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Chairman
Mr. Phil Eyler
Constituency of River East

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MANITOBA LEGISLATIVE ASSEMBLY
Thirty-Second Legislature

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LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON LAW AMENDMENTS
Thursday, 17 June, 1982

Time — 10:00 a.m.

CHAIRMAN — Mr. P. Eyler.

MR. CHAIRMAN: Committee come to order. We have our quorum. We have several bills to consider today and presentations from the public on several of these bills. How does the committee wish to proceed? All of the presentations at once and then the bills later or bill by bill?

Mr. Penner.

HON. R. PENNER: Mr. Chairman, may I propose, so that people who are waiting to make presentations can have some way of budgeting their time, that we hear all the presentations first?

MR. CHAIRMAN: Is that agreed by the committee? (Agreed)

BILL 15 - THE MARITAL PROPERTY ACT

MR. CHAIRMAN: The first person on the list is Ms Georgia Cordes on Bill No. 15.

MS G. CORDES: Thank you. I'm here today on behalf of the Winnipeg YWCA.

The Winnipeg YWCA is pleased to have the opportunity to appear before this committee today to speak to Bill 15, An Act to amend The Marital Property Act. Our organization has had a continuing interest and input into pension reform for women for approximately 10 years.

We can appreciate the direction of Bill 15 to increase the possibility of spouses to equally share pension assets at marriage breakdown. We heartily applaud its proposal to have pensions considered as family assets rather than commercial assets. Resumption of equal sharing should be more readily apparent to the judiciary.

Our YWCA nevertheless remains extremely concerned that Bill 15 contains sections by which judges, according to a variety of legal consultants, may easily use judicial discretion to vary spousal sharing of pension assets. These sections are the final paragraph of Section 4, according to how the bill is outlined, Item 8.1(1) and Section 5, Item 14(3).

Perhaps I'll just read those, looking at the bill under No. 4, Item 8.1(1), the final paragraph reads: "but the Act does not apply where it is in fact ascertained, as at the closing and valuation date, that there is no reasonable possibility of the rights ever being realized."

Under No. 5, Item 14(3): "Where an asset is by its nature not a marketable item, subsection (2) does not apply and the value of the asset for the purposes of subsection (1) shall be determined on such other basis or by such other means as a court deems appropriate for assets of that nature."

While researching The British Columbia Family Relations Act and their subsequent decisions, we note that no such judicial discretion exists in that jurisdiction where pension assets are being shared. It appears entirely possible that Manitoba's Isbister decision could be duplicated under Bill 15, given the two above notice sections and given that The Pension Benefits Act is not being simultaneously amended to allow for espousal division of pension assets or pension credits.

I'd like to read to you from an item written by Alice Steinbart of the Coalition on Family Law: "Bill 15 accepts the concept of separate as to property in respect of pensions, so that the pension always remains the contributor's pension. Bill 15 proposes that pensions be divided in the following manner, for example: the value of all the assets of the husband would be added up, including pensions, in one column and the value of all the assets of the wife in another column. Outstanding debts will be deducted so that you will have the net value of each estate. If the husband's estate is larger, the value of the wife's estate is deducted from his and she is entitled to receive one-half of the difference called the equalizing payment. The wife is never entitled to receive any of the actual property of the husband unless he decides to give it to her. She is only entitled to a money payment."

Perhaps it would be helpful to reiterate the Winnipeg YWCA's initial September, 1981, response and suggestions to the Court of Appeal decision of Isbister versus Isbister submitted to the Attorney-General's office and I quote:

"The Young Women's Christian Association of Winnipeg wishes to register its deep concern regarding the June, 1981, Manitoba Court of Appeal family law decision of Isbister versus Isbister. Mr. Justice J.A. Monnin's ruling on behalf of the Court of Appeal that pension plans were not shareable between spouses is one which our organization cannot condone.

"In our brief to the Standing Committee of the Legislature on Statutory Regulations and Orders during 1978, in response to the proposed revisions to The Marital Property Act, we viewed marriage as a true partnership in which both spouses share equally. In addition, we stated that any spouses associated with developing commercial assets is using the resources of the marriage partnership in his or her aspirations. We urge that division of commercial assets not be given wide judicial discretion.

"The marriage of the Isbisters was of a 10-year duration during which time $12,000 of the couple's family income was contributed to the husband's various pension plans. The YWCA contends that both spouses contributed to the ability of the pension plan member to take part in those pension plans. This was possible by virtue of the equal contribution through wage earning and non-wage earning roles within the marriage partnership, as well as the necessity of both spouses to manage the family without the additional $12,000.00.

"The YWCA recommends that, No. 1, The Marital Property Act be amended in order that pension plan assets be classified as family assets to be shared equally. The fact that British Columbia and Saskatchewan have been successful in this regard should prompt the Government of Manitoba to fully review those provinces' respective procedures and legisla-

tion as a prelude to such reform in our province. It is worthwhile to note that the Canada Pension Plan allows for pension credit splitting between spouses at the time of divorce.

"The Manitoba Government should also, No. 2, tabulate and assess the number of court decisions in Manitoba which have provided for equal sharing of pension assets since our recent Family Law Reform.

"In our view, pensions ought to be regarded as family savings held in trust, a long-term family investment. Mr. Justice Monnin states that no one can place a market value on a personal pension fund in light of the restrictions of Pension Benefit Acts, thereby resulting in no market demand for such a nonvaluable asset.

"Clearly, a major response and recommendation to his concern would be, No. 3, to alter The Provincial Pension Benefits Act to allow for some ability to equally divide pension assets. A second response is that nonmatured pension assets do have a value to the contributor recipient and to the family unit. Obviously, the pension assets in question in the Isbister case were in great demand by both Mr. and Mrs. Isbister.

"Mr. Justice Monnin states that pension benefits are income to be earned in the future. The YWCA prefers to view pension contributions as income or actual wages earned during the course of employment and marriage which are formally saved and earning interest for the future. Pensions by necessity are a product or asset which distinguish themselves by a mandatory period of saved contributions during one's years of employment. This characteristic of a savings plan of deferred income, which both spouses in a family unit choose and sacrifice to enter for their mutual benefit, should not be used to penalize either spouse at any point in their lives.

"The YWCA recommends that No. 4, The Marital Property Act be specific in its alteration to allow the courts to determine current cash value of pension assets and order equal division of said value at the time of divorce, or defer payment of the cash value at divorce until the plan benefits are realized. Loss of employment by or death of the contributor, or pension fund bankruptcy after divorce are unforeseeable events which could as easily happen before divorce as after. The possibility of these events should not be used to penalize nonmember spouses.

"It is unclear as to how and why both courts established the pension assets in the Isbister case at a total of $35,000, drastically lower than the range of $53,000-$90,000 estimated by an actuary, or two actuaries, in court. The "spread" caused "suspicion," as was quoted in the media, in the court. Clearly, and this is point No. 5, the court requires an improved method for accurately obtaining and processing complete financial data, which is so crucial in determining marital property division.

"It is obvious that the extremely low value of the pensions derived by the court in the Isbister case will likely work to the advantage of the pension plan member, Mr. Isbister, and to the further disadvantage of Mrs. Isbister. Not only does the $35,000 pension value, ascertained by the court, coincidentally equal the wife's $35,000 investment portfolio, but it also in all probability would increase substantially to the levels quoted by the actuary. Of course, that will take place after the marital property has been divided and the limitation period for appeal by a spouse is exhausted."

It is our suggestion that the previously noted sections of Bill 15 be deleted and that delineated guidelines be established for the court to determine pension value at a marriage breakdown in a consistent, objective and professional fashion.

British Columbia has developed one formula for such competition in its jurisdiction which appears to be working well. I might just point out to you in case you're interested in the formula that they use, in those plans where the plan is vested, they take the number of years that the marriage has lasted, divided by the number of years that the contributor has contributed, multiply that by one-half of the monthly benefit expected at age 65 in that particular plan and then that amount would be divided.

In Manitoba's own Pension Benefits Act, provision is made to establish the commuted value of pension assets which appears to offer another alternative and I quote from an item written by a local pension consultant, Janice Penner:

"Under The Pension Benefits Act of Manitoba, each member of a pension plan is required to receive annually a statement of her entitlement under such plan. For most people, the promise of an amount at age 65 means nothing in today's terms. However, using actuarial assumptions, such as those used in the triennial valuation required under the Act, and an accepted formula, the present value of that entitlement can be calculated. This present value is often referred to as the commuted value of the pension. In simple terms, the commuted value is the amount of money required at the date of calculation to provide a person with that specified entitlement at age 65.

"When talking about splitting pension assets on dissolution of marriage, the question arises, how do you determine the value of a benefit which isn't payable until age 65? This question is not applicable in the case of a money-purchase pension plan where the amount of the pension at retirement is dependent upon the accumulated value of the contributions at the age selected for retirement. In this case, by splitting the contributions accumulated to the date of the dissolution of marriage, in effect, you have split the amount of pension earned to that date. The analogy would be to the splitting of monies held in a bank account, a joint bank account.

"In the case of a defined benefit, i.e., career average, final pay or flat benefit plans, the value of the benefit payable at age 65 can be determined in today's terms. This is already in practice where a terminated employee transfers the commuted value of a deferred-pension entitlement to a locked-in RRSP.

"To calculate the commuted value, the plan administrator calculates a present-value factor based on the individual's age and the most recent actuarial assumptions used in evaluating the pension plan. This factor is applied to the pension benefit which the individual has earned to date to arrive at the commuted value. The commuted value is then equal to the amount of money which would have to be set aside at the rate of interest specified to provide that pension benefit at age 65." In case this is a bit confusing, I do have some extra copies of this explanation.

To illustrate, assume Mr. X has earned a pension

benefit of $300 a month or $3,600 a year at age 45. According to the terms of his pension plan, this amount will be payable at age 65 for life with a guaranteed period of five years. The actuarial assumption specified in the most recent valuation where an interest rate of 6.5 percent per annum and mortality according to the GA 1971 Mortality Table for males. Based on the above information, the plan administrator calculates that the present-value factor is equal to 2.5874; therefore, the commuted value of his pension would $3,600 times the 2.5874 figure, equalling $9,314-some-odd dollars.

This means that $9,300 would have to be set aside at age 45 accruing interest at 6.5 percent per annum to provide Mr. X with a pension of $3,600 per year. To split his pension, split the commuted value at the designated date.

Clearly, Bill 15 is needed as an interim measure to assist many separated spouses who are currently facing no possibility of equal sharing in pension assets for which they sacrificed. With our recommendations, we believe those spouses, the majority of whom are women, will have increased chances for receiving equitable sharing.

Ultimately, the pension reform goals of the current government will have to address the long-term pension needs of these women. For spouses to truly share in pension assets, methods will have to be investigated for splitting of pension credits between divorcing spouses along the model, perhaps of the Canada Pension Plan, computation for divorcing couples.

In this way, the long-term pension needs of women will be acknowledged, as opposed to the possibility of cash settlement at divorce in lieu of ongoing investment in some pension vehicle for those women.

The current statistics about the number of poor elderly women in Canada today are scandalous. That of people 65 and older, approximately three times as many women as men, are poor in this age group. The majority of these women have found themselves as victims of a pension system which gave and largely still does give no opportunity for recognition of their work contribution to our society which penalizes women for bearing and raising children, which is still willing to promote the attitude found in many laws and courts, being that at divorce: "She takes the children and he takes the pensions."

In fact, the Canadian Advisory Council on the Status of Women in their most recent fact sheet entitled "Women and Pensions" and I quote from here: "In exchange for a life of raising children, homemaking, interrupted employment and infrequent leisure, a woman can expect less than $4,500 a year in pension benefits. Her husband will likely receive $7,000 or more."

The Winnipeg YWCA urges this committee to amend this interim bill in order to begin now the task of equalizing those statistics. Thank you.

MR. CHAIRMAN: Thank you, Ms Cordes. Do you have copies of your presentation?

MS G. CORDES: I'm sorry I do not. I do have copies of the commuted value discussion.

MR. CHAIRMAN: Could you give a copy to the Clerk and she'll reproduce that for the committee?

MS G. CORDES: I also, if you wish, have one copy which I'll be able to leave of our YWCA submission concerning the Isbister case from which I quoted.

MR. CHAIRMAN: Are there any questions for Ms Cordes?

Mr. Penner.

HON. R. PENNER: Thank you, Mr. Chairman. First of all, I would like to thank Ms Cordes for her brief and her support of the general thrust of the bill. I think in looking at the number of persons who want to make presentations on this bill this morning and we have here a continuation of what has become an important process in the development of legal policy and law in the Province of Manitoba with respect, at least, to family law and that is the intents and informed involvement of significant elements of the community and that's very good. It's true that what we have here might be considered an interim measure to deal with the Isbister problem. A modest proposal, it was not possible, given the intricacies of The Pension Benefits Act and the problems that are associated to try and look at a solution for Isbister in terms of amendments to The Pension Benefits Act and thought it better to take a longer, much more careful look at The Pension Act before amending it. Hopefully, there may be major revisions to deal with the kinds of problem you've identified.

I want to just ask you three questions: one, you indicated concern with the phrase in proposed Section 8.1(1), that's No. 4 of the bill, dealing with the question of no reasonable possibility; that is, leaving it to the court to say that if there is no reasonable possibility of the asset ever being realized, then it would not be included in evaluation.

Ms Cordes, what if there is no reasonable possibility and supposing that there is a paper value of an asset of the kind that we're talking about, $50,000, but there is the evidence, satisfies the court, that there is no reasonable possibility that it will ever be realized, do you think it fair that the other spouse, the respondent, should have to be debited with $50,000 of something that will never be realized?

MS G. CORDES: I think what our main concern is we would like to see in the future, again we're talking about long-term, in terms of wider pension reform goals, that we will be thinking in terms of women continuing on with pension credits. So we're talking about, I guess, looking at paper figures and not necessarily having to quote cash-in at the time of divorce and splitting pension assets at that point. I guess our particular feeling is to delete that particular part from the bill and if a judge finds no way to be able to divide the assets after we have provided that judge with guidelines, then that may be a possibility, but I feel by stating it here in the Act we're just offering, for the want of a better word, perhaps possible loopholes that may in fact be used.

HON. R. PENNER: I have a number of examples and would be pleased to provide them to anyone of situations which are real situations. One, in fact, I've drawn

out of recent events in which there was no real possibility of an asset ever being realized of the kind that we're talking about which is wider than mere pension rights. Some of them are insurance rights in which it would be clearly inequitable to debit the respondent with an amount that is purely a paper amount.

MS G. CORDES: Perhaps if I could respond that I think that the pension industry from my personal point of view will have to take a look at ways in which plans are designed. It seems to me - I believe at one point you used the example yourself of, let's say a contributor has a terminal illness and is not expected to live a year or two past the end of the marriage - if that contributor had contributed over a wide number of years, X amount of money to that plan, one would think that the estate or the spouse or that someone should be able to have the benefit of those particular monies regardless of whether that contributor died or not. I believe that whole area needs to be looked after. It doesn't seem right that a person would go through a marriage of X number of years and then have that particular situation arise, the spouse who shared in that marriage not being able to gain any advantage from contribution towards those assets.

HON. R. PENNER: Let me ask you to comment and this will be my final supplementary on that point.

On this example, which is very analogous, very similar, to some recent events, take the case of a spouse who has been for many years paying into an insurance plan through an employer. The employer has run into financial difficulties and through no fault of the employer, let us say, but through the way in which the business has been managed or mismanaged has missed a number of premium payments to the insurance company which results in the cancellation of the policy. The employer goes bankrupt and has no funds. The insurance company will not relent and refuses to pay. Now, while the spouse may have a right of action against the employer, or even against the insurance company in certain circumstances, there is really no reasonable possibility that the spouse will ever recover what is owing under that policy.

MS G. CORDES: I guess my response is, is it right then to leave this particular, again, loophole, I will call it, within the Act to be able to handle those cases which I personally feel could perhaps be more the exception than the rule, rather to take it out and to allow judges to handle those situations when they do arise and to say to the pension and insurance industry that perhaps they will need to look at again the ways in which these particular kinds of pension and insurance schemes are established and the ways in which they are policed to not allow these particular kinds of things to happen?

HON. R. PENNER: I would agree just leaving the point that there ought to be something that is done through legislation to police the industry, whether it's the pension industry or the insurance industry, to protect persons in such a situation but in the meantime one shouldn't penalize an innocent party.

MS G. CORDES: I can't see by deleting this particular section that those particular people would be penalized. Again, it doesn't seem right and perhaps when I'm talking about the kinds of things that judges might look for to use as a reason for varying the equal division of the pension assets, I'll get back to your original comment about The Pension Benefits Act. I understand, of course, that this government is wanting to do major reform in that area.

I think I have some concern that if we don't simultaneously amend The Pension Benefits Act that in fact a judge can again point to The Pension Benefits Act, the section saying that pension plans cannot be attached, etc., as a reason for not allowing equal sharing of pension assets, even though we have stated in this Act that they are to be considered family assets.

MR. CHAIRMAN: Mr. Penner.

HON. R. PENNER: Reference was made in your submission to the B.C. legislation and some research that has been done by someone on the B.C. legislation. I have had the B.C. legislation researched and I can't find in it any provision of the kind indicated by you. I haven't been able to find anything in the B.C. legislation, that is The Family Relations Act, on the subject of valuation of marital property for purposes of the division. The B.C. Act in fact appears to leave the aspect of valuation entirely in the hands of the court, so I'm not sure what you are referring to when you talk about research on B.C. legislation.

MS G. CORDES: You're correct in that the Act does not specify any set formula or guidelines. It's pretty open. On this same hand, they do not offer any kinds of sections or loopholes, as we feel this particular bill does, that would allow them to vary. We came about this formula by contacting a lawyer in the Province of British Columbia to ascertain just what general trends are happening, what direction the court decisions are taking as a result of their Family Relations Act, and we understand that this particular formula has appeared to be workable in quite a number of situations and some people appear to be pleased with how it's working.

HON. R. PENNER: Yes, I think that's right. What has happened is that in an Act which in fact has left it completely to the discretion of the judges, the judges, because they must rely on expert evidence in arriving at principles of valuation, have developed principles of valuation that have become a precedent and I see no reason why that wouldn't happen here. I don't think the judges in Manitoba are really any different than the judges in B.C. and we'll monitor the situation and see what happens.

MS G. CORDES: I guess our concern is that we do have the benefit of experience in other provinces and we're bringing it forward to say let us perhaps look at this a little bit more clearly in terms of what kind of foundation we can launch from, so we can benefit from their experience and, again, this seems to be workable.

HON. R. PENNER: My last question, Ms Cordes, relates to the point you made about 14(3) when you

were expressing concerns about judicial discretion, which reads in its present form, "Where an asset is by its nature not a marketable item, subsection (2) does not apply and the value of the asset for the purposes of subsection (1)" - that's both these subsections being of the original Act - "shall be determined on such other basis or by such other means as a court deems appropriate for assets of that nature." Would it make any difference, in your view, if the section read, "not as a court deems appropriate but as is appropriate?"

MS G. CORDES: I don't know that it would make all that much difference. To me, I think it's a section that is there that can be used as a reason for not allowing equal sharing. Perhaps you could ask other people who would be speaking from a legal expertise.

HON. R. PENNER: Thank you very much.

MR. CHAIRMAN: Are there any other questions? Mr. Manness.

MR. C. MANNESS: Thank you, Mr. Chairman. I'd like to ask as someone who really doesn't have a thorough understanding of this whole area, but as one who is not a raving optimist as to the viability of many of the pension plans in existence, particulary through the economic consequences that may be suffered over the next little while and again, when I say viability, I mean some maybe 10 or 20 years hence.

I'm wondering which approach in a general, broad way you are suggesting or advocating. I'm wondering if you are suggesting computing a cash value now and expecting one spouse to pay out today that cash value, or are you saying that the split can be made now and the two parts remain vested; therefore, both may suffer the same bad consequences should they occur and hopefully they won't. Which are you advocating?

MS G. CORDES: I think the second option that you put forward is our long-term goal. I think the first option that you put forward in terms of determining the cash value for an interim measure is better than what is happening now in the Manitoba courts, but clearly I think the second option is the long-term goal we'd like to see; but I don't see that's possible to bring it in this short of a time, given the fact that we want to look at pension reform in general and perhaps work on it as a package.

MR. CHAIRMAN: Are there any further questions? Thank you, Ms Cordes.

MS G. CORDES: Thank you very much.

MR. CHAIRMAN: The next person on my list is Ms Jill Oliver. There is a brief that's been made available and it's being circulated by the Clerk.

MS J. OLIVER: Good morning. I'm here representing the Manitoba Association for Rights and Liberties, which is a nonprofit citizens' group dedicated to the protection of human rights and civil liberties in Manitoba. Its Legislative Review Committee has reviewed the provisions of Bill 15, which is An Act to amend The Marital Property Act, and offers the following comments and suggestions.

The main purpose of Bill 15 is to amend The Marital Property Act as it relates to rights of spouses under insurance policies, annuities and pensions, which are intended to benefit the holder of those policies, annuities and pensions and his or her spouse.

Bill 15 redefines these assets in Section 1(2) as family assets from their previous classification as commercial assets. Family assets are defined in the statute as assets owned by both spouses or by either spouse and are used for shelter, transportation, household and other purposes intended to benefit the family as a whole. Commercial assets are assets that are not family assets and which earn an income, such as a business interest and investments owned by one or both of the spouses.

The Act provides limited discretion for the court to vary the equal division of family assets, while providing a greater discretion to vary the equal division of commercial assets. The reclassification of insurance policies, annuities and pensions from commercial to family assets therefore limits the discretion the court has in dividing these assets in other than an equal manner between the spouses in the event of marriage breakdown.

MARL supports this change to the statute which would avoid in the future, we hope, similar decisions to that made in the Kozak case in 1981, in which the judge refused to allow the wife any share in the husband's pension, because the pension was not considered a family asset.

Bill 15 provides that assets consisting of rights, either present, future or contingent as in insurance policies, annuities or pensions, which may not have been realized or are not ascertainable at the date of valuation, are still subject to an accounting under Section 14 of the Act, unless there is no reasonable possibility of the rights ever being realized. The bill seeks to remedy the kind of situation which arose in 1981 in a recent case, Isbister, where the Court of Appeal found that a pension could not be shared because it had no marketable or assignable value. We are in support of this provision, which we believe gives a realistic value to the pension as property for the purpose of sharing between the spouses.

We are concerned however by the provisions in the new Section 14(3), which allows the court the discretion to determine how assets such as pensions, insurance policies and annuities should be valued and divided. We think that there should be some guidance for the courts as to the criteria to be considered in determining values. I believe the YWCA, with Ms Cordes, has very clearly outlined some of the guidelines that could be used in that regard.

Finally, we are in support of the amendment to Section 20 and the provision that an Order may be made for the preservation of assets. This is a positive step in preventing the liquidation and dissipation of assets before, during and after separation, but before division. The amendment provides greater assurance to the claimant spouse that the assets will not simply disappear or be divested.

In conclusion, we agree in general with the amendment, but our concern is that the Act provide some criteria as guidance to the courts in determining the values of assets such as pensions, insurance policies

and annuities.

Thank you.

MR. CHAIRMAN: Thank you, Ms Oliver. Are there any questions?

Mr. Penner.

HON. R. PENNER: First of all, let me thank Ms Oliver and MARL for the brief. It's an excellent brief identifying a couple of concerns that have already been discussed. As you will have noticed in the exchange between myself and Ms Cordes, the experience in B.C., which has no criteria built into the Act, seems to have been that over a period of time with evidence having been presented as it must in the nature of things by experts to the courts, the courts have developed what appear to be widely accepted criteria. It is our hope that will develop here and we'll see what happens. In any event, as indicated, The Pension Benefits Act will be examined in some depth.

My only question then, Ms Oliver, really relates to Section 14(3) and I'd like to put the same question to you as I did to Ms Cordes, having to do with 14(3). Would it in your view make any difference if instead of the clause "or by such other means as a court deems appropriate for assets of that nature," if it were to read, "or by such other means as is appropriate for assets of that nature?" Do you see some difference between those two formulations?

MS J. OLIVER: Yes, I do. I think primarily because, again, should we be able to present actuarial evidence as to disposition and valuation of such as a pension plan, the courts really can disregard it. In fact, that is exactly what happened in Isbister and we are very very concerned that could happen again.

I would certainly prefer for the changed wording, rather than have it up to the court to determine how those assets be valued, that certainly whatever evidence is presented would have to be accepted and not simply disregarded.

HON. R. PENNER: Thank you.

MR. CHAIRMAN: Are there any other questions? Mrs. Smith.

HON. M. SMITH: Yes, Ms Oliver, I wondered if you would care to propose some of the criteria that you would see as appropriate to give a court in guidance on their determinations under 14(3)?

MS J. OLIVER: Well, I certainly feel the process that has developed in British Columbia, and I think there are a number of cases that support this and can provide precedents for determining how a pension plan would be split, I think are very admirable and I would hope that our courts here - I would certainly again like to see something along these lines established as criteria for determining values.

For example, the formula that is being used, where you have the number of years of the marriage over the number of years of the term of the insurance of the pension plan times one-half, would actually come up with a reasonable division of the actual asset. Now, that could be determined in I suppose a couple of ways; either that the division would take place at the time the pension is actually paid out or it can be determined on the basis of a present disposition or division of the pension plan.

I think that there are some problems with a lump sum payment if there are no other assets that could be offset. I think that this is something that was touched on earlier. I think I'm of two minds of that. In many ways, I would prefer to see the payment of the pension plan and the division take place at the time it's paid out, hoping certainly that the spouse is going to last that long. The reason for this is because the majority of women and certainly women who have been in the home most of their lives do not have a pension plan, they do not have any pension income to look forward to, and I think that this at least gives them some income down the road when they most need it; I would certainly think that in a similar manner to the way the Canada Pension is divided, for example.

There is another suggestion that has come about in discussions with other lawyers and that is the difficulty, I think, that Mr. Penner raised earlier with valuing or trying to establish a value on a pension plan that may not have any value at any particular time. One of the suggestions that has been made with regard to that is that a value could be placed on it by trying to determine what it would cost, for example, with a woman in purchasing a comparable pension plan that would yield her a comparable amount under the pension plan. So, for example, if the pension plan that has no realizable value at this point in time was going to yield maybe $500 at age 65, then what would the cost be to that woman to purchase a pension plan that would yield her $250 at age 65? So that, we felt, was another way of perhaps establishing a value.

Now, again because the question is whether or not it would be fair or unfair to pay out or to have the husband pay out a lump sum at that time, that could also perhaps be offset by establishing another asset of comparable value, but you still have to establish a value.

Those are some of the suggestions that I have.

HON. M. SMITH: Yes, just one supplementary question. If you were having to recommend on whether there would be an immediate division or a deferred division, would you prefer the principle of choice or would you rather there be a specific criterion named?

MS J. OLIVER: I guess I really would prefer the element of choice. That particularly stems from - and it would be the choice of the parties or certainly the choice of the claimant - and to some extent, there would have to be the ability of the payor spouse to actually provide an amount of money or an equal asset.

The reason being that, while on the one hand I would prefer to see the spouse knowing that perhaps she has an income sometime down the road that otherwise she may not have, for many people and certainly in my experience, the difficulty lies in the whole notion of continuing to be tied to a spouse from whom you are doing your best to become untied. That does present a problem and I think for many people, if they feel that 20 years down the road they're still going to have to go back and start getting money from this

person, that could create a great deal of trauma, I think. As I said, my preference would be in many ways to have that paid out because I think that's when they need it is when they're past retirement age; but on the hand, recognizing where people are in this situation, I think probably an element of choice should be included.

MR. CHAIRMAN: Are there any further questions? Mr. Santos.

MR. C. SANTOS: Ms Oliver, in your conclusion, you stated that you had some concern as to some criteria to guide a court in determining the value of the assets such as pension, insurance policies and annuities. Do you have any ideas as to what these criteria are?

MS J. OLIVER: I think I went through some of those ideas earlier. As I said, I think one of the methods could be that there is a formula that had been developed in British Columbia that I think is very useful and I would certainly hope that the courts can be directed to use either that criteria or even one that is even better. I don't know whether there are better ones, but whatever is most appropriate and most fair.

This would establish a division of the asset based on the years of the marriage over the years of the life of the pension plan times say one-half, assuming that it's going to be equally divided. Now, that division of that split could take place at the time that the pension is actually paid out, for example, at age 65 if that's when it is. That would give each spouse some pension income at that time.

Now, the other method, of course, is to pay out a lump sum amount at the time of the actual separation or divorce either by paying out a lump sum of money or by offsetting it by another asset of equal value. That is one method that can be used and I would certainly urge either the Legislature to give direction to the courts or at least strong pressure being put on the courts to consider that kind of splitting.

MR. CHAIRMAN: Any more questions? Thank you, Ms Oliver.

MS J. OLIVER: Thank you.

MR. CHAIRMAN: Mr. A.L. Clearwater. Do you represent anyone or are you just a private citizen, Mr. Clearwater?

MR. A. CLEARWATER: I'm appearing just as a private citizen, as a practising lawyer, who represents from time to time all sides to the particular question dealt with by the bill. My comments will be very brief and limited to what came up at the end of the first presentation.

I have no quarrel as a lawyer with the concept of the equal division nor of the reclassification of pension plans in the family assets if that's the will of the people. But the bill as it presently stands, I submit, does not deal with what I consider to be a great inequity and the inequity which the Court of Appeal tried to deal with and I perhaps did not do it the way all of us would have liked it to have been done in the Isbister case; that is, pensions can be valued. There is no question of that. I don't know that it's necessary for the Legislature to set methods of value, actuaries, insurance companies. Businesses have been valuing pensions for years and will continue to do so no matter what's set down in this bill. They can be valued. That's not the problem.

The problem is what has been spoken to and that is, should a person be forced to come up with cash or money's worth now and divest himself or herself of it now when he or she may or may not get the value that's determined from that plan or part of it in the future at an indeterminate time? That's what's unfair and unfortunately the bill as it's drafted has the effect of moving pension plans into the family asset field, thereby limiting the discretion of the court even more than it's limited under the commercial asset section to do anything other than order a division and order a payment or a transfer of assets. That's unfair and that, I submit, should be dealt with now. That's not something that can be left for later. That's an immediate pressing problem to every person who finds himself or herself in this situation. The payment in whatever form it might take, it is unfair to order or direct that payment be made now from other assets. A pension is a particular special type of asset that's to provide for some security for people in their old age. That's all it ever was and that's all it is. It's not fair to have a person take other capital and divest himself or herself of it now and take a chance on what he may or may not get in the future.

It's true what has been said before that perhaps some further overall pension reform is needed. I think the committee should give serious consideration to the concept that's been dealt with for several years now in The Canada Pension Plan Act because I submit that if you're going to have an equal sharing, the Canada Pension Plan is just a pension the same as any other pension. It happens to be funded by the government and in other times people felt that was secure. It may or may not be the case.

At least it clearly deals with the concept in what I submit is a fair way; that is, at the time of the marriage break-up, the contributions are in effect valued, but no one gets that money or money's worth until they're entitled to it, that is, until their old age. That's fair, but what's being done by this bill is not fair, I submit. My comments are directed only to those pension plans that can't be, for lack of a better word, cashed now. My comments are not directed to RRSPs which is a common form of pension plan or investment for people or to some employee/employer plans which can at the option of - there are very few of those or at least in my experience I've seen very few, but occasionally there are some other forms of plans that you can if you wish elect to take your money out of the plan, pay the tax, whatever the consequences might be and divide it up. No quarrel with those kinds of plans, but unfortunately I think the main effect on most people in our community is the unfortunate effect that this bill is going to have and that is, it's those plans that are locked in. You can't get your money out and I say you shouldn't be required to divest yourself of capital now.

I think the previous two speakers have also in general dealt with that issue and they were given the two alternatives, I believe, by one of the questions and one of the speakers said, well, she would prefer that be a question of choice but, frankly, that doesn't deal with

the issue. There's no choice in these situations. Marriages don't break up between two happy people and if it's going to be choice, I think the suggestion was it would be the choice of the claimant. That's not choice. The fact is I think that the committee has to direct itself to that inequity and it is an inequity to require anyone to take cash and pay cash, now whatever that might be determined, whatever the amount might be, pay cash now. It's a pension plan; it should be left as such and it can be done. It's done under The Canada Pension Plan Act quite simply. There's no reason it can't be done, I think without any particular significant amendment to The Pension Plan Benefit Act in this statute. That's fair. Thank you.

MR. CHAIRMAN: Are there any questions?
Mr. Penner.

HON. R. PENNER: Thank you, Mr. Clearwater, for your presentation. You've certainly identified a problem with which we're concerned and we looked very carefully at the CPP, Canada Pension Plan, mechanism but thought it wiser to deal with our Pension Benefits Act as a whole rather than piecemeal.

Would you not consider - or let me put the question more directly - do you think that Section 19(1) of the Act, as it presently is and I'll just read it, may in the meantime deal with the kind of problem you identify?

Section 19(1) of the Act as is reads as follows - and I'll foreshorten it a bit - "Where a court makes an order or gives judgment against a spouse for the payment of money or the transfer, conveyance or delivery of an asset and the court is satisfied that immediate compliance with the order or judgment will work a hardship upon the spouse or is otherwise inexpedient, the court may order that the payment be made by instalments with or without interest or may otherwise allow the spouse such time with or without interest in which to comply, etc." Isn't that something of a safeguard in the meantime?

MR. A. CLEARWATER: That section could be used by the court to alleviate the inequity. Unfortunately, there just haven't been enough decisions yet dealing with the problem in the Isbister case, sort of cut off the problem completely, and that of course is the reason for the amendment to the bill. But having said that, I really don't feel that it's fair still to leave that particular discretion in the court with respect to those pension plans of which I'm speaking. You just should not have to pay capital, tax-paid capital now for something you may or may not get in the future. In situations where there is lots of money in a family, it isn't as big a problem; in situations where there is no money in a family, it's not a particular problem either, quite frankly. People have other problems. Where it is a problem though is in the ordinary average working-class family in his province, people who have been married for 10, 15, 20 years and people working at a job with an employer pension plan.

The main two assets in terms of values probably are in the majority of situations, a home, if they have one, and the value of this pension plan to be determined. The legislation, the way it's drafted now, leaves the court very little discretion. It's true, there may be some found in that section, but it almost says to the court that you've got to pay for that pension plan out of your share of the home, you're left with nothing and you'll get a pension when you're 65. Now that's great, I'm 40 and, by the way, I don't have this personal problem because I don't have a pension plan. I'm self-employed.

HON. R. PENNER: I can't help but remember the statement of Zsa Zsa Gabor, who you know, was married 9 or 10 times. She said that her mother taught her to be a good housekeeper, namely, whenever she left the husband to keep the house.

MR. A. CLEARWATER: I feel that people should be entitled to keep half, that's all, and this bill won't do it with the present attitude to the court.

MR. CHAIRMAN: Mrs. Smith.

HON. M. SMITH: Mr. Clearwater, I guess I'm not completely persuaded by your argument on the injustice of the current state of the law, I guess for these reasons, I'd appreciate your comment on them. I assume that if there have been contributions made to a pension plan that they've come out of the total income that family unit had and that contribution to a pension plan purchases protection; that both spouses in a sense are entitled to an equal amount of protection whether or not either one lives a long life and is able to realize a pension or not. It seems to me that the justice in and of at the moment of separation or determination by a court should look at the fact that the payment has come out of the combined income of the unit and that the right of each spouse to protection should be equal. The fact that there is perhaps insufficient money in the unit to make economic conditions easy or even possible in some cases, I think, is another issue. I think it's the equity issue between the spouses that we're attempting to address in this legislation. So I guess at the moment I can't quite follow the logic of your argument.

MR. CHAIRMAN: Mr. Clearwater.

MR. A. CLEARWATER: I think perhaps you misunderstood me then, because I don't disagree at all with what you said, pension plans are protection for the future and that's all they are. They are not like any other investment that's going to be divided up now. I'm saying that both spouses should have the protection that's been paid for during the period of cohabitation, during the marriage. What I'm saying is you shouldn't have it now, one or the other, neither one gets it now, neither one can get it now, but this legislation is going to give it to one now. That's what I'm saying. I agree completely and I believe that's what the Canada Pension Plan legislation is intended to do; that is, when there is a separation, the one party's share becomes the one party's share. That is, that's now the wife's pension plan, if she's the person who stayed at home and hasn't contributed, she has it, it's vested and when she's pensionable age, she gets what her share is worth in the plan. I don't disagree at all, I wasn't suggesting otherwise, but what your bill does is otherwise. It says you've got to pay it now out of other assets, prima facie, and I appreciate that there's

a bit of discretion but, unlike the previous two speakers, my experience is, very frankly, that the courts aren't that inclined to vary from the equal division payment now and get rid of this relationship.

You can get rid of the relationship under the principle that I'm proposing, that part of the plan that's valued and that becomes the one party's is now the one party's. It's got nothing to do - there's no payment. When they reach 65, the one party doesn't have to go to the other and ask for half the money. Not at all, that I agree in the relationships I've seen, that would be unworkable, we'd be back where we started from 20 years before. That becomes his or her pension and it's payable to her. It can be identified, it can be valued, it can be done and it should be done. I think it's fair and I agree with you that there should be a quality and equal protection.

MR. CHAIRMAN: Mr. Filmon.

MR. G. FILMON: Mr. Chairman, may I ask Mr. Clearwater, on the same point, is the difference that he is pointing out between the pension value and everything else, even including the house, the fact that it is not pre-cashable in many instances and therefore it cannot be in fact turned into a liquid asset at the present time. Whereas even with a home, there is the choice to sell it and it's clear what the value is or to place a value on it, if somebody isn't choosing to sell it, but it is a saleable commodity as at any given date. This is not and it runs the risk, as was pointed to by Mr. Manness, of the possibility that it is nonviable and will not in fact prove to be worth whatever it's valued by any actuary or any business or any insurance company at the present time, so that puts it in an entirely different situation. The ultimate and only fair way would be to have it vested at its present value equally in both people, so that they both take the risk of whether or not it's paid at that time or whether or not they live to benefit from it to whatever age is dictated. That is a very great difference in this particular item and anything else that's included in the whole Act.

MR. CHAIRMAN: Mr. Clearwater.

MR. A. CLEARWATER: That's right, I'm suggesting that the type of pension plan of which I've been speaking, not the ones that can be cashed, no matter whether it's employee/employer or RRSPs or whatever but only those ones which are, I think - this certainly affects the majority of the working people in the country and that's exactly right. It has to be. I appreciate you don't want too many exceptions but, unfortunately, we're into an area where I think an exception has to be made for that type of asset to have some sort of fairness in the legislation. It's because you can't sell it or buy it now; if you could, I have no problem.

MR. CHAIRMAN: Mr. Downey.

MR. J. DOWNEY: Just to make sure I understand the point, Mr. Chairman, you're not arguing the principle of sharing the benefits of a pension, it's how and when the pension is paid out. That's pretty much the point of it really.

MR. A. CLEARWATER: That's right. It's not my concern that the pension may not be worth as much, although that is obviously a concern of everyone, that's an economic concern. It's not my concern though that it maybe worth less, you may not get the benefits you thought you would get no matter how much this actuary says it's worth now. That's not really my concern. I'll assume that they're correct and I'll assume that hopefully our pensions will have some value when we reach age 60 - no age - when we get older. My concern though, is that what it was always to be, future protection, that's when you should get it and you shouldn't get it now. In fact, I don't want you to change the pension legislation and say that they're all cashable because weak people like myself would probably rather have a new car right now than a pension. We might cash all our pensions, that's not what I'm suggesting.

MR. J. DOWNEY: Or bread on the table.

MR. A. CLEARWATER: Well, that's possible.

MR. CHAIRMAN: Mr. Santos.

MR. C. SANTOS: Thank you, Mr. Chairman. In other words, the spouse can get the right to a pension now, but not be cashed because it is yet an incorrect right; it is not yet realized until the maturity or the date.

MR. CHAIRMAN: Mr. Clearwater.

MR. A. CLEARWATER: The spouse is entitled to that. He or she has stayed home and he or she has made her equal contribution; that is, that's money that otherwise would have come to the family. So she's paid her share; just define her share and set it aside.

MR. C. SANTOS: May I make an observation that because of the advances in health and health care and medical care, people generally are living longer in this generation than the last generation and they generally will live longer and longer. That means that people are drawing more and more from our pension funds and there are less and less people putting in so even if you may have it right now, by the time you retire maybe there is no more money in the fund, so it is contigent on the future.

Thank you.

MR. A. CLEARWATER: That's right. I'm concerned that may happen, but the poor guy who just paid cash now is going to be stuck with that.

MR. CHAIRMAN: Ms Dolin.

MS M. DOLIN: I have a question, Mr. Clearwater. In this I will personalize to the extent that I happen to be the party holding the pension in my particular marriage; my husband does not. If that were divisable and in the case of separation I did not live to 65, he would get no share of anything. Is that correct? Is that what you're saying?

MR. A. CLEARWATER: That's right. If that's the present term of your plan, if that is a term and condition of

your plan, yes.

MS M. DOLIN: Most plans do not have survivor benefits; that's what we found and that's where so many elderly women are left out when it comes to pension plans. I'm wondering if . . .

MR. CHAIRMAN: May I interject here? The Hansard recorder is having trouble identifying people. Could you wait until you're recognized before speaking?
Ms Dolin.

MS M. DOLIN: Thank you. I'm wondering if what you are saying is that the party who is waiting for the pension plan - both parties are waiting for that pension plan to mature at age 65 of the party that holds it. Are you saying that the other party then must hope the person from whom they have separated or divorced lives to that age in order to collect on the benefit?

MR. A. CLEARWATER: No, that's not what's intended. What I'm saying is that plan, and to personalize it, your plan is now at the time of separation divided and it's half of what it is now, what it's worth now, is now your husband's pension plan; whatever it's worth. If he makes it to 65 or 70 or whatever, he'll collect the same as you will and the same with you. If you make it to 65 or 70, you'll collect on your share. Obviously, your share is going to be reduced, your pension will be reduced, but that's the natural effect of a division of property.

MS M. DOLIN: One more question. You feel that we do have the technology to handle all of this?

MR. A. CLEARWATER: Certainly, there's no question. I believe it to be being done regularly under The Canada Pension Plan Act. I have some views on what I think should be amendments to that, but in principle it can be done. I don't think that's a problem. — (Interjection)— Oh certainly, legislatively it is possible right now.

MR. CHAIRMAN: Mr. Manness.

MR. C. MANNESS: Thank you, Mr. Chairman. I think the last comment leads into a very short question. You say in principle it can be done. In your view, mechanically, can it be done? Can you see any great problems? Do you feel it's just a paper mechanism that would allow it or is it going to involve something much beyond that, something that we can't foresee as far as a problem?

MR. A. CLEARWATER: No. When I say in principle, I mean mechanically it can be done by legislation now. It's effectively done by The Canada Pension Plan Act, the amendments that were put in about 1978, I believe, and with some modification it can be done. You can do to the existing plans by legislation, what The Canada Pension Plan Act does to the existing Canada Pension Plan by legislation and mechanically does it.

MR. CHAIRMAN: Ms Phillips.

MS M. PHILLIPS: Thank you, Mr. Chairperson. Mr. Clearwater, I understand what you're talking about in terms of The Canada Pension Plan and deferred sharing. However, if an individual has a private pension plan with an employer, it's quite a bit different in that, when they change employers, unless that plan is locked in with 10 years and 45 years of age and they change employers quite often, say for instance, during the life of a marriage they had been involved in three different pension plans, or two and had each of them locked in, would there be some way that the spouse who was working at home could have that divided and set totally aside separately, so that share stayed in that particular plan regardless of what the working spouse went on to do?

MR. A. CLEARWATER: Yes, I believe so. I would assume from your question that we're talking about a situation where during the course of a marriage, a person works at a job for 10 years and develops a pension plan, then moves to another job but that pension plan is not portable and stays where it was; yes, that's a definite plan, separate plan. It was accumulated during the marriage; it can be valued and set aside the same way that the Canada Pension Plan in effect is. The next plan can be done the same way, if another one and another. If on the other hand they become portable; that is, he goes to the second job and the plan is moved over and amalgamated, which is often the case, then again that's no problem. It becomes one plan.

MS M. PHILLIPS: I guess I see several problems with deferring it. I recognize the problem that you're bringing up in terms of splitting it and paying it out and the hardship right in the present that might create for some individuals; but in terms of deferring it, unless it was split out totally so that regardless of what that working spouse went on to do and whether they cashed out a future plan, whether they had two other wives in the meantime, that the assets that individual has would get paid out on her retirement. What if they chose to retire at different ages, if that's now the case in terms of not knowing that this individual has to retire at 65, her pension would come to her regardless of whatever choices the other spouse went on to make in terms of jobs or retirement age or remarriage or any of those kind of things. The difference between that and the Canada Pension Plan is regardless of what employer that person works for, the contributions are still in that one plan.

MR. A. CLEARWATER: Yes, I appreciate that, dealing with those situations where you move from plan to plan to plan, and I don't really believe that would be the majority of situations; but irrespective, that would cause what I describe as probably an accounting problem for employers as well if there's a marriage break-up; but I suggest to you that accounting problem is just that and that isn't sufficient in my mind to overcome the inequity of what's happening now. I think the accounting problem can be worked out, but the unfairness of making someone pay cash now can't be, unfortunately.

MR. CHAIRMAN: If there are no further questions, I'd like to thank you, Mr. Clearwater, for your presentation.

Mr. Filmon.

MR. G. FILMON: I just wanted to clarify one of the references that Mr. Clearwater has been making. He keeps referring to the fact that it is possible to do this. What I'm saying is, does current legislation allow for the pensions to be split and vested as of a certain time to pay out at age 65 or whenever, or would that require an amendment parallel to that which has been made, as he referred, to The Canada Pension Plan Act?

MR. CHAIRMAN: Mr. Clearwater.

MR. A. CLEARWATER: No, current legislation, as I understand it, does not provide for that. Rather, it requires a specific amendment which I am suggesting is the specific amendment that should be in this bill, and again it has to be co-ordinated with the provisions of our Pension Plan Benefit Act but really that is an amendment that I submit can and should be provided in this specific bill.

MR. CHAIRMAN: Thank you, Mr. Clearwater.

MR. G. FILMON: Can I further ask, in view of the questions of Ms Phillips on this matter and Mr. Clearwater referred to the accounting problem, are we not dealing with the situation whereby most pension plans are based on an amount that accumulates, that would in fact purchase an annuity that is worth so much per month at the time of retirement and, therefore, that amount could be split, purchasing two annuities of equal value and therefore returning equal value? If there were this appropriate amendment that would vest it, then it wouldn't have the effect of concern as to which of the spouses was still living, because whichever was still living would be entitled to his share or her share pro rata. So that is all possible, given the proper type of amendment, you're saying?

MR. A. CLEARWATER: My answer to the question is yes.

MR. G. FILMON: Thank you, Mr. Chairman. Thank you, Mr. Clearwater.

MR. CHAIRMAN: Lauranne Dowbiggin.

MS L. DOWBIGGIN: Good morning. I'm from the NDP Status of Women.

We're concerned about this but I'll warn you, we haven't done an awful lot of research, so don't ask real deep questions afterwards.

The thrust of this amendment that makes pensions a family asset is applauded. We commend the Attorney-General for developing this amendment so quickly. It demonstrates to us that the government understands the seriousness of this issue. We have two major concerns about this amendment, Sections 8.1(1) and Section 14(3).

We view Section 8.1(1) as an enormous loophole that would allow the court to decide to not make a ruling in a difficult or awkward case. We have Isbister versus Isbister, as I've heard you've heard quite a bit about this morning, as an example of this. In another end of the spectrum, we can see many scenarios that could be presented to the court and may be accepted; like an old or a middle-aged couple could use medical evidence saying that they will expire before 65 and therefore the pension has no value.

This section could be used to deem the asset at zero value and therefore there is nothing to equally divide. If this section is to protect the court and the family, then guidelines must be inserted. It is reasonable to set guidelines to clarify the intent of the section. Our strongest opinion is that the section should be totally deleted. In cases that are viewed as extreme and value would not be realized, the court can assign a $1 value and satisfy the intent of the legislation. Further, any plan paid into has a value. We cannot accept that a pension could at any point not have a value.

Our concern in Section 14(3) lies with having the court ascertain a market value and division of that value. Our first objection is one of principle. This section through its application continues the separative property concepts in family law. It does not assume that the pension is or has been jointly owned and that both parties can and should have the right to maintain that asset as a pension regardless as to whose name is on the asset. It does not allow for pension credits. As soon as you deem a dollar value to the pension and pay one party out, the asset ceases to be a pension. Under this section in its present form the nonholder, usually a woman, is forced by law to lose the pension totally. It is necessary to use this legislation to found the principle of community property and, as an extension of that, pension credits.

From my reading of The Pension Act, if this legislation, Bill 15, assigns both parties as owners of the pension, then there's no need to amend or change The Pension Act. We feel that pension credits should be inserted instead of Section 14(3) immediately. If the Committee refuses to accept the aforementioned concepts, then we see a strong need for guidelines to be applied; for example, in a pension that is employer and employee contributed, the date of separation could be used and the court could assume that the parties have turned 65 and ascertain the value of the pension at that point. In a plan where there is a one-person contributor, a commuted value could be assigned with a defined benefit pay out used to designate a value of the pension and equally divide it. In a new not vested pension, the amount of the premiums paid could be ascertained and that figure equally divided. To more easily ascertain the value of a pension and to maintain consistency in the courts, we would recommend that a court actuary or actuaries be appointed if you're going to maintain Section 14(3).

So our recommendations basically are that Section 8.1(1) be deleted totally, that Section 14(3) be deleted, and an appropriately worded section, allowing for pension credits as the only way to split a pension, be incorporated. Thank you.

MR. CHAIRMAN: Are there any questions for Ms Dowbiggin?

Mr. Filmon.

MR. G. FILMON: Thank you, Mr. Chairman. I just wanted to apologize to Ms Dowbiggin for the humour which we saw here at the beginning of her presentation. We indeed were not making light of her presenta-

tion. Rather, when she made the comment about not having looked into it in depth, researched it and therefore not perhaps able to deal with it in detail, my colleague just simply said that her party was known for that in the House as well, so that it was all right; we understood.

In any case, the question that I'd like to ask is that earlier in referring to pension benefits, I believe Ms Dowbiggin said a couple could convince the courts by producing medical evidence that the pension should not be paid out, because they had medical evidence that they would expire before reaching age 65. Is that what you said in your presentation?

MS L. DOWBIGGIN: It's an extreme example to make a point.

MR. G. FILMON: Okay. If I may just ask a question. What sort of medical evidence would you visualize that anyone could present that would convince a court that they would expire before age 65?

MS L. DOWBIGGIN: That's not the intent of the example. I'm sure we could go on and on and round and round, which is exactly what would happen in a court setting.

MR. G. FILMON: Okay, that's fine. Thank you, Mr. Chairman.

MR. CHAIRMAN: Are there any further questions? Mr. Manness.

MR. C. MANNESS: Yes. I think you made a comment that, in fact, any money put into a pension plan today definitely has value. Are you indicating that it's a guaranteed fact that all money invested - and I hate to use that word - today will have value in the future?

MS L. DOWBIGGIN: It will still be money; it's something that's been paid in. It can't come out at a zero value unless the whole plan has gone bankrupt.

MR. C. MANNESS: Well, fine. I think the witness has in fact said the qualifying mark. You said unless it goes bankrupt; so you acknowledge the fact that circumstances could arise that it might occur?

MS L. DOWBIGGIN: That's why I put the contingency in for the dollar value, as in $1.00.

MR. CHAIRMAN: Any further questions? Seeing none, I'd like to thank you, Ms Dowbiggin, for your presentation.

MS L. DOWBIGGIN: Thank you.

MR. CHAIRMAN: Mrs. Beth Kroll.

MRS. B. KROLL: I'm presenting this brief on behalf of the Winnipeg Chapter of the Congress of Canadian Women and its affiliates, the Women's Branches of the Association of United Ukrainian Canadians, the Federation of Russian Canadians and the United Jewish Peoples Order.

The Congress of Canadian Women is part of a world-wide organization, the Women's International Democratic Federation, with 121 member organizations in 106 countries. The WIDF holds consultative status B at the United Nations, which covers nongovernmental organizations and as such, participates in the work of the United Nations Commission on the Status of Women, which has resulted in the Universal Declaration of Human Rights, the Declaration of the Rights of the Child and the Declaration on the Elimination of Discrimination against Women. It was upon the suggestion of the WIDF, backed up by other nongovernmental organizations, that the United Nations decided to declare 1975 as International Women's Year.

For over 30 years, our Winnipeg Chapter has been working for the achievements of full equality for women. We made a submission on family law to the Law Amendments Committee in November, 1976, and we later welcomed the enactment of the family law legislation which followed.

One of the purposes of our organization is to advance the stability and well-being of the family, which we consider to be the foundation of society. Family law should not only deal with marital break-up, but should buttress the family milieu, bolstering the harmony between husband and wife and eliminating inequalities which create friction and hostility. This purpose can best be served by provisions for full and immediate community of property during marriage. If we concern ourselves only with the dissolution of the marriage, it becomes a case of locking the door after the horse has been stolen.

The nonearning spouse, in the vast marjority of cases the woman, should not have to wait for marriage breakdown to establish her right to a fair share of the property accumulated during the marriage. Marriage should be a partnership of shared responsibilities. The roles of the economic provider and the homemaker are of equal value to the relationship. Therefore, marriage can only be strengthened if the nonearning spouse is not put in the humiliating position, as many are now, of having to ask the earning spouse for money. To remedy this situation would be a positive step in creating and maintaining harmony in the home, with the resultant good mental health of all members and less marriage break-ups.

We, therefore, strongly urge that Bill 15 include the following amendments:

(1) To make provision for full and immediate community of property regime of family assets during marriage and on marriage break-up.

(2) In the event of separation, pensions be shared on an equal basis of 50 percent to the wife and 50 percent to the husband.

(3) The question of determing the value of a pension not be left to the courts or the judge, but that a formula to determine such value be spelled out in The Marital Property Act.

By so doing, we believe family law legislation will move in the direction of enabling women to achieve full equality. Thank you.

MR. CHAIRMAN: Thank you Mrs. Kroll, are there any questions?

MRS. B. KROLL: I have some copies here if anybody

wants them.

MR. CHAIRMAN: Could you give them to the Clerk and she will copy them and distribute them?

HON. R. PENNER: I'd like to thank Mrs. Kroll for her presentation and concern. I just want to make a couple of comments.

I think it should be understood - I hope it has been from comments I've made previously - that this bill is not to be taken as a comment, express or implied, on the concept for example of community of property. There was a particular problem - it was clearly an urgent one - that had been recognized in fact by the previous administration following Isbister and which we were anxious to deal with in what of necessity, of course, has to be a fairly short Session.

The larger question such as community property would really require very very careful consideration over a lengthy period of time, briefs and so on; so that the bill is designed in the main to deal with a particular problem in a particular way; nor is the bill a comment at all on the question that was raised earlier about desirability of pension splitting legislation. Indeed, I think generally there would be an agreement on that, but it's our advice that to amend The Pension Benefits Act is a horrendous problem and you don't want to do that without very careful thought as to how that can best be effected. So, this is an interim bill in a way, but we do believe it will meet the particular problem for the time being.

The only other comment I have is that with respect to formula, there are arguments that can be made both ways about putting formula or formulae into legislation. Our advice is that there's such a variety of pensions that it might be better to do as they did with some good results in B.C.; namely, since the courts will have to rely case by case on expert evidence, to allow the courts to develop the general approach to be taken in evaluation of pensions on the basis of expert evidence which is available, and we'll monitor the situation.

Thank you for your presentation.

MR. CHAIRMAN: Are there any further questions? Thank you Mrs. Kroll.

Ms Valerie Gilroy.

Ms Bernice Sisler.

MS B. SISLER: Mr. Chairman, I wonder if it would be permissible for Jennifer Cooper to take my place and for me to fall back to her place since she has to leave, if that's permissible for your committee?

MR. CHAIRMAN: Certainly.

MS B. SISLER: Thank you.

MR. CHAIRMAN: Mrs. Jennifer Cooper.

MRS. J. COOPER: Good morning. I'd like to make a presentation on behalf of the Manitoba Association of Women and the Law. I, first of all though, have a couple of comments about things that have come forward and that appear to be particular concerns of this committee.

The first is with respect to this formula that MARL was recommending, this idea of having the number of years that you have cohabited over the number of years you have contributed times a half. I think that's a little bit misleading to say that formula is going to work, because the question is still half of what. We still have to determine the value. In fact, it's my opinion that The Marital Property Act as it presently exists provides us with that formula, because if you think about it, that formula after all, all it's doing is allowing you to ascertain the number of years during which the spouses cohabited and made pension contributions, which is under our scheme in The Marital Property Act, when we're supposed to be looking at marital assets in any event.

I refer you to Section 4(1) where it makes the Act apply to assets acquired during marriage, so therefore if you made pension contributions before marriage, they wouldn't be included at all. Then I would refer you to Section 15, which makes the cutoff date basically the date of separation; so we don't need a formula like that, I would submit. I think that already we're going to be looking at the years of cohabitation to determine it. We're still left with the problem, which of course is what is the value of the pension.

The other point that I was going to make is with respect to a matter the person from the YWCA brought forward; that is Section 8.1(1) of the Act as it's proposed in Section 4 of the bill, and that is this phrase: "that there is no reasonable possibility of the rights ever being realized." The submission was that should be deleted entirely.

It's our submission that it could be a pension has zero value, it could be a pension is valued at $100 or $10,000 or $50,000 and that there are many many factors to take into account in determining value; for example, the age of the contributor the health of that individual, how long they've worked at their employment, their job history, maybe they jump from job to job and there's no likelihood that a pension will ever be vested. That's a job for the actuarial to consider. I would submit, that the cases that have already been handled in the courts when actuarial evidence is brought forward and these actuaries are being cross-examined, they give evidence that yes, in fact, they've considerd that this man is 64 ½ years of age, has been working at the same place for 35 years and they are assuming that he will get his pension next year, or they have considered that the man is only 20, has only worked at his employment for 2 years and the likelihood that his pension will vest, that he will work at that same place for 10 years, is somewhat unlikely. It could be that it's so unlikely that in fact the pension has zero value.

My feeling is that if the judges understand that if this Act is explicit enough with respect to those kinds of factors, then there's no need to have a provision like this. I would submit that it's dangerous to have a provision like this because I think it invites judges to hang their hat on this kind of reasoning by saying, well, there's no reasonable possibility. All of those factors must be considered each and every time the judge is in a position to try and assign a value.

The last thing I'd just like to speak to is Abe Clearwater's submission. He was pointing out the inequity of having to pay money over where there may be no

other assets.

This, of course, is an issue no matter how you value the pension; it's always going to be an issue. The first thing I would say about it is, I think it's not going to be that often that there aren't some other assets that can be transferred about to make it so that the spouse's position is equitable. For example, the family home would be a likely candidate or its contents or bank accounts and so on. In the event, that there aren't any assets to be transferred, it could be that the individual has a sufficient income that certain amounts could be ordered to be paid. As Mr. Penner has pointed out, there's certainly a provision in there that would allow it to be paid over time with or without interest, so as to avoid undue hardship.

The issue, I think though that really bothers Mr. Clearwater is the fact that this poor fellow could die at age 64 and never get a pension, but there he is at 35 years of age, he's divorcing his wife and she wants some of that value. The submission that I would make too, is to consider that in determining the value, those risk factors are being built in by the actuaries. They're saying, okay, the man is 35, when is that pension going to vest and they look at all those kinds of factors. Now, if he gets lucky and keeps working at the same place and lives till 65, he gets a windfall. If he gets unlucky and dies earlier, perhaps you could look at it as her getting a windfall, but the point being is that those factors are built into it. So it's not resulting in a fundamental unfairness to the contributor as Mr. Clearwater would suggest.

I would just like to then refer to my submission which, I would comment firstly, applauds this bill and its intent and in particular, its categorization of pensions as family assets which we think they should rightfully be characterized as.

Again, our issue that we're concerned with is the same one that concerns MARL, the YWCA and a number of other people who've made submissions. Our concern is that there's absolutely open-ended discretion for the judges and no guidelines in trying to determine how we're going to value the pensions. It's all very well and good to say, you get 50-50, but 50-50 of what? It could be very little or it could be quite a bit.

Bill 15, our concerns are twofold; first, that there will be a lack of certainty in making settlement. As a lawyer, I'm speaking particularly on behalf of my clients, there's going to be a lack of certainty that won't allow us to make settlement without recourse to the judicial system. Secondly, we're concerned that determinations of value of a pension might be clouded by a judge's opinion regarding perhaps the appropriateness of the Act or his view of the particular equities in the case, always the inarticulate major premise that sometimes seems to exist.

With respect to the question of certainty. I would comment that, generally, The Marital Property Act with its 50-50 sharing regime is very easy for the public to apply and to understand. Very often people come into the office, they've already listed their assets and they have proposals as to how they're going to deal with it 50-50. I guess the Act got a lot of publicity because it seems to be working well.

If there's an issue as to valuation, usually a mutually approved appraiser can be appointed, go in, take a look at the family home and give an idea as to value. Our submission is that this legislation which deals with the valuation of a marital asset, which practically everybody's going to have to consider, most people have some kind of pension or other, sometimes many different kinds, is going to introduce a big question mark.

How do we advise a client as to the appropriate amount of which to settle? There's going to be wide differences in valuation, depending on the approach that the court is going to use. We have no idea which approach the court will use. Court costs and lawyer's fees, of course, eat into the amount of the marital assets which for the average family is not all that large to begin with.

I would submit that time is not necessarily going to heal this, anticipating Mr. Penner's comments, because when I look at the B.C. situation I will admit that I haven't read all the cases, but I've certainly read a report which has come out rather recently prepared by two lawyers in B.C., Lyndon Robinson and Terry Webster, which indicates that the case - there are many different opinions and views being taken. They spend much of the report looking at the recent case of Rutherford versus Rutherford which they mildly call a landmark decision. It introduces all kinds of things - it's B.C. Court of Appeal - many of which I think are very questionable, I wouldn't want to see implemented in Manitoba. More about that case later, but I think the main point is that without some direction or guidance it's going to be increasingly difficult for the lawyers to guide people through a happy settlement - if that can be happy - at marriage breakdown of their assets without having recourse to the courts.

It's with all due respect to the judiciary that we articulate this second concern. Many judges, of course, make every effort to apply the existing law fairly and equitably; however, judges are human. They are a product of their environment and we can certainly look to some past cases to see that the courts have not always come out in favour of women. That's probably why there are so many women's groups here that are very very concerned. We are saying that where discretion exists, these factors, even though they may be as I say an inarticulate major premises, may influence the judge in the exercise of his discretion.

Another reason why women's groups were saying don't give discretion to vary 50-50 is the same reason why we're saying don't give nothing but discretion in valuing assets. For example, in the George versus George case, which is an unreported County Court decision in Manitoba, the courts looked at the cash surrender value of a pension, less the tax repercussions. Some courts have not taken into account tax repercussions. Ask yourselves whether it's equitable to take into account tax repercussions of a pension when it's unlikely that the individual is going to cash that pension out at their current income, rather they're going to probably wait until their income is somewhat less.

The point is that valuation of property cannot be influenced by any extraneous factor such as whether a judge after hearing the facts of the case in some way wants to punish the wife, for example, for her adultery, whether he considers that her contribution as a homemaker compared with his 14-hour days at his employment is somewhat less and he wants to equal-

ize that, the point is he's given unlimited option in terms of the method which he's going to use to value with quite different results. It may be that this mind-set results in a somewhat lesser valuation and again, it's fine to say 50-50, but what if it's 50 percent less than of what you should be getting?

Okay, well, the question that everyone worries about and is concerned about, how do we determine value then? Our submission is we should not look simply at the cash surrender value or the amount of the employee contributions and that's been done in the past, but rather we should look at what's been called the actual value of the pension. I refer you to this Rutherford case out of B.C. and I'm quoting the judge now. "Ordering the husband to pay one-half the pension contributions to date," which is what we're not recommending as a settlement of the wife's claim is clearly unfair to her. The value of the pension, once it comes into the possession of the husband is worth many times that sum. Why should the wife not share in its actual value? Why not indeed?

Now, the two major arguments that are used against determining actual value, the first one is that it's tough to figure out; the second one is that, well, we could have this inequity that a person is being asked to pay something they don't yet have. With respect to the first concern, surely, it's no response to say that because it's hard to figure out actual value that we shouldn't try. If you use a formula of actual cash value, then what you end up getting is consistently undervaluing pensions and is that equitable, having that result? So I think that we're forced to look at what the actual value is. We'd like to be able to give you a very simple formula, but heaven knows, pensions are complicated and I'm no expert, but one of the suggestions we have is something similar to The Family Maintenance Act which lists factors which the judge must consider in determining in that case under Section 6, I believe, amount of spousal maintenance that should be paid. In this case the kind of list that we would have would include factors such as the length of the marriage the age and the health of the contributor, the amount of contributions which have been contributed to date by the employee and the employer and whether that pension is vested. Now I don't suppose that list is exhaustive but I suppose with further research it could be made to be exhaustive.

I'm recommending that it be made a closed list because I think there are other factors which the courts have considered which I don't think are relevant to determining valuation. For example, I don't think that the cash surrender value of the pension is at all relevant and perhaps it's so important because the judges have used it so often, it may be so important to actually put it in the legislation they're not to look at it. Because it's so easy for those judges to say the cash surrender value if you walk down tomorrow and cash it in is $2,000, okay, she gets $1,000.00. That has nothing to do with the actual value of that pension right now which projected over the long term can be worth far, far more. You always find that the cash surrender value is much lower than the actual value.

Similarly the age of the recipient, typically the wife, shouldn't have anything to do with what that value of that pension is and it's been looked at or, for example, whether the wife has her own pension. What has that got to do with it except maybe that's got to be shared as well? Also, whether maintenance is payable and sometimes in situations they have said, well, the wife is going to get $500 a month maintenance, so we shouldn't share this. This pension is an asset, is a piece of marital property which must be shared.

The Family Maintenance Act tells us that after all marital property has been shared, then we'll look at the question of maintenance, whether it's needed. It might not be needed, now that she's got the house, furniture and things like that she may not need maintenance, she's got her own part-time job. Similarly under The Divorce Act, although it's not said explicitly, the case law is developed that you look at the division of marital property, you let that happen and then you say, okay, now is maintenance necessary? But we've had cases which are quite backwards to that, I think, where the judges are getting all mixed up about pensions because the man will be 65, he'll be on a pension and she's sharing it then by way of maintenance and so on, shouldn't have anything to do with it, we're suggesting.

That second problem that there's going to be no assets to satisfy the order, I've already dealt with. I think that we have remedial provisions in the legislation in the case where it's very unusual. There's one other solution and that's the Rutherford case that brought it forward. This would be, in my view, a situation where you had no other assets to transfer over and the individual had no income sufficient that you could satisfactorily order a payment over. In that situation what Rutherford did and I suggest our courts could certainly do it, is they ordered that the husband or they declared that the husband was a trustee of the wife's portion, so that she got her money out when he did.

Now, I make a word of caution here because I think that there are problems with that approach and that it should be used in a last resort. For one thing and this has been pointed out already, it obliges parties to keep in touch when they probably don't want to. Also enforcement is going to be a major problem. I think it's all too often that individuals who don't have any assets and don't have a significant income are also people who are without roots. They move around a lot and maybe you aren't going to be able to keep track of that individual - to realize that - when you want to 20 years down the line. Although the judge in the Rutherford decision said, well, the wife can obtain an order of security securing it against property or whatever, by definition there wouldn't be any security. If there was property or something else, you would presumably have used that to satisfy the obligation at first instance.

The ideal situation, and I agree with all of the previous speakers, would be a reform of The Pension Benefits Act which would eradicate all of the problems. We wouldn't have to worry about valuing these darn pensions, but the fact is, I agree with Mr. Penner, that it really should be done in the context of a global change to that Act and in the interim, best that we fix up Isbister so that women are being able to share in the value. In terms of what that value should be, I think the courts should be directed to look at the actual value of the pension.

MR. CHAIRMAN: Mr. Penner.

HON. R. PENNER: Let me thank Mrs. Cooper for an excellent presentation which, in part, I think because it is well thought out, illustrates the complexity of the problem. I would agree and have so stated that a better, not necessarily an ideal solution because I don't think there are ideal solutions, but a better solution will ultimately be found I hope in the revamping of The Pension Benefits Act. I just wanted to comment that I've read Rutherford and Rutherford, in fact, I have it with me. It's interesting that there's a commentary that Mrs. Cooper referred to on it extolling the virtues of the decision, but then you went on to add editorially that you don't agree with the commentary which indicates the fact that we had to wrestle with.

At the moment, there is no clear consensus as to what to do with the pension and how to value. In fact in Rutherford, referring to a California decision or an earlier B.C. decision, the judge at one point said, "In this case the pension is more complex than in Pryclak, which is the California case, and that rather straightforward formula cannot be adopted." I think I'm quoting that to illustrate the difficulty of attempting to put a formula for valuing when there are just so many different kinds of pensions and there are other contingent interests which are dealt with here, life insurance policies, accident and sickness insurance policies, to attempt to write into legislation a singular formula is enormously difficult. I think that while I understand the concern that many people have, not just women's groups about judicial discretion, the judicial discretion by definition must be applied judicially and that is on the basis of evidence that by the very nature of the beast, the particular asset being dealt with, there will have experts brought in who can give evidence on the particular pension or contingent interest that is in question. I would hope that the courts will in such instances, where the parties haven't agreed previously, come to a reasonable conclusion. Perhaps I should leave it on that reasonable note.

This legislation, like all other legislation, will be monitored very carefully. If in fact the kinds of fears that have been expressed that judges somehow or other won't be able to rely on expert evidence but will require formulae to be built into legislation, well, we'll have a look at that situation as it develops.

MRS. J. COOPER: I agree with Mr. Penner that there is no clear consensus as to formula. There certainly is none in the B.C. legislation as it's grown up and its certainly misleading to imagine that the experience in B.C. should hearten us in leaving all of the discretion with the judges to do with what they will. I don't think it's enough to say that we will have a watchdog position. I think we should always do that, that's a given, but one of the reasons why in the family law legislation we felt it necessary to have a list of factors for spousal maintenance is because the history was the judges were taking into account all kinds of factors which were not relevant and not the least of which was fault, the fault of the marriage break-up. We want to avoid a situation like that in this case. I think the very least that can be said is that it's unfair to divide the actual cash value; it's unfair to divide the sum of the employee contributions to date; it's probably unfair to take into account the tax repercussions given that people don't generally take their pension benefits out in a high income earning year, they wait until they're retired or laid off or something.

There are certain things that can be said which the judges have done, so quite frankly, I don't trust them not to do it again.

HON. R. PENNER: I might conclude with a self-serving statement. Apparently the difficulty with those judges is they took neither my evidence lectures or your evidence workshops.

MR. CHAIRMAN: Mr. Filmon.

MR. G. FILMON: Thank you, Mr. Chairman. I too would like to thank Mrs. Cooper for her presentation, a very broad coverage of the problem. I think because it required this sort of broad coverage, it illustrates how complex it is. I'm going to get to the nub of the issue which is to deal with trying to determine how the pension benefit shall be equitably divided. I think that we're all coming from the same viewpoint, that is, that equal sharing of all of the applicable marital assets ought to be our objective. However, pensions, I think we've had ample illustration, are the one asset that cannot if they are not ones that can be pre-encashed cannot be valued equally.

Mrs. Cooper has referred over and over again to saying that she's not in favour of utilizing cash value; she's not in favour of the sum of contributions to date; she wants to value them based on the actual value and I submit that there is no such thing. You either have the present value or you have the future value with risk and there's nothing in between. The fact of the matter is she has pointed out that actuarial analysis accounts for a risk factor; then you have said that therefore you are in an equal position with respect to windfall if you make evaluation today. The equal position is that if the spouse who had the pension or retains the pension benefits dies at 64 ½, the windfall is to the spouse who got the money at the time of marriage break-up.

On the other hand, if he lives and he gets the windfall, the fact of the matter is that's not true; if he lives, he only gets to get his equal share of whatever was divided some years ago at the marriage break-up. She has already received it, she has no risk if we're talking husband and wife - I'm sorry, I shouldn't do that because it could equally be the other way around and I want to make that point. But the fact of the matter is that once you give somebody their cash share up front they have no further risk. It's the other person who bears all the risk, so the only fair way is to find a method of dividing it in which the risk is shared and that only way is to have it vested at that point in time in both persons' hands and they each have the risk for their own half but they don't bear the risk for the other person's half. That, as Mr. Clearwater said, is able to be done with changes to the pension legislation. It would be able to be done and it would be able to be valuated but there is no such thing as actual value. That's my submission and I'll ask for Mrs. Cooper's comments on it.

MR. CHAIRMAN: Mrs. Cooper.

MRS. J. COOPER: I agree with what you said that changes to The Pensions Benefits Act are our ultimate

goal not only because it would make this problem a heck of a lot easier, but also because there's a very real social problem of elderly women in poverty and we have to provide for that in some way. With respect to your comment that the wife is not at risk, my submission understood that in the event that the husband is really very young and there is some issue as to whether he will live long enough or work at his place of employment long enough to get those benefits, then when the actuaries take that into account, they will in some cases seriously undervalue the pension in order to build in that risk factor. So in other words even though the wife walks away with $2,000 cash, as you put it, no strings attached, no risk; if she'd hung on, his value at age 65 might be $60,000, for example, and half of that is $30,000.00. But she suffers a little and if he dies before that, he probably suffers a lot except he's not around to know it.

I disagree with you that there is no actual value. I use that phrase only because the courts have brought forward that phrase and it can be distinguished from cash value or other phrases. The actual value causes you to look at really what that pension is worth and what it's going to be worth down the line. With respect to a formula for determining it, which I think is the issue that's before the committee, different people have put forward different proposals. I'm asking you to consider listing some factors the judge must look at and I think even that will help and, in particular, perhaps listing things he ought not to look at, in particular, if that list is not an exhaustive one.

The Family Law Subsection of the Manitoba Bar, of which I'm a member, will be presenting I suppose tonight - now that we're at noon - and they also have a submission as to a way in which one can determine value. It's similar to one that was brought forward early this morning; that is, you ask yourself the question what would it cost now to buy something which would have the result of the same benefit 20 years down the line and that's an alternative. The point is, if you don't have it there, you're going to wind up with no certainty in the law and possibly great inequities, especially if the judges are simply halfing the cash value.

MR. G. FILMON: Of course there are all sorts of uncertainty about the future and that is exactly the problem. You can't have any certainty in the law about the value of this pension, that's precisely the point. There is even the uncertainty as to whether or not ultimately the benefits might flow because of whatever happens in the economy at all, but that's another case and another problem. Mrs. Cooper has indicated that actuaries will take into account the risk based on the individual person, his health or how long he's likely to stay. That's not an actuarial analysis at all, that's somebody's crystal ball gazing and guess. Actuaries only make their analyses based on all of the accumulation of experience to date, on the millions of people and the projections of expected life, all of those things, how many times they may change jobs and so on. They are basing it on the broad spectrum of the millions of people who are under coverage for pensions throughout North America or the world, in general, and obviously their statistics are different for different areas because we seem to have higher risk areas of living. The fact of the matter is it is impossible for an actuary to do it on an individual case.

MR. CHAIRMAN: Mr. Evans on a point of order.

HON. L. EVANS: Mr. Chairman, on a point of order, while the information is interesting, the debate going on between the delegate and the member is intense and interesting as well, I believe our procedure and practice in the past is for delegates to present their views and for the members of this committee to ask questions. The odd time we do preface our questions with comments in order to elaborate on the question, but it seems to me that there's a debate going on between the delegate and the member of the committee. I don't think that's in order.

MR. CHAIRMAN: Do you have an explicit question, Mr. Filmon?

MR. G. FILMON: Mr. Chairman, I apologize and obviously that's part of the debate that should ensue after we've received the presentations. No further questions.

MR. CHAIRMAN: Mr. Manness.

MR. C. MANNESS: Thank you, Mr. Chairman. I just want to reiterate one comment made by my colleague and I guess it struck me when the delegate indicated that there is no certainty in the law and again I'm going to ask if that isn't the reason why we're having so much difficulty, or you're having so much difficulty, in attempting to arrive at a formula. The fact that, as I understand it, we can define present value and we can define future value, but we can hardly define future value without recognizing that there is risk. Are you saying that there is a position in between because I submit there isn't?

MR. CHAIRMAN: Mrs. Cooper.

MRS. J. COOPER: The issue of certainty, I think, it's being miscontrued. The comment that I made that there was not certainty or that there would be no certainty if this bill was introduced is that, as a lawyer, someone comes into your office and they have a bunch of pensions maybe or at least one and you're trying to sort out their marital property and divide it 50-50 between the spouses and you can't. You have no idea how to advise them as to what that pension is worth. All you can say to them is, "Well, the judge can do what he will."

Now if you have a list of factors to look at, you can, for example, the two of you, you and the lawyer on the other side, go and appoint a mutually approved actuary, have that actuary come up with a figure, because that actuary is guided by the factors which the Legislature has said are important. Of course, we do that with respect to evaluation of homes all the time. So the certainty issue is with respect to whether or not we're going to have to end up in court spending client's money, most of the time there's not all that much of it and it's very expensive to go to court.

MR. CHAIRMAN: Mr. Manness.

MR. C. MANNESS: I'm wondering, rather than calling in actuaries, if it wouldn't be more important to call in the investment people managing a portfolio of investments to determine their state, the present economic state, of where that pension money has been invested and making a value judgment as to their degree of certainty at that particular time. Wouldn't that be of greater value than calling in actuaries under your position?

MR. CHAIRMAN: Mrs. Cooper.

MRS. J. COOPER: Not being an actuary myself, I am under the understanding that one of the things actuaries do consider, and they consider a multitude of factors, is where the money has been invested, the interest rate that you're receiving on that investment you'll likely receive, what inflation is going to be over the next few years. Actuaries are very broadly educated in those areas from what I understand and I defer to them.

MR. CHAIRMAN: Mr. Santos.

MR. C. SANTOS: Thank you, Mr. Chairman. Certainly there is certainty in life. Everybody is certain to die and everybody is certain to pay taxes, but except for those two things, probably there is uncertainty in life and therefore life tends to be very complex. Because of this complexity, I want to ask Mrs. Cooper if it is wise to deprive judges of human judgment and discretion?

MR. CHAIRMAN: Mrs. Cooper.

MRS. J. COOPER: Yes. That's one of the reasons why we certainly deprive them of it in terms of varying the 50-50 sharing, because their wise discretion has certainly worked to the disadvantage of women over history.

MR. C. SANTOS: The fact that some judges had considered factors which you think are irrelevant is of course subject to the remedy of appeal, is it not?

MRS. J. COOPER: Not when the appeal judges think those factors are sensible. Our only remedy is to persuade the Legislature that the legislation should direct them to consider or not consider certain factors, then their hands are tied.

MR. C. SANTOS: I think what we need is not abolition of human discretion in judgment, but what we need is some criteria so that judicial discretion may not be exercised arbitrarily. It is the arbitrariness that is the danger, not the very presence of human discretion, otherwise we might as well consign ourselves to being ruled by computers if everything is by formula.

MRS. J. COOPER: I suppose that's exactly what I'm suggesting when I suggest a list of factors. I wish I could give you a mathematical formula, but I agree with all of the opinions that have been expressed so far, that there isn't one that will apply and give us a magical computer-like solution. That's why I suggest the list of factors the judges can look at. When we think they're going to look at irrelevant factors, we can direct them not to.

MR. CHAIRMAN: Are there any other questions for Mrs. Cooper? Seeing none, I'd like to thank you for your presentation.

MRS. J. COOPER: Thank you.

MR. CHAIRMAN: Mrs. Carlene Murphy. Carlene Murphy.

Ms Bernice Sisler.

MS B. SISLER: Thank you, Mr. Chairman. My comments will be very brief. I first want to compliment the government for bringing in a bill which clearly defines pensions as a family asset. I think that ought to have been done in the Family Law Debate in 1978 and many of us were very disappointed that it was not considered a family asset.

I think it's apparent from the comments made here this morning that most people are willing to accept that, apart from the family home, for most couples, a pension is the asset that families share; that the woman in the home and the children, of course, give up equally with the man so that the pension can be paid for. I think that there is a great need for new perceptions on the part of employers about their married employees. While I say that most people would accept the fact that pensions are a family asset, I think that will be accepted in a kind of academic argument, whereas the perception of married employees having to share the pension at home is not a perception employers have nor one I would say that the pension industry has. I think it's a logical extension of our Family Law Reform.

I would remind you that the time of a family law struggle, as we refer to it, the principles we fought for were considered very radical at that time. They are now incorporated in one way or another into The Marital Property Act. The principle that marriage is a partnership of legal equals and should be a social and economic partnership as well, that work done in the home is of equal value to work done outside the home, as I say, are principles now incorporated into our law. I think there needs to be the recognition of the new principle that pensions belong to both.

I would point out that I have a great deal of concern about the two areas that other speakers have listed, 8.1(1) and 14(3). It's my feeling, though I am not a lawyer, that those two sections just take us back almost where we were. I have conferred with legal advice in British Columbia with someone who practises family law out there and certainly it was the opinion of that legal advice that those sections are large loopholes. That person, of course, practises under law, a law that defines pensions as a family asset but has no guidelines as we have been told.

I think one of the difficulties in this bill is that it attempts to do all things for all people and, as I listen to the comments, it seems to me that we might figure something out for pensions, but then it doesn't hold for life insurance or accidents and sickness insurance or whatever, that there seems to be problems with the blanket category. Perhaps more astute minds than mine will be able to figure out a way to solve that.

I think another thing that hasn't been looked at is the kinds of pensions plans and particular categories. I would suggest that in a broad picture there are money-purchase plans and to find benefit plans. Then under each of those you have the situation where they are not vested and where they are vested. I think that if we look at the money-purchase plan, for example, it is quite possible that amount can be determined and that half of the employee contribution where it is not vested, because of course if it's not vested you don't have access to the employer contribution, that it can be determined relatively easily.

I must say that I subscribe to the suggestion, the theory, or I would hope it would eventually be practised, that pension credits should be given in lieu of an amount of money; that pension credits at pensionable age is obviously, to my mind, the way to solve this. I, like Mr. Clearwater, believe that we have the technology to do this. I think a lot of our problem arises from the fact that we're not imaginative enough and that we're held back by concepts that belong to another era. I think we should be bold, think ahead and think just because it's difficult doesn't mean we can't do it. You know, we can manage to get to the moon and so on, I think we can manage some of these other things. It's only because we don't think imaginatively enough that we're held back by that.

In a situation where a money-purchase plan has been vested, half of the commuted value, which was explained to you in detail by the first speaker, could be ascertained very easily. My option would be that would be put into a pension credit to be given out at pensionable age. It's very apparent that one of the major problems for older women is that they are poor. In fact, the Canadian Advisory Council on the Status of Women has pointed out, as others have, that the best guarantee to be poor in this country is for a woman to live to be 65 and over. So I think that the pension credit situation is a much better situation where the woman would have a pension.

In the defined-benefit category, you would have the situation of an employee leaving the plan or staying with it, in which case it would be vested. I think the same situations hold there that you could determine half the employee contribution and in the case of when it's vested, you could determine half the computed value. As has been pointed out, this is already done, where a terminated employer transfers the commuted value to a locked-in RRSP. Again, that's a thing we can put that value into a pension credit for women to have it down the road apiece.

I would say that I would agree with some of the former speakers who have said that 8.1(1) is an invitation to lawyers to argue for a zero value of the pension. I would hope that we would soon see reform to The Pension Benefits Act. I, myself, while I have a great deal of concern for women, primarily who are in the situation now because of Isbister versus Isbister, of not getting anything from the pensions at marital breakdown, my own opinion is that this would have been more manageable had the pension reform come first and this after. I say that with reluctance. I don't want to be misunderstood as being anti-woman; I think it's probably quite clear that I'm not. Thank you very much.

MR. CHAIRMAN: Thank you. Are there any questions? Seeing none, I would like to thank you for your brief.

Mr. Murray Smith. Murray Smith.

Ms Cheryl Hall. Cheryl Hall.

Mr. Penner.

HON. R. PENNER: May I propose if we're through with the presentations on Bill No. 15 and I'm not sure we are, but if we are, I would propose committee rise.

MR. CHAIRMAN: Mr. Filmon.

MR. G. FILMON: Mr. Fraser is here and he sat all morning for the next bill, so I wonder if we could . . .

HON. R. PENNER: Okay, Mr. Green indicated he'd have to go and he'd want to be heard this evening but that's still possible.

MR. G. FILMON: He can be heard this evening, but Mr. Fraser's been here all morning and I think he has a commitment this evening.

HON. R. PENNER: Sure.

BILL NO. 22 - THE MANITOBA LOTTERIES FOUNDATION ACT

MR. CHAIRMAN: Mr. Fraser.

MR. G. FRASER: Thank you very much, Mr. Chairman. My name is George Fraser and I'm not here as a private citizen, as was listed, I'm here as the Executive Director of the Manitoba Sports Federation at which I had registered myself.

I'll try to make my comments as brief as I can because we didn't intend to be too lengthy in our discussion of Bill 22, just a brief preamble. The Manitoba Sports Federation currently is completing or in the process of completing a formal agreement with the Provincial Government that would end in March of 1985 in which we are partners in another corporation which some of you may be familiar with, Western Lottery-Manitoba Distributors Inc. The other partners in that grouping are the United Way, the Manitoba Arts Council and total community involvement. We each share equally in the proceeds from that partnership which is an exclusive distributorship arrangement for the distribution of lottery products in the Province of Manitoba.

We are current sharers of approximately $1 million per year and I have a few copies of our Annual Report from last Thursday evening of June 10, which if you care to read, will give you an indication of the expenditure of the funds.

The agreement I spoke of earlier is one in which we not only were allowed to receive these revenues but we also have assumed responsibilities which were the prior responsibilities of the Provincial Government and that basically, is the operation of the Administrative Centre for Recreation and Sport here in Winnipeg and the sharing in the payment of salaries of individuals who work directly for provincial sport-governing bodies.

The Manitoba Sports Federation and sport in gen-

eral - I'd like to make this comment - have grown up with lotteries. The federation itself has been very involved in lotteries. We have been involved in every aspect of lottery operations.

As the growth of the involvement of government in lotteries has increased over the 10-year period from the early 1970s to the present, of course, communities groups such as ourselves - we are a separate, non-profit, nongovernment organization - the involvement has been lessened in terms of direct involvement in management or any of those factors.

Although we would like to comment at this time that the nature of the beast is that we even looked at Bill 22 and we thought it might be more appropriately named "The Catch-22 Situation for Sport." Because no matter how lottery legislation twitches, we, in sport, are subject to those very large twitches.

A report that was produced in April of 1981, which gave a brief rundown at that time on the 10 years of lotteries in Manitoba, indicates that at that point in time some $35 million in profit had been generated by lotteries. Sport, quite fortunately, at that point, shared with culture almost on an equal basis of about $7.8 million apiece.

Now, with direct reference to the bill and that gives you just a brief background at this time because of the hour, I would just like to go through the aspects of the bill, which do give us some concerns.

In particular, we'll place emphasis on the aspects, first of all of 6(1), which speaks of the proceeds of government lotteries and the indication that those funds will indeed go into Consolidated Revenue. It's our concern at this point in time that because we are involved in a partnership that was established, and in our opinion has borne out especially in the last few years, an understanding between those groups that are recipients of lottery dollars and I believe the powers that be in government, one of the appropriate methods of distributing at least, as is the case right now under the current agreement between that corporation, WLMD, and the Provincial Government, 51 percent of that distribution of revenue goes to those four partners.

It is somewhat unclear to us when we look at 6(1) as to the future of the corporation known as WLMD and, indeed, if we expand that again, of course, is to that type of revenue that would be derived by the Manitoba Sports Federation. We have concerns about the funding moving into the consolidated area and again, a further arm's length away from us in terms of the representation that we can make in terms of amateur sport. I cannot speak for the other partners in the corporation, but from a sports' standpoint, this is a very important aspect to us because it leaves us in somewhat of an unknown situation.

Item 6(2), Use for cultural or recreational purposes. I guess because we have some element of pride in the fact that sport does stand by itself and many politicians have expounded on the fact in the early '70s that lotteries were created to basically support culture and sport, in this bill, our only point here would be to ask that perhaps it would be appropriate under the circumstances of history of the last 10 years, that the word "sport" be inserted somewhere for the future when people such as the volunteers who are on the Manitoba Sports Federation Board of Directors and the various provincial sport governing bodies go about other activities, that those who follow behind would have something to secure what has been a substantial source of revenue for them.

Item 6(3). Again, it touches on the area of revenue being transferred into Consolidated Funds and, unfortunately, we already have an early indication that the current lottery, which is a computerized lottery known and advertised as 649 and as it being a separate product of lottery operations emanating from the Western Canada Lottery Foundation into the provinces, will bypass the distributorship known as WLMD and the revenue will be taken into government revenue. I'm not clear if it's lined up to coincide with this legislation or not, or whether it will truly be into Consolidated Funds or not; but it's a concern of ours that it is a revenue that not only will go into the government coffers, but it is also a product that creates competition for our source of revenue at the current time. In short, there are still a number of details, I suppose, that have to be presented publicly and to our Board of Directors in that regard; but again we have this fear of all revenues being placed within a Consolidated Fund without any particular earmarks, as I spoke before and I can only speak on behalf of sport, but particularly some earmark for sport, an expenditure to them.

The next area is 9, which would be on Regulations. I would just like to pause here and say that because we have been involved in lotteries - and I note that the Minister is here right now and the previous Minister, Mr. Banman, had been present earlier - we all recognize, because we've all been involved over the '70s, that lotteries do need regulating. There are aspects of it that must most importantly be addressed and we understand the role of government.

However. . .

MR. CHAIRMAN: Excuse me, Mr. Fraser.

MR. G. FRASER: Yes.

MR. CHAIRMAN: It's a custom that we have the committee rise at 12:30 p.m., unless there's committee leave to continue. Will your comments be brief or will it take considerable time for you to finish your brief?

MR. G. FRASER: I shouldn't take much longer than say 10 minutes.

MR. CHAIRMAN: Whatever the will of the committee is. You can continue now or come back tonight at 8:00 p.m.

HON. L DESJARDINS: Mr. Chairman, may I suggest that we try to accommodate Mr. Fraser. We can start with 10 minutes and then if there's too many questions, we can decide then, maybe, but at least finish the brief so he wouldn't be interrupted and have to start over again.

MR. CHAIRMAN: Is that agreeable for the Committee? (Agreed)

Continue.

MR. G. FRASER: Thank you very much.

In the area of Regulations, the only thing - that's em 9 and (e) - is the restricting the amount of money) be realized from the lottery scheme. Now, that is omething we had difficulty interpreting, but the only omment we would like to make there is, again, we are ery concerned about the maximizing of the profit oing back to charitable organizations and in particuır, in our case, to support organizations. We hope ıat the regulations, for example, wouldn't restrict ıat level of profit.

In the area of licensing, again, a number of our roups are dependent on lotteries at the community evel where licensing occurs, and at the provincial evel, and this would pertain to such things as casinos nd bingos. We would hope that the legislation, the egulations that follow behind it, would have some ıherent consistency that would allow them all to be ıdged on the same level. I know that it's been a difficulty for those licensing bodies that have had to issue cences, particularly in the area of casinos, but we ould hope that would allow for some criteria to be stablished at which everyone could be measured on ıe same basis.

Now, No. 11, the foundation may operate licensed otteries. Again, this raises a concern that we have in ıat we have this agreement to March of 1985 with the rovincial Government, which has us as a partner in ıis corporation called WLMD. Now, if the foundation as is indicated here - is allowed to operate licensed otteries, we would have some concern in that we may nd ourselves in an area of competition as a partner in VLMD with the foundation, who may in turn be operting a lottery. The big question is again for us, the uture of WLMD.

No. 12, again gets back to the point of the proceeds f licensed lotteries and reference to Consolidated unds and in reference again to the foundation movng revenue and profit back into Consolidated Fund reas. Again, I give the example of the present situaion that we were made aware of in the last couple of ays, that the 649 Computer Lottery, the revenue will o back into the government structure outside of the urrent agreement that WLMD has with the governent, the 5 & 9 percent sharing.

The next item I'll quickly move to is 23(1), Annual eports to the Minister. We would fully support this. Ve have always maintained that a full report and, articularly if we also address form and content of eports and additional reports as being a very imporant factor in the communication between the general ublic and the government or whoever is involved in he receiving of lottery revenues; but in this case in articular, that Annual Reports to the Minister be nade available to the public and, in fact, that interim eports could fall under the category of additional eports.

We have found in our own membership, which curently now is 75 provincial sport governing bodies and ll of their members which can be in excess of some 00,000 registered athletes, that there is a great deal of onfusion about where lottery dollars go, who is pending what and who is committed to spend what. o I think that this would show, particularly at the rime level of decision making, great leadership in his province in this essentially, compared to the dividng of assets that you've been listening about this morning; a relatively simple matter, I think.

I would hope, speaking on behalf of the federation, that a very practical approach to that would incur. In fact, if all of you I think may have a received a copy recently, the department gave an Annual Report for March 31, 1981, which does that and I commend the department for doing that. We, in our Annual Report, our Board of Directors have taken the same approach and that when you read through there, you will see exactly where all of our dollars go.

Just a brief comment on the last two areas, 27(1) and 27(2), which make references to cost of administration and advances for working capital, again, perhaps a fear that shouldn't be expressed; but whenever one sees foundation or Crown corporation or anything like that and the fact that again that sport, along with other sectors of the community, depend heavily on lottery revenue and that revenue is called net profit, if advances for working capital and cost of administration rest, I might say, solely in the hands of this particular foundation or the government - I guess their stewardship is something that we would have to rely upon - but again I think that there is some latent fear there that the net profit may somewhat be reduced because of the growth of this particular foundation.

Again, in summary, we have support of the current system, the partnership in WLMD has been most beneficial for the Manitoba Sports Federation of late, is most welcomed by our Board of Directors and our members in terms of the role that we now play with distribution of dollars and they interface with our membership. As I've said when I first came here, we grew up with lotteries. Unfortunately, it's the catch-22 situation that lotteries were promoted for the growth of amateur sport and culture in this country and, indeed, that has occurred, but as we move into the second decade of lottery involvement, sport is more and more dependent upon those revenues. I personally feel and the Board of Directors, I believe, would support me on this, that the present arrangement where at least we have some say in the 49 and 51 percent distribution of lottery revenues in the province is an equitable one. Thank you.

MR. CHAIRMAN: Are there any questions for Mr. Fraser? Seeing none, I would like to thank you for your brief, Mr. Fraser.

MR. G. FRASER: Thank you very much.

MR. CHAIRMAN: Committee rise.