect women completely. A lot of things can be going on in those risk factors that aren't crimes; however, her life is at stake—for example, mental health issues.

First of all, the Domestic Violence Protection Act: What they do is they provide victims with quick access to court. An order is made on an urgent basis and, if appropriate, served on the respondent. If he wants to object to it, there is a full hearing where people testify and people give evidence. It's not just what the woman says and the man says. The judge hears them speak and assesses their credibility. Other people are called as witnesses, whether it's doctors or counsellors or other people who have witnessed the abuse or have knowledge about it. A judge can actually hear what's going on and make a decision based on what people are saying. Once the orders are made, then the victim is not only granted a restraining order, but they get an order for possession of the house and removal of weapons and they also can get orders such as support.

Ontario is at least 15 years behind other jurisdictions. In the United States, all 50 states have had these statutes since 1994, all of which have withstood constitutional scrutiny. In Canada, almost every province and every single territory has a domestic violence protection statute.

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Once you have these statutes—it's in the chart on page 3 of my submission. If we go with Bill 133, we're missing out on people in dating relationships or other intimate relationships, and family members through blood relationship, care relationships or minors. If there's a teenager today in Ontario who is involved in a violent relationship, he or she cannot get access to the court to get an emergency motion. They can in other provinces and jurisdictions.

The next chart shows and really illustrates how much more protection order statutes can do. They can not only restrain contact, but you can then make custody orders and orders that are geared to safety, compel treatment programs, remove firearms—do a whole host of things that a mere restraining order cannot. The key difference is that if it's a comprehensive order, the woman can stay out of the relationship, which is what we want. We don't want her in the relationship; we don't want children exposed to the relationship. If all she has is a restraining order and not enough support, or is in danger of losing custody of her kids, she's going to have a hard time staying out.

Point six of my submission is that victims of violence deserve a hearing in front of a judge or justice of the peace. Affidavit evidence doesn't do it. I'll just read you a quick quote from Jeffery Wilson's On Children and the Law, where he says, in talking about how to get a violent male out of the home, that "the threshold of evidence required to force the violent male … out of the house is often too great to achieve in the course of interim proceedings that are premised usually on the exchanging of affidavits."

I want to talk to you about a case: Kate Schillings. I was in the same committee hearings in 2000 with Kate Schillings, whose son was murdered by her husband on his first access visit. He murdered his son and killed himself. She went to court with affidavits—she had a series. She had a history of being concerned about his mental health. She wanted that addressed. It was not addressed, and on his first visit he killed him. If the statute directed the judge to consider mental health issues and in fact to prioritize that over the husband's access to his child, the result could have been quite different. My outrage is that I'm here nine years later and nothing has been done. That very same situation could come up with the same result.

The next issue is: Why is our family justice system inadequately structured to deal with this? If you have read the Mamo report, the family justice system is not working functionally. On top of that, we have Family Court rules that make a person jump a hurdle before they can get in front of a judge. If I'm a woman wanting to leave a violent relationship, I have to wait 90 days to get in front of a judge unless I can prove that it's urgent. Many women can't prove that it's urgent because judges don't understand domestic violence and don't know the risk factors. In my respectful submission, the government is failing to meet the needs of the people of Ontario: not only the victims but also the community of Ontario, because we all suffer under the weight of domestic violence.

When I was here in 2000, the Honourable Michael Bryant was in this room, as was Mr. Kormos. Mr. Bryant has come and gone as Attorney General—no change. I'm a Liberal. For any Liberals in this room, I'm sorry, but I'm shocked at this party. I'm shocked that the Conservatives have done nothing; I think I feel more shocked that the Liberals haven't done anything since they haven't carried it on.

I just don't understand it. Somehow we're missing the boat. Why have the US, other countries and most provinces and territories got it right, but we don't? Why is that? What is going on politically in this province that we can't do what's absolutely the best thing to do for victims of violence? Why are we trying to do second-best? That's what I would like to know.

I'd like to close and say that I suspect that each of you is in this room because you came to do politics, because you wanted to do something and make a difference in people's lives. Each and every one of you has the opportunity to do that, and you've been trying to do that. So I ask you to seriously not just take what's in front of you and say, "Well, that's the draft. That's what the Liberals have come with. That's what my party's come up with." Look at it from an educated point of view. Call Peter Jaffe; he's constantly volunteering his time to educate people on domestic violence. Look to what's going on in the United States. Joe Biden, in the early 1990s, brought forward the Violence Against Women Act in committee. It took years and years, and it didn't pass in the committee until Bill Clinton got elected and then everything took off from there. It takes time, it takes perseverance, but let's face it, we're in the dark ages and we need to get out of it. Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. Babbs.

Mr. Kormos; about a minute or so per side.

Mr. Peter Kormos: Thank you kindly. It was a very potent presentation. You certainly got our attention. In 2000, we passed in the Legislature the Domestic Violence Protection Act; it was never proclaimed. One of the things that Ms. Elliott and I have been very troubled about is the fact that we welcome the amendments in Bill 133, but the Domestic Violence Protection Act gives a woman or kids—or men; usually it's women, let's cut to the chase—24/7 access to a JP who could make an ex parte restraining order. That's what you're talking about, isn't it?

Ms. Donna Babbs: Yes.

Mr. Peter Kormos: Short and simple. I share your same sense of frustration because this bill repeals the Domestic Violence Protection Act. For Pete's sake, if there aren't enough JPs, say so; if it needs more work before you proclaim it, say so, but don't throw it out. Thank you kindly.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos.

To the government side. Mr. Ramal.

Mr. Khalil Ramal: Thank you very much for your presentation. I listened to it carefully. As you know, that's why we have these committees: to listen to many people come before us and tell us about the weaknesses and strengths of the bill. Hopefully your presentation will be well taken by all the members and also our ministry's office. Hopefully we can address the issues in the future when we do clause-by-clause. Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Ramal.

Ms. Elliott.

Mrs. Christine Elliott: Thank you very much, Ms. Babbs, for coming today and for your very compelling presentation. I share your view that we really do need a separate domestic violence protection statute. However, we have what we have in front of us right now. Would it be your suggestion, even though it only skims the surface of what really needs to be done, if it didn't include the retraction of the Domestic Violence Protection Act, that would help somewhat?

Ms. Donna Babbs: It would help, but there are still problems with the fact that it's supposedly now enforced under criminal law. My question is, are the police already set up to be dealing with all this enforcement or are we going to be under the same false sense of security as we were when it was just prosecuted under the Provincial Offences Act, as the previous person just identified?

Mrs. Christine Elliott: So we need to continue to work on it?

Ms. Donna Babbs: Right.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. Babbs, for your presence and multiple written submissions.

DILKES, JEFFERY AND ASSOCIATES

The Chair (Mr. Shafiq Qaadri): I'd now invite our next presenters, Mr. Jeffery and Ms. McKeating of the law firm Dilkes, Jeffery and Associates, consulting actuaries.

As you see in the protocol, you have 20 minutes in which to make your presentation, and I'd invite you to begin now.

Mr. Jay Jeffery: Good afternoon, Mr. Chairman and members of the standing committee. Thank you for the opportunity to come and talk to you about the pension aspects of Bill 133. My name is Jay Jeffery. Beside me is my associate Kelley McKeating, and behind me in the gallery is our office manager, Maryann. Together, the three of us make up Dilkes Jeffery and Associates, consulting actuaries, one of Ontario's largest providers of pension valuations for family law purposes since 1988.

I hope that before you're finished you will all have an opportunity to read the full submission we've provided to you. It's quite comprehensive, but it is covered by a summary, and the most important aspects of that are what we'll be covering today. Let me add too that our full submission has the unanimous support of every expert pension family law valuator in Ontario, of which there are less than two dozen.

Actuaries who specialize in family law valuations are experts in the mechanics of pensions and the intersection between pensions and family law. As friends of the court, we must be impartial between the plan members, the members' spouses and the plans themselves. As small business owners, necessarily, we offer a responsive and cost-efficient service to the plan members, the spouses, the lawyers, the mediators and the courts that are our clients. If we did otherwise, we would soon be out of business. So, respectfully, I would ask you to keep in mind our expertise and our impartiality as you consider our submission and the submissions of others that you will hear over the next few days.

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I understand that you will hear from several major public sector pension plans which have been somewhat involved in shaping Bill 133. You may wish to keep in mind that there are many more members of small private sector plans and many more plans and many more small private administrators who have not been engaged up till now and who do not have the resources of the major plans.

Typically today, parties rely on one impartial expert pension valuation report which provides a range of values for family property purposes, and the parties must negotiate within this range. The fact is that this range is a reflection of reality, and the ability to match the pension value for property purposes to the specific facts of the situation is, in our view, crucial to real fairness. We might add that it rarely causes great difficulty in achieving a satisfactory property settlement.

I'm sure that most of you are well aware of the Law Commission of Ontario report tabled in December 2008. I'd like to read a brief quote from that report. "The real problem with equalization insofar as pensions are concerned lies not in their valuation, but with settlement." By "settlement," the law commission means access to a portion of the pension funds to settle the equalization obligation.

Mr. Barry Tobin, a prominent family law lawyer and mediator in our home town of London, puts it this way: "Valuation is rarely an issue. The method of calculating pension values seems to be well accepted across the province. It is the funding of the property order/settlement that is the difficulty."

Kelley?

Ms. Kelley McKeating: As you listen to our submission and to other stakeholders who will speak to you on this pension question, it's important to understand that what people call pension division is really the two-step process that Jay just referred to. There's valuation and then there's settlement.

When a marriage breaks down, all of the family property is valued, including the pension. We call this first step the valuation for net family property purposes. This first step always happens, and the pension plan is usually not aware in any way of its having taken place.

Then, if and only if the parties decide that they want to settle the equalization obligation by assigning some of the pension over to the non-member spouse, there is a second step where the amount to be transferred out of the plan gets calculated. It's at that second step that the plan must become involved. So when a plan administrator discusses the pension division process, they are only talking about step two.

Step two is complicated and messy. In Ontario today, it's extremely difficult to divide the pension between the member and the spouse. This does need to be fixed. The settlement provisions in Bill 133 are a great improvement over the status quo, and we absolutely support this part of the bill.

Our concerns lie elsewhere, with the fact that Bill 133 requires that the same pension value be used for both step one, the valuation, and step two, the settlement. It can be hard to understand how a pension plan can have different values. The reason is that the value of the pension depends on which components are included or excluded. On the second page of our written submission there is a graph that you can take a glance at.

A pension consists of a first component, which is called the basic vested pension—this is the guaranteed annual pension that usually begins at age 65 and to which the member has an irrevocable right, even if they leave the plan today—and then there's a second component, the additional non-vested benefits. These include early retirement enhancements and non-guaranteed indexing increases.

The right of a teacher to retire at 85 points with a fully indexed pension is an example of an additional non-vested benefit. If you belong to a pension plan with such generous additional benefits, you typically understand this and you take advantage. For example, the average retirement age for a teacher is about 57, and very few auto workers work beyond their 30-and-out date. The value of these additional non-vested benefits can be considerable, and this additional value is not included in the value of the basic vested pension.

The Ontario courts have consistently, over most of the last 20 years, included both pieces, the basic vested pension and the additional non-vested benefits, in net family property, those step one values. The Law Reform Commission in 1995, as well as the law commission last year, endorsed this, and our professional standards, those of the Canadian Institute of Actuaries, require that we include the value of these additional non-vested benefits when we calculate a pension value in a marriage-breakdown situation.

The value for net family property purposes—if it excludes the additional non-vested benefits, it would be unfair to the non-member spouse to the tune of tens of thousands of dollars or even more. If, for example, the basic vested pension is worth $80,000 and the additional non-vested benefits are worth $70,000, the cost to the non-member spouse of excluding those additional benefits from family property is half of that $70,000—$35,000.

Then, what I'm calling the step two value, which is used to determine the maximum amount that can be transferred out of the pension plan if, and only if, the parties choose this route to settle the equalization debt—if you take that settlement value, the step two value, and include those same additional non-vested benefits, you're being unfair to the plan because that would require the plan to pay out a portion of the additional benefits before the contributions to fund them have been made.

In my example, the plan has $80,000 set aside for the member's basic vested pension. So it's unfair to make the plan transfer out more than half of that, or $40,000, to the non-member spouse when the law says that no more than half of the member's pension can be relinquished to the benefit of a former spouse.

Bill 133 requires that the same value be used for both net family property and then settlement purposes. This isn't necessary to solve the problems that concern family lawyers and pension administrators. A single value for both purposes must be unfair either to the non-member spouse or to the plan.

Mr. Jay Jeffery: Thank you, Kelley. Necessarily, then, one single value for both valuation and settlement purposes must either shortchange spouses of plan members by tens of thousands of dollars or force plans to an immediate payout of amounts for non-vested benefits which they really cannot afford to pay out in advance, especially in this time of pension funding crisis.

Fortunately, there is a simple solution to this dilemma, and this is our key recommendation: Delink valuation and settlement. Separate the determination of the value for overall equalization purposes from the maximum transfer amount that the pension plan must pay out. Maintain the maximum settlement—that is, the immediate transfer from the plan—based on fully vested benefits only, and establish a separate valuation basis for net family property purposes which includes a fair share of non-vested contingent benefits which most plan members will ultimately realize.

This simple solution, separation of valuation and settlement, is essentially the same as the recommendations of two law commission reports in 1995 and again in December 2008.

The December 2008 report and recommendations:

Recommendations 1, 2 and 3: Establish the valuation for property purposes to include non-vested and contingent benefits.

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Recommendation 4: Set the maximum immediate settlement from the plan based on the fully vested benefits only. With respect to valuation, I'd like to read to you another quotation from the Law Commission of Ontario report: "Given the complexity and diversity of pension plan options and the multitude of different factual circumstances that could arise, the law commission is not convinced of the merits of a presumption regarding retirement age." It goes on to say that retirement age should be based on the facts of each specific situation. I hope the standing committee will pay close attention to the excel-

lent analysis and recommendations in the Law Commission of Ontario report tabled in December.

I'd like to conclude our prepared remarks by emphasizing this very important point: Our simple solution can only be accomplished if changes are made to the Bill 133 provisions themselves. Since Bill 133 in its present form mandates one single value for both valuation and settlement purposes, the separation of those values cannot be accomplished in the yet-to-be-drafted regulations. These changes will not be particularly difficult to the provisions of Bill 133. We have left with the clerk of the committee a one-page summary of one way that those corrections could be made in a relatively straightforward way.

Thank you again, members of the committee, for your attention. Kelley and I would be pleased to try to answer any questions you may have.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Jeffery and Ms. McKeating. We'll begin with the government side; about two minutes.

Mr. David Zimmer: Thank you. They say that trying to understand economics is a black hole, but I've always found that trying to understand the work of actuarial science is an even blacker hole. Anecdotally, out there in the street, if you will, in the court system and hearing from various people, we hear about the horrific battles of the actuaries. Anecdotally, what we hear is that each side rounds up two, three or four actuarial reports and then they battle it out in the courts. What I'm hearing from you is that your firm does about 800 valuation reports a year, and you only go to court two or three times. It's $400 to $600 a report; that makes about $400,000 in fees in a year. Where does the rest of the expense come from that we hear about anecdotally, that people complain about?

Mr. Jay Jeffery: Mr. Zimmer, I'm sure that what you are talking about is the debate that occurs between the parties with the help of their lawyers. It cannot be from the actuaries, as there are less than 20 practising actuaries in this field in Ontario.

Mr. David Zimmer: Don't the lawyers call the actuaries as the expert witnesses?

Mr. Jay Jeffery: Yes.

Mr. David Zimmer: So the actuaries are into it, along with the lawyers, as their expert witnesses?

Mr. Jay Jeffery: It is one impartial report, Mr. Zimmer, in practically every case. It is most unusual to find more than one report or more than one actuary involved, and when there is, it's generally over very large figures, and they're based with respect to facts.

Mr. David Zimmer: Are you saying that the typical approach to a piece of litigation is that the two sides agree on a single actuary and work from that?

Mr. Jay Jeffery: Absolutely.

The Chair (Mr. Shafiq Qaadri): I'll have to intervene there, Mr. Zimmer. Ms. Elliott.

Mrs. Christine Elliott: Thank you for your presentation. It was quite understandable. I just want to clarify: If a pension, with everything all in, was worth $100,000, for example, and the fully vested part was worth $50,000, that would be the transfer part that would be segregated for the benefit of the non-pension-plan-holding spouse? And then if the balance of it was another $25,000, that would be subject to the equalization payment over time?

Mr. Jay Jeffery: Precisely.

Mrs. Christine Elliott: Okay. That was my first question. I just wanted to make sure I understood that. My second question is: What views do you have, if any, with respect to the suggestion that the pension plan administrators would then be doing the valuations themselves? Do you think that's something that could be easily done or something that's best left to people such as yourselves?

Ms. Kelley McKeating: I think that's a point that's open to debate. There are public policy reasons why you might want to tell the plan administrators that they have to do it. When it comes to figuring out what they can afford to transfer out of the plan, that's absolutely the prerogative of a plan administrator. When it comes to deciding what the value of that piece of property is for net family property purposes, to determine equalization within a marriage breakdown, I don't think it has to be the plan; I don't think it has to be an expert—the experts are better suited. I have spoken to a number of plan administrators and a number of pension actuaries with large firms, small firms, big administrators, major employers, very small ones, and they are uniformly opposed—and it's a small sample, but they are very concerned about being put in the middle of a conflict, potentially, between the two parties. They're also very concerned about having to calculate a value that includes elements not yet vested.

The Chair (Mr. Shafiq Qaadri): Thank you, Mrs. Elliott; we'll have to intervene there. Mr. Kormos.

Mr. Peter Kormos: Thank you, Chair. I'm sorry we don't have very much time. What drove the legislation, and if the Law Reform Commission didn't recommend what's currently in the bill, where did that come from, in your view?

Mr. Jay Jeffery: My understanding, Mr. Kormos, is that the Ontario Bar Association and some major pension plans have been working with the Attorney General's office for some time now to try and improve the pension legislation as it relates to family law.

Mr. Peter Kormos: Sure. But you're objecting to the manner in which it's approached in this legislation.

Mr. Jay Jeffery: A portion of the manner.

Mr. Peter Kormos: Yes. Are we going to get lawyers in here agreeing with you?

Mr. Jay Jeffery: I hope so.

Mr. Peter Kormos: But what do you think?

Mr. Jay Jeffery: I know one lawyer who is trying to appear a week from today. I hope he succeeds. I'm not sure about the other lawyers are presenting here.

Mr. Peter Kormos: I'm just wondering why the government would not comply with the recommendations of the Law Reform Commission.

Mr. Jay Jeffery: That's a very good question, Mr. Kormos. I don't have an answer for that.

Mr. Peter Kormos: Perhaps, Chair, if the parliamentary assistant were agreeable, there should be an explanation, and it's not complex. Perhaps we could get that explanation from the ministry. We're going to hear a whole lot of things, a whole lot of critique, about the valuation process. Let's understand what we're dealing with and let's see what the ministry has to say about why they chose this particular model and why they didn't choose the Law Reform Commission model. It's not a state secret. We've got to have that before us.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos and thank you, Mr. Jeffery and Ms. McKeating, for coming forward and for your written deputation.

PENSION APPRAISAL SOLUTIONS INC.

The Chair (Mr. Shafiq Qaadri): We'll now invite our next presenter, Ms. Penny Hebert, president of Pension Appraisal Solutions.

Welcome. As you've seen the protocol, you have 20 minutes in which to make your combined presentation. Your written submission is being distributed as we speak, and I would invite you to begin now.

Ms. Penny Hebert: My name is Penny Hebert. I want to talk to you today about individual concerns we have about the pension when it is valued for marriage breakdown purposes.

Benjamin Franklin wrote in 1749, "In New England they once thought blackbirds useless and mischievous to the corn. They made efforts to destroy them. The consequence was, the blackbirds were diminished; but a kind of worm, which devoured their grass, and which the blackbirds used to feed on, increased prodigiously ... they wished again for their blackbirds." This seems to be the case with Bill 133.

A pension is financial security during a person's retirement. A pension is often the second most valuable asset the parties own. A pension is property that must be shared when the marriage ends. A pension is the most personal property a person owns because it is future income for them. A pension is a mystery to everyone except those experts who are directly involved in its drafting, administration or valuation. A pension is not a luxury item like a piece of art or a condo in Florida. A pension is not a savings account. A pension is not like any other property. It has no current market value. It cannot be sold for cash. The value of a pension is not just a number. It is a person's future financial security. The plan administrator is not totally concerned about the individual's circumstances but is primarily concerned about the plan itself.

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The quote from Benjamin Franklin illustrates what I believe was the policy-makers' approach to the pension asset in Bill 133. In their attempt to prescribe a simpler way of dealing with the pension when the marriage ends, the legislators have solved a problem today at the expense of future equity and fairness for all parties to the pension.

I am appealing to you today to review all the submissions you have received from pension valuation experts. Ask questions about the pension. Find out why the valuation of the pension for family law purposes must be done by the experts. Do not let sections 67.2 through 67.4 of Bill 133 proceed without full consideration of what the pension really means to the separating parties.

I have prepared over 4,000 pension valuation reports covering over 1,000 different pension plans since 1994. I have developed valuable relationships with lawyers and plan administrators across the province. I have presented many seminars to groups of lawyers to help them understand the pension. I have published numerous articles on pensions.

You have heard Mr. Jeffery and Ms. McKeating tell you about the pitfalls of prescribing the same pension value for both pension valuation and division. When parties separate, each case comes with its own set of circumstances. I will explain how these circumstances influence the value of the pension asset when the marriage ends. Furthermore, I will illustrate how Bill 133 needs amendments to recognize the uniqueness of the pension.

Valuing a pension when the marriage ends involves a thorough understanding of pension legislation, the pension plan, case law and the circumstances of the plan member and their spouse. We must apply the individual's specific circumstances to all that influences the value of the pension when calculating its value.

Furthermore, 60% of the pensions we have valued are owned by the husband. On average, men have higher incomes than women; therefore, men have more valuable pensions than women. When the marriage ends, it is often the women who suffer financially, because they have a lower earning capacity. They often must make career sacrifices during the marriage, because they're usually the primary caregivers for the children of the marriage. If the same value for the pension is used for pension valuation and division purposes, women will suffer further financial harm, because the plan administrator cannot provide a value of the husband's pension that would interfere with the solvency of the pension fund and the total value would be less for the separating couple.

Even though pension funds cannot be used immediately for day-to-day living, the potential for women to enjoy an adequate income in their later years will be substantially harmed if there are fewer pension funds available for family law purposes. In cases where the husband has the means to offer other assets of equal value to the family law value of the pension, if the pension value is lower, the spouse will end up with even less.

Bill 133 prescribes a no-win situation for many women. The only fair and equitable pension value is one that is based on the standards for calculating marriage breakdown lump-sum pension values, one that considers the member's entire pension earned to the date of separation, one that includes both vested basic benefits and non-vested contingent benefits.

Bill 133, in its current form, is definitely going to make it easier for the member spouse to hide pension

assets. If the member earned a pension with a prior employer and, due to a change of company ownership or change of employment, that pension is held as a deferred pension, it may not be associated with the current pension. Under Bill 133, the member would apply to their current plan administrator for the value of the pension. Their current plan administrator will have no knowledge of the prior pension entitlements and in fact does not care about the prior entitlements. The plan administrator's duty is to ensure the solvency of their own pension fund.

The responsibility of ensuring that all pension entitlements are accounted for will then rest with the plan member himself. The plan member may have forgotten about the prior pension or chosen not to report the prior pension. In situations where the member spouse is not co-operative, how will the non-member spouse know how to contact the prior plan administrator? How will the non-member spouse's lawyer get the prior plan information? This situation often arises, as companies are continually changing and people move from employer to employer regularly. Lawyers rely on us to do this research for them. Who will they turn to for help under the new pension valuation regime of current Bill 133? Pension valuators will be gone.

To illustrate the uniqueness of a person's pension, we were asked to value a person's LIRA. When a person transfers their pension out of the pension fund when they terminate their job, it must be transferred into a LIRA until the person reaches at least age 55. A LIRA is not a defined benefit pension. A LIRA is like an RRSP, but the owner cannot access the funds until they reach a certain age. We asked him where the LIRA funds came from. He told us that he earned defined benefit pension entitlements as an employee of Falconbridge starting before his marriage. His employment was terminated during his marriage, and the pension funds were transferred to a LIRA account.

Since there was a defined benefit entitlement at the date of marriage, it was necessary to value the defined benefit pension at the date of marriage in order to find out how much of the current LIRA funds to attribute to the marriage period. In a case like this, who would assist the person with the proper valuation of the LIRA? Under the new pension valuation regime of Bill 133, pension valuators will be gone.

Our written submission lists 14 such individual situations that would make the regulations associated with Bill 133 so complex and lengthy that placing a proper value to the pension will become even more difficult than it is now. I'm hoping that you get a chance to read through each of those 14 points that I've listed. They illustrate situations that bring the individual front and centre to the valuation process.

There are many, many more situations that impact an individual's pension value when the marriage ends, individual situations that are at risk of being overlooked if Bill 133 is not amended to allow for the valuation of the pension to be prepared by those very few of us who have the experience and the expertise to do so. Plan administrators do not have the experience to place a family law value to the pension. Plan administrators do not currently have the systems in place to do this.

Legislative changes are needed for the division of the pension when the parties wish to use the pension to satisfy an equalization debt, as Kelley and Jay mentioned prior to me. Legislative changes are not needed for the valuation of the pension. Why change a system that works? Why take the responsibility of placing a family law value to the pension from the experts and give it to those who are not experts? To cut costs?

Subsection 67.2(6) prescribes that the plan administrator may charge a fee for preparation of the pension value. The fees currently charged by experts are not unreasonable when one considers the substantial value of the pension. Fees charged by experts to value a business when the marriage ends are much higher. Legislative changes should be changes that can survive the test of time, changes whose consequences have been thoroughly understood and examined.

The fairest solution has been presented in the law commission's report, which outlines their recommendations for changes to the valuation and division of pensions on marriage breakdown. This solution resolves the important issues of (1) the method to be used for calculating a fair and equitable family law pension value, (2) the added responsibilities and burdens to the pension plan administrators who currently do not have the experience and the processes in place to calculate a family law value for the pension, and (3) the preservation of pension fund solvency while satisfying family law pension division requests.

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I encourage you to give this issue of placing a proper value to the pension the fullest consideration needed before this bill is passed in the Legislature. My recommendations, along with those of other professional pension valuators, will ensure that the property will be distributed fairly and equitably according to the intentions of the Family Law Act.

That concludes my presentation, and thank you very much for inviting me to speak before you today.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. Hebert. We'll have about two minutes or so per side, beginning with Ms. Elliott.

Mrs. Christine Elliott: Thank you very much, Ms. Hebert, for explaining the situation to us with the pension valuators to take a far broader range of factors into consideration when making a determination about the actual value and the equalization factor; it's so important. Do you have any idea whether anyone was consulted with, or was your group consulted with, with respect to the cost savings of having the plan administrators doing this analysis rather than the current pension valuators?

Ms. Penny Hebert: I have heard comments from lawyers. I know that some people are proposing that it costs a lot of money for the couples, when they separate, to have the pension valued. I have heard more from

lawyers, who have told me, "We don't have an issue with the cost of preparing a valuation for the pension." From $400 to $600 is really not difficult for the parties to pay when you look at the substantial value of the pension that's involved. Most lawyers I have talked to have no problem at all. Their clients don't have any problem at all with paying that fee.

Mrs. Christine Elliott: Thank you.

The Chair (Mr. Shafiq Qaadri): Mr. Kormos.

Mr. Peter Kormos: Of course, your fees pale in comparison to lawyers' fees. They seem trivial beside the lawyers' five-digit or six-digit accounts.

Once again, I'm trying to get a handle on who's driving this. I hear you; I hear other actuaries; I've talked to actuaries in my own community. This is not consistent with the Law Reform Commission recommendation. Where does this model that's in Bill 133 come from?

Ms. Penny Hebert: That's the $64,000 question for me. It just came out of left field for me—

Mr. Peter Kormos: Hey, don't criticize left field.

Ms. Penny Hebert: No harm intended. I was really surprised to see Bill 133 come out with that conclusion. It doesn't seem to fit with any understanding I have of what a proper marriage-breakdown pension value is. I concur with Jay when he suggested that it may have come from pressure from the Ontario Bar Association, which wanted to simplify the pension process.

Mr. Peter Kormos: Why would they? You said that the lawyers don't seem to mind.

Ms. Penny Hebert: The lawyers I have spoken to don't seem to mind.

Mr. Peter Kormos: I guess we'll have to ask them when they come here.

Ms. Penny Hebert: That would be a good question to ask the Ontario Bar Association. It could have come from the pension plan administrators themselves, because it's their responsibility to divide the pension in such a way that the pension fund solvency will be guaranteed and that not too much money goes out of the pension fund to satisfy the equalization debt. So when there is a different value for family law purposes than there is for pension division purposes, sometimes it's hard to reconcile the two, and that can cause difficulties: What do you do with the difference between the family law value and the maximum amount that can be transferred out of the pension fund? That may be where they were going when they decided to suggest one value.

Mr. Peter Kormos: Thank you.

The Chair (Mr. Shafiq Qaadri): To the government side. Mr. Zimmer.

Mr. David Zimmer: You used the expression that the pension administrators, in your view, don't have the processes in place that the actuarial consultants have in place to do this piece of work. Can you very simply just tell me what those processes are that actuarial consultants have that pension administrators don't have, in your view?

Ms. Penny Hebert: Their systems are set up specifically to calculate commuted values. They would have to develop new systems in order to calculate what we call marriage-breakdown values, which include the value of the non-vested contingent benefits. They would have to develop those systems. The pension plan administrator is not as closely in touch with the individual situation as the individual pension valuator is now. I'm not sure that they'd want to get involved with all the personal circumstances. They would have to develop systems that would be flexible enough to accommodate all the different personal situations that come up.

Mr. David Zimmer: And could pension administrators quickly and easily set up those processes?

Ms. Penny Hebert: They could set up those processes, and I can't speak for how well-equipped they are to do that. I'm sure there's no reason why they can't set up those processes.

Mr. David Zimmer: Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. Hebert, for your presentation and written deputation.

MICHAEL COCHRANE

The Chair (Mr. Shafiq Qaadri): I would now invite our next presenter, Mr. Michael Cochrane, who will be presenting to us. Are you here, Mr. Cochrane? Yes.

Please come forward. You'll be presenting to us in the capacity of private individual, which means you'll have about 15 minutes to make your presentation. I invite you to officially begin now.

Mr. Michael Cochrane: Thank you. Just on the second page of the handout that you're going to receive, there's a little bit of background on where my experience in family law comes from, which is as a private practitioner. Back in 1986, I was one of the policy lawyers who worked on the original Family Law Act and the Support and Custody Orders Enforcement Act, which is now known as the Family Responsibility Office.

On the second page of my handout, I've taken sections of the act that have caused me to scratch my head and maybe think of some suggestions that might be helpful. But in particular, on the first one, section 6 of the bill proposes to change section 21 of the Children's Law Reform Act. This is the new affidavit that's being called for, which would have people file an affidavit with the court describing the applicant's involvement in any family proceedings, child protection proceedings or criminal proceedings. I would recommend—and this is the first recommendation on that page—that you add the words "as a party" to that provision, because to not have this limited to parties would risk dragging witnesses and, in some cases, victims into family law proceedings. I don't think it was intended that it would cast that broad a net, but certainly adding the words "as a party" would narrow down the group that's being caught.

Just as it concerns criminal proceedings, I would recommend that you consider limiting the criminal proceedings to cases where there has been a finding of guilt, because to do otherwise would risk having people being required to file, as a part of that affidavit, that they

were in a criminal proceeding that led to an acquittal or was perhaps withdrawn or could have been stayed for lack of being pursued. The last thing that we want, as family law lawyers, is to have someone file an affidavit with the family law courts saying that they were involved in a criminal proceeding which they were acquitted for, and the parties then end up in a debate in the family law proceedings about whether that person should have been acquitted in the criminal proceedings.

The example I'd give you is somebody who has been charged with some form of domestic violence. They go over to the criminal courts and, for whatever reason, good or bad, they are acquitted. They then come over into the family law proceedings and they're forced to, on a different standard of proof, defend themselves again, perhaps, on whether they should or shouldn't have been acquitted of the domestic violence charge. That's a potential Pandora's box if it's left as wide open as it is right now. The same recommendations would apply to subsections 21.3(1) and (2) that have been proposed.

Section 7 of the bill proposes to amend the Children's Law Reform Act with respect to bringing police records into the family law system. This one, for some reason, is only applicable to non-parents seeking custody. It would be my recommendation that this apply—if you're going to do this—to all applicants, whether they're seeking custody or access.

On the issue of all applicants: It would boggle most judges' minds, and lawyers', that you could be in a situation where courtroom number one is dealing with a case where the applicant is a parent, and they don't have to provide criminal record checks and children's aid society checks, but in courtroom number two it's a grandparent who's applying for custody of a child and they do have to provide criminal background checks. So I think the net needs to be cast a little wider there. It should also apply to access. Some access orders are very extensive. They can include a child spending an entire summer vacation with a parent, non-parent, or grandparent. So I would recommend there that it be extended to custody and access and that it apply to all applicants.

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The next recommendation is about the resources. It's one thing to say that you're going to do this—I don't know where the police are going to get the resources to provide these kinds of reports about records. I also am very, very concerned—and I'll come back to this at the end of my presentation—about the confidentiality provisions, because not only do we have to see the police and other authorities get the resources to provide these reports, but there has to be something put in place to ensure the confidentiality. Section 8 proposes to amend the Children's Law Reform Act by adding a section that, again, non-parents must disclose previous encounters with children's aid societies. This should not apply only to non-parents. It should also apply to custody and access, the same as the other provision. Again, there will need to be resources delivered to the children's aid societies to comply with this provision.

I would say from a reality check point of view, just reading through the sections that are in this bill, that if they were law tomorrow we could pretty much predict that at least a month would be added to every single custody application that is going forward—probably more, because these reports aren't going to be available right away. There's a provision in the proposed legislation that talks about parties being able to request an extension of the time for filing the reports, and I would predict that this will become standard operating procedure on every custody application. There will be an automatic request for an extension of time. That will mean that no orders are made. Courts will likely not be making interim orders until this information is available and certainly wouldn't be making any final orders. So we're going to see a huge drag on the system with those kinds of reports being required. I'm not saying that those reports aren't a good idea, but you need to be realistic about what it's going to do to the system.

The fourth recommendation I have, under point 3 on page 2, is that you have to recognize that these provisions only apply to applications to the court. There's nothing in here to stop people from entering into domestic contracts to, I'm not saying "subvert" these amendments, but certainly to go around them.

I would also suggest, just again, from what happens on the street in family law, that a client is going to come in and say, "I want to apply for custody of my grandchild"—and there are lots of these cases that go forward. I personally have probably done 30 or more grandparent custody cases. When that person learns that in order to do the application, they're going to have to disclose every family law proceeding that they've been involved in—right now, that would mean somebody who's not even a party—every single encounter with children's aid societies and every single encounter with the criminal law system. Some of those criminal encounters may not be relevant in the least to whether they can have custody of a child. If they think that having to put all of that on the table is going to possibly make it public, then we may see some people who are otherwise worthy applicants for custody or access to children decide that they're not prepared to do that, particularly if the protections around confidentiality aren't stronger. That would be true, I would say in particular, if somebody went through a criminal proceeding and they were acquitted, or the charges were withdrawn or the charges were stayed because they weren't prosecuted quickly enough. Those people would still have to put all of that information into a family law application.

Point 4 on page 2: I just point out that there are three subsections in this bill that say that admissible evidence shall be considered by the court. To me, each time that this appears, it's absolutely meaningless. I don't know what it would do for a court to be told that a piece of evidence is admissible and they shall consider it. That's what they're doing, so you don't need to say it. I'd take that out or at least consolidate them.

Point 5 on page two; Sections 12 and 15 propose to amend the Children's Law Reform Act to improve the

court's powers to control parties during the litigation. The way that they do it now is to use restraining orders, and that can be a bit of a blunt instrument. No one likes to be subject to a restraining order: It doesn't sound good. Judges often revert to making mutual restraining orders, which sounds equally bad for both parties. They have made noncommunication orders in the past. I think these amendments are better descriptions of what the courts are actually doing, so this might make it a little easier for the court to make those types of noncommunication orders.

Section 18—this is on page 3 of my submission, paragraph 6—proposes to amend the Children's Law Reform Act to add confidentiality provisions. These subsections are very, very important, and they do not provide for what happens if there's a breach and the confidential information is disclosed. We have to remember that a great deal of otherwise confidential information will now be in the hands of very angry family litigants. Someone will be handed a file or an affidavit at some point in the process that talks about every encounter that someone else on the other side of the case has had with the criminal law system. Controlling what they do with that information is very important, because people can lose their jobs over that. You can't go for a job interview now and be asked about your criminal past. In many circumstances you're not allowed to ask those questions, and yet that information could be on the street overnight. There's an incident in the paper right now about young people talking on Facebook about the girl who was just convicted of murder here in Toronto. They are naming that girl; all of the details are out on the street. The same thing could happen with this kind of information. My recommendation is that we add a provision to section 70 providing the court with specific powers to punish the breach of the confidentiality provisions. That should be the equivalent, really, of a provincial offence.

Section 7 on page 3—I'm talking about section 18 there—which proposes to amend the Children's Law Reform Act to allow any interested person to apply for the protection of the confidentiality provisions: It's a little subsection that's tucked in there, but I think what the legislative drafts people are trying to anticipate here is that somebody named in those confidential records is not going to want that information disclosed; they're going to want the confidentiality protection. This provision says that they can apply to the court to have the records maintained as confidential. That's great, but how will they know this is happening? If somebody on the other side of the city or on the other side of the province is applying for custody or access to a child and those confidential records are on the way to the court process, how will the people who are named in them know? And how will they know to come forward and ask for the confidentiality to be given to them? My recommendation there is that notice provisions be added to section 70 so that any interested person receives adequate notice of the impending disclosure. Again, that's going to slow things down.

Paragraph 8 at the bottom of page 3: Again, there are three provisions here that all say exactly the same thing, and this is to allow portions of the Family Law Act to give the court the power to order noncommunication orders, so that they can do things in that part of the act. It's good to have this power, but you don't need to have it three times. I would consolidate this and just put it in one part of the act and have it apply to all sections, because it starts to look like there are three different kinds of noncommunication orders.

Page 4, point 9, section 22: This is the calculation of net family property under the Family Law Act, and there is now a change—I don't really have too many comments about the pension provisions, but I do have some comments here about this calculation of net family property, and it concerns pensions as well. We pretty much know how to do these things for the most part now in family law, and this provision that is changing which debts and liabilities are and are not deducted for date of marriage, and the pension changes, in my view, are going to increase litigation, not reduce it. My only recommendation is that if this goes forward, everyone should recognize that this will invite litigation over some of these changes.

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The Chair (Mr. Shafiq Qaadri): You have a minute left, Mr. Cochrane.

Mr. Michael Cochrane: Thank you. Just quickly, there are some other recommendations there about changes to the definition of "spouse" which I would urge you to reconsider. The Pension Benefits Act changes deal with the definition of "spouse." They've used the definition of "spouse" from part III of the Family Law Act, which includes common-law spouses. But really, part I of the Family Law Act is designed to divide property that's owned by legally married spouses, not common-law spouses. There's a broader definition used in the Pension Benefits Act. It should be narrowed to just legally married spouses so that we don't see common-law spouses thinking that they're going to be dividing pension benefits on date of separation.

Just in the few seconds that I've got left, at the very end of my paper I've put some general comments about family law, because really, everything else you're doing here is just tinkering with the system. What I wanted to tell the committee is that the family law system is in complete collapse out there. This is a terrible system—

The Chair (Mr. Shafiq Qaadri): I'll have to intervene there, Mr. Cochrane. I thank you for your considered written deputation and presence and actually contributing to the original legislation previously.

ONTARIO PENSION BOARD

The Chair (Mr. Shafiq Qaadri): I would now invite, on behalf of the committee, our next presenters: Mr. Shena of the Ontario Pension Board, senior vice-president of stakeholder relations, and—please come forward.

Mr. Peter Kormos: Chair, while those people are seating themselves, we've got a most unusual submission in that it's a submission signed by several provincial

family law judges. I'm wondering if that submission, which Mr. Cochrane and others might be interested in, is available on the pile over there for them to pick up, and if it is, I would encourage them to read it.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos.

Mr. Shena and your colleague, as you've seen, you have 20 minutes in which to make your combined presentation. Please do identify yourselves for the purposes of Hansard's recording. The time begins now.

Mr. Peter Shena: My name is Peter Shena. I'm senior vice-president of stakeholder relations and pension policy with the Ontario Pension Board. With me is Thu Truong.

Ms. Thu Truong: I'm a pension policy strategy adviser with the Ontario Pension Board.

Mr. Peter Shena: Mr. Fuller, the president, sends his regrets as it is March break and he decided to spend time with his children this week.

First, I'd like to thank you for this opportunity and give you some background on who we are.

The Ontario Pension Board is responsible for the administration of the Ontario public service pension plan. The PSPP, as it's known, is a defined-benefit pension plan. We provide pension-related services to approximately 38,000 members, 36,000 pensioners and their survivors. The membership is made up of eligible employees of the Ontario government, its agencies, boards, commissions and public bodies.

We're here today to express our support of the legislative reform for the division of pensions in marriage-breakdown situations. In our view, it's badly needed, as the current environment creates confusion for all parties involved, and with that confusion comes significant cost to the member and non-member spouse and in the administration of the pension plan.

I'm going to focus my remarks today on three key points as we see them: providing the non-member spouse with the option to leave their entitlement in the member's pension plan; the valuation methodology used to calculate the non-member spouse's entitlement; and, third—a different but related point—how much of a member's pension can be seized or assigned for division or support.

On the first point, providing the non-member spouse with the option of leaving their entitlement in the member's plan, which is covered under section 67.3 of Bill 133: We want to commend the government for recognizing the importance of defined benefit pensions by providing in the bill the option to the non-member spouse of leaving his or her lump sum in the member's pension plan—if the plan allows, however. We believe that all plans should be required to offer this option. If the plan doesn't allow the non-member spouse the option to stay in the plan, then we think that the standard will be that plans will force the non-member spouse out of the plan. In our view, this creates an unfair result.

Divisions of pension on marriage breakdown usually arise when the pension is most valuable, and that is when the split takes place after a long marriage—and it's likely to be based on a traditional marriage. Therefore, the most significant assets are the home and the pension. In some cases, particularly for those living outside large urban centres, the pension is the most significant asset.

Forcing out the non-member spouse imposes risks on the non-member spouse that they would otherwise not be exposed to within a defined-benefit plan model. These risks include: the investment risk, or making the right decisions on investing your funds to ensure you have retirement income—I'm sure there's no need to go through the personal tragedies of the current environment and people trying to manage their own retirement income; the risk of outliving a pension or retirement income—that is, the risk of not properly managing the decumulation of the asset. Simply put, you run out of money in old age. The last one I'd like to mention is the risk of inflation eroding the purchasing power of the pension.

The non-member spouse loses the positive effect of risk pooling that a defined-benefit plan provides, including the management of investment decisions, the administration of the plan by experts and the lower cost associated with participating in a large collective. These risks are effectively assumed by the individual, in this case the non-member spouse. In our view, risk has value, and therefore there is a price attached. If the pension amount is split equally and the non-member spouse is forced out of a defined-benefit plan, then the member spouse has a more valuable asset. To ensure a fair split, the non-member spouse will need to receive a larger share of the assets.

Just to mention, OPB will be taking advantage of the provision if it's passed, and that's section 67.3. We will be offering the non-member spouse the option to stay in the plan. We've looked long and hard at this issue, and we believe it achieves a fair result for all parties.

You may hear from others that this is costly to administer. We believe that it is no more costly than what we currently administer. In fact, we expect that with clarity provided through the legislation, the cost will be going down. It's not difficult to administer, it's not difficult for family law lawyers to understand and it allows for a clean break for the parties because we would set up a separate account for the non-member spouse.

The next point I'd like to speak about is the valuation methodology for calculating entitlements. That's under section 67.2 of the bill. It's our understanding that the principle behind Bill 133 is to enable the parties to settle immediately with a clean break. At the same time, the goal should be fairness between the parties, and as such, we're satisfied that using the termination method with the date of separation as the valuation date to calculate the commuted value of the pension would accomplish these goals, but we would add one modification. The non-member spouse can argue that the termination method undervalues the benefit because it doesn't incorporate the value of ancillary benefits, such as early retirement provisions.

We believe there's a simple solution that offers a compromise for both parties and that is not subsidized by

other beneficiaries of the plan. In our view, this could be accomplished by treating the calculation of the pension on marriage breakdown as a full termination by the member. This would then require the calculation of the 50% excess contribution refund, which, if any, would be split accordingly with the non-member spouse. Under the current provisions of the Pension Benefits Act, the division of pensions on marriage breakdown is not treated as termination, and therefore the 50% excess contribution calculation is not required.

The final point I'd like to speak about is giving the non-member spouse greater than 50% of the benefit earned during marriage, or what has come to be known as stacking.

Mr. Peter Kormos: I'm sorry?

Mr. Peter Shena: Stacking.

The proposed legislation is silent on this issue of stacking, which is the ability to seize or attach more than 50% of the pension accrued during the marriage. The current provisions of the Pension Benefits Act restrict the entitlement of a non-member spouse to 50% of the pension accrued during the marriage period. However, there is a provision under which the non-member spouse can stack an additional entitlement that would provide an amount in excess of the 50%. This we believe to be an unintended result.

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The 50% rule is an essential public policy objective. Therefore, our recommendation is that the 50% rule be retained and strengthened to eliminate the possibility of assigning up to 100% of the pension accrued during the spousal period. We believe there's a public policy intention that recognizes that defined benefit plans are protected and an important element of retirement security for members and their spouses.

Marriage breakdown invariably involves a diminishment of the standard of living for both parties. It is in the interests of the spouses and society at large that the protected element not be entirely removed from the member spouse. The issue should be clearly addressed in the regulation.

We do understand that there are extenuating circumstances that must be dealt with. One example I can think of is a situation where there are significant support arrears and no other asset to attach. In those circumstances, we could understand the need to seize an amount beyond 50%, but this exception must be clearly defined and articulated in the legislation and the non-member spouse must be required to satisfy a judge or court that there are significant support arrears and that there are no other assets to attach or seize. The court would then order an assignment for support arrears over and above the equalization of assets.

This concludes my formal remarks. I'm happy to take any questions from the members. I have brought along copies of our submission to the Law Commission of Ontario and a brochure that we provide to members and non-member spouses and their agents upon marriage breakdown which assists them with the division of the pension. The brochure outlines a unique solution that we offer currently to those who are dividing the pension on marriage breakdown, and it's a solution that has met with support from all affected parties. In our opinion, the solutions that we've put forward are doable.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Shena. We have about three minutes per side, beginning with the NDP. Mr. Kormos.

Mr. Peter Kormos: This has been fascinating for me. I never knew actuarial types were such interesting people. Now I do; it's been confirmed.

Mr. Peter Shena: Just a correction: I'm not an actuary, nor am I a lawyer.

Mr. Peter Kormos: To your credit. But again, all this complex stuff which most people never even have to think about or contemplate—one of the issues here, though, seems to be who gets to determine the value of a pension. Let's set aside the two types of evaluations. What is your argument to exclude actuaries, or people who do these assessments or appraisals, from that process and letting the fund itself determine the value?

Mr. Peter Shena: The value, as expressed in the legislation, is a calculation that we do every day for members. For us, it makes sense that the pension plan administrator just continue to do that calculation and provide it to the members, and the parties would deal with the split accordingly.

It does reduce costs for the parties. There is a provision in the proposed legislation that would allow the plan administrator to charge a fee. It is our intention not to charge a fee for this service. It's something that we currently do, and under the current situation it's actually more costly and more complicated for us to do what we do. The proposed legislation would clarify things and make it a lot simpler.

Mr. Peter Kormos: Because of the mathematical formulas provided?

Mr. Peter Shena: The methodology, yes.

Mr. Peter Kormos: Why are actuaries being used in the process of family breakdowns?

Mr. Peter Shena: Right now?

Mr. Peter Kormos: Yes.

Mr. Peter Shena: There is no clarity. There's no simple solution to the calculation currently. Essentially, the actuaries do the calculation and come forward with a value that's then split. The plan administrator reviews the figures that are presented before us, and we do our own calculation. If the calculation that the actuaries put forward is greater than 50% of the benefit accrued in the plan during the marriage period, then we don't pay out an amount above that. That's settled outside of the pension—the excess amount.

Mr. Peter Kormos: It doesn't surprise you for me to tell you that there are people shaking their heads, sitting behind you here.

One of the problems we have here, Chair, is that we don't get a chance to hear these people engage each other in a discussion so that they can respond. I suppose we'll

have to figure out a creative way of doing that, or extrapolate.

The Chair (Mr. Shafiq Qaadri): To the government side. Mr. Ramal.

Mr. Khalil Ramal: Thank you very much, Mr. Shena, for your detailed presentation. It seems that you are very expert in this field, from your title and also from your presentation. We listened to many speakers before you who spoke about this issue, and they weren't happy with the bill. They think it's going to complicate the issue and make it more costly, and they're asking us why we're changing it. The current and the present law isn't working, so we have to change to something that works.

I heard your presentation mention that if this bill passes, it will make it simpler and less costly for people, with exceptions, if we change some provisions and add some to the regulation in the future to make it satisfiable to yourself and to the people of Ontario. So what do you have to say to add to the people who mentioned before you to not change and to remain with the current process?

Mr. Peter Shena: Unfortunately I didn't hear their statements, so I'm not sure what their position is as to why the bill would make it more complicated. In our view, the clarity simplifies the process considerably. Our experience currently is that it's like we're spinning our wheels in the mud and can't get out of the mud. Every time we get a separation agreement that deals with a pension split, it takes us a significant amount of time to sort out what is and what isn't, what can be done and what can't be done. It invariably requires the member and the non-member's spouse going back to their agents, whether it's a lawyer or an actuary, to do further calculations or engage the pension plan administrator in a discussion of why we can't administer the agreement as it's written, which adds cost to the parties and adds cost to the administration. If there's clarity, then we know exactly what we are to do and what can and can't be done.

Mr. Khalil Ramal: So do you think that if this bill passes with some kind of modification, that will make it more clear and more cohesive for both sides?

Mr. Peter Shena: Yes, with the modifications that we recommend.

The Chair (Mr. Shafiq Qaadri): Ms. Elliot.

Mrs. Christine Elliott: Some plan people have told us that they're a little bit concerned about getting drawn into family law disputes if they're the ones who deal with the valuations and so on. It would seem that the plan that you're proposing as is set out in Bill 133 applies to standard form situations where it's very clear-cut that there are no outstanding support obligations and no other issues with respect to other pensions that may have predated the pension that you're dealing with. I'm just wondering if there's a sense that you're dealing with, family law issues being often very messy—what situations you would want to defer to other people and when you would take that decision.

Mr. Peter Shena: Hard to say until the legislation comes into practice. Currently, we deal with a number of messy situations, and as they come up, we will contact the parties and engage in a discussion as to what can and can't be done from our perspective. I can't really give you an answer to that until we see what kind of situations arise. Again, though, with greater clarity in the legislation and a prescribed methodology that clearly defines the methodology to be used, it's calculated and we provide the value to the parties and they split it. If the date of separation is the valuation date and only 50% of the benefit could be split on marriage breakdown, that which was earned during the marriage period, the calculation for us is fairly simple: "It's from this date to that date. That's what was earned. It's $100,000; $50,000 to the non-member spouse and $50,000 to the member spouse." If you accept our recommendation to allow the non-member spouse to stay in the plan, we'd give the option to the non-member spouse to stay in the plan and use that amount to provide for a pension under the defined benefit plan that's offered by the administrator.

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Mrs. Christine Elliott: So I guess it's fair to say that there are still a lot of unanswered questions about how it's going to operate, to say whether that's something plan administrators are going to be able to deal with in the majority of cases.

Mr. Peter Shena: I would say that in the majority of cases, plan administrators should be able to deal with what arises. But there are always going to be situations we haven't thought of.

Mrs. Christine Elliott: Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Shena and Ms. Truong, for your deputation and written submission on behalf of the Ontario Pension Board.

CANADIAN CHILDREN'S RIGHTS COUNCIL

The Chair (Mr. Shafiq Qaadri): I now invite Mr. Wilson and Mr. Ludmer, of the Canadian Children's Rights Council, or the Conseil canadien des droits des enfants, to please come forward and introduce themselves.

Gentlemen, you have 20 minutes to make your presentation in either official language, and I invite you to begin now.

Mr. Grant Wilson: Good afternoon. I'm Grant Wilson, president of the Canadian Children's Rights Council. We're an all-volunteer organization with members across Canada—we even have members in Australia and the Netherlands. We are entirely voluntary, working on children's rights, and have been for quite some time. Back in 2000, we presented on the act you are replacing, and have appeared on all sorts of different matters, including the special joint committee on custody and access 10 years ago.

The gentleman with me, Brian Ludmer, is a special adviser of the Canadian Children's Rights Council. He is a lawyer and an expert on parental alienation, a terrible form of child abuse that affects hundreds of thousands of

children significantly. He'll be speaking for a few moments to introduce you to that. He is also one of the key speakers at an international conference on parental alienation being held here in Toronto this weekend, as a matter of fact, with many American experts and all sorts of people coming from different continents to be here.

On that topic, by the way, I checked with the conference convenors on the weekend, and to their knowledge, no one from the Ontario government is attending—no policy advisers. This covers all sorts of different ministries, from education, educating teachers about this form of child abuse; to Attorney General; to health—mental health is part of this for children. We encourage you to talk to the different applicable ministries, learn about this and get somebody down there and do something about this.

On that subject, as a matter of fact, one of the most horrific cases I've ever come across was in the US, where a child was so brainwashed by the mother that at changeover time this 10-year-old boy took the mother's handgun, went out to his father's car and killed his father. That's how serious some of these cases can be. This is criminal behaviour. When somebody abducts a child, whether it's a parent or not, it is still criminal in nature, and it is a terrible form of child abuse.

One of the key points regarding the Canadian Children's Rights Council is that we have about a 2,000-page website, which is visited in any month by people from 160 different countries. We're the number one website in Canada regarding children's rights for Canadian children, and we run a virtual library with all sorts of documents, news articles etc. relating to children's rights in Canada and sometimes elsewhere for comparative purposes. You'll find there some progressive laws from different places, such as Australia, which has come across with some very important changes to their laws that are substantially more progressive than Ontario's.

I encourage all of you to read the special joint committee's report, For the Sake of the Children, from 1998. That was a committee of both Senate and House of Commons members that toured this country and heard from over 500 witnesses, including an equal number of men and women, and came out with a report. Virtually none of those recommendations have been implemented in Ontario.

One of the issues that isn't covered here, and I'll just mention it in passing, is that we currently do not have any kind of means test or anything like that with regard to the collection of child support from payers. It doesn't matter what the recipient's income is; they get government support for the purpose of enforcement. At the Ontario Bar Association stakeholders' conference, the past president and expert family law lawyer agreed with us outside the conference that parent-child relationships should be supported by the government in a similar manner and there should be no means test at all for parents to have lawyers provided by the government for the purpose of enforcing court-ordered parenting time schedules.

Mr. Peter Kormos: Who was that?

Mr. Grant Wilson: Heather McGee, the past president of the Ontario Bar Association.

As a matter of fact, our laws are so backward here that we're basically 20 years behind the times. If you go to Australia, for example, you won't find that they use words like "custody" and "access." They make "parenting orders." They don't use "sole custody." There's no such thing. I can show you orders from the Federal Magistrates Court of Australia that don't have any of this.

You may recall another law, which actually has been very active in family law in the last four or five years, and that has to do with paternity fraud and children's identity rights. With regard to that—and you can see it on our website—Spain, France, Venezuela and Korea have all now awarded civil damages to men who have been the victims of paternity fraud, and we expect at some point that their children will end up suing the mothers as well. This has nothing to do with recovering any costs of raising the children; it's strictly damages.

As a result of a major case in Australia, which went through to their highest court, they changed their laws and the Attorney General, Philip Ruddock, announced in June 2005 that their new law would require that any woman who committed paternity fraud would have to reimburse her husband or ex-husband, as the case may be, for the cost of raising the child and any child support he paid. That's sort of closing the barn door after the horse is gone, and we advocate for mandatory paternity testing, along with all the newborn tests, the screening that is done by the Ontario government. A mandatory test there for paternity would be terrific. It would cost the government all of $35 to $50, and it would save a lot of misery to people who are misidentified at birth or whose mothers keep the father off the birth record.

Ontario is in gross violation of the Supreme Court of Canada's decision in 2003 that gave you 12 months to correct the Vital Statistics Act and properly identify fathers for the sake of children's identity rights. According to the Supreme Court of Canada, children have the right to be named after both parents. That doesn't happen in Ontario. One phone call to Service Ontario explaining that your girlfriend had a baby and you have absolute DNA evidence that you are the father will result in them telling you that you are not allowed on the birth registration unless the mother agrees to it. You can read that in the current Vital Statistics Act.

I bring your attention to the Statement of Live Birth form used to register a child's birth, given to the mother after the birth by the medical facility—the medical attendant or midwife, as the case may be. It says, "It is an offence to intentionally lie on this statement. An individual who wilfully makes a false statement on the form, may on conviction be liable to a maximum fine of $50,000 or imprisonment for a maximum term of two years less a day."

We know from Judi Hartman, the director of Vital Statistics for Ontario, that approximately 6,500 children a

year don't have their father's information on there, and we know from the phone calls we get virtually every day that there are many cases where the father is known to the woman and she just decides she can keep him off there, and the child will not bear his name, hyphenated with hers, per the Supreme Court of Canada. If she can do it, she will. That's how it works. There's a $6.3-million lawsuit you can read about on our website against the BC government for not complying with the Supreme Court of Canada decision. I would expect that upon completion of that case there will be a class action suit against the government of Ontario for not complying with it for the same reason.

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Children have the right, according to the Supreme Court of Canada, to be identified with both parents, and it's important, when a child is born, to get their major medical information, get their identity established then and not have somebody turn around later on and have them find out, "The man I thought is my father is not my father. I've got a biological father out there someplace." It's extremely damaging to these people. We've seen all sorts of testimony about this kind of damage done to people. This occurred, I guess it was about five years ago now, at the committee hearings prior to the enactment of the Assisted Human Reproduction Act, where people explained the difficulty they had not knowing their heritage, background or any major medical information because they were the result of egg and sperm donors. Names are important; they're part of the bonding process, and these are extremely important.

I'll go through one more issue here and then we can get into the PAS. With regard to the identity issues, I want to tell you about the kind of thing that we've seen. A man called and wrote me explaining that a woman with whom he had lived had given birth and he was now a father. He explained, in about 15 e-mails and on the telephone with me on many occasions, his circumstances, his longing to meet and hold his son and how badly he felt when he was deprived of his child. He explained that he couldn't go to court; he didn't have the stomach for such a family law case and didn't know the first thing about family law or how to go to court. He explained that due to his job, he didn't have the time to fight a prolonged court battle in any case. His job commitment meant that he had to move quite a distance away in the near future and he had no choice but to move. He expressed his deep feelings of love for his son, whom he had not met and who was being kept from him. He was told by the government that he could not be on the birth registration without the mother's permission even if he had DNA evidence showing that he was the child's biological father. I will refrain from disclosing to this committee and the public the names or identities of the people involved.

In one of his last e-mails to me, he stated, "I find it hard to get by with such heavy burdens on my mind. This is quite the situation for a man of 21. My son's name is" such and such, or something along those lines, "and was born probably either in" such and such a hospital or this other hospital. "Both hospitals refused to give me any information about my son. His mother is" such and such, daughter of such and such. He went into details. "All the information I have was relayed by a friend."

After many frustrating attempts, he had to give up and go and do his job. He explained how immature this woman was and the problems he was having.

I can read further, but we're going to run out of time on this. The bottom line is that this loving father was a Canadian soldier who went off to war to fight for his country in Afghanistan, where he performed one of the most dangerous jobs of any member of the armed forces. He died fighting for this country—a country that wouldn't even allow him to be on the birth record of his son or for his son to be named after him, as determined by the Supreme Court in the baby-naming case of 2003.

Mr. Brian Ludmer: In the time that remains to us, I'd like to address the aspects of the bill that have application to what I'll call the typical high-conflict divorce. Imagine a set of raging emotions and parents not putting the interests of the children first—but not the extreme cases of physical abuse. Nonetheless, in these circumstances, we see many tactics deployed which are as reprehensible as some of the things that are being legislated against.

I'd like to leave the committee with some thoughts—and we'll follow up with a written submission—on what could be done to further constrain the parental behaviour that is so harmful. We're asking people to be at their best in circumstances where it's pretty well ordained that they're going to be at their worst, and therefore we need more rules.

As was previously mentioned, parental alienation is a form of emotional abuse of children. Simply stated, it is actions of a parent, usually in the context of a high-conflict divorce, that either have the intent or effect, even if unintended, of undermining the other parent's relationship. In terms of the aspects of the bill that might touch on this, you're making welcome changes in terms of the restraining orders; there are many circumstances where they're needed. However, in the typical non-physical-abuse but high-conflict divorce, there has been a tactic developed of false accusations for the purpose of getting a leg up in the typical custody battle to come. Simply stated, there is a solution: amend the proposed legislation to make a clear distinction between restraining orders focused on keeping the parents apart, and, even where justified, it should not extend to keeping the target of the restraining order away from the children. They may have hard feelings about the other parent and be misguided in dealing with them. That doesn't mean that for the next two or three years, until they clear it up, they don't get to see their children and the result of the divorce is pretty well preordained.

There are aspects of the bill which attempt to address what the explanatory note calls controlling, harmful behaviour, and they're very welcome. However, for those of us in the trenches seeing what's actually happening,

the proposed amendments to section 28 of the Children's Law Reform Act are very unsophisticated and do not reflect the broad range of tactics that are happening out there. Therefore, they don't go far enough, and even those that are being proposed have technical flaws. I'll give you an example. There's a proposed prohibition on engaging in specified conduct while the children are with you, but today, a lot of the alienating conduct takes place particularly when the children are with the other parent, and it's conveyed by phone, by text message, by Internet. That's a clear technical flaw.

You're adding provisions to prohibit unauthorized change of names. Obviously, a child's identity is rooted in their name, and if they adopt the name of a step-parent, it's going to undermine the name of their former parent. But those changes are only directed at legal changes of name, which are difficult to do today even under the current legislation, so you need to go further and deal with practical changes of name—in other words, registering the child for a sporting or other activity using a new name, or registering the child at a new school using a new name, even where legally the child's name has not yet been changed.

What's missing in terms of what you're proposing to do: There are unproclaimed amendments to the Children's Law Reform Act, sections 20 through 29, that you need to move on. There needs to be further protection for custody and access prior to the first court order. We're encouraging people to move out of the house to control the hostility, and yet we all know intuitively that the one who moves out is at a significant disadvantage in the custody battle to come. So we want to encourage people to disengage, but they're left defenceless with vague promises that, "Don't worry, we'll work out the custody arrangements in future," and then it never comes. All of a sudden, it's three years down the road.

The system is plagued with delays, and there's developing case law on status quo. So the parent who takes the mature view and moves out of the matrimonial home to control the hostility suddenly finds herself, three years later, facing a legal argument that they've acquiesced in the current status quo and they're out of luck in terms of trying to get meaningful time with the children.

Even where there's an access order, enforcement of access orders is very problematic and needs to be addressed in the legislation—

The Chair (Mr. Shafiq Qaadri): You have one minute, Mr. Ludmer.

Mr. Brian Ludmer: Thank you.

Lastly, in section 24 we have a definition of "best interests of the child." You can do a world of good by adding one more—there are eight criteria—which is, "support for the child's relationship with the other parent."

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Ludmer, and thanks to you as well, Mr. Wilson, on behalf of the committee for your written submission on behalf of the Canadian Children's Rights Council.

1640

CHANGING WAYS
LONDON ABUSED WOMEN'S CENTRE
WOMEN'S COMMUNITY HOUSE

The Chair (Mr. Shafiq Qaadri): I would now invite our next presenter to please come forward: Ms. Kate Wiggins, executive director of the Women's Community House.

Interjection.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos, for volunteering Mr. Zimmer's time. I'm sure he's much appreciative of that.

I'd now invite Ms. Wiggins to please come forward on behalf of Women's Community House, reminding you that you have 20 minutes in which to make the presentation. I would invite you to please begin now.

Ms. Kate Wiggins: I'd like to thank you for the opportunity to speak this afternoon. I'd like to thank you all for attending so patiently to all of our remarks—I've been here for a couple of hours; I know this room is a little warm—and I appreciate your attention.

I'm here representing three organizations. One is Changing Ways. I am the president of that board. Changing Ways is a program that provides services to abusive men and their partners. I'm also representing the London Abused Women's Centre, which is a feminist organization that provides counselling for women in the community of London. And I'm representing my own organization, Women's Community House, which is the largest high-security emergency shelter for abused women and children in this country, providing 67 beds plus 25 apartment units for second-stage housing.

I've been doing this work for seven years, but I've been in my community for the last 30, serving women and children.

I'll just read my remarks. I've handed in my submission, but I'll just read what I have here.

Changing Ways, the London Abused Women's Centre and Women's Community House support the overall direction of the amendment of Bill 133. However, we are concerned by the seeming lack—

Interjection.

Ms. Kate Wiggins: Yes, I guess I'm blowing you out of the room. Sorry.

However, we are concerned by the seeming lack of recognition of the context of woman abuse within current legislation, an omission that exposes women and children to continued violence.

We believe that all legislative policy reforms should be based on a comprehensive understanding of the significance of domestic violence in all child-related proceedings. Woman abuse is highly relevant to the determination of a child's best interests, and the principles regarding women's and children's safety must be paramount in any policy-making and judiciary process.

Around custody and access, it's often not in the best interests of the child to be placed in the custody of a

parent who has perpetrated acts of abuse against the child or a parent of the child. The principle of encouraging children to have maximum contact with both parents is problematic, as shared parenting means that abusive men have continuing power and control over their children and their children's mother.

In terms of recommendations, the history of abusive behaviour needs to be considered, as well as the impact on children of witnessing that violence, even if they are not victims themselves.

The primary caregiver of the child, if not posing a risk to the safety of that child, should be awarded custody. With a history of woman abuse, a parent who has perpetrated domestic violence should be denied access to his children except in a supervised capacity to ensure the safety of the child and mother.

The courts need to consider domestic violence as a mitigating circumstance for women fleeing from the matrimonial home, and consideration should be paid to her safety and that of her children in any decision of custody or access.

We support appropriate intervention programs, like the Caring Dads training offered by Changing Ways, that focus on the impact of exposing children to woman abuse and the responsibility of fathers to be safe for their children.

Restraining orders and legal aid: Restraining orders are often difficult to enforce, with minimal consequences, and the onus is still on women to call the police if a restraining order has been breached. Women are often at a disadvantage in obtaining legal counsel, and also may be subjected to inferior counsel due to lack of information about woman abuse among professionals and limited hours for preparation.

Recommendations: There's a need for additional monitoring and accountability of all restraining orders, especially in high-risk situations, with greater integration between policing and judicial units so that information that may place a woman at additional risk is shared immediately. I think this is captured in the changes that you're suggesting.

The qualifications for legal aid need to be expanded to consider the dynamics of woman abuse and the potential resulting lack of income for women, despite ostensible family net worth.

Women need to have access to appropriate lawyers who understand and are sensitive to woman abuse, with expanded qualifying hours to deal with their time-consuming family law cases.

In terms of confidentiality, currently identifying information of the victim is routinely released. An example of this is the name change permission form, in which both parties are required to sign their consent. This significantly increases the risk to the abused woman, and compromises her safety and that of her child.

Our recommendations: We strongly recommend that no information that could identify the city or residence of a victim of domestic violence be included in any joint forms.

In terms of kinship care, while we support the idea of kinship care for children in the midst of the upheaval of domestic violence and custody and access issues, we have great concern about children being awarded to the parents of the abuser, a decision that creates a power imbalance for the victim and increases her risk of unwanted contact with the abuser. In the case of a restraining order against her, visiting her children while the abuser is present may result in her incarceration.

Recommendations: We recommend that, with the exception of extreme extenuating circumstances, no child be placed with the parents of the perpetrator, but other suitable arrangements be made. In the event that a child is placed with his or her paternal grandparents, there needs to be close supervision and direct accountability for the safety of the victim and her ability to visit with her children without fear of contact with her partner and without any interference by the parents of the abuser.

In terms of risk assessments: Risk and lethality are dynamic. This is presently not captured by the courts and places women at substantively higher risk as circumstances for the perpetrator spiral downward with separation and altered access to his children.

Also, assessments are often conducted by ill-trained professionals without any comprehensive knowledge or understanding of the complexities of woman abuse.

We would strongly recommend that policies be put in place that adequately capture the dynamic nature of the risk for abused women, with ongoing risk assessments and careful monitoring of perpetrators. The implementation of common risk assessment tools, utilized by qualified assessors well trained in woman abuse, can significantly protect women from further abuse, increasing their safety and well-being.

We recently received some money from the city of London, with the London Police Service, at Changing Ways to set up a program that will monitor men to ensure increased safety and will also provide supports to abused women.

Judiciary training: This is sort of like some kind of sacrosanct cow that does not get spoken about. But anyway, currently, a wide range of professionals, ranging from lawyers, judges and mediators to staff at supervision facilities, are inadequately prepared to deal with woman abuse and the ways to properly support abused women. In Ontario, in the bar admissions course, lawyers receive only a two-hour lecture on domestic violence.

Our recommendation would be that there needs to be comprehensive training for judges and lawyers on the dynamics of domestic violence. In addition, the judiciary needs to create greater court accountability and offender responsibility.

In terms of pensions: I've heard a lot about pensions this afternoon. It's been very informative. Abused women are very often at a very distinct disadvantage with spousal pensions, as many have cared for their children rather than working outside the home. In many cases, victims of domestic violence have been pressured to stay at home by their abusers in an attempt to isolate them and control their movements.

Our recommendation would be that in the pension regulations, consideration be made for women who are victims of domestic violence, and the extenuating circumstances which have prevented them from creating a financial legacy.

In terms of net family property, while we generally support the amendments to the definition of "net family property," we are concerned that the many women who stay at home to raise their children, either through choice or coercion, are placed at a distinct disadvantage in the calculation of assets.

While there's a reasonable expectation that women will take responsibility for their part in building and creating financial opportunities after separation and divorce, we recommend additional time and resources to help build women's skill base, in addition to recovering from the trauma and legacy of abuse, in order to empower them to take their place as full and contributing members of society.

In terms of recalculated child support, we strongly support the mandatory provision of financial information on an annual basis. This relieves women of the onerous task of pursuing it on their own and often not receiving increases to the level of child support to which they and their children may be entitled. However, we request a little bit of clarification around the child support service that will do this.

Recommendations: Additional details about the child support service are needed. For example, who is providing this service, what is the process, and is it available for all women, regardless of economic bracket?

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Our conclusion is the following: The amendments to Bill 133 are significant and welcomed, but we believe there is a critical need for these amendments to be seen through the lens of woman abuse and the devastating repercussions that follow from a system that is unprepared and lacking in a comprehensive understanding of domestic violence. We all have a part to play in ending woman abuse, and every increment of support empowers women to live their lives in freedom and peace.

The Chair (Mr. Shafiq Qaadri): We have about three minutes per side, beginning with Mr. Ramal.

Mr. Khalil Ramal: Thank you very much, Kate, for your presentation. I know you are very expert in this field, and you bring to this table and to this committee a great wealth of information and expertise.

I know you spoke in general, and I'm not sure if you listened to all the people who spoke before you, but you definitely listened to some of them.

We're talking about Bill 133, and I know you talked about different recommendations and offered your own point to us and to the committee and to the government. I know there are big divisions about pension, about restraining, about children, many different aspects. Of course, no bill can please everyone, but you know it's our intention, our goal, our aim and end to make the whole process very clear, less complex, less costly. So do you think, if we pass that bill as it is with some kind of modifications from the floor, from the opposition, we'll make it better, easier and clearer?

Ms. Kate Wiggins: I think to a certain extent it will do that. My issue has always been, the devil is in the details. What the legislation says is not necessarily what gets enacted at the ground level.

I would cite a very clear example of this, and that would be the changes to the housing regulations, which were supposed to make it much easier for women who required special priority status and urgent status to get on housing lists and to get housing. Rather than that being an easier process, a clearer process, it's a nightmare for women. I see that on a daily basis because of the clients that I serve, because of our residents, our tenants at second stage housing—it's been horrendous.

There are more barriers and more obstacles to getting special priority status than there ever have been before, even though the legislation appears to be so patently clear: You require a letter with this kind of information, and previously that would have cut it. We write letters for women to get housing, to get special priority status so they don't wait for a long period of time.

Now, what this means to myself and my organization and women who are at risk in our communities is that our length of stay in the last year has gone from 21 days to 46 days because there isn't social housing in the community of London. Rather than deal with the issue, and I know it's going to be dealt with now since we've had this marvellous announcement, what our community has done is created more barriers for abused women, and that's unacceptable.

So for me, I think, substantively, these changes are a good idea, but it all depends on how it is interpreted and it all depends on the ability of people working on the ground to actually manage; whether it's the police services, the court systems, shelter workers—

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Ramal. Ms. Elliott.

Mrs. Christine Elliott: I can't tell you, Ms. Wiggins, how helpful it is to have somebody with your knowledge and experience come and speak to us about this bill, because we're trying to work through a number of different areas. I'm particularly interested in, obviously, the domestic violence aspect of it.

I have two quick questions: Do you think it's necessary for the Domestic Violence Protection Act to be repealed in order to proceed with this legislation? Because it would seem to me that it's complementary and adds an extra level of protection for women. Secondly, do you think that we can achieve what we really need to do within the context of changes to the Family Law Act, or would you prefer a separate, stand-alone domestic violence protection statute?

Ms. Kate Wiggins: That's a good question or two. Well, I actually do believe we do need something in addition. The Domestic Violence Protection Act makes sense to me. There needs to be something that clearly addresses the issues as they relate to domestic violence or to woman abuse. And the second part of your question?

Mrs. Christine Elliott: It was about the existing Domestic Violence Protection Act being repealed as part of this bill going forward, which would allow emergency intervention orders, which isn't addressed by Bill 133.

Ms. Kate Wiggins: Yes, so personally I would prefer that there be something separate as well as the amendments suggested with Bill 133.

The Chair (Mr. Shafiq Qaadri): Thank you, Mrs. Elliott. Mr. Kormos.

Mr. Peter Kormos: Thank you, Ms. Wiggins. One of the frustrating things is that this type of legislation doesn't get revisited every couple of years; it's once every 10, 15 years, and that means that it's very critical that as much work as possible be put into making it right. We've got a most interesting—there's a copy over there for folks who want it—submission by some 12 provincial Family Court judges. I'm not aware of judges—the judiciary—ever commenting on legislation, especially legislation that directly affects them.

They talk about this mostly in the context of their custody issues. They say, "We are convinced Bill 133 does not provide a workable system." These judges decry the absence of resources in the Office of the Children's Lawyer and they decry the proposition that—they say that "an investigation by the children's lawyer is, in our view, the clear solution to the problem of custody cases where parties are unrepresented, or where an application is unopposed."

They once again point out that lawyers—when lawyers are available in Family Court—who are experts in that area provide a very important role, but very few lawyers want to be in Family Court.

Ms. Kate Wiggins: Well, they're available, if you have the resources to afford them.

Mr. Peter Kormos: I know it's a whole lot, and what I'm trying to do is get the judges' position onto the record—they won't be here to talk to it—but I really would like to hear if you have any comments in response to what the judges have said.

Ms. Kate Wiggins: You don't want to get me started on judges. I'm sorry.

Mr. Peter Kormos: Okay. You and I could spend a lot of time. I've been there, done that.

Ms. Kate Wiggins: I don't want to go there. If the courts are complaining about a lack of resources, they ought to come and hang out with me and my brothers and sisters behind me, because the system, in my personal opinion, is broken. The system is really not a system; it's a series of disconnected pieces that I don't think work at all to the benefit of abused women. I see that on a daily basis.

I spoke with the women in shelter when I heard about this bill and, by and large, they were thrilled. As flawed as it is, they were thrilled because it's something, and women who are in shelter are in shelter because they're afraid and they really have nothing. They lack money; they lack good legal counsel; they can't get legal aid certificates if they're above the threshold; they have to figure out how they're going to live on Ontario Works. They have nothing. I can't imagine anybody, really—and I love the work that I do—who would choose to come into a shelter unless they absolutely had to.

I think we've got a long way to go to create a system that actually works on behalf of the women and children who inhabit it, and I do believe that some of the recommendations that I have been made will be helpful, but there's a whole lot of work that needs to be done and a whole lot of training—

The Chair (Mr. Shafiq Qaadri): With regret, Ms. Wiggins, I'll have to intervene, but I thank you for your presence and your deputation on behalf of the committee.

CENTRE FOR RESEARCH AND EDUCATION ON VIOLENCE AGAINST WOMEN AND CHILDREN

The Chair (Mr. Shafiq Qaadri): I would now invite Ms. Barbara MacQuarrie, community director for the Centre for Research and Education on Violence Against Women and Children.

Ms. MacQuarrie, I invite you to please begin your 20-minute presentation now.

Ms. Barbara MacQuarrie: Thank you for the opportunity to speak today. The Centre for Research on Violence Against Women and Children is located in the faculty of education at the University of Western Ontario. I'm just going to read my submission, and if you have questions afterwards, you can ask me.

Abused women and their advocates in Ontario have long been frustrated by the restraining order legislation provided under family law. A quick review of the literature available on the website of the Centre for Research and Education on Violence Against Women and Children revealed several studies that drew similar conclusions. These conclusions are: Restraining orders are often confusing and often contain conditions that are difficult to understand. Police are often reluctant to enforce the orders and the consequences to an abuser who has breached a restraining order are frequently minimal. As a result, women and their children do not get the safety they deserve and abusers are not held accountable for their actions. Your citations are below that.

1700

The concern that "civil [restraining] orders from the Family Court are not taken as seriously and may not be enforced by the police" was repeated in reports from the Domestic Violence Death Review Committee to the chief coroner in 2004, 2005 and 2006. The 2004 report notes that, "Unfortunately, a number of the tragic cases that result in fatalities occur when the perpetrator is subject to a bail order or the victim has obtained a restraining order." Deborah Sinclair's 2004 Overcoming the Backlash report also details the deaths of women who were killed by current or past intimate partners despite having restraining orders against them.

As early as September 2000, the Ontario government announced its intention to make breaking a restraining order a Criminal Code offence. The 2004 domestic vio-

lence action plan repeated the promise, stating, "Based on consultations with justice and community partners to be held in early 2005, civil protections for abused women will be improved, including improvements in restraining orders and enforcement of breaches."

The government has followed through with this process, and on November 24, 2008, Attorney General Michael Bryant introduced Bill 133, which contains extensive revisions to restraining order legislation as well as a number of other important law reform initiatives.

Prior to introducing this legislation, the Ministry of the Attorney General addressed the need to ensure that restraining orders get from the court to the police as soon as they are issued. The ministry has worked with police through the Ministry of Community and Social Services so that police services treat domestic violence entries as a priority. MAG is also piloting a restraining order index to ensure that police receive restraining order information quickly and in a more streamlined fashion.

Bill 133 addresses other outstanding concerns about restraining orders. As noted above, one of the biggest difficulties with restraining orders is effective enforcement. At the present time, a breach of a restraining order is punishable under the Provincial Offences Act. Bill 133 would make a breach punishable under the Criminal Code. A man who breaches a restraining order could be arrested by police, charged with a criminal offence and held for a criminal bail hearing. His case would then proceed in criminal court, and if he is found guilty, he would be liable to potentially more serious penalties.

I understand that the legislation is gender-neutral. I am talking here from the perspective of working with and for abused women, just to make that clear.

The Family Law Act currently restricts restraining orders to spouses, former spouses or people who have cohabited for at least three years. Bill 133 expands this to include people who have lived together for any period of time. This will ensure that women, no matter how short-lived their cohabitation arrangement, have access to the safety of a restraining order.

Under the new provisions of Bill 133, a woman will be able to obtain a restraining order by making an application to the Family Court where she can show that she has "reasonable grounds to fear for ... her own safety or for the safety of any child in ... her lawful custody"—subsection 46(1). This language requires that the person applying for the restraining order show some evidence of her need, which should help protect against malicious restraining order applications being brought by abusive men, but does not require complicated evidence and maintains the "on the balance of probabilities" standard of proof.

Bill 133 requires that all restraining orders appear on a standard form order, which will make them more easily understood by women and will simplify enforcement by the police.

The bill also sets out specific provisions that judges can include in a restraining order:

Under section 46:

"(3) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:

"1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant and any child in the applicant's lawful custody.

"2. Restraining the respondent from coming within a specified distance of one or more locations.

"3. Specifying one or more exceptions to the provisions described in paragraphs 1 and 2.

"4. Any other provision that the court considers appropriate."

Bill 133 also introduces new provisions to limit inappropriate behaviour by people involved in Family Court proceedings: that "the court may also make an interim order prohibiting, in whole or in part, a party from directly or indirectly contacting or communicating with another party, if the court determines that the order is necessary to ensure that an application ... is dealt with justly." This should be of great assistance to women whose partners use the Family Court proceedings as an opportunity to engage in ongoing legal bullying. In cases where the judge makes this order and it is breached by the abuser, it would provide good evidence to support any application the woman might decide to make for a restraining order in the future.

In summary, I am in support of Bill 133 because the new restraining order regime will expand the eligibility of who may apply for a restraining order to include all couples who are cohabiting, regardless of the length of time of cohabitation; strengthen enforcement by prosecuting breaches under the Criminal Code; introduce a clear evidentiary test which judges must consider before granting a restraining order, which should help protect against malicious restraining order applications being brought by abusive men while maintaining the "on the balance of probabilities" standard of proof and therefore not requiring complicated evidence; and provide the authority for a court to include specific terms in restraining orders in order to restrict the respondent's contact with the applicant.

Bill 133 also contains changes that will increase the safety of children, particularly in cases where non-parents are seeking custody, by requiring evidence that affirms an applicant has the capacity to provide appropriate parenting and by providing judges with greater powers to control inappropriate or harmful behaviours by parents.

Bill 133 makes it mandatory to provide financial information on an annual basis, thus relieving women of the onerous task of pursuing it on their own or of not receiving increases to the level of child support to which they may be entitled.

The government also intends to create a plain-language guide to help potential applicants understand the process for obtaining a restraining order under the new regime. This will be a useful resource for all those who are applying for a restraining order, but particularly

for the ever-increasing numbers of women who proceed through Family Court with no legal representation.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. MacQuarrie. We have about three minutes or so per side, beginning with Ms. Elliott.

Mrs. Christine Elliott: Thank you very much, Ms. MacQuarrie. I think we're all pleased with the provisions of Bill 133 that make it easier to obtain restraining orders for women and to have them enforced. I do have a concern, however, about the ability, in terms of timing, to get the order. There's been some suggestion that there should be the ability to apply for emergency intervention orders, that it's not just during court times that these sorts of situations arise. Would you think that that would be an important thing to retain within the legislation that is going to be repealed to be replaced by Bill 133?

Ms. Barbara MacQuarrie: I do think that the ability to get restraining orders on an emergency basis is important, yes.

Mrs. Christine Elliott: Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Mrs. Elliott. Mr. Kormos.

Mr. Peter Kormos: I suppose, to that end: how, in this proposed regime? Because this same Bill 133 is repealing the Domestic Violence Protection Act, which had a provision for ex parte, 24-hours-a-day, seven-days-a-week restraining orders, and I, for the life of me, don't know why the government would repeal that rather than work on implementing it.

Ms. Barbara MacQuarrie: Personally, I see change as a process. What I have before me is better than what we have right now. The Domestic Violence Protection Act was on the books for a long time and nothing happened with it, so I'm choosing to support some legislation that is going to give us something better than what we have today, with the idea that we're going to have to continue working on the areas that are inadequate.

Mr. Peter Kormos: This bill is going to pass. I can guarantee that without hesitation. This bill is going to pass, if only because it's a majority government, but at the end of the day, I suspect the opposition parties won't find anything so distasteful in it that they'll vote against it.

Having said that, we don't get too many kicks at the can. This type of legislative reform doesn't happen that often. It's a 10-, 15-, 20-year event. Shouldn't we be striving for a little more this time around, or should we wait another 10, 15 or 20 years?

Ms. Barbara MacQuarrie: I'm being realistic, again, about what's on the table. This is an opportunity that I see to put some improvements in place, and that's why I'm supporting it. I'm not suggesting that we should all accept that this is the end of the process. It's not.

Mr. Peter Kormos: Okay. Thank you kindly.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos. To Mr. Ramal.

1710

Mr. Khalil Ramal: Thank you, Barb. It seems like today's a London day. So many people, from lawyers to community activists, researchers and many others spoke in this place regarding this issue.

I know that you've been working very hard for many years in the research field and also in the community to protect women and trying to understand the whole atmosphere around this issue, in particular the laws and rules that regulate and conduct activities in this area. I know you support this bill; you spoke and gave us some suggestions. In your opinion, will it make it easier and clearer for people to move on, and less costly, if this bill passes?

Ms. Barbara MacQuarrie: I believe it will, and that's an opinion based on my consultations with people who know the law better than I do. I have consulted, and that's the consensus of the people I've spoken to. Like I said, I believe it's a step in the right direction. I believe it's important that we improve what we have in place. But I also believe that we need to continue reviewing what happens when we put new legislation in place, and we need to be in a continuous process of monitoring and seeing how we can do better. I'm assuming that that commitment is there; I hope it's there.

Mr. Khalil Ramal: Thank you very much.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. MacQuarrie, for your presence, deputation and written submission on behalf of the Centre for Research and Education at the University of Western Ontario.

THE ADVOCATES' SOCIETY

The Chair (Mr. Shafiq Qaadri): I now invite our next presenter, Ms. Nicoll, of McInnis and Nicoll, on behalf of the Advocates' Society, to please come forward.

You've seen the drill and protocol. You have 20 minutes in which to make your presentation. I invite you to begin now.

Ms. Judith Nicoll: Good afternoon. I am here on behalf of the Advocates' Society, a professional organization of 3,800 lawyers in the province of Ontario. While the Advocates' Society does not encompass only family law lawyers, it is a testament to how important the organization views family law issues that they have chosen to make this submission today.

In general terms, the Advocates' Society supports the draft legislation that has been put forward, provided of course that there is a properly funded and resourced set of tools that go along with the proposals. In particular, we welcome the opportunity for easier access to various elements within this legislation; for example, under the various provisions that allow for the change-of-name provisions under the Vital Statistics Act and the Children's Law Reform Act. This gives an opportunity for people not to have to go through the same multi-layered steps that have previously been involved when one could only proceed under the Vital Statistics Act. Being able to do it in conjunction with a declaration of paternity allows people to make these changes without going through the additional step.

Hopefully, it will also provide a greater likelihood that the general public will be aware of their rights with respect to getting their name onto a child's birth certificate. I can tell you, as a practitioner who has been in the family law field for the past 25 years, that many people simply aren't aware what their opportunities are to get that name onto the birth certificate, and in many instances where there's a dispute, whether it's about paternity or just about the child's custody—particularly where parties aren't cohabiting—there is a general assumption that there's a default position with no rights available to the other party. This gives a greater opportunity for both names to be on the birth certificate to reflect the true parentage of the child.

With respect to the custody provisions in the Children's Law Reform Act, I have had an opportunity just briefly to review the submission of the judges where they're very concerned about the ability for a court to actually oversee the very detailed information requests this new legislation would allow for. Certainly, from our perspective, we are concerned about the administrative nature of a lot of this stuff: how all this information will get before a court; how it will be handled; whether or not there will actually be other privacy issues that haven't been contemplated here where mistakes could be made, such as people with similar names—that sort of thing. But the intention is good, and we're going to try to fill those gaps we've seen that have resulted in tragedies in this province in recent times.

The other thing that appeals, as a practitioner in this area of the law, is the concept of obliging people at the first instance to deal with a parenting plan; not some amorphous "Since I want custody, I ought to have it" but rather an opportunity for a person to have to specifically turn their mind to what their plan is for the care of that child. I don't know how many of you have ever actually seen some of the applications that are presented for custody and access matters in this province, but they're often quite weak because someone wants custody or access but there are no details as to what is contemplated in that. Now, the legislation purports to set out in greater detail what the expectations are. So the hope would be that at a front-line entry basis into the system, whether a person is represented or not, there is a greater recognition that one has to be specific about what they're looking for when seeking this kind of relief from a court.

Hopefully, the development of the demand for that information will include getting some people to pause and reflect about making some of these claims, which can sometimes—I'm not saying often—arise really more from a knee-jerk response that because a claim has been made by the other side, they must similarly make a claim. A lot of time is wasted in our system where people ask for everything in the absence of a plan and without any real expectation that this is what they'll ultimately be able to do for the most practical of reasons. I think it's very important to be trying to get people to assert their actual plans at an early stage in the proceeding.

With respect to getting records into the court system, I am concerned about the time this might take, particularly in situations where there could be emergencies and one is concerned about getting a speedy remedy in a custody situation. I think we'll have to balance the need to make sure we've got the best information with the need for protection at an early stage, so there can be no doubt as to who has a custody order and who does not, even if it is on the most temporary basis, so there can't be people taking actions under their own steam without the benefit of a proper court order.

We are pleased with the expansion of the class of people to whom restraining orders will be made available. This has been a problem under the law, and we continue to have some problems with respect to matters such as exclusive possession orders, which haven't been available to the full gamut of people who potentially require such an order, but this is a very good first step to seeing the extension of this option for people who are in need of protection.

Practically speaking, some of the members today have asked questions about the speed with which one can get an order and how to get that order. The reality is that it's difficult to imagine any system that will always prevent tragedy. As we've seen with some matters that have arisen over the years, it is often difficult to predict the dangerousness of a situation, and in many instances we don't get a warning that something will happen. Having said that, the more teeth we can put into our system to attempt to avert any problems, the better, and we welcome that opportunity with these changes to the legislation.

With respect to the provisions that deal with whether or not a court can determine that a court has the capacity to determine that more files will be sealed and the information not made available in the public domain. I think that this is a good strategy for a number of reasons, not the least of which is, first and foremost, of course, the best interests of children, many of whom are seeing their lives played out in the courts these days and without even the most basic information being protected. I think that sometimes as lawyers there is a bit of a push and pull between this desire to have access to all information and to have the opportunity to see what precedential value a case might have, but the reality is that it's the end user here that counts and it is imperative that we protect the privacy of people wherever possible while making sure that in doing so we're not compromising either the integrity of the system or the safety and security of the people involved.

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One of the things that has been, I would submit, long overdue is the concept with respect to the annual disclosure of the financial circumstances in the child support provisions. As you are no doubt aware, the child support guidelines came into law in 1997. All these years later, we still don't have the system that was contemplated under those guidelines, which was to have provided for the recalculation, offices in every province and which was to have made this a simple system.

I believe at the time, in 1997, the guidelines were kind of touted as something that people could sit down at their

kitchen table and figure out. As a lot of case law has revealed, that isn't exactly how it has worked out. Certainly some of the criticisms that I've heard about the amendments contemplate that they still don't deal with problems of imputing income and the self-employed person and that sort of thing. I'm not convinced that any legislation could deal with all of those problems.

I would put it to you that the fact of the matter seems to be that in these complicated times, there will always be compensation packages which defy one-size-fits-all. We've seen this problem with people who were paid in a variety of different ways, who received benefits in kind. So I don't expect that the legislation could have extended to cover those problems. But we have struggled with this notion that there hasn't been an annual obligation that has been written into the legislation, so that's an imperative step. The hope would be that there would be regulations, however, that would adequately provide for the recalculation office, whether it's a branch of the FRO or however else, but it really would avoid an awful lot of problems if people were able to understand that there's a new level of support, it's now this amount, and I don't have to bring a variation application in order to compel the receipt of that amount.

The consumers on the ground, as I see them, cannot comprehend that this is what's necessary. We have cases where money is sitting in the offices of the FRO that people aren't able to get because—this is where people are doing what they're supposed to. I know we always hear about people who aren't doing what they're supposed to, but there are lots of men who do not fall into the deadbeat dad category and lots of recipients who are doing what they're supposed to do. But the system sometimes fails them because of the hurdles over which people have to go. So in the absence of this recalculation order, you can't get your money out, even though it has been paid, which seems, of course, to be something of a bizarre result to the person who's paid their money in and the recipient who's waiting to get it.

So it is imperative that we get a system not unlike perhaps that which is provided for in Manitoba, which allows for a recalculation order to be made and in a very administrative kind of a way. Again, as I've said, it's not for everybody; it's not for people with complicated forms of income, and it does get more complicated when we get into section 7 expenses. I think that for people who don't deal in issues relating to the special or extraordinary expenses, it isn't just as simple as saying, "The child is in baseball; therefore, you pay your percentage and the other party pays the other percentage." There are thresholds that one has to determine, as to whether or not it's a reasonable and necessary expense within the context of this family's budget. So again it doesn't lend itself to an instant recalculation, but the guideline amount does, particularly for people who are salaried employees who have a T4 at the end of the year that one can look to have that exchanged and do the math from there.

We ought to live up to the promotional material that was around in 1997 that was going to allow this to be a simple process for people because, truly, an awful lot of work could be spared within the court system if this was done.

We have a process in Toronto called the "dispute resolution officer" that's been in place for about the last 10 years. They deal largely with variation applications at the Superior Court on University Avenue. The bulk of the cases that come in there deal with people who are trying to figure out their child support with somebody sitting there. It's their lawyers who volunteer their time, but they have an enormous percentage of success in dealing with these matters because it's very straightforward. So we need to have a venue for people to be able to do this because of the massive amount of time that's being taken in the courtroom.

I know that another concern with any kind of amendment to legislation in family law matters is always—a starting point is that there aren't enough judges and there aren't enough resources, but a lot of judicial time is being spent on matters which need not be done by a judge. So I think it's imperative that we find ways as a community to streamline the process as much as possible. We see these amendments in this Bill 133 as a first step towards that.

I hear Mr. Kormos say again and again that we don't look at this stuff often enough, and I couldn't agree more. It seems like we've been doing this every year since the whole issue of family reform came into play in the 1970s. However, we have to work with what we've got. We are in uncertain economic times and to throw the baby out with the bathwater would be an extremely unfortunate result, because there are things here that can offer some relief to people in the immediate term. So, despite the efforts to have that perfect legislation, I think it is imperative that we work with what we have here.

If I might just speak lastly to the property provisions of the proposed legislation: We are pleased that the definition of "net family property" has been adjusted to take away the liabilities that exist in connection with the matrimonial home. There's quite a bit of debate as to whether or not we would have been happier had it also been considered that the date-of-marriage deduction for the matrimonial home had been considered in the legislation.

One of the problems from the perspective of some practitioners in family law is that if a party brings the matrimonial home into a marriage and that property remains the matrimonial home, one doesn't get to deduct its value. That presents a bit of an anomaly in our law because if I had $100,000 in the bank, I could deduct that, but I couldn't deduct a $100,000 matrimonial home.

There are varying views as to whether or not that serves an injustice to more women, but in any event, it hasn't made its way into the proposed legislation and that is seen by some amongst our ranks to be something of an oversight that we would have preferred was there because certainly in its absence it does compel people to either suffer some prejudice or, alternatively, to have to go once again to lawyers for domestic contracts to create their own regime so as to protect this asset that they're

bringing in. But at least, as I say, the fact of this new definition of the net family property allows for some relief there.

With respect to the pension, I'm not going to presume to comment in any great detail with respect to all of the provisions regarding the pension. I'll leave that to the actuaries and the pension plan administrators. The proposal is not without its complications, and certainly the actuaries have had plenty to say about that in terms of the method of valuation that's contemplated.

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The Chair (Mr. Shafiq Qaadri): You have a minute left, Ms. Nicoll.

Ms. Judith Nicoll: Thank you very much.

We are pleased, however, that the concept of the division is included in the proposed legislation. We commend to you the Law Commission of Ontario's report with respect to the proposed division of pensions, because it speaks to the valuation issues.

We also appreciate the tidying up of the issues related to jointly-held properties on death, which now confirm that any property that has passed because of a death is now calculated out of the equalization payment.

All in all, we look forward to these amendments being passed, provided, again, that there are adequate resources to make them work and to give the consumers in this province an opportunity to see a fairer division in their rights and responsibilities so that everybody can feel that they're being well served by the Family Law Act.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. Nicoll, for your precision-timed comments and your deputation presence, on behalf of the committee.

BCH ACTUARIAL SERVICES

The Chair (Mr. Shafiq Qaadri): I'd now invite our final presenter of the day, Mr. Jocsak, actuary and president of BCH Actuarial Services.

As you've seen the protocol, you have 20 minutes in which to make your combined presentation. I invite you to begin now.

Mr. Jamie Jocsak: My name is Jamie Jocsak. I am an actuary, and I offer a slightly different perspective from those of my colleagues who spoke earlier.

I have only been doing this marriage-breakdown work for about two years. Prior to that, I worked for Mercer, which is the largest pension consulting firm in Canada. I worked as a pension actuary and I helped a lot of mid-sized and large private clients with their pension plans, both funding and administration. So perhaps I can offer a bit of guidance on the administration side of it, as to what I see with this bill.

I would like to thank you all for the opportunity to come here and speak. I congratulate the government on addressing this important issue and working to improve the divorce process for couples in Ontario. I believe, for the most part, you've done an excellent job with the bill. It's going to be provide much-needed flexibility by way of lump-sum transfers and eliminating the problematic "if and when" arrangements. These problematic "if and when" arrangements are those situations where the couple wanted to split their pension later on and they created these really complex separation agreements, which is what Mr. Shena was referring to, in the sense that I know, as administrators, we would often spend thousands of dollars trying to figure out how to implement the separation agreement. I would point out that this is not a valuation issue. It was never a valuation issue. It's a separate issue, and this bill does address that issue.

I would like to start first by saying that I do agree with the comments of my colleagues Jay Jeffery, Kelley McKeating and Penny Hebert. As well, I want to start with two brief definitions that you probably already heard, but I just wanted to make sure that my comments are clear later on.

The commuted value of a member's pension benefit represents the value that they will receive if they are assumed to terminate employment. This is only the contractual rights the member has on termination, in accordance with the pension plan. Depending on the member's age and the plan, there are other benefits that don't fit into this situation. For example, sometimes you have a member who can receive an unreduced pension after 30 years of service. Now, say the member has 28 years of service and terminates. Often, this is not included in the commuted value because they didn't have enough service to vest in it. So the problem that you have is that the commuted value might exclude this benefit, assuming the member terminated, when in fact he or she is very close to gaining a right in this benefit. That would be left out of the spouse's share of the assets.

I have two recommended changes to the proposed legislation. My recommendations would bring the legislation more in line with the recommendations that were made by the Law Commission of Ontario in its recent report, which a lot of people have referred to.

In summary, I recommend that the net family law value of the member's pension benefits be determined differently for purposes of the Family Law Act and from the Pension Benefits Act. Under the Pension Benefits Act, in my mind, the main purpose of determining a lump sum is for the transfer to the spouse, and I believe the commuted value approach should be used in this case. However, under the Family Law Act, you're trying to determine the value that's appropriate for the family property, and I believe that the current approach, the hybrid termination-retirement approach—the mouthful approach—is the appropriate approach to use.

To clarify, the hybrid termination-retirement method is a method currently in use. Under this method, the value of the member's pension benefits is calculated under several different scenarios. What the actuary does is, you typically assume continued employment and assume retirement at various different ages, and you also provide an indication as to the value assuming termination of employment. The reason for this is that the value of a member's pension benefit is heavily dependent on what their individual intentions are. So if a member is likely to terminate soon, it's a very different value than if

they're intending to retire five or 10 years from now. So the value that is used for equalization purposes is the value that is considered the most likely, given the individual circumstances of the member.

I want to turn back to the Pension Benefits Act briefly, as far as the transfer. I'll explain why I believe the commuted value is the correct value to be using for that purpose. For one, and first and foremost, it doesn't make any sense to me to pay out benefits which have not yet been vested. So if the member were to terminate shortly after date of separation and we already paid out a benefit that never existed to the spouse, you sort of have a problem, so I understand that commuted value is a very important method to use for that purpose, and plenty of administrators have spoken to that.

In addition, as Mr. Shena mentioned, every plan administrator calculates commuted values all the time because members terminate all the time. This is something they can do very easily, so they do this all the time. If you were to try to implement something other than that, something that included some of these ancillary benefits that are invested, it would be very, very costly. I can say from my experience with private sector plans that private sector plan sponsors do not have a lot of expertise in this area, so they always turn to their actuaries, i.e. Mercer, to help them with this. If you implemented this, they would have to go to Mercer, which usually charges $400 or $500 an hour for actuaries' time to work through these calculations. It would be enormously expensive for private sector plans. I highly recommend you don't do that; you stick with the commuted value approach. As we can all admit, this is not the time to be loading plan sponsors with additional burdens, especially private sector plan sponsors.

I suspect actually that most plan sponsors would be in agreement regarding the commuted value for the transfer value, and I believe that's what Mr. Shena was saying. However, because you're using the commuted value for the transfer value, you have a bit of a problem, because if you use the same value for family law purposes, you're assuming the member literally terminated, and that's what you're valuing the benefit as. The problem with that is, it significantly understates the value of the member's pension in the case where there are significant unvested benefits that are not included in termination value and are most likely to be realized, such as generous bridge benefits and unreduced pension at, say, 30 years of service or something along those lines. Who is going to be hurt by this? It's the non-member spouse. The commuted value is sort of the minimum value you should assign to the pension, and then it goes up from there, depending on what the member's intentions are. By choosing the minimum value—which is what I suspect most plan administrators are going to push for, because they should be; from their point of view, that's the correct value—it's not the correct value for family law purposes and it's the non-member spouse who's going to lose out.

To illustrate why I believe the hybrid termination-retirement method should be used to determine the value of members' pension benefits under the Family Law Act, I'm going to provide a simplified example. I'm going to toss out income tax and a few of the other details, but the value is actually quite accurate and representative of a real case. Jane and John have been married for 35 years. Jane raised four children and only worked low-income part-time jobs during the marriage; she has no pension of her own. John made a very good living and has a large DB pension of around $80,000 per year at the date of separation, and his 30-year career was completely during the marriage.

John's pension is a private pension plan and, as is common with private sector pension plans for members who terminate prior to age 55, all he's entitled to is his $80,000 pension, beginning at 65. However, if he were to work past age 55, he then becomes entitled to retire at age 60 with an unreduced benefit and generous bridge benefits. A lot of private sector plans work like this because they try to reward long-service employees who retire from the plan and don't quit prior to retirement. So often, you see a big increase in value when you pass a threshold, such as age 55, to reward these long-service employees.

Let's suppose, however, that John is 52 at the date of separation, so he hasn't met that threshold. The plan administrators will snap their fingers, they'll pump out the commuted value, and I can tell you that it'll be around $500,000 and it will be based on an $80,000-a-year pension payable from age 65. What about the situation where he was assumed to work past 55? Say that John has a very secure job, he has no intention of terminating and his real intention is to work to age 60 and take advantage of that unreduced pension and those generous bridge benefits. What would the value of his pension be? It pops up to around $800,000. So the value of taking that pension early at age 60 and the bridge benefits are around $300,000; it's almost 70% of the termination value.

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So the question is, "What is the fair value under the Family Law Act?" The problem with the way the legislation is written right now, is you have to choose one value. Okay, so let's try to choose one value. What will work? Let's choose commuted value. Let's put it at $500,000. What's the spouse's share? It's $250,000, so she gets a quarter of a million dollars for the pension. Well, what about the situation where John is secure in his position, he works to age 60, he retires with his great unreduced pension and his bridge benefits? Effectively, I can tell you, to put it in simple terms, if you look at the $250,000 Jane will receive when she tries to retire at age 60 as well, her pension will be roughly half of what John's pension would be with respect to the marital period, and that was a pension that was supposed to be split equally. It doesn't seem very fair to me.

Let's look at the other hand, which is if John intended to leave his employer and was almost certain to terminate prior to age 55. Then the commuted value is a fair value. It's representative of what's likely to happen to John. However, what happens if, because of the previous

situation, the Attorney General's office decides to come up with some magic number that takes into account some of these ancillary benefits? So they have their magic formula and it pops out a value somewhere in between: Let's say $700,000. The problem with that is that then Jane gets $350,000 paid out to her; John terminates. Now we have a problem, too, because John's got $150,000 left and Jane's off with the rest of it. All of a sudden it's switched the other way, so now who's at a disadvantage? John's got a major problem.

So you're thinking, how exactly do we deal with this? The reality is either of just two possibilities, but as pension actuaries we see these situations every day. The range is quite enormous in pension plans, and that's actually by design of a defined-benefit pension plan. The beauty of defined-benefit pension plans is that they adapt to people's lifestyles and you can't actually value a defined-benefit pension plan without knowing what the person intends to do. That's a defined-benefit pension: defined contribution or the alternative.

One thing I want you to notice from this example is that we're not nitpicking over a dollar here or there; this is a major, major issue. The other thing I wanted to point out is that the hybrid termination-retirement method, which provides several different values, is not this needlessly complex method created by actuaries for fee generation. It is needed, because in a defined-benefit pension, really the value depends on the individual's intentions. You need several values to correctly quantify what the true value is, because there is not one value for a defined benefit pension plan.

From my experience with Mercer, I wanted to point one other thing out. There seems to be this belief that there's this one value to value your pension. Mr. Shena keeps talking about, "We have the value." But what he's talking about is commuted value. When you read in the news, you hear a lot about solvency problems with pension plans. The solvency liability is basically the sum of the commuted value because everybody is concerned with what will happen if the plan terminates. But in fact, that's not the only funding basis a sponsor has to fund on. They have to fund on a funding basis, assuming it's ongoing as well. How does a plan sponsor do that? Lo and behold, they create many different liabilities, depending on when the person is assumed to retire. The way they get around the problem we're facing is they choose what the average plan member does and they assign that to it, and then they make sure, in addition to the solvency liability, the commuted value, they have enough funded so that they can provide for these additional ancillary benefits that will become vested in the future.

You can ask any pension actuary, as I was—if a plan sponsor asked me: "The amount of fund we have in the fund for you is not correct; it is wrong." I will guarantee you that 100%. What I can say is, over the entire population it is correct. We have a problem here because we're trying to do it for one person. We don't have the law of large numbers to help us out here. We're stuck with one number, "so stuck with one number" means that you have multiple values, and any plan actuary will also tell you there's no such thing as one value for your pension. So for those of you who are a member of your pension plan, you don't have one value for your pension plan; it will depend on when you choose to retire.

To be clear for my recommendations, Jane could receive up to $250,000 transferred into her RRSP, regardless of what you choose as the value. That's the max we should transfer, because that's the commuted value. We don't want to go above that. But in reality, it could be a bit higher because we decide that he's most likely to retire at age 60 or something like that. The difference would have to be made up in the equalization payment.

This is actually sort of the status quo, because for plans that aren't part of the Ontario Pension Benefit Act, such as federal civil servants, they already get transfer values right now, and this is being done currently. It's not a problem, because this payment would probably affect a large part of the equalization. So the system actually works fairly well.

The second comment I have: As a pension plan actuary and administrator previously, my concern was for the benefits security of the members. Some plan administrators have come in here and made comments as to what should be paid out and what they're willing to do, and I think that's very helpful, but then they step over into the realm of what's the appropriate value for family law purposes. I don't understand why they're making comments in that regard. And the fact that they're making the suggestion that it should be commuted value? Commuted value disadvantages the non-member spouse and is best for the member spouse. It seems a little bit questionable to me. So, personally, my point of view is that I would certainly view the recommendations of plan sponsors who are protecting their own members at the disadvantage of the non-member spouse with a little bit of a question, and this is not an obscure issue.

In summary, I'd like you to look at Jane and John and think about somebody you know who's in that position. In fact, it was modelled after my parents. If my parents had terminated in their early 50s, this would have been them. If this law is passed with the commuted value or one single fixed value—I suspect it will be the commuted value—my mother, or Jane, would be really left out in the cold. She would get $250,000 and be told, "Good luck. That's what you're entitled to. We've decided that."

Individual circumstances cannot be effectively addressed in any formula-based approach that could be prescribed by regulation. I'm trying to make that very clear, because the value of a defined-benefit plan depends on your intentions. So do not leave this to a magic regulation to go with this pie-in-the-sky, one-value-fixes-the-whole-problem.

Now, to answer the question as to why I think they've gone this way, I think they are going after the pie in the sky. I think they want this to be a great simple system. You go to your plan administrator, you press a button,

the value comes out, and everybody's on their way. I would love that too. The problem is, defined-benefit pensions don't work like that. The sacrifice of having that simplicity is going to be people like Jane losing a lot of money. Now, considering that this is a lot of people's biggest assets, I don't think it's appropriate.

To sum it up, the reality is that defined-benefit pensions are far too complex, far too individual and far too valuable to be taking any shortcuts or trying to do it in this way. I feel that separating the two values as I have suggested will provide an acceptable solution for all parties. It protects the plan sponsors. In fact, they only have to calculate a commuted value when somebody wants a transfer. They only have to pay out commuted value. There's no risk to plan solvency. It protects the non-member spouse, whom I'm very concerned about right now with the way this legislation is going, because it's making sure that she has her say and that if she is the low-income earner and John has that beautiful pension coming up, she gets her fair share of that pension as well, which is extremely important. In addition, it allows the flexibility of lump-sum transfers and ends these ridiculous "if and when" agreements. I think it's the best compromise you can come to.

The next step is what they're trying to do, the one value. I just want to say, the one time an actuary can say with 100% possibility, it is not possible. The sacrifice will be major lack of fairness in the system.

Again, I'd like to thank you for the opportunity to speak with you today, and I'd like to open up to questions now.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Jocsak. We've got about a minute and a half per side. Mr. Kormos.

Mr. Peter Kormos: I concede right off the bat: Actuaries are smarter than lawyers. I surrender. Thank you.

You and I have talked before and you've been helpful in helping me get my head around this, but I think you bring a very important observation to this debate or this discussion. I think your words speak for themselves. What we've got to have is people from the ministry explaining why they are doing what they are doing and responding to your comments and the comments of your colleagues and presumably comments we're going to hear down the road. That's why it's very important that you're here today. Ministry staff will be reading the Hansard, and I want to hear from them.

Mr. Jamie Jocsak: So do I.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos. Ms. Broten.

Ms. Laurel C. Broten: Thanks very much for your presentation. I just want to examine the issue where there's another asset in the marriage, for example, the matrimonial home, which also sees a fairly drastic increase in value post-termination of marriage. A lot of family law lawyers will set up a circumstance where, "You keep the pension. I'll take the house," and I receive an increased value associated with my house because we invested over a long period of time. How do you see that counterbalancing off, and do you still see, even in light of that asset exchange, which often happens—what's the circumstance for the wife, who usually takes the house because she has the kids?

Mr. Jamie Jocsak: The problem is, you're throwing a dart at a dartboard at that point, because what's the value of the house and what's the value of the pension? They may not even be close. That's a very concerning thing to do because of the fact that there is a way to value the pension by looking at multiple range, and saying, "What are you really intending to do?"—and that's the best way, the only way, to hammer down the fair value. So—

Ms. Laurel C. Broten: I'm not saying, "Throw a dart at the dartboard." I'm saying you have two values. You have the commuted value for the pension—say you have it at $250,000—and you have the home value, current day, valued at $250,000. You take your $250,000; I'll take my $250,000. Your $250,000 is going to be maybe up at $400,000 by the time you retire, but the house will also be up at $400,000. In an increasing real estate market we might have been able to assume that; maybe not today.

Mr. Jamie Jocsak: It would have to be one heck of a real estate market in a lot of cases, because the increase over five years to go from $500,000 to $800,000 would require quite the real estate increase. In addition, the poor spouse who's stuck with the house has the maintenance costs, not to mention the risk of the real estate market. It's not exactly on the upswing, it doesn't look like, any more, so—

Interjection.

Mr. Jamie Jocsak: But the value of the pension, because it's a defined benefit, is guaranteed by the plan sponsor except for the one situation which we did speak about, which is where you have solvency concerns. That's another issue I should mention: What happens if you have a GM pension and it's a regulation? You can't—

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Jocsak. I'll now have to invite Ms. Elliott, please.

Mrs. Christine Elliott: Thank you very much for your presentation, Mr. Jocsak. It's very clear and very compelling. I have to agree with Mr. Kormos that we really need, in light of the comments made by you and some of your colleagues, to understand the government's rationale for bringing this forward in the form that it is. I think there is the potential for significant harm to be done to the non-pension-holding spouse. So it is something, let me assure you, that we're going to be taking a serious look at. So thank you very much for your comments and being here today.

Ms. Jamie Jocsak: Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Jocsak, for your presentation and deputation.

If there's no further business before the committee, the committee is adjourned till tomorrow.

The committee adjourned at 1750.

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