

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c.28;

AND IN THE MATTER OF a Proposal of the Superintendent of Financial Services to Make an Order pursuant to section 87 of the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c.28 (the "Act") respecting the Ontario Teachers' Pension Plan, Registration No. 0345785;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the Act:

B E T W E E N :

ONTARIO TEACHERS' PENSION PLAN BOARD

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES
and ANNE STAIRS**

Respondents

BEFORE: Martha Milczynski
Chair of the Tribunal and of the Panel

Judith Robinson
Member of the Tribunal and of the Panel

William Forbes
Member of the Tribunal and of the Panel

APPEARANCES: Freya J. Kristjanson and
Markus F. Kremer
for Ontario Teachers' Pension Plan Board

Deborah McPhail
for the Superintendent of Financial Services

Arthur D.C. Ross
for Anne Stairs

HEARING DATE: March 27, 2000

R E A S O N S

INTRODUCTION

This hearing relates to the application of subsection 48(13) of the *Pension Benefits Act*, and the pre-retirement death benefit payable upon the death of Mr. Roger Mowbray, a member of the Ontario Teachers' Pension Plan (the "Plan"). For reasons set out below, the Tribunal finds no amount of a pre-retirement death benefit is payable to Mr. Mowbray's former spouse, Ms. Anne Stairs and directs the Superintendent of Financial Services (the "Superintendent") not to issue the Proposed Order dated May 6, 1999.

FACTS

Agreed Facts

There was no evidence called at the hearing; the parties relied on an Agreed Statement of Facts which set out in part the following:

- Anne Stairs and Roger Mowbray were married on May 6, 1961
- Roger Mowbray was a member of the Plan effective September 1, 1965
- Roger Mowbray and Anne Stairs commenced living separate and apart on July 1, 1988, entered into a Separation Agreement on August 10, 1990 (the "Separation Agreement") and divorced on March 7, 1991
- During the marriage of Mr. Mowbray and Ms. Stairs, Mr. Mowbray accumulated 22.995 years of credited service
- The terms of the Separation Agreement provided in part, as follows:

10. PENSIONS

- (1) The parties agree that the wife has a substantial interest in the husband's pension with the Teachers' Superannuation Commission. The parties further acknowledge and agree that it is their intention that each of the parties should be liable for income tax on his or her share of the pension payments received. The wife's interest in the pension shall be calculated as follows:

One-half ($\frac{1}{2}$) times twenty five (25) years of married cohabitation during which pension contributions were made, divided by the total number of years (or portion thereof) during which the pension contributions were or will be made, times the pension benefits payable.

The husband shall pay to the wife her share of the pension as he receives payment or benefit under the pension.

- (2) In the event that the husband is assessable for income tax based on the total amount of the pension payments paid by the Teachers' Superannuation Commission (and the wife is not required to include her share of her income) rather than only assessable for income tax on his share of each pension payment, calculated as aforesaid, then the foregoing payments to the wife shall be paid in an amount equal to the gross amount of each payment, before any deductions, times a fraction equal to:

One-half ($\frac{1}{2}$) times twenty-five (25) years of married cohabitation during which pension contributions were made, divided by the total number of months during which contributions were or will be made.

The husband shall pay to the wife the support aforesaid immediately upon receipt of any payment or benefit under the pension and the husband shall continue to be an express trustee for the wife's benefit of her share of each pension payment to the husband from the plan. The quantum of support payable pursuant to this provision shall not be subject to variation whether or not any material change in circumstances occurs for either of the parties and shall be paid to the wife for their joint lives.

- (3) The parties agree to execute any further assurances, authorizations, directions or elections as may be required to permit them to carry out their mutual intention that each party should bear income tax liability in respect of their share of the pension payments.
- (4) In the event a death benefit becomes payable under the pension and the wife is not the only surviving spouse of the husband then the wife will be entitled to an interest in the death benefits as follows:

twenty-five (25) years of married cohabitation during which pension contributions were made, divided by the total number of years (or portion thereof) during which contributions have been made to date of death, times the death benefit payable.

- (5) The husband shall be trustee of the wife's share in his pension. The husband shall provide the wife with copies of all communication between himself and others respecting the pension within (10) days of such communication.
- (6) The husband shall notify the Teachers' Superannuation Commission of the wife's interest and shall authorize the Teachers' Superannuation Commission to disclose all information concerning his pension to his wife.

- On September 28, 1992 Mr. Mowbray married Catherine Mowbray.
- Mr. Mowbray delivered a copy of the Separation Agreement to the administrator of the Plan, the Ontario Teachers' Pension Plan Board (the "Board") on July 14, 1994. There was no evidence in the Agreed Statement of Facts or otherwise that indicated whether or not the Board reviewed the terms of the Separation Agreement or communicated what the Board understood to be the Agreement's unenforceable provisions during the nine months the Board had the Separation Agreement in its files prior to Mr. Mowbray's death.
- Mr. Mowbray died on April 17, 1995, before commencing his pension under the Plan, but while remaining a member of the Plan.
- Catherine Mowbray was the legal spouse of Mr. Mowbray at the time of his death. She did not waive any entitlement to a pre-retirement death benefit under s.48(14) of the *Pension Benefits Act* and did not sign the Spousal Waiver of Pre-Retirement Death Benefit form, which is prescribed as "Form 4" by the Regulations to the *Pension Benefits Act*.

Pension Plan

The pre-retirement spousal death benefit under the Plan is provided for in section 61 of the Plan, which states:

61. (1) If a member who is entitled to a deferred pension or a disability pension dies before the first day of the month in which the first instalment of the pension is due, the person who is the spouse of the member on the date of death is entitled to receive,
- (a) the benefit described in section 62 in respect of the member's employment, if any, before the 1st day of January, 1987; and
 - (b) the benefit described in section 63, in respect of the member's employment, if any, on or after the 1st day of January, 1987.
- (2) Subsection (1) does not apply if the member and the spouse are living separate and apart on the date of death of the member.
- The pre-retirement spousal death benefit under the Plan thus consists of two parts – one part relates to the Plan member's service before January 1, 1987 and the other part relates to the member's service on or after January 1, 1987.
 - Section 62 of the Plan provides the spouse of a member who dies before retirement with a monthly lifetime pension based upon the member's service for employment before January 1, 1987:

62. (1) This section applies with respect to that portion of the death benefit that relates to a member's employment before the 1st day of January, 1987.
- (2) The spouse of a member with ten years or more qualifying service is entitled to the survivor pension described in section (3) for the lifetime of the spouse.
- (3) The amount of the survivor pension, before adjustment for inflation, shall be based upon the member's credited service for employment before the 1st day of January, 1987 and shall be one half of the amount of the pension, before adjustment for inflation,
- (a) that would have been paid to the member at the date of death, if the member was at least sixty-five years of age on the date of death; or
- (b) that would have been paid to the member as of the first day of the month following the month in which he or she would have reached sixty-five years of age, if the member was less than sixty-five years of age on the date of death.
- (4) The spouse of a member with less than ten years of qualifying service is entitled to a refund of the member's contributions for employment before the 1st day of January, 1987 together with interest thereon.

- The amount of the death benefit payable as a survivor pension for pre-1987 service is equal to one half of the benefit the member earned for credit before 1987, after reduction for CPP benefits. At the time of his death, Roger Mowbray had more than ten years of qualifying service with 21.39705 years of pre-1987 credit, including 20.99705 years of CPP credit. The average salary used for this calculation was \$68,686.95.
- The annual death benefit payable as a spousal survivor pension for Roger Mowbray's pre-1987 service was calculated pursuant to the formulas set out in sections 62 and 42 of the Plan:

2%	x Average Salary	x Pre-1987 Credit	-	CPP Reduction x 50%
0.02	x \$68,686.95	x 21.39705	-	\$5,031.59 x 50%
			=	\$12,181.18 annual base

- The current version of Section 63 of the plan provides the spouse of a member who dies before retirement with a choice of either a lump sum payment equal to the commuted value of a pension for credited service after 1987 or an immediate or deferred pension in the amount which could be provided by the lump sum:

63. (1) This section applies with respect to that portion of the death benefit that relates to a member's employment on or after the 1st day of January, 1987.
- (2) The spouse of a member with two years or more qualifying service is entitled to the benefit described in subsection (4).
- (3) The spouse of a member with less than two years of qualifying service is entitled to a refund of the member's contributions for employment on or after the 1st day of January, 1987 together with interest thereon.
- (4) The benefit referred to in subsection (2) is,
- (a) a lump sum payment equal to the commuted value of the deferred pension to which the member was entitled for credited service for employment on or after the 1st day of January, 1987; or
- (b) an immediate or a deferred survivor pension for the lifetime of the spouse, the commuted value of which is at least equal to the commuted value of a pension for credited service for the member's employment on or after the 1st day of January, 1987, calculated as if the member had become entitled to a retirement pension on the date of death.
- (5) The spouse may elect the form of benefit to be paid under subsection (4) and a spouse who does not do so within twelve months after the death of the member shall be deemed to have elected to receive an immediate survivor pension.
- (6) A spouse who elects to receive a deferred survivor pension may elect to begin to receive the pension at any time up to the month after the month in which the spouse reaches seventy-one years of age.

The version of section 63 of the Plan that was in effect at the time of the Mr. Mowbray's death contained the same provisions, except that the phrase used was "qualifying service" rather than "credited service."

- The commuted value for Roger Mowbray's post-86 service was calculated based on the following formula:

$$\begin{array}{rcccccl}
 2\% & \times & \text{Average Salary} & \times & \text{Years of Credited Service} & \\
 0.02 & \times & \$68,317.82 & \times & 8.3116 & \\
 & & & = & & \$11,356.61
 \end{array}$$

- The actual commuted value depends on the level of interest and inflation rates in effect at the date of death as well as the spouse's date of birth. In this case, the entire post-1986 commuted value was estimated at \$146,961.17.

Anne Stairs

- In correspondence dated April 24, 1995, Anne Stairs wrote to the Board to inquire about her eligibility for benefits.
- In correspondence dated May 11, 1995, the Board replied:

My investigation has indicated that you were the former spouse of Mr. Mowbray and are inquiring about survivor benefits payable to you as a result of Mr. Mowbray's death in light of a Separation Agreement we have on file. I regret to inform you that you are not eligible for survivor benefits since the Separation Agreement cannot affect the terms of the defined benefit plan. Under s. 61 of Schedule 1 to the Teachers' Pension Act, a spousal death benefit is only payable to Mr. Mowbray's current spouse provided they were not living separate and apart at the date of death.

- The Board paid both the pre-1987 pre-retirement spousal death benefit as well as the post-1986 pre-retirement spousal death benefit to Catherine Mowbray, and did not pay any portion of the death benefit to Anne Stairs.
- Anne Stairs sought the assistance of the Financial Services Commission of Ontario in January 1997. On May 13, 1999, the Superintendent of Financial Services served upon the Board a Notice of Proposal to make an Order dated May 6, 1999, that stated, in part:

I PROPOSE TO ORDER the Ontario Teachers' Pension Plan Board to comply with section 51 and subsections 48(13) and 87(2)(c) of the Pension Benefits Act, R.S.O. 1990, c. P. 8, as amended by the Financial Services Commission of Ontario Act 1997, S.O. 1997, c. 28 (the "Act") in respect of Ms. Anne Stairs' right to or interest in benefits provided under sections 48 and 51 of the Act, as set out in the domestic contract between Ms. Anne Stairs and her former spouse, Mr. John Roger Mowbray, a domestic contract described in section 51 of the Act. The benefits provided under section 48 of the Act are in respect [sic] Mr. John Roger Mowbray's service after December 31, 1986. The Ontario Teachers' Pension Plan Board is to comply with section 51 and subsection 48(13) and pay to Ms. Anne Stairs the amounts to which she is entitled in respect of her right to or interest in benefits provided under section 48 and 51 of the Act set out in the domestic contract between Ms. Anne Stairs and her former spouse, Mr. John Roger Mowbray, a domestic contract described in section 51 of the Act, within sixty (60) days from the date of my Order.

- On June 14, 1999, the Board delivered a Request for Hearing in respect of the Superintendent's Notice of Proposal, which provided in part:

Relief Sought

Order directing Superintendent to not issue the Proposed Order; to approve the death benefits paid or payable to Ms. Catherine Mowbray pursuant to the Act; and such further and other relief as the Applicant may request and this Tribunal may deem just.

ISSUES

The issues were framed as follows:

- Issue #1:** Is the Ontario Teachers' Pension Plan Board required to pay to Ms. Anne Stairs an interest in the pre-retirement death benefit relating to the service of her former spouse, Mr. Roger Mowbray, pursuant to ss. 48(13) of the *Pension Benefits Act*?
- Issue #2:** If the answer to issue #1 is "yes", is the Tribunal's jurisdiction limited to considering benefits accrued by Mr. Mowbray after December 31, 1986?
- Issue #3:** If the answer to issue #1 is "yes", is the interest limited to benefits accrued by Mr. Mowbray as at the date of separation, which is the valuation dated under the *Family Law Act*, R.S.O. 1990, Chap. F.3?
- Issue #4:** If the answer to issue #1 is "yes", is the interest, or the jurisdiction of this Tribunal to make an order, limited by subsection 51(2) of the *Pension Benefits Act* to 50% of the benefits accrued between January 1, 1987 and the valuation date under the Separation Agreement of July 1, 1988?
- Issue #5:** In the event this Tribunal orders payment to Ms. Stairs of a pre-retirement death benefit, does this Tribunal have jurisdiction to order Ms. Mowbray to repay to the Ontario Teachers' pension Plan that portion of benefits received by her which relates to entitlements payable to Ms. Anne Stairs? If so, should this Tribunal make such an order?
- Issue #6:** What is the quantum of any of the interests found to be payable? This issue is to be deferred until the Tribunal has decided the five issues listed above. If the Tribunal finds that any of the interests are payable, the Tribunal is to direct that the parties attempt to settle the quantum payable among themselves, with the Tribunal remaining seized if the parties cannot come to an agreement.

PENSION BENEFITS ACT

The relevant provisions of the *Pension Benefits Act* are as follows:

"Spouse" means either of a man and woman who,

- (a) are married to each other, or
 - (b) are not married to each other and are living together in a conjugal relationship,
 - (i) continuously for a period of not less than three years, or
 - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the *Family Law Act*, (“conjoint”)
- 37(1) A member of a pension plan who meets the qualifications in subsection (2) is entitled to the benefit mentioned in subsection (3).
- (2) The qualifications are,
- (a) that the member must be a member on or after the 1st day of January, 1988;
 - (b) that the member must be a member for a continuous period of at least twenty-four months; and
 - (c) that the member must terminate his or her employment with the employer before reaching the normal retirement date under the pension plan.
- (3) The benefit is a deferred pension equal to the pension benefit provided in respect of employment in Ontario or in a designated province,
- (a) under the pension plan in respect of employment by the employer after the later of the 31st day of December, 1986 or the qualification date;
 - (b) under any amendment made to the pension plan after the 31st day of December, 1986; and
 - (c) under any new pension plan established after the 31st day of December, 1986 for members of the pension plan.
- 48(1) If a member or former member of a pension plan who is entitled under the pension plan to a deferred pension described in section 37 (entitlement to deferred pension) dies before commencement of payment of the deferred pension, the person who is the spouse of the member or former member on the date of death is entitled,
- (a) to receive a lump sum payment equal to the commuted value of the deferred pension; or
 - (b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the deferred pension.

- (3) Subsections (1) and (2) do not apply where the member or former member and his or her spouse are living separate and apart on the date of the death of the member or former member.
- (6) A member or former member of a pension plan may designate a beneficiary and the beneficiary is entitled to be paid an amount equal to the commuted value of the deferred pension mentioned in subsection (1) or (2) if,
 - (a) the member or former member does not have a spouse on the date of death; or
 - (b) the member or former member is living separate and apart from his or her spouse on that date.
- (7) The personal representative of the member or former member is entitled to receive payment of the commuted value mentioned in subsection (1) or (2) as the property of the member or former member, if the member or former member has not designated a beneficiary under subsection (6) and,
 - (a) does not have a spouse on the date of the member or former member's death; or
 - (b) is living separate and apart from his or her spouse on that date.
- (13) An entitlement to a benefit under this section is subject to any right to or interest in the benefit set out in a domestic contract or an order referred to in section 51 (payment on marriage breakdown).
- (14) A member and his or her spouse may waive the spouse's entitlement under subsection (1) or (2) in the form approval by the Superintendent and, for the purpose, subsections (6) and (7) apply as if the member does not have a spouse on the date of the member's death.
- 51(1) A domestic contract as defined in Part IV of the *Family Law Act*, or an order under Part I of that Act is not effective to require payment of a pension benefit before the earlier of,
 - (a) the date on which payment of the pension benefit commences; or
 - (b) the normal retirement date of the relevant member or former member.
- (2) A domestic contract or an order mentioned in subsection (1) is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses.

REASONS

(a) Submissions of the Respondents

Counsel for Ms. Stairs and the Superintendent both submitted that subsection 48(13) of the *Pension Benefits Act* operates to divide and redirect payment of the pre-retirement death benefit otherwise payable in full to an eligible surviving spouse where the deceased plan member had, at some earlier date, entered into a domestic contract that granted an interest in the death benefit to a former spouse.

Counsel for Anne Stairs submitted that the Separation Agreement set out Ms. Stairs' and Mr. Mowbray's intention to deal with Mr. Mowbray's pension in a manner that recognized Ms. Stairs' "substantial interest" in the pension. Counsel asked the Tribunal to enforce the Separation Agreement as drafted and at the hearing requested that the Tribunal order that Ms. Stairs receive a full 25/30^{ths} of the pre-retirement death benefit for all pre-1987 and post-1986 service, with no 50% limitation and no restriction of the division to the benefit accrued during the marriage up to the date of separation.

Counsel for the Superintendent submitted that in accordance with section 37 of the *Pension Benefits Act*, the *Act* draws a clear and unambiguous distinction between pre-1987 and post-1986 rights and entitlements that may be enforced under the *Act*. Counsel for the Superintendent further submitted that where terms of a domestic agreement are unenforceable as drafted under the *Pension Benefits Act*, the Superintendent could, in effect, vary the terms of the domestic agreement and, as in the case of the Separation Agreement in issue, order that a smaller portion than what had been agreed to or sought be paid. Thereby, counsel for the Superintendent requested that the Tribunal uphold the Proposed Order that Ms. Stairs receive 50% of the death benefit payable in respect of Mr. Mowbray's post-1986 service accrued to the date of separation on July 1, 1988 – that being 50% of Mr. Mowbray's benefit accrued over some 18 months.

(b) Analysis

With respect to the issue of credit splitting, the *Pension Benefits Act* does not permit payment pursuant to a division of pension credits on marriage breakdown prior to the benefit becoming payable to the pension plan member and consequently, may require a former spouse who has not otherwise been paid out of a plan member's other assets to rely upon an "if and when" approach. However, the Separation Agreement entered into by Ms. Stairs and Mr. Mowbray presents further difficulties regardless of their intention to divide his pension, including:

- (a) the provision dealing with benefits payable to Ms. Stairs upon Mr. Mowbray's death does not distinguish between pre-retirement and post-retirement entitlements, and thereby purports to grant an interest to Ms. Stairs in a post-retirement death benefit in the event that Mr. Mowbray had another spouse as at the date of his retirement and upon his subsequent death – a provision clearly unenforceable in any amount under the *Pension Benefits Act*,
- (b) it fails to address Ms. Stairs' interest in the event of Mr. Mowbray's pre-retirement or post-retirement death where he did not have another surviving spouse; and

- (c) it sets out incorrectly the period of Mr. Mowbray's pension accrual that is subject to division under the *Pension Benefits Act*.

While the words of subsection 48(13) that state an entitlement to a pre-retirement death benefit is subject to any right to or interest in the benefit set out in a domestic contract or order under Part I of the *Family Law Act* may lend themselves to the interpretation advanced by the Respondents, the Tribunal prefers a "plain reading" interpretation of the legislation. This is one that takes into account the priority of entitlements expressed in section 48 of the *Act*, and the fact that it cannot be simply any domestic contract that can override or interfere with the payment of pre-retirement death benefits that are otherwise payable under the terms of a pension plan and *Pension Benefits Act*.

The scheme of priorities in section 48 of the *Pension Benefits Act* is clear and provides that a pre-retirement death benefit payable thereunder is first an entitlement of a surviving spouse so long as that spouse and the member were not living separate and apart as at the date of death and so long as there had been no waiver of the entitlement in the form and manner prescribed by the *Pension Benefits Act*. As in the case of section 44 of the *Act* and post-retirement death or survivor benefits, in the absence of an express waiver, priority is given to the eligible spouse.

In accordance with subsection 48(6) of the *Pension Benefits Act*, only where there is no eligible surviving spouse can a plan member determine who should receive payment of the pre-retirement death benefit by designating a beneficiary. In the absence of an eligible spouse and a designated beneficiary, subsection 48(7) of the *Pension Benefits Act* provides that the pre-retirement death benefit is payable to the deceased plan member's personal representative to be included as part of the member's estate.

As noted, subsection 48(13) of the *Pension Benefits Act* provides that an entitlement to a benefit under any part of section 48 is subject to any right to or interest in the benefits set out in a domestic contract or order under Part I of the *Family Law Act*. Subsection 48(13) of the *Act* does not identify in any manner the parties to the domestic contract that can interfere with an entitlement to a pre-retirement death benefit, but cannot be taken to mean any domestic contract. In that regard, this provision must refer to domestic contracts and court orders that bind or are enforceable against the person to whom the pre-retirement death benefit is payable. In the case of the Separation Agreement between Anne Stairs and Roger Mowbray, the Agreement attempts to redirect payment of a portion of the benefit to which only Ms. Mowbray is entitled under the terms of the pension plan and subsection 48(1) of the *Pension Benefits Act*. There is an issue of privity as Ms. Mowbray was not a party to the Separation Agreement, and did not otherwise waive her entitlement at a later date. As is set out in *Fridman, The Law of Contract in Canada*, 4th ed. (Carswell, 1999) at p. 197:

...none but parties to a contract can sue on the contract or any of its terms, and consequently none but a party may be subjected to liability.

The Tribunal also accepts the submissions of counsel for the Board and authority offered, *Dick v. Dick* [1993] O.J. No. 140 (QL) (Gen. Div.), that held that death benefits are not considered or included as "property" for the purposes of Part I of the *Family Law Act*. In the present case, Mr. Mowbray had no proprietary or other interest in the pre-retirement spousal death benefit and therefore could not grant Ms. Stairs any part of or interest in that entitlement by way of contractual agreement. The principle that no person can give away something which they do not own (*nemo dat quod non habet*) applies. At best, Mr. Mowbray could designate a

beneficiary for payment of pre-retirement death benefits under ss. 48(6) of the *Pension Benefits Act*, but only in the absence of an eligible surviving spouse as at the date of his death.

To deprive or interfere with Ms. Mowbray's entitlement to a spousal pre-retirement death benefit under the Plan on the grounds of a domestic contract between Mr. Mowbray and a former spouse would require a clear expression of legislative intention. In this regard, *The Berton Dress Inc. v. The Queen*, [1953] Ex. C.R. 83; *Rex v. Hladych*, [1942] 3 D.L.R. 299 (Sask. C.A.); and *Hickey v. Stalker* (1923), 53 O.L.R. 414 (App. Div.) are applicable, and in *Toronto Transit Commission v. Aqua Taxi Limited et al*, [1955] O.W.N. 857 (H.C.J.) it was noted at page 859-860:

It is trite law that the common law rights of the subject are not held to have been taken away or affected by a statute unless it is expressed in clear language or must follow by necessary implication, and in such cases only to such an extent as may be necessary to give effect to the intention of the Legislature thus clearly manifested. It is presumed that where the objects of an act do not obviously imply a contrary intention the Legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is therefore expected that if the contrary is intended it will be made manifest, if not in express words, at least by clear implication and beyond reasonable doubt. If the statute is ambiguous, the court should lean to the interpretation which will support existing rights.

In our view, sub-section 48(13) of the *Pension Benefits Act* does not express the required clear and unequivocal Legislative intention to take away or interfere with an entitlement to a pre-retirement death benefit that is payable to a person (an eligible spouse as at the date of death or designated beneficiary), where the domestic contract that would interfere with that entitlement is between the deceased pension plan member and another party, a former spouse.

Counsel for the Superintendent pointed out the lack of a provision similar to subsection 48(13) in the scheme of post-retirement benefits set out in section 44 of the *Pension Benefits Act* as an indication of the Legislature's intention to permit a former spouse to "trump" an existing spouse's entitlement only where the member has died prior to retiring. Counsel also relied upon *Suchostawsky v. Metropolitan Life Insurance Co.*, [1993] O.J. No. 1650 (Q.L.) (Gen. Div.). Clearly, in cases of post-retirement death of the plan member where there is a subsequent spouse as at the date of retirement who has not executed a waiver, a domestic contract between the member and a former spouse that purported to grant an interest in the survivor benefit to the former spouse is unenforceable under the *Act*. *Britton Estate v. Britton* (1993), 1 C.C.P.B. 236 (Gen. Div.), affirmed on this point, (1995) 16 R.F.L. (4th) 266 (Div. Ct.). In *Suchostawsky*, the court enforced a provision in a divorce judgment so as to require payment of a portion of a pre-retirement death benefit to a former spouse, even though there was an eligible spouse as at the date of death. However, there is little in the reasons to indicate how the court came to this conclusion. The result is also inconsistent with the high priority given to spousal entitlements created either as at the date of death in the case of pre-retirement benefits or as at the date of retirement in the case of post-retirement survivor benefits.

To adopt the Superintendent's interpretation would be to accept that the Legislature somehow intended to establish a regime where the ability of a former spouse to enforce certain rights under a domestic contract and to deprive an otherwise eligible existing spouse is dependent upon forces beyond anyone's control: the timing of the plan member's death (pre- or post-

retirement). The Tribunal cannot accept that interpretation and the uncertainty that it would cause. Consequently, the provisions in the Separation Agreement as they relate to the payment of pre-retirement death benefits are not effective to give rise to any rights under subsection 48(13) of the *Pension Benefits Act*.

Subsection 48(13) would only divide payment of an entitlement to a pre-retirement death benefit payable to an eligible surviving spouse where it was the surviving spouse who was a party to the domestic contract or was bound by or subject to an order under Part I of the *Family Law Act* requiring such division. For example, where the pension plan member has entered into a cohabitation agreement or a marriage contract with a person who was their spouse on the date of their death, the death benefit would vest in the spouse, and would be subject to the terms of the cohabitation agreement or marriage contract, which might limit the spouse's entitlement to the death benefit. The cohabitation agreement or marriage contract might provide that the pre-retirement death benefits are to be paid to the member's adult children or former spouse, rather than to the surviving spouse.

The Tribunal is sympathetic to the position Ms. Stairs finds herself in but having found the Board's interpretation of ss. 48(13) of the *Pension Benefits Act* to be the proper one, the Tribunal must find that she is not entitled to payment of any portion of the death benefit.

ORDER

Accordingly, the answer to the first issue is in the negative and it is not necessary to address issues 2 through 6. The Tribunal directs that the Superintendent refrain from issuing the Order contained in the Notice of Proposal dated May 6, 1999.

At the conclusion of the hearing, counsel for Ms. Stairs requested an opportunity to address the issue of costs. The Tribunal remains seized with respect to the matter of costs in the event any party wishes to make submissions.

Dated at Toronto, this 31st day of May, 2000.

"Martha Milczynski"

Martha Milczynski

Chair, Financial Services Tribunal

"Judith Robinson"

Judith Robinson

Member, Financial Services Tribunal

"William Forbes"

William Forbes

Member, Financial Services Tribunal