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Lundi 30 mars 2009

Standing Committee on Social Policy

Family Statute Law Amendment Act, 2009

Comité permanent de la politique sociale

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

Chair: Shafiq Qaadri
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON SOCIAL POLICY

COMITÉ PERMANENT DE LA POLITIQUE SOCIALE

Monday 30 March 2009

Lundi 30 mars 2009

The committee met at 1431 in committee room 1.

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.

The Chair (Mr. Shafiq Qaadri): Ladies and gentlemen, colleagues, I welcome you to the Standing Committee on Social Policy. As you know, we're resuming 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.

Just on behalf of all committee members, I'd like to welcome to his very first, no doubt, of an endless series of committee meetings the honourable Rick Johnson, newly elected MPP from the riding of Haliburton–Kawartha Lakes–Brock. With that, I—yes, Mr. Kormos?

Mr. Peter Kormos: Now come on, did you want people to be told when your very first patient walked into your office as a medical doctor? Did you want them to know that that was your very first diagnostic exercise? Mr. Johnson's acclimatized well in the week and a half that he's been here, and it's about time he was in committee.

The Chair (Mr. Shafiq Qaadri): We all thank you for that vote of confidence, Mr. Kormos.

I'd now like to advise the presenters of the protocol for today. We'll have 20 minutes per presentation for organizations; 15 minutes for private individuals.

YWCA TORONTO

The Chair (Mr. Shafiq Qaadri): To begin with, I would now invite our first presenters of the day, Ms. Dale and Ms. Cross of the YWCA Toronto. As you no doubt know, any time remaining within the 20 minutes will be distributed evenly—and vigorously enforced—amongst the three parties. I invite you to begin now.

Ms. Pamela Cross: Good afternoon. My name is Pamela Cross. I'm a lawyer, and I've been working in the field of violence against women for many years as an activist, an educator and a law reform advocate. My years as a family law lawyer representing abused women have given me extensive opportunities to observe and analyze the frustrations many of them experience in the family court system and the ongoing safety issues that confront them.

Ms. Amanda Dale: I'm Amanda Dale. I'm the director of advocacy and communications with YWCA Toronto. I've been working to end violence against women since 1983, first of all in shelters, later doing research, and now most focused on systemic advocacy. My organization has 38 member associations across Canada; we have 14 in Ontario. We have more than 25 million members in our association worldwide. We are the largest single provider of shelter and housing for women in Canada.

Across all of our programs, the most common factor limiting women's engagement with their community, their family, their career or their potential is the reality of violence in their home and the control over their decision-making and autonomy in dispute, custody or immigration matters.

We're here today to speak strongly in support of Bill 133; in particular those provisions dealing with restraining orders.

We would like to say at the outset that we approach our work as women's advocates in a very pragmatic and non-partisan way. We're interested in supporting legislation that is good for women and their children, regardless of the government in office at the time it is developed. Indeed, we have been part of consultations about restraining orders in particular through more than one government in this province—probably three, in fact. We urge the committee to set aside partisan point-scoring to hear what we have to say from our considerable experience in this area.

Ms. Pamela Cross: Abused women and their children in Ontario have long been frustrated by the restraining order legislation currently provided under family law. Restraining orders often contain conditions that are difficult to understand, the police are often reluctant to enforce the orders, and the consequences to an abuser who has breached a restraining order are generally minimal. As a result, women and their children do not get the safety they deserve, and abusers are not held

accountable for their actions. YWCA Canada research recently conducted shows that women who enter a shelter are at a 75% risk rate for fatality on standardized tests. Clearly, this is a matter we wish to find the most precise solution to.

For this reason, we do not support any move to maintain the Domestic Violence Protection Act. While women's advocates initially supported this legislation, it quickly became apparent to us, as the regulations were being developed, that it was essentially unworkable and not helpful to women. We don't want to take too much time today to talk about an old piece of legislation, but since we know that some committee members may favour the DVPA over Bill 133, we would make the following comments.

It's certainly true that the DVPA offers the possibility of 24-hour-a-day access to emergency protection orders. This is emotionally attractive, especially if we consider the picture of a terrified woman being threatened by her abuser in the middle of the night. However, the facts just don't support this picture. First, according to the evidence of the domestic violence death review committee, women are not killed because they could not get a restraining order in the middle of the night or on the weekend; they're killed after they get a restraining order, because the police either do not enforce it or are not able to enforce it properly. Second, if a woman is in such a dangerous situation in the middle of the night, she should be calling the police to have criminal charges laid against her abuser. This will ensure that he is taken into custody and held there until a bail hearing, at which time, if he's released, he'll be subject to a criminal no-contact order.

Third, under the DVPA, a woman who wishes to obtain an emergency protection order outside regular court hours must contact the police to do so. If the situation is serious enough to warrant an emergency protection order, it will be serious enough to warrant criminal charges, and so the EPO is an unnecessary step.

Finally, with respect to the DVPA, many women in Ontario do not want their partners charged criminally. These women would never use the EPO provisions of the DVPA because of the requirement that they work through the police to get one.

1440

Ms. Amanda Dale: We acknowledge that many provinces and territories have legislation similar to the DVPA. However, in our conversations with women's advocates in those parts of the country, we hear many concerns and complaints about how poorly women are served by these laws. In fact, I have just returned from seven months in Nunavut working on the development of a women's shelter, where Pam actually joined me just last week. Both of us met with government lawyers, legal aid lawyers and women's advocates in Iqaluit to talk about Nunavut's Family Abuse Intervention Act.

The room was unanimous in its early skepticism that FAIA plays any visible role in keeping women and their children safe, and that, at times, it may actually confuse women, police and advocates with mutually contradictory areas of law and interfere, therefore, with women's ability to leave their abuser and move on to safety. In addition, real-life lack of enforcement is actually the gap that puts paid to the act's good intentions. We believe that Bill 133 addresses the core of women's vulnerability to murder and can do so with clarity and effectiveness.

Ms. Pamela Cross: Reports of the Domestic Violence Death Review Committee have identified key commonalities across homicides of women by their partners or former partners. In more than 90% of the cases reviewed, the homicide was preceded by violence and/or abuse in the relationship. Significant risk factors found across these homicides include recent or pending separation in more than 80% of cases and custody and access disputes. Further evidence of this ongoing abuse that women experience even after a relationship ends can be found in research conducted recently by Luke's Place Support and Resource Centre for Women and Children in Durham region. This research project gathered information from women, service providers, lawyers and judges about the experiences of abused women who must handle their Family Court proceeding without legal representation. That research established that more than 60% of unrepresented, abused women going through Family Court feared for their lives because of the ongoing violence and threats of their former partner.

Ms. Amanda Dale: Clearly, women and their children need the best protection we can offer them to make them able to feel safe enough to leave an abusive relationship, deal with their legal issues and move on to lead lives free from violence. As noted above, many women turn to family law restraining orders to assist them in staying safe. Bill 133 takes a number of significant steps to make the existing system of Family Court restraining orders work better than it does now.

Ms. Pamela Cross: We'd like to first address the issue of enforcement of restraining orders. Historically and presently, one of the biggest difficulties for a woman who has received a restraining order is effective enforcement. Right now, a breach of a restraining order is punishable under the Provincial Offences Act. Bill 133 would make a breach punishable under the Criminal Code. This is of critical importance to keeping women alive and safe.

With these changes to the legislation, 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 were to be found guilty, he would be liable to potentially more serious penalties than are available under the Provincial Offences Act.

This can improve women's safety in at least two ways: First, men may take the restraining order more seriously knowing that they face a possible criminal conviction if they breach; and second, when there is a breach—and there are often breaches—the man will have to appear for a criminal bail hearing and may be held in custody until trial. This can give his former partner the time she needs to create and implement an effective safety plan.

We know that some submissions have raised a concern that judges may be reluctant to issue restraining orders knowing that a breach could lead to a criminal charge. Our response to this concern is that this doesn't mean we change the legislation; it means we ensure appropriate education opportunities for judges.

Ms. Amanda Dale: We're also pleased to see that Bill 133 broadens the categories of people who can apply for a restraining order. 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 is far more realistic for what we see in our services, and this will ensure that women, no matter how short-lived their cohabitation agreement, can have access to the safety of a restraining order. Young women who are in the age group at highest risk of lethal violence in their relationships will particularly benefit from this amendment.

Ms. Pamela Cross: A third important area of reform is that of the evidence required. The language contained in Bill 133 maintains the Family Court "on a balance of probabilities" standard of proof while also making it clear that it is the woman's own reasonable grounds of fear for her safety that is to be established, not the opinion of any third party. Bill 133 also provides specific provisions to assist judges in determining the appropriate conditions to place in the restraining order.

We're also really interested in the bill's provisions that would limit inappropriate behaviour in situations where the woman does not necessarily fear for her safety. These provisions should be of great assistance to women whose partners use the Family Court proceedings as an opportunity to engage in ongoing legal bullying, a very, very real problem in a significant number of cases. In these cases, where the judge makes an order with respect to appropriate behaviour 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.

We mostly came here today to talk to you about the restraining order provisions of Bill 133, but we'd like to comment extremely briefly on some of the other provisions. We strongly support the requirement that evidence be provided in all custody cases, even where the parties are consenting to an order. We're also in agreement with the provision that further evidence, the results of a recent police and child protection records check and information about current or previous Family Court proceedings be required where the person seeking custody is a non-parent. Taken together, these changes will increase the safety of children, particularly in cases where non-parents are seeking custody.

Ms. Amanda Dale: We appreciate that government must weigh many competing interests in the development and passage of legislation. We also know that changing a law is only the first step and that both those who apply it and those who seek it must become familiar with those changes before they have any real impact. We can assure you that Bill 133 takes us a long way in the direction of increasing safety for women and children, thus making it easier for women to leave abusive relationships and move on with their children to lives free from violence.

Ms. Pamela Cross: We strongly urge you to recommend this bill, as written, for third reading, and we welcome any questions.

The Chair (Mr. Shafiq Qaadri): Thank you, Ms. Dale and Ms. Cross. We have about two and a half minutes per side, beginning with Mrs. Elliott.

Mrs. Christine Elliott: Thank you for your presentation. I certainly agree with you that the criminalization of the breach of restraining orders is an important step towards protecting women and children from domestic violence, but I would really appreciate your comments on why it's necessary, in order to bring these provisions forward, to repeal the Domestic Violence Protection Act. It seems to me that the provisions are not mutually exclusive, and I'd really like your further comments on that, if you don't mind, please.

Ms. Pamela Cross: They're not mutually exclusive, but it's our opinion that with the provisions proposed in Bill 133 that would amend both the Family Law Act and the Children's Law Reform Act, the DVPA is simply not necessary at this point. It becomes a piece of legislation that would create the possibility for a process for emergency protection orders that we think is unneeded, and we think everything else that's important in the DVPA appears in Bill 133.

Mrs. Christine Elliott: Thank you.

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

Mr. Peter Kormos: Thank you kindly. You're the first presenter here who has raised this concept of legal bullying, and I'm surprised that it hasn't been addressed before. Every town has at least one lawyer who purports to be a family law practitioner, who's the hired-gun approach, right? He'll motion an interim order and appeal and appeal and appeal the other party, usually the woman, because it's usually men who get these lawyers acting for them. How should that be controlled? Why isn't the law society taking a stronger interest, for instance, because much of that legal conduct on behalf of that practitioner is unethical conduct as well, isn't it, especially in a family law context?

1450

Ms. Pamela Cross: What's interesting in what you're saying is that if you look at the stats now in terms of who's in Family Court, who's represented and who's not, we've got some pretty staggering figures. About 65% of parties are unrepresented. The most serious legal bullying is taking place and being perpetrated by people who are unrepresented. In the amount of time we have this afternoon, I'm not going to get into a conversation with you about what the law society should be doing to better govern lawyers. It's an interesting conversation.

Mr. Peter Kormos: How else are we going to address legal bullying?

Ms. Pamela Cross: Most of it's being done by unrepresented litigants; it's not lawyers who are doing most of it.

Mr. Peter Kormos: No? What about the lawyers who do do it?

Ms. Pamela Cross: Well, something should be done. That's a conversation for another bill, I think.

You're not going to entice me into a conversation about that. We only have a couple of minutes here.

Mr. Peter Kormos: You raised the issue, and I thought we've got to address it, because I found it interesting—

Ms. Pamela Cross: The most serious legal bullies are abusive men who are in Family Court unrepresented. We need to shut them down through proper legislation that limits their ability to harass.

Ms. Amanda Dale: Like what's being proposed.

Ms. Pamela Cross: That's right.

The Chair (Mr. Shafiq Qaadri): I take that grimace as the end of your remarks, Mr. Kormos?

Mr. Peter Kormos: I wanted to know about legal bullying, and I've heard these ladies' responses.

The Chair (Mr. Shafiq Qaadri): No, I appreciate that. Have you completed your questioning?

Interjection.

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

Mr. Khalil Ramal: Thank you very much for your presentation. It's unique because, as Mr. Kormos and Mrs. Elliott mentioned, you focused on restraining orders.

Many people spoke before you. Probably you read all of the presentations. Some of them who came and presented to us said that this bill is not strong enough, it's flawed, even though they support it to a certain degree. Then you came and strongly supported the bill, but you think that broadening the scope of restraining orders will protect women. Why is that, in your opinion? Just to focus on one element among many different elements being proposed in this bill, you thought restraining orders were the best one to protect the family.

Ms. Amanda Dale: The evidence shows us that's most often where the breach occurs and where the most devastating crimes occur. That's most often when murder occurs. The evidence that we've presented to you today from the domestic violence review committees and the evidence that we've gathered from doing post-shelter analyses of what happens to women across Canada shows that in terms of the criminal justice side of the social system, that's where the biggest breach is.

Mr. Khalil Ramal: And you think if this bill passes as it is, it will serve the purpose and create a safety mechanism for women and children in the province of Ontario?

Ms. Amanda Dale: Well, we're confident that this is a strong step forward. If it doesn't work, we'll be back here.

Mr. Khalil Ramal: Thank you very much.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Ramal, and thank you, Ms. Cross and Ms. Dale, for your deputation and presence on behalf of the YWCA Toronto.

HOSPITALS OF ONTARIO PENSION PLAN

The Chair (Mr. Shafiq Qaadri): I'll now move directly to our next presenters, Mr. Hills and Mr. Miller of the hospitals of Ontario pension plan. Gentlemen, I invite you to be seated. As you've seen, there are 20 minutes in which to make your combined presentation. Your written deputation is being distributed as we speak. I invite you to begin now.

Mr. David Miller: Good afternoon. My name is David Miller, and I'm senior vice-president and general counsel with the hospitals of Ontario pension plan, or HOOPP. Here with me is my colleague Graham Hills, HOOPP's director of policy development.

I know I've met some of the committee members before—recently at Queen's Park, in fact—and hopefully you'll recall or otherwise be aware that HOOPP is a large, multi-employer, defined benefit pension plan with almost 250,000 members and pensioners, over 330 participating Ontario health care sector employers and close to $30 billion in pension assets. I believe HOOPP is the fifth-largest pension plan by asset value in Canada.

HOOPP is pleased that the Ontario Legislature has provided to us and to other pension stakeholders and interested parties the opportunity to provide input on Bill 133. We believe the government of Ontario has taken an important step in bringing this bill forward, and we're grateful to the government, to the Law Commission of Ontario and to you as members of this standing committee for being so consultative in the various stages of law reform that have led us to being here today.

Through Mr. Koch, we've distributed to the members of the standing committee copies of HOOPP's written submission on Bill 133, along with copies of our 2008 submission to the Law Commission of Ontario entitled Division of Pensions Upon Marriage Breakdown.

Just like HOOPP's written submission on Bill 133, I want to limit my remarks today to those parts of the bill that relate to the splitting of pensions on marriage breakdowns and also to those parts which are of particular relevance to HOOPP, its beneficiaries and other stakeholders. Specifically, I want to focus on four of the bill's features: first, the immediate settlement method; second, the method used for determining the value of a member's benefit for family law purposes; third, the application process and use of prescribed forms; and fourth, the discharge of plan administrators.

Turning to the first of these features, the immediate settlement method, HOOPP supports the government's decision to table a bill that endorses and adopts an immediate settlement method or, as it's called, an ISM. HOOPP holds the view that ISM is the most balanced, fairest and most efficient method of dividing pension entitlements in family law cases. The ISM method is also

easiest for the parties to understand and will undoubtedly simplify the administration of DB, or defined benefit, plans. Under ISM the non-member spouse would have immediate access to his or her share of the pension benefit. We believe this change is long overdue. Under the current system, a non-member spouse is often forced to wait years, sometimes even decades, before receiving their share of the benefit. This method of settlement is also fair to the entire pension plan membership because it effectively addresses the concerns of their plan administrator, who currently bears the responsibility, the costs and the risks associated with interpreting domestic contracts and court orders and administering the divided pension for the benefit of non-member spouses.

Turning to the second feature, the valuation method, HOOPP strongly prefers the termination method of valuing accrued benefits in order to complete pension divisions in family law cases. The termination method, of course, means the pension benefit and the non-member spouse's share are valued as if the member had terminated employment on the date of separation. Under this method, the non-member spouse would receive a portion of the commuted value or the lump sum value accrued by the member during the period of marriage. This amount could then be transferred to a locked-in vehicle to provide the former spouse with his or her own personal retirement income. In turn, the member's pension would be actuarially reduced in order to fund the value of the non-member spouse's share that is paid out.

HOOPP submits that a non-member spouse's relationship to the plan, and therefore his or her entitlements which result from family law proceedings, most closely resembles the position of a member who terminates from the plan. Non-member spouses are not plan members nor, in most cases, do they remain plan beneficiaries. Accordingly, HOOPP believes it is fairest that they be treated as closely as possible as if they were members terminating from the plan.

We believe that the value of pension benefits for family law purposes under the bill should be determined by employing a simple variation of the pension plan's commuted value formula used to calculate benefits payable to terminating members. The current method of calculating the commuted value of a deferred pension is prescribed by regulations currently under the Ontario Pension Benefits Act, and this prescribed method had been developed by the Canadian Institute of Actuaries. It's pretty straightforward, as straightforward as it can be for use. HOOPP strongly believes that benefit calculations that are prescribed for family law cases should also be performed by plan administrators. We're more than capable of doing this. Plan administrators are already responsible for performing various calculations for retirees, terminating members, surviving spouses and beneficiaries.

There's an argument that the termination value approach is unfair to the non-member spouse since the CV, or commuted value, calculation is the same amount the member would receive if membership had been terminated at the valuation date. We however think the termination method of valuation is fairest to all concerned. HOOPP believes the former spouse shouldn't benefit from post-separation increases in the value of the pension that are attributable to the member's post-separation salary increases which the member himself or herself would not be entitled to realize in the event their membership in the plan terminates.

1500

HOOPP believes that a hybrid termination or retirement valuation method could lead to inequality in favour of non-member spouses, as they could receive benefits from the plan using a calculation that would consider future benefit accruals that the member himself or herself would not be entitled to receive if he or she terminates plan membership.

Turning to the third feature, that of the application process and use of prescribed forms: HOOPP supports the creation and prescription of forms that facilitate, clarify and simplify pension divisions and lump-sum transfers to non-member spouses. The result should be an easing of the administrative burden and a reduction in the associated costs. Such forms would eliminate the need for administrators to interpret court orders and domestic contracts, which are, in many cases, not as clearly or consistently drafted as they could be.

The final point, the discharge of pension plan administrators: On this subject of discharge, we'd like to confirm HOOPP's support of the inclusion of the discharge clauses in the bill. An opportunity for a plan administrator to receive a full statutory discharge on the proper completion of a pension division is hugely important to plan administrators and, indirectly, to the plan members as a collective.

In closing, HOOPP supports the pension-related changes that are set out in Bill 133. Once again, we'd like to thank the Ontario government for tabling the bill and this committee for giving us this opportunity to speak to some of its features. I hope my remarks have been helpful. Once the bill is proclaimed, and we truly hope it will be, HOOPP will be pleased to participate in any further consultations to assist with the design of regulations and prescribed forms in particular.

That concludes our presentation, and we'd be happy to answer any questions you may have.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Miller. About three minutes or so per side, beginning with Mr. Kormos.

Mr. Peter Kormos: This has been one of the difficult parts of the bill for most of us because it's so complex and so far removed from most of our areas of—never mind expertise—just plain experience. Why is it that the actuaries are lined up on one side—because they disagree with you; you understand that. We've had some very smart, bright young people in here: Jamie Jocsak, David Wolgelerenter. We had Peter Shena of the Ontario Pension Board basically taking your position, applauding the formula and the methodology approved in this bill. The actuaries say that we can't use a one-size-fits-all

approach. Why is there this division and why is the line drawn the way it is?

Mr. David Miller: You're asking us to speculate on—

Mr. Peter Kormos: No; there's obviously something going on here, right? There's something going on here. The actuaries are on one side; the pension plan administrators are on another. What's going on? You're all intelligent people.

Mr. David Miller: The bill calls for a fairly fundamental change in the way pension benefits are split under family law cases. We might observe that actuaries make their living from the current calculation method.

Mr. Peter Kormos: And you're going to be allowed to charge for doing what you do under the act, right?

Mr. David Miller: We're not driven by profit; we're simply cost-recovery. And we do these calculations every day. They can be complicated but they're not significantly so that we can't do those—

Mr. Peter Kormos: So the actuaries—it's self-interest that's motivating them?

Mr. David Miller: I'm speculating.

Mr. Peter Kormos: You've heard their arguments. You know their arguments. Are they wrong?

Mr. David Miller: What we're advocating is a better balance in terms of the interests of the plan membership as a whole, which we don't agree should be subsidizing individual members of marriage breakdowns.

Mr. Peter Kormos: But are the actuaries wrong? You've got to help us.

Mr. David Miller: In our opinion, they are on this issue. Yes.

Mr. Peter Kormos: Fair enough.

The Chair (Mr. Shafiq Qaadri): To the government side: Mr. Zimmer. The floor is yours, Mr. Zimmer.

Mr. David Zimmer: No, you've answered the questions. Thank you very much for your presentation.

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

Mr. Khalil Ramal: Thank you very much for your presentation. I listened to you carefully. I know you think this bill will serve its purpose. As you know, when we introduced this bill, it was the aim and goal from the introduction of the bill to make it simple and easy for people, especially when the split is not going to cost them a lot of money etc., to make it spell out exactly in detail, black and white; there's no difference. So do you think this bill, if this passes as it is, will serve your goal, as a person who's in charge of some pensions and you want to deal with them in a simplified way?

Mr. David Miller: Absolutely, we do. Yes.

Mr. Khalil Ramal: Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you for the very crisp line of questioning.

Ms. Elliott.

Mrs. Christine Elliott: Thank you for your presentation. I have two quick questions, one on valuation and one on settlement. With respect to valuation, I see on page 3 of your presentation that you note that, "A valuation completed by an independent actuary could lead to inequities among members, their non-member spouses and the general membership." Could you just elaborate along those lines and tell me why you think that's so?

Mr. David Miller: I think the theory that actuaries are proposing is that a defined benefit plan doesn't provide former spouses with a sufficient value for the benefit, because if both the former spouse and the member remain in the plan to retirement, the value that will be paid out at retirement will be higher. It's a question of how you value that for family law valuation purposes and the timing of that. I made the point earlier that it's the perception that the plan membership as a whole is subsidizing, to a large extent, the marriage breakdowns of individual plan members by valuing, at a very high level, the portion of the pension benefit that would go to the non-member spouse.

Mrs. Christine Elliott: I guess that sort of leads into my next question on the settlement aspect of it and the idea the actuaries have presented that there should be two values used: one used as the transfer value and the other used as the equalization value for net family property purposes. They are suggesting that if you don't do it that way, it leads to a huge inequity for the non-member spouse. So I guess that there's certainly a discrepancy. The way that you're suggesting suggests that they would be supplemented by the plan; the actuaries are suggesting that they would be treated inequitably if you used anything other than their valuation. Do you see any way for us to resolve that?

Mr. David Miller: There's an assumption there that the member is going to remain in the plan till retirement. In a lot of cases, that happens. There's also the argument that future salary increases for the member, after the date of separation, basically accrue to the benefit of the non-member spouse. I'm not sure, from a family law perspective, whether that's equitable. In some cases, that is subsidized by the entire plan membership, as is administering the former spouse's or non-member spouse's remaining benefit, to the extent that it remains in the plan, and the fact that a plan administrator has to administer that and bear risks associated with that. All of that has to be paid for by the entire collective, the entire membership. Those are the concerns that plan administrators have.

Mrs. Christine Elliott: Thank you.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Miller and Mr. Hills, for your deputation on behalf of the Hospitals of Ontario Pension Plan.

ONTARIO TEACHERS' PENSION PLAN

The Chair (Mr. Shafiq Qaadri): We'll now move to our next presenters, Ms. Slivinskas and Mr. Harrison, on behalf of the Ontario Teachers' Pension Plan. We welcome you and invite you to please come forward.

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

Ms. Anne Slivinskas: Good afternoon. My name is Anne Slivinskas and I am the senior legal counsel for

member services at the Ontario Teachers' Pension Plan board. My colleague Ken Harrison is the director of actuarial, tax and accounts receivable at the Ontario Teachers' Pension Plan board.

We appreciate the opportunity to make submissions on the proposed reforms to the valuation and division of pensions on marriage breakdown. Teachers' is one of Canada's largest defined benefit pension plans. Its members include over 353,000 elementary, secondary and retired teachers, as well as inactive members. With this large membership base and an annual pension payroll of more than $4 billion, Teachers' has significant experience in the division of pensions.

We have seen first-hand the casualties of the current system, a system which has been widely acknowledged as complex, confusing and unnecessarily complicated to administer. We applaud the Ontario government for taking steps to clarify this unsatisfactory system and in general support the reforms proposed by Bill 133. My submission will focus on the following three points that impact plan administrators: first, the introduction of the immediate settlement method of dividing pensions; second, the expanded role of the plan administrator; and third, the transition provisions. Ken Harrison will then speak to the valuation method.

1510

Moving to my first point, we welcome the introduction of the immediate settlement method for plan members who separate before retirement, because this option represents a fair and simple solution to the problem of dividing pensions. Spouses of plan members will be able to apply to the administrator for an immediate transfer of a lump sum representing no more than 50% of the net family law value of the member's pension. This is very different from the current pension division rules, which require spouses to defer receipt of their portion of the benefit until a pension payment is triggered from the plan by the member's termination or retirement, or their death.

Under Bill 133, spouses will no longer be held hostage by the member's choice; lawyers will no longer have to draft complicated pension division provisions that address each of these contingencies; and plan administrators will not have to administer these provisions. The immediate settlement method also treats defined benefit pension property in a manner that's consistent with the way that other retirement savings, including RRSPs and defined contribution pension plan benefits, are divided on marriage breakdown. This makes sense from a policy perspective.

Moving to my second point, Teachers' does not oppose the new responsibilities in calculating the net family law value that plan administrators will be assuming. Once the valuation method and the assumptions are set out in the regulations, pension plan administrators would be able to perform these valuations efficiently. We have been calculating the amount of pension that accrues during the spousal period using the termination method, as prescribed by section 56 of the regulations to the Pension Benefits Act, since that provision was introduced in 1987, and we're capable of calculating the net family law value in accordance with the regulations that will accompany Bill 133.

It's important to note that if this obligation is set out in the Pension Benefits Act, compliance with it by plan administrators will be subject to review by the Financial Services Commission of Ontario, which regulates all registered pension plans in Ontario. If an error in the calculation of net family law value is made, it will be subject to review by this regulator.

With respect to the actual division of the pension after it has been valued and the role of the plan administrator, I cannot stress enough the importance of clear, prescribed forms. Under the current system, one of the greatest burdens for plan administrators is the need to interpret poorly drafted agreements and court orders. This burden could be alleviated if the parties who wish to elect to divide the pension at source complete clear, prescribed forms that solicit all the required information and attach those forms to their agreements or to the court orders. This would also assist the very many plan members and spouses who draft their own separation agreements without the assistance of actuaries and lawyers.

To add further clarity, Teachers' recommends that the wording of the fourth application criterion in proposed subsection 67.3(1) and 67.4(1) of the Pension Benefits Act be amended by replacing the term "formula for calculating it" with the word "proportion." We believe it would be simpler for plan members and their lawyers to state a proportion of the pension to be assigned instead of trying on their own to draft a formula.

Third, the transition provisions: Subsection 67.5(1) of the Pension Benefits Act states that pension division provisions in any orders, awards or domestic contracts filed with the administrator of a pension plan on or after the effective date are limited to two new options: the lump sum transfer for separations that occur before retirement and the division of pension payments for separations after retirement. In other words, this provision prohibits the administration of existing "if and when" divisions that have not yet been delivered to the plan administrator. It doesn't matter if these agreements have been executed; all that matters, under Bill 133, is the filing. We're concerned that the administration of this transition provision will create uncertainty for separating spouses and difficulties for plan administrators.

We note that this will compel everyone with existing separation agreements not yet filed with the administrator to renegotiate and rewrite those agreements. This is unfair to plan members and spouses who have, in good faith, already settled their obligations.

As a result, Teachers' recommends that subsection 67.5(1) be amended by changing the key transition date for family arbitration awards and domestic contracts from the date that those documents are filed with the administrator to the date that those documents were executed by the parties. We note that the filing date doesn't have special significance under the Pension Benefits Act, and

under the current regime, even parties who file agreements and orders with the administrator may wait many years for the pension event that will trigger the assignment of the spouse's share from the plan.

Teachers' also recommends that any amendment to the transition provisions preserve the right of parties to amend their old agreements in order to avail themselves of the new settlement options offered by Bill 133. It would be a shame not to allow consenting couples an opportunity to divide their pensions under the new and improved system.

I will not be making oral submissions on issues of tax, the depletion of pension property before transfer and the technicalities of dividing pension payments and pay, all of which are addressed in Teachers' written submissions. I would be happy to answer any questions that the standing committee may have on those points, following Ken Harrison's submission on the appropriate method for calculating the net family law value.

Mr. Ken Harrison: We note that Bill 133 is silent on the actual method of valuation. We strongly believe that the actual method of valuation should be specified, and as we have stated in other public commentary on this topic, we strongly prefer the termination method of valuation for pension rights for purposes of computing the net family law value.

A variation of the termination method has been successfully adopted in other provinces, most notably Quebec. The Pension Benefits Act requires that commuted values payable on termination be calculated with the Canadian Institute of Actuaries' standard of practice for determining pension commuted values. If the methodology and assumptions are clearly prescribed, the results are the same regardless of who does the calculation, since there is no actuarial judgment involved. We believe this kind of certainty is a desirable goal. Since plans already have the systems in place to do this type of calculation, compliance will be easy and more cost-effective than if a different calculation basis is prescribed.

A valuation method that provides a spouse with a value higher than the termination value would require assumptions about future events such as projected date of retirement. Any discrepancy between these assumptions and the actual experience may cause an unfair result. For example, as shown on page 3 of our submission, a hybrid valuation may assume that the separated plan member will work continuously until the earliest unreduced date and therefore value them, at family law value, at $600,000, which is higher than the commuted value of $400,000. Under this scenario, the spouse would apply for a transfer of 50% of the net family law value, or $300,000, leaving $100,000 in the plan for the member. Should the plan member terminate employment or die before the assumed date used in the net family law valuation, he or she or their estate will be disadvantaged. In the example above, if the plan member terminates shortly after separation, he or she would only receive $100,000, while the spouse would receive $300,000. If a termination method of valuation is used, the spouse would receive 50% of the termination value—in this case, $200,000—and the plan member would also receive $200,000.

We use the commuted value basis when a member terminates membership and elects to transfer the value of the deferred pension or to pay a member's beneficiary estate the value of the member's accrued pension benefit in the event of the member's death before retirement. If the commuted value basis produces an appropriate value to be paid the member who terminates membership or dies, why would it not be an appropriate value for payment of the non-member spouse's interest?

At page 43 of the final report on the division of pensions on marriage breakdown, the Law Commission of Ontario stated: "On balance, the LCO believes that" the immediate settlement method "with a transfer based on commuted value is the most appropriate solution. We also note that the commuted value does not always produce a lower value than the hybrid method...." Further, at footnote 227, found at page 68 of the same report, the Law Commission of Ontario notes: "With one exception, pension division regimes in Canada that have adopted the ISM approach use commuted value."

1520

Teachers' believes it is important to ensure that any pension-division regime enacted is cost-neutral to the plan; that is, the total of the payments made to the spouse and the plan member, in case of a relationship breakdown, should not exceed the amount the plan member is entitled to under the terms of the plan in cases of no relationship breakdown. In the hypothetical example above, the spouse received $300,000 and the plan member terminated before retirement and only received $100,000. Though some may argue the plan should top up the plan member, such a topping up would not be revenue-neutral to the plan and would bring the total of the spouse and the member's payments over the plan member's entitlement and would constitute an impermissible distribution under income tax rules. Likewise, the pension-division regime enacted should ensure that the plan does not experience gains arising from the division of pensions.

In conclusion, Teachers' is a strong advocate for a fair and simple approach to dividing pensions on marriage breakdown. That is why we welcome the introduction of the immediate settlement method for plan members who separate before retirement, we accept the new responsibilities the plan administrators will be assuming in calculating it at family law value, we urge the Legislature to amend the transition provisions, and we recommend the adoption of the termination method for the valuation of pensions.

We appreciate the opportunity to comment on Bill 133 and would be happy to answer any questions.

The Chair (Mr. Shafiq Qaadri): We have about two minutes per side, beginning with the government. Mr. Zimmer.

Mr. David Zimmer: Assuming that we go with the hybrid method of calculation, do you feel pension administrators are going to be comfortable and able to work through that prescribed method of valuation?

Mr. Ken Harrison: Yes, provided it is prescribed in the same level of detail as the commuted value basis is prescribed.

Mr. David Zimmer: So, what you need to carry out your duties, if it's going to be the hybrid method—you need a clearly prescribed method, and then you'll apply the necessary analysis to that prescribed method.

Mr. Ken Harrison: Yes.

Mr. David Zimmer: And you have no problem with that?

Mr. Ken Harrison: No.

The Chair (Mr. Shafiq Qaadri): Mrs. Elliott.

Mrs. Christine Elliott: Thank you for your presentation. You've indicated that any valuation method that's employed should not separate the ancillary benefits from the base value. I take it that you disagree with the actuaries with respect to their prescribed method. Is that so? It basically provides that the base amount be used as the transfer amount and that both of them be considered for the net family property calculation.

Mr. Ken Harrison: I'm not familiar with the actuaries' position on this.

Ms. Anne Slivinskas: Just to clarify, are you looking at a point made on page 4 of our submission?

Mrs. Christine Elliott: Yes, just before "Tax Issues Raised."

Ms. Anne Slivinskas: That statement is, "While Teachers' agrees with the valuation approach set out in subsection 67.2(2) ... we submit that any prescribed valuation method should not require that the value of ancillary benefits be itemized separately...."

What we were saying was, if we are required to provide the number, we can provide the number, but we would prefer that it not be set out separately. So it wouldn't be a statement that has on one column "base amount"; on the other column "ancillary amount." It would be best if it was a combined number.

Mrs. Christine Elliott: The actuaries, though, have indicated to us that the ancillary amount is something that you don't really know until you actually realize it. For example, when a person actually stops working, you don't know what benefits they would be entitled to, so any kind of calculation that takes place before that time is really just going to be an educated guess about what the amount should be and therefore leads to unfairness. Could you indicate how you could address that?

Ms. Anne Slivinskas: We hope that the regulations will provide an answer to the question of what date to assume retirement at. That is where a lot of the educated guesswork comes from. If the regulations provide an assumed retirement date and everybody calculates the hybrid retirement method valuation according to that regulation, there wouldn't be ambiguity.

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

Mr. Peter Kormos: Once again, there's a clear pattern developing here. I'm going to wait till the actuaries get up there and ask them why they think you don't agree with them, because I've already asked your colleagues from HOOPP the corollary question. Thank you kindly.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Harrison and Ms. Slivinskas, for your deputation and written submission on behalf of the Ontario Teachers' Pension Plan.

LUKE'S PLACE

The Chair (Mr. Shafiq Qaadri): I advise members of the committee that we have one cancellation. Hopefully our next presenter, Ms. Barkwell, executive director of Luke's Place, is here.

Interjection.

The Chair (Mr. Shafiq Qaadri): Great. Please come forward. As you have seen the protocol, you have 20 minutes. I invite you to begin now.

Ms. Carol Barkwell: Good afternoon. I'm Carol Barkwell, executive director of Luke's Place. I have worked with adult and teen women abuse survivors and their children for more than 22 years in both shelter- and community-based service settings as a counsellor and advocate. My areas of interest and experience are program development, community collaboration, research and systemic response. I have participated in numerous violence-against-women stakeholder consultations on policy and law reform. My personal approach, and the approach of Luke's Place, to the work of advocating for and serving women and children is non-partisan.

Luke's Place supports abused women and their children throughout the family law process and provides them and the Durham community with specialized resources and information about family law and woman abuse. A charitable organization incorporated in December 2000, the organization is a unique resource centre that focuses exclusively on the legal issues surrounding divorce, separation and child custody for abused women and their children. Luke's Place was created as a result of extensive research and community consultation done in Durham region on the needs of abused women and their children during the family law process.

I'm here to speak in favour of Bill 133 and, in particular, to the amendments that address restraining orders and automatic reporting mechanisms that could reduce court appearances. I would like to take just a few moments to set the context within which I, on behalf of Luke's Place, offer this support.

Post-separation violence is a reality. Recent separation is a common factor in the domestic homicides of women by their male partners. It is present in more than 85% of the cases reviewed by the Ontario Domestic Violence Death Review Committee of the coroner. In their 2004 report, they stated, "In our review of cases in the past two years, separation and a prior history of domestic violence are significant risk factors for women and children facing death at the hands of the intimate partner."

"There is no family law case more complicated than a case in which the safety issues are present and the abuser uses the legal system to continue to harm and harass. These cases are both challenging and time-consuming."

Further, in 2005, the DVDRC states, "In identifying risk factors, two of the three top risk factors were 'an actual or pending separation' and 'a prior history of domestic violence.'"

Research conducted by Luke's Place, A Needs Assessment and Gap Analysis for Abused Women Unrepresented in the Family Law System, 2007, supports the annual findings of the DVDRC that violence and the threat of violence does not end for women upon separation: "Women who leave abusive men must continue to deal with their harassment, their intimidation and their violence in very real ways. Levels of physical violence, including the risk of lethality, often increase in the first six months after separation. More than half of the women who participated in our study reported that the abuse continued and even increased post-separation, and over 60% told us they were in fear for their lives while they were going through Family Court."

Family law proceedings are often initiated in this time frame, particularly by women seeking safety and security for themselves and their children: "Not surprisingly, the vast majority of women … listed custody and access as the number one issue they were dealing with in Family Court, followed by child support and restraining orders.

"Joint custody was the most common custody outcome … for the women in the study. Every one of these women reported ongoing harassment by the abuser related to child-related decisions and access arrangements."

1530

For many reasons, the criminal court is not an option or a choice for survivors of domestic violence. It is in the Family Court where most women seek restraining orders. We support Bill 133, which offers restraining order amendments that provide significant improvements in enforcement and accountability, as well as expanding access to them by greater categories of people in need. Additionally, we support the repeal of Ontario's Domestic Violence Protection Act, passed in 2000 and never implemented due in part to the number of concerns raised by many system stakeholders. The safety of abused women and their children can be better served through simpler approaches that target the area of greatest need for reform.

As advocates for abused women across the province have known for years, family law restraining orders are not an effective mechanism to keep women safe. Currently, orders are problematic for enforcement, particularly by police, and timely response is virtually nonexistent. Consequences for those who violate them are often minimal. Currently, a breach of a Family Court restraining order is punishable under the Provincial Offences Act. Bill 133 breaches would be punishable through Criminal Code section 127, which states, "Every one who, without lawful excuse, disobeys a lawful order made by a court of justice … is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

"(a) an indictable offence and liable to imprisonment for a term not exceeding two years…."

This change would provide for a person in breach of a restraining order to be arrested by police and charged with a criminal offence. With the potential of a holding for a criminal bail hearing and pre-trial custody, a woman can have the opportunity to become safe. As the case proceeds in the criminal court, more serious penalties and restrictions could be levied than are currently available, upon a finding of guilt. This process and outcome could serve as a potential deterrent to abusers.

Also of benefit is the maintenance of the standard of proof required. Under the Family Court "on a balance of probabilities," it is the applicant's "reasonable grounds to fear for her own safety or for the safety of any child … in her lawful custody" that is established. This can prevent potential delays caused by the gathering of third-party evidence in obtaining this protection.

The expansion of categories of people who can access restraining orders to include people who have lived together for any period of time increases accessibility of this protection, particularly to young women, who are statistically most at risk of being seriously injured or killed. Bill 133 also offers specific provisions that judges can include a restraining order, while providing a starting place that also allows judges to make any other provision that the court considers appropriate.

Further, provisions of Bill 133 could assist in addressing some concerns regarding use of Family Court proceedings by abusers to continue their harassment and control through legal bullying; specifically, those provisions that would limit inappropriate behaviour in situations where a woman may not fear for her physical safety: "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."

The provision in Bill 133 relating to child support that will make it mandatory for payers to provide updated financial information on an annual basis, and proposed amendments to pension information disclosure in the division of pension assets, offer the potential of a far less onerous process. This can assist women whose former partners are abusive to reduce the need for initiating more ongoing contact through the court process or, in the alternative, of not receiving the support increases or pension benefits to which they are entitled by staying out of the court.

Luke's Place strongly supports Bill 133 amendments requiring that evidence, including the results of a recent police check and child protection records check, and information about any current or previous Family Court proceedings, be provided where the person seeking custody is a non-parent. Further, we support that evidence is required in all custody cases, even where the parties are consenting to an order.

In summation, Luke's Place believes that Bill 133 offers important first steps in improving the emotional and physical safety of women abuse survivors and their children. On behalf of Luke's Place, I urge you to recommend this bill, as written, for third reading.

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

Mrs. Christine Elliott: I'm certainly aware, as a member from Durham region, of the great work you do in your agency, and I thank you for being here today and for your presentation.

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

Mr. Peter Kormos: Thank you as well. It's remarkable: Some of the language in your submission is identical to the language in the YWCA submission.

Ms. Carol Barkwell: Well, we are colleagues, and we do agree on many points.

Mr. Peter Kormos: As I say, it's just interesting.

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

Mr. Rick Johnson: Thank you for your presentation. I would be another Durham region representative, on the north side. You talk about Bill 133 offering important first steps. Could you expand on possible other steps?

Ms. Carol Barkwell: Well, probably not in this forum, but I certainly think that other steps we could go to from here would be some reform around court process and the legal bullying issues that arise often for women. I think it's important first steps, and that remains to be seen on the rollout—

The Chair (Mr. Shafiq Qaadri): Thanks to you, Ms. Barkwell, for your presence, deputation and written submission. I now move ahead to our next presenters, Mr. Dart, Ms. Slivinskas and Ms. Napier on behalf of the Ontario Bar Association.

Mr. Peter Kormos: On a point of order, Mr. Chair: We've received a written submission, this one on the 14-inch paper, that's offensive, vicious, mean and hateful. It appears to be written by a nutter. Do we have to accept it as part of the record?

Interjection.

Mr. Peter Kormos: A nutter.

The Chair (Mr. Shafiq Qaadri): Mr. Kormos, the question is very well taken. It's actually the will of the committee if we want to proceed to—

Mr. Peter Kormos: I seek unanimous consent not to receive and table this particular submission.

The Chair (Mr. Shafiq Qaadri): Mr. Kormos is seeking unanimous consent from the committee to un-accept, de-accept—agreed. Point well taken.

Now, do we have our next presenters, Mr. Dart, Ms. Slivinskas, Ms. Napier?

GOLDEN ACTUARIAL SERVICES

The Chair (Mr. Shafiq Qaadri): Do we have our subsequent presenter, Mr. Martin of Golden Actuarial Services? Your time is now, sir. Come forward. Thank you, Mr. Martin, for agreeing to go ahead earlier.

Interjection.

The Chair (Mr. Shafiq Qaadri): Just leave it with the clerk. We'll have it distributed. Please begin.

Mr. Peter Martin: First, thank you for inviting me to speak to the committee, and I note the order paper; I am an actuary and not a lawyer.

First of all, let me say that I applaud the settlement aspects of this bill, which were long overdue, and I have no problem with provisions of the bill dealing with the division of pensions already in pay. The issues concern, primarily, valuation of pensions that are not yet in pay, and there are two sub-parts of that: one is the inclusion of contingent benefits, and the second is that the current form of Bill 133 effectively denies recourse where the facts of the case are at variance with the net family law value.

I'm going to change my presentation slightly because of the previous remarks and start by pointing out two errors in previous presentations. The presentation made by HOOPP stated that if division occurred and included contingent benefits, this indeed might have to be subsidized by members of the plan as a whole. That is not correct. If, indeed, contingent benefits were included in the amount that had to be transferred out of a plan for the benefit of a spouse, then it would be the plan member who's married to the spouse who might have to subsidize that, not the members of the plan as a whole. I'd also point out that I think the position of actuaries is that the clients should not be required to transfer out any more than the value excluding these contingent benefits; commuted value is very closely related. So that was the first mistake I'd like to correct.

Then, in the presentation by Mr. Harrison, he quoted from page 43 of the law commission's report that the law commission had endorsed commuted value as the most appropriate solution for valuation. That is a misquote. On page 39, you will see that a section C begins, "Settlement: Defined Benefit Pension Not Yet in Pay," under which the line that he quoted falls. The law commission in fact recommended, and this is from page 5 of this report, that the value of contingent benefits actually be included in the value of pensions for the purpose of division between the spouses but that the plans not be required to pay out any more than the value without those contingent benefits being in there. In effect, the value of these contingent benefits, in my estimation, runs to perhaps 10% to 40% of a typical value that you now see in a marriage breakdown in Ontario, and the difference in value would have to come from other assets of the plan member, in the recommendations I think most actuaries have been making.

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Now, with that out of the way, I wanted to talk a little bit about these contingent benefits. The contingent benefits, as I said, are usually about 10% to 40% of the total value of the pension for purposes of the division of value on marriage breakdown. If these are excluded from the net family law value, then, in effect, we would be cutting the proportion of the pension value that would be going to the spouse in comparison with what is the norm in Ontario today. This is part of a wider concern that I have for Bill 133, as proposed, in that the process set out

for valuation and settlement, I believe, will lead to a spouse achieving for retirement purposes not just 10% to 40% less than what they might be led to expect, but I would estimate perhaps a full 50% less than what they should actually be receiving for purposes of retirement.

What are contingent benefits? These are, in effect, subsidies given to people to allow them to retire earlier than the normal retirement age; this is typically 65, but in the private sector in Ontario, the average retirement age is about 62, and in the public sector, it's about 58. These are things that a plan member typically does take advantage of; these are not exceptions. These are substantial benefits. As I said, they are worth approximately 10% to 40% of what is currently the norm in Ontario.

I'll say that the concerns that I've had with the inclusion of the contingent benefits and with respect to recourse, if the facts of the case are different from the assumptions of the net family law value, are essentially the same concerns that you've already heard voiced by each of the actuarial and pension valuators that you've heard. In fact, I would endorse the submission of Dilkes, Jeffery and refer you to it, and it is probably the most complete exposition of those two concerns about valuation and related issues.

My recommendations on how to treat the two concerns about valuation are essentially the same as what you have heard before, and I would again direct you to the Dilkes, Jeffery submission. In effect, what I'm recommending, and what most actuaries are recommending, is to implement the law commission's recommendations. Bill 133, on the other hand, has tried to implement the simplest, least demanding and most streamlined system, as opposed to what the law commission strictly recommended.

Now, the thing is, we actuaries do not include these contingent benefits, which are so much a dispute between the plans and ourselves, because we like doing it; we do it because the courts have mandated that they have to be in there. You need to understand something of the history and the treatment of the contingent benefits in Ontario: in the Family Law Act of 1986, "property" was defined as "any interest, present or future, vested or contingent, In real or personal property." However, approximately three lines down from where that was set out, the Family Law Act of 1986 attempted to exclude contingent benefits in 4.(1)(c): "in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including.... " In effect, they tried to leave them out. But in the intervening years, the courts have overruled this part of the Family Law Act, and it is now very well accepted that these are part of the value of the pension for the purposes of the division of value on marriage breakdown.

The law commission on page 5 of its report recommended that:

"2. The Family Law Act be amended to indicate that unvested pension rights are also 'family property.'

"3. The Family Law Act be amended to provide for use of the hybrid method in valuing rights under a defined benefit plan."

The LCO's recommendation number 3 embodies the value of the contingent benefits described in recommendation 2.

I believe that if Bill 133 is not amended as suggested above, then in all likelihood, the contingent benefits will be excluded and the amount allocated to a spouse in a typical case will fall by perhaps 40%. The reason is that the various parties have different expectations of how the bill will work—as you have well heard—as much of its substance will be determined by the as-yet-unknown regulations.

The family law bar believes:

—the same single number as what Bill 133 will value their clients' pensions at—the net family law value—will be available from the plans as a lump sum for transfer. This is entirely sensible, given what Bill 133 says.

—that the single number will include the value of contingent benefits, again, because that's what the law commission's recommendation said.

The Attorney General's office, at an Ontario Bar Association pension information seminar on Wednesday, March 4, announced that they intended to implement inclusion of contingent benefits and the hybrid method in the regulations.

The majority of major public sector pension plans appear to expect that the net family law value, which they would have to calculate and one half of which is the maximum that they would have to transfer as lump sums to spouses, will exclude contingent benefits and be the so-called "commuted value," or something very close to it—also called "termination value"—which they currently provide to members who terminate and want a lump sum paid to them rather than the eventual receipt of a pension. Their belief is reasonable, as the LCO recommended that the commuted value be the maximum value that they be required to transfer to a spouse. However, they are confusing the value for settlement purposes—the transfer to the spouse—with the value of the overall pension for division of value between the two parties.

The expectation of several knowledgeable actuaries is that the plans will strongly object to inclusion of contingent benefits and the net family law value, because it would require them to set up a new calculation procedure using the hybrid method—I think the large plans could probably manage this; the small plans may have more trouble, but they may actually still be able to do it—but particularly because it would require them to pay out substantially more than half the so-called "commuted value"—perhaps up to 40% more—and this may erode their solvency position. I won't get into the actual aspects of that.

At this point, I would like to read from a submission by the County and District Law Presidents' Association—they did not decide to appear here—and their remarks on pension division provisions:

"After much consideration, the LCO recommended the hybrid termination-retirement method as providing the fairest balance as between the competing interests of the parties. CDLPA endorses the LCO's recommendation

and supports the use of the hybrid termination-retirement method within the valuation of such pensions for family law purposes.

"Secondly, CDLPA is concerned that the provision which provides that the pension administrator is to provide the 'preliminary value' of the pension member's interest potentially creates a conflict of interest as those values will be subsequently used to determine the lump sum to be transferred to the non-member spouse. Pension administrators may be pressured within their role as administrator to reduce the amount of pension paid out pursuant to these provisions, and may be tempted to use conservative assumptions when conducting the calculations."

And a following point, which is not directly related to this, but which I think is worthy of consideration, "Thirdly, CDLPA is concerned that the mechanism for the immediate transfer of a lump sum out of a pension plan is effective regardless of whether either or both of the parties have declared bankruptcy," is well worth noting.

In other provinces where a similar approach to division has been instituted, the final result has involved eliminating the contingent benefits from what the spouses receive and using commuted values alone. I suspect this happened partly because the magnitude of the overall 10% to 40% that contingent benefits provide was not appreciated, as well as to facilitate administrative convenience.

1550

To ensure that this will not occur in Ontario, I recommend that regardless of any other actions that the standing committee may undertake regarding Bill 133, that in accord with the views of the CDLPA, the views of, let's say, all valuators of pensions in Ontario pensions, the views of the Law Commission of Ontario and the consistent decisions of the judiciary over the last 20 years, that Bill 133 be amended to include the LCO's recommendations and the stated intention of the Attorney General's office to include contingent pension benefits valued using the hybrid method in the net family law value for the purposes of valuation, not necessarily for purposes of settlement or transfer from the plans.

I'll comment briefly on this broader issue of the erosion of pension values transferred to spouses. You'll see this on page 6 of my original submission. If you don't put in the contingent benefits, spouses will lose 10% to 40%. But if you then transfer out their lump sums, there's a problem in that most spouses are not good investors and if you put their sums into funds, they will be paying relatively high percentages or, MERs, for getting investment advice.

Then there's also the issue of annuitization, which I don't want to get into. I think there will be lots of questions coming. But basically, it means that unless you take very good care of your money, you'll run out of money, whereas if you leave the money in the plan, then you'll never run out of money. So I would urge that the committee also consider adopting measures to promote and perhaps even compel the plans to offer the spouse the option of leaving their lump sum in the plan. But I am quite sympathetic to the plan's plight, and the plan must be consulted on this, because they have a new member who has to be looked after for many decades. I would hope that allowing the plans to charge a fee for this privilege—they're not currently allowed to charge a fee under Bill 133—might help to promote this.

I remark briefly on recourse, that where the facts are not in accord with the single retirement age assumptions, the Attorney General's office has announced that it will develop regulations to take into account contingent benefits embodying one age. This will ameliorate the retirement age issue, but I have thought about this, as have other pension valuators. Because of the complexity of pensions, even well-drafted regulations will not be able to cover a significant number of cases fact actually differs from the net family law value.

The key point I want to make is that if there's going to be recourse, then this requires multiple ages to appear on one of these reports, because without seeing alternatives and the relative magnitude of the impact, the parties will not understand the alternatives, and no recourse can be sought. There is actually an advantage in having only one value, because it makes it unnecessary for lawyers to become knowledgeable about pensions, as well as assisting the self-represented client. But there is a significant drawback in that practically, if you only see one value, you will not recognize that other possibilities exist, and in effect, there is no recourse.

So I would recommend option (b) proposed by Dilkes, Jeffery, on page 8 of their submission, where in addition to the regulated net family law value, there would be additional values in some prescribed way. The net family law value which would appear in reports would provide a safe harbour for lawyers, for the self-represented and perhaps even for judges as well. Also, there's a possibility there for pensions below a particular size. You might even omit these extra values.

One example of where these extra values are used now is where the circumstances of divorce change the financial circumstances of the plan member and their plans. Even though this is strictly, in law, a subsequent event that's disregarded, the parties renegotiate a different value based on such supplementary values.

So what I would actually recommend that the committee do is consult with the plans about the issue of whether they actually are prepared to pay out a value based on the hybrid method, which is going to be in excess of the commuted value, and if they are not, to modify Bill 133 so that—

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

Mr. Peter Martin: —the value for valuation purposes will be different than the value for transfer purposes, the extra 10% to 40% coming from the pocket of the member and not from the plan. Thank you very much.

The Chair (Mr. Shafiq Qaadri): You have time for pleasantries—Mr. Kormos.

Mr. Peter Kormos: Thank you very much, sir. I know that the government members were listening carefully to your arguments. I look forward to actuaries continuing to challenge the government to justify why it's dumbing down—

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos. The government side, Mr. Zimmer?

Mr. David Zimmer: Thank you very much. When I listen to these complicated submissions, I am reminded of the little ditty, "How much wood could a woodchuck chuck if a woodchuck could chuck wood?"

The Chair (Mr. Shafiq Qaadri): I thank you for those words of wisdom, Mr. Zimmer. Ms. Elliott?

Mrs. Christine Elliott: Thank you very much for your presentation. It really distils things into the fundamentals. Just in a nutshell, if I could say, if you don't add the value of the contingent benefits into the calculation, it's going to (a) result in some level of unfairness to the non-member spouse—

Mr. Peter Martin: According to the courts, yes.

Mrs. Christine Elliott: —okay—and also result in a breach of the Family Law Act, which requires the calculation of contingent benefits into net family property.

Mr. Peter Martin: The courts may overrule whatever modifications are made.

The Chair (Mr. Shafiq Qaadri): I'll need to intervene there. I thank you, Ms. Elliott, and Mr. Martin for coming forward, for your written deputation and as well for agreeing to go earlier than stated.

ONTARIO BAR ASSOCIATION

The Chair (Mr. Shafiq Qaadri): I now invite our previous presenters, Mr. Dart, Ms. Slivinskas and Ms. Napier of the Ontario Bar Association to please take your places. You've seen the protocol, and I invite you to begin now.

Mr. Tom Dart: I'm going to begin. I'm Tom Dart. My job in this process is to simply explain to you what the family law parts of the bill are about. The pension experts are next to me, and they're going to address you with regard to the pension benefit sections of the legislation. I'm here—

Interjection.

Mr. Tom Dart: I will, in the sense that we have been working for a long time to get these changes. It's been an issue for family law lawyers and clients for many years, to be able to pay the equalization payment from the pension itself. We have been working hard for many years, trying to get these changes in place, so to us this is a very important piece of legislation in terms of the pension sections.

We are in general support of the other sections of the legislation. We have some concerns about the custody provisions of the legislation in terms of how that's going to work practically. We support the concept of having an application for custody contain the provisions that are in the bill. We think it's important to have that information in front of a judge. It's just going to be a little bit difficult, in the practical sense, to always have to comply. It costs our clients money whenever we have to complete an application of any sort, so a lengthy affidavit—and I realize this is going to be part of the regulations, so perhaps it can be addressed at that stage. But the concern that we have is just simply not only what we have to do to get the application before the court properly and how much additional costs are going to impact our clients, but we also want to make sure that the information that's being obtained through police record checks etc. is going to be useful to the court. So there needs to be something to address the type of information that's coming forward. For example, if there's a criminal conviction for whatever, how does that impact the custody decision? Some criminal convictions may have an impact on a custody issue, obviously, and some may not. I suppose that'll work out to the court, but it would be helpful to have something in the legislation or the regulations indicating what needs to be produced.

1600

In other respects, in terms of the bill itself, we are in general support of the concepts and we're very grateful, in particular, to see that, finally, family law, after so many years, is being addressed in the legislation.

I'm going to turn it over to Anne now to speak to you about the pension provisions of the legislation.

Ms. Anne Slivinskas: Thank you, Tom. My name is Anne Slivinskas and I'm here before you now to make submissions as an executive member of the pension and benefits section. It's been a great honour to work with the lawyers in the family law bar, as well as with the Ministry of the Attorney General, as we grappled with the complex issues raised by the division of pensions on marriage breakdown.

The Ontario Bar Association supports the principles underlying the proposed amendments to the Pension Benefits Act and the Family Law Act, for they contemplate an equitable division of pension assets while reducing the costs and uncertainties that are associated with the division of pensions under the current system. There are, however, a number of provisions that need to be clarified, either by amendment to Bill 133 or in the accompanying regulations.

Very briefly, I will be addressing the following four points: (1) valuations; (2) restriction on transfer of disproportionate share; (3) transfer options; and (4) support.

Valuation of the pension: Bill 133 provides that the net family law value of the member's interest in a pension plan is determined in accordance with section 67.2 of the Pension Benefits Act. We note that this new section does not contemplate the valuation of a spouse's interest in a vested spousal survivor pension in cases where the valuation date occurs after first instalment due; that is, the couple separated after the plan member retired and on that retirement date, if the spouses are not living separately and apart and haven't waived the benefit, spouses get a lifetime survivor benefit. This is family property as well, and it needs to be valued and included in the calculation of net family property. An amendment

must be made to Bill 133 itself; this can't be addressed in the regulations. That's our first recommendation.

The second point on valuation: Although Bill 133 doesn't expressly state how the net family value will be calculated, we understand that such a method will be prescribed in the regulations. The family law bar accepts that the new scheme will create values for pensions which will, in some cases, be more advantageous to the member spouse and, in some cases, more advantageous to the non-member spouse, depending on how the assumptions that are made realize in the course of time in each individual fact situation.

There still is a concern, however, that there may be a minority of cases in which the calculation of net family law value works such hardship that there should be some residual discretion on the part of a judge hearing a family law matter to either adjust the net family law value or the equalization payment, in the interest of fairness. Such an exception should be fairly narrowly defined and should entail little, if any, administrative burden on the part of the plan administrator. It should be no more difficult than, for example, a triggering of the exceptions contained in the child support guidelines. The child support guideline rules are largely rigidly applied but do contain some flexibility, such as in cases of undue hardship.

My second submission is on the restriction on transfer of a disproportionate share. Subsection 10.1(4) of the Family Law Act restricts the amount that can be transferred as a lump sum from the plan member's pension plan in satisfaction of an equalization obligation. The Ontario Bar Association notes that the formula in this section does not work when the pensions holder has debt or pre-marriage assets, because the definition for "C" in the formula does not take these debts and assets into account. For this and other reasons detailed in our written submissions, the OBA recommends that the formula be removed.

Third: transfer options. The OBA has two recommendations on the transfer options, the first recommendation being that the menu of transfer options offered in subsection 67.3(2) should be expanded to include transfers to a spouse's estate in the event that the spouse dies before the transfer is completed. The situation we have in mind is that the parties separate, the parties value their pension; the spouse applies for the transfer, but before the transfer is completed, the spouse dies. The Income Tax Act would prohibit plan administrators from completing the transfer, say, to the spouse's RSP. That's why we would need an additional option to transfer to the spouse's estate.

The second point on transfer options: Subsection 67.3(2) contemplates implementation of the transfer by leaving the money in the plan to the credit of an eligible spouse in such circumstances as may be prescribed. We recommend that the regulations clearly outline the spouse's rights under the pension plan and the corresponding obligations of the plan administrator if this transfer option is chosen.

My fourth point is on support. While the pension property is considered family property, it's also considered an income stream and may be subject to support deductions. Proposed subsection 67.3(10) of the Pension Benefits Act clearly states that the transfer of a spouse's share of the pension benefit in a lump sum in satisfaction of the plan member's equalization obligation does not affect the spouse's claim for support. This means that the portion of the member's pension that remains in the pension plan can be subject to support deduction. We note that there is no parallel provision in proposed section 67.4 of the Pension Benefits Act, which deals with the division of pensions in pay. The absence of such a parallel provision may be interpreted as an attempt by the Legislature to stop the stacking of equalization and support orders which can result in the payment of 100% of the member's pension benefits to the spouse—half as equalization and then half as support. The Ontario Bar Association wishes to clarify whether the member's remaining pension payments can be assigned or seized for support.

Subsection 67.4(5) of the Pension Benefits Act limits the spouse's share of the pension to 50% of the net family law value of the pension. There has always been a 50% limit on the amount that can be assigned for equalization. The family law bar believes that there should be no such limitation, or that if one is retained, that there be a power reserved to a court to override it in deserving circumstances. In a meritorious case, a court should be able to award 100% of a spouse's pension to a former spouse, regardless of whether the basis for that is in property, support, or a combination of the two. We acknowledge that in such cases, the amount paid to the spouse can't exceed 100% of the commuted value of the pension, as distinct from 100% of the net family law value, which you have heard can exceed 100% of the commuted value, depending on the valuation method that's used.

I'm going to sneak in one additional point. Finally, the Ontario Bar Association urges the Legislature to establish a retirement fund into which non-member spouses may deposit the transferred amount. This is the 10th recommendation that was made by the law commission. The Expert Commission on Pensions also recommended the establishment of an Ontario pension agency to receive, pool, administer, invest and disperse stranded pensions in an efficient manner. This is one recommendation that I believe everyone can support, and I think it provides a response to Mr. Martin's concerns that an unsophisticated spouse would be unable to sufficiently manage and invest the lump sum.

Those are all my submissions. I welcome your questions.

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

Mr. David Zimmer: I want to thank you, on behalf of the Attorney General and the government, for the great work the OBA has done with us in moving this along. We look forward to working with you on the matters that remain to be attended to—regulations and the like. Thank you very much for all the time that your members have put into this.

The Chair (Mr. Shafiq Qaadri): Mrs. Elliott.

Mrs. Christine Elliott: I'd also like to thank you for your excellent and substantial presentation on this issue. It's apparent to me that the members of the bar association have spent a significant amount of time on this. Your consideration of the issues that you've raised—recognizing the need for some clarity in terms of pensions in family breakdowns. I would urge the government members to take this into consideration, because these are not inconsiderable recommendations that you're making. It would seem to me that we should have consulted more widely with you before we got this material before us in the first place. But there certainly is time, and I would urge the government members to take it into consideration in their deliberations. We certainly will.

1610

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

Mr. Peter Kormos: Needless to say, for New Democrats, the proposal of a provincial pension agency which would not only deal with the situation you described, but also accommodate small businesspeople, small employers with one or two employees and people in non-traditional work, creates real opportunities.

Two interesting things: One was page 5 of your submission and your comments here. Your observation is that there are going to be some losers and there could be some winners from time to time. Is that not bothersome? Is there not a process where we can sort of broaden the peak of the bell curve so that there are more people who come out just right? I suppose it's like Goldilocks and the Three Bears and the porridge; right? That causes me concern, obviously.

Ms. Anne Slivinskas: If a decision is made to classify pensions as property, that challenge will always be faced because pensions are unlike other properties in that they are a stream of future payments. You have to do, as the Supreme Court of Canada noted, some educated guesswork to determine exactly what amount is required at the present time to recreate that future value. So there will always be some guesswork. Unless you take a pension out of property, just take it out of the regime altogether, and everybody divides it at the time that it's paid, that's the only time you will get it right 100% of the time.

Mr. Peter Kormos: Okay. When you talk about overriding the 50% rule—I want to make sure I understand—you're not talking about some fault-based justification for that.

Ms. Anne Slivinskas: I'll let Wendy Napier speak to that point.

Ms. Wendy Napier: We don't mean so much fault, although there can be merits to an argument that one should have access to 100% of a pension. For one thing, the party should have the ability to decide that perhaps all of a pension can go to one spouse—

Mr. Peter Kormos: Okay. You're arguing that the statutory protection of at least 50% of the pension for the named pensioner should be capable of override, if it's in the interests of—

Ms. Wendy Napier: That's right, because it limits the flexibility of the options open to the parties as to how to deal with their issues. But there's a secondary consideration, and that is where you have somebody who has absconded from a jurisdiction and they've taken all their assets, and the only thing left in Ontario is the one pension. We want to be sure that in a meritorious case, the spouse can actually get that pension asset transferred, because they don't have the ability to realize their claims—

Mr. Peter Kormos: And the policy for the 50% rationale is the same policy that we have around pensions in general, that we don't want to destroy somebody's means of income in their—

The Chair (Mr. Shafiq Qaadri): I'll need to intervene there. Thank you, Mr. Kormos. Thank you, Mr. Dart, Ms. Slivinskas and Ms. Napier, for your deputation and written submission on behalf of the Ontario Bar Association.

OMERS ADMINISTRATION CORP.

The Chair (Mr. Shafiq Qaadri): I now invite our next presenter, Mr. Gibbins of the OMERS Administration Corp., corporate counsel. You've seen the protocol. You have 20 minutes in which to make your submission, beginning now.

Mr. Gareth Gibbins: Good afternoon. My name is Gareth Gibbins and I'm the corporate counsel in the pension group at the OMERS Administration Corp. I'd like to start off by thanking you for the opportunity to speak to you today about the provisions in Bill 133 pertaining to the divisions of pensions on marriage breakdown.

I'd like to start with a little bit of history about what OMERS is. The Ontario municipal employees retirement system was established in 1962 as a pension plan for employees of local governments in Ontario. On June 30, 2006, the Ontario Municipal Employees Retirement System Act, 2006, was proclaimed into force, and the OMERS registered pension plans now consist of the OMERS primary pension plan and the OMERS supplemental pension plan for police, firefighters and paramedics. Today, the primary plan provides pension benefits for approximately 390,000 current and former employees of more than 900 participating employers. Under the OMERS Act, 2006, the former OMERS board was continued as the OMERS Administration Corp., and this is the perspective I will be speaking from today.

I would like to start by congratulating the government for its efforts to reform the division of pensions on marriage breakdown. OMERS supports a statutory scheme that permits pensions to be divided with finality and certainty at the time of the relationship breakdown, and OMERS believes that the changes proposed in Bill 133 set the framework for accomplishing this objective. Such changes are necessary to ensure certainty and predictability of results and also ensure that the parties'

intentions are carried out without the increased administrative, legal and litigation costs associated with the current "if and when" regime and ambiguously or poorly drafted domestic contracts and court orders. OMERS has also made a written submission on Bill 133, and today I will be focusing on four observations that are addressed in that submission.

First, turning to the valuation for family law purposes, OMERS supports the requirement in Bill 133 for the administrator to calculate the net family law value in accordance with the prescribed valuation method. Generally speaking, OMERS prefers a prescribed valuation method that is based on the commuted value of the pension in question, calculated in accordance with the existing provisions for calculating a termination value in the PBA and the regulations. This would allow administrators to value pensions using their existing calculators and systems. That being said, to the extent that the adjustments in the new subsection 67.2(2) of the PBA are added to the preliminary value in new subsection 67.2(1) of the PBA, the details for how that preliminary value should be calculated and the adjustments thereto should be clearly prescribed in the regulations.

Turning to the transition provisions in the bill, new subsection 67.2(9) of the PBA provides that an application for a statement of net family law value cannot be made if the order or domestic contract was filed with the administrator before that section comes into force. Similarly, new subsection 67.5(1) of the PBA provides that an order, a family arbitration award or a domestic contract that is filed with the administrator after the date on which that section comes into force is not effective to the extent that it requires the administrator to divide the pension otherwise than permitted by new section 67.3 or 67.4. Similarly and finally, new subsection 67.6(1) of the PBA provides that new section 67.6 applies if the order or domestic contract is filed with the administrator before the date on which that section into force.

In all three of the transition provisions I mentioned, the date the order or domestic contract is filed with the administrator is used to determine whether the new or the old regime applies. OMERS believes that a more appropriate transition date would be the date the order is made or the date the agreement is executed. This would allow the parties to honour the terms of an order or domestic contract entered into before the applicable provisions of Bill 133 come into force. Furthermore, a transition date based on when an order was made or an agreement entered into would also provide a bright-line test to determine whether the new regime applies. This would, to give an example, avoid disputes over when an order or domestic contract was "filed" with the administrator.

Third, in terms of adjusting or revaluing the pension, and I offer this more by way of a general comment, new subsection 67.3(7) of the PBA requires administrators to adjust benefits and entitlements of the member in accordance with the regulations to take into account the transfer of a lump sum for family law purposes. New subsection 67.4(4) of the PBA, once the application for the division of a pension is complete, requires the administrator to revalue the member's pension in the prescribed manner. Similar revaluing takes place under subsection 67.6(5). My comment here is simply that the method for adjusting benefits and revaluing pensions should be clearly set out in the regulations. This is particularly important if the termination method is not used for calculating the net family law value.

Finally, I just wanted to briefly touch on the eligibility criteria to apply for a transfer under subsection 67.3(1) and for the division of a pension under subsection 67.4(1). An administrator will not be in a position to confirm that some of the conditions in these provisions have been met. For example, an administrator will not know whether there is a reasonable prospect that the spouses will resume cohabitation. Accordingly, OMERS recommends that these provisions be amended to clarify that the administrator is not responsible for ensuring that the specified conditions exist. Instead, OMERS recommends that prescribed forms be developed for the member or non-member spouse to apply to the administrator for a transfer or division of the pension.

1620

In closing, OMERS believes that the amendments to the PBA and the Family Law Act proposed by Bill 133 will help bring much-needed clarity to the division of pensions on marriage breakdown. The immediate settlement method will permit pensions to be divided with finality and certainty. Furthermore, the new valuation method using the net family law value will help to simplify the pension division process for all parties.

The minor amendments proposed by OMERS in its written submission will help clarify when the new regime applies, who is eligible to apply for a statement, and when the applicable eligibility criteria have been met. OMERS looks forward to the passage of an amended Bill 133 and the opportunity to provide feedback on the regulations pertaining to the division of pensions on marriage breakdown.

Thank you for your time today.

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

Mrs. Christine Elliott: Thank you very much for your presentation, Mr. Gibbins. You may have heard Mr. Martin's presentation earlier, where he indicated that the value of the pension can be undervalued, as far as the non-member spouse is concerned, by 10% to 40% if you don't include those extra contingent values, yet the method that you're proposing seems to be that that can just be sort of dealt with as an adjustment somewhere down the line in the regulations. Are you a little bit concerned that this is something of greater importance that you may need to turn greater attention to if it can be undervalued by an amount that significant?

Mr. Gareth Gibbins: I haven't seen an actual calculation to show the example, and I'm also not an actuary myself, but just as a more general comment, and I understand that there are arguments on both sides, an example

I hear from time to time is that you don't take into account the increased value of a painting that may go to one spouse or another after the applicable separation date. So that's one analogy you can draw. I also point out that no one disputes that the commuted value of a pension is appropriate when a member terminates employment as well.

Mrs. Christine Elliott: Just one other comment. It seems that the arguments in favour of the more simplified method, not taking into account the contingent benefits straight away, are the sort of ease of efficiency and greater certainty, but then on the other side you have to balance that with an unfairness aspect that might arise more frequently than one might consider. Surely that would be a more important consideration, to get it right rather than to calculate it easily. I'm just concerned about the discrepancy between the two systems.

Mr. Gareth Gibbins: And I understand the concern. I guess my point is, I see that more as a policy question of how it's going to be planned. As we heard in some of the other comments, to value the pension in almost all circumstances is going to require some sort of guesswork and some sort of—I hesitate to use the word "trade-off," because I don't think that's quite appropriate, but some sort of guesswork in assigning a probability for future events. In terms of which side of the spectrum, where you go, I think that's more of a policy question.

Mrs. Christine Elliott: Thank you.

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

Mr. Peter Kormos: Sorry. I had to step out, but I did read most of your submission. Of course, when I got to the conclusion, I went, "Eureka!" Well, really it wasn't a "eureka" moment, because it's part of the pattern we're seeing here.

This whole thing about guesswork: The actuaries have been calling that "assumptions," and they say that they make those assumptions subjectively; they don't just draw them out of thin air, because each family scenario is different—different ages, the spouses could be closer in age range, there could be huge disparities, all sorts of types of occupation. So the actuaries argue, and I hope I'm putting this correctly, that it's less guesswork than it is a science—that's elements of artistry, where that could be said of any profession. You don't discount that, though, do you, the role that actuaries play in customizing their analysis to the family scenario? They would argue that they are customizing it, right? Is that a fair way to put it?

Mr. Gareth Gibbins: Sorry. I'm not sure exactly what the question is.

Mr. Peter Kormos: Well, you say it's guesswork. The actuaries say it's assumptions, and they are assumptions based on experience, on research, the various stuff that's been written over the course of years, academic stuff. They say they can tailor a number that fits that family instead of assuming that one size fits all and then living with the winners and losers and perhaps a bell curve that's really very narrow in terms of where it comes out just right. What's wrong with that approach?

Mr. Gareth Gibbins: I'm not sure anything's wrong with that approach per se. I would just like to say, my father is an actuary, so I have a lot of respect for actuaries.

Mr. Peter Kormos: I understand your hesitation.

Mr. Gareth Gibbins: But I think maybe the underlying comment is, are there still, whatever you want to call them—and I certainly didn't mean to misuse words. But are there are still assumptions that are based on future events?

Mr. Peter Kormos: Okay. Thanks kindly.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Kormos. To the government side.

Mr. David Zimmer: Let's assume that we have the hybrid method of valuation. My question, and I asked this earlier in the afternoon: Assuming that the hybrid valuation methods are clearly prescribed, are the administrators going to be able and comfortable applying the prescribed method?

Mr. Gareth Gibbins: Yes. As I stated, OMERS' preference is for the termination method, but if a hybrid method was clearly prescribed and the administrators were provided with an appropriate lead time to implement the necessary systems, yes, we could do it, and we would see that as an improvement over the current "if and when" approach.

Mr. David Zimmer: So what you need is a clear set of rules or a clear set of prescriptions to carry out your task.

This is a more delicate question. Do you think that the valuators might have an almost subconscious sense, when they're working through the prescribed calculations, that, if possible, they can err in favour of the member?

Mr. Gareth Gibbins: No. We have our fiduciary duties and our obligations to follow what is set out in the regulations. It's my understanding—and again I note I'm not an actuary, but if all the requirements are clearly set out in the regulations, then two different actuaries, whether that's a plan's actuary or an independent actuary, should come to essentially the same number based on those prescribed requirements.

Mr. David Zimmer: So you just bring your skill set and your professional standards of practice and do the calculation as prescribed?

Mr. Gareth Gibbins: Yes.

Mr. David Zimmer: Thank you very much.

The Chair (Mr. Shafiq Qaadri): Thank you, Mr. Gibbins, for your deputation on behalf of OMERS.

JASON HOWIE

The Chair (Mr. Shafiq Qaadri): I now invite our final presenter of the day, who will be presenting to us in his capacity as a private individual, which means that he will have 15 minutes in which to do the combined presentation. Welcome, Mr. Howie, and I invite you to begin now.

Mr. Jason Howie: In my capacity as a private individual, I'm a family law lawyer, and I think it's very

important, before this committee considers any amendment to the Family Law Act, that this committee hear an opinion at least as to what impact this bill will have at ground level with the people—mainly people like me—who are faced with dealing with this legislation.

The first comment I would like to make is this: The history of family law is individual justice. Nobody comes to court or goes to a lawyer for the purposes of getting the national average of RRSPs, the average support. It is a case-by-case determination based on the activities and the savings and the income of that particular family. My concern is that the individuality is lost very subtly but very fundamentally in the amendments to the Family Law Act that are suggested.

1630

I should also say this: I practise in southwestern Ontario. I am a family law specialist. I've been practising for 20 years—I only look young. I've been a specialist since 2002, and I have consulted with just about every other family law lawyer who would listen to me on this particular subject. I assure you that what I'm providing you today is a consensus.

Let me deal first with the current regime. There have been some misconceptions about what happens in family law. When parties separate, they hire a lawyer. When they hire a lawyer, they have to produce a statement of assets, amongst other things. Included in that is to figure out how much this pension is worth. With all due respect, it is not an expensive, elaborate, complex process. It consists of somebody coming to my office with their pension statement, and me requesting a report for $500. For $500 that client has an individual report determining the value of their pension plan as at the date of separation.

I note that the act prescribes that the plan will now provide the value at a cost. Other provinces, I understand, charge $250 or $300. So my question is, if the plans are going to charge $250 or $300 to give you the report, does it make any sense, for the sake of saving $200, to lose the individuality which exists in family law settlements? That is, in my view, and with all due respect, false economy.

The pension plan person comes in. We get a list of all the assets. We get a list of all the debts. Lately, the list of the debts is sometimes bigger than the list of the assets, but that's the way it is. We get it all together. We present it to the other side.

Under our current system, the pension valuation is routinely obtained within 72 hours at a cost of $500. It has been a minimum—a minimum—of 15 years since we've had duelling actuaries disagreeing about this, that or the other thing. I consulted my colleagues, and they don't recall a single case in the last 10 or 15 years in which they have ever been required to call an actuary to court. We rely on the $500 report.

By the way, the actuaries have come to the table—and many years ago, they came up with standards for their report. It is very typical, if both spouses have pensions, that we use the same actuary.

So if all of this is good, what's the real problem? The problem is this: The spouse comes to me, or anybody, and says, "I've got a pension." Seventy-two hours later, we get the report, and we say, "Mr. Jones, the value of your pension is $350,000. All things being equal, can you please cut me a cheque for $175,000 payable to your spouse?" Of course, people don't have the ready capital to make that payment. So the problem is not determining the value of the pension; the problem is figuring out how to fund the settlement. In the materials that you've received and from Hansard, people call this "settlement." I call it "funding." It's great that somebody's pension is worth $300,000. Where are they supposed to get the $150,000 to pay? They can't borrow against it. They can't do anything. So what has happened to date is that the pension plan holder is stripped of all of their other assets, or takes over a disproportionate amount of the debt, or goes to the bank and borrows a lot of money in order to fund the pension settlement.

I give the government full grades for coming up with an amendment to the Family Law Act which takes that funding problem out. That is doing a service to the public that, frankly, is immeasurable.

But this is the problem: In my view, the plan administrators have no role in the valuation of the pension. The plan administrators have no interest in what somebody's net family property statement is, how much their Visa cards are, how much their line of credit is. Their interest is to serve their members the best way they can and to allow, if you pass the legislation, an orderly transfer to the non-pensioned spouse. I have heard in questions—and I'm just wondering if everybody realizes what this means.

If you would do me the privilege, could you turn to page 3 of the summary that was just handed out? This is the problem. You ask the plan administrators to value the pension, but what does that mean? Under current law, the square that's called "Early Retirement," the basic vested pension and the indexation are all part of the pension that's valued. To use the word "pension" is a misnomer. It's a basket of contractual privileges when you stop working. If the legislation or the regulations say that, "For family law purposes, we will only consider the termination approach," which was urged on you by, I believe, the member of HOOPP and, I believe, OMERS, what that really means is that you have created two classes of non-shareable property. That spouse has a basket with three things in it. By legislation, you will be determining that the spouse only has access to one. That turns back the law to 1978, because it was in 1978 that the Ontario Family Law Reform Act created this concept of family assets and non-family assets. Twenty-three years ago, we got rid of that concept. We said, "That's unfair; an asset is an asset."

This legislation, if you allow pensions to be valued on a termination basis, will turn the clock back to 1978 and allow the pension holder to retain non-shareable property. That, in my respectful view, is a step backward. I looked different in 1979; I'm sure everybody looked and thought a little differently in 1979. Why can't you just

ask the pension plan administrator with—somebody said 200,000 or 300,000 members? That's an astronomical number. I thought 50,000 lawyers was bad enough in Ontario. That's chump change. Why can't we just have the plan administrator calculate all this for us? It's really unfair just to consider the basic, "This is what you get at 65," so just do the whole thing and make it fair. What's wrong with that? The problem with that is this: There is only one issue in pension cases in Ontario: When is the pension holder going to retire? Basic family law: The earlier you retire, the more pension you collect and the pension's worth more. Is that clear?

But what are you going to tell the administrator in your regulations or your legislation? You have to determine the date of retirement. You just pick age 58 because the average teacher retires—actually, the average teacher retires at 57, so you just take 57. That means that a pension plan holder who cannot possibly retire at age 65 has to overcompensate their spouse. Then you say, "We'll pick a later date. Let's say 62. Pension plan administrators, you value these things; you do it all the time. Assume age 62." What happens if the plan member, through his or her own hard work during the course of the marriage, takes early retirement? They get to keep that.

My concern about Bill 133 relates back to the preamble of the Family Law Act. The preamble of the Family Law Act says this: "Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize"—and this is a key—"the equal position of spouses as individuals within marriage and to recognize"—the other key—"marriage as a form of partnership"—partnership. How does this legislation sit equally with individuals in marriages being partners? The truth is, if it's accurate, it's by luck.

There are other circumstances that the pension plan administrators cannot reasonably be asked to consider. What about mortality? I don't mean to be morbid, but what happens if I have a client in front of me at the office who is terminal and they're absolutely going to pass away within 12 months? I have to tell that person that they have to share their assets based on the assumption that they're going to retire in seven years and live to age 80. How does that make sense?

How about income tax? What income tax rate should be subtracted from the value of the pension? If somebody retires and the only thing they have is their pension, they're going to have less income tax than somebody who retires rich. How is that fair to the pension plan holder? How is that fair to the spouse?

Perhaps the most common one that we're hearing these days—and I realize it might not be a problem. I'm confident it's not a problem for the major public plans—I don't want to start any rumours—but what about solvency?

The Chair (Mr. Shafiq Qaadri): You've got about a minute left, Mr. Howie.

Mr. Jason Howie: Thank you, sir.

What happens if the plan is not solvent? These regulations will dictate to a member that they have to pay capital based on the assumption that the plan is solvent.

In closing, I give the government full marks for giving family law lawyers and the public the tools to settle their cases, to create the ability to reach out to the wealth that's needed. I caution, in the strongest possible language, arbitrary numbers which will simply bring family law into disrepute.

The Chair (Mr. Shafiq Qaadri): Thank you very much, Mr. Howie, for your presentation and written deputation.

If there's no further business before the committee, I remind us that the administrative deadline for filing amendments is Thursday, April 2, at 12 noon.

Is there any further business before this committee? Committee adjourned.

The committee adjourned at 1640.

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CONTENTS

Monday 30 March 2009