



August 15, 2008

The Honourable Chris Bentley
Attorney General for Ontario
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON
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Dear Minister Bentley:

Re: Family Law Reform

On behalf of the Ontario Bar Association (“**OBA**”), we are pleased to enclose our submission on Family Law Reform.

We welcome the opportunity for further input on this important initiative and our submission in response to it.

Yours truly,

Gregory D. Goulin, LSM
President
Ontario Bar Association



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

Ontario Bar Association

Submission to the Attorney General

on

Family Law Reform

Submitted on *August 15, 2008*

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About the Ontario Bar Association

The OBA is the voice of the legal profession in Ontario, representing and advancing the interests of almost 17,000 lawyers, judges, students and legal professionals, while promoting respect for the justice system and the rule of law. As the voice of the legal profession in Ontario, the OBA, among other things, advances reasoned positions to the public, governments and LSUC for the benefit of our members and to improve the law and the administration of justice, provides our members with professional and personal support and with a variety of forums in which they can participate, and promotes equality and the elimination of discrimination.

This submission deals with reform in three main areas of family law: child support, property rights of spouses and parentage under the *Children's Law Reform Act*.

I. CHILD SUPPORT

A. *Support for Adult Children*

Recommendation: Amend section 31 of the *Family Law Act* to expand the circumstances in which a person may have an obligation to pay support for an adult child, such that those circumstances are the same as are provided for under the *Divorce Act*.

Where the parents of adult children are, or once were, married, they are able to bring child support claims under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and, hence, the definition of “child of the marriage” in s. 2(1) applies:

“child of the marriage” means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability, or other cause, to withdraw from their charge or to obtain the necessaries of life.

Parents who have never been married (and the child him- or herself) can establish a child support claim in respect of an adult child only under the provisions of the FLA. Married spouses may apply under either statute.

Section 31 of the FLA states:

31. — (1) Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full-time program of education, to the extent that the parent is capable of doing so.

(2) — The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control

This provision introduces a requirement not found in the *Divorce Act*. The child must be a full-time student. Section 31(1) fails to make allowance for a child who is not a full time student for any reason, including illness or disability.

Case law under the *Divorce Act* permits support to be ordered for adult children in a broader range of circumstances and with greater discretion. The language of the statute

specifically requires recognition that a young adult may be unable, “by reason of illness, disability or other cause,” to withdraw from parental charge. In many cases, support has been ordered where there is good reason, on the facts of the case, for the adult child not to be in school full time.

Furthermore, the court may take into account that the child suffers from a physical or emotional disability or that the child is temporarily unable to find employment.

Courts have at times strained the language of s. 31(1) of the FLA to attempt to assist adult children who are struggling and have been unable to attain independence, but are not attending school full-time. However, there are many instances of failed applications and doubtless many individuals have received legal advice that support is not available for a child who remains dependent upon a parent but is not a full-time student.

A further distinction between the two statutory tests is the additional requirement in s. 31(2) that a child sixteen years of age or older shall not have withdrawn from parental control. Sixteen- and seventeen-year-olds in Ontario are still minors.¹

The provision in section 31(2) opens the way for factual issues which are difficult to determine and increase the cost of litigation. There is no guarantee that young people deprived of parental support on the basis of this provision will be eligible for social assistance. The OBA submits that so long as a child is under the age of majority, each parent should remain obliged to support that child, regardless of any breakdown in the parent-child relationship, as is the case under the *Divorce Act*.

Moreover, section 31(2) of the FLA is no longer consistent with the *Education Act*, R.S.O. 1990, c. E.2, which now extends the age for mandatory attendance at an educational facility from 16 to 18. The OBA recommends that this provision for the termination or suspension of child support upon a child 16 years or older having withdrawn from parental support be removed.

The different standard of eligibility for support based on whether or not the parents were ever married represents grievously differential treatment on the basis of family status. Ontario should amend s. 31(1) to bring its provisions into harmony with the *Divorce Act* and resolve the inconsistency between the laws providing for the support of young adults.

B. Mandatory Annual Income Disclosure by Support Payors and Retroactive Child Support Orders

Recommendation: Amend section 25(1) of the Child Support Guidelines to make annual income disclosure by payors mandatory, and to make it clear that a court has discretion to order an increase in child support retroactive to the time income disclosure should have been provided.

¹ *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7, s. 1, establishes 18 as the age of majority.

Child support under the Child Support Guidelines is based on the income of the paying parent. Once an initial amount of monthly child support is established, the Guidelines provide that this support may be reviewed once a year to keep pace with changes in the income of the paying parent. Unfortunately, there is no mandatory requirement that a paying parent provide the recipient parent with proof of their income each year.

Section 25 (1) of Ontario's Child Support Guidelines provides:

25. — (1) Every parent or spouse against whom an order for the support of a child has been made must, on the written request of the other spouse or the person or agency entitled to payment under the order not more than once a year after the making of the order and as long as the child is a child within the meaning of these guidelines, provide that other spouse, or the person or agency entitled to payment under the order, with,

- (a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the parent or spouse has not previously provided the documents;
- (b) as applicable, any current information in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and
- (c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

Prior to the Child Support Guidelines, most agreements and court orders for child support built in a requirement for automatic annual cost of living increases. Under the current process, each year, a recipient parent must find out if their child is entitled to an increase in child support by making a written request for income disclosure to the paying parent. If income disclosure is forthcoming, the parents must then calculate the amount of increased child support and amend their agreement or court order accordingly. If income disclosure is not forthcoming, the recipient parent is obliged to take the paying parent to court to compel disclosure, in the hope that at the end of this process they will find increased income that will ultimately result in an increase in child support.

Putting the onus on recipient parents (usually mothers) to obtain annual income disclosure is regressive and onerous. Reluctant payors (usually fathers) engage in a game of income “hide and seek” to avoid disclosure, since without disclosure there is little likelihood their child support payments will be increased. Most mothers do not have the financial resources to hire a lawyer or the personal resources to push for income disclosure every year. Instead, many, faced with a refusal to disclose income, simply tighten their belts and their children make do with less. Section 25(1) of the Child Support Guidelines should be amended to place the onus on the payor to provide annual income disclosure by making this obligation mandatory and automatic each year. If

disclosure is still not forthcoming, the recipient parent should have access to a government-funded recalculation service to enforce this obligation.

In addition to shifting the onus to the payor to provide annual income disclosure, courts should be encouraged to provide more retroactive orders. Some payor parents, after stonewalling annual increases in child support for years, have been able to avoid full liability by claiming the amount of child support now owed is more than they can afford to pay. The issue of retroactivity of child support was recently addressed by the Supreme Court of Canada in *D.B.S. v. S.R.G. et al.*, [2006] S.C.J. No. 37. While our highest court made it clear that parents have an obligation to support their children in a manner commensurate with their income, the court was reluctant to enforce long outstanding child support obligations retroactively. The court cited concern for the hardship to payors in having to make large lump sum payments for child support after the fact. No concern was expressed for the hardship to mothers who may have forfeited savings or a better lifestyle to prevent their children suffering as a result of being shortchanged on child support. Without an expectation that retroactive child support will be ordered, there is little incentive for reluctant payors to increase child support when their incomes increase.

Section 25(1) of Ontario's Child Support Guidelines should be amended to make it clear that courts have discretion to make any increase in child support retroactive to the time income disclosure should have been provided.

C. Recalculation of Child Support by Provincial Agency Under s. 25.1(1) of the Divorce Act

Recommendation: Establish a provincial agency with the authority to obtain financial disclosure, conduct an investigation, make an initial determination of a party's income for support purposes, and calculate the quantum of support based on that determination. Either party would be permitted to challenge the determination, either directly to a court or to a Tribunal established for this purpose and subject to judicial review.

1. The Context

a. Child Support

Child support in Ontario is calculated pursuant to either the federal or provincial Child Support Guidelines. In general, child support consists of two components: (1) the "table amount" and (2) "special and extraordinary expenses" or "section 7 expenses".

The Guidelines include tables that fix the amount of support owing based on the income of the payor and the number of children. The section 7 expenses are "add-on expenses" for items such as private school tuition, extraordinary extra-curricular activities, and medical expenses not covered by a benefits plan. These expenses are generally shared in proportion to the parties' respective incomes. This description is very

general. It is not intended to be comprehensive or to describe the exceptions to the generally applicable provisions.

Given the structure of the Guidelines, the income of the payor, and in some cases the income of the recipient (*e.g.*, where section 7 expenses are payable), is of central importance. Although the Guidelines do not mandate automatic adjustments to support when the income of one or both of the parties changes, they contemplate implicitly that support will be adjusted in keeping with increases (or decreases) in incomes. Moreover, the Supreme Court of Canada, in its retroactive child support trilogy, has warned payors who do not adjust their child support to reflect changes in income that they do so “at their own peril” and risk a retroactive support award.²

b. Enforcement of Child Support

The Family Responsibility Office (“FRO”) is the provincial agency in Ontario established and empowered by the *Family Responsibility and Support Arrears Enforcement Act* (“Act”) to enforce child and spousal support orders made by an Ontario court. The OBA’s submission deals only with child support.

In addition to traditional court orders, a domestic contract — in the case of child support a “separation agreement” — may be filed with an Ontario court and enforced by the FRO as a court order. The agreement may be filed at any time after it is executed. Whether and when an agreement is filed with the court will more often than not depend on the level of goodwill or animosity between the parties.

When a court makes a support order, it sends a Support Deduction Order (“SDO”) to the FRO. The SDO is the document that the FRO enforces. The SDO and related information form set out, *inter alia*, the amount of support (both table support and special and extraordinary expenses if applicable), the payment frequency, the biographical information for the support payor and recipient, and the “income source” from which support is to be deducted and paid to the FRO, to the extent it is available. The FRO then begins the process of contacting the income source and processing the support that is payable.

In addition to ongoing support, the FRO is empowered to enforce support arrears. The support recipient is required to swear a “Statement of Arrears” that sets out, on a month-by-month basis, the amount of support payable and the amount of support paid and calculates the total arrears owing.

As set out in section 1.a above, the quantum of child support is determined largely based on the payor’s income and varies with the payor’s income. This raises the question: If the FRO is enforcing child support by way of an SDO, how is the quantum of support adjusted to reflect a change in the payor’s income, whether an upward or a downward change? Similarly, how is the quantum of support adjusted if the child’s section 7 expenses change?

² The Court’s warning is in tension with its reluctance, noted above in section **B: Mandatory Annual Income Disclosure**, to enforce long outstanding child support obligations retroactively.

2. *The Problem*

Under the current legislation, the FRO is not empowered to recalculate support to reflect changes in a party's income or changes to section 7 expenses. Rather, a party seeking to adjust the quantum of support must apply to the court to vary the existing support order. The court then issues a new SDO that is forwarded to the FRO with the new quantum of support.

This system may not appear problematic at first glance. However, in practice there are three primary problems: (1) the cost to litigants; (2) the waiting time to obtain a court date; and (3) the potential for abuse in the case of domestic contracts.

a. *Time and Money*

The first two problems relate to the practical difficulties faced by litigants in the family courts and will be addressed together. These problems are not new, nor are they complicated. To put it simply, bringing a motion to vary a support order is both an expensive and a time-consuming proposition. While the Family Law Rules ("Rules"), which govern the conduct of family law proceedings, do provide simplified procedures where the variation is on consent (*i.e.*, no court attendance is required), they do nothing to help the litigant whose former partner will not consent. Even where a matter proceeds on consent, legal fees of several thousand dollars are still common.

With respect to time, although the Rules provide for a variation to proceed by way of motion rather than application, a case conference must still be held before the motion is heard. In some jurisdictions, it takes four months or more to obtain a case conference date. To put this in perspective, assume that a support recipient receives the payor's income tax return in May and the payor's income has increased. The recipient is diligent, contacts his or her lawyer, files a motion to vary in June and obtains a case conference date in August. The motion is heard in September and the FRO processes the new SDO and begins enforcement in October.

Under the current system, there is a very real prospect the recipient will be forced to begin this process again in just 7 months. If it is a jurisdiction with longer waits for a case conference (*e.g.*, Brampton, Newmarket, Barrie), or there are even small delays in obtaining disclosure — not an uncommon problem — the "down time" between proceedings will be much less. Where a payor's income fluctuates regularly, a litigant may spend 50 percent or more of his or her time involved in litigation. With variation proceedings regularly exceeding \$5,000 or \$10,000 in legal fees, the drain on a family's financial — not to mention emotional and psychological — resources is potentially crippling.

The high cost of litigation, besides acting as a drain on a family's financial resources, has a further, less visible effect. Just as restrictions on free speech induce a "chilling effect", the cost of litigation deters many litigants from seeking a variation of support at all. While those with greater financial resources may find it distasteful to spend thousands of dollars seeking a variation of support, the cost, relatively speaking, does not have the same impact on that family's overall resources and long-term prospects. Lower-income families are less able to absorb the cost and therefore the long-term effects (such

as paying the legal fees over time) are greater, particularly where the payor's income frequently changes. Children of lower-income parents are no less entitled to the benefits of the Guidelines than children of high-income earners.

b. The Potential for Abuse in the Case of Domestic Contracts

Two components of the current regime combine to open the door for abuse: (1) the fact that a separation agreement may be filed with the FRO at any time after it is executed (absent a provision to the contrary in the agreement) and (2) the fact that the FRO is not empowered to recalculate support to reflect changes in income.

It is not uncommon for parents with a separation agreement to make informal arrangements to address annual increases or variations in child support from year to year. If changes in child support are not recorded as a written amendment to the separation agreement and the child support recipient later files the separation agreement with the FRO for enforcement, the FRO must enforce according to the terms of this original agreement, irrespective of any subsequent informal agreements. For example, if parents adjusted a pre-Guidelines support agreement to reflect the Guidelines,³ and the support recipient later filed the original agreement, the FRO would have to enforce the original pre-tax amount, not the Guidelines after-tax amount. A payor who had paid the appropriate level of Guidelines support for several years could suddenly be facing an unjustified claim for arrears (as has happened in at least one case). Parents might be more inclined to formalize annual changes if they had access to a re-calculation agency. In any event, potential abuse could be avoided if the FRO was given discretion to take into account informal agreements made by parents to vary child support, between the time their separation agreement was executed and the time the agreement was filed with the FRO for enforcement.

Enhancing the jurisdiction of the FRO or appropriately empowering a Tribunal, as later discussed in this paper, would have the additional benefit of diverting up to 30 percent of the case load⁴ in both the Superior Court of Justice (in unified family court jurisdictions) and the Ontario Court of Justice. Court resources would remain deployed on matters requiring judicial determination, allowing more administrative or procedural claims to be resolved through the FRO. This would dramatically enhance access to justice as both courts would be able to better meet the needs of the remaining case load, which includes child protection and *de novo* claims for child and spousal support.

3. A Partial Solution

Section 25.2(1) of the *Divorce Act* provides that the federal government may enter into an agreement with a province authorizing a provincial agency to recalculate child support in accordance with the Guidelines. The section provides:

³ Even without a change in the payor's income, the quantum would drop under the Guidelines, as pre-Guidelines child support was taxable to the recipient and deductible to the payor but support under the Guidelines is net of tax to the recipient (and not deductible).

⁴ Estimate offered to a contributor to this submission by a Justice of the Superior Court.

25.1. — (1) With the approval of the Governor in Council, the Minister of Justice may, on behalf of the Government of Canada, enter into an agreement with a province authorizing a provincial child support service designated in the agreement to

- (a) assist courts in the province in the determination of the amount of child support; and
- (b) recalculate, at regular intervals, in accordance with the applicable guidelines, the amount of child support orders on the basis of updated income information.

Under this provision the Province of Ontario could enter into an agreement with the federal government such that the FRO would be given the authority to adjust the quantum of support to reflect changes in a payor's income (or a recipient's income, in those cases where it is taken into account) without the need for either party to bring a motion to vary the existing court order. This measure would save many litigants thousands of dollars in legal fees, reduce the time it takes to obtain a variation (provided the provincial agency is properly staffed), and help ensure that both low- and high-income earners are able to seek variations when necessary. As noted above, it would help prevent the abuse that can result if a party files a separation agreement with the FRO many years after its execution.

The matter is nevertheless not straightforward. Where the parties are employed and receive primarily T4 income, problems are less likely to arise. Other cases pose greater challenges:

- (i) In the case of self-employed persons, would the agency have the authority to conduct an investigation and make a determination of the person's income? For example, could this agency determine whether certain expenses that are charged through the company are personal and should be added back to the person's income?
- (ii) In cases where a party disagrees with the income as determined by the agency, what recourse does that party have? In other words, what would be the relationship between the agency and the courts?
- (iii) What authority would the agency have to obtain financial disclosure where a party refuses to produce disclosure that is requested or takes the position that it is not producible?
- (iv) Would the agency be authorized to adjust support in all cases or only where the support order provides for an adjustment to support at a specified regular interval?

The issues outlined above warrant broad consultation with all persons and bodies affected:

- bar associations;

- the FRO;
- support payors and recipients;
- the bench;
- organizations serving the poor;
- Legal Aid;
- social workers and mental health professionals, who see the impact of family litigation on the family and children; and
- possibly, police organizations; police officers see the impact of poverty on families and there is a connection between delinquent support payors and poverty.

Some of these groups can offer suggestions with respect to the appropriate legal framework, while others can provide the necessary context as well as the viewpoint of those who use the system or may feel alienated from the current system.

In the interim, the following suggestions are offered:

- (i) A new provincial agency, or a new branch of the FRO, should be established and empowered to:
 1. Compel production of the financial disclosure required by s. 21 of the Guidelines (this production would be mandatory), and further disclosure if, in the opinion of the agency, it is relevant to a determination of a party's income, with the opportunity for the party from whom such additional disclosure is sought to challenge the request (either in the courts or through a Tribunal system; see (ii) below);
 2. Compel production of financial disclosure, including disclosure from a third party, necessary to determine the quantum of a section 7 expense. For example, if a party refuses to provide a statement of his or her annual daycare expense, the agency could request the statement from the daycare directly (with an opportunity to challenge the request as in 26(i)1 above);
 3. Make a determination of a party's income for support purposes as well as a determination of the proportionate sharing of section 7 expenses, both in the case of employees and self-employed persons. The agency's authority would extend to making recommendations on all issues related to income — i.e. imputing income, Schedule III adjustments, etc. This function would be performed by lawyers employed by the agency who would provide a written report to the

parties setting out the determination. To simplify the processing of these reports, the agency would only be required to provide reasons for the determination if an amount other than line 150 income is used:

Example 1

Two employees earning T4 income only. Line 150 income used for both parties. The agency would only be required to provide a letter stating the income for each party and the quantum of support based on that income.

Example 2

Payor earns T4 income, receives capital dividends, and also receives non-taxable distributions from a family trust. The agency would be required to provide an explanation for its adjustments to income in the case of the dividends and non-taxable distributions as well as the support calculation based on the income used.

(ii) After the initial investigation and income determination by the agency, there are two possible approaches that should be considered:

1. In the first model, if a party disagrees with the agency's income determination, the party can apply to a court of competent jurisdiction to determine the party's income. The agency would be responsible for arguing its position before the court while the party challenging the position would be required to obtain counsel to argue against the agency's position. Therefore, only the party challenging the determination would incur legal fees.
2. The second approach is to use a system similar to the former Ontario Human Rights Commission system. The Investigation Branch would be responsible for the initial investigation and determination of income. If this determination were challenged by one of the parties, the matter would proceed to a Tribunal for adjudication. The Tribunal's decision would be subject to judicial review, but the parties would not have access to the courts for a *de novo* determination. The intention in this model is to remove recalculation of support from the courts (except for judicial review) and establish a Tribunal adequately staffed so that the time from the initial claim to a decision is reduced. As in the first model, only the party challenging the initial determination would incur legal fees.

When assessing the suggestions set out above and the very real challenges that will undoubtedly arise, it is important to maintain a practical perspective. Most income earners are employees whose total income is derived predominantly if not completely from sources reporting on T4 (and T3 or T5) forms — income not requiring adjustment. If the objective is to create a system in which most participants avoid protracted proceedings and the need to incur legal fees, whether in the courts or through a Tribunal,

then the proposed agency is likely to have an immediate and beneficial impact for most support payors/recipients.

For those whose situation is more complicated, the objectives of the proposals outlined above are to reduce the cost of fact-gathering and the initial income determination (by making the agency responsible for these functions) and to reduce the time required for a final adjudication if one party opposes the agency's determination (either in the courts or a Tribunal system, the latter being more likely to reduce time).

A related benefit is that if more cases are removed from the courts and handled by an agency and potentially a Tribunal, this will also reduce the waiting times within the courts for cases that are not within the agency's jurisdiction will also be reduced.

4. Recalculation Services in Other Provinces

Recalculation services for child support have already been established in Newfoundland,⁵ Prince Edward Island,⁶ Manitoba,⁷ and British Columbia.⁸ Alberta has introduced legislation and hopes to open the Service by the summer of 2009.⁹ The Canadian Bar Association National Family Law Section introduced a Resolution which was passed by Council at CBA Mid-winter Meeting in February 2008, urging the federal, provincial and territorial governments to introduce permanent child support recalculation services in all jurisdictions. The Resolution is attached to this submission as Schedule A.

The following chart shows some features of the recalculation services in Manitoba, British Columbia, Prince Edward Island and Newfoundland and Labrador.

Province	Permanent or pilot project	Applies to	Disclosure enforcement	Provided by
Manitoba	Permanent	Orders only; s. 7 expenses; Income of self-employed persons	Demand notices on third parties; relief from court, including penalties and imputation of income.	A new provincial agency
B.C.	Pilot project in Kelowna	Orders made at designated Provincial Court registries; agreements that can be filed at those registries; Not s. 7 expenses; Not self-employment income	Only income tax information is accepted. If payors do not submit IT information, agency assumes a 10% increase.	An existing agency
P.E.I.	Permanent	Orders and filed agreements; Not self-employment income	Deeming provisions	An existing agency
Nfld. & Lab.	Permanent	Orders and filed agreements; Income determined by Line 150 sources	If payors do not submit income tax information, agency assumes a 10% increase.	An existing agency

⁵ Child Support Service Regulations, NLR 31/07.

⁶ *Family Law Act*, R.S.P.E.I. 1988, Cap. F-2.1; Administrative Recalculation of Child Support Regulations.

⁷ *The Family Maintenance Act*, C.C.S.M., c. F20, s. 39.1.

⁸ Child Support Recalculation Pilot Project Regulation, B.C. Reg. 129/2006.

⁹ See <http://www.justice.gov.ab.ca/initiatives/Default.aspx?id=5365>.

II. PROPERTY RIGHTS OF SPOUSES

A. The Matrimonial Home

Recommendation: Remove all references to the matrimonial home in Part I of the Family Law Act

When the FLA was proclaimed in 1986, it was anticipated that the equity in a matrimonial home would always be shared by the spouses in the event of marriage breakdown. While that goal may have been laudable, it quickly became apparent that it was impractical in the context of legislation that provided for spouses to share equally in the increase of their respective net worths over the course of the marriage. The definition of “matrimonial home” in the FLA and the special treatment given to matrimonial homes in Part I have frequently produced anomalous results in the calculation of spouses’ net family property (“NFP”). For example, section 4(1)(b) removes the right to deduct the value of a matrimonial home that is owned at the date of marriage. The inclusion of *all* debts at the date of marriage in calculating net worth at that date, without a credit for the value of a matrimonial home owned at the same date, has resulted in demonstrably unfair determinations. Furthermore, the special treatment of the matrimonial home in the area of exclusions arising from gifts or inheritances has created artificial distinctions in the manner in which these benefits are shared between spouses.

This part of the OBA submission addresses the problems associated with special treatment of the matrimonial home in Part 1 of the FLA and the effect of the proposed reforms. The proposed amendments address two main provisions of the FLA: section 4(1) (definition of “net family property”) and section 4(2), paragraphs 1 & 5 (relating to exclusions from net family property).

1. Section 4(1): Definition of “Net Family Property”

a. Matrimonial home owned at the date of marriage

The OBA recommends amending section paragraph (b) of the definition of “net family property” to remove the reference to the matrimonial home. Currently, the definition of “net family property” in s. 4(1) of the FLA reads:

4.— (1) In this Part, ...

“net family property” means the value of all property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse’s debts and other liabilities, and

(b) the value of property, *other than a matrimonial home*, that the spouse owned on the date of marriage, after deducting the spouse’s debts and

other liabilities, calculated as of the date of the marriage;” [Emphasis added]

The proposed amendment to the definition would remove the italicized words, eliminating the prohibition on deducting the value of a matrimonial home owned on the date of marriage. The amended section would read:

“net family property” means the value of all property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

- (a) the spouse’s debts and other liabilities, and
- (b) the value of property that the spouse owned on the date of marriage, after deducting the spouse’s debts and other liabilities, calculated as of the date of the marriage;

In order to understand the mischief caused by the current definition of NFP, it is essential to look at the definition of “matrimonial home” found in s. 18 of Part II of the *FLA*. This definition is explicitly incorporated into Part I by virtue of the definition of “matrimonial home” in s. 4(1):

4.— (1) In this Part, ...

“matrimonial home” means a matrimonial home under section 18 and includes property that is a matrimonial home under that section at the valuation date.

Section 18(1) of the *FLA* provides:

18. — (1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

Under this definition, a property will qualify as a matrimonial home if it is owned and ordinarily occupied on the valuation date (typically the date of separation). Thus, a home which was *formerly* occupied as a family home but no longer is at the date of separation (because of a change in use or because of disposition) will *not* qualify as a matrimonial home. In practice, the interaction between the deduction rules and the definition of “matrimonial home” can lead to absurd results. Consider the following fact situation.

The wife owned a house at the date of marriage worth \$200,000.00 and the husband owned a cottage worth \$200,000.00. Both the house and the cottage are ordinarily occupied by the parties during the marriage. A year prior to the separation, the husband, with the wife’s consent, sells the cottage and uses the proceeds to buy a replacement cottage.

The parties separate. On the date of separation, the wife still owns the house she owned at the date of marriage. It is now worth \$400,000.00. The husband owns the replacement cottage, which is also worth \$400,000.00 at the date of separation. If we assume that neither the husband nor the wife owned any other assets or debts at the date of marriage or separation, using the current definition of NFP, the wife's NFP is \$400,000.00 and the husband's is \$200,000.00. The reason is that the wife is not permitted to deduct the value of the house at the date of marriage, because it qualifies as a matrimonial home. The husband's first cottage does not qualify as a matrimonial home, so he is permitted to deduct its value at the date of marriage.

The wife in the example would owe an equalization payment of \$100,000.00 to the husband. Thus the parties entered the marriage with exactly the same net worth and had the same net worth the day before they separated, but the husband leaves with \$500,000.00 (a \$400,000.00 cottage and a \$100,000.00 equalization payment). The wife leaves with a net worth of \$300,000.00. The result is absurd and cannot be justified on any rational basis. If the proposed amendment were in place, each spouse would receive a deduction for the value of the property that spouse owned at the date of marriage, irrespective of whether either or both qualified as matrimonial homes. Neither spouse would owe the other an equalization payment. The spouses would leave the marriage with equal net worths, just as they had when they entered the marriage and on the day before they separated.

b. *Deducting debts from date of marriage value without credit for the value of a matrimonial home*

The definition of net family property in s. 4(1) of the FLA provides that a spouse may deduct the value of all property (other than a matrimonial home) owned at the date of marriage, less *any debts* owed at that date, from the net value of property owned at the valuation date. Thus a spouse who owned a matrimonial home at the date of marriage, and who also had debts at that date, receives no credit for the value of the home brought into the marriage *and* receives a “negative deduction” for date of marriage debts (which leads to an *increase* in the spouse's NFP). The courts have stepped in to relieve against some of the harshest results arising from the strict application of this rule. A spouse who owns a matrimonial home at the date of marriage which has a mortgage *secured* on title for funds borrowed to purchase the home is permitted to ignore the secured debt; it is treated as a component of the value of the matrimonial home. Similarly, a loan which qualifies as a housing loan pursuant to the *Income Tax Act* is sufficiently like a mortgage (in that there are significant “legal and financial” constraints on the borrower which are linked to the home) so that this debt, too, is treated as a component of the value of the home. Other debts cannot be ignored.

The following example illustrates the inequity that results:

A spouse (“the owning spouse”) brings a house into the marriage worth \$200,000.00. In order to buy the house, the owning spouse used savings

and borrowed \$50,000.00 on an unsecured line of credit. The spouses live in the house during the marriage, so that it is their matrimonial home. At separation, the home is worth \$300,000.00. The line of credit has been paid off. If it is assumed neither spouse had any other assets or debts at the date of separation, the owning spouse's NFP is calculated as the value of assets at separation (the \$300,000.00 house) less assets-minus-debts at date of marriage. Since the owning spouse is not permitted to deduct the value of the matrimonial home at the date of marriage but must *include* the unsecured debt, \$50,000.00 are added to the spouse's NFP, for a total of \$350,000.00. The owning spouse owes an equalization payment to the other spouse of \$175,000.00. Thus, a spouse who came into the marriage with a net worth of \$150,000.00 leaves with a net worth of \$125,000.00 and a spouse who came into the marriage with nothing leaves with a net worth of \$175,000.00.

The proposed amendment to s. 4(1) will solve the problem that arises when a spouse owns a property at the date of marriage which is a matrimonial home on the valuation date and also has a date of marriage debt. No inequity will result since the spouse will be entitled to a date of marriage deduction for the value of the home, minus the debt. Thus in the above example, the owning spouse's NFP would look like this:

\$300,000.00 (the value of the matrimonial home at separation) less
\$150,000.00 (the value of the matrimonial home at the date of marriage
less the line of credit) equals \$150,000.00. The owning spouse owes the
other spouse an equalization payment of \$75,000.00. The owning spouse
leaves the marriage with a net worth of \$225,000.00 and the other spouse
with a net worth of \$75,000.00. The increase in the owning spouse's net
worth — \$100,000.00 from the growth in the value of the house and
\$50,000.00 from paying off the line of credit — has been shared equally
with the non-owning spouse, as intended by the FLA.

The inequities described in the above examples play out in lawyers' offices every day in Ontario. They inhibit settlement as aggrieved spouses focus their energies on other areas of the dispute in an effort to recoup their losses around the matrimonial home.

Spouses who enter into marriage contracts commonly do so just to permit a spouse to deduct the value of a date of marriage matrimonial home in the NFP calculations. However, because of the statutory and court-imposed requirements for an enforceable domestic contract, marriage contracts are expensive to negotiate. The negotiations can be hard on relationships. Further, many people simply cannot afford legal assistance or are unaware of the potential problem.

It has often been women, particularly in second marriages, who bear the brunt of the inequity relating to the matrimonial home. It is not unusual for a woman to settle her rights arising from a first marriage by receiving the matrimonial home. She commonly requires the home to house the children. Thus, when she enters a second marriage, she brings with her a home which then becomes a matrimonial home in the second marriage, thereby losing a date of marriage deduction for its value. While inequitable results of the matrimonial home provisions in Part I of the FLA are unacceptable, whoever suffers from

them, the likelihood of women in second marriages experiencing these effects raises special concerns in view of the disproportionate numbers of senior women among the poor.

2. Section 4(2), Paragraphs 1 and 5: Definition of “Excluded Property”

The OBA recommends that the definition of “excluded property” be amended to remove references to the matrimonial home.

The relevant provisions of s. 4(2) read as follows:

4. (2) *Excluded Property* — The value of the following property that a spouse owns on the valuation date does not form part of the spouse’s net family property:

1. Property, *other than a matrimonial home*, that was acquired by gift or inheritance from a third person after the date of the marriage; ...
5. Property, *other than a matrimonial home*, into which property referred to in paragraphs 1 to 4 can be traced. [Emphasis added]

The proposed amendments to subsection 4(2), paragraphs 1 and 5 would result in the subsection reading as follows:

4. (2) *Excluded Property* — The value of the following property that a spouse owns on the valuation date does not form part of the spouse’s net family property:

1. Property that was acquired by gift or inheritance from a third person after the date of the marriage; ...
5. Property into which property referred to in paragraphs 1 to 4 can be traced.

Consider the following example:

During the marriage the wife inherits a cottage that has been in her family for generations. It is located in Muskoka and because of its location at separation is worth \$500,000.00 for land value alone. The property has been used by the family as a recreational home during the marriage. The husband also receives an inheritance from his family during the marriage. He invests his inheritance into the stock market and his investment is worth \$500,000.00 at the date of separation. Assuming that the parties had no other assets or debts at the date of marriage or separation, the wife’s net family property is \$500,000.00 (the value of the cottage, which qualifies as a matrimonial home and is not eligible for an exclusion). The husband’s is nil since he is permitted to exclude the value of the stock portfolio, which can be traced to inherited funds. The wife owes the husband \$250,000.00 and, no doubt, will have to sell the cottage to pay him. The

husband ends up with a net worth of \$750,000.00 and the wife ends up with a net worth of \$250,000.00, even though they received inheritances of similar value during the marriage.

The proposed amendments to s. 4(2) would eliminate the obvious unfairness in the above example. If the amendments were made, the wife would be able to exclude the value of the cottage on the date of separation in the calculation of her NFP. Both spouses would have nil NFP and equal net worths of \$500,000.00 at the date of separation.

The perversity of the results based on the treatment of matrimonial homes in s. 4(2) has given rise to all sorts of artificial devices to avoid its application. A spouse who receives an inheritance will receive legal advice that if he/she wants the benefit of an exclusion in future, he/she must keep the funds separate from the family's resources. When an inheritance is received, most spouses want to pay off any existing mortgage on their matrimonial home; however, if they do so, they will lose the benefit of the exclusion. Thus, spouses are advised *not* to use inherited funds to reduce mortgages on matrimonial homes. This advice flies in the face of common financial sense and conflicts with ideas of marriage as a partnership and of sharing within the family. Nevertheless, it is warranted by s. 4(2) of the FLA.

Lawyers assisting clients with estate planning have developed a variety of legal fictions to avoid the inequity of s. 4(2). It makes little sense that people of modest means need to employ a lawyer at significant expense because they want to be generous to their married children.

3. Protections Afforded by Part II of the FLA

The proposed amendments to Part I of the FLA do not diminish the protections afforded in Part II of the FLA with respect to the matrimonial home. Spouses will continue to need each other's consent to sell, mortgage or otherwise dispose of a matrimonial home and both spouses will continue to have rights to possession of a matrimonial home, regardless of which spouse owns it.

Summary

The preamble of the FLA provides that one of the purposes of the Act is to provide for the "orderly and equitable" settlement of the property issues arising from breakdown of the spousal partnership. In other words, the FLA *should* provide for a scheme that promotes certainty and predictability while at the same time meeting an objective standard of equity and fairness. For the most part, the FLA achieves these goals. However, in the treatment of the matrimonial home in Part I, fairness is compromised, except where it is achieved through the use of legal fictions which undermine the integrity of family law theory. It is important when addressing legislative reform to Part 1 that any changes be as discrete as possible so that we do not lose the benefit of those provisions that do meet the goals of certainty, predictability and fairness. The suggested amendments, which eliminate references to the matrimonial home in Part I, would achieve this result.

B. Assets Acquired by Surviving Spouse Outside the Will or Intestacy Laws

Recommendation: Add a credit mechanism in Part I of the *Family Law Act* similar to that already provided for life insurance, pensions and other plans which will apply to assets acquired by the surviving spouse on the death of the deceased spouse through mechanisms outside of the Will or intestacy laws.

The preamble of the FLA states as one of the Act's goals the recognition of marriage as a form of partnership. This objective is supported by provisions in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership.

To achieve the recognition of the marriage partnership, the FLA provides a scheme in which, with some exceptions, the value of assets acquired and the value of asset growth during the marriage are "equalized" at the end of the marriage. A marriage ends, for the purposes of the FLA, when a divorce is granted, when a marriage is declared a nullity, when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, or when a spouse dies. The mechanism adopted in the FLA is a calculation of each spouse's "net family property" and payment to the spouse with the lesser net family property of one half of the difference between the net family properties of the spouses. In the case of death, the right to equalization is given only if the spouse with the lesser net family property is the surviving spouse. The estate of the deceased spouse is not entitled to an equalization payment from a surviving spouse with a higher NFP.

Three features of the equalization scheme in the FLA combine to create a windfall to the surviving spouse of the deceased's interest in jointly held property and other assets passing outside of the Will or the intestacy laws. These features are:

- the definition of "valuation date" in subsection 4(1);
- the election on death under subsections 6(1), 6(2) and 6(3); and
- the limited credit given under subsection 6(6).

Except for the assets specified in subsection 6(6), no credit is given against the surviving spouse's equalization entitlement for such assets. The goal of equalization of assets acquired during the partnership of marriage is not achieved; rather, inequality is created.

When spouses hold a property jointly, the calculation of net family properties on the date before the date of death allocates a half interest to each of the surviving spouse and the estate of the deceased spouse, notwithstanding that the surviving spouse will receive the whole value of the jointly held property by right of survivorship. In the calculation of the surviving spouse's equalization claim, no credit is given against the claim for the survivorship interest acquired by the spouse.

The following are the applicable FLA provisions:

4. — (1) In this Part, ...

“valuation date” means the earliest of the following dates...

5. The date before the date on which one of the spouses dies leaving the other spouse surviving.

5. (2) — When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

6. Election: spouse’s will. — (1) When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.

(2) *Idem: spouse’s intestacy.* — When a spouse dies intestate, the surviving spouse shall elect to receive the entitlement under Part II of the Succession Law Reform Act or to receive the entitlement under section 5.

(3) *Idem: spouse’s partial intestacy.* — When a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the Succession Law Reform Act, or to receive the entitlement under section 5.

(4) *Property outside estate.* — A surviving spouse who elects to take under the will or to receive the entitlement under Part II of the Succession Law Reform Act, or both in the case of a partial intestacy, shall also receive the other property to which he or she is entitled because of the first spouse’s death.

(5) *Gifts by will.* — The surviving spouse shall receive the gifts made to him or her in the deceased spouse’s will in addition to the entitlement under section 5 if the will expressly provides for that result.

(6) *Insurance, etc.* — Where a surviving spouse,

- (a) is the beneficiary,
 - (i) of a policy of life insurance, as defined in the *Insurance Act*, that was taken out on the life of the deceased spouse and owned by the deceased spouse or was taken out on the lives of a group of which he or she was a member, or
 - (ii) of a lump sum payment provided under a pension or similar plan on the death of the deceased spouse; and
- (b) elects or has elected to receive the entitlement under section 5,

the payment under the policy or plan shall be credited against the surviving spouse's entitlement under section 5, unless a written designation by the deceased spouse provides that the surviving spouse shall receive payment under the policy or plan in addition to the entitlement under section 5.

(7) *Idem.* — If a surviving spouse,

(a) elects or has elected to receive the entitlement under section 5; and

(b) receives payment under a life insurance policy or a lump sum payment provided under a pension or similar plan that is in excess of the entitlement under section 5,

and there is no written designation by the deceased spouse described in subsection (6), the deceased spouse's personal representative may recover the excess amount from the surviving spouse.

The net result can more easily be understood with the following example:

Chris – Surviving Spouse	Pat – Deceased Spouse
On valuation date owns: - ½ joint home \$300,000 - RRSPs \$100,000 on which Pat is beneficiary Net Family Property = \$400,000	On valuation date owns: - ½ joint home \$300,000 - RRSPs \$50,000 on which Chris is beneficiary - Rental property \$300,000 Net Family Property = \$650,000
Equalization claim on separation or divorce = \$125,000 Total = \$525,000	After payment of equalization claim on separation or divorce Total = \$525,000
Equalization claim on date before death = \$125,000 Reduced by credit for RRSPs to \$75,000 Chris now receives: Home \$600,000 Chris's RRSPs \$100,000 Pat's RRSPs \$50,000 Equalization payment \$75,000 Total = \$825,000	Pat's Estate is left with: Rental property \$300,000 Less equalization payment of \$75,000 Total = \$225,000

The end result is a windfall to the surviving spouse, in this case of \$300,000, representing the value of the joint property acquired for which there is no credit under the FLA.

The OBA recommends that the credit provided for in subsection 6(6) be expanded to include other property, besides that already specified in the subsection, to which the surviving spouse becomes entitled because of the deceased spouse's death, other than under the deceased spouse's will or the provisions of the *Succession Law Reform Act*. We offer an example of how subsections 6(6) and (7) might be amended. Additions are underlined; deletions are struck through.

(6) ~~Insurance, etc.~~ and other property received as a result of the death of a spouse. — Where a surviving spouse,

- (a) is the beneficiary,
 - (i) of a policy of life insurance, as defined in the Insurance Act, that was taken out on the life of the deceased spouse and owned by the deceased spouse or was taken out on the lives of a group of which he or she was a member, or
 - (ii) of a lump sum payment provided under a pension or similar plan on the death of the deceased spouse; or
- (b) is the recipient of any property to which he or she is entitled because of the first spouse's death other than under the deceased spouse's will or under Part II of the *Succession Law Reform Act*, whether by right of survivorship or otherwise; and
- ~~(b)~~ (c) elects or has elected to receive the entitlement under section 5,
 - (i) the payment under the policy or plan shall be credited against the surviving spouse's entitlement under section 5, unless a written designation by the deceased spouse provides that the surviving spouse shall receive payment under the policy or plan in addition to the entitlement under section 5; and
 - (ii) the value of the other property acquired by the surviving spouse shall be credited against the surviving spouse's entitlement under s. 5, unless the deceased spouse, either by will or other written statement, expressly provides that the surviving spouse is to receive such other property in addition to the entitlement under section 5.

(7) *Idem.* — If a surviving spouse,

- (a) elects or has elected to receive the entitlement under section 5; and
- (b) receives payment under a life insurance policy or a lump sum payment provided under a pension or similar plan ~~that is in excess of the entitlement under section 5; or~~
- (c) acquires other property referred to in subsection (6)(b),

that ~~is~~ together are in excess of the entitlement under section 5 and there is no written designation by the deceased spouse described in subsection (6)(c)(i) or no express provision in the deceased spouse's will or in a written statement as described in subsection (6)(c)(ii), the deceased spouse's personal representative may receive the excess amount from the surviving spouse.

Although the OBA considered recommending that the valuation date in the case of death be changed to the date of death rather than the date before the date of death, we rejected such a change because it does not solve the problem. The date of death does not necessarily coincide with the date that jointly held property reverts to the surviving joint tenant.

Using the example above, the credit would work as follows:

Chris – Surviving Spouse	Pat – Deceased Spouse
On valuation date owns: - ½ joint home \$300,000 - RRSPs \$100,000 on which Pat is beneficiary Net Family Property = \$400,000	On valuation date owns: - ½ joint home \$300,000 - RRSPs \$50,000 on which Chris is beneficiary - Rental property \$300,000 Net Family Property = \$650,000
Equalization claim on separation or divorce = \$125,000 Total = \$525,000	After payment of equalization claim on separation or divorce Total = \$525,000
Equalization claim on date before death = \$125,000 Reduced by RRSPs to \$75,000 Reduced by ½ interest in joint property to (-\$225,000) Chris now receives: Home \$600,000 Chris's RRSPs \$100,000 Pat's RRSPs \$50,000	Pat's Estate is left with: Rental property \$300,000 Plus recovery by estate of \$225,000 excess if an election is made

<p>If an election is made, less recovery by estate of \$225,000</p> <p>Total= \$525,000</p>	<p>Total = \$525,000</p>
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If such a credit mechanism is provided in the FLA, it would quite likely eliminate the election by a surviving spouse in such circumstances, providing a more equitable result while not achieving full equalization, as no equalization right is given to the estate of the deceased. The OBA does not recommend providing a right to the estate of the deceased spouse to recover the full amount of the windfall unless it is specifically gifted by the deceased, so that such a recovery would not be dependent on the surviving spouse making an election.

C. Property Rights for Unmarried Spouses

Recommendation: Amend Part I of the *Family Law Act* to provide property rights to unmarried spouses.

1. The Problem

The form of the typical family has been changing substantially, with over ten percent of Ontario’s intact families consisting of unmarried spouses according to the 2006 Census. Ontario’s family legislation continues to treat such families differently from those formed by married spouses. Unmarried couples are treated as strangers for the purposes of family property law. While married spouses now include both same sex and opposite sex spouses, unmarried cohabitants continue to be excluded from property rights under Ontario’s family property legislation.

The sharing of wealth accumulated during marriage under the FLA was initially justified as reflecting our society’s expectation that marriage is an economic partnership. Ontario’s property legislation was originally designed to protect unsophisticated married spouses by providing a default regime for the sharing of wealth, from which spouses could opt out by contract if they agreed to do so. Cohabiting couples are not protected by this default regime. Economic intertwining during their relationship may give them grounds to assert equitable claims based on resulting trust or unjust enrichment, but these claims are expensive to litigate and the outcome is uncertain.

Cohabiting spouses are partially protected by Ontario’s family legislation. They may make spousal support claims and any contracts that they enter into are domestic contracts with the special protections those receive under the FLA. Anecdotally, family lawyers report that many unmarried cohabitants discover only at separation that they are excluded from the right to equalization under the same statute. The partial inclusion of cohabiting spouses under the FLA contributes to the confusion. That cohabitants acquire

mutual financial obligations of support by default, but not property rights, is scarcely self-evident to the general public.

Across the country a number of other provincial and territorial governments have broadened the scope of their family property statutes, either including unmarried cohabitants by default or enabling spouses to opt in to statutory property rights by registered domestic partnerships. For Ontario's family legislation to reflect the realities of contemporary family forms, we need to join the law reform effort already under way in eight provinces and territories.

Property rights for unmarried spouses in different degrees have been enacted in the Northwest Territories, Nunavut, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Quebec, and Saskatchewan, and are pending in the Yukon.

Northwest Territories: *Family Law Act*, S.N.W.T. 1997, c. 18, ss.1, 34: property rights govern spouses who have cohabited for two years or in a relationship of some permanence with a child. The rights have retrospective application.

Nunavut: *Family Law Act*, R.S.N.W.T. 1997, c. 18, ss.1, 34: property rights govern spouses who have cohabited for two years or are in a relationship of some permanence with a child. The rights have retrospective application.

British Columbia: *Family Relations Act*, R.S.B.C. 1996, s.1, Part 5, s. 65 and Part 9, s. 120.1 as am. by S.B.C. 1997-20-22: unmarried spouses who have cohabited for two years may opt in to property sharing by agreement, although they continue to be excluded from the default provisions of the Act. Once they have opted in, the court retains power to vary the apportionment of family assets if unfair. There is no retrospective application to these provisions, which apply only to agreements entered into after February 1998.

Manitoba: *Vital Statistics Act*, C.C.S.M., c. V60, s. 13.1, *Family Property Act*, R.S.M. 1987, c.M45, s. 2.1: unmarried spouses who register a partnership *or* cohabit for 3 years are included in property rights with retrospective application unless the parties had already separated at the time the legislation was introduced.

Newfoundland and Labrador: *Family Law Act*, R.S.N. 1990, c. F-2, s. 63: unmarried spouses may enter into a domestic contract opting in to the property regime for married spouses.

Nova Scotia: *Vital Statistics Act*, R.S.N.A. 1989, c. 494, s. 54 as am. by *Law Reform 2000 Act*, 2000, c. 29, s. 45: any two individuals may register as domestic partners and have the same property rights as married spouses under *Matrimonial Property Rights Act* R.S.N.S. 1989, c. 275.

Quebec: *Civil Code of Quebec*, L.Q. 1991, c. 64, as am, s.521: any two individuals may enter into a civil union and by doing so opt in to the property regime for married spouses.

Saskatchewan: *Family Property Act*, S.S. 1997, c. F-6.3, ss. 2, 3: property rights are extended to unmarried spouses who have cohabited for two years, with retrospective application.

Yukon: *Family Property and Support*, R.S.Y. 2002, c. 83: amendment to extend property rights to spouses who have cohabited for 12 months (not proclaimed).

2. Options for Reform

Law reform efforts in other jurisdictions highlight the options available for reform. THE FLA could be amended to:

1. *Give property rights to all spouses who are currently eligible for spousal support.*

This option has the advantage of simplicity and consistency with spousal support obligations. It would include not only spouses who have cohabited three years but also spouses who are in a relationship of some permanence with a child. As a consequence, it may cover a number of spouses who have relationships of very brief duration. The FLA already provides discretion to a court to reduce or deny equalization for married spouses who have cohabited for less than five years. Presumably the same discretion would apply to unmarried spouses.

Equalization applies to assets acquired by a couple during a specific period of time. The appropriate starting date for the period of acquisition must be considered. The date of marriage provides a clear date for the equalization calculation. The date of commencement of cohabitation may not be as clear in many cases. However, the courts have had little difficulty in developing jurisprudence to deal with similar evidentiary problems in spousal support cases and with respect to separation dates for married couples.

Just as when the FLA (and before it, the *Family Law Reform Act*) was first introduced for married spouses, the legislature will need to consider whether the rights should have retrospective application if unmarried spouses are included in a default regime.

2. *Extend property rights only to spouses who have cohabited at least three years*

This option would exclude spouses who “are in a relationship of some permanence” and have a child together. A specified period of cohabitation establishes a more easily determinable basis for parties to acquire mutual property obligations. A three-year period of cohabitation is consistent with the existing default period for establishing standing to claim spousal support.

3. *Permit all spouses to opt in to property rights by means of a voluntary registered domestic partnership system or domestic contract.*

Ontario’s legislation now permits unmarried spouses to enter into domestic contracts in which, if they choose, they may opt in to the property scheme for married

spouses. Courts are imposing increasingly onerous financial disclosure obligations on parties to domestic contracts under the FLA. These obligations can discourage parties from entering into such contracts or result in significant legal fees which are a barrier for low income and middle income Ontarians.

An alternative is the registered domestic partnership or civil union regime used in some other provinces. Under this type of regime, the couple jointly register and by so doing assume all the obligations of a married couple. Registration is voluntary. It has the advantage of not requiring a domestic contract with the formal requirements and financial disclosure required by the FLA. Cohabiting partners who register might not be fully aware of the legal rights and obligations they incur or their practical impact; but their experience would not differ from that of couples who marry without a full appreciation of the implications of that status. The disadvantage of an opt-in regime is that it does not protect unsophisticated parties or those in relationships where there is an imbalance of power.

Ontario has fallen behind other jurisdictions. Whatever approach may be chosen, it is time to reform our family legislation to provide coherent support and property protections for all spouses.

If property rights under the FLA are extended to common-law spouses, there may be additional challenges to court resources. While we would expect less litigation over claims based on resulting trust or unjust enrichment, litigation over equalization claims might reasonably be expected to increase. Contemporaneously with such a statutory revision, the requirement for additional court resources would need to be examined.

III. PENSION DIVISION ON MARRIAGE BREAKDOWN

This Part of the Ontario Bar Association's submission on family law reform was originally prepared in response to the Law Commission of Ontario Consultation Paper on the topic of pension division on marriage breakdown. We are pleased to submit it also to the Attorney General, as an important part of our proposals on family law reform.

The Law Commission posed a series of questions in its consultation paper. The OBA submission is framed around those questions, which are reproduced under the section headings.

Introduction

The method of valuing pensions and the method of dividing pensions, once value has been determined, are the essential policy issues which must be decided by the Ontario government in any project to reform the law of pension division on marriage breakdown. The primary reasons for amending the *Family Law Act* and *Pension Benefits Act* provisions governing pensions are to provide for a more equitable division of pension assets while reducing the costs and uncertainties that are associated with division of pensions under the current system.

There is a large measure of consensus within the OBA on the questions presented by the Law Commission of Ontario. However, the differing expertise, client constituencies and practice experience of the lawyers within the Sections whose members are most concerned with the division of pensions on marriage breakdown have predictably led to some differences in how we assess the available options for reforming the law in this area. Where we differ, we share the view that setting out our opinions and the reasons for them will be useful to the Law Commission because it will clearly show where the crucial policy decisions have to be made and what considerations are relevant to making them.

In any discussion of policy for pension division purposes, a number of factors must be considered, including the following:

1. The economic realities for Ontario seniors and the goal of maintaining financial independence for Ontario's aging population;
2. Which (if any) parties to a marriage have had the opportunity to participate in a pension plan;
3. The type of pension plan in which parties to a marriage have participated; and
4. Retirement savings in vehicles other than pension plans, including personal Registered Retirement Savings Plans (RRSPs), group RRSPs sponsored by an employer, Deferred Profit Sharing Plans (DPSPs), and Tax Paid Savings Plans (TPSPs).

Question 1: Whether the ISM or the DSM¹⁰ is fairer

1. *Which approach is essentially fairer to the parties: the ISM or the DSM (or some other model) and why? We want to know whether you think the ISM is unfair to the nonmember spouse or creates a windfall for the pension plan, and if so, whether it can be modified in such a way as to alleviate these problems. Similarly, we seek your views on whether the DSM gives the non-member spouse a share in increases in pension plan value that truly are attributable solely to the postbreakdown period, and if so, whether it can be modified to reduce or eliminate any injustice to the member spouse.*

The OBA believes that which model is adopted — the ISM or the DSM — will depend on the policy objectives the Government is seeking to meet. One such policy choice is whether to regard a pension primarily as a capital asset or primarily as a source of income. Questions to consider include whether a non-member spouse who receives a capital transfer at the time of separation under the ISM is more likely to make a spousal support claim later, and whether a spouse who receives a separate pension under the DSM is less likely to seek spousal support.

Fairness

The OBA believes that it is important at the outset to define what “fair” means. We submit that the elements of fairness, in the context of pension division on marriage breakdown, are:

1. Fairness of value: a method that results in fair values being assigned to pension interests;
2. Fairness of form: the asset received by the non-pension holder should afford him or her investment opportunities that are not significantly different from those enjoyed by the pension holder;
3. Clarity and comprehensibility: the parties and their lawyers should be able to understand the pension division process. We point out, as well, the increasing trend to self-representation by people who cannot afford or do not wish to use lawyers. They must be able to understand the process without a lawyer’s explanation;
4. Ease of implementation for spouses and for pension administrators;
5. Lack of expense: costs to the parties should be lessened or eliminated and administrative costs should be minimized; and

¹⁰ With the Immediate Settlement Method (“ISM”), the non-member spouse’s share of a pension is settled immediately by way of a lump-sum transfer from the pension plan to another pension plan or to an RRSP. The ISM may also involve a member purchasing or offsetting (using other marital property) the non-member spouse’s interest in a pension, in which case an actual division of pension benefits may not occur. With the Deferred Settlement Method (“DSM”), the non-member spouse is assigned an interest in a portion of the member’s pension. Actual division of benefits occurs later on a “trigger” date such as termination of employment, death or retirement. At the trigger date, the non-member spouse’s interest may be settled as a lump-sum transfer or as a life pension payable from the plan.

6. Enhanced future income security for non-member spouses (thereby minimizing the potential for future spousal support disputes).

Valuation and settlement are separate issues

The OBA believes that it is important to distinguish the question of how the pension asset should be valued from how the non-pension holding spouse's entitlement should be settled. For example, the question of whether the DSM gives the non-member spouse an inappropriate share in the post-separation increase in the value of the pension assumes a retirement method valuation. However, the DSM does not *per se* presuppose either a termination or a retirement method valuation.

The ISM does presuppose one valuation method, the termination method. The question of whether the ISM is "unfair" to the non-member spouse assumes that the non-member spouse should share to some extent in post-separation increases in the value of the pension. The decision whether such post-separation increases are or are not to be shared by the non-member spouse is one of policy; the issue is ultimately not a legal one.

Generally speaking, if it is determined that some or all post-separation increases in the value of a pension earned during the relationship (*i.e.*, accruals and contributions made to the plan after the end of the relationship) should be taken into account for purpose of determining a value to be assigned to a non-member spouse, then a retirement method will be chosen and the DSM makes the most sense. In contrast, if it is determined that post-separation increases in value should not be taken into account and a termination method is chosen, then the ISM would seem to make more sense, since the value of the pension will not change after separation. Issues arising around the form of the asset received by the non-member spouse on an immediate settlement of the division are addressed below under the heading "Dealing with ISM Settlements".

A single prescribed valuation method

Ideally, there should be one clear prescribed method for valuing the pension that includes prescribed assumptions for variables such as the retirement date of the plan member and life expectancy. If clear valuation rules are prescribed, the parties will not have to hire competing experts to prepare valuations. Under the current regime, situations arise where the cost of valuing and dividing a pension on marriage breakdown approaches or exceeds the value of the pension itself. Reform of pension division on marriage breakdown should focus on substantially reducing the likelihood that such situations will occur.

Therefore, regardless of the settlement approach that is adopted, the OBA strongly recommends that the valuation method, the reporting of pension values, the method and terms of the pension division, and the elections available to members and non-member spouses, all be clearly prescribed. There should be no discrepancy between the valuation methods prescribed by the PBA and the FLA. The particulars of a prescribed method of valuation and division, and the use of prescribed forms, are discussed in detail in other sections of this submission. Ontario can benefit from the experience of other provinces in this regard. At the same time, the experience of other provinces is but one factor to consider. The particular context and circumstances of pension division law reform in Ontario, including the Province's economy in the broad

sense and its entire family law regime, are the essential framework into which the reform of pension sharing must be placed.

Pension plans and plan participation in Ontario

The OBA observes that the question posed seems to presume that non-member spouses of pension plan members are predominantly women and are disadvantaged. That is not necessarily the case. The largest group of members of final average earnings defined benefit pension plans are in the public sector, and female members of public sector pension plans significantly outnumber male members.

At the same time, there do not appear to be any statistics readily available that address the marital status of pension holders. Therefore it is difficult to assess who is affected, or how many pensions are affected, or the types of pension that are affected on the breakdown of marriages in Ontario.

More men than women participate in pension plans, but women are catching up. In 1993, men accounted for 57.7 percent of total pension plan membership in Canada. In 2003, this percentage had dropped to 53.6 percent and in 2007, to 51.5 percent. From 1998 to 2003, most (about two-thirds) of the growth in female pension plan participation occurred in the public sector. In 2007, overall female participation in defined-benefit (DB) pension plans surpassed male DB pension plan membership, for the first time ever.¹¹ As we have noted, there are no readily available statistics on the marital status of pension holders.

There are several different types of retirement plan in Ontario with varying degrees of value for the member and former spouse of the member of the plan, depending on the benefits provided in the plan text. DB pension plans typically provide benefits that are more generous than defined-contribution (DC) pension plans. DB pension plan participation is overwhelmingly weighted to the public sector, where 85 percent of workers belong to a pension plan. Most public sector DB pension plans provide pension benefits using a final average earnings (FAE) formula that determines pension amounts based on a member's earnings at or close to retirement, which are usually the highest. Public sector pension plans also provide indexing, bridging and subsidized early retirement benefits. Private sector DB pension plans are more likely to provide benefits based on career average earnings (CAE) and to offer less generous indexing and early-retirement benefits. In the private sector, 1.1 million (more than one-third) of pension plan members belong to DC and hybrid/combo pension plans, which typically provide less generous benefits than FAE/CAE DB pension plans. Of the membership in DC and hybrid/combo DB pension plans, 690,000 (58 percent) are male.

Fewer than 40 percent of employed Ontario workers participate in a pension plan. In the private sector, pension plan participation is below 25 percent.¹² Those who don't participate in a pension plan rely mainly on accumulations in personal or group RRSPs.

¹¹ See Statistics Canada, "Pension Plans in Canada" January 1, 2003 at <http://dsp-psd.tpsgc.gc.ca/Collection/Statcan/13F0026M/13F0026MIE2004001.pdf> and Statistics Canada "The Daily" July 4, 2008 at <http://www.statcan.ca/Daily/English/080704/d080704a.htm>.

¹² See <http://www40.statcan.ca/101/cst01/labr66g.htm> and <http://www40.statcan.ca/101/cst01/famil119g.htm>.

The fact that retirement saving for most happens outside registered pension plans raises the question as to why retirement savings vehicles other than pension plans do not appear to be considered in any pension division regime in Canada, including Ontario.

Policy reasons supporting the DSM

Lawyers representing the Family Law Section of the Ontario Bar Association believe that the preferable model for pension division reform is the DSM.

This preference is based principally on the view that the deferred settlement method of division results in a fairer division, because it takes into account the actual realized value of a given pension. It does not entail the making of numerous assumptions about future events and their impact on that pension's value. The goal of the DSM is to ensure that the spouses benefit equally from the pension that accrued during their marriage.

The ISM, while administratively simple, may result in values that are lower by one third to one half than those that result from the DSM.¹³ The reason is that the ISM assumes that the pension member terminated employment at the date of separation and would not have retired until age 65. This approach to value has been rejected by the Ontario courts, which have struggled with issues of pension value in the 22 years since the law of Ontario first required pensions to be included in a spouse's net family property for the purposes of equalization. The introduction of the ISM into Ontario would run contrary to the expectations of spouses during their marriage and would result in payments to spouses which are considerably lower than is currently the case.

With the DSM, no assumptions are necessary. The spouses end up sharing exactly what the pension turns out to be worth. Deferred settlement does involve some fractional sharing of value accrued after separation, but the Family Law Section believes that this is not unfair for the following reasons:

1. Pensionable service accrued during a marriage may increase in value as a function of vesting of ancillary benefits (e.g. bridging benefits; early retirement subsidies) that depend in part on the total number of years of pensionable service accrued by a member, including during marriage.
2. Pension plans sometimes experience surpluses, which may have accrued during the marriage, and these would not be shared with a spouse except under a DSM combined with a retirement method of valuation that allows the spouse to share any plan improvements.
3. Some post separation benefit enhancements (such as may be caused by promotions) may appear to be attributable only to the post-separation efforts of the member, but an analysis which takes into account the complex realities of how family members divide their roles and responsibilities would reveal that this is not necessarily the case. One spouse may have focused on career development while

¹³ The British Columbia Law Institute (BCLI) provides an excellent comparison of the differences in valuations produced using an ISM as opposed to a DSM model in Appendix D to their 2006 report: "Pension Division on Marriage Breakdown – A Ten Year Review".

the other took on a greater share of household or child care responsibilities. The existing law recognizes marriage as a partnership and mandates recognition of all types of contributions by spouses to the marriage.

It is important when a marriage breaks down to consider not only the economic circumstances of the spouses at the time they separate, but their future economic security, particularly as they approach retirement age. The life expectancy of both men and women has increased significantly during the last century. While more women have entered the labour force during this time period, the average earnings for women, compared with men, have not climbed much beyond the 60 percent level. Ontario women still spend significantly more hours than their male counterparts providing unpaid housework and unpaid childcare. As a result of the continuing wage gap and the greater assumption of unpaid labour in the home, it is not surprising that there are twice as many low-income women at age 65 and over, compared with men in this same age range.

The preamble to the FLA states that marriage is a form of partnership. While contributions to this partnership may end at separation, the benefits from participation in a pension plan during marriage may increase after the end of the marriage. By allowing the non-member spouse to share the benefit of post-marriage contributions and benefit accrual the DSM model offers enhanced income security to the non-member spouse.

Policy reasons supporting the ISM

Lawyers representing the Pension and Benefits Section of the Ontario Bar Association believe that the preferable model for pension reform is the ISM, for it is both simple and fair.

The ISM method is simple, for it is easily understood by the parties and their family lawyers and does not unduly complicate the administration of defined benefit pension plans. It also treats DB pension property in a manner that is consistent with other retirement savings, such as RRSPs and DC pension plan benefits.

As we have already noted, the question of whether the ISM is “unfair” to the non-member spouse assumes that the non-member spouse should share to some extent in post-separation increases in the value of the pension. The decision whether such post-separation increases are or are not to be shared by the non-member spouse is one of policy; the issue is ultimately not a legal one.

While the DSM model tends to provide higher values for a non-member spouse, the value of a DSM settlement varies significantly depending on the type of pension plan. A number of factors cause increase in value of a pension associated with the period of marriage. In a capital accumulation plan (CAP) such as a DC pension plan, RRSP, DPSP or TPSP, continuing accrual of investment earnings is responsible for the increases in the post-separation value of retirement savings accumulated during the marriage. Post-separation increases in the pension accrued during the marriage in a DB pension plan are also attributable to post-separation contributions and plan participation. The difference between DB and DC pension plans is that in the case of a DB pension plan (particularly an FAE plan) the value of continued participation increases substantially as a member ages, making participation much more valuable in late career than in early career. The

DSM model presumes that some of this increased post-separation value relates to years of service during marriage. There is a logical basis for this presumption in DB pension plans that offer final earnings formulae, early retirement and bridging benefits, which vest as a function of the number of accumulated years of service. However, not all DB plans provide these benefits.

The DSM model is not generally applied to DC pension plans, even though they are similar to DB pension plans in that there is post-separation added value. However, that added value is a function of post-separation investment earnings which can in theory be replicated by the ISM through investment of the divided capital sum. Nevertheless, some DC pension plans have contribution formulae that increase as the number of years of participation increases, which effectively relates some post-marriage contributions to years of participation during marriage. This raises some interesting questions:

- Is it appropriate to apply the DSM model to DB plans but not to DC plans?
- Should the DSM model be applied to other CAPs (*i.e.*, DC pension plans RRSPs, DPSPs and TPSPs)?
- From an administrative point of view, is it feasible or desirable to apply the DSM model to CAPs?

The value of a DSM settlement will be highest in a DB pension plan that has an FAE benefit formula because pension benefits are based on the member's end-career salary, which is usually the highest salary. Whether or not the DSM model would deliver a higher value than an ISM settlement in a DC plan or other CAP will depend on whether the non-member spouse gets a share of contributions made in respect of a member after marriage breakdown, and on whether investments within the DC plan will outperform investments selected by the non-member spouse outside the plan.

In effect, the DSM model applied to a DB pension plan provides to a non-member spouse the opportunity to benefit from contributions made to the plan after marriage breakdown. For this reason, the DSM model can be used to address expected income disparity between men and women. However, this seems to presuppose that more men than women are members of DB pension plans that have an FAE benefit formula. Further research is needed to determine whether the DSM model can in fact address income disparity between men and women because the fact that female members of DB pension plans outnumber males suggests that the majority of beneficiaries of a DSM settlement will be male. In the public sector, where most members of FAE pension plans are found, the difference may be even greater.¹⁴ In itself, this is not sufficient information to conclude that that a DSM model applied to DB pension plans would in fact disadvantage women. Other factors, such as wage disparities, would also need to be considered. However, given that the overwhelming number of members of FAE pension plans is in the public sector, where pension plan membership appears to be weighted toward women, it may be inappropriate to presume without further study that DSM settlements providing

¹⁴ For example, the federal public sector pension plan has 9% more female active members than males. Almost 73% of the active membership of the Ontario Teachers Pension Plan is female. Data for the entire Ontario public sector indicate that in 2007, 465,651 pension plan members were female as compared to 263,615 male members (source: Statistics Canada Table 280-0009).

higher values for non-member spouses will tend to correct income disparities between women and men.

As a final point, it should be noted that the extent to which a DSM settlement can or will address future income disparities between separating spouses depends to a large extent on employment choices made by the member spouse after marriage breakdown, which are outside the control of the non-member spouse. Since a DSM settlement gives the non-member spouse rights to participate in future increases in value of a pension accrued with a particular employer, the value of a DSM settlement will be significantly lower if the member spouse changes jobs after marriage breakdown. Whether or not a new job involves pension plan membership, the non-member spouse will not participate in the value of future pension accrual after a job change. Particularly in the private sector, where job changes are common, this will be an important consideration in determining whether the DSM or the ISM model is preferable from a value perspective.

Dealing with ISM Settlements

One concern associated with the ISM, particularly for DB pension plans, is that non-member spouses lose the benefit of professional asset management because when an ISM settlement is transferred from a pension plan, the non-member spouse must determine how to invest the transferred assets. A large body of research demonstrates that individuals don't do a good job of selecting investments and that investments selected by individuals typically under-perform market indices.¹⁵ This issue could be addressed by creating a public pension fund (*e.g.*, the "Ontario Pension Trust" or "OPT") operated on a cost-recovery basis by an arms-length agency analogous to the Canada Pension Plan Investment Board. The OPT could receive transfers relating to ISM settlements, providing non-member spouses with professional investment management services at reasonable rates and at no cost to taxpayers. The OPT could also accept transfers in respect of missing pension plan members, thus removing a major administrative burden from pension plan sponsors and providing a single point of contact for recovery of pension funds by former pension plan members.

Windfalls

The payout of a commuted value to a pension plan member is generally not considered to create a windfall for the plan. It follows that the payment of a commuted value to a non-member spouse does not create a windfall.

Question 2: Mandatory or Optional Pension Division Regime

2. To what extent should the parties be bound by the Regime? Should there be a presumption that the approach will be used unless certain exceptional circumstances exist, and if so, what are those exceptional circumstances? Might it instead simply be a default regime, which applies only

¹⁵ See Broadbent, John, Michael Palumbo and Elizabeth Woodman. "The Shift from Defined Benefit to Defined Contribution Pension Plans - Implications for Asset Allocation and Risk Management". Prepared for a Working Group on Institutional Investors, Global Savings and Asset Allocation established by the Committee on the Global Financial System. December 2006 and Tapia, Waldo and Juan Yermo. "Implications of Behavioural Economics for Mandatory Individual Account Pension Systems" at 8. OECD Working Papers on Insurance and Private Pensions No. 11. Organisation for Economic Co-operation and Development. France. July 2007.

if the parties cannot agree to some other means of settling their affairs? Or should it apply in all cases, without exception?

The purposes of reforming the law governing division of pensions on marriage breakdown are to reduce the sources of dispute between separating spouses, to reduce the cost of settling their affairs and to provide a clear, fair and efficient method of dividing pensions without unduly burdening pension plan administrators — indeed, to eliminate the burdens on administrators caused by some aspects of the present system.

Lawyers representing the Pension and Benefits Section of the Ontario Bar Association favour a division scheme that is voluntary to enter, but mandatory and with clear prescribed rules, if applied. Once an equalization calculation is performed (and we are assuming that the pension would continue to be valued in the net family property calculation), the parties to a marriage should have the option of determining how they wish to settle the equalization obligation, and should not be required to divide a pension simply because it exists. A mandatory division at source can also create awkward situations and unnecessary work where both parties have independent pension plan entitlements.

However, if the parties do opt to divide a pension at source, it is our view that it would create more certainty for all involved (the parties, pension plan administrators, employers, regulators, legal counsel, etc.) if the scheme into which they opt is prescribed and would apply in all cases. We are assuming, however, that the prescribed regime will be relatively simple (not highly customized). As such, it will not be suitable for all and it will be difficult to identify in advance for whom it is unsuitable. Therefore an opt out prevents the regime from being too intrusive.

It would be inappropriate to create a default election into a division scheme as this might encourage too little attention to the pension issues. Rather, the “default” in the absence of a positive election would be no division at source.

Lawyers representing the Family Law Section of the OBA note that while including pensions in spouses’ shareable property was a progressive step, the method of sharing pension assets under the FLA is costly to spouses and to the court system. The FLA does not contain a definition of “value” and does not prescribe a method for valuing pensions. One of the main sources of dispute and cost is the valuation of pensions in a family property regime in which the *value* of property acquired during the marriage is shared, rather than the assets themselves, and the legislated way of settling equalization obligations is by a cash payment.

The simplest way to address the difficulties that arise from the current treatment of pensions in the FLA is to remove pensions from the net family property equalization calculation and deal with them in a separate Part of the FLA. Valuation and settlement would be carried out under a mandatory scheme with a prescribed valuation method and a prescribed settlement method; these issues are discussed in detail in our responses below.

An alternative is to prescribe a mandatory valuation method, but to give spouses the option, once the pension has been valued, of dividing it at source or including its value in the net family property calculation and equalization process. Where both spouses have pensions, particularly if the pensions are relatively close in value, keeping

the pensions in the equalization calculation might be simpler than dividing both pensions at source.

Allowing spouses to opt out of division at source is workable only if all pensions of separating spouses are valued according to a prescribed method. If spouses must obtain actuarial valuations (separate, competing valuations in many cases) in order to decide whether to opt in or out of the division regime, an important purpose of reforming the treatment of pensions on marriage breakdown is defeated.

If the parties opt to divide a pension at source, the OBA's view is that the scheme into which they opt should be prescribed and should apply in all cases. A single, prescribed scheme would create more certainty for all involved (the parties, pension plan administrators, employers, regulators, legal counsel, etc.) We are assuming, however, that the prescribed regime will be relatively simple (not highly customized). As such, it will not be suitable for all and it will be difficult to identify in advance those for whom it is unsuitable. An opt-out prevents the regime from being too intrusive.

The OBA submits that the parties should be required to make an irrevocable election to divide or not to divide any pension owned by either spouse when they finalize their affairs after separation. We note that it will be important to develop measures to ensure that parties who do not seek legal advice do not inadvertently fail to address pension issues.

Question 3: Prospective or Retrospective Application

3. Retroactive or prospective application: A decision will also have to be made about temporal application, i.e., should the new regime apply where the valuation date under the FLA falls on or after the day on which the legislation creating the regime comes into force (even though, in the case of the DSM, pensions would no longer be subject to the equalization requirements), or should some other date be chosen?

The new settlement regime should be implemented on a prospective basis, as of a fixed date, to provide pension plans with the time necessary to implement required administrative changes. Some of the changes will require pension plan administrators to revise their administrative systems, practices and procedures. This means some lead time is needed to prepare for the new regime.

Parties who separate after the day on which the new regime is proclaimed into force would automatically be subject to the regime. Parties who separated prior to the new regime being proclaimed into force, but who have not yet settled their affairs, could be permitted to elect to proceed under the new regime. Parties who had already separated and had not yet incurred the expense of an actuarial valuation would thus be able to take advantage of cost savings under the new regime. Voluntary opting in by already separated parties would need to be on consent of both parties, and be subject to the approval of the pension administrator in those cases where pension division has already been initiated.

Question 4: Taxation Issues

4. *Taxation Issues: Since both the ISM and the DSM will result in the non-member spouse receiving a benefit at source, he or she will pay income tax on that benefit. Some might suggest that this is unfair in the case of the ISM if pensions are to remain subject to the FLA equalization regime, in that an equalization payment should be tax-free.⁵⁴ Is it unfair, and if so, is there a way to reduce or eliminate the unfairness? The DSM divides the pension outside of the equalization provisions, but does this mean that there is no unfairness in the non-member spouse being taxed on what he or she ultimately receives? In the case of either model, if there is a tax-related unfairness, is there a way that it can be reduced or eliminated?*

While an equalization payment is an “after tax” payment, when it is calculated, contingent liabilities (including income tax) are deducted from the value of assets at the date of separation. More particularly, when valuing pensions pursuant to the FLA, the pension value is reduced by the estimated rate of tax that the pension member will ultimately pay on his pension. This estimate of the future average tax rate, which may well turn out to be inaccurate, is one of the many variables that are taken into account in pension valuations. The risk of inaccurate discounting for tax is one of the problems in the present approach to pensions.

The Family Law Section of the OBA envisions a reform of pension division legislation under which pensions would not automatically be included in the equalization calculation prescribed by the FLA. The Act would continue to provide for sharing of pensions, but outside the net family property equalization mechanism, unless the spouses elected to include them by opting out of division at source.

It is not the case that an ISM settlement generates an immediate tax burden for a non-member spouse. Within a pension plan, the division of a pension asset is done on a pre-tax basis. The member and non-member spouse will each hold an entitlement that is taxed only when the asset matures and provides income. There is one exception: a pension plan member who takes a transfer value upon termination of employment has a tax-free rollover up to a prescribed limit and must pay tax on any excess amount (which is unlocked and payable in cash), while an assignee spouse who receives a transfer value settlement on marriage breakdown has a tax-free rollover without any cap. However, the terminating member is not required to take a transfer and can avoid this taxation by choosing a pension from the plan. Thus, even with this one difference, there is no fairness problem.

Where members and their former spouses receive taxable payments from a pension plan, such as from separate pensions under the DSM, differences in the after-tax value of such payments arise only to the extent that there are differences between the marginal tax rates that apply to such payments. Such differences, which are completely extrinsic to the pension plan, arise as a result of differences between the parties’ other sources of taxable income.

Question 5: Valuation Method under the ISM

5. *The ISM and Valuation: If the ISM approach is adopted, should a particular valuation method be required as a matter of law, and if so, what should that method be? Should the valuation be performed by the plan administrator, as under Quebec’s Supplemental Pension Plans Act 55 (which essentially adopts an ISM approach), rather than by actuaries retained by the spouses, with the hope of reducing disagreement and litigation?*

The OBA submits that a primary goal of pension reform is to reduce transaction costs by reducing the scope for dispute. For that reason, if the ISM approach is adopted, one valuation method should be required as a matter of law. The use of a uniform, accepted valuation method reduces the possibility of disputes arising over the valuation of pension benefits.

In Quebec, pension benefits are valued on a termination basis using the Canadian Institute of Actuaries' 2005 Standard for Determining Pension Commuted Values ("CIA Standard"). The Pension and Benefits Section of the OBA believes that the Quebec approach, which prescribes a valuation methodology as well as the date of valuation in regulation, is appropriate. The use of a uniform, accepted valuation method (such as the CIA Standard) reduces the possibility of disputes arising with respect to the valuation of pension benefits. Valuations of this nature should be performed by the plan administrator. If the valuation method is clearly set out in the regulation, there would be no need for the spouses to obtain two independent valuations. Furthermore, since the administrator has easy access to the data required to do the valuation, it would be most efficient for the administrator to do so. However, if a single uniform valuation method such as the above is not prescribed, then the administrator will likely not be in a position to perform the valuation.

Alternatively, the Pension and Benefits Section of the OBA submits that a "progressive ISM approach" could be adopted whereby the parties are provided with estimates of the commuted value of the pension at certain prescribed times (e.g. date of separation, earliest unreduced retirement date, and the normal retirement date) based on a prescribed valuation method. The parties could then decide on the most appropriate value to be used in the settlement, based on the unique factual circumstances of those parties, with appropriate external independent legal and/or actuarial advice and with the intervention of the family court (if necessary). The agreed upon/ordered valuation amount can then be settled when the anticipated trigger date occurs (as an ISM settlement). This approach would provide the parties with some flexibility, while maintaining a level of certainty in the pension division process. That being said, if the parties have to choose among the different valuations, it may lead to litigation if they cannot agree on the most appropriate one.

However, the Family Law Section of the OBA submits that in some situations, the retirement method may be preferable as a means of addressing future income disparities between separating spouses and may thus be more consistent with the existing family law regime in Ontario. The termination method of valuation assumes job loss as of the date of separation, which may not be an appropriate assumption in all cases. Under the FLA, some assets are valued for equalization purposes based on their value at the date of marriage breakdown; others are valued based on reasonable assumptions about their expected date of realization, adjusted for their present value to the date of separation. It may be appropriate to have similar flexibility with respect to pension valuations. The Family Law Section also submits that other standards, such as the annuity purchase standard (which tends to produce higher values than the CIA standard) are also available and should be considered.

We note that the assumption that most people will work for the same employer to their normal retirement is no longer valid. With the exception of the public sector,

workers can be expected to change jobs more frequently than was usual in the past. We note, as well, a trend toward early retirement.

The OBA recommends that the plan administrator perform the valuation based on a legislatively determined approach. The plan administrator can most cost-effectively deliver that service. Valuation by the administrator relieves spouses of the expense of hiring experts or entering into extended negotiations. Once implemented, the pension division scheme should be accessible to spouses who do not have the benefit of legal or actuarial advice.

As discussed in the response to question 8, the OBA recommends that a fixed-fee structure be prescribed so that separating spouses may be required to pay part of the cost of pension valuations and partitions, at the option of the administrator. The OBA believes that pension plan members and their former spouses should not be required to pay fees on a full cost-recovery basis, to the extent that such fees would significantly exceed the fee rates prescribed in other provinces.

The OBA submits that valuation of pension benefits by plan administrators on a partial cost-recovery basis will be of significant benefit to members and their former spouses because it will reduce the cost and delay of obtaining valuations and effecting partitions, and related disputes.

Question 6: Spouse's Pension Commencement Time under the DSM

6. The DSM model: If the DSM approach is adopted, should a non-member spouse who elects to take a pension from the member spouse's pension plan have the option of having his or her pension commence at a time other than actual retirement of the member spouse?

The OBA submits that if a DSM approach is adopted, the non-member spouse should not be provided with an election to commence his or her pension at a time other than the member's trigger dates. Such "trigger dates" should be the member's termination of membership, the member's pre-retirement death, the termination of the pension plan or the member's pension commencement date. In general, permitting different start dates for the member and the non-member spouse will increase the cost and complexity of administration for pension plan administrators. For further details, please see the response to question 9, below.

The OBA suggests that an exception to the general rule that the non-member spouse should not be provided with an independent election should be permitted only in the case of diagnosis of shortened life expectancy, as defined in section 49 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("PBA") for the non-member spouse, prior to the member's trigger date. This provision is intended to apply to plan members, but could be modified to apply to a non-member spouse:

49. (1) A pension plan may permit variation in the terms of payment of a pension or deferred pension by reason of the mental or physical disability of a member or former member that is likely to shorten considerably the life expectancy of the member or former member.

(2) A pension plan shall be deemed to permit variation in the terms of payment of a pension or deferred pension in such circumstances of shortened life expectancy as may be prescribed, if the prescribed conditions are satisfied.

Section 51.1 of Regulation 909 of the PBA sets forth the conditions which must be met in the circumstances.

Further, the OBA notes that new, phased-retirement (PR) rules permitted under the *Income Tax Act* will introduce uncertainty to the meaning of “retire” and “retirement”. While the PBA does not currently allow for phased retirement, it can be expected that it will be amended to accommodate the new phased retirement tax rules after the Ontario government has had an opportunity to review the Ontario Expert Commission on Pensions’ report that will be delivered in November 2008. The OBA submits that the impact of PR rules needs to be considered carefully if a DSM approach is adopted. As a starting point, the OBA submits that non-member spouses should not be permitted to commence pension payments during a PR period (*i.e.*, they should be required to wait until the member has fully retired), provided that the non-member spouse is permitted to transfer his/her entitlements from the plan.

Structuring Alternatives - Transfer to Other Retirement Vehicle

There are two main settlement alternatives under the DSM, a **separate pension paid from the plan to the non-member spouse** and a **commuted value transfer out of the plan** (a “locked-in transfer”). A spouse receiving a locked-in transfer should have the same range of options available to members who have this right, except that the purchase of an annuity should be excluded because of the expense and because of the implications posed by section 147.4 of the *Income Tax Act*.

The Pension and Benefits Section of the OBA submits that the CIA CV Standard should be used where there is to be a transfer to another retirement vehicle.

DSM valuation

The OBA submits that the valuation should be performed by the plan administrator. The administrator is in the best position to value the pension, if it has all of the data. There will be no need to make assumptions about future increases in value if the pension is valued as of the trigger date.

To reduce disputes between members and their former spouses, and to avoid unduly increasing plan administrators’ costs, comprehensive rules for the valuation of pensions to be divided pursuant to the DSM approach should be prescribed by regulation.

Interest on non-member spouse’s settlement under termination method

If a termination valuation method is chosen for the DSM, the value of the non-member spouse’s settlement should be increased with interest at a prescribed rate from the date of valuation to the date pension payments begin, to avoid loss to the non-member spouse from inflation and forgone investment returns. To the extent that the DSM will permit post-separation increases in the value of a pension accrued during marriage to be

subject to division, a retirement valuation method that assigns benefits to the non-member spouse pro-rated on service would appear appropriate.

Question 7: The Fifty Percent Rule

7. Fifty percent rule: Change or drop? If it is to be retained, should the currently-prescribed method of valuation be changed?

The OBA recommends that the 50 percent rule be reconsidered with respect to sections 51, 65 and 66 of the PBA. These sections provide that neither a domestic contract nor a court order may permit a spouse to become entitled to more than 50 percent of the pension benefits or moneys payable from a pension (including a life annuity) that were accrued by a member or former member during the period when the party and the member or former member were spouses. Under the PBA spouses are “special creditors” in that they are permitted through domestic contract or court order to receive up to one half of prescribed benefits. No other creditor has such standing as pensions are otherwise exempt from execution, seizure or attachment.

The Family Law Section of the OBA recommends that this special creditor standing be expanded to permit the transfer of up to 100% of the pension benefits, whether at source, or upon moneys in pay from a pension. Such transfers would be at a Court’s discretion. For example, a transfer of 100 percent of pension benefits or moneys payable under a pension would be appropriate when:

- a) no other Ontario assets are available to satisfy an Order that is in breach by the member spouse, or
- b) the member spouse has deliberately placed all other assets and income sources outside the jurisdiction of the Court, or
- c) a member spouse wishes to satisfy a lump sum payment of support or equalization from his or her pension.

Such an extension is consistent with the federal *Pension Benefits Standards Act, 1985*, which allows assignment of 100 percent of accrued benefits.

Active pension plan members who assign 100 percent of the value of a pension accrued during marriage will generally — barring abrupt career curtailment — continue to have an opportunity to accrue pension benefits for the remainder of their careers. There may be different considerations that support a transfer of 50 percent or less for members who have fully retired and whose pensions have commenced at the time of separation.

Allowing the Courts discretion to assign up to 100 percent of a pension or moneys payable from a pension assures that the purposes of the FLA and the *Divorce Act* will no longer be frustrated by creditor exemption provisions within the PBA.

The Pension and Benefits Section of the OBA agrees with the removal of the 50 percent limit if an ISM settlement regime is adopted but not if a DSM settlement regime is adopted.

The current method stipulated for valuation of a pension under the 50 percent rule is the termination method. If the DSM settlement method is adopted, combined with a retirement method of valuation, and the 50 percent rule is retained, there must be consistency in valuation methods. Therefore, the Family Law Section advocates for the application of the retirement method of valuation for the 50 percent rule prescribed by subsection 51(2) of the PBA.

Question 8: Reducing Burdens on Plan Administrators

8. Reducing Burdens on Plan Administrators: Either approach, but particularly the DSM, would impose burdens on pension plan administrators. Are there ways of minimizing those burdens? Should administrators have the option of charging fees to member or non-member spouses so as to offset their additional costs?

In its submissions to the Ontario Expert Commission on Pensions, the OBA noted that the promotion of Defined Benefit pension plans requires a reduction in the burden of administering these plans.

The adoption of the ISM method would significantly minimize the burden of dividing pensions. In the alternative, a DSM method that allows a plan administrator to pay out the spouse's share in a lump sum upon the occurrence of the trigger event (member's termination, plan termination, member's pre-retirement death or member's retirement) would also minimize the administrative burden. (This option is explained in greater detail in the response to Question 9, below.) While plan administrators would still be required to keep track of the non-member spouse from the date of separation and provide him/her with fiduciary level service until the date of the trigger event, the administrator would be relieved of all of the service demands posed by the non-member spouse from the date of the trigger event to the date of the non-member spouse's death, because the payment would have already been made in a lump sum.

The OBA believes that one of the greatest burdens for plan administrators, whether under the ISM or the DSM approach, is the requirement to interpret separation agreements and/or court orders as they pertain to the partition of pensions at source. This is particularly burdensome in light of the fact that separation agreements and court orders are all worded differently and are often incomplete or unclear. The need for plan administrators to interpret separation agreements and court orders, to seek legal advice and to circle back to the parties repeatedly to clarify intent is costly, time-consuming and frustrating for all involved. Moreover, the need to interpret such documents creates significant risk both for administrators and for separating spouses

The OBA therefore recommends an approach under which plan administrators are not required to interpret court orders or separation agreements. The OBA believes that this will be advantageous to all stakeholders. Specifically, we propose that prescribed forms be developed. These forms would be completed by the pension plan member and their spouse and would include all necessary information for the pension plan administrator to divide the pension, without the need to review the specific terms of a separation agreement or an order. It is particularly important, if the DSM approach is adopted and the non-member spouse's share is not paid out in a lump sum, for the forms to include directions for settlement of the spouse's share should *any* contingent event occur, such as death, termination, or retirement of the member. We recommend that the

forms also include a designation of trustee to cover the possibility of future incapacity of the spouse. The OBA believes strongly that prescribed forms should expressly provide administrators with a discharge of liability provided that they perform pension divisions in accordance with the instructions in the form. The OBA also recommends that the Law Commission consider measures to alleviate the burden that plan administrators face in collecting pension overpayments that have been inadvertently paid to a non-member spouse following his or her death. Many plan administrators make pension payments by direct deposit and must rely on notification of the pension recipient's death by a third party. If timely notification is not provided, the payments continue beyond the entitlement period.

In addition to the burden of interpreting separation agreements and court orders, the OBA notes that plan administrators face further challenges when administering pension partitions at source. Agreements reached by the parties, or imposed by the courts, vary in the types of calculations they require plan administrators to perform, making it difficult for plan administrators to implement streamlined and efficient processes, and making it virtually impossible to automate such calculations within their normal benefit administration systems. For example, some separation agreements and court orders require plan administrators to split pension payments at source until a specified limit, which is not always readily identifiable, is reached. These types of obligation expose plan administrators to additional legal risk and strain their resources. Additional costs associated with these types of arrangement are absorbed by the pension fund and ultimately borne by all members of the plan.

The OBA believes that limiting the range of calculation options for pension division purposes through a prescribed method of valuation and division would alleviate the administrative burden on plan administrators and reduce the sometimes excessive cost of valuing and dividing pension benefits. Moreover, the OBA submits that separating spouses will benefit from more efficient and expedited processes.

The OBA notes that some of the best-understood pension division rules are underpinned by strong informational resources and tools provided by the responsible government body. The best example is found in British Columbia, where information and tools include a comprehensive Question and Answer document developed by the British Columbia Law Reform Commission and now maintained by the British Columbia Law Institute. Ontario should take advantage of the work already done in many provinces across Canada in this area.

The OBA submits that pension plans should not have to bear increased administrative costs as a result of law reform. We recommend that a fixed fee structure be prescribed so that separating spouses may be required to pay part of the cost of pension valuations and partitions, at the option of the administrator. We note that the most common approach is to permit the administrator to charge a maximum fee of \$500 in respect of defined benefit plans, in relation to valuation/disclosure and/or actual pension partition. British Columbia, Alberta, Nova Scotia and Newfoundland all prescribe a \$500.00 maximum fee in relation to defined benefit plans. The OBA believes that fees at this level are reasonable, although they will not typically represent full cost recovery. The OBA further believes that such fees should be shared equally between the spouses and that in order to decrease the burden on both plan administrators and separating spouses,

the plan administrator should be clearly permitted to deduct the fee from any amount paid to the plan member or spouse. This would require an amendment to section 65 of the PBA, which prohibits any “transaction that purports to assign, charge... or give as security money payable under a pension plan”.

Question 9: Structuring Alternatives for the Deferred Settlement Model

9. DSM Structuring Alternatives: If the DSM is adopted, are there ways to structure the division other than creation of a separate pension for the non-member spouse that would be more advantageous? If there are, should these be available as options, and if so, at whose option would they be?

It is the OBA’s view that there is no single answer to the question whether any particular structuring option for a deferred settlement is advantageous or not. What is advantageous depends on the circumstances of each non-member spouse and each plan administrator. Therefore, it is the OBA’s position that if the DSM is adopted, some flexibility should be built in. The extent of the flexibility should depend on the nature of the triggering event:

- retirement at the member’s normal retirement date;
- termination of employment before normal retirement date but after becoming eligible for early retirement; or
- pre-retirement death of the member.

There are two main settlement alternatives under the DSM, a **separate pension paid from the plan to the non-member spouse** and a **commuted value transfer out of the plan** (a “locked-in transfer”). The Family Law Section of the OBA submits that the non-member spouse should not, in any scenario, be forced to take a transfer if the member is able to take a pension and that a spouse receiving a locked-in transfer should have the same range of options as is available to members who have this right.

It has been suggested that the direct purchase by the plan administrator of an annuity for the non-member spouse would lead to conflict with section 147.4 of the *Income Tax Act*. Study is necessary to determine whether such a conflict would arise. If it would, that option for the non-member spouse should be excluded. If there is no conflict, the option of direct purchase of an annuity should be available to a non-member spouse who transfers a lump sum value from the plan.

Retirement

The OBA believes that where the trigger is the member’s normal retirement date, the best approach would be to permit a choice of settlement options for the non-member spouse. The non-member spouse should be entitled to elect either a separate pension in a life only form (with or without a guarantee period, as permitted by the terms of the plan) or a locked-in transfer. The OBA believes that this election should not be put to the spouse until the member’s pension calculations are being performed upon the member’s actual retirement (as opposed to requiring this decision to be made when the separation agreement is finalized). Since the spouse’s age will often differ from the member’s age,

it would make sense to provide the transfer option for the non-member spouse regardless of the member's age and even if the member does not have the option. This approach maintains flexibility for the spouse, while at the same time creating the possibility that the administrative burden of managing two separate pensions may be lessened.

Termination

(i.) Before normal retirement but after eligibility for early retirement

The OBA supports similar options where the trigger is the member's termination of employment before normal retirement date but after becoming eligible for early retirement. However, in order to eliminate potential confusion and to streamline administrative processes, we recommend that the separate pension option be limited to a choice of either an immediate pension at the time of the triggering event or a deferred pension payable at the non-member spouse's age 65. The non-member spouse's election to take a locked-in transfer, immediate pension or pension deferred to age 65 should be required at the time of the triggering event and should be irrevocable. For a deferred pension, there must be a provision that if the non-member spouse dies before age 65, the commuted value of the pension is paid to the spouse's estate or beneficiary.

(ii) Before eligibility for early retirement

Where the triggering event is the member's termination of employment prior to becoming eligible for early retirement, the Pension and Benefits Section of the OBA does not believe that a separate pension for the non-member spouse is appropriate. Rather, the Pension and Benefit Section believes that only a locked-in transfer should be provided in order to ease the administrative burden of pension plans.

In contrast, the Family Law Section believes that non-member spouses should be entitled to the same options as the member. If it seems advisable to require the spouse to take a locked-in transfer where the value of the member's pension or the non-member's interest is small, reasonable definitions are required.

Pre-retirement Death

The OBA believes that if the triggering event is the death of the plan member before employment terminates the benefit available to the non-member spouse should not differ from the pre-retirement death benefits otherwise payable from the plan. (See also question 11). Eliminating the separate pension option altogether in these scenarios will alleviate some of the administrative burden for pension plan administrators. Therefore, it is the OBA's submission that the non-member spouse should be given a lump sum cash payment or a transfer to a non-locked in RRSP on the pre-retirement death of the member (as pre-retirement death benefits are not locked in under the PBA).

Question 10: Subsequent Spouses

10. Possibility of Subsequent spouses: There is a possibility that the member spouse will have entered into spousal relationships with one or more individuals between the date of marriage breakdown and the date that the pension comes into pay. Does the DSM need modification so as to deal with this possibility?

The DSM does not need modification to deal with the possibility that a pension owner will have entered into one or more subsequent marriages between the date of marriage breakdown and the date the pension comes into pay. An individual cannot be married to more than one spouse at a time. Each spouse may potentially receive a share of the pension accruing *only* during the years of his or her cohabitation with the member spouse.

Question 11: Pre-Retirement Death Benefits under the DSM

11. *Pre-Retirement Death Benefits: If the DSM is adopted, should the non-member spouse, in the event that the member spouse dies before retiring, be entitled to a pre-retirement death benefit (or to a share of it if the member spouse acquired another spouse or spouses following marriage breakdown)?*

Pension benefits are payable from a plan upon the occurrence of a triggering event: termination of plan membership, wind-up of the pension plan, retirement of the plan member or death of the plan member. A spouse's entitlement to a division of the pension plan assets would also be paid upon the occurrence of the member's triggering event. In the case of a member spouse's death before retirement, the non-member spouse should be entitled to a share of the death benefit, as otherwise his or her pension interest would be frustrated.

If the non-member spouse does not receive a right to a *pro rata* share in the pre-retirement death benefits, then the member spouse would need to obtain life insurance to secure the DSM interest for the non-member spouse, adding to the transaction costs of a matrimonial settlement. Furthermore, some member spouses may be uninsurable at all or at a reasonable cost because of age or health concerns.

Please see the responses to questions 9 and 10 for further suggestions on the division of the pension in the case of the plan member's death before retirement.

Question 12: Pensions in Pay

12. *Pensions in Pay: What rules should apply where payment of pension benefits had already commenced before the spouses separated?*

Many of the uncertainties associated with valuing a pension disappear if the pension is already in pay when the spouses separate. The plan member has retired and is no longer accruing any further credits and the applicable plan terms have been fixed. Retirement may, however, give rise to an additional pension valuation issue if the non-member spouse is entitled to a spousal survivor pension.

Subsection 44(1) of the PBA provides that: "Every pension paid under a pension plan to a former member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension." This means that a spouse who separates from the plan member after the plan member's pension has commenced, is entitled to a spousal survivor pension upon the plan member's death. While subsection 46(1) of the PBA permits a spouse to waive this entitlement, any waiver must be submitted to the administrator before the plan member's pension commences. After that date, the survivor pension has vested in the spouse and becomes

his/her vested, contingent property which meets the definition of “property” in subsection 4(1) of the FLA.

As a result, the survivor benefit should be valued and incorporated in the pension property to be divided, just as the member’s retirement pension is valued and divided. The plan administrator should not be responsible for making any retroactive adjustments to pension payments that have already been made. The pension is valued as of the valuation date, and not the date of retirement.

Once the issue of the valuation of the spousal survivor pension is resolved, the next step is settlement, which involves the actual division of the payments.

Under the ISM, the present value of the spouse’s share of the member’s retirement pension as well as the spouse’s share of the survivor pension should be calculated and paid out to a locked in retirement vehicle selected by the spouse, and the member’s retirement pension should be actuarially reduced accordingly. Further to our comments on question 7 regarding the division of pensions in pay, it would not be appropriate for policy reasons to permit assignment to a non-member spouse of an amount that exceeds 50% of the total remaining value of the joint-and-survivor pension in pay attributable to the period of in-marriage accrual.

Under the DSM, the administrator should be required to divide the joint and survivor retirement pension on an actuarially equivalent basis into two independent life pensions payable to each of the member and the spouse for life. The non-member spouse does not receive a survivor benefit upon the member’s death.

Question 13: Plans Other Than Defined Benefit Plans

13. Plans other than Defined Benefit Plans: Is the current law satisfactory insofar as defined contribution plans, RRSP’s and RRIF’s are concerned? What about supplementary health plan benefits and dental plan benefits that an employer makes available to retirees? Are special rules needed in the case of pension plans that combine elements of a defined contribution plan and a defined benefit plan?

Defined contribution plans and hybrid plans

Under current law in Ontario, the only real issue regarding defined contribution plans is the determination of tax liability. Often this is solved by a “rollover” of the plan from the holder to the non-holder’s plan. The current law is therefore satisfactory.

Whatever method of division is accepted could apply to both parts of a hybrid plan. We note that in British Columbia, hybrid plans are divided in two steps. The defined contribution element of the pension is divided according to rules that apply to DC plans and the defined benefit portion is divided according to rules that apply to DB plans.

Whatever approach is taken to hybrid plans should be consistent with the Ontario government’s overall policy decisions.

Supplementary health benefits

Supplementary health benefits are not considered “property” for division purposes. These plans do not provide for continuation upon divorce and they usually do not permit the non-member spouse direct access to the benefits provided under the plan. Supplementary benefits are usually considered a support-related issue. More support is awarded, where possible, to compensate the non-member spouse for the loss of these benefits. Where there is a great need for these benefits, support is not a sufficient remedy as the member spouse usually does not have enough income to fully fund the need.

Most plans provide that the member spouse can designate only one spouse as beneficiary under the plan. Upon divorce, the first spouse is removed as beneficiary and, if there is no second spouse, then the benefit is lost. One option might be to allow the plan holder to continue coverage for the divorced spouse under the plan. In addition, it might be possible to require that such plans must, upon appropriate directions being executed, deal directly with the non-member spouse with respect to paying for the benefits covered. These would not be complete solutions to a spouse’s loss of benefits, as the divorced spouse would be removed as beneficiary if the plan member remarried or re-cohabited. The need to renegotiate the employer’s contract for benefits might be an obstacle.

Retirement savings vehicles not subject to the PBA

It is important to note that a portion of the pension to be divided on marriage breakdown may be paid from a Retirement Compensation Arrangement, in addition to payments from the registered pension plan. Since pension contributions are tax sheltered, federal legislation limits the annual pension benefit which an employer can pay to a retiree. The limit applies to registered defined benefit pension plans. Typically in such plans the beneficiary would receive a percentage of annual earnings times the number of years of service, the legislated maximum being 70 percent of recent earnings. Retirement Compensation Arrangements are not subject to the PBA. Therefore, if pensions are removed from the definition of family property in the FLA, the Law Commission of Ontario must ensure that supplementary pension arrangements that are outside of the scope of the PBA are included in the new pension division scheme. To be clear, it would not be enough to house the new regime rules entirely in the PBA because there are many supplemental pension plans that are not subject to the PBA.

Question 14: Where Both Spouses Have Pensions

14. Where Both Spouses have Pensions: Are special rules needed for this situation? What if one pension is a defined benefit pension and the other is a defined contribution pension?

The OBA submits that no special rules should be applied to the division of pension benefits where both spouses have pensions, regardless of whether the spouses belong to the same plan or different plans or whether one is a defined contribution plan and the other is a defined benefit plan.

The Pension and Benefits Section of the OBA notes that the adoption of the ISM method would alleviate any discrepancies between the division of defined benefit pensions and defined contribution pensions;

Question 15: Canada Pension Plan Credits

15. CPP Credits: Should credits under the CPP be excluded from the definition of “family property” under the FLA? Is legislation needed to address whether and how such credits are to be taken into account under either the ISM or the DSM? Should Ontario enact legislation allowing spouses to agree to opt out of the equal division of credits provisions of the CPP?

The longstanding and widespread practice in Ontario when addressing property division issues under the FLA has been to disregard the existence or value of CPP entitlements. Family law lawyers advise spouses of their right to apply for a division of credits under the Canada Pension Plan. It has been helpful to economically vulnerable spouses who need retirement income to know that a division of credits will produce some CPP income. The CPP is a self-contained program which operates reasonably fairly and spouses do not, for the most part, require a lawyer’s assistance in arranging for the credit division.

If there are any problems in the operation of the Plan, it would be preferable for these to be the subject of reform at the federal level, rather than for Ontario residents to have to seek legal advice before applying to divide credits.

It has been to the benefit of all concerned that there has been no means to opt out of this federal program. It would not be helpful to spouses for one of them to be subject to pressure from the other to give up this right. In summary,

- CPP credits should be excluded from the definition of “property” under the FLA;
- No further legislation is necessary to take these credits into account;
- Ontario should not adopt legislation to allow spouses to opt out of the CPP pension credit division program.

IV. PARENTAGE UNDER THE CHILDREN’S LAW REFORM ACT

Recommendation: Amend Part II – Establishment of Parentage of the *Children’s Law Reform Act* to recognize the child and parent relationship in same-sex unions and where the child was conceived with the use of assisted human reproduction technologies.

Parts I and II of the *Children’s Law Reform Act* [“CLRA”] were enacted to remove distinctions between children born inside and outside of marriage so that all children would enjoy the same rights and privileges, with distinctions based on “illegitimacy” abolished. As noted by the Ontario Court of Appeal, “The CLRA was

progressive legislation, but it was a product of its time.”¹⁶ The CLRA fails to recognize children with same-sex parents and children who may be conceived with the use of assisted human reproduction. Part II of the CLRA should be updated as follows:

A. Declarations of Parentage

The OBA recommends that Part II of the CLRA be amended to provide for declarations of parentage declaring that a child has more than one mother or more than one father.

The Ontario Court of Appeal has found that a legislative gap exists in Part II of the CLRA because it contemplates that a child can have only one mother and one father. The Court found that the CLRA does not deal with a child born into a family where there are, in psychological and social reality, two mothers or two fathers; nor does it contemplate the disadvantages to a child in such a family when the law does not recognize and accord parental responsibility and rights to more than one mother or father. Children may have social parents and genetic parents. A child may have both a genetic and a gestational mother. The persons involved in bringing a child into being and raising the child in one case may not have the same intentions about who will parent the child or have significant relationships with the child as those in another case. The CLRA should recognize a parent/child relationship where relevant circumstances exist. Such recognition should extend, in appropriate cases, to more than two legal parents of a particular child or children.

While the Ontario Court of Appeal has held that a court may make a declaratory order for more than one parent of the same sex in the exercise of its *parens patriae* jurisdiction, this remedy requires each family to apply to the discretion of an individual judge on a case by case basis. The CLRA should be amended to recognize that Ontario children are living in families with more than one mother or more than one father, and sometimes with more than two parents.

B. Presumptions of Parentage

The OBA recommends that the CLRA be amended so that the presumptions in section 8(1) include presumptions of maternity.

Section 8(1) of the CLRA sets out circumstances in which a male person is presumed to be the father of a child. There is no similar provision with respect to presumptions of maternity. The presumption of paternity exists where a male person was residing or married to the mother during the gestation or birth of the child, where a male person has certified that he is the father under the *Vital Statistics Act*, or where a male person marries the mother after the child’s birth and acknowledges that he is the father. These presumptions are heterosexist and assume that the mother can only be in a

¹⁶ *A.A. v. B.B. et al* 2007 CarswellOnt 2 (C.A.)

relationship with a man. Presumptions of maternity should apply to female persons in the same relationship to the mother. In addition, since a child may have more than one mother (gestational, genetic or social), the gestational or birth mother should be presumed to be a mother, but this presumption should be rebuttable.

Legislative provisions for a presumption of maternity should be drafted to be consistent with provisions for a declaration of parentage that allow for more than one parent of the same sex. The presumption of maternity should not, explicitly or implicitly, contemplate only one mother of a child.

Schedule “A”

Resolution 08-03-M

Child Support Recalculation Services

WHEREAS the Government of Canada established the Child-centred Family Justice Strategy to help parents focus on the needs of their children following separation and divorce;

WHEREAS one aspect of the Strategy is ongoing support for delivery of services in the area of family justice through the Child-centred Family Justice Fund;

WHEREAS federal child support guidelines, enacted in 1997, create a need for child support recalculation services to facilitate prompt, inexpensive and efficient changes to child support as family income changes, and section 25.1 of the *Divorce Act* authorizes federal/provincial agreements for provincial child support services;

WHEREAS successful pilot programs for child support recalculation services in Newfoundland and Labrador, Prince Edward Island, Manitoba and British Columbia have been funded in part by the federal government through the Child-centered Family Justice Fund, and services are contemplated for other provinces and territories, but permanent programs are not available in all jurisdictions;

WHEREAS provincial and territorial Attorneys General requested that the federal government renew and enhance its funding for the Child-centered Family Justice Fund in November 2007;

BE IT RESOLVED THAT that the Canadian Bar Association urge the federal, provincial and territorial governments to implement permanent child support recalculation services in all jurisdictions, and to continue their efforts to make financial disclosure and support recalculation and collection more accessible, understandable and certain for all separated or divorced families.

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