Legislative Assembly of Manitoba

HEARING OF THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital

TUESDAY, June 7, 1977, 10:00 a.m.

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TIME: 10:00 a.m.

MR. CHAIRMAN, Mr. D. James Walding.

MR. CHAIRMAN: We have a quorum gentlemen. The Committee will come to order. The next person on my list wishing to speak to the Committee is Ruth Pear. If Ruth Pear is here, would you come forward please. Ruth Pear not present? Leigh Halparin, would you come forward please.

MS. LEIGH HALPARIN: Good morning, gentlemen. My name is Leigh Halparin. I am a member of the Law Society and am involved in the practise of family law. I am a member of the Manitoba Division of the Canadian Bar Association and am actively involved with the family law subsection of the Canadian Bar.

As a member of the subsection, I endorse the recommendations of the Law Reform Commission although I admit to having some reservations at the time I did endorse those recommendations. And after hearing Mr. Houston's brief, I must say that my reservations are confirmed. But before I go into that any further, perhaps with your permission I might digress for a few minutes and deal with something which has caused me great concern.

Unfortunately, my remarks are addressed primarily to Mr. Attorney and I see he is absent. But for the purposes of the record, I find it most curious and am suspect as to why Mr. Attorney has chosen to make inquiry as to whether the brief presented by Mrs. Bowman, on behalf of the family law subsection of the Manitoba Division of the Canadian Bar Association, and the Bar Association itself reflects the feelings of the substantive majority of the family law subsection. In fact, Mr. Attorney had requested that Mrs. Bowman supply him with the recorded vote with abstentions but has neglected to make like enquiry with respect to the vote in other associations. Any individual, or individuals, who attended that meeting — and I might make further comment with respect to the individuals who did attend that meeting. At that meeting, individuals attended who had never before attended a family law subsection meeting during the current year. It was my personal feeling that that meeting was a packed meeting.

In any case, any individual or individuals who attended that meeting and felt that that meeting was not properly constituted, or that there was irregularity in the proceedings of that meeting, had several options open to them. I might assure you that that meeting was indeed properly constituted. There is no doubt about that and, in fact, the individuals who I felt packed the meeting were given the opportunity to vote on the recommendations, and their votes were recorded.

In any case, any individual or individuals who felt that that meeting was not properly constituted had a number of options available to them. At the time that the meeting was held they could have voiced their objections, whatever they might be, or however ill-founded they might be. They could have reported what they felt to be the irregularity to the Bar Council or to the Law Society, or in their presentation before this Committee if they indeed made a presentation before this Committee, could have voiced their objection. If, and I'm not saying that this is the case, but if that individual approached Mr. Attorney or any individual associated with Mr. Attorney, and on that basis Mr. Attorney raised the possibility of an irregularity, then I think, quite frankly, that that is most improper. —(Interjection)— Yes, and I'm not making any accusations but if that were the case I'm saying that it's most improper. I believe the function of Mr. Attorney is not to represent any particular group vis-a-vis another group.

Now, if I may continue, I'd like to deal with those reservations that I advised you that I had initially. I agree with many of the womens' groups who presented briefs before you that there are indeed inequities in the law in recognition of womens' physical contribution to the marriage and therefore the acquisition of assets acquired during the marriage. But why is it assumed and the legislation based on the premise that equity is equality. In many cases equity may be a 60-40 split. There are many marriages where the female spouse, in addition to housekeeping and assuming the major responsibility in child-rearing, also has a full-time job. Her income may be solely used for the maintenance of the family and, in fact, may be equal or close to that earned by her husband. Can it be said in that case that equity is a 50-50 split? Well, perhaps it could be, especially if the parties agree that the wife's contribution was to be equal to 50 percent. But assuming not, assuming that there is no agreement between the spouses, certainly it can't be said that in that case equity would be a 50-50 split.

Or let's take the case of the husband who maintains a full-time job, returns to the household after work, is involved at that time perhaps with bathing the children, cleaning up the supper dishes, on weekends he perhaps takes full responsibility for the children to give his wife a rest and in addition attends to various maintenance tasks around the household: repairing the home, effecting repairs to the home, mowing the lawn, doing the gardening. In that case, can it be said that there is indeed a 50-50 split between the spouses?

Now, the government in this case has made a policy decision and has decided that marriage is indeed a 50-50 partnership. That if marriage is indeed a 50-50 partnership entitling each spouse to 50

percent of the assets acquired during the marriage, then certainly the contributions made by each spouse to the marriage should indeed be equivalent. I am not saying necessarily equal — there is a distinction — but the contribution should be equivalent if marriage is indeed a 50-50 partnership. Yet, the government has not legislated that each spouse is under an obligation to make contribution to the marriage equal or equivalent to his or her spouse.

I submit that if marriage is indeed to be an equal partnership and not just a partnership, as it has been up to now, then the obligation of each spouse must be equal or equivalent and in the event that the contribution of each spouse is not equal or equivalent to that of his or her spouse, a remedy to the spouse who makes the larger contribution to relieve against an equal sharing, just as the law now provides in other non-marital partnerships — and I use the term non-marital in the sense of this bill — must be provided to those individuals as well. That is what I believe Mr. Houston suggested in his brief presented on Saturday, that is, — and if you will forgive me for going on, reiterating — if you must legislate that marriage is indeed an equal partnership and hence assets acquired during the marriage are to be shared equally, then you should legislate a presumption which can be set aside in the event the equal or equivalent contribution is lacking, or, in the event the parties do not intend their partnership to be an equal one.

Now I would like to see and would advise the government to adopt Mr. Houston's proposal with respect to the amendment of The Married Women's Property Act but I suspect that the government will not do so and therefore I am going to turn to some of the inequities in the present Bill 61, with amendments, and deal with some examples of certain inequities which would arise under that Act.

In the event that a marital home is subject to a mortgage, and certainly that's the case with most homes in Manitoba, and the mortgage is in default, under the mortgage the mortgagee has the option of either (1) foreclosing or (2) suing on the mortgage covenant. In the event the mortgagee elects to sue on the convenant, only the owner who mortgaged the property is liable and not the spouse. Now the injustice is clear in that case. A spouse has an interest in the asset but not in the liability. Certainly if a spouse acquires an interest in the home, he or she should also acquire an interest in the liabilities attached thereto. I think that's a point that Mr. Carr rose and was concerned about, that there should be a sharing of liabilities, not in all liabilities but only in liabilities that are acquired in connection with an asset which is shared under this regime.

The Act as it is presently drafted may affect the rights of third parties, as in those cases where prior to the enactement of the legislation a spouse who is the sole owner of the marital home, with the consent of his spouse, granted an option to purchase the marital home to a third party for good and valuable consideration. I don't know if all of you are familiar with this but under the existing law, irrespective of whether a male or female holds title to the marital home, if his or her spouse does hold title, then the other spouse has dower interests in that home and the spouse that holds title to that property cannot mortgage, sell, pledge, hypothecate or whatever, that home without obtaining his spouse's consent.

Now this is the case of an individual who, prior to the enactment of the legislation, is the sole owner of the marital home and obtains the consent of his spouse to grant an option to purchase to a third party, and that option is given for good and valuable consideration. Let's assume that it is a three or four year option and the consideration is, let's say, $5,000.00. That consideration is given to the homeowner himself, the one who holds title. Now let's say the legislation goes in January 1, 1978 — that's the date, and the option period has not yet expired at that time. Now, gentlemen, you tell me whether that third party is entitled to exercise his option, or would you say the contact between the original owner and the third party is frustrated? I don't know. And if it is frustrated, is the original owner bound to return the consideration to the third party? If he is, what if the consideration is no longer in existence? It's not unreasonable for that individual to have spent that money. Is he now bound to make restitution so that his wife is allowed to stay in the marital home? Why should the original owner be liable to compensate either his or her spouse or the third party as when he entered into the contract for option he was operating within all laws and, gentlemen, this is an example of what retroactivity does to people.

Furthermore, gentlemen, many individuals have released many of their rights under The Dower Act for good and valuable consideration. There is a provision in The Dower Act, Section 6, subsection 1 which allows you to release your dower rights for good and valuable consideration. That type of a release is wiped out under this Act and on my reading of the Act, Section 28 does not protect an individual who has had his or her spouse release dower rights. The release is ignored even though valuable consideration is passed — and valuable consideration must pass under The Dower Act — that you are ignoring that.

For example, Mr. A. is the owner of a homestead property within the meaning of The Dower Act. Mr. A. obtains a release of interest from Mrs. A. for her dower rights in the homestead pursuant to the provisions of the The Dower Act. In consideration for this release, he pays Mrs. A. $5,000.00. Okay? Does Mrs. A. still have a joint interest in the homestead or do we ignore what was a *bona fide* transaction between the spouses? It seems as if we are facting existing contractual rights, not only

between third parties but between the spouses themselves and, quite frankly, I don't believe that Section 28 remedies this particular fact situation.

Mrs. Bowman already raised the instance of the case of the female spouse who was born of wealthy parents and during the course of her marriage and while cohabiting with her spouse her parents begin gifting large amounts of cash to her. The husband, in turn, has acquired a small business. Mrs. X's financial worth might be three, four times that of her husband's yet, because her assets fall within the division of non-shareable assets, she is entitled to keep all of those assets yet she is entitled to share in her husband's assets . So that Mrs. X may walk away being worth in excess of a quarter of a million dollars and her husband may walk away being worth maybe $70,000.00.

Another inequity that hasn't been raised, in these proceedings at least, is that it is my feeling that we are going to have a real bonanza for creditors in this province. It is not unusual in this province for men to place the marital home in the name of their wife to protect that particular asset from creditors. Although they may not have judgments against them or even pending litigation at the time that they do so, it is very common to do so just by virtue of the nature of their particular businesses and it is something that is continually advised by lawyers to do so, so that one asset at least is preserved.

The result of this legislation is that the spouse, normally the male spouse, will now immediately acquire an interest in that particular asset and, of course, if there is a judgment at that time, the creditor can then execute on that judgment against that particular piece of property, and you haven't helped anybody there. There's been a disservice perpetrated with respect to both spouses because you have eliminated an asset and typically it will be the marital home where there's children involved. There's no longer going to be that home. Now you say, well, a possible solution is opt out as soon as the Act comes in with respect to that particular asset , but what if there is a judgment at that time. I submit if there is a judgment registered at the time or if there is litigation pending at that time, that would be undoubtedly decided to be a fraudulent conveyance to defeat creditors. That is what I would certainly argue if I were acting for a creditor and I think I would have some success with that argument.

Okay, let's take another example of the spouse who is a working spouse, the female spouse is a working spouse, but does not work in order to supplement the family income in terms of maintaining the family. She works for her personal pleasure and for her personal indulgence. I know of quite a few women in the middle and higher economic strata who work for the purposes of being able to buy clothing for themselves, to go for manicures, pedicures, hairdos, jewellery. Now all of those assets you appreciate are exempt, they are not shareable assets. Some of them are not even assets' in the case of maintaining the body. Now you obviously have an inequity there because those particular assets are not shareable. Yet, her spouse who has worked to maintain the family and invested assets for the benefit of the family , or which can be used for the benefit of the family will have to have his assets shareable.

Let's say both spouses do work for the benefit of the family but with whatever excess they have they use it to buy things which appeal to them, personal pleasures; so that the wife goes out and buys fur coats and the husband goes out and buys power tools. Now the fur coat is unshareable but the power tools are.

Another thing that this Act doesn't cover is that you haven't provided any relief, by virtue of the way Section 9 is drafted in the exemptions, for an individual who maintains his livelihood as a result of non-shareable assets. And I am speaking of those individuals — and there are many of them in this province — who have had the fortune of having wealthy parents who have involved them in family businesses or who have gifted let's say apartment buildings, or whatever, to their children, or shares, and as a result of working those shares or apartment buildings, or those assets, they are maintaining a livelihood from those assets. That may be their sole source of livelihood but because the income that results is from a non-shareable asset, the wife would not be entitled to one penny under this Act.

Now many people have said, "Yes, we agree that there will be hardships; yes, we agree that there will be those hard cases, those inequities, but so what, at least it will protect the majority interests." Gentlemen, I say to you that if you are aware of just one inequity, if one inequity is brought to your attention, then it is your obligation to protect against that inequity being perpetrated by this legislation. It is incumbent upon you if there is only one inequity. Now I have raised five or six; Mrs. Bowman has raised several and I don't recall particular individuals who have also. But you are aware of many inequities right now and to fly in the face of them and not protect those individuals from those inequities is repugnant and reprehensible.

MR. CHAIRMAN: Does that conclude your presentation?

MS. HALPARIN: No, I'm still going. Just as an aside before I continue any further, I would like to add two more individuals to the list of businessmen who are leaving the province.

I would like to deal with some of the provisions of the Act, Bill 61 in its present form with amendments, as I assume that is what you are going to be putting through. First thing, I must commend you for removing income from the area of family assets, and I must also commend you for eliminating the discrepancy between income which was earned as a result of employment and

income which was earned as a result of a business. It was obvious that as Bill 61 existed in its original form it was discriminatory against individuals who earn their livelihood through business versus individuals who earn their livelihood through employment, but I see that that is remedied right now in the amendments. There has been some talk of bringing income in as a family asset and perhaps I might digress for one moment. I believe some individuals were inquiring as to whether income is shareable in the State of California. I have spoken with an attorney who practises in California and also a resident of California and apparently it is not shareable.

In any case, I urge you that in the event you still decide to include income as a family asset, you should be wary so as not to discriminate between individuals who earn their livelihood through businesses and individuals who earn their livelihood through employment, which was the case in Bill 61 in its original form.

I'd like to deal for a few minutes with Section 2 subsection 2 as it appears in the amendments. As it appears in the amendments, the standard marital regime will not apply to spouses who are living separate and apart from each other pursuant to an order of a court or following the commencement of proceedings for the dissolution of their marriage.

The thing that troubles me is that there are many individuals who do not initiate proceedings, formal proceedings for separation, because there simply is no reason to inititate proceedings for separation. Many times an individual will come into my office and say, "I want a separation. That's all I want from him; I don't want maintenance from him. There is no problem with custody of the children. They're coming with me." Or there may not even be children who are the subject of a custody order. "I just want a separation. I want to divorce myself completely from him. I don't want to see him ever again. I just want my separation." And I'll tell that individual that unless her husband is harrassing her and she is in fear of bodily injury to herself, or mental injury as a result of his harrassment, there is simply . . .

MR. CHAIRMAN: Order please.

MR. PAWLEY: I would just mention it would be of some help, I think, to Ms. Halparin, that I believe we indicated the other night we were making a change to deal with that situation and that was the amendment that I was reading out the other night.

MS. HALPARIN: Okay, well perhaps I can reinforce your reasons for doing so.

MR. PAWLEY: Okay, if you wish. Give her her day in court.

MS. HALPARIN: That's right; everybody is entitled to their day in court, even those wives who have been beaten up. It has proven to be very cathartic for them to have their relief.

In any case, as I was saying, in those cases it is simply not necessary to initiate proceedings for a separation. There is absolutely no need. It is a waste of legal fees and it is a waste of the court's time. So, in those particular situations, I say, "Lady, be off. You don't need my help. Just stay away from him and that's all you need. And when you want your divorce, come and see me in three years."

Now Section 2 subsection 2 as it now reads, does not provide for those cases. Well perhaps, Mr. Attorney you can reiterate what the change would be.

MR. PAWLEY: Do I have the Committee's concurrence? The change would be, as of May 6th, 1977, the standard marital regime does not apply to spouses who are living separate and apart from each other and the standard marital regime remains inapplicable to those spouses for such periods of time as they continue living separate and apart from each other.

MS. HALPARIN: In that case, Mr. Attorney, would you also be eliminating Section 2 subsection 3? Because of necessity anybody who has a Decree Absolute would be living separate and apart, normally.

MR. PAWLEY: We were intending to keep it in. If you can show us why you feel it should be deleted, we would certainly take a look at it.

MS. HALPARIN: Well, people whose marriages have been dissolved by Decree Absolute of Divorce, or a Decree of Nullity, are no longer living together. They are living separate and apart. — (Interjection)—

MR. PAWLEY: Two different dates here; one May 6th, one the date it comes into force.

MS. HALPARIN: All right, another thing is why draw the distinction between Absolute and *Nisi*. If the intent is that for all intents and purposes — and that's obviously the intent behind the amendment to Section 2, and not only the amendment but the original premise behind Section 2, that marriages that for all intents and purposes have gone under, this Act should not apply to them. Certainly that could be said to be the case in the case of individuals who have obtained a Decree *Nisi*. Well, I'll let you think on that. Okay?

MR. PAWLEY: Yes.

MS. HALPARIN: Getting back to the area of shareable assets, Section 9, as was pointed out to you, Mr. Attorney, in your office and I believe before the committee hearings, we originally had a problem with those cases where individuals had transferred, prior to the enactment of the legislation, half of let's say the summer cottage to their wives. And the result of the legislation, as it originally was

devised, was that the woman who had her half share of the cottage gifted would not have to share.

MR. PAWLEY: We have taken care of that. Carry on, if you wish, on the point but I just want to mention to you, so you know that we are dealing with that.

MS. HALPARIN: Okay, well we have the case of the half being cured by the amendments but not the case of less than a half, or a third.

MR. PAWLEY: Yes.

MS. HALPARIN: You're aware of that. Okay. Now, I've noticed that there is an amendment with respect to the acquisition of the marital home prior to marriage. Not only does the marital home have to be acquired in specific contemplation of the marriage, but also in specific contemplation of the use of the premises as the marital home of the spouses. Why have you not made similar provisions with respect to premarital assets, Section 9(2)?

All you have said with respect to premarital assets is that as asset acquired by a prospective spouse before but in specific contemplation of the marriage is a shareable asset within the meaning of this division. But you haven't said whether it was acquired in specific contemplation of use of that asset. I think that's just a question of making it consistent with Section 7 subsection 2.

Another thing that I'd like to raise right now as an aside is the problems that you're going to have with insurance. First of all, I'm not clear whether insurance is a family asset or a commercial asset. Many individuals use insurance as an investment vehicle. Indeed, it's often required that an insurance policy be assigned to a lender as collateral security. But certainly there are cases where it's not used strictly as an investment vehicle. It's used as a means of protecting an individual's family following his or her death. But it's a distinction that is going to have to be drawn and it is going to give rise to some litigation. The ratifications of it being a family asset are enormous. Theoretically, it would be possible because a woman or a man has managerial rights in that policy to compel cancellation of the policy, which could be a disaster in the event that the man is no longer insurable. He is now being rated. Or in the event he is insurable, the premiums maybe go up if he desires to once again effect insurance on his life. It could be a very costly burden for him.

In the event, as I said, that the beneficiary is capable of being changed under that policy, a wife could theoretically compel that her husband change the beneficiary of that policy. It offends me, frankly, that a woman, or in the case of a woman who is a named beneficiary of a policy or where her children are the named beneficiaries of a policy, where she is theoretically entitled, I guess, to share in what would be the cash surrender value of that policy. It offends me; I don't think that's fair.

Now in the case of a commercial insurance or insurance which is classified as commercial, I think you are going to have another inequity resulting. It's not uncommon — in fact it's extremely common in the case of partnerships — for partners to effect insurance on each other's lives. The term used is "criss-cross" life insurance. Now, on dissolution of the marriage, not only would, let's say in this case, the wife be entitled to share in half the business but she would be entitled to share in half the value of the insurance. I think there is a real inequity resulting there.

Now, to continue on. If we could deal for a few moments with Section 28. I agree with Mrs. Allen that there is a real catch 22 involved here. Section 28 is made subject to Section 28 subsection 5 which basically provides that we'll look at your separation agreements, we'll look at your marital agreements, we'll look at your anti-nuptial agreements, and we'll say that they are valid, but only to the extent that they deal with assets within the standard marital regime. If they don't cover those assets, then we can open them up. And as Mrs. Bowman pointed out, in drafting those agreements three years, two years, even a year ago, it was impossible to anticipate certain assets that would fall within the standard marital regime. Mrs. Bowman pointed out the case of pensions and I quite agree with her. I have never seen a separation agreement which deals with the division of the pension or says that the husband has a right to retain his pension benefits. Nobody dealt with them, they were never contemplated and as a result, all those agreements will be opened up because pensions were not provided for. You can't expect that solicitors or barristers would have anticipated that pensions, let's say, should have been covered. We are not just looking at pensions. Please don't redraft the bill and say that pensions are just excluded, except for pensions. There are other assets as well. But I just want to bring home to you that Section 28 isn't much of a concession to us. Those agreements are still going to be opened up or capable of being opened up. Whether the court will choose to set aside the agreement and include some other assets as shareable is another story but it certainly is going to give rise to a tremendous amount of litigation.

I am also concerned with respect to the nomanclature used in referring to these particular agreements. For example, an individual who separates and then, let's say, enters into an agreement with his spouse which involves conveyance of a certain piece of property. Now, they may not have agreed as a result of that property transaction to separate *per se*. They had an agreement following separation which dealt with the transfer of property. They did not deal with separation. Can that be said to be a separation agreement? I don't know. I would think that it is fundamental to a separation agreement that you have a separation clause in there . Yet you are not going to look at their agreement because it is not a separation agreement *per se* because it lacks that clause? And I doubt

very much, well, I shouldn't say that I doubt very much, but I have some reservations as whether you could argue that that transaction fell within the term of a marriage contract because you specifically provided for separations. I think that has to be remedied. Frankly, I don't think Section 28, subsection 1 is wide enough. I think there is room for saying that quit claims can't be looked at and dower releases can't be looked at, I think they should most definitely be looked at and included under Section 28, subsection 1. As it reads, I think there is a possibility that they wouldn't.

I have another concern with respect to the valuation of businesses and I don't think it has been raised yet. I conferred with some accountants and they agree that my objections and concerns are legitimate ones. Apparently one way of valuing professional practices is to look at the work in progress, the accounts receivable, less debts and liabilities; and in looking at what is a debt and liability, you don't normally look at the salary or the draw that the individual takes, the individual who comprises that professional practice takes. That is not viewed as a debt or a liability because it would result in that individual being in contract with himself in order to make it a debt. So we are just looking at debts and liabilities other than draws and salaries to the actual members of that practice.

Now what the result of that is going to be is, let's say an individual makes a gross of $100,000 as a result of a professional practice and there is $50,000 in debts and liabilities. This is at the date of valuation of the business. The business would have a value of $50,000 and the wife would be entitled, theoretically, if she had no assets, to $25,000.00. Now, let's assume that out of that $50,000, that individual then draws a salary, makes a draw, of $25,000 and puts it in the bank. She is also entitled in addition to $25,000 of the business, to half of the $25,000 that he deposited in the bank. So you have got $25,000 plus $12,500 and the woman has, in fact, walked away with three-quarters of the value of the business because you have nailed the same income twice and the Act doesn't cover that. You have a provision in the Act that says assets acquired — the same assets which have already been shared under that division. But these are different assets. You've got a bank account asset which is from the business actually and the business asset and the wife gets twice — she nails him twice for the same income.

Section 21, I guess it now reads subsection 1(a), where the event under Section 19 authorizes the notices, the making of a separation agreement, the date specified in the agreement, or if no date is specified, the date of the agreement. This is the valuation date, gentlemen, in case you are not aware of the section, this is the date when you start valuing your assets. This provision now provides that if you have a separation agreement it is the date the separation agreement was entered into unless the separation agreement provides otherwise. Now, I think you have an inequity resulting because, again, you are in a Catch-22 situation. If individuals entered into a separation agreement, let's say for the sake of argument May 7th, 1977, and because this Act wasn't in force, they didn't appreciate that they would have to provide in the agreement that there should be a valuation date. They are now stuck with the date of the agreement instead of the date they ceased cohabitation, which could have been earlier. And from the day they ceased cohabitation to the date the agreement was entered into, those assets may have appreciated and the husband or the wife — whoever has the assets — now has to share that appreciated asset for the sole reason that they entered into a separation agreement. That's what it boils down to. Because if they hadn't entered into a separation agreement, they could have looked to the date that they ceased cohabitation to value their assets but because they entered into a separation agreement, you are in effect penalizing them.

I apologize, but again, I would like to return to Section 28. I note that there is a distinction made between separation agreements and agreements supposedly entered into during the course of the marriage, in that you are prepared to acknowledge and look to written or oral separation agreements but not oral marriage contracts or marital agreements. Why the descrepancy, gentlemen?

An agreement, if it is an agreement, whether it is written or oral, is a good agreement providing, of course, that you can prove it.

Another section that I object to is Section 34, Subsection 1, which allows a spouse to make application for a division of commercial assets up to, for all intents and purposes, one year after a Decree of Nullity. Now, let me put this situation to you gentlemen, and that is the case of an individual who obtains his Decree Absolute and then marries and has a child shortly thereafter. He now has a responsibility to two family units, to two spouses, because, theoretically, under this Act, following the Absolute until up to one year after that Absolute, his first spouse or second spouse, the spouse preceding this new one, can come after him and request an accounting.

One last point which no one has brought up is why don't you get rid of the presumption of advancement if you are intent on putting this bill through? Let me explain for the non-lawyers what the presumption of advancement is. In Manitoba and, in fact, in other places, it is common law principle that where a husband transfers property to his wife for no consideration or for consideration which is less than, let's say, its market value, he is presumed to have gifted her that asset. So that, if Mr. X purchases the marital home and puts it in the name of his wife as well so that they hold in joint tenancy, and she doesn't put up any money, he is presumed to have gifted her that half of that asset. It's a gift. The reverse isn't true. If Mrs. X purchases a piece of property and she puts

up all the money, but puts it also in her husband's name so that they hold in joint tenancy, she is not presumed to have gifted him that part of the house. He is presumed to hold that part of the house in trust for her. So, although Mr. X has legal title to the house, Mrs. X has beneficial ownership to the whole thing. If you are going to put this bill through, you should also legislate away that particular presumption.

That concludes my remarks.

MR. CHAIRMAN: Thank you, there may be some questions. Mr. Pawley.

MR. PAWLEY: I just wanted to clear one thing at the beginning with Ms. Halparin. She seemed to feel that I was suggesting some irregularity at a sub-committee meeting of the Bar Association. I want to certainly advise Ms. Halparin that I never suggested there was any irregularity.

MS. HALPARIN: My concerns were that you seemed to be suspect, Mr. Attorney, of the vote count and whether it was particularly representative of a substantial majority of those who were members or participants in the family law subsection, but you did not make similar inquiry with respect to other groups. I query why you zeroed in on this particular subsection. You've got to admit that it was most irregular. You didn't ask the Manitoba Teachers Association, the Provincial Council of Women, the YWCA; similar queries were not put to those groups. Now, why the subsection?

MR. PAWLEY: Well, you would certainly agree with me that it would be of interest to the committee to know if 35 or 40 percent of those at the meeting whose special interest was family law, their training was family law, disagreed with the recommendation or didn't vote in support of the recommendation. Would that not be relevant to this committee?

MS. HALPARIN: That might be relevant but I don't know where you might have gotten the information, or even assumed, or even turned your mind to the fact that there might have been some dissention.

MR. PAWLEY: Well that hardly matters. The information was correct, wasn't it?

MS. HALPARIN: No, I don't think it was correct.

MR. PAWLEY: I thought that the information that we received was around 60 percent, 57 to 60 . . . or 18 to 10 I believe it was, the vote.

MS. HALPARIN: Well there was also a qualification put with respect to that, Mr. Attorney, and that is that many of the individuals who attended that particular meeting had never attended a family law subsection meeting in their lives. Many of them were law school students, many of them were just articled students as, I might mention, is the composition basically of the Women in Law Association group. It's basically novices, students, articled students.

MR. PAWLEY: You've noted that three practising lawyers with considerable experience in family law, or interest in family law, presented briefs to this committee, who probably were members of that family subsection, who have, in fact, suggested we haven't gone far enough with our legislation.

MS. HALPARIN: I don't know which particular individuals you are referring to.

MR. PAWLEY: You've sat through the hearings, you've heard, I believe, every presentation made.

MS. HALPARIN: I think I've heard virtually every presentation made. I don't know what individuals you are referring to. But I would again reiterate, and I am not saying that this is the case, but if any individual approached you, Mr. Attorney, and challenged the vote, and as a result of that information you are now making or you did make inquiry with respect to the vote count, I believe that to be quite improper.

MR. PAWLEY: Well I would like to advise you, Ms. Halparin, that it is proper for me to ask of any group just how representative their particular point of view is. It's proper . . .

MS. HALPARIN: I don't challenge you on whether the question is improper but why did you not ask all those groups, Mr. Attorney? That's why I am suspect. Why was not the vote recorded with respect to YWCA? Why was not the vote recorded with respect to the Manitoba Teachers Association? Why was not the vote recorded with respect to the Provincial Council of Women? Etcetera, etcetera, *ad nauseum*.

MR. PAWLEY: Ms. Halparin, you seem to be very sensitive on that point.

MS. HALPARIN: I am sensitive.

MR. PAWLEY: I don't know why. If the other groups were back before me I would be delighted to ask the same question.

MS. HALPARIN: Well, many groups appeared following us. There were several groups that appeared after us and that question was not asked.

MR. PAWLEY: Ms. Halparin, in your brief you made references to contribution should be equal and because you indicated . . .

MS. HALPARIN: Or equivalent, Mr. Attorney. I also qualified it, I said by necessity a contribution couldn't always be equal.

MR. PAWLEY: Yes. And you indicated that there was some problem with provincial legislation not making this possible. I'm not quite sure of your reference there, but there was a reference to the existing legislation, provincially, not making this type of situation possible for some reason.

MS. HALPARIN: As Bill 61 now reads.

MR. PAWLEY: Well I thought you were referring also to other types of legislation.

MS. HALPARIN: No, I was referring specifically to Bill 61.

MR. PAWLEY: Are you prepared to concede that contribution takes many many forms?

MS. HALPARIN: Absolutely.

MR. PAWLEY: And it is very difficult for any court or any individual to determine the extent of that contribution or effort, or whatever it be, very very difficult.

MS. HALPARIN: Well, I appreciate that contributions can take many forms. They can take the form of financial contribution, physical contribution, even emotional support. It may be worthwhile to an individual to enter into a marriage with an individual who does nothing around a home, just because he or she happens to be extremely emotionally supportive. But I don't think that it's beyond the courts to assess contribution.

MR. PAWLEY: You have heard many many briefs dealing with the problems that are encountered by getting into the very type of nitty-gritty of home life that you are making reference to: whether or not their spouse cuts the lawn, whether or not he has contributed by washing the dishes when he comes home at night, whether or not he or she makes the beds, etc. And you feel that institutions can evaluate, fairly and equitably, the type of contribution that one spouse makes to the marriage by entering into that determination after a lifetime of marriage.

MS. HALPARIN: Yes I do.

MR. PAWLEY: So you agree with Mr. Houston's presentation.

MS. HALPARIN: I said basically I did endorse Mr. Houston's recommendations. I think his proposal that the Married Womens Property Act be amended is a good one.

MR. PAWLEY: And you disagree with the basic concept of the Law Reform Commission's Report, then.

MS. HALPARIN: No, I didn't say that I disagreed. When I saw the bill, I had some serious reservations with respect to the bill basically in the area of retroactivity. Also I was concerned about the fact that somewhere this figure of 50 percent had been taken out. However, I was prepared to endorse the family law subsection's recommendations for want of a better solution.

MR. PAWLEY: But you're happier with the proposals by Mr. . Houston?

MS. HALPARIN: Yes, quite frankly, I am.

MR. PAWLEY: Let's deal with basic concept here, because the legal technicalities are important and we will examine your points. So that in basic essence, you would prefer to leave judicial discretion than to accept the recommendations of the Law Reform Commission, which did suggest equal division.

MS. HALPARIN: No, because Mr. Houston in fact made two proposals. He said, number one, forget about this, don't enact anything. That was his first proposal. I don't agree with Mr. Houston on that score. He said that if you are intent, though, on a 50-50 split, which is what the Law Reform Commission was talking about, he said "Do it this way." He said, "Make an amendment to the Married Womens Property Act, that there is a presumption in this province that all assets acquired during the marriage are to be divided on a 50-50 basis, unless you can set aside that presumption by showing that the intention of the parties was something else." The proposal was as presumed 50-50; that's what the Law Reform Commission said. They didn't say, "Presume it." They said, "Just legislate it."

MR. PAWLEY: Just one more question. I was curious; you made reference to oral marriage contract. I'd like you just to expand on that, what an oral marriage contract is.

MS. HALPARIN: Well, an oral marriage contract would be like an oral separation agreement. By that I mean by necessity a separation agreement contains terms as a result of the parties having separated, while a marriage contract theoretically deals with their rights and obligations, and duties, and how they are going to deal with specific pieces of property, or whatever, during the course of their marital union.

MR. PAWLEY: Is that not just an understanding that each and every one of us have in our own marriage relationship?

MS. HALPARIN: Well, I don't have a marriage relationship so I don't know.

MR. PAWLEY: So you can't speak . . .

MS. HALPARIN: I am a single individual who has no vested interest in this legislation. I am only going to gain by this legislation and Mrs. Bowman forgot two other professional groups that are going to gain by this legislation, and that's accountants and appraisers. They are going to have a heyday.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Ms. Halparin, I guess I am concerned about it on behalf of those students of the law who have not yet been called to the Bar, whose opinion, I believe, you don't value too much in the Bar Association.

MS. HALPARIN: I don't say that.

MR. CHERNIACK: What did you say about it?

MS. HALPARIN: I don't say that.

MR. CHERNIACK: What did you say about the fact that they were not yet practising lawyers?

MS. HALPARIN: Mr. Pawley, I believe, was saying that was it not relevant, since we were dealing with a professional body of lawyers, to hear what dissention there was with respect to that professional body.

MR. CHERNIACK: I just want to know, did you feel that their opinions were of less value than that of practising lawyers?

MS. HALPARIN: Well, I wouldn't say it was of less value. Certainly, they have a right to be heard and were heard. But by necessity, it's just logical that various lawyers who have worked in the field for a longer period of time are more alert to various problems. They can see difficulties, there is no substitute for experience, and an articled student, or a law student who is still attending the university — especially a law student who is still attending the university — has no conception of the practicalities of implementing this legislation. And I'll be the first one to admit it. If I were in law school and I saw this particular piece of legislation, I would have said, "Terrific."

MR. CHERNIACK: Can you just tell us when you changed from being an articled student to a practising lawyer?

MS. HALPARIN: I have just completed my first year.

MR. CHERNIACK: Thank you.

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

MR. AXWORTHY: Mr. Chairman, I'm just kind of concerned about Ms. Halparin's endorsement of Mr. Houston's position. The reason I am concerned is that in cross-examination he conceded that he basically does not believe in the equality of partners in a marriage and, taking that as his initial premise, the rest of his argument becomes somewhat suspect, I think, in terms of its logic. While it may be logical, I think the initial premise is one that is not within the keeping of the principle of this bill and I am surprised that he would endorse that position even when he further conceded, as has been reported in several commission reports, that by simply allowing the presumption to be built in legislation and then relying totally upon judicial discretion, it results in a high degree of uncertainty and unpredictability. I think that that was the report of both the Canadian Law Reform Commission and others. I'm curious as to why you would back away from the position that the Family Law Subsection took, where there was at least legislated the concept of equality in marriage and then if there had to be some discretion, it would be based upon legislated principles, as opposed to the much more uncertain principle that Mr. Houston advocated in terms of the Married Properties Act. I'd like to know why you changed your mind, taking these two concessions that he made into account? First, he doesn't really believe in the whole thing anyway. Second, if he does . . .

MS. HALPARIN: Well, I want to take issue with that. He began his brief by saying that he didn't think there was a need for any kind of legislative amendment, not this bill nor an amendment to the Married Womens Property Act, and I take exception with that. So I'm not endorsing him in that respect. What I did endorse was I believed that his solution to this problem . . . And looking at the problems of retroactivity, the problems that you're going to encounter in connection with the immediate community of property and family assets, the ramifications that that's going to result in, the problems with separation agreements, etc., etc., I think his solution is probably a good one and it's a tidy and clean solution.

MR. AXWORTHY: While it may be tidy and clean, it may not work to the intent or objective or what we're trying to achieve here. You can get tidy and neat solutions which may in fact not be the best solution. You know, there's a good old principle that you don't necessarily want to find the easiest answer, you want to find the best answer and it may be, from his point of view, and perhaps from yours, this idea of using total reliance upon judicial discretion is an easier answer but it may not be the best answer in terms of solving the basic problem.

MS. HALPARIN: Well, we're starting off, though, with a presumption; a presumption of a 50-50 sharing. Now you require pretty cogent evidence to satisfy a presumption in law.

MR. AXWORTHY: Well, I'm not sure that is the case and I sort of defer to your legal knowledge, but my readings of the actions in the British Courts, where there is that kind of system and working, is that it is not working that well.

MS. HALPARIN: Well, I have not read those cases so I'm not familiar with them and I'm not in a position to comment with respect to that.

MR. AXWORTHY: It seemed to me that that was the conclusions reached by observers of the British system, which really works upon almost that kind of total presumption within the law's discretion.

MS. HALPARIN: Well, you're in an area that I can't even comment on.

MR. AXWORTHY: No, what I am concerned with here is the best way of achieving I think what we both share is an objective. I sort of take to heart some of your criticisms but I am still concerned that if you don't have certain legislated principles in the Act and simply rely totally upon the courts, and that's why I have been more impressed by the arguments of the Family Law subsection where there

needs to be some court discretion but based upon legislated rights.

MS. HALPARIN: Well, my only concern was that I don't think a unilateral opting out with the right of the ousted or unpropertied spouse to apply for a lump sum based on her physical contribution or her economic contribution or, I think, it is on the intention of the parties, I am not quite sure, will solve all inequities. I don't think it's going to cover all inequities.

MR. AXWORTHY: Which ones will it miss?

MS. HALPARIN: Well, for example, it won't correct the case of the individual I believe who holds all the assets from which he makes his livelihood and they are not shareable assets. It won't correct the case of the individual who was born of wealthy parents and is in receipt of a number of assets which are not shareable. Yet I am of the firm opinion that those situations are not equitable situations under the Act.

MR. AXWORTHY: Drawing that to a more logical conclusion then, presumably we should include those as part of the shareable assets then.

MS. HALPARIN: I would be prepared to do that, most certainly.

MR. AXWORTHY: Would you?

MS. HALPARIN: Yes.

MR. AXWORTHY: You would think that that would strenghten the Act then?

MS. HALPARIN: Yes, and there would also be more in the pool. I mean, as I pointed out to you, there's the case of the individual who has inherited an apartment block, shares, whatever, because he has had the fortune to have wealthy parents — his father was born before him, the old story, he's lucky his father was born before him — by virtue of the fact that they are gifts or were left to him by will, they are not shareable but they can be his sole source of livelihood and that woman is left with nothing.

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

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

MR. SHERMAN: Mr. Chairman, I just have one question in effect to Ms. Halparin. Ms. Halparin, you said in response to Mr. Cherniack that you are completing your first year in the field, as it were, and in the introductory comments on your presentation you said that you specialized or worked in the field of family law essentially.

MS. HALPARIN: That's right.

MR. SHERMAN: Would you say that the field of family law constitutes by far the major portion of your professional work?

MS. HALPARIN: Well, my article was done completely, I did a very unusual article. I did what is called "a specialty article" which is a relatively new concept in Manitoba, in which all I did was family law for my articles. My second year — well, actually it is my first year of practice — I'd say that about 60 to 70 percent of my practice is devoted to family law. In a strict sense, I might say that I am also involved in some family law situations which are really commercial but certainly they are most applicable to what is going to happen under the standard marital regime. I might say that Mr. Carr and I had our first experience with opting out under this Act if you can possibly fathom that we tried to opt out of an Act which isn't yet in existence, but it's just an example of the kinds of burdens that you are putting on people. We had a case of individuals who were both entering into a second marriage and neither of them wanted this regime to apply to them and we were in the unfortunate position of having entered into this agreement after May 6th so that our agreement is no good. I'll again endorse Mr. Carr's concern with respect to the fact that you have put people in a limbo position for seven months We are talking about people who want to settle their differences, people who have separated but want to settle differences or are intending on separating and want to settle their differences. They don't care about this Act, they don't want this Act right now. They want to settle their differences. You're not allowing them to settle their differences; you only recognize their separation agreements as of January 1, 1978 so you have put them into a state of limbo where you are actually prohibiting and preventing people from settling their differences. You're saying, "You can't; even if you want to we won't let you."

MR. SHERMAN: Would it be your experience in discussions with other lawyers in the field that the same thing has happened generally, not only in terms of the cases that you're dealing with but generally in the practice of family law cases at the present time that they've all gone into limbo.

MS. HALPARIN: Oh yes, negotiations have ground to a halt in this province. Nobody is moving. Everybody is holding out for their goodies under the Act.

MR. SHERMAN: Well, 60 to 70 percent you would calculate of your practice is in the field of family law.

MS. HALPARIN: That's right.

MR. SHERMAN: Could I just ask you, with respect to your presentation, without — and this is not asked in a sense of criticism — how would you have developed that presentation, which was very detailed I might say, that you have made before the Committee, would that have been developed entirely on your own or would it have been developed as a consequence of discussions with other

lawyers in the family law field like yourself?

MS. HALPARIN: Not in the family law field. As I mentioned, with respect to the accounting problem, with respect to businesses, it was something that occurred to me and I checked it out with some accountants. I also have the fortune of working with my uncle who happens to be involved in the area of commercial law. But basically these concerns were my concerns.

I might draw, if you will permit me, to draw attention to something that I find is happening right now . Our firm acts for a gentleman who is involved in a common-law union and he wishes to mortgage his home and he has applied to a chartered bank, a major chartered bank, in this country for a mortgage loan. The bank is requiring that we obtain the consent of his common-law spouse to the mortgaging of the property. Now, as Mr. Pawley can tell you and Mr. Cherniack, as the law exists in Manitoba right now, a common-law spouse has no dower in her common-law spouse's home, you have to be married to have dower, so it is not necessary to obtain her consent. There is no existing law which requires that her consent be obtained to this mortgage. However this bank, major bank, is now insisting — as a matter of course — that we obtain consent. **ow why would they do something like that?**

MR. CHERNIACK: Well why would they?

MS. HALPARIN: Well, I will tell you why they are doing it. Because they are afraid, Mr. Cherniack, that this government is capable of enacting legislation retroactively which gives a common-law wife dower. —(Interjection)—

MS. HALPARIN: Mr. Cherniack, you know, at one time I would have said, "Isn't that ludicrous?" But you know, a year and a half ago I made the comment that this legislation could never be enacted retroactively because it would be ludicrous to do so. So you have shown me that you are capable of doing this, so why not that?

MR. CHERNIACK: We've shown that we're capable of doing . . .

MS. HALPARIN: The bank thinks you're capable of doing it.

MR. CHAIRMAN: Do you have any further questions, Mr. Sherman?

MR. SHERMAN: Well, what you're saying to the Committee essentially, Ms. Halparin, is that people are taking steps and measures now to protect themselves, their spouses, whichever partner it is in the marriage or in the commercial proposition against anticipated legal hardship. Is that correct?

MS. HALPARIN: Well, this is the case at the bank, protecting itself, and they refused to make this mortgage loan — although as law exists now it is not necessary to obtain consent — without this woman's consent because they frankly don't know what this government is capable of doing. The effect of it is that you are going to restrict mortgage lending because this individual that we act for is now in this unfortunate position. He doesn't want to see his common-law spouse liable on the covenant. She is in a position where she says, "Well, why should I sign the covenant if I don't have an interest in the property?" It is possible that this particular loan transaction won't go through. All the effect it is going to have is that you are restricting mortgage lending in this province and home building, home purchases, because there is going to be all kinds of new caveats and conditions attached to mortgage lending.

MR. SHERMAN: In anticipation of legislation that is not understood at the present time but is feared, would that lead you to the conclusion that there might be some justification for a wider public exposure and a wider study of what the Committee is facing?

MS. HALPARIN: If you're asking me whether I would advise that the government hold back on enacting this legislation and make sure the public is fully advised as to what is happening — and I believe that a majority of the public is ignorant as to the ramifications of this bill — I believe that the public is being made aware of the fact that there is a bill which may result in a sharing of property but I don't think they fully appreciate the consequences of this legislation. If you're asking me whether we should hold back for the purposes of getting more input from the profession, from the public, sort of educating the public so that they are in a position to make contributions, I say yes.

MR. SHERMAN: Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: Thank you, Mr. Chairman. I would like to ask Ms. Halparin. She made a statement that the Law Reform Commission found a presumption in this province that marriage assets be shared on a 50-50 basis. Do you believe that this is something new? The marriage vows in the Old Testament say that the man is supposed to love his wife as himself. Now immediately this infers 50-50 sharing as far back as the days of the Old Testament. Now, do you think it would be sufficient to apply this principle as a recommendation and ask judges to use this principle but leave some discretion to the judges as far as the division of property and maintenance is concerned upon marriage separation?

MS. HALPARIN: Well, first of all, sir, not all individuals subscribe to the Old Testament so not all individuals adopted those particular vows. But I will tell you, there is a case in Manitoba, a decision of the Manitoba Court of Appeal, the case of Morris and Morris, where they said that those particular vows "to love, honour and obey" were not certain and therefore could not be viewed as a contract

between individuals. I think that answers your point.

MR. BROWN: Thank you.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: No, Mr. Chairman.

MR. CHAIRMAN: Then if there are no further questions, thank you, Ms. Halparin.

MS. HALPARIN: Thank you.

MR. CHAIRMAN: Mr. Charles Huband, please.

MR. CHARLES HUBAND: Mr. Chairman, I have a written submission that is in the process of being passed out to all members of the Committee. I might say at the outset in very short order that I believe very strongly that reform in marital property laws is necessary. The particular brief that I am submitting is dealing more with the mechanics as to how that might be achieved than the principle, because I accept the principle that there should be reform, that that reform should fundamentally be based on an equal division of property between the spouses other than for exceptional circumstances. I approach this legislation from three standpoints.

First of all, as a politician, ' because I cannot separate myself from a political position; as a practicing lawyer and as a person — perhaps one of the few such persons in Manitoba — who has an academic interest in the law of trusts. For close to 20 years I have taught that subject at the Manitoba Law School and it is from my perspective as a teacher of that particular subject that I think I might be able to add some contribution to the discussion on marital property law. So this is not really a political speech but I think it is important to recognize that in the particular contributions of people who have come before the Committee up to the present time, that virtually all of them have approached it from the standpoint of lawyers who are teaching or participating in domestic law practices. That is not my practice. My practice comes from another avenue and that is the law of trusts which I happen to teach and I think that it may be useful to take a look at this whole subject matter from that very different perspective because if one approaches it from the standpoint that the law of trusts may afford a remedy and a more acceptable remedy than what we have before us, that is something that frankly has not been considered, to my view, by the other people who approached this Committee.

The more I consider the situation, the more I see and hear in the submissions that have been made to you, of the problems inherent in the legislation as drafted — I'm not saying that it's incapable of amendment but I think that there are difficulties in it — the more I conclude that the concept of a constructive trust will accomplish the purpose intended by the Legislature with simplicity and with little disturbance. But in order to make my comments clear, I think that one has to grasp the concept of a constructive trust. At the risk of being somewhat pedantic, let me take you through a very short historical lecture.

Some trusts are intentionally created, as when you have a pension fund lodged with a trustee to hold for the benefit of employees, or when property is left to a trustee under a will for distribution to beneficiaries after death. But some trusts are imposed by the courts because equity demands it and these are known as constructive trusts. It is important to understand — and it is something that the Supreme Court unfortunately did not in the Murdoch case — that there are two kinds of constructive trusts. One is called a resulting constructive trust and I give an example of that. Suppose I transfer property to my son. He now becomes the legal owner of that property. The law assumes that he is also the equitable owner of the property — but not necessarily. If subsequent evidence proves that I did not intend that he be the equitable owner, then the courts will order that he is a mere trustee of the property for me. The equitable ownership in the property "results" back to the original transfer or owner of the property. A constructive resulting trust depends upon the intention of the parties at the time of the transaction. Did I really intend to confer a benefit upon him when I put the property into his name or did I intend to retain the equitable ownership of the property?

Now there is another kind of constructive trust that does not depend upon intention at all and it is simply called an implied trust or an implied constructive trust. The acknowledged authority on the law of trusts is a legal text called Underhill and the Law of Trusts and the Twelfth Edition of Underhill contains the following statement or definition of an implied trust.

> "In every case where a person in whom real or personal property is vested at law has not the whole equitable interest therein, he is *pro tanto* a trustee of that property for the person having such equitable interests." Now that doesn't mean anything to you but

that concept was developed by the Courts of England some 300 years ago as a method of preventing what we call unjust enrichment or to prevent a fraud. I give an example.

Suppose there is an ailing father, he wants to execute a new will before his death in order to disinherit a wastrel son but the son willfully prevents the father from preparing and executing a new will, either by refusing to give him a pen and paper, or refusing to call his solicitor, or in some other mischievous way prevents the father from writing out a new will. What happens then is that the son inherits the property on the father's death. He becomes the legal owner of the father's estate. Under the law there is no one who can question his legal title. But a court of equity will "imply" a trust. The court will order that in order to prevent fraud or to prevent unjust enrichment, the son is a bare trustee

of the assets. The beneficial or equitable ownership lies with those who would have been named beneficiaries had a new will been executed. So he becomes a trustee under a constructive implied trust.

Note the distinction between a resulting constructive trust and an implied constructive trust. In the former, the existence of a trust depends upon the intention of the parties at the time of the transation. In the latter, the courts impose a trust relationship even though there was obviously no common intention between father and son.

Now I mentioned that the concept of constructive trust is an ancient one; but the application to issues of marital property is fairly recent. It is recent because until the last century, and indeed the last few decades, the property rights of female spouses in assets legally in the husband's name simply was not asserted. But in recent decades there has been a flood of cases in the courts where women have in fact been asserting such claims.

Such a claim can be sustained if there is a contract between the spouses which establish their respective proprietary rights, but in the vast majority of marriages outside Quebec, such contracts simply do not exist.

The basis, therefore, of asserting a property claim has been that of a constructive trust.

Women in Manitoba, and across Canada, have been dissatisfied with the result, and I do not blame them. Let me now explain what has gone wrong.

The claim of a spouse could be based upon a constructive resulting trust where the wife argues that when marital assets are placed in the husband's name there was a common understanding and intent that a proportion of the equitable interest (let us say half) was for the wife. In cases where the courts can find such a common intent, that it did exist when the asset was acquired in the husband's name, appropriate relief has in fact been granted. For example, in the case of Kowalchuk versus Kowalchuk, a decision of Chief Justice Dewar of the Manitoba Court of Queen's Bench, he was able to conclude that such an understanding did in fact exist. Thus the husband was said to hold the property as trustee for his wife under a resulting trust. When the transfer into the husband's name was made, it was the intent, the common intent of the parties that she should have an equitable interest. Half of the equitable value of the property "resulted" back to the wife under a constructive trust.

But what happens when there is no common understanding when assets are acquired? Well, there is a simple remedy. The law can enforce an implied constructive trust which does not depend upon intention. The court can imply a trust in order to prevent fraud or to prevent unjust enrichment. And indeed the vehicle of an implied trust has in fact been employed with success. In the case of Trueman versus Trueman, which was decided by the Alberta Appellate Court in 1971, the claim of a wife to half of the accumulated assets was allowed. And the court relied upon a previous judgment of Lord Reid in the case of Gessing versus Gessing, decided by the House of Lords in England in 1970. And I quote from the decision in the Gessing case:

> ". . . the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust."

I think that the words "or resulting trust" at the end should be stricken but I left it in the quotation because it so appears. But what he is saying is that in these kinds of situations the court can imply a trust, even though there has been no common understanding. There are two ways that you can give the wife relief, a resulting trust and implied constructive trust.

Now, citing the above quotation with approval, the Alberta courts concluded that the law of trusts afford the spouses two remedies: either the "resulting trust" or an implied trust, depending upon the factual circumstances. The latter does not depend on any understanding of common intention. So, in the Trueman case, the wife became entitled to one-half the assets because of her work and effort as a farm wife, even though there had been no common intention for the oint sharing at the outset of the marriage and even though the wife had made no direct dollar contribution. In short, the vehicle to give relief was an implied trust, not a trust of a resulting nature.

Now, had the law remained as it is set forth in the Trueman case, I firmly would question whether we would be here today. But the law did change, the law changed in the case of Murdoch versus Murdoch, where four of five judges of the Supreme Court of Canada, with Chief Justice Laskin dissenting, overturned the Trueman decision.

As a person who teaches the subject of trusts, I am convinced that this decision was and is wrong. The courts seemed to have concluded that they could not give relief to Mrs. Murdoch, in circumstances similar to the Trueman case unless those circumstances would justify the declaration that a resulting trust existed. This in turn depended upon a common intention, a common intention that the wife should have an equitable share of the assets at the time of its acquisition. In his concluding sentence in the judgment, Mr. Justice Martland states, and I quote:

> "In my opinion, in the light of the evidence in this case, and the findings of the trial judge thereon, it cannot be said that there was a common intention that the beneficial interest in the property in issue was not be belong solely to the respondent . . ."

Note the word "common intention" which must be the basis for a resulting trust.

The Supreme Court did not seemingly appreciate that there could be an implied trust, regardless of the intention of the parties, based on the concept that the court is there to prevent unjust enrichment.

Now in his dissenting judgment, Chief Justice Laskin demonstrated that he was fully aware of the distinction between a resulting trust and an implied trust. He would have allowed Mrs. Murdoch's claim on the basis of an implied trust. And he stated in his dissenting judgment:

> "The appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend upon evidence of intention."

And Laskin quotes with approval from a textbook on the Law of Trusts, written by Scott, quote:

> "a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it . . . Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property . . ."

Laskin, in other words, was right; the majority judgment of the Supreme Court was wrong.

Now the purpose of that little review is to indicate that if we could find a way to legislate Laskin's dissenting judgment, in large measure, I believe, that the problem would be cured with one exception. In the Trueman case that I referred to earlier, the Alberta Appeal Court decision, the court ordered a 50-50 division of the assets. In the Murdoch case, Laskin did not decide the proportionate division. He ended his judgment by saying this matter should be referred back to the original trial judge or the referee of that court, who would make the necessary assessment and divide the property accordingly.

In the Murdoch case he didn't make that proportionate decision and most outside observers would prefer that under the circumstances of the Murdoch case, an equal division should be made.

Now let us assume that there is an acceptable way to legislate that implied trusts shall apply to the marital relationship with some assurance that a 50-50 division would be the standard. What are the advantages and disadvantages of simply legislating that as compared to the legislation that you have before you and the amendments that you are considering to it? I will deal with that under several headings.

1. First of all, the subject matter of deferred or immediate interest in the property. One of the problems with the present legislation is that commercial assets are subject to deferred sharing while family assets are subject to an immediate vested interest. There are difficulties with deferred sharing because some women would like to have control of commercial assets while the marriage subsists, but they are precluded from doing so. On the other hand, the immediate vesting of family assets for people with subsisting marriages will be nothing but a nuisance, imposing greater difficulties and complications for both in normal commercial transactions in acquiring credit and things of that kind.

I suggest that an implied trust is a better solution for both. For a person who wishes a trust declaration before any separation or divorce takes place, that declaration can be obtained at any time and it will apply to all assets without distinction as to whether those assets are family assets or commercial assets. A wife who feels that her husband is about to sell a commercial asset in which she claims an equitable interest is entitled to a declaration to establish her interest before that asset has been disposed of. On the other hand, in subsisting marriages where immediate vesting is nothing more than a nuisance, the concept of an implied constructive trust causes no difficulties. There are no consents to be signed and the husband can still obtain credit on his own signature, no problems in arranging credit or things of that type.

The implied trust is somewhere between the concept of an immediate vesting and a deferred sharing in that the property rights can be established at any time by the person who wishes to assert those rights, regardless of the kind of asset.

2. Retroactivity. Many people, including myself, are concerned that the legislation now being considered will affect family assets in a retroactive way. In effect, an interest is conferred by legislation in the car that I may have bought and sold last year or ten years ago. No matter if my marriage is a stable and subsisting one. But if I should separate, my wife and I then become embroiled in a dispute about her monetary interest in property long since disposed of. There may be legal battles about the tracing of that property into the hands of others. If the asset is of an income generating character, there may be squabbles about who should have paid income tax on past earnings.

The concept of an implied trust avoids these difficulties. The proprietary rights can be established at any time, before or after separation or divorce, or upon the death of a spouse and before the

property is distributed to beneficiaries. But judging from the manner an implied trust would have been enforced in Laskin's judgment in the Murdoch case, the declaration of a proprietary right would apply to the existing assets at the time that the application is made and the declaration is sought and obtained. I think that that is a simpler thing than trying to deal with it on a retroactive basis.

I suppose that legislating the framework for a claim under an implied trust might be said to be legislating retroactively in one sense. In situations which up to now, if litigation had ensued, the majority decision in the Murdoch case would apply, would now be subject to new rules, but those rules would not be applied and would not affect normal commercial activities until one of the spouses took steps to assert his or her rights under those rules.

I suggest it would be a far more acceptable method of dealing with the whole subject of retroactivity.

3. Taxation. I will forget about the question of taxation other than to simply say that an implied constructive trust would avoid possible conflict with the tax laws and avoids the potential difficulties in reassessment of past years' taxes. I go on to the fourth point under the heading of "Opting Out."

4. Opting Out. The legislation that we have before us creates a standard marital regime but allows some married couples to opt out after the legislation if they wish to avoid the consequences of that legislation. I am fearful that many married couples will, in fact, opt out and I am also afraid that they will be the wrong people. The dominant husband who has now everything in his name is far more likely to want to opt out than the husband who has already placed the assets in the joint names of the two spouses. And it is the same dominant husband who is more likely to persuade his wife to opt out, whether she wants to or not, and in spite of any independent legal advice. The implied trust simply removes the necessity of opting out. or putting in any provision for opting out.

The implied trust is subject to contractual agreements between the parties, but there would be less reason for the spouses to enter into special arrangements. Let us take an example. As in the Murdoch case, suppose that a husband and wife are working jointly to develop a family farm, and suppose that, as in the Murdoch case, the assets are being placed in the husband's name. The Marital Property Act is then passed at a time when the marriage still subsists and for all intents and purposes will continue to do so. The husband asks the wife to agree to opt out, and foreseeing no problems on the horizon in her marriage, she agrees to do so. But seven years later, a separation takes place. The wife now has no rights other than what she may derive under the majority decision of the Murdoch case, which is nothing. In this same example, let us suppose that the legislation establishes the foundation for implementing Laskin's dissenting judgment. True enough, the spouses could enter into an agreement to distort the application of equitable principles but there would surely be less reason for them to do so. Existing property rights would not be affected in any overt way. There would be less cause for the husband to believe his position to be threatened, and thus less cause to try and avoid the consequences of the law. There would be no need for making a provision for opting out, which stands as an invitation to do so. Yet the end result would be that the spirit of the legislation would be maintained.

5. I also have a section on common law marriages that I think is of some importance because they are left out of the existing legislation and I think, on an optional basis, if we were to follow a different course and simply legislate an implied trust, common-law relations could be included within the ambit of the law.

The concept of an implied trust could easily be made applicable to common-law relationships. The proposed legislation does not. To some degree the legislation discourages people from becoming married in order to avoid the rigidity of the Marital Property Law. An implied trust, on the other hand, is little more than a formula to allow equity to be done, to prevent unjust enrichment. And it is as important to prevent unjust enrichment in common law relations as it is in a legal marriage.

6. Flexibility is the next thing. The proposed legislation would give a spouse an equal interest in the assets accumulated during marriage, the interest in the marital home and the family assets being immediate, the interest in commercial assets being deferred.

In my view, this is appropriate in a vast majority of cases but there are some instances, and other speakers have brought those instances to your attention, where this equality of division is manifestly inequitable. I would like to see sufficient flexibility to deal with the exceptional cases on a basis other than an equal division, and the use of an implied trust affords that opportunity.

7. And finally, under the heading of "Complexity in Legislation", I simply make note of the fact that the simpler the legislation the better, both in terms of public comprehension and in order to avoid the torture of numerous court cases to interpret the various sections of an Act. To legislate the foundation of Laskin's dissenting judgment in the Murdoch case would be relatively simple and straightforward yet would accomplish the goal that appears to be shared by the majority of the members of the Legislature, and indeed the public.

So I have given a sample of legislation and I don't pretend to be a legislative draftsman but nonetheless I invite you to look at it. As I foresee it, it could be as simple as three sections, one of which would say this:

1. The equitable concept of implied constructive trusts shall apply to the ownership of assets acquired during a marriage — and this of course would be optional — or during a common-law relationship, and that in every case where the person in whom the real or personal property is vested has not the whole equitable interest therein, he is *pro tanto* a trustee of that property for the person having such equitable interest.

In legalese, it's just taking the definition out of Underhill's trust text and putting it in legislative terms.

2. That time and effort, including time and effort devoted to household responsibilities, shall be the standard to measure the relative equitable interests of married persons or persons in a common-law relationship, rather than direct financial contribution in the acquisition of assets.

Taking again Laskin's dictor in his dissenting judgment of saying it shall be based on time and effort rather than direct financial contribution.

And thirdly, to establish a basis that it will be 50-50 in the vast majority of cases:

3. In the absence of special circumstances, if there is a relative equality in time and effort, there shall be an equality of equitable interest in the assets acquired subsistence during marriage or during the of a common-law relationship.

Now, I may be overlooking all sorts of other practical problems, but I simply make the point that this legislative committee, in my view, has a tough problem. We have a complex piece of legislatation that runs to 30-odd clauses. We know that there are imperfections and problems, practical problems with it. We are searching for ways to amend that legislation before the Legislature prorogues. I'm sure that Mr. Silver and the other legislative draftsmen are just about going crazy trying to accommodate legitimate concerns about the legislation and I am simply saying perhaps this affords a better and easier vehicle to accomplish a common purpose.

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

MR. CHERNIACK: Thank you, Mr. Chairman. Mr. Huband, would you not agree that the legislation that is proposed and we are considering, removes certain amounts of discretion from the courts, which your proposal does not remove at all?

MR. HUBAND: Yes, Mr. Cherniack, I agree that in the way that I would draft the legislation, it would come close to the same result as the suggestion made by Mrs. Bowman to have some aspect of flexibility and discretion lodged with the courts, to deal with the exceptional cases.

MR. CHERNIACK: Well, you do say in the absence of special circumstances.

MR. HUBAND: That's right.

MR. CHERNIACK: Would you not, yourself, want to spell out at some length what you consider might be special circumstances, or would you allow it completely to the discretion of the courts?

MR. HUBAND: I think I would be inclined to leave it to the discretion of the courts, Mr. Cherniack, unless and until there were indications that they were misapplying, if you will, the discretion to determine exceptional circumstances. If they began finding, in every instance, special circumstances then I think that quite obviously the Legislature would have to intervene further. But quite frankly, I would have confidence that the courts would accept the spirit of this legislation and would truly only allow exceptions to that 50-50 division of property where the equity actually demanded that a 50-50 division be inappropriate.

MR. CHERNIACK: Mr. Huband, in the concept of the legislation as you describe it, surely it would not really make any change in setting out the, I use the word, "parameters" within which the legislators think a court should work, other than to say to the courts, "There shall be an implied constructive trust." Is that not really the only change that you are proposing for the present law? You are, I believe, stating what you think is the law today, but you are saying to the Supreme Court, "Because you are wrong, we better tell you that you should have listened to Laskin and you should have accepted the concept of implied constructive trust." In effect, that's what you're saying, isn't it?

MR. HUBAND: I'm saying that in 1971, when the Trueman case was decided, I think that it brought an equitable result for people and had that case continued to be followed, as it was followed by Laskin, we wouldn't have the problems that we are in today. However, I go one step beyond that and I say, but I know that some people are concerned about the courts making adjustments that are more favourable to the husband in all circumstances and that may be a legitimate concern. In Great Britain, as I understand it . . . I get this information not from my own survey but from Myrna Bowman, for example. She says that the average division of property under the British legislation is that the wife gets one-third and the husband gets two-thirds. That's the average. And I think that we are seeking something closer to equality as the average. So that's why I would add a section saying that unless the circumstances are unusual, then the 50-50 division should be the norm.

MR. CHERNIACK: Then one other minor thing. Do you think there is anything in your proposal

where you specifically relate to common-law relationships, anything in what you're saying here that would give cause to a major chartered bank to get nervous about accepting a mortgage from a common-law husband today?

MR. HUBAND: No, I don't believe so, Mr. Cherniack. I want to add something about common-law relationships. It seems to me that if our purpose is to take a look at the equities between people, that common-law relationships probably should not be exempted. That we're looking at a property matter, and just because the husband says, "I want to avoid giving my wife, my common-law wife, what is due to her," we shouldn't allow that to happen. And the application of an implied trust would enable us to apply those same rules to common-law relations with ease.

MR. CHERNIACK: Mr. Huband, I'm sure I'm trying to exploit your legal knowledge and get a free legal opinion from you, but since the matter was mooted in your presence today, I come back to ask you whether there is anything in today's law or even under your suggestion that would give a person concern, who enters into a *bona fide* for value arrangement today, giving a mortgage to a man without getting a consent from his common-law wife?

MR. HUBAND: Not that I can see, Mr. Cherniack.

MR. CHERNIACK: Do you see anything in our legislation?

MR. HUBAND: If I was a bank manager, I wouldn't be concerned about it.

MR. CHERNIACK: That's fine, thanks.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Huband, first you indicated that like Mrs. Bowman's representation, I think you were referring to the Law Reform Commission's recommendations?

MR. HUBAND: Yes.

MR. PAWLEY: You were making allowance for exceptional cases. I was just wondering if you could expand on that, because I believe the only difference between our legislation and the Law Reform Commission's legislation pertaining to cases would deal with the retroactivity situation, the question of unilateral opting out within the first six months. So when you made reference to exceptional cases, was that your reference, too? Because I'm not aware of any recommendation of the Law Reform Commission that indicated that after that six months period, the unilateral opting time . . .

MR. HUBAND: Then it becomes the standard formula for all. I agree with you, Mr. Pawley. I would like to see that discretion allowed for exceptional cases, even going beyond the time that such legislation is passed.

MR. PAWLEY: Of course, you are suggesting that it be done by way of the implied trust. What type of exceptional cases are you thinking of? The very unconscionable type of situation? The extraordinary type of situation?

MR. HUBAND: That's right; there have been examples that have been given before this Committee and I forget the examples but let's take one where the wife has an alcoholic husband who does nothing. She works; she looks after the whole family. She builds up the equity in the house and acquires a few modest assets and then is brought to the point where she feels it is necessary to separate and he then acquires 50 percent of her assets. And I would simply say I would like to have the discretion to say, "No, that shall not be so."

MR. PAWLEY: Well, what if that alcoholic husband was an invalid and was in a wheelchair, and did not contribute to the accumulation of the assets because for 20, 25 years the husband, rather than an alcoholic, was an invalid?

MR. HUBAND: I think that we lose sight of the fact that the courts have dealing with the division of equitable interests for something like 700 years now and I appreciate that they have not applied those same rules to marital relationships. What I am now saying is let's legislate that they do because they seem disinclined. The Supreme Court of Canada seems disinclined to do so. But in all kinds of commercial disputes involving partnerships and the division of assets, the amount that one partner has done, and the other partner has not done, they have dealt with those problems by use of constructive trust on innumerable occasions and with a great deal of facility. I don't see why they can't continue to do so in terms of applying implied trust to the marital relationship.

MR. PAWLEY: But if we could just return to that example, you made reference to the alcoholic husband. The implied trust proposal would take care of that. My concern is that it might be interpreted that the implied trust arrangement would also take care of the situation. In my case, I feel it should not. In the case where the husband was handicapped for 20 years in a wheelchair . . .

MR. HUBAND: All right. Let's take that case which you give as an example, and it may be a difficult one. I would hate to say what a court of equity should do under those circumstances. It seems to me that they have two options under those circumstances. They could say, "This is exceptional because the wife, in fact, has put in all of the labour albeit because the husband is invalid. But she is solely responsible for looking after the household, looking after the children, raising the children, acquiring the assets that are there, building up the equity in property, running a business, earning the income to keep the whole family." And if separation does take place, I don't know that it would be so

inequitable to say, "She shall have the whole, or a larger portion, of the assets under those circumstances."

MR. PAWLEY: But doesn't this subtract from the basic concept that we're trying to establish by law that marriage is basically an equal relationship, an equal partnership? If the law doesn't reflect that, that philosophy . . .

MR. HUBAND: Well, I think that I do in fact endeavour to reflect that by the wording that I would give to that third section, "That in the absence of special circumstances, if there is a relative equality in time of effort, there shall be an equality of equitable interests." So I'm taking the standard as being that and I'm simply suggesting that, as in the Trueman case, or the Murdoch case, or any other case, the courts ought to have the flexibility to determine otherwise under exceptional circumstances. It seems to me likely that had Laskin proceeded to make a division in the Murdoch case that he would have made that division on a 50-50 basis. He did not do so. He chose to refer it back down to the lower court for that kind of an assessment. But I suppose that it would be possible for one to argue on the facts of that case, that no, it should be 40 percent to the wife and 60 percent to the husband, based on some assessment of their efforts. Or alternatively, it could be 60 percent to the wife and 40 percent to the husband, if he was away on trips a lot of the time and left the running of the household and the farm to his wife.

MR. PAWLEY: Mr. Huband, just for a moment if you don't mind, if I could return to that case which concerns me, of the invalid in the wheelchair. Does he not have the right to know that there is some certainty in the law that . . . You know, his wife may be earning a large income, bringing home all the income, building up the assets and at the same time she is sharing many years of marriage relationship with her invalid husband in a wheelchair. Does he not have some right to know with some certainty that in the event there is a termination that he will not just end up without anything and with his wife taking all, in that case, all the benefits?

MR. HUBAND: Mr. Pawley, I would say that the certainty that I would provide him is the certainty that our institutions are equipped to do equity and, if we can provide that certainty, I suggest to you that the Legislature has done all that I would expect from it, whether I was well or whether I was invalided.

If we have the mechanics in our institutions to say that equity shall be done, then I think that we have reached the point where we have fulfilled our obligation. I agree with this legislative committee and with the government that at the present time that certainty cannot be guaranteed. Indeed, it is almost a certainty that the opposite would occur. And so we have to change our laws but I think that my suggestion is a simpler suggestion for assuring the certainty that equity shall be done.

MR. PAWLEY: If I could just for a moment pose a question pertaining to the common-law relationship. In Ontario common-law relationship was included in the legislation and it was suggested by many, "Look, we're living common-law because we don't want any type of legal system, standard relationship, imposed upon us by law. That's one of the reasons that we chose a common-law relationship as against a legal contract, a marriage contract."

Now, are you not, in your recommendations, Mr. Huband, imposing a legal arrangement, even though it may be called an implied trust, upon a common-law relationship that the couple themselves may not wish? That may be the reason why they haven't entered into the marriage contract.

MR. HUBAND: Yes, what I say, Mr. Attorney, is that had the Trueman case remained the law of this land — as I perceive it was the law of the land for at least a few years between 1971 and 1974 when the Supreme Court gave the decision in the Murdoch case — I suggest to you that the law in the Trueman case would in fact have applied to common-law relationships. It would have. That equity would have said those principles apply to a common-law relationship as well as to a marital relationship. And I'd like to get back to that law. I think it ought to apply to common-law relationships as well.

In the Trueman case it was not based on the fact that they were married. It was based on the fact that two people had come into a relationship with each other and had both helped to acquire certain assets, and the courts said that it would constitute unjust enrichment for one person to take back all of the property out of that relationship merely because the legal title was in his name. I think that's sound law and sound law whether it be common-law relationships or legal marriages.

MR. PAWLEY: So you are saying that if a common-law couple wish a different arrangement, then let them enter into a contract according to . . .

MR. HUBAND: Yes, a person could certainly do that.

MR. PAWLEY: Of course, most do not and they are living common-law without the anticipation that they are receiving any legal benefits.

MR. HUBAND: Well, as I said, the Trueman case . . . Of course I don't say that it would have got widespread publicity at the time that it became law, at the time that the Alberta Appellate Court delivered that judgment, but I don't think people in common-law relationships ran around trying to rearrange their affairs because the Trueman case said that implied trusts would apply to those circumstances.

MR. PAWLEY: You know, I doubt whether very many were aware of it that . . .

MR. HUBAND: Probably not but I think it would, in fact, affect them. Of course, it depends on them asserting their rights and I suppose that in many common-law relationships, the spouses would not assert their rights. We can't cure that under any circumstances.

MR. PAWLEY: Mr. Huband, failing your recommendations, do you feel that legislation with appropriate amendments should still proceed?

MR. HUBAND: Yes, I do, Mr. Attorney. I would very much like to have legislation at this session of the Legislative Assembly and before it prorogues because I think it is a very important area that requires immediate reform. I would hate to see the legislation shelved over to another session. I am making a suggestion *bona fide* believing that it might be of some use to consider this simple form of legislation rather than what we have on the table. I appreciate that it comes late. Indeed, I will go so far as to say that it was not until recent weeks that a simpler form of legislation occurred to me and so I thought it would be appropriate to bring it forward to this Committee. I still think that something of the order I have proposed would be less complicated and would get over the practical difficulties easier than what you are considering. But if you decide that that is not to be, then I would urge that the necessary amendments to take care of those practical problems that we have heard so much about in recent days, be made and that the legislation be proceeded with at this session of the Legislature.

MR. PAWLEY: Just one more question. You heard the recommendation of Mr. Houston. First, of course, he suggests the legislation not proceed but if we did proceed with the legislation, he suggested that a presumption be legislated for. What would be the difference in your end recommendation as compared to Mr. Houston's?

MR. HUBAND: Well, in a sense we are both heading in the same general direction. I would suggest to you though that my formula — legislated formula — is just as simple as Mr. Houston's yet more effective because I think, as I have suggested in dealing with the issue of retroactivity, of opting out, of its application to common-law marriages, that my suggestion has more merit than Mr. Houston's.

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

MR. SHERMAN: Yes, Mr. Chairman. I would just like to ask Mr. Huband, following up on the Attorney-General's questions. Mr. Huband, would you suggest that the proposal that you have put forward is a possible option or a possible alternative that could be considered or would you suggest that the proposal you put forward is, in your view, better than the proposed legislation?

MR. HUBAND: Well, I think it is better but I stated at the outset that I am not a legislative draftsman and I think that it would be necessary to have legislative counsel take a look at it and see the merits of it and report back to this Committee. I honestly do believe that this simple formula that I have advanced does away with the practical problems that have been raised in many of the briefs but at the same time accomplishes the purpose that this Committee, as I perceive it, has in mind.

MR. SHERMAN: On Page 13 of your brief, you say that to some degree the legislation discourages people from becoming married in order to avoid the rigidity of the marital property law. Would you chance a personal estimate as to what degree? How serious do you think that is?

MR. HUBAND: Oh, that I could not say. It would be idle for me to speculate on that. I simply say that there may be some people at the present time who would prefer to maintain a common-law relationship rather than become legally married, not because of a personal aversion to the institution of marriage but because of the implications of the property laws that we would be passing. I simply say that I doubt whether passing the legislation as I have drawn it would have that same effect. Moreover, since it would apply to, or could apply to, common-law marriages unless it was specifically excluded, there would be no point in wanting to maintain a common-law relationship.

MR. SHERMAN: Yes, but you obviously, although you don't hazard an estimate as to how serious that degree is, you see that as one of the defects in the present legislation.

MR. HUBAND: I do.

MR. SHERMAN: Thank you.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, in the Murdoch case, Mr. Huband, I believe that in your brief here, you said that in the final result that Mrs. Murdoch got nothing. Is that correct?

MR. HUBAND: Well, I am aware of the fact that she got something in terms of maintenance and things of that nature but she got nothing under her claim that went before the Supreme Court for a division of property.

MR. GRAHAM: At the same time, when a case goes before a court, does not the court judge on the merit of the argument that is put forward by the various legal counsel . . . ?

MR. HUBAND: Yes, if you want to go back to the Murdoch case, what I am suggesting is that they made a substantial error in law. The substantial error in law being that they felt that the only way they could give relief to Mrs. Murdoch was to find a common intention on the part of husband and wife, that the wife would have a part-ownership in the asset at the time of its acquisition. Since, on the facts, they could not find that common intention, they denied her claim. What I am suggesting is that is not the law; never was the law. Chief Justice Laskin knew it; they knew it in the Trueman case. You can imply a trust without having that common intention simply implying a trust in order to avoid a

fraud, in order to avoid unjust enrichment of one party over another. So I think that they simply made an error in law. Since it was made by our highest court, there are only two ways to rectify that error. One is to have a case eventually find its way to the Supreme Court where a majority of five out of nine instead of four out of five, five out of nine of the judges could overrule that decision and say, "No, that was erroneously decided," or, alternatively, it has to be a legislative response. What I am saying is, let's not wait until the Supreme Court again has a case of this same character before it; let's do it by way of a legislative response. The easiest legislative response is to simply take Laskin's decision and translate that into legislative form.

MR. GRAHAM: Another question. I realize I have no right to ask this but if you had been arguing the case for Mrs. Murdoch, would you have argued it on the same basis that the legal counsel argued it?

MR. HUBAND: Well, not having heard what they argued, I can't really say. It may well be that they raised the right issues but the court simply ignored what they were saying. I simply do not know.

MR. GRAHAM: Okay.

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

MR. HUBAND: Thank you.

MR. CHAIRMAN: The time of adjournment being almost at hand, the Committee rise and report. The Committee will reconvene this evening at 8 p.m. and the first name on my list is Mary Jo Quarry, followed by Norman Coghlan and Arnold Gardner.

Committee rise.