Legislative Assembly of Manitoba

HEARING OF THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital

SATURDAY, June 4, 1977, 2:00 p.m.

Printed by P.N. Crosbie — Queen's Printer for the Province of Manitoba

TIME: 2:00 p.m.

CHAIRMAN, Mr. D. James Walding.

MR. CHAIRMAN: Order please. We have a quorum, gentlemen, the Committee will come to order.

Perhaps I could indicate to those who are waiting the order on my list. Following Mr. Rich, Ruth Pear, Leigh Halparin, Charles Huband, Mary Jo Quarry, Jim Stoffman, Norman Coghlan. I have had an unofficial indication from the Committee that they would like to adjourn this afternoon around four o'clock. The Committee will then reconvene on Tuesday next at 10 a.m.

Mr. Rich, would you come forward please.

MR. ARTHUR RICH: Thank you. First of all, I am not here in any official capacity whatsoever. I am in fact the President of the Law Society but I do not presume to speak on behalf of the Law Society. The Law Society, as at this particular date, has no position and has no position, I think, because none of the amendments or the Acts came before it so we could consider them. So I am here merely as an associate member of Mrs. Bowman's committee, part and parcel of the family law subsection of the Manitoba section of the Canadian Bar. That's what I am doing here today. I am also a very active practitioner in the field of family law and I term myself as being in the front line as far as family law is concerned. I am part of that small segment of the Bar that is going to be where the action is as far as any legislation that will be passed relating to family law. We're going to have to see whether we can carry out the dictates of the Legislature.

So with those few remarks by way of introduction, I would like to start. Before I commence my submission, I would also like to clear up a few things that have come to my mind since I have been sitting here since Wednesday. I think when Mrs. Bowman was giving her presentation one of the things that disturbed me, she was asked what percentage of people voted for the form of the proposal that she was putting. I didn't recall hearing any of the other people who came forward representing all kinds of organizations, asked the same question. I don't know, for instance, how many people voted in the various committees and associations that Alice Steinbart represented. Perhaps that is not even important, but it did seem to me at the time to be an unhappy position to have Mrs. Bowman placed into. In any event, I know that Myrna Bowman appeared on behalf of that portion of the Canadian Bar that we call the family law subsection and she appeared with the full blessing of the Council of the Manitoba Bar , I think that's what she was doing there.

I want to address most of my remarks with respect to Bill No. 60 rather than with Bill No. 61. You must be sick to death of Bill No. 61 and I know I can't conceive of a question that could possibly be asked of Bill No. 61 that hasn't been asked. Perhaps something that I might say might cause somebody to think that there is some portion that hasn't been covered.

I am Mr. Houston's partner but I don't share Mr. Houston's views. We have what we call interesting discussions and I have a different opinion than Ken does. I appreciate his opinion, I hope he does mine . There is nothing better, I think, than an honest difference of opinion and discussion that usually follows, we almost always learn by that.

I like to think that the purpose of the legislation that is before us is that it is an attempt by the Legislature to cure and correct inequities and to try and make the situation between husband and wife a more equitable situation. I am addressing my remarks with respect to the maintenance bill rather than the marital property bill. I think the Wives and Childrens Maintenance Act, which is the main piece of legislation that we operate under, is probably the cause of a lot of inequities in the question of maintenance. Mrs. Paxton gave many illustrations as to what happens when somebody goes through the process in the Family Court and what the results are. I am absolutely convinced the Wives and Childrens Maintenance Act has to be looked at. I think our subsection had been working on that most of the year and we had some proposals. Of course, these proposals have been usurped by what is transpiring now.

I said I was in the front line. I don't think there are any more than about 15 to 20 lawyers in all of the City of Winnipeg that do a substantial amount of family law. I, myself, don't appear in the Family Court because it would be an obvious conflict. I sit as a part-time provincial judge and as a part-time provincial judge I cannot appear in any court in which I preside. I have presided as a Family Court judge on occasion . . .

A MEMBER: At the zoo.

MR. RICH: At the zoo and in the sub-zoo, the French zoo in St. Boniface and the various zoos throughout the province. I know something what a judge goes through and I know something, I think, about judicial discretion . . . I find myself thinking more and more that judicial discretion isn't the worst thing in the world.

In any event, I think one of the things that disturbs the people who have been looking at this legislation is the uncertainty of Bill No. 60. I don't think it is certain at all. I think Mrs. Bowman indicated, in much stronger terms than I will, how inadequate the Act is. I think that in order for an Act to be of any use at all, those of us who are sitting and advising clients have to be in a position where we

can offer advice to clients that is, in fact, pertinent. And when there is as many things wrong with that legislation as I think there is, it is very difficult to give any client pertinent advice. There isn't any leadership in the Act that indicates, to me anyway, what procedure has to be followed. I think we should know or we should at least have the ability to find what necessary services are available to carry out whatever this Act says we can do.

I would like to look at this piece of legislation. First of all, I think it opens up — how can I describe it? I use the Spadina Express Freeway, you remember the Spadina Express, that ribbon of concrete that came from outer Toronto into downtown Toronto and was to funnel an innumerable amount of automobiles and traffic into the centre of town and then when you got to the end of Spadina Avenue . . . there are a bunch of little wee streets leading off of it, you couldn't help but have a great deal of congestion. Here you have opened up what I think is going to be many avenues of litigation and problems that the court will have to resolve and you haven't given us anything at the end of this avenue. You haven't given us the court facilities that are going to be required to answer, I think, a great deal of questions that the public, who I presume intends to use the court process, the public is going to have to use that.

Sam Malamud appeared, I think he was the last speaker yesterday, and came up with one of the problems that I saw was central to this, the question of the judge. When you put in a piece of legislation that a judge can be any one of judges in three courts and you cloak these judges with the same power, and in addition thereto you pass component or complementary legislation which says only judges in the Court of Queen's Bench or the County Court of the province can handle 'the situation, you, in fact, say to the Family Court, you don't need the Family Court anymore because, as Sam Malamud said, nobody is ever going to go to the Family Court to look for the remedy of maintenance when that person can go to the Court of Queen's Bench or the County Court and receive not only the remedy of maintenance but the remedy of a division of property at the same time. You have done away with the concept of fault as far as The Maintenance Act is concerned so there is not even a question of whether a person is or is not entitled to maintenance. As I read the Act the person is entitled to maintenance merely because that person is married and for no other reason than that. So you say you don't have to determine the question of fault anymore. If that is going to be the case and you have said in The Property Act that the division should occur the moment the marriage breaks down, who is going to go to the Family Court? The Family Court can't handle any property settlements so naturally everybody is going to go to the Court of Queen's Bench.

What Sam Malamud has suggested, I think cures it. When I saw the Acts I said first of all, why wasn't the Provincial Court given the kind of authority that I thought it should have. I think there's, what, 41 provincial judges and I think there's — somebody mentioned the figure 17 judges that are Section 96 judges. I envisage a great increase in business — if I can use that term — and I envisage the Court of Queen's Bench, which I don't think is ever happy about having to look at family matters, being overwhelmed because we heard Mr. Houston say he would never think of going to Family Court. I think that most of us in the practice of law that do family law would consider going to the Family Court when there is an alternative court to go to.

I call it the "barber theory." None of us would ever go to a barber where the barber doesn't want to cut hair, he doesn't like cutting hair. And yet they ask us to go to the Court of Queen's Bench which I know doesn't like doing family law and they ask the litigant to be judged by somebody who doesn't like the job that he is doing.

So I'm saying that perhaps a lot of this can be cured by the concept of the unified Family Court. Maybe I'm worrying about things that are in the Act that will cure themselves by the institution of an entirely new type of Family Court.

I look at Section 3 of the Act, and that's the Personal Allowance Section. It strikes me that there is a right and an obligation in that particular section. I don't see how it is going to be enforced. The moment somebody says, "I want a share of the money that you are earning," the person who is asked to give the share, if he doesn't object, he is certainly going to be objectionable, and I can see that this might happen the very first time there's any differences at all between the husband and the wife that would probably have been passed over at some time in the past and are now going to assume a much more important type of impetus once you put in legislation where one person can demand from the other a reasonable amount. I can't see what a reasonable amount is. I know some of the ladies that I represent exist on what I consider to be practically nothing at all and I think the husband in that particular case would consider that to be a reasonable amount. You are going to have to ask the judge to determine what a reasonable amount is if there is a confrontation on this particular point and in order for the judge to determine what's a reasonable amount, you are going to have a confrontation. It might not be a question of fault but there certainly is going to be a confrontation. The wife is going to say, "This is a reasonable amount." The husband is going to say, "That's a reasonable amount,"

and that's going to cause the kind of litigation that I envisage.

Looking at our present court system, our court system indicates that there is a first hearing, there is the right of appeal. This is not only going to be a costly process, it can be a long and involved process. What is the party going to do in the meantime? I think there is a section somewhere in the Act where the only person that can give a stay is the judge that grants the order or I think the Court of Appeal, if I remember correctly. You are going to out of necessity ask for a stay if the husband is not happy about it, and what is that going to do in the meantime? I can assure you that their marriage is going to fail and perhaps the question of no fault is not germane to this particular Act, but the question of no dispute should be and this is going to be a situation where there is going to be a great deal of dispute. There's going to be an awful lot of rancour. I don't think once this process gets started, that you are ever going to get a reconciliation or whatever reconciliations are going to be gotten, are going to grudgingly and because it's going to cost the party too much not to reconcile — what was the song — "It's Cheaper to Keep Her?" I think that might be the case here.

Section 4 is what I call the financial independence section and that deals with, as I read it, once a person attains financial independence, then that's going to be the end of the need to support. I'd like to know, as everybody else who has been up here would like to know, what is financial independence? What happens on a fluctuation of income by the financially independent spouse? Part of the Act says, I think, after three years, if the income fluctuates, tough luck. What happens if it fluctuates in the three-year period? Does it mean that once a person becomes financially independent and sometime during that three-year period, the husband can then come to the court and say, "She's financially independent, I want some relief." Does the court give that relief? If that is the case then again you are going to have a great deal of problems that the judge is going to have to decide.

Supposing this person who is financially independent after the first year and the husband gets relief, by no fault of her own or even by fault of her own — an investment that is no good or an expensive boyfriend, whatever it is that causes people to become financial unindependent — then is she going to go back to the court and say to the court, "I'm no longer financially independent, I want to get some more assistance." What is the standard of proof? What procedure is going to be followed?

Mrs. Paxton, I think, her descriptions and illustrations were what happens most of the time. Most of the people that we see are not the people that have the million dollars. They seem to be able to resolve their problems without the need of resorting to the courts, but they are these little people whose fortunes fluctuate up and down.

Section 4, Subsection (2) is the independence on separation section. You have a situation where the lady doesn't need any support. The best illustration of that is two people, a husband and a wife, who are school teachers, both earning exactly the same income. I'll illustrate it by saying that the wife receives custody of the two children on the breakup of the marriage and all the husband is required to do is to pay something for the children. Then the custody of the children reverts back to the husband. The wife loses her job as a school teacher; she is no longer financially independent. If that occurs on the 1,096th day, that's three years and one day, she's out of luck. If it occurs on the 1,094th day, obviously she can go back to court and if she is no longer financially independent she is going to get some maintenance or she is going to be entitled to maintenance. There is no fault that we have to worry about.

What about dependency on separation? This is the most obvious case. Let's take a situation where the parties get together and what we call "agree to disagree." They enter into a comprehensive separation agreement and part and parcel of the separation agreement is the delivery or the transfer or the conveyance of the marital home and the contents of the marital home to the wife and she has a reasonably large chunk of money that is tied up in the house. The case that I have in mind is one where the lady decides that she doesn't want the big house herself and sells that big house and dissipates the money. At the time of the sale of the house she was probably financially independent but she made a very bad investment and ended up without any financial independence.

Does she then come back to the court? I don't know. I think we have to have a standard. I don't think the Act builds in the standard. I think we have to have a norm.

I'm going to talk a wee bit about judicial discretion. Throughout Bill 60 is the concept of judicial discretion. Throughout the judge decides on just about everything and here is a situation where the Legislature is prepared to trust the judge to make decisions with regard to maintenance, but not prepared to trust the judge to do what's right with respect to the property and I think that's an anomaly. I think that requires some kind of an explanation. I'm thinking about some of the judges that might be biased toward — or if I can use that expression, I'm afraid to use it now — with respect to maintenance, some judges, we know from experience, are pretty generous when it comes to handing

out dollars and cents in the way of maintenance. Some judges are, to my way of thinking, niggardly, or not prepared to understand that some people need certain moneys for certain pleasures. I think Mrs. Paxton said the first thing she went out and bought was a garbage can whose lid flips back and I can see sometimes, this is very necessary.

I think we all have to sit in the position of a judge to try and understand what kind of a problem a judge faces when he has to sit and exercise his judicial discretion. I sit mainly as a criminal judge and most of the law is codified and most of the time I don't need to exercise discretion and my problems are resolved. But whenever I do sit as a Family Court judge, it is a pretty awesome responsibility and most of the time you do best with what you have in front of you and sometimes the cases are not properly before you.

I thought that perhaps a lot of the problems could be resolved if we look at what happens on a labour arbitration. I initially thought, why not have a board of arbitration appointed, or something similar to a board of arbitration, to resolve the question of maintenance. It avoids the need of going to the judge all the time. It avoids complicated procedures and maybe this is an area that we haven't looked at. I know down east in Toronto they resolve a lot of the problems with regard to custody by the simple process of arbitration and maybe this is something we should look at. Sam Malamud has brought up the idea of the referee, a *quasi judicial* function where a lot of these problems could be funnelled through the referee. In the Ontario courts, they use the Master far greater than we use the Master here. The Master has all the various references preliminary to a hearing. I think the closest thing that we have to a no-fault type of maintenance is the proceedings that one takes with respect to interim maintenance. You don't have to prove anything more than the fact that the parties are married and there is a need by the woman to get interim maintenance. It is not a question of deciding who is at fault or who isn't at fault and that, down east, is done in front of the Master and perhaps that's what we should look at here, instead of a judge perhaps a quasi-judicial function that the Master can examine and take that particular part of the business away from the judge.

I think the Act is instituted for the purpose of giving relief to a spouse and I think that's what the Act is all about. I don't think it takes into account what happens in the question of illness, insanity, the question of the parties going back to school. Time and time again I see, in my function as a Family Court lawyer, a situation where the young people get married and they agree between themselves that he should go back to school and she will work and sure enough, she goes out and works, he goes back to school and they use her salary to pay the expenses of operating the home. I don't know how often it happens to other people who do a fair amount of family law, but it happens quite often to me that once the young fellow has finished his primary education, has received his degree and the woman has assisted in putting him through, before the fruits of whatever efforts she has expended can be realized, he decides to leave or takes up with another person or finds his wife not as desirable as he did at the time. And there never seems to be a balancing off and here you have a situation where there is no fault, the woman has contributed mightily to the man's future which is many years hence and her reward, if I can call it that or the payment for the effort is limited to three years. I'm thinking of financial independence. Maybe she is financially independent, but surely there must be some balancing, if the contribution has been that great to the man's ultimate success then surely putting a person financially independent isn't sufficient, or at least to my mind it isn't anyway.

Again, once you establish that there is a financial need and an amount is given, there is, in my experience in any event, a constant fluctuation in the man's ability to pay and the woman's need and there is a constant referral back to the courts. I think the courts are, in the Court of Queen's Bench anyway, divorces are plugged, literally plugged by these applications for variation. I think you'll find it more and more as far as the Family Maintenance Act is concerned.

Section 5. The notes that I have here is — Section 5, is it no fault? I look at each one of those sections and I say to myself, some of them are certainly no fault but they certainly are not disputable.

Financial needs — that's Section A and the heading I've got is Financial Needs. I've got disputes, certainly, for instance, the automobile. I think Mrs. Paxton said that her evidence of financial independence was when she was able to afford and drive a car. Some people take a car as being a complete and utter necessity. Some people look at a swimming pool that way. Some people look at a vacation that way. Some people like clothing, entertainment, the various cultures, church, charities, teeth, glasses. Maybe your teeth are good this year and they might not be good next year and that might destroy your financial independence. I think what happens is that when a judge fixes an amount that he thinks would be satisfactory for the maintenance of a woman and a family, he doesn't take into account all of the many things that can and do happen.

I have somewhere here what I call a preparation sheet, and in it I list something like 40 different items that can occur. These are the many things that I think a lot of the judges don't take into consideration: rent, property taxes — if it's owned — water, telephone, hydro, heat, food and

groceries, clothing, dry cleaning, transportation — that's bus or taxicab — automobile expense, auto insurance, life insurance, dental bills, medicine, haircuts, hairdos, cigarettes, newspapers, reading material, cosmetics, drugs, sundries, entertainment, coffee breaks, gifts — somebody mentioned something about gifts, Christmas, what have you — babysitting expenses, children's expenses for music lessons, books, allowances, entertainment, bus fare, donations to charity, repairs to the home, holidays.

This is the type of thing that I think has to be taken into consideration and this is the type of situation where you're going to get a dispute, the man's going to say she doesn't need a vacation for two weeks, she only needs a vacation for one week, and this is the kind of confrontation that's going to happen continuously. Financial means, it's always arguable as to how much the woman needs or how much the man needs, so you're going to have an argument and you're going to have a dispute there as well. And then there's this thing called standard of living. The catch phrase is that she's entitled to be kept in the same standard of living that she had when she was married, or when they were living together. Somebody, I don't know which one of the persons that addressed you, indicated that it's virtually impossible unless there is a great deal of money, not to have the standard of living for both components of the marriage depressed considerably once there is a separation.

Paragraph (b) of Section 5 is Existing Obligations. Maybe he has to support a mother and a father. Quite often mother-in-laws and father-in-laws don't get along too well with the daughter-in-law or the son-in-law and there might be a great dispute of why he should give so much to Mom or give so much to Dad. So again here is another situation where there is a dispute.

Paragraph (e) I think is the one that Mrs. Bowman talked about. That is, I think the only real no-fault or the fault sub-section that we have in paragraph 5. That's going to be a problem there. That's going to be a situation where there is going to be a dispute. How much money she is going to have? Why should she have that much? What is the value of her service? What is the dollar and cent value of what she has done? I think there is going to be nothing but disputes there.

The value of property settlements. That's paragraph (f). You very rarely get two people to agree as to what the value of the house is or what the value of the car is. Usually the person who is giving the car away or is giving the house away or giving the property away, says it is worth much more than the person who is receiving it. So you've got a dispute and a difference of an opinion there.

Financial independence. I've talked about that before. What is financial independence? You're certainly going to get an awful lot of argument from both parties with respect to that.

Income earning capacity. I think sub-section (g) splits down into two sub-sections — an income earning capacity. I would like to know what that is. Some people are able and do work at two or three jobs and their income earning capacity is greater than those that only work at one or only want to work at one.

One of the persons that addressed you, I guess it would even be Mrs. Paxton, who talked about people that she spoke to that got terribly depressed when in one of these positions and their capacity to earn was reduced merely because of the trouble that there was between husband and wife. Just the mere fact that there is trouble, reduces earning capacity.

Paragraph (h) is Children and the liability to provide support for children.

Paragraph (i) is the attempt to obtain financial independence. Some people want to go to school and improve their opportunities, or they used to be able to improve their opportunities for employment by obtaining a University degree. It is not so certain anymore.

I think paragraph (j) is about the only certain thing there is in the whole of paragraph 5 and that is the length of time that the marriage has subsisted. We know that because it starts at a certain time and it finishes at a certain time.

The rest of the items I would submit, if I am making a submission, are disputable and will be in dispute and this is the type of thing that's going to come up in front of the judge.

Not only are lawyers going to be terribly busy but I think you're also going to call upon the profession of chartered accountant much more than you had before. I think the chartered accountant now is almost obligatory when one takes a look at the income tax returns. I suppose that you hire him as well to take care of whatever the accounting is between spouses that differ and spouses that break up. Let's assume that we have no fault. And let's assume that this is no-fault legislation and I don't say that it is, it certainly is not no-dispute legislation. What about the costs that are going to be involved in this? I called it the Spadina Expressway. You're not going to have enough courts and enough judges to be able to handle the flood of business that is obviously going to result if everybody that has a dispute, asks the court to resolve that dispute.

Now, sub-section 5 (2) is also another sub-section that I think invites a lot of disputes. That is as amended, I believe, and that's why I haven't got it there. That's the housekeeping, child care,

domestic services performed by the spouse for the family. Sometimes these are not performed to the satisfaction of the party that complains and you're going to have a dispute about that.

Paragraph 5, sub (3) is the domestic arrangement. The one that's during the marriage and the one that's on the breakup of the marriage. There's going to be disputes there. Each one, especially if they are at odds, are going to say that it wasn't satisfactory during the marriage and it's not going to be satisfactory during the breakup. And I'm thinking of who handles the kids and who takes care of the children's needs.

The question of access to children is one that is sometimes easily resolvable and sometimes it's the naughtiest of all the problems that the judge has to resolve. You can get people agreeing on everything, the delivery of a $100,000 house — and somebody mentioned Jaguars — the delivery of a very expensive automobile, everything else and the question of access comes down. When can Dad see the kids or when can the kids see Mom? It might just be a difference of opinion of over one or two hours on any given week and this causes a confrontation and the need to come back to the court.

I am looking at the financial information section where complete financial disclosures are not only required but are sought I think what's going to happen, or looking at this legislation the most logical thing to do is, when you apply for a marriage licence, also at the same time you sign a direction to the Income Tax Department that all information filed under the Income Tax Act from and after the date of the marriage should be disclosed, I think you should also sign a direction to the employer that he is to release the information of the earnings of the spouse to the other spouse. I think there should be a direction to the bank. Have you every tried to get information from a bank on subpoena, that's a pretty difficult thing. I think at the same time you sign your application for the marriage license, you sign all these little documents to make sure that sometime in the future this financial information is made available.

Again I'm looking at the expense that's involved. Let's assume that the marriage has run along fairly smoothly. Nobody has thought about the breakup of the marriage and most marriages start off on the basis that it's not going to break up and then all of a sudden problems occur. Somebody makes demands pursuant to this Act on the other person who takes offence and then the fun starts. Then you have to go out and try to obtain the information of the financial situation. That again is another one of these expenses that I think this Act will create.

I find that governments and not necessarily this government but it brings me in mind of a case that I had many years ago where I got a Receiving Order against the Minister of Welfare. The receiver was the Minister of Welfare; government employed this man in the capacity of an attendant in one of the parks where he had seasonal employment. He worked the eight months that the parks were open and the four months during the winter time he didn't work. So he was constantly in and out of work. The receiver was the Director of Welfare. I obtained an order, I guess it was Mr. Justice Bastin who gave it to me then, appointing the Director of Welfare as the receiver; served him. The money was supposed to be paid from one department to another department and the order, I guess it was the Department of Tourism, or whatever the Department of Tourism was in those days, they would not honour the order given by the judge.

So perhaps the Act will cure that, but that's an example sometimes of trying to get information.

What about self-employed people? How do you get information on a self-employed person, the guy who doesn't keep good books? How about a salesman, a commission salesman? How about a fly-by-night operator, an entrepreneur that opens up a business today and closes it down tomorrow? What about a farmer? How do you get this information?

What about the argument you are going to have over deductions all the time. Sometimes a person has $1,000 by way of salary and he has committed himself to a certain number of obligations that are deducted at source. What happens to these obligations? How is he going to be able to pay them if payment is going to be made to his wife? There are all these things that have to be taken into account and all this information that is needed.

What if there is no employer? I'm thinking of a wife, and there are quite a few women who operate businesses out of their own home: Avon ladies, hairdressers or the people that — what do they call them — dress parties or Tupperware parties, whatever it is, and some of them do fairly well at that and there just are no records.

There is a restriction built in the Act that prohibits the dissemination of information, if I recall it, from one partner to another. Let's say my partner Houston — I shouldn't use him perhaps — but he's not going to be very happy if my wife decides that she wants to have the information disclosed.

What about the situation where it isn't wages that the man earns, but he gets a share of the profits and that's not determined or determinable until a certain period of time well on in the year? What about payment being made to an employee other than by money? All these things, I think, are problems that are implicit in the legislation.

Section 7, the next part of the Act I call "Procedure" and Section 7, I look at — again, I'm looking at this as the determination of a judicial discretion. A spouse or any person on behalf of a spouse may apply to a judge for relief under this part. I think that is Section 7(1). So it looks like all you have to do to get relief is to apply. I think in order to apply, all you have to do is to be married. I think Section 7, Subsection (1) — I better come back to that. It tells you that you have to apply in order to get relief. Getting into Family Court — I thought I had fixed the Act up, I obviously had one.

Section 7, Subsection 1 reads, "a spouse or any person on behalf of a spouse may apply to a judge for relief under this parthere the other spouse is in breach of an obligation under this part." Well then, I think you are going to have to determine what the obligation is and what the breach is to permitthe person to apply. It says, "there has to be a breach of an obligation or where the applicant spouse desires an order for separation." I think that the only grounds for separation should be — and I think they should be spelled out — the irretrievable breakdown of the marriage. That once the marriage has irretrievably broken down, if you are going to have no-fault maintenance, I think that's the only grounds that there should be. I think a speedy decision is essential.

What about the rights of appeal? Our system is geared in such a manner as to give a person not only the right of the first review but the right of a subsequent review by another court. I think that's a problem that is not going to be resolved quickly or easily unless we have the facility to do so.

Section 7, Subsection 2, deals with separation agreements and the right for the court to review these separation agreements. Here again is a question of uncertainty. You've got your judicial discretion. What happens with separation agreements where property is passed and this property is dissipated? Property that's dissipated is given in lieu of periodic payment. What happens when a man's business fails after a separation agreement?

Separation agreements quite often include — I think Mrs. Bowman pointed this out — not only the question of dollars and cents but perhaps a diminuation of the amount of periodic payments in return for which a person would surrender custodial rights or visitation rights, or give up certain pieces of property. If separation agreements can be reviewed by judges and apparently they can, if the circumstances of the spouses or either of them have changed — and again I am illustrating that point where the lady got the house, sold it and then lost all the property — what happens then? This is, after all, no-fault maintenance.

I am looking at Section 7, Subsection 3, again looking at it in the way of no-fault maintenance. That section reads, "an application that is limited to a request for relief under Section 3 or 6, or both, shall not be made by a spouse more than once within a 12-month period." What if the changes occur several times during the 12-month period? I gather once the lady or the man has made the application once in a 12-month period, for the next 11 months and 30-odd days, they cannot go back. And that is compelling the delivery of information from an employer.

Section 8, it says "you can apply." It doesn't say how you are going to apply. Are you going to apply by way of petition? Are you going to apply by way of statement of claim? Oh, pardon me, I apologize. "Upon an application for relief under this part, a judge may" — I guess that is now "shall" is it? — "subject to Section 5 make an order containing one or more of the following provisions and may make any provisions in the order subject to such terms or conditions as he deems requisite." I presume that the application can be made by way of information, by way of summons, by way of petition, by way of originating a notice of motion. I wonder how that application can be made. I think we should have . . .

MR. PAWLEY: Look at 18.

MR. RICH: Eighteen? It says what?

MR. PAWLEY: Section 18 of the Maintenance Act, "application for relief under this Act shall be commenced by filing and serving a written statement . . ."

MR. RICH: I'll come to that and that's why I want to make a point of this. Thank you very much. I will come to that very shortly.

The various sections under Section 8 look like they are lifted out of the Wives and Childrens Maintenance Act. A lot of them are quite similar to the Wives and Childrens Maintenance Act and this is where we had our hot bed of dirty linen, where people were bringing up all the bad things that happened in the marriage.

Section 8, Subsection 2, deals with the discharge of the order.

A MEMBER: No, no.

MR. RICH: Oh yes, is that dealing with the discharge? I think even Myrna hasn't got that. My notes read, I'll try and clarify that, these orders can be discharged . . . once they are put on they are always subject to review and I think the old law was that once you resume cohabitation the person was entitled to make an application for a discharge and quite often the discharge was granted. Two weeks after they kissed and made up they were back fighting again, starting the whole round all over again.

Section 9, I call it "partition avoidance" and that is the case where the rights to the marital home is given . . .

MR. CHERNIACK: Mr. Chairman, I wonder if I may . . .

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Just for clarification. I think you said what 8(2) is but I don't think you commented about it.

A MEMBER: Yes he did.

MR. CHERNIACK: I'm sorry then, I missed it.

MR. RICH: I said about the discharge, about once a person has an order it can be discharged.

Now, when people kiss and make up quite often you don't go back to court you just carry on the way you were before. On the question of condonation, once the order is out of the way whatever the dollar and cents are are no longer required to be paid, the person takes back the spouse, the discontent occurs again . . . you are back to square one again. Is that not what that section reads?

MR. CHERNIACK: Mr. Chairman, it is not in order for me to interrupt but I don't think Mr. Rich would mind . . .

MR. RICH: Not at all.

MR. CHERNIACK: . . . if I pointed out . . . I think what that means is that it has to continue, the cohabitation has to continue for 90 days. . .

MR. RICH: Yes, that's the one.

MR. CHERNIACK: . . . before a discharge can be given, which means that if it can't last 90 days then you don't go back, you just continue the order. That's my reading of it. I am sorry, Mr. Chairman, this is very irregular to interrupt but . . .

MR. RICH: Not at all, I appreciate that. Let me just see what I've got . . . and I apologize.

MR. CHERNIACK: The top of Page 3.

MR. RICH: The top of Page 3, yes. "Where an order made under this Part contains a provision under clause 1(b) and subsequent to the making of the order the spouses resume cohabitation for a continuous period of at least 90 days, a judge of the court from which the order issued may upon application of either spouse discharge the order in whole or in part." We have the same problem, that's the way it is under The Divorce Act.

MR. CHERNIACK: That's right.

MR. RICH: We run into that problem when we have more than one period of time where the cohabitation resumes that totals more than 90 days or less than 90 days and we run into that problem on that. Probably what my notes suggest is that particular time.

I would like to go on to Section 9 and I call this "partition avoidance." This is where the third party . . . the judge makes an order permitting one of the spouses to remain in the home provided that person is given custody of any child of the marriage. It doesn't say the child must live in the home, it just says he must have custody. I look at that section as being a difficult section when the mortgage on that piece of property comes due. Mortgages usually have a five-year termination date and there is a need sometimes to refinance. I can't see a man who is not living in the house wanting to refinance a piece of property, at least without embarrassing the woman who is occupying the house. I think it defeats the legitimate aspirations of the owner. It just says, "he has custody of a child." Doesn't say how old the child is. I guess you can't have custody of an adult except in cases where the adult is handicapped and sometimes handicapped children don't live in the house. And if the child does live in the house, how long does the child have to live there?

This is the type of uncertainty I think the Act is rife with.

I am not going to deal with common-law at this particular time. I'm as confused as Mrs. Bowman was on common-law. I don't know how long the common-law parties must have lived together in order to — I don't mean it that way— I have the greatest admiration for Mrs. Bowman. How long does that common-law situation have to exist before a person becomes entitled to support from a common-law spouse? —(Interjection)— My opinion? I think the way the Act reads, that you just have to live with a person for a half a day. —(Interjection)— What do I think it should read? I think the kind of cohabitation that I would think, if you are going to include common-law, should have to be substantial cohabitation.

There is also the situation which the Wives and Children's Maintenance Act covers now where the woman has a child from another man and it's covered when they are married in *loco parentis* rules. It's certainly not covered in this particular rule.

I think as far as children are concerned, I think Mrs. Bowman pointed out and I certainly concur with her suggestion, I think we can use The Child Welfare Act for almost everything that is covered by the children in this particular Act. I think all we need is perhaps a small amendment to The Child Welfare Act, if in fact we do need that, in order to take care of the children. I don't think that section is

needed at all.

Part 3, I think, deals with procedure and this where we are going to get to Section 18, I hope. Section 16: "An application for relief under this Act may be made to a judge of the Court of Queen's Bench, a judge of the County Court, a judge of the Provincial Court." Let's have the husband going to the judge of the County Court and the wife at the same time — it's a breakup of a marriage with no fault — going to the Court of Queen's Bench.

In The Divorce Act, when you go to divorce at the same time in two different jurisdictions, the person who files first, that's where the thing is heard.

I don't think there is any clarification as to what happens in cases like that and with no fault, either party being able to apply, I think you might have some confusion there and I think there is a great deal of uncertainty. What happens if you apply for your original order in the Court of Queen's Bench and you are granted that order, as I think you must, with no fault; you kiss and make up for the 90-day period; you come back to the County Court the next time; you go back to the Provincial Judges Court the third time. What happens in variations? Do you go back to the same court that the original order was given? I don't know.

I would like to just deal very briefly with Section 18: "An application for relief under this Act shall be commenced by filing and serving a written statement setting out the reasons for the application and the relief claim." A written statement, to me, would probably be a letter saying what? The reasons — I don't like him anymore. That should be sufficient reasons if it's a no fault. I think the statement should state, "We have irreconcilable differences," and that should be sufficient if it's going to be pure no fault. If it isn't going to be pure no fault, what do we need reasons for? If there are reasons, does this mean that the judge has a discretion? If he doesn't like the reasons, does it mean there isn't going to be a separation; there isn't going to be maintenance? I guess it's a nice thing to say, "a written statement." That satisfies a lot of things. I don't know how the Court of Queen's Bench is going to look at pleadings — what they are going to call as pleadings. Obviously pleadings are contemplated because the very next section says, "Answer, discovery, particulars." Why do we need answer, discovery and particulars when there is no fault? An answer to what? I don't quite understand what you are going to answer if there is no fault. You don't need a trial because there are no issues, obviously. All we have to do is find out how much the man makes and determine there or let the judge exercise his or her judicial discretion to determine how much the payment is going to be.

The failure to file an answer. Here is a situation where the man totally ignores the procedure that is set out in the Act. He doesn't file one and the person against whom it is filed, can't even sign default judgment. The person can wait for the very last minute, as they often do now, show up in court without a lawyer and say, "I want to dispute this." And they permit that to happen. The judge can go ahead without — or Section 20 appears as though he can go ahead without . . . he can adjourn it and let the answer be filed if it's not prejudicial to the applicant. That, to me, presumes there is going to be some kind of a hearing to find out whether it's prejudicial or not. And again, I say, why do you need a hearing if it's no fault?

Section 21 deals with the Interim Orders. I have indicated to you that right now we have an interim order that requires no fault as far as Queen's Bench is concerned. I guess Section 21 is something that we have all longed for when dealing with The Wive's and Children's Maintenance Act. I don't know how necessary it is now because I don't know what the enquiry is all about.

Section 5, if it is a no-fault proceeding and all the judge has to determine is Section 5, then I presume that the applicant should set out in his statement, or in the reasons, all the financial circumstances that the applicant has and all the other facts. I think there has to be some guidance given to the various courts. If I recall the Act, I think you say to the Family Court, you can make up your own rules now. There are all kinds of rules in the Court of Queen's Bench; different kind of rules in the Country Court; we're going to have the third set of rules to determine the same relief in another court.

You've heard something, I think, of the problems of enforcement. That's always been the most difficult thing to explain to a successful, if I can call it that, applicant, somebody who has got a maintenance order from their spouse, why they have not been paid. I think the figure has been bandied about at 75 percent of all maintenance orders are unenforceable or not enforced. It seems to be about the easiest order of the court to avoid is an order for maintenance, and it troubles me because this, I think, is where the heartache comes in on not only the breakup of the marriage, but the fact that the woman quite often is compelled to go on welfare and the children do without a lot of the necessities of life. The Criminal Code has a provision in it which makes it a crime by way of indictment if you flagrantly disobey a court order. The section is never used. When you are determining penalties under some of the sections of the Criminal Code, there are provisions for

restitution. Perhaps this section can be looked at and, again, you might have to do some work with the federals on this, to compel restitution, restitution meaning arrears.

I guess it was Mrs. Paxton who said that the greatest ploy in the world is to let the maintenance order get behind, get hauled up after two or three months of not paying. Quite often the judge says, "Well, not only do you have to give the $100 a month, but you also pay $5.00 on the arrears." It puts the lady and the children in a difficult position we seem to be powerless to do anything about .

Both Bill 60 and Bill 61 indicate to me that a great deal is expected from the power of the court. The power of the court has never ever been able to enforce a simple payment of maintenance and here you are going to ask the court to divide hundreds of thousands of dollars worth of property, compel employers to divulge information, go behind a lot of the financial statements, and we can't even get a simple maintenance order paid. I think it was Mrs. Oliver that suggested a central registry and enforcement through The Income Tax Act. It always bothers me because I know that if you owe ten cents worth of income tax, you are going to damn well have to pay it. If you owe hundreds of dollars of maintenance to something other than a government, there doesn't seem to be any mechanism at all for enforcing that. I have thought myself for many years one of the ways to enforce this was to assign all orders and judgments to the Federal Government and have the Federal Government enforce it the same way they enforce income tax arrears. They very rarely do without the payment of income tax, I think maintenance should be put in exactly the same position. I think this is the biggest crime that's inflicted upon the people that suffer from the breakup of marriage and most of the time they are the women.

I think it could be resolved. The income tax requires a certain amount of secrecy. You can never reveal any sources that are given to the Income Tax Department, sources such as where the man is working and where the man is living. It should be a simple thing in this day of computer to locate the man. We can't even locate the man most of the time. He changes his name. He might not be able to change his Social Insurance number but you try and get that Social Insurance number. There has to be some mechanism. I am suggesting that again we try and do something with the federal authorities about making the use of the facilities of the Income Tax Department for the satisfaction of maintenance arrears.

I share with Mrs. Paxton the complete frustration in trying to enforce a maintenance order. I have more than a few in the office that I have been unable to effectively collect; I have just not been able to enforce them. Your continuing garnishing order is fine as long as the man continues to work; it's not so good once he quits or once he leaves the province. I don't know whether any of you have suffered the frustration of trying to collect under The Reciprocal Enforcement of Maintenance Orders Act. Not only would you have to get your Attorney-General's department to move or get the people in the Attorney-General's department to move but you have to get the Attorney-General's department in another province to move as well. And by the time you get it, either the people are too old to appreciate it — the results are just not gratifying at all. I don't think this Act covers that glaring weakness and I think it is something that the Legislature should address itself to.

I would like to spend a few brief moments, if I may , on Bill 61. I adopt Mrs. Bowman's position completely. The wonder that I have is why the Law Reform Commission recommendations were not adopted. It seems to me that not only do they resolve the problem, they're fair and I think they're workable. I think there was some talk about the family farm. I think one of the reasons why the family farm was always treated differently and those people who are farmers can correct me on this, was that the man always wished to pass the farm on to the eldest son, and he couldn't very well do that — well, Mr. Cherniack is looking at me — but there was always the desire for the son —(Interjection)— I think it's still the same today and if you give it to the wife you are not going to be able to pass it on. This my thought anyway. You notice that there is a rise in the corporate farming now. That's one way, I think, when they incorporate the farm you avoid a lot of the problems that the farmer feels he has. You avoid, I think, the heavy impost of death duties, you avoid gift tax, you avoid capital gains. It's a pretty good built-in estate plan. These are the reasons why I think the family farm has always been treated differently.

When we first looked at the Act and we looked at it prematurely as you have indicated to me, Mr. Pawley, we were struck with the fact that the very first issuance of the Act indicated that . . . we thought the wages were even included. Wages as Mrs. Paxton has said — and I am always referring to Mrs. Paxton; I was delighted with her presentation — wages appear to be the only real asset that most of the people have and it, as somebody pointed out, is only good usually for about three days and then the institution of that particular marriage is assetless. That sounds nice.

I'd like to talk about realities as Mrs. Paxton has, about wages. I mentioned prior obligations. Mr. Houston touched very briefly on what I call the psychological problem with wages. If you take too much of the man's wages, he is not going to want to work. The judges at the Family Court always say,

"We can't leave him with nothing; we have to leave him with the incentive to go out and make some money." That's usually the No. 1 reason why they don't put people in jail a lot for default is because if a man is in jail he can't very well pay.

I am not at all as unhappy about judicial discretion as obviously the Legislature is. It has stood us in good stead up till now, I think Mrs. Bowman's approach on when it should be used is fair and just. I trust the judges. I am not as fearsome and as fearful of the judges as some of the people are. I would like to have had more input in both of these Acts with respect to the Unified Family Court. I think that's something that's coming. Somebody says that Bill 60 and Bill 61 are ideas whose time has come, I think the Unified Family Court has to be looked at and I look at that as being the appropriate vehicle to encompass both of these Acts. We've dealt with retroactivity *ad nauseum*.

One of the things about retroactivity that bothers me is something that Mr. Houston touched on albeit briefly, and that was dealing with separation agreements. He said, if I recall correctly, that here are people who separated by way of separation agreement last year. And in that separation agreement they settled their affairs in accordance with what the law was at the time they made the settlement, as a lot of people married, knowing what the law was at the time of the marriage. Now you say things have to be retroactive. People with separation agreements should also have the opportunity of reviewing their position with respect to what they gave up when they signed the separation agreement.

Section 2(2) and Section 28(1), I don't know, I think they're totally incompatible. Section 2(2) I think speaks of living separate and apart if I remember correctly. Oh yes, living separate and apart pursuant to an order. Do you know that right now if you get an order from the court for a separation, it does not include the disposition of any property? There's no such thing as a Family Court order that can deal with property.

Section 28(1) seems to take into account separation agreements provided those separation agreements have dealt with all of the assets. 28(1) subject to Section 5, the standard marital regime does not apply to spouses who on May 6, 1977 have entered into or have a subsisting marriage settlement under The Marriage Settlement Act. Does that mean that the marriage settlement has to be registered, I don't know. Or any marriage contract or any other marital agreement under any other law or any subsisting separation agreement whether written or oral. How can you have an oral separation agreement that deals with real estate? Do you set aside the statute of frauds? I don't know. It says, "that contains provisions relating to the disposition of any marital home of the spouse or any shareable asset." I know that you can't have an oral agreement dealing with real estate. These are cases where I think as far as the two are concerned, they're totally incompatible.

I said initially that I wouldn't deal with Bill 61 as deeply as I would with Bill 60. Of the two, I don't think there is any question, I can certainly live with Bill 61. I think myself that the concept is sound, I think it needs a lot of tightening up. Bill 60, I share with Mrs. Bowman her abhorrence of the problems that Bill 60 is going to create. Thank you very much.

MR. CHAIRMAN: Thank you. There may be some questions. Mr. Cherniack.

MR. CHERNIACK: Mr. Rich, you expressed disappointment, but you used a stronger word, that the Law Reform Commission recommendations were not accepted. Would you not agree that to the very largest extent, tbe recommendations of the Law Reform Commission were accepted, were acted on and disagreed with to some extent?

MR. RICH: I certainly agree that in the main they were, but I think what has happened here is that the disagreement or the changes that have occurred are those changes that make it more difficult to carry out the Law Reform Commission Paper.

MR. CHERNIACK: No question about it, but yet it can be said fairly that we have gone some steps beyond the Law Reform Commission but have accepted most of the recommendations and of course the principle. Do you agree with that?

MR. RICH: I do agree with that.

MR. CHERNIACK: Now, one other minor matter. Toward the conclusion of your remarks, you agreed with Mr. Houston about the fairness of going back to separations of the past. It is my interpretation, and you heard him as well as I did, that he was saying, "Well, if you are going to be so wrong as to go retroactive then why not in all fairness go all the way back?" I don't think he was proposing that we should go back at all, but then said, "If you are going to be wrong, be consistently wrong." That's my interpretation of what he said. Am I wrong?

MR. RICH: No, I think perhaps you are right. I was just looking at that as an example of the distortion of retroactivity.

MR. CHERNIACK: Well, if I am right about my interpretation of what he said, do you support which of his two: that we shouldn't do any retroactivity at all, in spite of what is recommended by the Bar Association Subcommittee; or that we should really accept his recommendation and go all the

way? Because you don't agree with him in principle.

MR. RICH: I don't agree with him in principle but I didn't think that the Bar Commission recommended retroactivity. I thought this was one of the . . .

MR. CHERNIACK: As I read it, the Bar Commission — the Bar Report, I'm sorry — and the Law Reform Commission, in different words, said, "Have unilateral opting-out," which expression this . . .

MR. RICH: That cures, to my way of thinking, retroactivity.

MR. CHERNIACK: . . . has now rejected, "and take into account on a separation where there was an opting-out, a sharing of assets taking into account assets that would," to put it in my words, would otherwise have been shared except for the opting-out but in a different way with a different measuring stick. So, in effect, I believe the Law Reform Commission, and I believe your subcommittee, agree that assets acquired during marriage prior to the enactment of the Act, should be looked at from the standpoint of a form of division but not necessarily equal. And Mr. Houston is opposed to that.

MR. RICH: Mr. Houston is unalterably opposed to that. I don't even use them advisedly because that is . . . I am opposed to the concept of retroactivity but if we must have it, please let us have it with respect to what the Law Reform Commission said. Let us have retroactivity if we must, but let's use judicial discretion in tempering it.

MR. CHERNIACK: But you know that we don't "Must." It's up to us to decide.

MR. RICH: That's what I'm saying.

MR. CHERNIACK: Then you are not following the recommendation of the Law Reform Commission which did provide for a measure of retroactivity?

MR. RICH: Retroactivity in relation to the use of judicial discretion to determine the division.

MR. CHERNIACK: But you say, "only have it if you must." But you oppose having it.

MR. RICH: No, I don't oppose having it. I'm not that unhappy with retroactivity and I can certainly live with it if it is retroactivity as defined in the Law Reform Commission Report.

MR. CHERNIACK: All right, Mr. Rich. I want to make a general comment and because you and I have been colleagues in law since you entered the profession and I have respect for you, I want to give you the opportunity of slapping me down for the unfairness of my comment. And that is, that listening carefully to what you said, I felt that as an individual, you not only properly but very helpfully pointed out what you saw as defects in this proposed legislation. I wonder whether you could not have taken into account the fact that the Legislature without dissent approved the principle of these bills, brought them here in order to listen to representations and then to develop a workable Act as a result of hearing those representations.

In that light, it seems to me that as a member of the Bar Association, it would have been helpful had you brought suggested amendments rather than the criticism and especially since you have had in your possession information as to the nature of the drafting for a couple of weeks.

MR. RICH: Only Bill 61.

MR. CHERNIACK: And you have had these bills for some period of time too. It must be maybe two weeks also. On May 6th, wasn't that the big day?

MR. RICH: Yes.

MR. CHERNIACK: In any event, it would have helpful, I think, to us as legislators, to have had a more concrete proposal as to what the changes ought to be. Now, I don't discount the contribution you have made by picking section by section and pointing out the problems, but do you not think on reflection it could have been a little bit more positive?

MR. RICH: I think so. I think, by way of alibi or excuse or whatever you want to say — I don't much care what word you use — June is without a doubt the worst month for almost anybody who is practising law and I think it has been explained to you before . . .

MR. CHERNIACK: I remember.

MR. RICH: . . . and you've got to practise before the courts to know what June means and the preparation the month before that. We looked at the bill. We looked at it in depth; we looked at both bills in depth and we have had more than one session and we came to the conclusion very early on that Bill 60 was so unworkable that we just had to do everything we possibly could to persuade — it was my interpretation anyway — to persuade you people not to pass it. We thought that you were creating more problems than you were resolving.

MR. CHERNIACK: I deeply appreciate your stating what I have been believing all along, that that was the intent of the Bar Subcommittee although it was never stated as forthrightly as you have just done.

MR. RICH: I think that's what happened on that particular bill. The other bill we looked at and we said to ourselves, that is a workable piece of legislation. The other one, we thought was a mess.

MR. CHERNIACK: To the extent that our legislative drafters are able to fashion a bill which is more workable. To that extent it is very helpful that your criticism has been voiced even at this stage.

MR. RICH: With respect' Mr. Cherniack, I think that's what the Bar Association tried to do, is to try to say to you or point out to you how bad we thought the legislation was in the hope that maybe the legislative draftsmen could do something about giving us something we could work with.

MR. CHERNIACK: That by all means. I just must remind you, maybe you weren't here and I now have to paraphrase the chairman of your subcommittee who said, "Well, if you go along with our suggestions, we think we can help you work towards improving them."

Now I come to the fact that you have disagreed with policy issues, which of course is beneficial. You have also disagreed with the drafting and I distinguish between the two and I would have afforded more help. But I want to be more specific about . . . Firstly, you have listened to the discussions on which court; you have pointed out the problems when you have three courts to choose from. What is your solution?

MR. RICH: My solution is a unified Family Court and let's get the mechanism to do the job.

MR. CHERNIACK: Right across the province?

MR. RICH: Sure.

MR. CHERNIACK: And then remove from the other courts their jurisdictions?

MR. RICH: Mr. Cherniack, they don't want to do . . .

MR. CHERNIACK: I don't care about their . . .

MR. RICH: Well, you are dealing with human beings, sir, and it's very important.

MR. CHERNIACK: But you are saying one unified Family Court system is the answer.

MR. RICH: I think if you would give us the mechanism . . . can be workable.

MR. CHERNIACK: . . . do that, there is finally apparently an agreement to setting up one which is considered a trial court, is it not the same . . .

MR. RICH: I think they have them in Newfoundland now. or three judges; B.C. has one. Winkler County has set up three'

MR. PAWLEY: We have a unified Family Court that will be established this fall in St. Boniface.

MR. RICH: We've been waiting a long time for that.

MR. CHERNIACK: As your partner pointed out, it takes a long time to translate into action what people think. Then you say the answer is the unified Family Court and until then, what courts would you remove or limit?

MR. RICH: Well, you've heard some — I wasn't here — but there were some pretty acid comments about the Family Court. It's a difficult court to practise in.

MR. CHERNIACK: Well does that bring us to the County Court?

MR. RICH: No, the Court of Queen's Bench is a perfect vehicle, I think. The County Court hasn't been used enough. It's being used more and more because a lot of us do not go to the Family Court and we take our applications on the Wives and Children into the County Court.

MR. CHERNIACK: But would you accept . . . I think you accepted Mr. Malamud's recommendation that the Queen's Bench could have the matter in its hands and delegate to a Family Court person, a magistrate.

MR. RICH: Could I interrupt, please? Remember we used to do that for mechanic's liens?

MR. CHERNIACK: Very well.

MR. RICH: When we used to have mechanic's liens in front of . . .

MR. CHERNIACK: Very well, very well, and that you recommend. Well, that's very helpful. Now, Mr. Rich, another small point. You talked about enforcement of the maintenance orders. You talked about income tax and maintenance orders. I can see various differences. I can see just the mere fact that the Federal people are involved in Income Tax, that they can follow through and find a person more readily. I don't believe that they collect every ten cent piece owing to them.

MR. RICH: They do an awfully good job.

MR. CHERNIACK: Yes, because they have that ability to follow through; a province doesn't and until we can . . . I don't know if you favour a Federal State or otherwise . . .

MR. RICH: No.

MR. CHERNIACK: . . . but it becomes a little difficult, you will agree.

MR. RICH: We have for years surrendered certain of our Provincial powers to the Federal when it suited our purpose and I think this might be one, the collection of arrears on maintenance orders.

MR. CHERNIACK: It so happens, Mr. Rich, that this present government has been a leader in attempting to get the Federal Government to assume more jurisdiction in the maintenance field.

MR. RICH: I think the idea that Mrs. Paxton said. Let's pay the orders. If you get a court that says this lady needs money, why doesn't she get it?

MR. CHERNIACK: I was coming to that. Mr. Houston said that in his opinion, based on his

experience, that judges take into account the availability of welfare. Just an opinion, he had. Now, I take it to the next step and I should have asked him except it was getting late, whether he believes that tax moneys should be used to pay maintenance orders in the absence of the receipt of moneys from the husband.

MR. RICH: Are you asking me? I can't answer for Mr. Houston.

MR. CHERNIACK: Of course. **o, I think I know his answer, that's why I should have asked him.**

MR. RICH: I think it should be used, yes. I think there is a heavy responsibility on the judicial process to enforce its own orders, for want of anything better.

MR. CHERNIACK: But now we are not talking about enforcement. We are saying, in lieu of enforcement, let the taxpayer pay.

MR. RICH: Let me come around to the point. I would like the judicial process to enforce its own orders and in the process of enforcing it, make sure that the lady doesn't do without. The various governing bodies suggest that the lady should go and use her own resources to enforce something that is properly the State's responsibility. Let the state pay. As I say, let's get an assignment of all these judgments, assign them to the Federals if that's what we have to do, and let them go out and collect. You people even collect under the Unsatisfied Judgment Fund . . .

MR. CHERNIACK: You would agree though that under the Unsatisfied Judgment Fund there was always a shortfall which the taxpayers had to pay. That's okay with you?

MR. RICH: That's okay, you are usually paying welfare, so . . .

MR. CHERNIACK: You will also agree that if the government paid all maintenance orders, there would be a substantial shortfall which the taxpayers would have to pay? I don't quarrel with you on that although I believe there are people in this Legislature who will shudder at the thought of the taxpayers being further involved than they are now.

Now I ask the next question. Should the government, on behalf of and reaching into the pockets of the taxpayer, pay the maintenance order which is ordered at any level for that wife, or do as it is now doing and that is paying it at a minimum level? Because right now we are paying every maintenance order to the extent that on the welfare rolls we are paying — but that's at the standard set by the welfare. Now, what you have said up to now is, pay the maintenance orders, which means for a wealthy couple it could be $1,000 a month easily and much more. Now what do you see as the government's role in using taxpayers' money as between the levels of the standards that the judges impose for the different people?

MR. RICH: Well, if it is a wealthy person, I don't know what mechanism can be used but we use the mechanism now by paying it into the Family Court. I have orders that are $1,500 to $2,000 a month that are paid to the Family Court and the Family Court pays it out. Why not do it that way with the wealthy person? Nobody loses any money.

MR. CHERNIACK: I'm sorry, I am now talking about that wealthy husband who has run off to Nassau and whom we can't reach. You say, and I'm inclined to agree, that the taxpayers should pay for that person in enforcing the order. But this fellow is out of reach and the order against him is $1,500 a month and he is not paying. Should the taxpayer pay $1,500 a month to one spouse and welfare rates to another spouse?

MR. RICH: I don't think it should pay welfare rates. Let me just go back to the bottom rung and say it should pay what the court orders.

MR. CHERNIACK: But sometimes the court only orders the welfare rate.

MR. RICH: **o.**

MR. CHERNIACK: No. But didn't Mr. Houston tell us about some court, Judge Deniset's court, where he said, "Well, if all he's going to pay is $200 or he'll quit his job, then he might as well pay $200.00." I'm assuming $200 is . . .

MR. RICH: He won't make that finding. He'll say she should receive what would be appropriate in the circumstances, as your Bill 60 says. You set out a criteria of what the lady should have and that's what should be paid.

MR. CHERNIACK: I thought he was only going to order as much as the man would pay, lest he quit his job. You yourself said, "Well, we don't send people to jail because if they go to jail, they won't earn."

MR. RICH: Yes, but if the judge orders a fair amount to be paid to keep the woman at whatever level she is entitled to be kept, whatever level the judge determines is right, she should receive that, whether it's paid by us or paid by somebody else.

MR. CHERNIACK: Mr. Rich, now we know that the court, and I will not dare to suggest bias, but the court, knowing that the payment will be made by the government if it can't enforce it, will, I believe, make a strong effort to provide a decent standard of living for that spouse, knowing that the

husband's willingness to pay is no longer in question, that the husband's resentment is no longer in question, that the husband's running away is no longer in question from the standpoint of the spouse, but that the taxpayers will pay it. He will set a level higher than welfare.

Now we have the situation of the two women, one of whose husband deserted her and the other whose husband died, and the widow is on welfare and the one woman whose husband deserted her is not on welfare but getting more from the taxpayer. Doesn't there seem to be some inequity there?

MR. RICH: The same inequity, I guess, that Alice Steinbart mentioned, that there are going to be some hard cases with Bill 61, I suppose. Let's just look at that. I indicated to you that there is an indictable offence under the Criminal Code. If somebody goes off to Nassau and the Bahamas, I think we would bring him back and we would put him in jail if we had to. You people operated, or the government operated, an Unsatisfied Judgment Fund for years and years and years, where the judge knew that there was going to be payment made, with very little opportunity of collecting and I don't think the judgments were out of line. He didn't give more because there was an Unsatisfied Judgment Fund. The judges are pretty responsible people. I don't think the judges will, merely because it isn't going to be the husband who is going to pay, order more than what the person is entitled to.

MR. CHERNIACK: Is that a valid comparison where one is assessment of damages and the other is a discussion as to a standard of living?

MR. RICH: I think so. The judges are very fair.

MR. CHERNIACK: Okay, I don't want to debate that further. Now, let's talk about fault. The way I approach this bill is that there should not be a dispute or discussion as to who is at fault for the breakdown, but I do see the need to assess effort, or a fault, in relation to the opportunity and taking advantage of the opportunity to become financially independent. I think that after the marriage has broken down, that then I would expect the dependent spouse to make an effort to live at a decent standard, not be extravagant, and try to get a job or try to go to university and equip herself. I would say, if that person is not making an effort in the judgment of the court, then I think there is a form of fault and I would be prepared to penalize her by reduction or removal. But I would not want anything to go to reflect behind that separation as to why it happened because I don't think it's of value to know that. Do you accept that concept, that difference of application of fault?

MR. RICH: I accept the concept of no fault, particularly with respect to The Marital Property Act. I don't think that no fault is important at all there. With regard to Bill 60, however, I think fault is important, not in necessarily determining quantum — I think you had a discussion with Mrs. Bowman where she talked about the "bejesus syndrome."

MR. CHERNIACK: Yes.

MR. RICH: And the six-month marriage, and you saying that aren't you penalizing somebody because that person was responsible? As I understood the issue, Mrs. Bowman said, "No, there is something more than the penalty. There's the deprivation by the innocent party of what she thought she had, and that is, a marriage state."

MR. CHERNIACK: Which is damages?

MR. RICH: Call it whatever you wish. She is certainly entitled to some compensation for whatever it is that she has lost as a result of the idiot doing what he did. .

MR. CHERNIACK: So now we are saying that there is a form of damage, penalty, award, or compensation . . .

MR. RICH: She should get more than if she was the one that ran off . . .

MR. CHERNIACK: . . . compensation. And you are concerned about disputes in court?

MR. RICH: Yes.

MR. CHERNIACK: Now, I don't see any problem with the dispute as to how much there ought to be paid. That happens. You can resolve that by making it a simplified 40 percent of income shall be paid regardless of . . . and that should resolve disputes. But you said, and you seemed to want to avoid a dispute and I say that if the dispute is in relation to need and availability of need and all those factors, most of which come straight out of the Law Reform Commission on Maintenance, then I don't see a problem with disputes. But you do?

MR. RICH: I do, yes, because disputes — they are going to start to do on what we call the "he says, she says." When you are in Family Court, it's always everybody trying to make the other person look back and this is what you are going to do. You are going to say, "She didn't take out the garbage."

MR. CHERNIACK: I'm not talking about the past.

MR. RICH: You mean for the future projection?

MR. CHERNIACK: Yes, maintenance we are talking about. That's my point. I think that the one thing we tried to — and we didn't succeed and I hope we will yet — to eliminate from Section 5 of The Maintenance Act, is the opportunity or the need — yes, the opportunity — to go back behind the separation and start finding faults — she did that, she didn't do that, he said that. I want to talk about

the present and to that extent only do I feel I want to live with the judge's discretion. I accept judicial discretion in maintenance. I do not accept it in Marital Property because then a chartered accountant can do that and I don't see the point to that. But in the Maintenance Section, I do see judicial discretion. To a large extent, I have confidence in it but I do want to remove from the judge the opportunity — and I can't completely — the opportunity to have his own bias reflected by what went on prior to the separation. I think that that's what we tried to accomplish in Section 5 as compared with the recommendation of the Law Reform Commission because we took out that — and that's all we took out — the relative responsibility of both spouses for the separation or marital breakdown or for the refusal or neglect to provide support. We took that out because to us that meant fault-finding and we don't want the judge to do it. We can't force him not to because his own bias may make him do it, but we think on appeal, the Court of Appeal would say, "Heh, he imputed a motive that relates to fault there." Do you disagree with our approach?

MR. RICH: o, I don't.

MR. CHERNIACK: And on that basis, I would eliminate 5(e), because I think . . .

MR. RICH: Take it right out of the Act?

MR. CHERNIACK: I would take it out; that's my present inclination. How do you react to that?

MR. RICH: It would certainly overcome a lot of the objections that I have. I thought the whole Section 5 was just rife with the kind of things that will be used by competent counsel to convince the judge that the lady shouldn't get as much as she wants to get.

MR. CHERNIACK: Because of past actions?

MR. RICH: Yes. But I think that you are going to have past actions brought up all the way down the line. You are going to have a lot of judges permitting it to go in. And you're not going to have many people going to the Court of Appeal.

MR. CHERNIACK: You see, Mr. Rich, what we said specifically was, "The judge shall consider the following factors."

MR. RICH: Yes.

MR. CHERNIACK: I determine that to mean, no other factors . . .

MR. RICH: I think you even said so on your amendment, "and no others," if I'm . . .

MR. CHERNIACK: Oh, fine, then you say a judge will still do it.

MR. RICH: Well, he's going, I think, with respect to any one of them — what is it, up to (k) or (l) — there are going to be differences of opinion between the two parties as to what constitutes whatever it is that they are fighting about.

MR. CHERNIACK: But, really, if you read these carefully, isn't it the present, not the past?

MR. RICH: Yes.

MR. CHERNIACK: And if a judge goes into the past, would that not be grounds for appeal?

MR. RICH: It would be grounds for appeal.

MR. CHERNIACK: One more thing. I have taken up a lot of the Committee's time, just one thing. You didn't really deal with common-law; you passed it by. Do you not believe that a common-law wife who has lived with her husband for 30 years and contributed to the marriage, common-law marriage, and who has thus been denied the opportunity to acquire the means whereby she could be financially independent or self-supporting and has reached the age where she is unlikely to be that, do you not think that proving the need, that she should be entitled to some maintenance from her common-law husband — even if she doesn't have a child by him?

MR. RICH: I have always had problems with common-law. I have always said to myself, if a person chooses to live in such a manner, knowing what the law is, then that person shouldn't be able to come back and complain because they are not being taken care of when they had the choice and the opportunity. In the old days, a lot of people couldn't get a divorce and common-law was almost a necessity if people wanted companionship. But today it isn't.

MR. CHERNIACK: What about those people? They are still around.

MR. RICH: Well, there might be an inequity in that but a common-law association to me is still a common-law association.

MR. CHERNIACK: Thank you.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Rich, from the discussion which you just completed with Mr. Cherniack, I gather if 5(e) was removed from 5 and the reference to conduct related to the present, not going back into the past, that you would find that fairly acceptable to you?

MR. RICH: Certainly a lot less offensive that I find Section 5 now. I think that was the one that struck us immediately as being the one that made Mrs. Bowman's hair curl, saying for sure this is going to end up in the same type of dog fight that we ended up in under The Wives and Childrens. That would eliminate certainly a lot of the dirty linen but I don't think it would eliminate a lot of the

disputes. Maybe you can't avoid disputes. It doesn't do away with the rancour, that's for sure.

MR. PAWLEY: I just want to mention to you, Mr. Rich, because you indicated that Mrs. Bowman was concerned about that paragraph, that in the Law Reform Commission's recommendations on Page 113 that principle is recognized.

MR. RICH: The fault principle.

MR. PAWLEY: No, 5(e). The words are, "Where by agreement one spouse is engaged in taking care of the home and/or family and has no significant independent income, or the other spouse is employed outside the home, the at home spouse is entitled by reason of her or his unpaid work in the home to be paid and to be considered as a full and equal partner in the economic and financial aspects of the marriage." That's the principle in 5(e) that there was an attempt to recognize in the legislation, taken from the Law Reform Commission's recommendations.

MR. RICH: If I recall correctly, the Law Reform Commission recommendations did not emphasize the no-fault maintenance, if I remember correctly. Am I wrong on that?

MR. PAWLEY: They didn't ever say behaviour only as a factor.

MR. RICH: Yes, but I don't think they ever recommended no-fault maintenance.

MR. PAWLEY: That's right.

MR. RICH: I think in context of the non-recommendation of the no-fault, that would certainly be germane.

MR. PAWLEY: But this paragraph which I just read to you, Mr. Rich, I don't think that relates to fault, the paragraph that we are dealing with.

MR. RICH: The paragraph that you are dealing with, would you suggest, then — if I may direct a question to you, Mr. Pawley — that should be used in substitution of Section 5(e)? Perhaps the clause can be framed to take that into account and thus come in line with the Law Reform Commission's recommendations.

MR. PAWLEY: We will re-examine that.

MR. RICH: Perhaps that's one way we can accomplish both purposes.

MR. PAWLEY: We just feel that 5(e) reflects pretty well the Law Reform Commission's recommendation on Page 113 but we will re-examine that.

MR. RICH: I will have to look at it again in the light of what you said. But I think the original draft that we saw of the Family Maintenance Act even contained a more offensive section, Section (I) or whatever it was, that seemed to just open the whole ballgame completely, if I recall correctly. And that was only in the rough draft. I think that was certainly not in the final draft.

MR. PAWLEY: You made a number of other references to sections in Bill 61 as in connection with the personal allowance. You are aware that was also Law Reform Commission recommendation.

MR. RICH: Oh yes. I wasn't happy with that. I can probably live with it. I wasn't happy with it there. I just thought it was one of the things that to me is almost unworkable.

MR. PAWLEY: With the changes that developed from your discussion with Mr. Cherniack, if those changes were made and other smaller changes which deal with, you know, obviously smoothing up some of the reading of the bill, would you be able to recommend that the bill should proceed still this session?

MR. RICH: The biggest stumbling block that I see is the lack of a vehicle to properly carry out what I think this legislation is trying to do. I don't think you've got the facility. I think — and I'm speaking personally — that there never seems to be enough money available for the administration of justice, and when you're bringing in this type of legislation, which is going to literally invite the people to the use of the court, you're going to have to provide a heck of a lot more courtrooms, a lot more court personnel, a lot of Legal Aid personnel. You are going to increase the amount of money that you're going to expend and, unless you are going to give us a vehicle in which to operate this thing and I don't think you can — I think that's the problem there.

MR. PAWLEY: Are you suggesting that there will be more pressures that way than under the present Act, the present legislation?

MR. RICH: Oh yes, your Court of Queen's Bench is going to be overwhelmed.

MR. PAWLEY: You were here, then, yesterday when Mr. Carr was . . .

MR. RICH: No, I wasn't here. I was busy . . .

MR. PAWLEY: He was indicating that, as a result of our Bill 60, that in fact there would be — as I understood Mr. Carr yesterday — less activity at the Family Court, more in the Queen's Bench, more divorce thus less pressure.

MR. RICH: If Mr. Carr made that statement, I don't know how you develop grounds for divorce if grounds don't exist. I don't understand how there can be more divorce if there aren't grounds for it.

MR. PAWLEY: His reference was in relationship to the aspect of no-fault being included in our legislation and federal divorce legislation not containing fault.

MR. RICH: Well, we're not comparing the same things. If you are going to have no-fault divorce that's an entirely new ball game. We haven't got no-fault divorce now. It gets tougher and tougher all the time with our courts, to prove divorce.

MR. PAWLEY: But in view of that, you know, your comment was that there would be greater pressure on Family Court.

MR. RICH: Oh sure, you're going to have people running to court almost all the time.

MR. PAWLEY: From the submission yesterday, from the rationale that was presented by Mr. Carr, as I understood him, there would be less activity because of what he saw to be this differential insofar as grounds, divorce and separation, as outlined in 60 — less activity in our Family Courts.

MR. RICH: Somebody somewhere along the line said there will be more divorces, and I don't see how there could be more divorces unless there is more grounds for divorce. Divorce is a pretty ultimate step and you are restricted on how you can get a divorce.

MR. PAWLEY: Well, if I could just deal a little further with Mr. Carr's rationale. He felt that where there were people that had a choice, a choice whether to sue for judicial separation or for divorce, that they would choose the divorce route because of the different . . .

MR. RICH: Yes, I would advise them to do that.

MR. PAWLEY: So, if that in fact was the case, then the end result would be less pressure.

MR. RICH: You've got a no-fault proposition on maintenance which means that all you have to do to get maintenance is to be married and not want to live with the person. Am I right? I mean, surely the moment there is any unhappiness between the parties, the parties are going to say, "I want to be separated." And there is nothing to stop them from being separated.

MR. PAWLEY: Well, that is the present situation.

MR. RICH: No, it is not the present situation. You have to have grounds now.

MR. PAWLEY: Well, there is nothing to keep . . .

MR. RICH: Yes, but you can't get maintenance then.

MR. PAWLEY: . . . a couple living together. They can go later and obtain maintenance.

MR. RICH: Practicality keeps them living together because if she walks out on him she doesn't get anything. If you have no-fault she can walk out on him and she can get her maintenance.

MR. PAWLEY: Could I just make reference to the fact that your reference to once in the 12-month period the application for variation, that that was a recommendation that was also received from the Law Reform Commission.

MR. RICH: I think it's impractical.

MR. PAWLEY: Are you suggesting there should be no restriction as to the number of times application is made?

MR. RICH: I presume that that refers to one employer during the 12-month period. If the fellow changes jobs, as sometimes these people do, 15 times, you keep running back all the time to get orders compelling employers and, as soon as you get the order compelling the employer, he quits his job and moves on to his next job. What happens when there is the kiss and make-up in 90 days? They separate and the order goes out for the employer to hand out the information and then they get together again and they live for 90 days together. Then they bust up again. Is she going to be stopped, then, from getting information from the same employer?

MR. PAWLEY: So you would suggest that we remove the time restriction, then, completely?

MR. RICH: Most employers now, all you have to do to get information from them is to say, "I will subpoena you to come to court. Get the information for me." And they give it to you. We have bigger problems with banks than anything else, because they usually come to court armed with their own counsel and they plead the Bank Act.

MR. PAWLEY: I wasn't clear as to why you felt that a time limit was required in connection with the section on common-law relationship, because here we are dealing only in such relationships where children exist. Why would we need a time requirement in that case?

MR. RICH: Well, you don't have to live common-law with somebody to put somebody in a family way. It isn't even a question of living common-law. One could father a child and then live with that person after the child was fathered.

MR. PAWLEY: Of course, they would have other remedies in that case.

MR. RICH: Yes, all right, let's have a situation where a child is born illegitimately and you don't live with the lady, and you subsequently live with the lady. There is no child born of that union until after the fact. Unless you are going to say that one-night stand was a common-law . . . And how often have you run into a lady that has had four or five children from four or five different people? It does happen and it happens quite often.

MR. PAWLEY: I would have thought, Mr. Rich, that the other legislation would take care of it.

MR. RICH: Yes, affiliation proceedings are fine. They pay you — they could pay you maintenance,

I suppose. They could order maintenance. But what if they don't.

MR. PAWLEY: Mr. Rich, when you were reviewing the various items in 5 — if we could just return to that — you weren't disputing the need for those items to be included. Your concern was in reference to . . .

MR. RICH: No, I was worried about all the fights that would occur. I was worried about the kind of thing that happens that uses up the court's time now. I was worried about disputes rather than the question of fault.

MR. PAWLEY: But surely we can't get away from those factors being considered and being in dispute, can we?

MR. RICH: I guess we can't.

MR. PAWLEY: Were you suggesting that there need be no reference to these factors?

MR. RICH: Well, you've been in on labour arbitrations yourself, sir, where you have an arbitration board that is set up and they look at all the facts surrounding it and they come to a conclusion. I was hoping that perhaps this could be resolved in that particular manner; a very informal process rather than the use of the adversary system. Again, the use perhaps of a *quasi-judicial* function of somebody like the Master or the Referee.

MR. PAWLEY: So actually, here again, you disagree because in the main the factors in Section 5 are taken from the Law Reform Commission's Report. So in the main you disagree again with the report.

MR. RICH: I don't disagree. I would just hope that something could be done to avoid all the confrontations that I envisage. You look at the report differently than you look at the legislation which flows from it. You see what the legislation does. It brings home the problems that I think the report, perhaps, didn't reveal.

MR. PAWLEY: Just to summarize, you would be not opposed to seeing Bill 60 proceed if it made that important change which you felt was necessary in connection with 5(e), and it was clear that even though conduct would not be considered pre-separation that conduct would be included as an aspect to be considered in the awarding of maintenance on the particular occasion, of course, upon which the application was made for the maintenance.

MR. RICH: Broadly speaking, I'd say yes. But again, you know, I looked at the Law Reform Commission's recommendations and I thought they were genuinely good and then when the Law Reform Commission recommendations were translated, it certainly changed my idea of whether they were as good as I thought they were. This is what sometimes happens. Until you see the legislation you really don't know whether you are going to accept it or not. But I think, with certain changes, I could live with Bill 60 as well.

MR. PAWLEY: Just so we could be clear on that, you're not suggesting that the legislation that we have here — except for that question of fault — doesn't accurately reflect the recommendations. It's just that the legislation, the statute itself — the proposed statute — looked a little different when it was written in a legal sense than in the recommendations.

MR. RICH: So much so that I think it is unworkable the way it is now, with the machinery and the equipment we have to handle it. First there has got to be certain changes made before you can adopt the Law Reform Commission's recommendations.

MR. PAWLEY: Of course, that is another aspect that hopefully we can proceed to deal with outside of legislation. But surely you would not recommend that we continue under the present outdated — and I don't want to go into great detail there — provisions of the Wives and Family Maintenance Act, after we get ourselves straightened out on new improved maintenance enforcement procedure, conciliation, and what not.

MR. RICH: I'm certainly not happy with it. I would like to see the institution of the Unified Family Court first and then the procedure after.

MR. PAWLEY: And carry on with the existing Wives and Family Maintenance Act in the new Unified Family Court?

MR. RICH: I'm not happy with it; I've lived with it for 24 years now and I guess I could live with it a little while longer. I'm not happy with it. I don't think your Act is workable, frankly.

MR. PAWLEY: Well, let's be very clear then. Are you saying the Act that you are looking at is unworkable, or if the change that was proposed to you was made that then you would prefer this to the Wives and Family Maintenance Act?

MR. RICH: At one time I used to think anything was preferable to the Wives and Childrens Maintenance Act because in that piece of legislation the man has no rights whatsoever. None whatsoever, and I thought anything would be an improvement over that. I think I indicated to you that we were working on that last winter. We thought that a revision of the Wives and Childrens

Maintenance Act would suffice, rather than the concept of no-fault maintenance. I hate the idea of patchworking but sometimes it has to be done. I don't think you can carry out this Act, with the greatest respect, without making a fundamental change in the court system that I think I suggested. I think you are going to have to. You just can't handle what's going to occur with the court facilities that you have.

MR. PAWLEY: Of course, if Mr. Carr is right, then you're quite wrong.

MR. RICH: Mr. Carr is probably right.

MR. PAWLEY: Listening to him yesterday, I got the impression nobody would be in the Family Court, or very few.

MR. RICH: I don't think anybody will but you are going to overload the Court of Queen's Bench and they are not going to be able to function. I don't know what the statistic is but I would venture to say that 60 percent of the work that the Court of Queen's Bench does now is domestic relations. I think it is better than 50 percent and I don't think that court is designed for that. You're going to make it 75 percent and they just can't handle it. Nobody is going to go to the Family Court. You would be a damn fool to go to the Family Court. You can only get one kind of relief there.

Let's look at the use of the court in relation to both Acts, where you've got your Property Act, which you have to go to the Court of Queen's Bench or the County Court. The Provincial Court can't handle that at all. So who is going to go to resolve maintenance when you have a choice of going to Court of Queen's Bench? And if you are going to have immediate sharing of assets, then aren't there going to be a lot more references made to the Court of Queen's Bench, or the County Court initially? Wouldn't it follow?

MR. PAWLEY: Let's be fair, though, getting back to this question that if the Act is amended then you are not necessarily holding to the position that you're taking at the present time, are you?

MR. RICH: Well, I am almost married to the idea of fault. I'm not as strong as Mrs. Bowman on it, but the concept of fault to me is important in determining pre-separation, post-separation, and everything else.

MR. PAWLEY: So that is your hang-up?

MR. RICH: That is one of the hang-ups, yes. Mrs. Bowman took a strong position on that. I think I would take equally as strong a position.

MR. PAWLEY: Also I would have to then presume, at the present time, you're not sure whether you, speaking I gather personally for yourself, that you are able to support the Law Reform Commission's recommendations.

MR. RICH: I think, if I recall correctly, the Law Reform Commission did not do away with the concept of marital fault on marriage breakdown.

MR. PAWLEY: But you indicated, when you saw these provisions, even those recommended by the Law Reform Commission, that they looked altogether different to you now on paper, even though you accepted the fact they may have reflected in the report, that you have second thoughts.

MR. RICH: The first thing I saw in Bill 60 was the fact that it was not no-fault maintenance. Notwithstanding whatever was said about it, it was not no-fault maintenance, it was definitely maintenance with fault. That's the way I looked at it. I don't know whether I'm talking in circles.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, any questions I had have been asked and answered more than once in the last couple of hours.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I have listened to Mr. Rich here and the other night we heard Ms. Bowman dealing in particular with Bill 60 and the concern expressed there about the unworkability of that bill. I think we heard an even stronger presentation this morning dealing about that, and now I think we find one that is even stronger still in the presentation that we have had right now on the fact that Bill 60 in its present form and with the amendments that have been proposed, is unworkable and would cause a tremendous backlog in the courts.

In the issue of the Unified Family Court which you have strongly recommended, Mr. Rich, I understand that we are going to set up one Unified Family Court in Manitoba this coming fall. How many Unified Family Courts do you think we would need in the province to handle this aspect of legislation?

MR. RICH: A statistic was bandied about here where one in every three marriages fail. I don't know whether it's that high. I know there is a substantial amount of failure in marriage. I don't know what number they are up to in the Court of Queen's Bench but I think it's past the 15,000 mark in our Eastern Judicial District for divorce since 1968, which is some nine years ago, which works out to what — 1,000 divorces a year, I guess. I think if the legislation that is envisaged in Bill 60 and Bill 61 creates the kind of activity that I think it will, you are going to need a lot more than one. You are going

to have to do a lot of overtime. I can't even calculate the amount that will be required.

MR. GRAHAM: Can you envisage 4,000 and 5,000 a year, and more?

MR. RICH: I don't know how many are in front of our Family Courts now. There are literally thousands of cases. The Family Court judges, there's about four that sit full-time here in the City of Winnipeg; there are several that sit part-time. They over-book. They are like Air Canada; they book more cases than they know that they can handle. I think some of the judges might handle as many as ten a week. That's under this present almost unworkable Act, The Wive's and Children's Maintenance Act. Translate that into the kind of disputes that are likely to be unresolved with respect to the other legislation that is pending, and I think you have got a monumental figure. I would hate to think of the expense that would be involved.

MR. GRAHAM: In that respect, then, you feel that we would just be causing undue concern and dissatisfaction to society if we provided them with this type of Act at the present time without giving them the mechanics and the court facilities to handle the work that would be pushed at them?

MR. RICH: I think there would be a very difficult problem created; there is no doubt in my mind at all. There is a difficult problem now. I don't think we're handling the situation now and it's going to intensify. It's got to; there's going to be that much more controversy.

MR. GRAHAM: You have strongly suggested that we institute the Unified Family Court first before we make changes in the The Maintenance Act. How long would it take a unified Family Court to be set up and fully functional and well into the swing of things before we added an additional aspect to it?

MR. RICH: I can't even guess at it. I don't know the form it is going to take. It's going to be very interesting to see how this one court works. It is going to be limited, as I understand it, to what we call the St. Boniface Judicial District, so it's going to be limited in scope. I'm very anxious to see how it does handle it. I know there is a court operating in British Columbia that apparently operates quite successfully. But again, it is limited in the area of its operation. I'm going into court next week on a four-day contested divorce. That's what we estimate it will take and that's one case that is going to tie up a courtroom for four full days and that involves — we've sort of got a Unified Family Court going there because we're talking not only about divorce, we also have a proceeding under The Child Welfare Act and a property dispute that is akin to the Murdoch dispute that we're all going to resolve at one time. But this is the type of thing that the Unified Family Court will be called upon to resolve. And that is a four-day hearing that we anticipate.

MR. GRAHAM: I was very thrilled last year when the concept of a Unified Family Court was brought forward in the Legislature over a year ago. I want to get on now to a concept that you espoused here in the enforcement of maintenance orders. I believe you suggested that the courts should enforce that order and, if necessary, the state should involve itself directly in that respect. In the enforcement and the making of maintenance orders, what would be the effect if, as you suggest, that maintenance be sufficient to maintain that person in a satisfactory manner, what would be the effect of the maintenance order on the individual if they were unable to provide the necessary amount required? Would the state then go after that individual for the entire amount, or would you envisage the judge setting forward in his judgment the amount that that person should be able to contribute and the state make up the difference? You are a little unclear in that respect.

MR. RICH: First of all, a person shouldn't live better in a separated state than they did when they were married. If a person has a comparatively low standard of living while married they shouldn't be improved merely by separation. So it has to be something that is equivalent to or something less than, realistically speaking, than when they were living together in a happy married state. So it wouldn't be any better standard of living than when the lady was living with her husband. So it can't be greater than that. It would have to be something within the husband's means to start off with, so it would be something less than . . . I think I did state that you cannot possibly operate two homes for the same salary. So both party's standard of living has to suffer so it would be something less.

MR. GRAHAM: Both will degenerate, yes.

MR. RICH: So the state would be asked, I think, to pick up what the judge would fix as a reasonable amount and if the man can't afford it, then there is the variation proceeding. He would go back to court and say that, "It's beyond my ability to pay," and the lady would suffer a diminuation in standard of living as a result.

MR. GRAHAM: I may have misunderstood you. I got the impression that you were suggesting that the court order a specified payment to her even though it may be beyond the ability of the person . . .

MR. RICH: I hope I didn't leave that . . . I didn't intend to leave that and if I did, I am certainly wrong. No, if a man only makes $900 a month or $500 a month and he manages to keep his wife and family on that, surely she shouldn't be better off separated than she would be married.

MR. GRAHAM: A final question that deals with Bill 61. I believe this morning we heard your colleague suggest that 90 percent of the cases this bill would not apply to, that people were doing that

anyway. I think the Attorney-General corrected that to say that in all probability it would only apply to 1 or 2 percent of the people. If that is true, then would you not consider it might be more feasible to have this passed as permissive legislation allowing those that need this protection to opt into it if they so desire.

MR. PAWLEY: Mr. Chairman, I wonder if Mr. Graham would mind if I just interrupt. The statement I made was that I suspected 2 or 3 percent at the most would contract out.

MR. GRAHAM: Very well, I misunderstood the Attorney-General in that respect. But what would your opinion be if this was allowed to be permissive legislation allowing people that wanted that type of protection to opt into it, rather than putting everybody into it and allowing those that want to to opt out of it?

MR. RICH: I can live with legislation that defines what I think Bill No. 61 tries to do. I have fought too hard and too long to try to get something more for women for quite a few years. I think, somebody used the expression, "It's an idea whose time has come," and that is something that I would adopt. I don't think it's as offensive as Mr. Houston seems to think it is. I certainly can live with it. I like the idea of unilateral opting-out with judicial discretion being used, as Mrs. Bowman envisages it in her supplementary paper. I can certainly live with that. I certainly think the women need something more than what they have now, for nothing more than to permit them, if they can't be equal and I don't think they could ever be equal to the men, to at least have the appearance of being equal. I see nothing offensive. It doesn't offend me at all. I know Mr. Houston doesn't think it's necessary and we have had sharp differences of opinion on that but I think we need something more than what we have now and I think for want of a better expression, it's a modern idea and I certainly don't find it offensive at all.

MR. GRAHAM: Thank you, Mr. Chairman.

MR. CHAIRMAN: If there are no further questions, thank you, Mr. Rich.

MR. RICH: Thank you very much.

MR. CHAIRMAN: Before I accept a motion to adjourn, I have been informed there is a Mr. Stoffman present who has a five-minute presentation for the Committee and cannot return again next week. Is it your wish to hear him at this time? Mr. Stoffman.

MR. JIM STOFFMAN: Thank you, Mr. Chairman. I appear on behalf of the Manitoba Trial Lawyers Association. Due to the hour, I will certainly endeavour to be as brief as possible, perhaps not even take five minutes.

Because of the very recent amendments to Bills 60 and 61, I bring forth our comments without the comprehensive and thorough analysis that the proposed legislation would otherwise merit. We submit that in their present form, Bills 60 and 61 are replete with problems in that they are generally ambiguous and lack definition of essential terms. We submit that without substantial redrafting and revision, the bills are unworkable.

Whenever you allow a word or phrase to be interpreted in different ways, you open the avenues for protractive and costly litigation and the bills as they stand today will only add to the lawyer's arsenal and thus ensure that the warring spouses will be placed upon a larger battlefield and will have to undertake even greater wars.

Pertaining to one substantive area in Bill 61, being the concept of retroactivity which you have heard so much about already, we feel that that concept applied to subsisting marriages without some method of invoking judicial discretion, is so repugnant to, inconsistent, and in conflict with the right that every responsible adult enjoys to contract freely, that we vehemently oppose its application. It insults and degrades the intelligence of every married individual. The retroactive law as proposed in Bill 61 excites our emotions of frustration and bewilderment.

Marriage has been spoken of as being a contract or partnership. We submit that you do not give one of the parties to a contract or a partnership the right to unilaterally alter the very foundation upon which the contract or partnership was formed. We must assume that the partners entered into the contract or partnership voluntarily and with their eyes open. The inequity results not from trying to relieve certain spouses from the unfortunate position in which they find themselves in today, but it stems from compelling certain spouses to assume certain obligations and liabilities that were not contemplated and perhaps would not have been undertaken by either spouse at the time of the contract or partnership or marriage some six months or perhaps sixty years ago.

I do not propose, because of the strictures of time, to reiterate all of the concerns expressed by some of the very experienced and learned colleagues of our profession.

We adopt whole-heartedly the technical and procedural criticisms of the two bills advanced by the chairperson of the Family Law Subsection.

If I might just very briefly run over some of the highlights of some further problems that I foresee, and I speak now from a personal point of view. Firstly, pertaining to Bill 61, which obviously will allow for greater litigation and more protractive and costly litigation, not only in terms of expense

financially but in terms of pressures that will have to be borne not only by the litigants but by the children to the particular union in question.

Sections 2 and 28, to my mind, certainly appear to be inconsistent.

Section 36 of Bill 61 speaks of receiving orders, speaks of dissipating assets — whatever that means — and I put it to you that some definition of that particular term must be incorporated. Does it mean that a man has to hire a transfer company or purchase a plane ticket? We don't know what dissipating assets means.

Section 24: What is an excessive gift? Nobody has mentioned that — mention has been made of it but we certainly don't know what an excessive gift is.

With the numerous terms that are contained throughout these bills, if you put in so many terms that are without definite meaning or capable of different construction, all that you are inviting is more and more litigation.

Very briefly, with Bill 61, I cannot conceive of how you propose to do away with the concept of fault because in some manner or some form, a lawyer will be able to get it in through any door no matter what the legislation is proposing and no matter how you frame each particular section, because whenever there is the issue of custody involved, there will be reference made to the drinking, there will be reference made to the beatings. And these will be brought out, not in terms of the financial matters of the particular application to the court but insofar as whether or not that particular spouse is a proper parent to have custody of the children. So you can't do away without the dirty linen or without the skeletons being brought out from the closet. It's impossible.

Insofar as Section 4(2), or Section 4 generally is the financial independence and I just pose these questions. Whether or not under 4(2), if one party is financially independent upon the separation and loses that financial independence a month or a day after the separation, whether or not the obligation ceases after the three years? Or if they are financially dependent but gain independence a month later and then lose it a month after that, whether or not again the obligation to financially support ceases upon the expiration of the three years from the date that that party became financially independent for, let's say, for one month. And the rights and obligations during cohabitation, after cohabitation, whether the parties are independently or otherwise financially dependent or independent, those have to be clearly spelled out because the bill is unclear as to whether or not and for what length of time the obligation is upon the spouse to support the other spouse.

Insofar as the common-law situation, I query whether or not a better word to be used in that particular section would have been "cohabit," rather than "live." As far as my appreciation of the law is concerned, one can live as husband and wife and therefore fall subject to the Act within a much shorter period of time than it would require to cohabit as husband and wife and have a child of that union. So that I would recommend the implementation of the word "cohabit."

Section 23 — that was dealing with Section 11 — under Section 23, again I question whether or not the words "fresh evidence" would be the proper words to use in that particular section. What I would suggest the Legislature is proposing to do, in its intent at least, is to allow for a variation of an interim order upon fresh evidence or a variation of a more final order upon a change of circumstances. As it is now, to make the provision only applicable for a variation order on fresh evidence, I respectfully suggest is quite meaningless and that it should read, "upon a change of circumstances," or at least, "upon the introduction of fresh evidence on an interim order."

Again, we reiterate the position we take with the concept of retroactivity. I now speak on behalf of the Manitoba Trial Lawyers Association again, and wholeheartedly endorse every technical and procedural query that was put to this Committee. Thank you.

MR. CHAIRMAN: Are there any questions of Mr. Stoffman. Hearing none, thank you, Mr. Stoffman.

Committee rise and report. The Committee will stand adjourned until Tuesday morning at 10:00 a.m.