Legislative Assembly of Manitoba

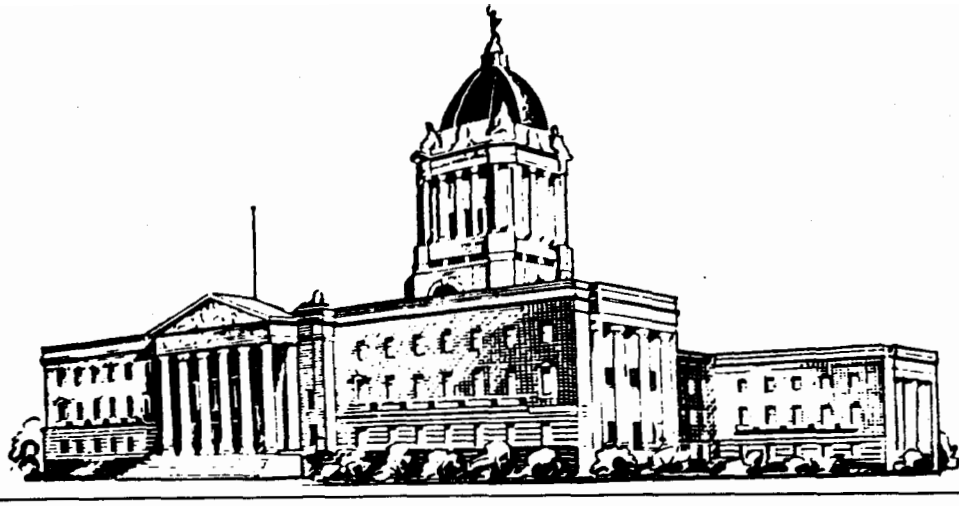
HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of ST. Vital



FRIDAY, June, 3, 1977, 10:00 a.m.

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TIME: 10:10 a.m.

MR. CHAIRMAN, Mr. D. James Walding.

MR. CHAIRMAN: Order please. We have a quorum, gentlemen. The Committee will come to order. Mr. Pawley asked me to mention that he is delayed at another meeting and he will be with us as soon as possible. May we continue then with the list. We had reached Ray Taylor. If Ray Taylor is here would you come forward please. Ray Taylor is not here, I will then call Mrs. Goodwin from the Provincial Council of Women. You have copies of your brief? Proceed whenever you're ready.

MRS. GOODWIN: Thank you. The Provincial Council of Women of Manitoba represent approximately 40,000 women, composed of representatives from 52 local organizations and 15 provincial organizations.

Council recommend that Family Law legislation reflect the concept of economic and social equality between spouses and marriage as an interdependent partnership of shared responsibilities.

These concepts would be interpreted as follows:

1. Marriage as an economic and social partnership of legal equals.

2. Marriage as an interdependent partnership of shared responsibilities and rights.

3. The family as the fundamental unit within the economy and unpaid work done within the family recognized as vital to the unit and to society and to be given recognition equal to that of bringing money into the unit.

4. At the dissolution of the marriage, for whatever cause, the right of the partners to an equal share of the assets accumulated during the marriage, and a right to the protection of those assets from undue alienation during marriage.

Council commend the government for presenting this legislation which is more in keeping with the accepted values of today's society. We urge that government implement this legislation immediately.

Council recognizes Bill 61, The Marital Property Act as primary in importance because it recognizes the contribution of the "at home" spouse, however we will deal firstly with Bill 60.

Bill 60 — The Family Maintenance Act.

Council agree with the principles as set out in determining maintenance.

Council has opposed the principle of fault as a means of determining maintenance and therefore raise as a concern the fact that in subsection 7(2) and Section 23, fault might be used to challenge an agreement where the circumstances of the spouses or either of them, have changed significantly since the date of the agreement. I might point out that we do not look upon ourselves as legal experts and this is just a concern that we do have, and if there is a possibility that fault could be used in this area, we would like it to be considered.

Those factors which are presently recognized by law as fault seldom relate to the true causes of the marital breakdown.

Council agree with the principle that spouses have a mutual obligation to contribute reasonably to each other's support and maintenance and a right to periodic reasonable amounts for personal clothing and personal expense allowance.

We agree that both spouses have the mutual obligation to provide each other information and an accounting respecting the financial affairs of the family or the marriage.

As previously stated by Council, we would like to see the joint signing of the income tax return to ensure that each spouse has access to this information. We realize that income tax is a federal matter and encourage this government to help develop this principle.

Council firmly believe that the family unit is the foundation of society. Those who choose to live outside of marriage do so at their own will, and should not be entitled to the protection of Section 11.

Council agree, however, that where there are children resulting from a common-law relationship that it should be the primary responsibility of the natural parents to maintain, support and educate their children until the child reaches the age of majority.

We question whether subsection 12(3) would be workable and therefore suggest, that instead of placing the secondary responsibility of maintenance on a person other than the natural parent, that this responsibility rests with society; that is a state responsibility.

Council agree that the parents have a primary responsibility to support, maintain and educate their children until the child reaches majority.

Collection of maintenance has been a concern of Council. Council has advocated the creation of a "special agency" to administer maintenance orders because, in the past, many women have found themselves with little alternative other than welfare because a supporting spouse is in default.

Bill 61 — The Marital Property Act.

This legislation appears to deal adequately with the concept of deferred sharing of property — to be known as the Standard Marital Regime; and with the application of this principle to all assets acquired by joint or individual effort during thei marriage, with the exception of gifts, inheritance,

trusts and damage for tort.

Council agree in the principle of deferred sharing of commercial assets and find that the system of accounting under Section 19 to be acceptable.

Council agree that the sharable assets of a spouse should never have a negative value unless that were attained by deducting debts directly incurred in fulfilling family maintenance obligations or other family obligations including obligations to maintain the family's standard of living. It was suggested yesterday that this could be used to the advantage of one spouse and . We the disadvantage of the other would hope that there would be provision to protect a provision to protect the individual from arriving at a negative value by unscrupulous manoeuvres. Council are in agreement with the right to mutually agree and would you please note, "mutually agree has been omitted on the brief that you have. Council are in agreement with the right to mutually agree to opt out of the FMR after receiving independent legal advice. Council recommend that, in the absence of a will, the surviving spouse receive the entire estate. The surviving spouse has the legal responsibility for supporting the children and also is considered to be in partnership with the other spouse.

Once again, council urged the government to abolish the succession duty and gift tax between spouses. This legislation is considered regressive and, to say the least, well behind the times.

Council expressed concern that in contemplation of marriage couples are inadequately prepared to deal with the responsibilities they will encounter. We suggest, in preparation for marriage, that couples be ncouraged to be (a) familiar with each other's financial affairs, (b) determine if the FMR is to apply and, if not, prepare a marital contract and (c) prepare a will. We consider this an opportune time to put one's affairs in order.

As has been evident in the presentations before us, there has been some concern over the use of discretional powers on the part of j,udges. May I just raise as one point our concern, and we have expressed it previously, for t-he absence of ,women in the judiciar y. Thank you.

MR.CHAIRMAN: There may be some questions Mrs. Goodwin. Mr. Graham.

MR. GRAHAM: Thank you, Mr. Chairman I notice that in your brief, Mrs. Goodwin, there seems to be sev,eral areas where your brief has maybe some variance, or maybe in some places considerable variance, from those presented by ot-her groups so far.

One of the first areas I noticed was in the field of deferred sharing of property. We have had other groups that have i-nsisted on in-atant community of property, but I notice your group has opted for the deferred sharing. Was there considerable discussion on this within your group before you went for this position?

MRS. GOODWIN: Yes, Mr. Graham, this particular brief is really in addition to o, previous briefs. These have been positions held by council for many years and it's just a combination of the positions that we have taken over the years on these matters.

MR. GRAHAM: A second area that I notice where there seemed to be a considerable difference between what is in the bill and what has been t-he view of numerous groups, is in the field of common-law relationships and the children of that relationship, where you state that the primary responsibility is that of the natural parent, and instead of placing the secondary responsibility of maintenance on a person other than the natural parent, that this responsibility rests with society, that it is a state responsibility.

MRS. GOODWIN: Yes, The reason we feel that it is ,unworkable is that in a normal situation of common-law cohabitation the arrangement would probably be looking after the childrrn together, jointly. However, t-his Act would only apply in cases where there was some question of default and who was responsible. Our point is that it would be difficult to apply this principle. If the common-law spo'se, after discontinuing the relationship, was a responsible i ndividual and felt a commitment to the children, he or she would continue that responsibilty.

MR: GRAHAM: There is one other point. I notice that you have urged the complete abolition of Succession Duty and Gift Tax between spouses.

MRS. GOo.DWIN: Absolutely.

MR. GRAHAM: Thank you.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: You have given us a very supportive brief. There is just a couple of questions. One is, I confess that having left all my documents here last night I'm missi-ng my copy of the Family Maintenance Act and the proposed amendments, so I'm not too sure. T.he second line you have on Bill 60, deali-ng with Section 7(2) and 23. I don't quite read fault into that. And I'm wondering just how you . . . ?

MRS. GOODWIN: The reason we raise some concern?

MR. CHERNI AC.K.: Yes.

MRS. GOODWIN: Actually, we don't profess to be lawyers so it was just a matter of our looking at it and wondering if after the fact, after a maintenance order had been defined by the court, if circumstances had changed and there was fresh evidence as expresses in No. 23, what do they intend by the use of the words "fresh evidence".

MR. CHERNIACK: Yes' I understand. You mean it might be evidence as to fault.

MRS. GOODWIN: Yes, our point is . . .

MR. CHERNIACK: Well, let's j,ust accept it that you made the. point and I think our legal advisers will have to comment on it.

MRS. GOODWIN: Thank you.

MR. CHERNIACK: Then let me move to the common-law, Section 11.

My own attitude on which I would like to comment is reflected by a couple for whom I acted years ago where there was a disability that prevented a marriage from taking place, but the couple to all intents , and as far as society and their children were concerned, were married. The fact is they were not legally married and I think probably the two of them and their lawyer were the only ones who knew that they weren't married. They are now in their seventies and have lived a very full life together and all the children are grown up and it sort of offends my sense of fairness to think that he could have walked out on her at any time. I am just wondering whether you don't recognize that there are circumstances where people have no — well, you say they have a choice — they could have said, "You are barred forever from being my friend," but that is the choice. Are you hard enough to say that it applies in that way. Pardon me using that word.

MRS. GOODWIN: I could sympathize with the couple that you use as an example, however, there are reasonably liberal grounds for divorce today. Those cases are not as common as they used to be. If a person contends that they can't get a divorce I would certainly question that, and so it is a conscious decision to live in common-law, and if there is a concern about who is responsible for the care of the two spouses, then I would suggest that an agreement could certainly be drawn up between them.

MR. CHERNIACK: In advance.

MRS. GOODWIN: Or during.

MR. CHERNIACK: Well, during . . .

MRS. GOODWIN: Whenever they liked.

MR. CHERNIACK: Well, during, it has to be mutual. That's the case where you may find a little problem, having each of them see it their way.

MRS. GOODWIN: One of the things is is that we tend to think that people in marriage don't get along, but I would like to express that I hope that that is assuming a minority situation.

MR. CHERNIACK: But I suggest to you that when it comes to signing an agreement where you are faced with independent legal advice, that is the time when people might accept the *status quo* rather than be gracious or liberal enough to say, "Okay, you are right. You're in your rights.

MRS. GOODWIN: Right. I would imagine any man in a business situation, going into a new venture is going to look into it and I think probably one way to express it is that we don't put enough emphasis and spend enough time preparing ourselves for when we enter into a state of a relationship like this — not marriage, but common law.

MR. CHERNIACK: I'm sorry. I am not thinking in terms of relationships about to be commenced — and I agree with you, divorce now is available — I am thinking of existing common-law situations. I'd be glad to settle with you to say that all common-law relationships which commenced prior to a certain date should have a protection.

MRS. GOODWIN: Yes, that may be the answer. Yes, that may be the answer.

MR. CHERNIACK: Do you think I can sell you on that? Maybe, I don't know.

MRS. GOODWIN: Well, I really haven't considered it.

MR. CHERNIACK: One other thing. That is the Devolution of Estates Act where you are suggesting — and someone yesterday suggested — that there be a transfer of 100 percent to the spouse, which is really not specifically related to what we're doing, that is recognizing the spouse's right to be paid an equal share of the accummulation. Now, you're saying on death that spouse has acquired a right to all of the estate.

MRS. GOODWIN: Yes, he or she has deferred the use of the one-half. Over the years.

MR. CHERNIACK: Well, I say Ah, that's the point I'm making, deferred use of one- half — no question about it, that's in the legislation.

MRS. GOODWIN: Well, no, I think my point here is that in situations where there is no will, I feel, and I know counsel feel, that in the absence of a will the implied intention is that this couple will deal as though the two are living once one is deceased. They expect the estate to go to the other spouse. I think it would come as a surprise to married couples without wills to find out that there is a Devolution of Estates Act.

MR. CHERNIACK: Well, let me just suggest to you that I guess you should have something to fight for in the future. I do not believe that the Devolution of Estates Act is germane to what we are dealing with here because here we are dealing with the rights of a spouse to share equally in the accummulated assets, that's really what we're talking about. We are not talking about how it ought to be in the wills of those people who neglected to make a will. I see that as a different, separate and very interesting concept which I don't think has had our attention. All we did in changing the Devolution of

Estates Act was to recognize the right to equal sharing whereas, formerly it would be one-third under the Devolution of Estates Act, we have now made it one-half and I think otherwise we haven't changed it, and that's only to adjust to the concept we're dealing with. So, frankly, my conscience doesn't trouble me that we haven't gone into this next question that you raise because I don't think it's related.

MRS. GOODWIN: Well, certainly, if it has to be dealt with separately we will be prepared to do that.

MR. CHERNIACK: Well, all I can tell you is that I am sufficiently interested to discuss it a lot more in the future and I hope that you will continue to press for it because I don't quarrel with you. I just tell you that I don't think that's it's specifically relevant to what we're doing.

MRS. GOODWIN: Yes, I can appreciate that.

MR. CHERNIACK: Thank you.

MR. CHAIRMAN: Mr. Toupin.

MR. TOUPIN: Mr. Chairman, I would like to relate to the middle of Page 2, section 12, subsection (1) in regards to collection of maintenance being a concern of your counsel. The special agency you are talking about, could you possibly add a comment in regards as to how this would work and how this would tie in to different levels of government pertaining to what we heard in previous briefs in regard to having a certain level of government being the financial arm of last resort in regards to collection of maintenance?

MRS. GOODWIN: Right. It's certainly difficult for me to say how we envision this department functioning because we haven't seen in reality a department such as this in its workings. But I would imagine it would have to be something similar to the collection of taxes — a collection agency, and what we advocate is that all maintenance orders be dealt with through this method. I would suggest that if there was any question as to whether you're going to accept this concept or whether you're not, that at least you consider having an agency to deal with these matters which are in default. Once you become in default, you lose your right to administer the maintenance.

MR. TOUPIN: Mr. Chairman, would Mrs. Goodwin care to comment in regard to what is expected by your Council in regard to financial assistance by the Crown at different levels in regard to fault in maintenance orders?

MRS. GOODWIN: Well, that would have to be consistent to what is considered reasonable. We would imagine that it would have to go along similar lines as the Welfare Program, what is adequate for today's minimum standard of living.

MR. TOUPIN: So, you don't actually see an active participation by the different levels of government in the special agency?

MRS. GOODWIN: An active participation, I think the guarantee would be that you would be allowed this certain level of maintenance but, although the order itself would probably be for more, that would not be received by the receiving spouse unless it was collected.

MR. TOUPIN: Mr. Chairman, Mrs. Goodwin, why do so many people seem reluctant in accepting a fact of life of today in regards to common-law relationship? We hear it day in and day out and yet it's a fact of life that is becoming much more apparent today than it was ten or twenty years ago, and it is a contractual arrangement between two individuals whether it be before a religious order or not.

MRS. GOODWIN: Right. I would agree that it is a trend. However, it is not an established trend and once it is, then of course, we have to have legislation to deal with it. But legislation should not be creating the social trend.

MR. TOUPIN: Mrs. Goodwin, you are advocating that the legislation not deal with it.

MRS. GOODWIN: Pardon me?

MR. TOUPIN: I take it that you're advocating that the legislation before us not deal with these cases in the same fashion?

MRS. GOODWIN: In the same fashion, the only area that we feel should not be dealt with is in the liability for maintenance of the common-law spouse. The liability or responsibility does remain for any children in that union.

MR. TOUPIN: Thank you.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mrs. Goodwin, last night we heard some examples given where the question of the principle of fault should be included in the Act, because otherwise judgments would be made that would be unfair. I think one example was used of someone's been married six months, and someones beating the Jesus out of her but the judge has no capacity to determine that as a criteria for granting an order under the way the Act is written. Now, your Council is suggesting that fault not be considered as part of the family maintenance principle. How do you reconcile those two positions?

MRS. GOODWIN: Well we are totally opposed to the use of fault in determining maintenance or the division of property. First of all , to use fault in a positive manner you would deal with it before the marriage breakdown ' when there is a means of conciliation or reconciliation. That is if there is a problem of fault such as we use the example, alcoholism, you get at the root of the problem and find

out what is the cause of the alcoholism and then try and rebuild that marriage. But to use fault in determining maintenance is only using the thing that is aggravating the problem. It is not the problem that you are dealing with, and so what you're really doing, is society is hammering away at this individual who is already having to contend with the problems of not succeeding in marriage — and let me tell you, that's a trauma — and then to find out that you're a "rotter" on top of it, because society and the Courts have said this, leaves somebody in a state of devastation. And then after that, you are supposed to pick-up and maintain your responsibilities after you are a broken person.

May I point out, that usually the person at fault is the male and we don't see what purpose is served by furthering this position.

MR. AXWORTHY: Well, okay, I can understand the reasons for it but what about the application of it? As was pointed out last night, would it end up in those kinds of injustices being made because there was no capacity to make judgment on the contribution of the different parties.

MRS. GOODWIN: Yes. May I point out that often there's confrontation because there is fault. You have to draw lines and start fighting, and often you don't have a battle going; you agree that you simply don't get along. You go for advice and then you find out that the battle line is established and you start, and you become embittered. You are destroying one another and certainly the children are a part of this battle line too. Our contention is that we deal with all points as constructively and responsibly as we can and that's the best solution.

MR. AXWORTHY: Well, do I take it from your remarks that you feel, in order for this provision to work that there has to be some form of compulsory conciliation effort prior to the court deciding on the maintenance order?

MRS. GOODWIN: I think I feel that these two Acts really deal with "after-the-fact" when there is no recourse. The hope of reconciliation at this point is over. Although you have the principles which are very important to be enshrined in legislation as far as the concept of sharing and equality in marriage, the rest of the legislation really deals with after the marriage has failed.

MR. AXWORTHY: Yes, I am aware of that but we've been discussing, I think, by different representations that it is pretty difficult to separate what has happened in the marriage and the decision as to what the division would be afterwards. I gathered from your remarks you're suggesting though, that if there is to be any fault assessed it has to come up prior to this in whatever counselling activities go on. But I don't know what the record is, how many couples seek out that kind of counselling prior to simply saying what it is worth.

MRS. GOODWIN: Well, what is available today in counselling services?

MR. AXWORTHY: I don't know.

MRS. GOODWIN: There really isn't very much. You have to know where to go and I think you'd find that in the majority of instances the woman has no other place to go than a psychiatrist who gives her tranquilizers and then she tries to contend with the situation. But there is no ongoing availability of counselling services; it is a preventive program.

MR. AXWORTHY: Just a minute, if I may, Mr. Chairman. Just to follow that line one step further, you would mean to say that other than if you were relatively sophisticated in the ways of how to work things and you went to see a psychiatrist , who I think are pretty much a pre-marital course lecture in many respects, that most people simply don't have access to those kinds of services, and that that is a prevalent state in our society?

MRS. GOODWIN: Well, I would imagine in the past that probably a number of people use the church as their means of counselling and that's very helpful, but not all people go to church today. When you're seeking help, and often married couples need a third person's unbiased opinions.

MR. AXWORTHY: Do the courts not provide that? Does the Family Court not provide the counselling services?

MRS. GOODWIN: Well, if I was in a situation of being involved in the courts I would say that it is beyond reconciliation.

MR. AXWORTHY: Okay. Thank you, Mr. Chairman.

MR. CHAIRMAN: Are there any other further questions? Hearing none, thank you, Mrs. Goodwin.

MRS. GOODWIN: Thank you.

MR. CHAIRMAN: Margaret Johnson please.

MRS. JEAN CARSON: Mrs. Johnson teaches school and is unable —(Interjection)— Pardon?

A MEMBER: You changed your name again.

MRS. CARSON: Yesterday, I am Della Carson, today I am Margaret Johnson. Mrs. Johnson teaches school and is unable to be here today and has asked me to read this brief.

Mr. Chairman and members of the Committee, I must tell you that I am simply reading this brief. I have not been actively concerned in its composite and the University Women's Club is a very structured organization. These are simply items to which they have agreed at various times in the past which have been compiled into this report. There was no time to formulate any new understandings of the Act and take them to the board. So, what I am giving you, is, as I suggest, just a selection from previously agreed points.

The University Women's Club supports the position that laws relating to women and men in marriage must incorporate the principle of equality between spouses in marriage as an interdependent partnership of shared responsibilities.

Bill 61 — Marital Property Act.

Shareable Assets (Divisions 2, 3 and 4)

We accept the concept of marriage as an economic and social partnership of legal equals. The family is a fundamental group unit of the economy and therefore the unpaid work within the family must be recognized as being as vital to the unit and to society as paid work performed outside the family.

The above divisions recognize the claim of the spouse performing the work of the household to a share of the assets accumulated during the marriage. We agree with the exceptions to sharing of assets as outlined in Sections 9 and 10.

At the dissolution of the marriage for whatever cause, the right of the partners to an equal share of the assets accumulated during the period of the marriage and their right to the protection of those assets from undue alienation during marriage are recognized in Sections 17, 18 and 19. This is in accordance with previously stated University Women's Club recommendations.

We endorse the accounting and equalization procedure as outlined in Sections 20 to 27. In our opinion, the marriage relationship implies a special type of partnership, and therefore , the the provision in Section 22 with reference to the accounting process not resulting in a negative value for the accumulated assets is necessary.

University Women's Club has advocated that the standard marital regime should apply to every marriage as stated in Section 28. Marriage partners should have the right to contract out of any fixed statutory matrimonial regime with a formal written agreement, after independent legal advice to each of the parties as set out in Sections 29 and 37. We oppose unilateral opting out of the standard marital regime in the case of existing marriages at the time of the passing of the Act, and approve of Section 30 where it is to be a matter of agreement between the two spouses.

Bill 60 — The Family Maintenance Act.

Part I — Spouses.

University Women's Club policy is that during the currency of the marriage, the responsibility of the partners to support one another with services and/or finances reflects the concept of marriage as an interdependent partnership of shared responsibilities as stated in Section 2. Separated spouses should become financially independent of each other as soon as, and if, reasonably possible per Section 4(1).

We agree in general with the factors affecting the maintenance order as set out in Section 5(1), but we are stating emphatically that the determination of the spouses for the separation or marital breakdown should not be considered by the judge in arriving at a maintenance order.

Part II — Children.

The University Women's Club is firmly convinced that parents support minor children — their natural and legal obligation. We perceive this obligation to be a generally accepted social norm. This is in accordance with Section 12(1) and (2).

MR. CHAIRMAN: Are you prepared to accept any questions there might be on behalf of the University Women's Club?

MRS. CARSON: I would have to simply present this to you as the views of the University Women's Club. I could not argue any subject. I could express my own views only if there were any contradiction of these positions.

MR. CHAIRMAN: Are there any questions? Hearing none, thank you, Mrs. Carson. Aleda Turnbull please. —(Interjection)— Thank you. Janet Paxton please. —(Interjection)— Thank you. Is Robert Carr present please? Will you come forward?

MR. ROBERT CARR: Good morning, Mr. Chairman. Perhaps I should first apologize and explain to you to the Committee the mix-up yesterday with Mrs. Bowman and myself was as a result of her making a more or less last-minute request that we switch positions because she had a trial today and I did not. I think there was some suggestion that it was for some other reason and I can assure you that it was not.

I had initially prepared a rather lengthy brief that was based on the bill as I saw it before the substantial amendments had come out. I should maybe perhaps, just by way of background, say that I am a practising lawyer in the City of Winnipeg. As well I am on the faculty of the University of Manitoba and teach domestic relations to the Law School. . In addition to that, I conduct the course entranceship for the Bar Admission Course for law students entering into the profession.

As I said, I had originally a rather lengthy submission prepared. One of the other reasons that we asked Myrna Bowman's submission to be heard before mine was in the hope that possibly I would be able to simply adopt her submission because ours were, initially at least, fairly close. Unfortunately I'm not able to do that. I can't simply say that those comments made by Mrs. Bowman may be adopted as my own views. Rather, what I would like to do this morning with you, is to raise a number of issues

that I consider that the Committee must, of necessity, come to grips with before either of these pieces of legislation can be passed and ask your indulgence if it happens that I'm dealing with an area that has already been the subject of amendment, that you simply stop me and cut me off there. I have had a chance to very quickly peruse the amendments and I was here yesterday and sat in.

Let me say that in theory and philosophically, my own view is that both pieces of legislation ought to be passed in some form. I can say that with more certainty with respect to the Marital Property Act. I think that there have been a number of significant amendments in the right direction with respect to that bill, all of which I think are geared towards taking away the significant and obvious injustices that may result as a result of the retroactivity aspect of the Act.

I am concerned specifically with Section 2, subsection 2 of the Marital Property Act and I may need some guidance here to refresh myself on the state of that section. There has been so much discussion on it. I think I am correct in recalling, at least at midnight last night, that where we left was an indication from the Minister and from Mr. Cherniack that the wording was going to be changed such that the SMR would not apply to persons who were living separate and apart and that was all.

MR. PAWLEY: As of May 6th.

MR. CARR: As of May 6th. Okay. I think that there is no question that there must be some amendment to the Bill in its original form such that persons who are living separate and apart are not within the Act. I'm concerned, however — and this is not the position I took originally with the Bill — I am concerned about the unfortunate person who, through circumstances other than their own fault — and we did operate under the fault concept under the old legislation — became separated on May 5th, and that's a rather extreme example — but there's going to be a very sharp distinction between the protection afforded to a wife or husband, in fact, if the case amounts to that, who is separated on May 5th as opposed to the one who was separated on May 6th. I'm not sure how to solve that problem and, in a general way I can say that when you're dealing with a piece of legislation like this, there is no question that inequities are going to result. I think it's a question of minimizing those and, as Mrs. Bowman pointed out, making sure that the minority groups who are going to be aggrieved in some way, are treated with the degree of fairness that they can be treated.

I am concerned about that sharp cut-off. I think that that will result in almost like an unjust enrichment situation for the fortunate person who separated on May 5th and the unfortunate person who was beaten up on May 6th and is living separate and apart after that day. I don't have a solution to that. I think that that's one of the difficulties with coming to grips with this notion of retroactivity and how it's going to work. With the exception of some of the women's groups that have presented submissions, at least during the time that I was here, I think that most people on a reasoned opinion will at least go so far as to say that persons whose marriage was solemnized 20 or 30 years ago should be treated in a different way than people whose marriage will be solemnized after the coming into force of this legislation. You've heard it said of a number of people that it's unfair to change the rules in the middle of the game. I think that that goes part way. I think that to say that all of those marriages which were solemnized prior to the passage of the Act, have no protection, is equally unjust.

The submission by Mrs. Bowman, on behalf of the Family Law subsection, was to the effect that there should be an intermediate position taken with respect to the unions solemnized prior to the passage of the Act. That is, no question in my view at least. The unilateral opting out, with the result that the aggrieved spouse shares in nothing, is totally inequitable. That's my view, at least, and I understand that that was the view of the Family Law subsection. To simply say a registered letter goes out to your spouse and the old law applies, Murdoch and Murdoch and other cases like it, will continue to prevail, is totally inequitable.

What is wrong, however, with adopting a position that because persons entered into a contract — and marriage is a contract, unique as it is — but because they entered into a contract believing the terms to be different from the terms that we're now proposing, that those persons should be treated differently. Specifically, why not adopt a provision that would allow for special circumstances to be considered in the situation where persons whose marriage was solemnized before the passage of the Act is terminated for one reason or another, whether it's separation or otherwise. I simply can't understand what the objection would be adopting that kind of approach. If you're saying that the objection is because you want to treat everyone who is married equally, I think quite frankly that that's naive and unfair. I don't think it's reasonable to take marriages that have been in existence for 20 years and say that those people must be treated in the same way as those persons who in went into marriage with their eyes wide open. Without more time to deliberate personally on that — and I confess that the amendments have thrown me off a little bit — I think that I would have to go along with the Family Law subsection on that — discretion on the part of the judge, with respect to that aspect only.

If you take a look at both the Marital Property Act and, to a limited extent, the Family Maintenance Act, what must be recognized is that we are dealing here with a statute that allows for no discretion — and that's fine, providing there are no mistakes in the statute. Because if there are errors in the statute and there is no judicial discretion to correct them, we are going to have substantial injustice, a host of

amendments coming forward after the legislation and people whose situations are going to be just like Mrs. Murdoch, who is going to be able to say to herself: Well look what I did. By losing everything myself, I've forced the legislatures of the provinces to do good for everyone else; that all of those persons caught under the Act are going to be out of luck. We're dealing with a code here, and unless it's workable then the situation that will result is, those persons who can not ask the court to exercise some discretion are going to be out of luck entirely.

And there are examples that were given, countless examples. Let me talk to you on one of them that's particularly sensitive to me. It's sensitive because I'm in the middle of a rather large piece of litigation which touches upon this and I can't see that the Act has yet been amended to take this into consideration. I use this as only one example to show you that we're dealing with a code, an Act that doesn't allow for discretion. I have a man who is a client of mine, who owns a home in his own name, and its value is $72,000.00. He was a man of substance , and as a result of that, was able to secure loans in the amount of $48,000 to improve that home. As a further result of his particular credibility and the fact that he was a man of substance, as I say, these loans were not secured. I know I'm not raising a new issue, but I'm raising it again because it touches me. The result of the implication of this legislation is that the wife is entitled in effect to a half interest in a $72,000 home and she has no responsibility for the $42,000 of encumbrances albeit that these encumbrances are not registered against the title. If the man had been a prophet and could forecast the legislation, well that would have been easy. He would have taken his $48,000 indebtedness and secured it against the title. But he didn't know about that. And some of it is old debt; some of it is a debt to his father. There's a $13,000 promissory note that he signed to his father, but it's unsecured and his wife receives the benefit of that. He has the liability of that, and that's an inequity and it's got to be corrected.

A simpler example, I go out and I use my Mastercharge credit card and I buy a piano for $500.00. I then secure my wife's consent, because that's required if I'm going to abide by the law, and the piano is sold. My wife gets $250 for the piano and I'm stuck with the bill for $500.00. It's not reasonable; it's just not fair. My suggestion is this: please don't over-react and say that spouses are equally responsible for the liabilities of their spouses. That would be the wrong thing. We have the obvious example of the — let's talk about our friend, the alcoholic husband. He seems to be getting a lot of publicity. Whoever it happens to be, someone goes out and incurs a massive debt and surely we are not going to saddle the other spouse with the responsibility , but any debt that is incurred for the purchase of a shareable asset must be taken into account when determining the interest of the spouses. Now, we're dealing with a rather difficult notion here because we have a new kind of concept of ownership of property with this instantaneous family asset. I'm not quite sure exactly what the spouse is getting. Once the Act is enacted, I presume that the wife will automatically become a 50 percent owner of the automobile that's registered in her husband's name. Again, as I see it, she is not responsible in any way for the outstanding, unsecured debt against that chattel. I think that's got to be corrected. I leave it to your wisdom to figure out how to correct that but it would be dangerous, I think, to leave that section in because it could work a windfall for the spouse who becomes instantaneous owner, yet does not have to participate in the liabilities.

With respect to the — excuse me for jumping a little here — but with respect to the Family Maintenance Act, I want to deal on one area specifically and I, again, I am going to waffle a bit and not come out with a specific recommendation because I am just not exactly sure where we stand on the Act with amendments. I have a concern with respect to the notion of fault. The Act is a good Act; I think that the Family Maintenance Act has got a good solid basis for it. I have always taken the position, whether it's publicly, whether it's teaching a law school class, my own view has always been — and I won't vary from that — that fault is an archaic concept. My own view is that maintenance is an archaic concept, quite frankly. I think we're going to see radical reform in the area of Family Law in the next 20 years. The whole idea of maintenance, if you think about it, seems to be a little archaic. Why maintenance? Why does one spouse have the obligation to maintain? Well, the answer is good, right now, the reason is because women do not have equality in the work force; traditionally their functions have been non-paying functions; that's changing rapidly and I think that the whole question of maintenance is going to be subject to review.

But with respect to the question of fault, I have a genuine concern. I want fault abolished; I want it abolished from the separation legislation; I want it abolished from the divorce legislation. Unfortunately, my views and the views of hundreds of others with respect to the divorce legislation has not yet come to fruition. Here's my concern. I have been in practice only for six years now and I do a good deal of domestic litigation and originally in my practice when I was really wet — now I'm just damp — I was appalled at the extent to which my clients would place their whole lives in front of me and say to me, "You do whatever you think is best for me." I'm still appalled by that; the way people will come into my office and say, "I've got domestic problems, you tell me what to do and you go ahead and solve them for me. You take the right course of action for me. If it's a property settlement,

do it. If I have to battle for the custody of my children, do it. If divorce is better for me, go ahead and do it." I can assure you, and there are practising lawyers, or were practising lawyers, sitting right now, and I think that there's no question that the young practising lawyer is astonished with the responsibility he has, particularly in areas of such personal concern. I'm not hung-up about settling a whiplash injury for someone and letting me handle it on my own, but when they tell me whether or not they should be separating or divorcing I'm concerned about it.

Now, the result of this is that a client is going to come into my office next week and say to me, for example, "I came home last night and I saw my wife in the arms of another man. As a result of my discovering her affair, my wife ran out on me with the other man and they're shacked up somewhere and I don't know any more details than that." Let's make it even more vivid than that — they were sleeping together. "I walked in on them when they were in bed together." The client comes to me as all, particularly male clients do, with the comfort in his mind that: "The law will protect me; my wife is at fault." Believe me, practising lawyers have a very difficult time explaining to clients that fault is not determinative of the issue. It may be relevant and we don't know yet whether it is going to be relevant provincially but it is not determinative of the issue. But, this man's in my office now and he's sitting across the table from me and he says, "What do I do?" I've got two options available to that man, let's assume that reconciliation is unlikely. I can say to him, "Are you worried about maintenance? Are you worried about how much you're going to have to pay?" His answer is going to be, "Yes, that's a concern to me." I'm going to tell him this, "If you petition for divorce, the divorce court is bound to consider your wife's adultery as a factor in determining her entitlement to maintenance." Lots of case law; lots of statute law; federally under the Divorce Act that says, "Although a wife's adultery, a husband's adultery, a wife's cruelty, a husband's cruelty, is not determinative of the issue of maintenance, it is at least relevant and admissible." The wife will get less, likely, because she did as I prescribed. She slept with this man and deserted.

The Provincial legislation says, "Not only isn't it relevant, it's inadmissible. Any conduct, pre-separation, is inadmissible." Now, you gentlemen tell me what I am going to advise my client. I am going to tell him, "If you want to stay married to her, you've got to go for separation; if your concern is maintenance, you'd better go for divorce because she's going to get less on divorce. Because the separation court can stand on their heads but they cannot even let me bring up the incident that you've described."

Now, there were religious groups making representations here, all of us want reconciliation. No one in the room disagrees with the fact that we have to gear ourself towards reconciliation. I have my own views on that. I don't think it works statutorily. I don't think the federal legislation has done a bit of good or the 90-day provision has been introduced for reconciliation. If they come to my office, they are finished. I've had, out of the hundreds of divorces that I've done, I've had three or four reconciliations. They get back together once, twice. The lower income people, I think, statistically, statistics will bear me out that the lower income people, for some reason, give it a ry a few more times. They are more likely to take some kind of punishment from their husband, but reconciliation by statute doesn't work. The Federal Law Reform Commission is proposing to reconcile us to death before ytu can get your divorce. They're wiping out all the grounds but you have to be counselled until you're blue in the face.

My own view is that, if the legislation is passed now, being so inconsistent as it is with federal legislation, that I am bound to say to my client, — and this is contrary to our notion of reconciliation — "You'd better go for your divorce if you're concerned about reducing your maintenance payments." And there's no way around that as I see it in the legislation. I should say that there's no way around it unless legislation is amended. A suggestion for amendment? I think that Myrna Bowman's suggestion was that we make conduct during the marriage at least admissible and relevant. Remember why all this legislation is here. Why are we all here? We're here because the Wives' and Children's Maintenance Act is useless. It's no good. It's unworkable. It's unworkable because why? We have the exact opposite situation. The Wives' and Children's Maintenance Act now says that if a wife commits adultery — out of court on separation.

MR. CIRMAN: Would you speak into the microphone, please.

MR. CARR: I'm sorry. I got a little carried away there. The present provincial legislation says that if a wife commits adultery she is disentitled to maintenance on separation. The federal legislation I've just reviewed with you. It doesn't disentitle her; but it makes that conduct relevant. We have a real problem right now, today, that the federal legislation is at odds with the province. A woman commits adultery and comes into my office and wants relief. I tell her she's got to go for divorce if she wants maintenance. The separation legislation disentitles her. So too if she deserts without lawful excuse. That's why you're here today; that's one of the reasons, because the Wives' and Children's Maintenance Act doesn't work. It's old; it's archaic; it's got to be amended.

But look what you've done. You've taken the pendulumn and swung it full swing. You've now got exactly the same situation but the other way. You've got the federal legislation now saying that the conduct is admissible and relevant, and the provincial legislation says we won't even listen to you on

it. Does that encourage reconciliation? What do I do as counsel for this man? I'm bound to tell him, "She may get $500.00 a month if you go for a divorce but if you go for separation, she'll get $850.00." What's he going to do? How's he going to handle that? This is a constitutional dilemma that faces every province enacting legislation where there seems to be overlap. It's a dilemma but it's got to be resolved, and until we have consistency between provincial legislation and federal legislation, it's going to be extremely difficult for a spouse to decide what option they are going to take.

Let me back-track for a moment and give you a piece of philosophy that I see happening. I think that separation is almost a thing of the past. My own view is, as separation becomes automatic and divorce becomes no-fault, clients are going to divorce. They don't want the double legal fees, to go through a separation, pay their lawyer X dollars, $500.00 to go to Family Court, and get them their separation and come back after their reconciliation has not worked out. It's cheaper for them to get divorced and then remarry. Marriage is free. They might as well go through their divorce at the initial instance, pay their legal fees of X dollars and then remarry if their reconciliation works out. Otherwise, they have got their separation fees and their divorce fees. Gradually separation is becoming a thing of the past. I am seeing in my clients, regardless of their socio-economic class, they are saying to me, they are coming into my office and saying, "I've got to get out of this marriage; get me a separation." I say to them, "Why have you jumped at the fact that you want a separation? Is your marriage terminated?" This is, of course, after I've complied with all the requirements of the Divorce Act which say that I have got to encourage reconciliation , and then I've got to give them the proper advice. That is, to say to them, "Is your marriage finished? I don't want to milk you for your fees. I don't want to charge you double — separation today and divorce tomorrow. If you're marriage is finished' why have you not suggested divorce?" And they said, "Well, can we get it? I never dreamed that a divorce was available to me." And you explore with them the fact that every wife has cruelty against their husband if you work at it hard enough. And you say, "Sure you can get your divorce. There's enough there to petition on the grounds of cruelty." I'm afraid of that; I'm afraid that's what happening is, that clients will divorce initially — that's what's happening — and we don't see it yet, we see the clogs in the Family Court now for separation because we don't yet have the federal legislation. But, ultimately, because of the fact that statistics bear out that reconciliation is so infrequently successful, the parties are almost better off to say, "Okay, let's end it. If reconciliation happens to work or if we want to fall in love again and get married, we'll do it." But separation, I predict, is going to become less and less common. Why separate under provincial legislation once the divorce law is no-fault? The only answer to that is, "Well, because we think we may make a go of it if we can reconcile." But I see that being a significant change in the law.

What to do with the problem of disparity between provincial and federal legislation? My own personal view: Make them as close to each other as they can. If you want to wipe out conduct in separation — and I say conduct fault — wipe it out when the Federal Government does it, or you are going to have a nightmare on your hands again. The very people that complain to you that adultery was a bar to a wife's maintenance, they complained that that was inequitable because the federal legislation didn't allow that, they're going to be back on your backs again, believe me they are. A wife is going to come and phone her MLA and say, "Why have you made it this way? I don't want to divorce him." Or a husband is going to say, "I don't want to divorce my wife, but it's going to cost me so much more to give reconciliation a try and separate." I urge you to consider that problem. If you don't consider it, all it means is that it's going to be a hell of a lot of work for me so I shouldn't complain. It's going to mean that there are going to be more and more people who are going to require the services of a lawyer and that isn't necessary. I'm not taking the position with either one of these statutes that you've created a monster here and you've got to chuck the legislation. That's not the case at all. The legislation is so significant — not only as Myrna Bowman describes, not because it involves a large transfer of land, that's nothing; that's just money. It's because it touches everyone, everyone who is single or married. Those who are single contemplate marriage; those who married contemplate being single. And believe me, it's happening more and more. I suppose because I do domestic litigation, I only see the people who are in trouble and I get a rather pessimistic kind of view about marriage but check the statistics and you'll see what's happening. The Minister, Mr. Toupin, raised it. We see more and more common-law unions. Sure we do. People are getting a little nervous, a little jumpy about the legislation. I had a millionaire client call me this morning and he said to me, "You've got to find out for me what that section 2(2) means. Does that mean if I dump her now, she's out?" He was nervous about it and his marriage was shaking. He wants to know what to do.

Let me advert to another concern that I have. As a practising lawyer, I think that it's probably my prime concern. My concern is that lawyers doing domestic litigation now won't talk to me over the telephone. They say to me, "Call me back in three, four months. We're not settling our cases." The disturbing aspect of that is that — and I appreciate the difficulty that the Committee is wrestling with, this retroactivity aspect and the May 6th date and whether it's the date of separation or the date of the court order. It's all a difficult problem but what are we left with now? We now seem to have some kind of consensus, I think, amongst some of the members of the government, at least, that let's amend 2(2)

so that it's May 6th. But how do I settle my cases today? It's going to be January 1st before we see legislation. I've got people phoning me. I've kept track because I knew I was making representation. I've had 36 phone calls from practising lawyers asking my opinion on how they settle their cases, different preambles that they can suggest for their separation agreement: "Whereas the Legislature is now debating Bill 60 and whereas we want to opt out of it, even though we can't . . ." People can't separate. That's right. I don't have the answers for them. I've got some beautiful clauses that my colleagues and I are throwing around, indemnification clauses: "If you come back at me after the Act is passed and you get $10,000 from me, you owe me $10,000.00." You know, little things that lawyers try to work into their agreement. But why are lawyers doing tbat? So people can settle their cases. What do I do for all my poor ladies who are being beaten now and want to get out of the house. I can't even ask the husband to sign over the house to me. What happens if he agrees to sign over the house to me? It was after May 6th. I haven't really helped my lady, have I? Half the house goes back to the husband after the legislation. How do we deal with that? I am concerned with the fact that this period of limbo is making the practice of domestic law (1) not very lucrative for me; and (2) unworkable for the poor clients. And the solution to that I think is only one of two things. I see only one of two remedies to that. The legislation has to be put away for awhile so that it can be put in proper form — I'm not supporting that — I heard lots of hisses. I'm not supporting that. I would like to see the legislation in proper form put through this session — both statutes — neither one of them shelved.

The alternative to that is, get it in proper form in time to pass it and make it effective immediately so that people can settle their cases. We are going to have a nightmare on our hands if we've got from May until January to sit and twiddle our thumbs and tell our clients, "You can't settle your cases." Maybe I've missed something, but if my reading of the Act and my skimming of the amendments is correct, I can't settle my cases now, and I can't settle them until January.

Finally, I have a point to raise and I'm not going to make any comment on it; I'm going to give you my own view on the result of it and let it sit with you. There has been a most significant amendment in the Family Maintenance Act, that says that the Queen's bench now has jurisdiction to hear separation cases. Those of you who aren't practising lawyers, and I tread on this subject lightly for obvious reasons, but I think it's worthy of note at least. Those of you who aren't practising lawyers don't know that the lawyer acting for either husband or wife, has almost always in a domestic situation, to choose from several options, one of them being what court do I go to? There has been I think a pattern and I speak from personal experience now, and I again say that I tread on the area lightly, but I think that it's fairly safe to say that Provincial Judges Court Family Division, is a court where many senior lawyers have chosen not to appear. That's my personal observation. Many of them, for whatever reason — maybe the Queen's Bench is closer to downtown and let's use that as the reason and keep me out of trouble — they've decided to go to the Court of Queen's Bench because it's closer.

The result of the Maintenance Act giving a brand new option to people may significantly affect the use of the three courts. I point that out to say that, I don't know whether the Family Court is going to find that they have less or more work now. I presume that they will have less work to do now, because we have given them an extra court. Why is it the Childrens' Maintenance Act — for those of you who may not be aware of it, the present statute — gives you the option of Family Court, Provincial Judges Court Family Division or County Court? We now have the Court of Queen's Bench who hitherto have not had this kind of separation jurisdiction. They have separation jurisdiction under another statute which I presume from the legislation goes by the wayside with respect to separation.

As to Divorce and Matrimonial Causes Act, it allows for separation when grounds are proven. I presume that that will no longer be used by people. I wonder whether or not it was intended by the draftsman, that counsel be given that third option and whether or not it's really been thoroughly considered, what will the effect be on the court structure? Let us suppose that everyone decides to go to the Queen's Bench, when are we going to get a Queen's Bench hearing? We'll wait six months before we can get into the Queen's Bench and so will the criminal trials — that's Queen's Bench — the jury trials, so will all the civil actions. I'm not suggesting a court be created where they hear nothing but family matters. I've never supported that. I think that it's nice to have a judge who hears all kinds of different cases, and doesn't get stale.

I can say that we already have legislation in the province — Family Law legislation — under the Child Welfare Act, that does give counsel making an application for custody, the option to go to those three courts, Family Court, County Court or Court of Queen's Bench. You do have the option now, but custody applications are almost always coupled with other applications so it's not a major concern. We're talking now about such a substantial amount of litigation, that I think that the Committee should give very careful consideration to what court is going to be given jurisdiction to hear these matters. I have no suggestion on that. I think that it's going to have to be the decision — you are making the decision who you want to hear these cases — it is certainly not for myself to be saying that I think certain courts are better able or should be saddled with the jurisdiction to hear those cases. But I direct your attention at least to that.

The other final point on the question of fault is this, in all of the discussions I've heard, and I

haven't heard all of them, we seem to be assuming that wiping out fault must be done both with respect to the entitlement to separation and with the relevance to the question of maintenance. Why is that? Why do those two necessarily have to go together? Why can't we say that fault is irrelevant and inadmissible with respect to the question of separation? If you want a separation, you get one. Remember the present law, wife commits adultery , wants a separation, can't get it.

Actually I'm sorry I have to take that back. That's not entirely true. The adultery bar in the wives and children is a bar to maintenance, not a bar separation. Let me backtrack and say that, why can we not say that a wife or husband is automatically entitled upon application to a separation, conduct and fault are irrelevant to that, but at least give the court the jurisdiction to look to the question of conduct with respect to determining quantum of maintenance so long as the court can look at it when they are hearing a divorce action. I don't know whether that's been proposed. I'm not sure that it's acceptable. I know that there is strong disagreement with the notion of fault, but I wonder whether that notion of fault has been thoroughly examined in the light of the federal legislation.

I think those are my questions. I can only say that if you haven't given me a lot of work to do by way of litigation, you've certainly made it necessary for me to completely change the course that we are giving at the Law School, so you've taken away my freedom for the summer and for that I bear a grudge. I'm prepared to do the best I can with any questions that may result either from the comments that I've made or from any of the amendments that you want to inform me of and I appreciate your hearing.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, it would only be crocodile tears if I wept about Mr. Carr's summer. I have taken out of what he said, not sufficient to be able to summarize it, but we'll have an opportunity of reading it and reviewing it, but the one point is choice of courts. You do not think that there should be a court that deals only with matters of this nature.

MR. CARR: That incidentally as you well know, Mr. Cherniack , is a controversial question. The whole question of unified family courts across the country is happening. My own personal view is that if I were sitting as a judge, I would prefer to have a variety of cases, and I think I would give a better hearing to people if I were hearing cases that were not all so similar. That's my own view.

MR. CHERNIACK: Any yet you feel that there has to be . . . it's too broad to let it go to the number of courts that are now available.

MR. CARR: No. I didn't say that. I said that I wonder whether the Committee has put its mind to the effect that the legislation will have upon the case load in the various courts, that's all.

MR. CHERNIACK: It's interesting that you are concerned about whether or not the Committee has put its mind to it. It would be more helpful to me if I knew a practising lawyer who has done hundreds of divorce cases, and therefore, a great deal of family law would be helpful to us by giving us some guidance.

MR. CARR: Okay, then I'll go out on a limb. My personal view is that we did not have a complaint with the Wives and Childrens Maintenance Act. It allowed us to go to Family Court and County Court. Maybe I used the "we" speaking of myself and my immediate colleagues and I certainly can't speak for the profession, but if I can be an "ear" for complaints, that was not one of the complaints of the Wives and Childrens Maintenance Act. We had two courts to choose from and that was adequate. Many may disagree with me. I don't think it's a very controversial issue quite frankly. I think all it's going to do is, it's going to mean a significant change. Maybe in my own practice when I have an option between the Queen's Bench and the County Court, I'd use the Queen's Bench. Maybe another lawyer thinks that the Family Court gets his hearing done quicker. My own view is that that was not a complaint with the existing legislation and there was no real need to create a new Court. I think I know why you did it. One of the reasons is because you tied it into some property questions and. . .

MR. CHERNIACK: But you see no problem with their dealing with property questions?

MR. CARR: Well, I see it's a problem quite frankly and that is that, again in my own view, if the legislation allows the County Court and the Queen's Bench to make orders that the Family Court cannot make, Family Court's work may dry up and that's what the statute does. It says that there are at least certain things that the Queen's Bench and the County Court can do. I mean specifically now the postponement of partition or sale , for example, Family Court can't do that, I'm going to opt for the higher courts.

MR. CHERNIACK: But would you give the Family Court that jurisdiction?

MR. CARR: If I were leaving it in the Queen's Bench jurisdiction you mean?

MR. CHERNIACK: If what?

MR. CARR: If the three courts were going to have concurrent jurisdiction? Is that the question?

MR. CHERNIACK: No, no. If we are going to have a lesser option, a lesser choice and say County Court or Family Court, then they should have that jurisdiction?

MR. CARR: Yes I would.

MR. CHERNIACK: By doing that we eliminate the additional court which may be unnecessary and

has its own business to do.

MR. CARR: Yes.

MR. CHERNIACK: But then you said that because of the jurisdiction in divorce matters, it does go to the Queen's Bench.

MR. CARR: What does? Divorce?

MR. CHERNIACK: No, maintenance under divorce or alimony.

MR. CARR: That's right. If you were going for a divorce, you have no choice in this province.

MR. CHERNIACK: Please help me — I don't know if I ever knew it so I was going to say — remember something about jurisdiction, but I'm not even sure I ever knew it. On what basis does the Queen's Bench Court acquire its power to deal with alimony and is it the kind of power that we could remove from them?

MR. CARR: There's a bit of a misnomer I think, with respect to alimony and maintenance.

MR. CHERNIACK: Your right. Let's talk about maintenance.

MR. CARR: Are you talking about maintenance on divorce or to alimony as an independent remedy?

MR. CHERNIACK: Maintenance on divorce.

MR. CARR: It acquires the jurisdiction by virtue of the fact that it's given that jurisdiction by the Divorce Act, in the Court of Queen's Bench in Manitoba.

MR. CHERNIACK: Court of Queen's Bench in . . .

MR. CARR: Queen's Bench in Manitoba.

MR. CHERNIACK: All right. Then it derives its authority through the provincial statute.

MR. CARR: It's in the federal statute. It's in the Divorce Act.

MR. CHERNIACK: But the authority to deal with property and civil rights.

MR. CARR: It is within the jurisdiction of the province. You are getting into a constitutional question.

MR. CHERNIACK: Well, that's what I'm asking you.

MR. CARR: Well, I don't see where we have the problem right now.

MR. CHERNAICK: Let me pose my next step. If you are saying and I think you are, that we should consider fault be as long as or until the feds change their approach, then I have to ask you whether we cannot remove from the jurisdiction derived through the divorce law from our courts, the right to deal with maintenance and thus remove the federal influence.

MR. CARR: No. I think that you've got a constitutional law expert in Mr. Gibson far superior than I'll ever be. But my answer is no, and I think he'll back me up on that.

MR. CHERNIACK: All right, then I can discuss it with him?

MR. CARR: Yes. I think that's pretty clear, that that cannot be done. You can't remove that jurisdiction.

MR. CHERNIACK: The other very important point that you made which I have not yet fully comprehended, but I'm not asking you to explain it further, is the problem that occurs with the Act being postponed to the beginning of next year. You say it should be immediate.

MR. CARR: Well, I think I proposed two possible ways out of it. I can see only two, either the legislation comes into effect or it doesn't come into effect. I'm saying that if it does come into effect, it should come into effect as soon as it can. That's all I'm saying.

MR. CHERNIACK: If it doesn't come into effect, it's dropped completely for. . . Those are the alternatives you say.

MR. CARR: Yes.

MR. CHERNIACK: Either you pass it or you don't pass it. If you pass it it should be immediate. pass it as soon as you can. But what does

MR. CARR: No' immediate mean? As others have indicated . . .

MR. CHERNAICK: Well, there are several ways, let me tell you something. An Act can come into force on enactment on Royal Assent. It can come into force on proclamation or it can come into force on a date in the future set out in the statute. Which do you recommend?

MR. CARR: I'm saying that what we should be able to do is, and perhaps you can help me with this as a legislator where I have no experience, I've given you the problem. The problem is, I want to settle my cases. My clients want to settle their cases. I'd like to get them settled as soon as I can. Now, what date to . choose? I would be perfectly content to have the legislation , once the retroactivity aspect is settled, come into effect as soon as it possibly can, as soon as it possibly can.

MR. CHERNIACK: You are aware of the problem that we've discussed in relation to income tax, the impact of taxation.

MR. CARR: I wasn't here for that discussion. I'm aware of the income tax and other tax implications, incidentally. I don't want to get off on another tangent but we have all kinds of them. I don't know whether the periodic payments of maintenance paid by a common-law spouse are tax deductible. Under the Income Tax Act, I kind of doubt that they are.

MR. CHERNIACK: But if it's periodic payments we're talking about maintenance and there it's. . .

I don't think I personally am very much concerned about the tax implications on maintenance.

MR. CARR: Why are you not concerned to give a break to the person who by legislation is forced to pay alimony to . . .

MR. CHERNIACK: Because you are the one that pointed out that there is federal legislation and there's provincial, and if we are by making an enactment relating to distribution of an asset, and in doing that we involve federal law, then we have to take it into account. If we're looking for maintenance, then maintenance is a question that is ongoing. It is not to do with the right of a spouse for recognition of the accumulation of assets during the marriage. To me there is a distinction.

MR. CARR: Well, I didn't make the point because I didn't want to get into an area where I consider myself non-expert. In the area of taxation, I don't think that you've really answered the query that I put. Any periodic payments of maintenance under any Court Order or under any statute presently are tax deductible by the payor, and taxable by the payee. I wonder whether or not the new legislation that you are enacting, it says that common-law husbands may have to pay periodic payments to their wives is similarly tax deductible. I think not.

MR. CHERNIACK: Would you say if it's not we shouldn't have them pay it?

MR. CARR: No, I'd say. . .

MR. CHERNIACK: Then make them pay less?

MR. CARR: Well, as a matter of fact, I think quite frankly you have to do nothing because a prudent lawyer would raise that in court and say, "She's getting $600 a month, if she were a wife, she'd have to pay tax on it."

MR. CHERNIACK: Thank you very much, because that's exactly the way I understand the bill to read taking into account the needs and the obligations, so we'll do nothing, I'll forget that you raised it if you don't mind.

Let me then move to the question of fault. I heard you say that as long as the feds divorce law deals with fault, we should not make the rules different. I gathered from that that you yourself did not support the theory of fault. On the other hand in my mind, there still rests your example, which to me is is "far out" — and that is the gentleman who comes home and finds his wife in the arms of another gentleman or another person, and he then is rather surprised or astonished, and she walks out on him — that's the *scenario* a new word that I've learned. You're almost making it appear that she is at fault because of what happened in that less than five minute span of time and to me, that is not what I would have expected from a lawyer who has been involved in domestic relations for six years.

MR. CARR: Why?

MR. CHERNIACK: Because that is not a logical description of the life that that couple shared and what triggered that separation. Are you sure you, without knowing even the hypothetical case but relying on my experience, that there is a great deal that went on long before that occasion about being in the arms of another person and the walking out . . .

MR. CARR: I don't see the relevance of what you're saying.

MR. CHERNIACK: Well, because you gave to some people who may be looking for it — and I am sure there's nobody in this room who is looking for a reason to really bring fault back into the into the concept — but there may be some people somewhere who would like to affix fault, an attitude which I have inferred from what you said, that that action puts her completely at fault and therefore, he should . . .

MR. CARR: Absolutely not. Let me clear that up . . .

MR. CHERNIACK: Let me finish. And therefore, he should run right to the divorce court to get rid of her because he can take advantage of it. Then, since I interpreted wrongly, please correct me.

MR. CARR: Well, whoever is at fault with respect to the interpretation, let me clear up what I meant to be saying. I meant to be saying there are at least some circumstances where everyone in this room will would agree that one party is more at fault than another. I chose an extreme example because I always find that they're left controversial because you can't possibly argue with me when I give you an example that everyone agrees to end it. The example I gave is very far-fetched but possible. Someone could come to me with that situation, they've only been married a week and suppose that happens, then your argument no longer applies. But let's move from that example. Let us assume someone is more at fault than another. The only point that I raised was, that the fault is relevant on divorce and not in separation. That's all I raised.

MR. CHERNIACK: So it is clear that you yourself do not support the principle of fault.

MR. CARR: I do not support the principle of fault personally and I divided that into two separate areas: fault entitling you to relief of non-cohabitation and fault as relevant to maintenance. Clearly now we can wipe out entirely the fault aspect with respect to getting your separation. No one disagrees. I query whether or not we aren't perpetuating the difficulty that we have between province and feds which you agree we have now that adultery is a bar to the wife and children, not in the divorce, are we not perpetuating that difficulty by leaving still a very marked difference in the different pieces of legislation? That was my only point.

MR. CHERNIACK: Yes, and therefore what you are saying is until the feds change, we shouldn't

change.

MR. CARR: Yes, that's right. Yes.

MR. CHERNIACK: And we have to wait until the feds decide to change even though we believe sincerely that fault should not be a factor.

MR. CARR: Okay. What you seem to be trying to do, I think by asking me that question is making it appear that I am taking a position that, "Oh, let's just leave all these poor stranded wives without relief until that lazy Federal Government comes along and changes it." Believe me, that is not what I'm saying and please don't misconstrue that. I am saying if you thought you cured the difficulty between the difference in legislation, don't be fooled, because you didn't. My own personal advice is: the Federal Government, I think it looks fairly certain that there is going to be divorce amendments. When, I don't know; you probably know better than I do. I think it's coming. When I don't know. But until such time, I wonder whether we should be erasing the question of the relevance of fault in determining quantum of maintenance so quickly.

MR. CHERNIACK: But as I understand it the whole difference is whether a lawyer would choose to take the divorce route or not.

MR. CARR: Or the client.

MR. CHERNIACK: I am sorry, I mean the client.

MR. CARR: Okay. What I am saying is I've got to say to my client, divorce and separation are entirely different remedies. You tell me whether you want to be married to your wife, I'll tell you which remedy is available to you. But if he says, "It makes no difference to me whether or not we're married or not," then I am bound to say to him, "It's likely that on divorce, you are going to have to pay less than on separation," and it doesn't seem to make sense to me.

MR. CHERNIACK: So I interpret that if this bill goes through the way it is, then there will be a sort of a loophole available to that person who wishes a divorce and wishes to assert fault.

MR. CARR: No. Does not wish a divorce.

MR. CHERNIACK: Oh yes, but gets a divorce because he could assert fault.

MR. CARR: That's right.

MR. CHERNIACK: Yes.

MR. CARR: He says to me, "Well really I didn't want a divorce. I simply wanted a separation for the time being." And I think I will to have to say to him, "Well, good, it will cost you a few bucks because you are going to pay $850 on separation and $700 on divorce monthly."

MR. CHERNIACK: And that is the factor of that point.

MR. CARR: That's the only point that I was raising.

MR. CHERNIACK: All right, then you're really leaving it to us to decide what is worth more, the principle, the effect of it or the money that may influence some individuals to take advantage of the difference in the law.

MR. CARR: Correct.

MR. CHERNIACK: And as a legislator — could you put yourself in our position or would you rather not? You don't have to.

MR. CARR: I'd be pleased to.

MR. CHERNIACK: What would you do?

MR. CARR: If I were the Committee, right now, what I would do is I would wipe out fault for separation, for the entitlement to a separation and I would, for the time being, say that the judge may consider the conduct of the parties in determining one thing only, quantum of maintenance. I would be very quick to wipe that out as soon as the federal legislation changed.

What I am saying to you is you're at the mercy of the Federal Government but I didn't write the BNA Act and there's nothing I can do about that to help you. That's a real dilemma. We're talking about areas that are so close — separation and divorce — yet for some reason, our Constitution says one is provincial, one is federal. We've got a real dilemma and it's difficult to solve until we can get the provinces and the Federal Government together to agree on some kind of standardization. Not only are we going to have inequities, but we're going to have it better to live in Alberta, maybe better to live in B.C., maybe best off for a woman or a man to live in Manitoba in terms of remedy.

I have one other thought that I was going to put forward — I'll keep you here forever — and that is that — and I say this not facetiously so please take it seriously, and I don't know whether it has been raised — I strongly recommend that when you get your marriage licence, you get a copy of this Act. I think it's very wise. When you enter into a contract you are entitled to know it its terms. If it's a government imposed contract, let's impose the terms with knowledge. Don't say everyone is presumed to know the law. Give them a copy of the statute before they get married.

MR. CHERNIACK: That's already been . . .

MR. CARR: Too bad, I wanted credit for that.

MR. CHERNIACK: So you get credit for working . . .

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Carr, you suggested that the legislation be made effective immediately with

one of the alternatives to adopt rather than to leave the legislation at limbo between now and the end of the year. I am just wondering if you could benefit us with your view of any possible disadvantages or consequences of making the legislation effective as of, say, the date of the Royal Assent of to the bill.

MR. CARR: If you make the legislation effective as of the date of Royal Assent, the man who phoned me this morning, who is the a millionaire, is going to dump his wife today because then the standard marital regime doesn't apply to him. Mr. Cherniack may think that I am trumping up an example that is an extreme but it is true. He'll dump his wife and he's got a lot of money and she is going to be out of luck. That's not fair to her.

I think it would be unreasonable to make the legislation so as to allow people to simply separate now, waiting for the legislation to become effective. I don't think that is reasonable. It certainly is not consistent with all of our principles of reconciliation.

MR. PAWLEY: What if it was made effective on May 6th?

MR. CARR: Well, that's reasonable. I haven't given it enough thought to say that that's without problems, but I think that it is clearly better because no one really knew what the legislation was before then . . .

MR. PAWLEY: The day of the introduction.

MR. CARR: Yes, yes. I could give that more thought.

MR. PAWLEY: If you have further thoughts on that, would you permit me to have them?

MR. CARR: Certainly I will.

MR. PAWLEY: I just want to get clear your reference to common-law maintenance payments. Presently a father can be required to make common-law maintenance payments and he can be required to make them to the mother of the children as well, can he not?

MR. CARR: That's right. Again, I am not certain enough of the tax area to give you a definitive answer but I think that those payments are non-deductible presently and they will continue to be non-deductible. I mentioned to Mr. Cherniack that I'm not really too concerned about that, because if counsel is prudent and if the judges are aware of it, they will simply say, if you're a common-law wife you're going to get proportionately less than you would if you were married, because if you are married you've got to pay income tax on what you're receiving. Follow what I'm saying? So there's a distinction there, and I'm not too concerned about that. Now I could be shown to be wrong. Maybe the Income Tax Act has been amended to include "common-law" in the definition of spouse, I don't think so. But I'm not too concerned about it anyway, because it's the net amount that will be available to the wife that should concern the judge, if she's got to pay income tax — and I might indicate from practice that Provincial Judges Court judges and other judges are more and more being receptive to arguments from counsel on the income tax question — because that's a very significant question. If a husband is paying $1,500 per month alimony, it's tax deductibility is very crucial to him. If he's in the 50 percent bracket it's far better for him to be paying periodic payments than lump sum payments, which are not tax deductible. But I'm not too concerned about that for the reasons I've given.

MR. PAWLEY: I would just like to zero in again on the question of fault. Did I understand you properly to say that you preferred that fault not be a factor, if it was not for the federal legislation?

MR. CARR: Yes.

MR. PAWLEY: If the federal legislation was changed would you prefer to see fault not a factor?

MR. CARR: I've already made representation federally to wipe out fault entirely from the Divorce Act. I would have to say lawyers are going to have a very big job on their hands explaining that to their clients. We do now. But I support it and people will just have to come to realize that the old notion of fault — which was relevant in determining maintenance — no longer is. I personally support that; that's a very controversial point.

MR. PAWLEY: So even with the example that you gave you would be prepared to concede, even with that example, that incident — that 10-minute incident.

MR. CARR: Yes. That's right. Absolutely.

MR. PAWLEY: You feel that that even is a factor.

MR. CARR: That's right.

MR. PAWLEY: And your only problem relates to the difficulties pertaining to the existing federal legislation?

MR. CARR: That's right. Many many people, as I'm sure you've heard in representation, many senior practitioners, many theorists, disagree with that. There are lots of people who think that that conduct has got to be relevant. You're paying a woman or a man X dollars per month, surely we've got to see whether or not she's done anything that we should consider in making that order. I don't support that. My idea of maintenance is totally different from the idea of maintenance as it presently stands. My personal view on maintenance is, it's payments for economic readjustment and conduct has nothing to do with that. I don't care if the husband — it works two ways — the husband beater is not going to have to pay more. I should say the wife beater, it might be more common. The wife beater is not going to have to pay more under this legislation. Remember all the women who come into their

lawyers and say, "We've got to get a lot of money from him, look what he's done to me." That's all going to be wiped out, but I think that's reasonable. Maintenance is not punishment, it's to get the unfortunate spouse — unfortunate in the monetary sense — back on their feet. I have all kinds of proposals for that but those are federal in nature.

MR. PAWLEY: Well in practice the final alternative under the existing situation with the fault principle that if fault is not proved then the province or the municipality has to end up making those maintenance payments, even though the . . .

MR. CARR: There's no question fault should be wiped out entirely now with respect to separation, I'm saying. The unfortunate part of the legislation right now which makes it in my view totally unworkable is the instance you use. If a wife has been guilty of adultery, I, the taxpayer, have to support her, because her husband doesn't. Correct? Adultery is a bar to a wife's relief on separation under the present legislation. She's out of court, she's on welfare as a result of it.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, I would like to ask Mr. Carr some questions about the issue of flexibility in retroactivity which I've been kind of wrestling with since the bill came in. I gather from your remarks that you figure that the amendments proposed, Section 2(2), which takes away any recourse if there has already been a separation agreement, is in itself swinging too far back from that issue.

MR. CARR: Right.

MR. AXWORTHY: I am just trying to establish that you would suggest that in those cases even though there is a separation agreement, in fact, one of the aggrieved parties may acquire some form of the assets, through judicial discretion make an order to a court. Is that the correct interpretation?

MR. CARR: No. I'm talking about people living separate and apart without an agreement.

MR. AXWORTHY: Okay.

MR. CARR: The concern on retroactivity is that I feel that you simply can't lump, as many people wish to do, all marriages together. Some recognition, I think, must be made. I noticed that everyone agreed with me when I said, let's give The Marital Property Act out when you get married. Everyone agreed with that. But the people who got married twenty years ago didn't get a copy of the Act. We're all now eager to inform people of their rights. But what of the people who entered into a contract thinking its terms were different? And I'd say we must recognize that in some way. How to recognize it, I appreciate, is a very difficult situation.

But why are we making this radical reform in legislation? I've given a few reasons. The Wives and Childrens isn't workable because it debars. Another reason is because of Murdoch and Murdoch, that's not workable either. We can't take a situation where a housewife has raised children, made contribution to the home and tell her because she's not on the title she's not entitled to anything. It's absurd, it's unfair and unjust.

But why did Murdoch and Murdoch — why was it decided that way? It was decided because the Supreme Court Justices, in their wisdom, said "The Legislature has our hands tied."

MR. AXWORTHY: Right.

MR. CARR: There's nothing we can do for poor Mrs. Murdoch. Mr. Justice Laskin (?) said, "To heck with that. I'll do something for that lady. Two ways to change the law, one by me and one by the Legislature." That was the gist of his decision. He said that we can wait for the Legislature and that's one way to do it, but I'll take a look at the law of trust and I'll find a way to give her relief. But the bulk of the courts won't do that.

There have been subsequent cases to Murdoch. Our own Kowalchuk case, a case in the Manitoba Court of Appeal, which was after Murdoch and very similar to it. One of our Queen's Bench judges said to himself I presume, "This lady is entitled to relief, I'm not going to let her fall within the Murdoch situation. But I can't go against Murdoch because I'm bound by it, therefore, there's a partnership," and he made a finding of a factual partnership. Now, don't misread me to say that the evidence didn't support that, presumably it did. But judges have got to do too much trickery right now in order to give relief to a wife. We've got to correct the Murdoch and Murdoch situation, and we've got to correct it even for those spouses who were married twenty years ago. But the way to correct it is to introduce new discretion that never existed at the time Murdoch was heard.

We all know about — or perhaps we don't all know — but our Married Women's Property Act has a section which looks beautiful. It says that a judge has discretion to make orders with respect to the marital property on an application of either one. But look at the case law that's resulted from that Act and it all says, "We, as judges, can only exercise that discretion in accordance with recognized principles of law, whether it be trust law, the law of property, whatever." In other words, we really don't have discretion. All we can do is we can make an order once we've looked at the law, the law of trust. Murdoch, they looked at the law of trust, it didn't help us. We've got to intervene there. You're doing that, you're intervening. I'm suggesting that you may be intervening and creating problems unnecessarily. There may be a way to get relief for couples who are already married, without going that full route.

MR. AXWORTHY: Well, before I fold that one up because that's an interesting idea, I want to pin down this question of separated couples who don't have an agreement. Are you suggesting that we have a new clause in the bill that would allow the separated couple, one party or the other, to make claim in the court for some settlement of property under guidelines set out in legislation based upon the 50-50 principle but allowing some discretion. Is that what you're basically saying? So we need a new clause in the bill in effect?

MR. CARR: That's right. Yes. That's right.

MR. AXWORTHY: Okay. So that takes care of couples then, and that would mean we should wipe out 2(2) and replace it with another clause.

MR. CARR: Yes, can I digress for one moment too to another very important point. It's just one that comes out of what you've raised. There has been a lot of chatter about separation agreements and, my God, we can't set them aside. The parties have entered into agreements freely. I just wonder whether the Committee is aware of the fact that separation agreements are over-ridden every day by courts. If I make an imprudent agreement, let's suppose that I decide that I am going to pay $1,000 per month to my wife for maintenance and even if she gets legal advice and three years down the road we come back and she's agreed to take $1,000 for the rest of her life, the Queen's Bench judge has the jurisdiction to say, "Sorry, on divorce I've got jurisdiction to give you $1,500, $2,000 anything I want, in spite of the fact that you've contracted otherwise."

But what has the court done in fact with that kind of jurisdiction they Cases are coming out weekly now and the trend is fairly marked. I think that I can summarize the law this way presently with respect to separation agreements. The court has the jurisdiction to set aside a separation agreement on a divorce. There's no question of that. They can give you more than you agreed to take. The case law also says they are becoming increasingly reluctant to do so. The old notion of the freedom to contract. If we are going to pay legal fees to both lawyers to draw up a separation agreement, we're going to get independent advice, let's make sure that that agreement stands unless it is so imprudent, unless there is such a dramatic change in circumstance that we must change it.

The reason that the agreements that we're talking about now do not fall within that category is because they are not maintenance agreements. They are property agreements and the reason that the divorce court has jurisdiction to vary separation alreements is because of the corollary relief jurisdiction under the Divorce Act. That jurisdiction doesn't exist provincially, so that if we have an agreement, a separation agreement, the husband to give the house to the wife — that's all it says — no court can set that aside. There have been Manitoba decisions to say, if the parties enter into an agreement and there is no duress, let's suppose it can't be attacked for some reason that any contract can be attacked, as independent legal advice, where are you going to go to get that set aside, a property agreement? There's no courts you can go to. The Family Court can make maintenance agreements inconsistent with the separation agreement but with respect to property claims, there is no present jurisdiction to vary them. There's been a lot of talk about that because it's a very important point.

The concern is, what about the thousands and thousands of Manitobans who are sleeping with their separation agreements. Surely we are not going to tear them up and throw them out the window. I think that that's essential that that be the case. But don't be misled into thinking that setting aside those separation agreements is unheard of. But that setting aside is solely as a result of corollary relief jurisdiction under the Divorce Act and it relates only to maintenance.

MR. AXWORTHY: Okay, I would sort of come back though. We've got ourselves a new clause now dealing with separation, okay?

MR. CARR: Right.

MR. AXWORTHY: Now we come to a tougher job which is the one of existing marriages and you're saying that there is a degree of unjustness because you're applying this legislation to contracts which, in effect, were already made.

MR. CARR: Right.

MR. AXWORTHY: Now, is the simplest solution the one that was recommended in the Bar Association brief, that you allow opting out, again with court discretion, to work out a settlement? Now, the one thing that wasn't in that Bar Association brief though was the idea that the Legislature would also set forward basic instructions to the courts, that that settlement should be based upon the 50-50 principle unless circumstances dictate otherwise.

MR. CARR: I think that's very difficult; I think that's very difficult. What I am afraid of, quite frankly, on that, is that you may get a tremendous divergence of opinion from judge to judge. What are the guidelines? You're saying, in effect, that you are entitled to 50-50 unless you can show me otherwise. Well, how do I show otherwise? On the basis of what? I am saying that this probably, this one area that you're raising is the most difficult area that I have with the entire scheme, both Acts, how to deal with the people who are married now, who separate after the legislation.

I think that any solution that arises out of this Committee is going to be subject to inequities. That's my own view. I can't think of a solution that is fool-proof. I think that the way that it's set up now

will work more injustice than at least building in some discretion in the trial court judge to consider the fact that that was not the arrangement that the couple knew to be the terms of their contract when they got married.

MR. AXWORTHY: Well, okay then. That doesn't require a unilateral opting out then.

MR. CARR: No, it doesn't. That's right. That's right.

MR. AXWORTHY: We would just simply say that if one of the parties wanted to challenge the deferred sharing . . .

MR. CARR: There's two things there, though.

MR. AXWORTHY: . . . they would be able to go to court and ask for some discretion. Is that right?

MR. CARR: There are two considerations. One is: you might want to say that spouses are entitled to know whether they are in or out. Maybe you should be forced to tell your spouse that you are unilaterally opting out. I don't know. The other thing about that is, I wouldn't send that letter to my wife.

MR. AXWORTHY: Probably not, no.

MR. CARR: When I first saw the Law Reform Commission proposal, that's the thing that I really twigged on. I said, "My God, are we going to have registered letters going out to happily married couples?" It's ridiculous. Do you assume that everyone who sends the letter out is not a happily married man or woman? Because, well, the women's groups and the women may say, "If it was a good marriage, they wouldn't even be thinking about money." But that just isn't the case. You can see by the number of people who are here and the number of letters and phone calls you get, that people are concerned about money. Sure they are.

MR. AXWORTHY: Yes, sure they are.

MR. CARR: It's a very important part of their life and particularly . . . not so much from greed, from security, from the sense of security. I'm not particularly happy with the unilateral opting out idea. I'm happier with the idea of judicial discretion, as you say, with the power for a judge to do something other than 50-50 if there's a real good reason for it.

MR. AXWORTHY: Okay, that's the point that I was coming to, that certainly the representations we've heard, between those and the religious groups, say that the idea of mutual opting out in itself is an important fact in terms of maintenance of a marriage, that the need to have a partnership in that decision as well as others is important. But we are saying we want to protect against those areas where there may be inequities.

Now, I gather the Canadian Law Reform Commission, the Hart Commission, indicated that for a transition period in existing marriages, a degree of discretion be allowed on the application of one spouse say against the deferred sharing principle. Now is that what you are advocating in effect?

MR. CARR: I'm advocating a discretion during that period, that's right. I don't think anyone is saying — I'm certainly not saying — that the standard marital regime should not apply to all couples once the Act is in effect. I don't care whether you were married in 1902, once the Act comes into effect, you're stuck with the standard marital regime unless you mutually opt out. I think that's clear.

MR. AXWORTHY: Okay. So where does the discretion come in on that? Can you pin-point? If we were drafting an amendment, where would we draft it? How would we apply it?

MR. CARR: I think that discretion comes in to any couple who are married prior to the commencement of this Act.

MR. AXWORTHY: Allowing a degree of discretion on the application . . .

MR. CARR: Allowing a degree of discretion, that's right.

MR.AXWORTHY: Okay, Mr. Chairman, thank you.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Carr, first in regard to existing agreements, I have in my mind separated the two Acts very clearly. The Maintenance Act does not prohibit any re-opening of a Maintenance Agreement or a maintenance arrangement simply because the law recognizes the need for review and re-consideration. But I have thought that under the Marital Property Act that by setting a deadline we are indeed doing what I think is the law today and that is that you cannot re-open a property settlement.

MR. CARR: Oh, I agree with that. Don't misunderstand me.

MR. CHERNIACK: So, I don't see it as a problem. You said people are didn't think so. being misled by it and I

MR. CARR: No, no. I didn't say that. I said that there had been a lot of talk about people saying, "My God, you can't interfere with separation agreements; it's unheard of." I was simply giving an example in the law where they do.

MR. CHERNIACK: Maintenance.

MR. CARR: Yes, that's right. My position is clear, separation agreements should not be subject to attack — the property aspect of it.

MR. CHERNIACK: Now, you have pictured for us the dilemma to a happily married husband who has to make a decision about unilateral opting out and I had the same reaction you did. I thought well

it's not going to happen or if it happens, it's going to break the marriage anyway so that's the end of it. But, it bothers me that you opt for unilateral in preference to bi-lateral opting out and then say, well, we'll leave it to the judge's discretion. The Law Reform Commission said that in determining it, the court shall take into account the actual fact as to what property may have passed or what recognition was given in the past.8 I'm sorry, I haven't got the wording at hand. The Bar Association brief presented by Ms. Bowman says, "The party could apply to the judge for a discretionary lump sum out of the value of the ousted assets." The reason I wanted to ask you a question is because you said to Mr. Axworthy that you don't quite see how you can set out guidelines for the judge. That sort of floored me.

MR. C ARR: No . . . Well, what I said was that I think it would be very difficult for you to come into court and say of a judge, "Well, the 50-50 scheme is really supposed to apply to me even though mine's an old marriage, but there's something in the Statute that says that you can do something better for me." What is the judge going to look to? No, I think I said the opposite, that if you leave it just so open, then what is the judge going to look to? What is admissible, what is relevant and how much weight should be given to it? That's a real concern that I have.

MR. CHERNIACK: So8 how would a judge deal with it? You did say that different judges will have different attitudes.

MR. CARR: I agree. How does a judge deal with any discretionary matter? How does a judge interpret the word "dissipating assets?"

MR. CHERNIACK: Isn't that why some of us are concerned about that?

MR. CARR: Yes. I join with them.

MR. CHERNIACK: Over a period of time, do we get common-law . . . we have cases develop that do have help to show judges of lower courts that appeal courts don.'t agree with them and something builds up, but without that happening, if you expect that a judge will recognize the equal sharing, then what — the onus will be on the person that says it should not be equal?

MR. CARR: Yes. Yes.

MR. CHERNIACK: Then there will be fault factor brought in. She didn't do her housework; he beat her up; I mean, aren't we back for all situations prior to the magic May 6th, are we then into fault for that and not for after?

MR. CARR: Well' let me first say that you make that sound like it's so awful. What you're saying is that the terms that the party has agreed to when they got married are going to apply.

MR. CHERNIACK: Well, we don't know what terms they agreed to. We assume . . .

MR. CARR: Well, the law imposed upon them.

MR. CHERNIACK: I'm sorry . . . ah, yes, because I assume that marriage is considered an equal partnership. I start with that; others do not. But the law did not recognize that.

MR. CARR: Right.

MR. CHERNIACK: So, now you're saying, well then, for up to this portion of time, we will let a judge decide what ought to be the case, not what is the case, because we know what it is . . .

MR. CARR: Right.

MR. CHERNIACK: . . . but what ought to have been the consideration that should have been given had the parties been given the kind of conditioning that they should have had. I mean, we're getting into a partnership.

MR. CARR: I understand. What I am suggesting is, how do we get around Murdoch? That's what concerns me. We've got to make sure that the one thing we don't do is over-react; wipe out retroactivity completely and leave poor Mrs. Murdoch in exactly the same position as she was before the legislation. What we are struggling with here and please don't take me to be someone who comes with all the answers. I am pointing out areas which really concern me and I don't pretend to have given this the kind of consideration that I would like to have done if I were drafting. I am pointing out to you that I think that the marriages have to be treated differently, if they were old marriages or new. We must get around Murdoch by giving the court the power to give the wife — usually the wife — more than she would have got under the old law. But there has to be some door open to distinguish those marriages from marriages where the parties have been handed a copy of the legislation before they got married.

MR. CHERNIACK: But you are saying and you do agree that a marriage that did not receive that copy of the Act should be bound by the law from hereon in.

MR. CARR: Yes.

MR. CHERNIACK: So it becomes a . . .

MR. CARR: They can get out.

MR. CHERNIACK: So because of a decision now, shall we smash it?

MR. CARR: Yes, well, every legislature when they pass an Act has the problem of the fact that they're very often changing something in mid-stream. That's a Legislative dilemma that happens and you try to be as fair as you can. Income tax is the area where it's of most concern, setting aside

schemes. I think that you're changing things in mid-stream, no matter what we do. I think you have to do that because that's the whole nature of correcting an inequity. Murdoch cried out to Supreme Court judges' "Please change the legislation in mid-stream," when in effect they said, "Yes, we've got to do it." But I say that we still have to have some distinction between the old and the new.

MR. CHERNIACK: Shouldn't we do that then with a Dower Act as well? We are changing the Dower Act.

MR. CARR: Yes, but you can opt out.

MR. CHERNIACK: Oh, that's where you could opt out of other things too.

MR. CARR: No, you could get out of the marriage. There go your dower rights. Three years, you've got your divorce and no dower rights. Death cures that. . —(Interjection)— That's right. Divorce cures that. Divorce cures and death doesn't at all. Death has a whole mess of problems but divorce cures dowers.

MR. CHERNIACK: You see, the distinction that I thought we were reaching at, which supported by the majority of the briefs presented so far, I believe, my interpretation is, that where there is an existing separation as of May 6th, there's no change in the law; no benefits or liabilities or . . .

MR. CARR: Well, are you sure you want that?

MR. CHERNIACK: I'm saying that's what we've reached, that stage.

MR. CARR: Well, okay, let's just look at that carefully before you do it because . . .

MR. CHERNIACK: The reason I do it is that there is a finality and a certainty about it and nobody is worse off.

MR. CARR: Well, why isn't anyone worse off? What about the situation we've just been talking about — the spouse who entered into his marriage four years ago not knowing what terms were going to be imposed on him. Sure, he's going to be worse off.

MR. CHERNIACK: That's not what we're talking about. We're talking about people who have already separated.

MR. CARR: If you have already separated. Okay. The difficulty with that is, you are going fairly far there by doing that. What you're saying to the lady who is separated on May 5th, you're in a different position than the person who separated on May 6th.

MR. CHERNIACK: That's right and you're no worse off . than you would have been had you not separated.

MR. CARR: Under the old law.

MR. CHERNIACK: Sorry, this law doesn't affect you, we cannot cure . . .

MR. CARR: That's right.

MR. CHERNIACK: Well, the next thing is we could say simply what the Law Reform Commission said8, bilateral opting out from hereon in; unilateral, we could even make it easier on the marriage, a less strain on the marriage if we say that the law we are passing only affects future assets. That would be so simple.

MR. CARR: Yes.

MR. CHERNIACK: And then we'd say, all right, then nobody is worse off than they would have been if we hadn't passed the Act. But we have to make a decision and I am one who is prepared to make a decision to recognize the past insofar as marriages that are still in existence.

MR. CARR: I agree.

MR. CHERNIACK: All right, then I am already creating a situation where I cannot say you are no worse off. I have to say to the unhappy rich partner, or say the husband, sorry, because you stuck it out . . .

MR. CARR: You were soft.

MR. CHERNIACK: . . . until after May 6th, you're worse off because of the new law.

MR. CARR: That's right.

MR. CHERNIACK: Well, you see, my conscience can live with that.

MR. CARR: Okay.

MR. CHERNIACK: What my conscience cannot live with is to say to the lady who on May 6th was living and each of them trying to make whatever effort they were trying to make, that we are retroactively considering it, rather than say to a judge, "We did not agree to bilateral opting out only. We did agree to unilateral opting out. We did say that the husband might decide to give his wife notice. Now you, Mr. Judge, in your wisdom and with no background of any case law or knowledge, just your own wisdom, you make an arbitrary decision."

MR. CARR: Well, what you're saying is . . .

MR. CHERNIACK: No, no. I wanted to add my next sentence. That's all.

MR. CARR: Go ahead.

MR. CHERNIACK: My next sentence is, what would you expect the judge to use as his criteria in arriving at that?

MR. CARR: Contribution, including housework, the raising of children and any domestic chores that have been done by the wife. Where did the assets come from? All kinds of things.

MR. CHERNIACK: Fault?

MR. CARR: No.

MR. CHERNIACK: You would deny him that right?

MR. CARR: I personally would like to see fault taken out of that. We get back to this problem I raised before about the difference between the legislation .

MR. CHERNIACK: No, no, not for property settlement, there's no conflict.

MR. CARR: Why?

MR. CHERNIACK: You mean the Federal court will deal with property settlement and . . .

MR. CARR: No, no, I'm sorry.

MR. CHERNIACK: I'm saying property settlement. I'm distinguishing maintenance. Well, then I'm saying with property settlement, you would say — I'm getting you now I think — you say that there is something that would go as instruction to the judge.

MR. CARR: But no fault.

MR. CHERNIACK: No fault.

MR. CARR: Yes.

MR. CHERNIACK: All right. Now would you tell me, would the judge not bring all his biases into his thoughts in determining the value of the housework, the value of the communal work done by the wife in going to the church, organizing church teas as being a contribution to the community.

MR. CARR: Then you'd better make your legislation work. It better be perfect. If you're saying, "Sorry we don't trust you judges, you're going to bring your biases in" — then you'd better make sure your legislation is perfect because you're boxed into it.

MR. CHERNIACK: Sure, I understand that.

MR. CARR: Why do you seem to be taking the position that, well, we're balancing things. We're not too worried about the rich man, we can live with that. On a balance, we've tipped the scale, it's the poor lady who is going to win. I have more empathy for Mrs. Murdoch than I do for him, so chuck him. Mrs. Bowman said very articulately that legislatures don't just take a nice balance and see if they can please the majority, they protect smaller interest groups as well. The fact that the smaller interest groups here may be millionaires, if that's what concerns you, is irrelevant. We're trying to make the legislation just.

MR. CHERNIACK: I agree with you, Mr. Carr.

MR. CARR: Why does it have to be black and white?

MR. CHERNIACK: All I'm saying is that it seems to me that if we say that where there is a marriage in existence, just like you're saying, then what I am saying is that that contribution should be taken into consideration.

MR. CARR: Yes.

MR. CHERNIACK: You're saying, no it should not be unless they are willing to and if they're not willing to, let them get a divorce now so it doesn't cover in the future.

MR. CARR: Right.

MR. CHERNIACK: Well, I think that's where we differ. I am willing to go back and recognize and you say there's a danger inherent. I would say that the most cases, you're talking about majority, are not the rich husband, the poor wife, it is really the poor couple who have saved together to have a house, very little really, that I say should be divided. I would be willing, if you like, to say that anything over 50,000 or 75,000 they can opt out. Would you like me to put that in as a discretion?

MR. CARR: Definitely not. First of all, I'm not prepared really to sit today and to articulate with you the various sections of the Act. I'm interested in the legislation. I've got certain areas which trouble me. I would be happy to redraft it for you. There's an offer. There's my offer. I would be happy to. We can negotiate the fee. But you can't expect me to take a look at amendments that are massive . . .

MR. CHERNIACK: I was hoping to get more than I could expect.

MR. CARR: I'm interested in it and I'd like to help you more on it and it's the worst area to deal with, this one area of how do we work out the retroactivity with respect to existing marriages. But I can't draft that quickly, I'm not that bright.

MR. CHERNIACK: I appreciate that. I do appreciate what you've said and helped us with up to now. Thank you.

MR. CHAIRMAN: Are there any further questions? Hearing none, thank you, Mr. Carr.

MR. CARR: Thank you very much.

MR CHAIRMAN: Order please. The name on my list is Aleda Turnbull.

MS. ALEDA TURNBULL: I only wanted to speak to you on one matter and it's not as involved as some of the other speakers have been dealing with. I wanted to talk to you on the enforcement of family maintenance.

The new Act doesn't really deal with the problems of enforcement of family maintenance. The only reference to it is, I believe, Section 28 of the family maintenance bill, which says that if you continue to be in default that you can be sent to jail for a maximum of 40 days. It seems to the people who have been looking at this, and we've done some considerable study on what other jurisdictions

are doing and what is working and what is not working, that that kind of system really is what we have now and that there will not be any change, that we will continue to have 75 percent uncollected as we presently do. We really have to move to a new system if we want any change in the amount of collecting of child maintenance.

Now there are several states and two provinces which have instituted a new system of collecting family maintenance and it is working fairly well. In Ontario, for example, they have a registry system and they collect through the court family maintenance. They have found that their collection rates have risen quite substantially and they are not dealing with this old kind of situation. Now the reason they are being successful is that they are not working on this punitive system whereby in order to try and collect you have to go to court every time, you have to look up the person through the court procedure. The people in the enforcement agency are working very much as a bill collecting agency works and they are finding that this kind of system yields money. It's very hard to get statistics out of people, partly because the programs are relatively new, but one program in Holt County, Florida collected $1 million for the expenditure of $20,000 so that it's not even expensive to the Crown, who is running this agency. As a matter of fact the Crown would probably save much more money than it would normally pay out in welfare payments by turning this money over into collection salaries for people to do this kind of work.

If, on ordinary debts, a collection agency can get up to 99 percent, only 10 percent of those being difficult to collect, it seems ridiculous that if we establish spousal maintenance and child maintenance along lines that are considered more fair, and I think this is what the law is doing, that these really are debts which are very similar to ordinary debts in the market for buying television sets and refrigerators and so on and that they should really yield the same kind of payment pattern as collection agencies have. I submit to you that if the government were prepared, under this new law, to establish that kind of collection, that we would then move into a new regime, that we wouldn't have women and children living in poverty as a result of non-collection of child maintenance because the money is there. It's just that the procedure for collecting it is so cumbersome and so punitive that courts resist putting people in jail if there is any kind of a reason why the person hasn't been paying, why the spouse hasn't been paying, and because of that there is no effective way of collecting. I think if we're going to talk about no fault in other areas, we have to get away from looking at this as primarily a punitive operation and look at rather an effective operation. I suggest to you that there are systems which are working in other provinces and in the States which would do this.

Now the basic problem right now is that there is a real incentive for people to go on welfare if there is child maintenance needed and the spouse is not paying regularly. The reason for that being that some money regularly is better than a lot of money now and again, so the person tends to go on to welfare and then not continue to pressure for maintenance. If you established a system where if the spouse with the children was at home, you took a welfare application when the person came in and the agency continued to attempt to collect, if no money came in from the husband or the paying spouse, for that month the person would get a welfare payment but the agency would continue to attempt to collect. Over the long run there would be an incentive to attempt to collect whereas now we have a disincentive to attempt to collect. It's very expensive and it means that your monthly income will be very irregular and unreliable.

So I would urge you to look at this option. I know that the Committee rejected the submission that was made by the Family Law group earlier that the state be responsible for the amount of court-awarded maintenance. But if you have a system which includes the payment at a welfare level if the maintenance is not collected and the payment of the collected amount when and if it is, then I suggest to you that you will be moving up probably fairly quickly from the 25 percent ratio that we now have of collected child maintenance. Thank you.

MR. CHAIRMAN: Thank you. Are there any questions? Hearing none, thank you Mrs. Turnbull. Mr. Cherniack.

MR. CHERNIACK: If I may, Mr. Chairman. I would think Mrs. Turnbull that the legislation we have before us does not in any way make it impossible or create any impediment to carrying out the program that you have in mind. That would be an adjunct to it and may be able to be brought in at a later date. Would you agree that there is nothing . . .

MRS. TURNBULL: Yes, there's really no change in the law that is needed.

MR. CHERNIACK: New law. New procedure.

MRS. TURNBULL: Yes. There is sufficient enforcement law now. What we need is a mechanism for doing it, an agency for doing it, which could be set up under this law.

MR. CHERNIACK: Thank you.

MR. CHAIRMAN: If there are no further questions, thank you. The hour being almost 12:30, is it the will of the committee to rise at this time? Committee rise and report. Committee will reconvene at 8:00 p.m. this evening with questions for Mrs. Bowman.