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 14, 1977, 3:43 p.m.**

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**TIME**: 3:43

**CHAIRMAN**: **Mr. D. James Walding**

**MR. CHAIRMAN**: Order please. We have a quorum gentlemen. The Committee will come to order. The motion before the Committee is the Amendment as read to Clause 1(a) of Bill 61. Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, I was just pointing out to Mr. Spivak before the meeting started that I believe that the discussion he and I got into was premature. I think that (a) deals only with a description of assets and the discussion we were having was whether it should be considered commercial or family asset. Therefore, I think it would come in under (b) or (d). I think we were out of order, just premature in our debate. That's all I'm suggesting.

**MR. CHAIRMAN**: Mr. Spivak.

**MR. SPIVAK**: I'm not sure it was really a wasted exercise, however, I accept what Mr. Cherniack has said and I think we can move into the commercial and then maybe deal with the same items. I've already indicated in my discussion with Mr. Cherniack a position, and he can at least put it on the record because I think it's important. In defining asset, we're supposedly defining everything including the equitable interest with the exception of (1) and (2). But one of the concerns I have and I put it before the Committee because it's a matter to be considered and it may very well be something that will be considered afterward, is that whether in the definition of asset — and we're talking equitable interest therein — we are talking at all about anything that would affect a Hutterite in a Hutterite Colony and their rights. I think that we should have some determination whether in fact a right that they would have within a colony is affected by this definition section or not.

**MR. CHERNIACK**: I want to answer that only because it's raised. A Hutterite who has an equitable interest or otherwise in anything which comes under the description of asset is no worse than any other person who wants to share with his wife and therefore if he has something, and my impression is that a Hutterite living on a Colony has been denied the right to ownership of any part of that — I think there has been a very extensive case dealing with that — that I don't think Hutterites on Colonies have any rights other than as long as they live on the Colony. I think once they leave the Colony I think they lose their rights. But that to me is academic. I think that whoever they are and no matter what their religious background or allegiance is, what they own that comes within the description of asset is included. In my opinion and I may be wrong, but I think that too is academic, if they own something or nothing, then whatever it is is still something that would become shareable later on, under the other definitions and under the Act.

**MR. SPIVAK**: I wonder if the government can inform us whether they've had any discussions with members of the Hutterite community with respect to the Act and with respect to the definition section of assets.

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: Mr. Chairman, I think that Mr. Spivak will have to accept our view that Mr. Silver — we've asked him to come up to deal with the particular question — but I'm satisfied personally that the Hutterite community would not be affected by this legislation. If the Honourable Member for River Heights recalls that it was back in 1967 or 1968, there was a case involving Interlake Colony and an attempt by families called Hoffer to obtain a separation of some of the assets and ownership to themselves after they had departed from the colony. And it was held by the court that all the assets in the colony are common, that none of them are individual even upon departure from the colony. So that I don't see where there would be any property interest difficulty in respect to the Hutterite Colonies pertaining to this legislation. I think it was a case by Justice Dickson in the Court of Queen's Bench, a very thorough analysis of ownership in Hutterite colonies. Now, I think that we should have no concerns that way.

**MR. SPIVAK**: I wonder if the Attorney-General would be prepared to indicate whether asset would include any property owned by a commune in the sense of giving a wife the right to a portion of the commune in the event there is a separation between the husband and wife who are members of a commune.

**MR. PAWLEY**: I'm sorry, that the wife has the right to some of the property within the commune?

**MR. SPIVAK**: That's right.

**MR. PAWLEY**: In the event of a separation between husband and wife?

**MR. SPIVAK**: Husband and wife, yes.

**MR. PAWLEY**: I'm not aware of any and let me just add to Mr. Spivak, if this was a concern to the Hutterite people, I'm sure that we would have heard from them or their legal counsel during our Law Amendments. This is the first time that there's been any suggestion that there'd be any legal implications insofar as Hutterite Colonies are concerned. Certainly it would be contrary to any understanding that I would have as to the law pertaining to ownership in Hutterite Colonies. We can further pursue this when legal counsel arrives.

**MR. CHAIRMAN**: Mr. Johnston. The Amendment as read?

**MR. PAWLEY**: Well, I don't know whether Mr. Spivak wants to raise it afterward. I indicated to him that legal counsel is on the way. He may not accept my view of this and in fairness I want him to be able to pursue it with legal counsel.

**MR. SPIVAK**: What I'd prefer to do and I think would be the proper way, we're going to be on commercial assets right after this and I think we're going to get back to the discussion where we were before. When the counsel comes here, I'd like to at least have an explanation from him. The question will be put by the AttorneyGeneral and we could at least have his opinion at that time.

**MR. CHAIRMAN**: The Amendment as read—pass. 1(a) as amended—pass; 1(b). Mr. Jenkins.

**MR. JENKINS**: Mr. Chairman, I move that clause 1(b) of Bill 61 be struck out and the following clause be substituted therefor:

(b) "commercial asset" means

(i) a shareable asset used or held or primarily used or held for or in connection with commercial business, investment or any other income or profit producing purposes or used or held or primarily used or held in a manner calculated to produce income or profit whether or not the asset actually produces income or profit, or (ii) notwithstanding sub clause (i), any shareable asset in money or cheque form, whether or not deposited and held in a bank account and, if deposited and held in a bank account, whether or not the account is an interest bearing account.

**MR. CHAIRMAN**: The amendment as read. Mr. Spivak.

**MR. SPIVAK**: Let Mr. Sherman go first.

**MR. CHAIRMAN**: Mr. Sherman.

**MR. SHERMAN**: We're back I think into the discussion we were having just before the lunch hour break having to do with a "chose in action" such as an instrument of life insurance, a life insurance policy. I would also raise the question relative to similar instruments, such as pension plans where you are dealing with specific evaluations but you're also concerned with locked in accretions and locked in benefits and deferred benefit payments. It seems to me, Mr. Chairman, that that subject, the one having to do with pension plans rightfully belongs in the discussion that we started earlier having to do with insurance policies and we find that the inclusion of same will produce the kinds of difficulties that I've suggested before and that Mr. Spivak has suggested before and we want to know what the government's position is in respect to them. How is the government going to answer those questions? How is the government going to deal with them?

Mr. Cherniack suggested before the lunch hour that we should be prepared to suggest amendments. I quarrel with that suggestion of Mr. Cherniack's on one level and that is that I think there was an implication in his remarks that amendments and suggested amendments and suggestions generally had not been forthcoming from this side of the House or this side of the Committee. I submit that they've been coming forth in substantial volume in all the weeks we've been considering this legislation. Our position at the moment is that there are a number of sections, a number of clauses in both bills on which we pose the question, how are these going to operate? Have you considered the implications? If there were time after that for us to sit down and work together on amendments that would be most agreeable to us but at this juncture we raise the difficulties that we foresee and suggest that the government has either not anticipated them, or if they have anticipated them, then they must be ready with some answers. So, I don't accept the implications of Mr. Cherniack's suggestions prior to 12:30. In this area of a "chose in action" we go back to the question raised at that time. How does the government propose that the potential problems and questions that can arise with this kind of categorization will be handled.

**MR. CHERNIACK**: I do not speak for the government. I think members of the committee know that I am not a member of the Treasury Bench and I speak as a member of the committee. I will state my opinion but, Mr. Chairman, I do not intend to let Mr. Sherman off the hook on which I think he belongs. Now, he can feel he's off it but that's okay.

I want to deal specifically with the item raised. The question raised by him is what about an annuity or a pension. Mr. Spivak talked about an insurance policy, and I am looking at the motion before us which describes what is a commercial asset. A commercial asset is an asset that does not pass except on separation under the various methods outlined in the Act. Therefore, it remains in the management control and ownership of the spouse who has it and the other spouse has no right or claim to it except under the various occasions when that spouse can assert the right.

I think it describes a commercial asset in a way which I believe satisfies the need for those who think that control and ownership, and management, should remain in the hands of the one spouse until there is that separation.

Having said that, and having read the definition before us, I think it describes it fully. Then I would say that the court is expected to make a decision when there is non-agreement between the parties. I am quite satisfied that the definition of a sharable asset is such where a court could not only arrive at a decision of a certain annuity or of a certain insurance policy, but I believe arrive at a right and good decision.

In other words, I believe that if that insurance policy or that annuity is considered to be a saving of some kind on behalf of the family group, not being used to earn a livelihood, then I believe it ought to be considered a family asset. I believe the court will so find. However, the court will still have the right to say what it believes, and I think that I, as a legislator, should be prepared to leave it to the court to adjudicate on that, providing I give a workable definition to court. I think we're doing that here.

So I have to say to Mr. Sherman and to Mr. Spivak that if they have a better suggestion to help the court in the definition so the court can more adequately make the decision, let them make that suggestion. But before doing that, I think it is very fair to ask of them whether they think it ought to be a commercial asset, or whether it ought to be a family asset. Once we hear what they say and discuss it on the basis of their argument, then it is a simple matter for us to turn to legislative counsel and say, "Do what we think you should do and you do the words that are necessary."

But since Mr. Sherman and Mr. Spivak say it is not necessary or needed, on their part, to make a definite recommendation and if all they want to do is ask questions, then I have to answer for myself that I am satisfied that the definition of commercial asset is sufficiently descriptive for a judge, hearing the facts before him and using all the discretionary powers given, and being proposed to be given to him in this bill, to arrive at a fair decision and I am quite prepared to leave it to that judge under the circumstances.

**MR. CHAIRMAN**: Mr. Spivak.

**MR. SPIVAK**: Well, let's take the example of an annuity or a life insurance in which there is an irrevocable beneficiary, and in which the contribution then is made both by husband and wife to the payment of the annuity, or to the payment of the life insurance policy.

Under the terms that Mr. Cherniack has spoken about, then in effect that is a sharable asset, that is a family asset; it's not a commercial asset. And on that basis there is a right to a division, notwithstanding the fact that the beneficiaries have been set up and are irrevocable.

In other words, there is a capability and a capacity to cancel. Now, if that's the case, then it would seem to me that we are going to change a great deal of the normal transactions that have taken place for a variety of different situations, annuities which are provided for education of children in which payments have been made, and a number of other situations. Now, the thing that I can't accept from what Mr. Cherniack has said, is that I don't accept that we should just simply leave this to the court to decide. Because I think we have got to then say what we are really intending at this point, and to deal with these situations, not with every scenario but with some basic ones that we can visualize, so that we are very specific in what we are doing and we understand the nature of how we are doing to deal with this. So that, as well, the people who supply annuities and supply insurance, will know that in dealing with people that there are certain things that are going to be required that they do not now have, to ensure that there is a joint responsibility, particularly in those areas that would be considered family assets and therefore in which there would be a responsibility for managerial rights of the other spouse.

**MR. CHAIRMAN**: Mr. Adam.

**MR. CHERNIACK**: I wonder, Mr. Chairman, if Mr. Adam would permit me to ask a question of Mr. Spivak.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: I'd like to know whether an irrevocable beneficiary policy still entitles the owner to cancel it without the consent of the beneficiary.

**MR. SPIVAK**: No, I'm not sure that that can happen, no. In some cases, I guess . . .

**MR. CHERNIACK**: That's what I thought.

**MR. SPIVAK**: But, Mr. Chairman, that simply will mean that as a result of a separation that in effect there will either have to be the paid-up value of the policy brought forward for a vesting or for a transfer to the other spouse of their half, or in effect — and it can in many cases — cause severe hardships for an annuity that was in fact provided for a beneficiary, which was the child, for furthering their education because that may very well be the only asset that will, in fact, be shareable.

Now I'm simply saying to you, you know, if that's intended, if that's really what we are doing, I don't think it is a question of the court suggesting it. I mean if what Mr. Cherniack is saying is his interpretation and that's his understanding of it, I think there may very well be more ways that we can make this explicit by talking to the legislative counsel and doing it, if that's what's intended. And all I'm saying is we better determine really what we're intending and then look at the legislation, and make it in a specific way, rather than leave this vague because I don't think that the courts are going to arrive at a decision quickly, and I don't think that there is going to be consistency of it in the decisions in the years to come in the interpretation of this, and this may cause more hardships.

And then it still leaves the other problem of those who are in the business of supplying, knowing exactly with what they are dealing. to know what is required. Because the general tendency will be then to accept, in principle, that they are going to apply everything on the assumption that it is a family asset. In which case, the other spouse will be involved in a whole range of commercial activity and in a whole range of undertakings that are not expected as a result of this, and this can very

directly affect the nature of business as it operates. If this is what the government is intending, that's fine. If this is what it's intending, so that you have the whole relationship for business to be affected by this and for professional people to be affected by that, if this is really what they are intending then we should know it. And I don't think they are really prepared to make that kind of statement.

**MR. CHAIRMAN**: Mr. Adam.

**MR. ADAM**: Yes, thank you, Mr. Chairman. I just wanted to ask a question either of the Attorney-General, or perhaps Mr. Cherniack, if the interpretation of 1(a) or 2(b), the definition is wide enough to include, to define, a windfall asset, such as a lottery ticket or something along that nature?

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: Yes, it is wide enough, it falls within the definition of asset.

**MR. ADAM**: Of a family, or . . . ?

**MR. PAWLEY**: A commercial asset.

**MR. ADAM**: Commercial?

**MR. PAWLEY**: Yes.

**MR. CHAIRMAN**: Mr. Graham.

**MR. GRAHAM**: Mr. Chairman, I apologize to the committee. I haven't been here for all the discussion that has gone on but maybe I can ask for some information. I believe a mention was made of an annuity that was bought for a child, or something. Is it the intention that that be a shareable asset of the spouses, or is that quite properly an asset of the child?

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: Mr. Chairman, it depends on the ownership of the annuity. Does Mr. Graham refer to an annuity that is purchased by the father or the mother? It depends on the ownership of the . . .

**MR. GRAHAM**: No, I just heard — that was used in the previous discussion here where I think mention was made of it and I just wanted to know if that . . .

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHEIACK**: Mr. Chairman, I would want to answer Mr. Graham on this basis, that it depends who owns the annuity. If, indeed, it is intended to be for the child and is transferred to the child, then the child owns it. If, however, a person buys an annuity intending it to be for the child but not giving it to the child, in other words retaining it, then I would say that it would be shareable, that it would be something that that person owns. If he doesn't give it to the child, then obviously he doesn't intend to give it to the child except under certain circumstances: like if the child has grown to a certain age; like if he had enough money to pay the premiums until then; like if the child is going to school; like if the child is a good child; like if the child is responsive; like if the child is indeed going to behave in a way that the owner wants him to do.

If the owner wants to retain all that kind of power, then I think that the intent is only a wish and a hope in law and that if it is controlled in that way by the person who bought it, then it's a shareable asset. I think that's almost a restatement of the law.

**MR. GRAHAM**: Well, if the child was named in the annuity and it was to mature say at age 21, and even though it was purchased in the name of one of the parents and was maintained by one of the parents but it was named specifically in that annuity that it became the property of that individual on their 21st birthday or something. What would happen in that case?

**MR. CHERNIACK**: I think the way Mr. Graham describes it, it's an outright gift to the child the way he describes it, and that way I would say it belongs to the child.

**MR. GRAHAM**: I just wanted it clarified.

**MR. CHERNIACK**: That's just an opinion, for what it's worth.

**MR. CHAIRMAN**: Mr. Spivak.

**MR. SPIVAK**: Can I ask the government, do they consider the insurance that is available for the husband under a group insurance policy of a business is considered a commercial asset or is that a family asset?

**MR. CHERNIACK**: I don't think that is an asset, is it? Is that an asset?

**MR. SPIVAK**: Yes, insurance . . .

**MR. CHERNIACK**: Term insurance is not an asset surely.

**MR. SPIVAK**: But insurance in which there would be, under a group insurance policy, which would allow for some payout in the event that termination takes place, would that be considered a commercial asset or would that be considered a family asset? And while that question is being put, I would like to ask as well, will a pension that is payable under a group pension plan which has retirement provisions, is that considered a commercial asset or a family asset in the event of a separation before retirement?

**MR. CHAIRMAN**: I don't think your second question was heard properly at this end of the table, Mr. Spivak.

**MR. SPIVAK**: I'll wait until they are finished . . .

**MR. PAWLEY**: I think the example — Mr. Silver also has expressed the opinion that the type of policy that you refer to, Mr. Spivak, would be a policy which would be commercial. It's for business

purpose or earning of money and therefore it would be a commercial asset.

**MR. SPIVAK**: Let me put the example of the group pension with a provision for a pension upon retirement. In the event a separation takes place prior to that in which there would be vesting if the person, either with or without vesting, but in which there would be some cash payment out if the person was to retire prior to his retirement, is that considered commercial or family?

You see, the problem I have at this point, I don't know what the government thinks in relation to this.

**MR. PAWLEY**: Mr. Spivak, I indicated I thought it was a commercial asset.

**MR. SPIVAK**: Sorry?

**MR. PAWLEY**: I had indicated that I thought that the group insurance policy that you referred to . . .

**MR. SPIVAK**: No, I'm talking now about pension plans, group pension plans.

**MR. PAWLEY**: Well, again, it would be our view that since it's for profit, that it would fall within the definition before you under 2(b)(1).

**MR. SPIVAK**: But isn't that really unfair in relation to what we are talking about at this point? I'm sort of in this position: the government has introduced the legislation; we are trying to deal with it. The questions that are being asked are for the purpose, really, of trying to get some clarity in this thing and determine what is supposed to happen. I think it is necessary, if these questions are still a subject of uncertainty, for it to be clarified. That's all I'm saying and I think that's part of our function here.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, I'm just waiting for an opportunity to find out whether Mr. Spivak has an opinion which we can discuss and translate into legislation, or whether he intends to pose many many such questions to see how many points he can make on what is not clear. I would have to respond by saying that as a member of this Committee, I am satisfied that we have legislation here which is descriptive in a general nature of the difference between a commercial asset and a family asset and I am prepared to leave it to the court to interpret, under its powers under this bill, in each particular case when the case is known. If Mr. Spivak feels that's not good enough law, then let him recommend a way in which to change it and I think we can change it.

If, however, all he wants to do is point up examples or instances where he cannot get a snap response, then I suggest he give us a list and since I don't think we'll finish today, let that list be looked at by Legislative Counsel and maybe it can be worked in. But I'm trying to ascertain in my own mind at what stage we are going to find out whether there are any recommendations being made, whether the commercial asset description is sufficient and if not sufficient, how it can be changed to make it adequately descriptive of the intent.

**MR. SPIVAK**: Mr. Cherniack is under a misunderstanding. They are the government; we are the opposition. If we are to become the government, then fine, we'll make all the decisions, then they can be the opposition. In terms of the responsibility we have, the purpose of asking these questions is not for the purpose of making points, as Mr. Cherniack would suggest, but for the purpose of indicating that there is a need for some additional clarity on this with respect to it. I would suspect that if he believes, and Mr. Pawley believes, that what I have mentioned is in fact commercial, I think that there are a number of people who are sitting here who would be very incensed at this, in fact they would consider it to be not commercial by any means, but family, for a good reason.

It would seem to me that it's necessary for us to consider that situation and to arrive at a decision. If the government says, "No, we are not prepared to consider it because we don't know but we have a feeling that somehow or the other between our definition sections that the court will find a decision somewhere," and they think that that's sufficient in terms of legislation, I don't. I really don't. I think there's a need for greater clarity and the responsibility is theirs; and the responsibility is theirs to come forward with it.

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: I have indicated that it's our opinion that the group insurance policy, the annuity falls within 2(b)(1). Is he proposing that there should be greater clarification that should be written into 2(b)(1)? I don't think it requires that further preciseness or clarification. If he is proposing it does require that, then let's look at that.

**MR. SPIVAK**: Let me put it another way then, to Mr. Pawley. He accepts that group insurance should be within the commercial asset and is not a family asset, or the rights for a group insurance policy. That's what he is basically saying. Now, that's the definition section; that's his interpretation. Then you are saying that a pension plan and a group insurance plan is really a commercial asset and it is not a family asset?

**MR. PAWLEY**: By definition.

**MR. SPIVAK**: No, but that's the policy of the government, not by definition. The policy of the

government, as expressed in this Act, is that policy.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, we have a definition before us. At this stage, this is in the possession of the Committee. My opinion, I believe, is as good as Mr. Pawley's and as good as Mr. Spivak's. I don't know Mr. Spivak's opinion yet, so I have to listen to Mr. Pawley and the counsel he has with him. If they are wrong, then it would still be a question for the judge.

May I say that I believe it is the policy of the government, which I support, that commercial assets should not be shareable until one of the eventualities discussed in the bill and that the description of a commercial asset as set out in the definition before us, is sufficient to describe the nature of the asset which shall not be shared until the separation takes place, in accordance with the section.

Now that's really all we have to talk about, the general principle. I don't think that if Mr. Spivak can dream up any other individual, unusual, enigmatic problem, that that has to be settled by government in the voice of any person or any Minister. That would be being entrapped into the kind of discussion which is not relevant at all.

We are legislators. The intent of government is very clear, I believe, and if it isn't, it should be improved. I think that Mr. Spivak has to reach a stage where he is prepared to state a difference of opinion or a support, and go on from there. And if there is a difference of opinion, to state the manner in which he thinks it ought to be changed. But I don't think he will accomplish anything or even gain Brownie points if he keeps saying, "Oh, so the government wants this or the other to be included as commercial or otherwise." The Brownie points, he can make outside really, but if he wants to make them here, I think he is going to fail.

**MR. CHAIRMAN**: Mr. Spivak.

**MR. SPIVAK**: Mr. Chairman, I recognize that the government has a majority in this Committee and obviously anything we are going to do is going to fail. To begin with, Mr. Chairman, I really don't understand the exercise we are going through. The government has presented a bill in which there is a definition section. Mr. Cherniack has suggested that having a pension fund and a group pension fund is an unusual situation, you know, it's not a normal thing. That's ridiculous. It's very normal. — (Interjection)— Well, the suggestion was implied that somehow or the other this is not a normal kind of transaction. This is a very normal transaction and something in which all I want to know is the established policy of the government. The established policy of the government, I want to be able to interpret from what they say. I can read the clauses but I want to be sure that this is what they are saying because if that is what they are saying, fine. If it is not what they are intending, then don't leave it up to the court to try and resolve something that they are not prepared to deal with themselves.

They are basically saying it's a commercial asset and they are basically saying it's not a family asset. That's what the Attorney-General said, and that's fine, that's their policy and so let it be clear on that. I think we have a right in this Committee to know and understand the policy determinations which they have arrived at which have brought forward the amendments that are being proposed. I don't think there is anything unusual or strange about it.

The question of whether that should be a family asset or a commercial asset, I think, is an issue that can be discussed and there may very well be others who are prepared to discuss it. My purpose at this point is to determine what they consider commercial assets, not in anticipation that somehow or other we are just going to get an interpretation now which the courts may ultimately throw out, but realistically something that will be consistent with what judgments the courts should make if the questions are put to them by anyone, in connection with any cases that may arise as a result of this Act.

**MR. CHAIRMAN**: Mr. Johnston.

**MR. F. JOHNSTON**: Mr. Chairman, I get a real kick out of the fact that now we are making Brownie points. I was in this Committee from the beginning and I was there when we went through — after all the hearings — the Law Reform Commission Report when we went clause-by-clause. We brought up points that we thought weren't clear or how they could be done and made suggestions. As a matter of fact, we didn't make too many suggestions. We are not drafting the legislation; we're not men who are capable — or at least I'm not — of drafting legislation. There are people much better at that than I and that's been said before the Committee many times.

We are bringing up points that we feel are not clear in legislation. I always remember Mr. Campbell said, "Don't leave it to any more discretion than you have to; put it in the bill," is what he used to say.

Mr. Chairman, I don't think that this section does anything to clarify a commercial asset versus personal property or assets, in any way, shape or form. You haven't done anything for the self-employed people. If you want to say that it is commercial assets used or held in connection with commercial business, I assure you that I have entertained around my dining room table for the benefit of doing business because my office is in my home. I am allowed to do that by the Income Tax Act of this country, claim one room of my home for tax and I can put in expenses and the Income Tax accepts them because I do entertain in that home.

On the other side of the fence, if you are going to take insurance on a person who is self-

employed, and talk about being used, an insurance policy, and it's being used to do something that it's borrowed against for the benefit of doing business — then it's commercial. But really, I don't ever think it really falls into that category as far as that's concerned.

So from that point of view, we are now back to where we were before, as Mr. Sherman said. We have had the Law Reform Commission Report in front of us; we have had hearings on it; we have had a bill that has been questioned; and now we have amendments that have been questioned. Now when we question them, we are accused of making Brownie points.

Mr. Chairman, the section is just not clear regarding commercial assets and for anybody who hasn't got a limited business — and I'll put farmers in that and self-employed people — this section is nowhere near being clear on that basis.

**MR. CHAIRMAN**: Mr. Sherman.

**MR. SHERMAN**: Thank you, Mr. Chairman. If I may say, with respect, I think Mr. Cherniack misinterprets the position of the Conservative caucus on this Committee and the position that has been advanced through the remarks of Mr. Spivak.

Mr. Cherniack is asking us for amendments. I think, in fairness, he would have to acknowledge the fact that the proposed amendments in front of us were available to us in terms of our opportunity to study them as a caucus, as of yesterday morning. They represent almost a new bill; in many areas the notes accompanying them say, "this section, this division, this part has been completely recast." We did not know until the Attorney-General very kindly came to our caucus room at approximately 8:30 last evening, which of these amendments were even accepted by the government. The Attorney-General was kind enough to come and tell us in our caucus room. But at that point, we didn't know which of these amendments we would actually be dealing with because they would have received acceptance from the Government caucus. uPF Now, for Mr. Cherniack to suggest that Mr. Spivak or anybody else on our side should be in a position as a consequence of that to propose amendments to amendments that we didn't know would prove acceptable or not, I think is an unfair and an unreasonable position. What we are saying is that we have identified problems and questions related to a number of clauses and a number of sections and we are attempting to point those out with the implied suggestion that amendments should be worked out for them. But I think to expect us to have done that in the time frame and not knowing which amendments were acceptable is not reasonable. May I just put a question to Mr. Cherniack, Mr. Chairman, for my own information? How does Mr. Cherniack read insurance policies *vis-a-vis* the clause of the bill that we're looking at? Does he feel that the clause identifies them as a family asset or a commercial asset? I would like to know how he interprets the clause because until I know how the government interprets the clause, I don't know how to respond to him when he asks me for my suggestion.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Thank you, Mr. Chairman, but firstly, in the light of Mr. Sherman's protestations against my suggestion that they should have amendments, I am prepared to withdraw it and hold it in abeyance for a little while longer to see whether I want to repeat it. But I have to answer him, and at the same time Mr. Johnston saying that I read commercial asset before us to be one which is held for in connection with commercial, business, investment. When we come to investment, I consider a life insurance policy to be an investment, it's a saving; and I consider an annuity to be an investment, it's a saving — and so far I have had no problem with the points that were raised except the question of the Hutterites. Now I admit that I have a little problem with them although my recollection of the law is that they did not have a right.

Now, I will tell Mr. Sherman that I believe that investments ought not to be commercial. That's my personal opinion. I think that if a husband — let's say a husband, through his income is able to purchase an apartment block or Province of Manitoba bonds, I believe it should be shared right off the bat. But I have to tell Mr. Sherman I do not carry with me the majority of the people. Therefore, I am only interpreting to him what I believe the law says, and what I think is not important. You have got counsel here; you have got two people whose job it is to give objective opinions with which you and I can disagree. Nevertheless, they stated that they felt that life insurance and annuities and group insurance, they said they believed that's covered under commercial assets, and having asked them just privately, learned that their interpretation of investment includes those items. Now I think it does, so I've answered Mr. Sherman directly and I don't think that I, for one, nor the Attorney-General have avoided question.

What I was talking about was what I still think are kind of remote examples that are being brought in. And let me assure you that eventually you will get to one where we may not be able to answer — any of us answer — and I would then have to say, well, I think that that is sufficiently covered in the general description. So I have to say again to Mr. Sherman that I would not expect him to come with a typewritten legally worded amendment, but surely if he thinks that insurance or annuity or group insurance ought to be commercial or not, and would state so, then we could discuss the principle, then I don't think it's a question of what the wording is, we've got people who are professionally trained and paid to do that very job.

**MR. SHERMAN**: Well, thank you, Mr. Chairman. If I may just respond to that. If Mr. Cherniack tells me that the bill in his view, specifies that normal, ordinary life insurance policies are a commercial asset, then that's good enough for me, because I believe they should be a commercial asset. But when Mr. Cherniack asks me, as I infer from his remarks, that he wanted us to put amendments forward, what would be the point of my putting an amendment forward until I knew how he and his colleagues interpreted this section, because when we examined this section, we were not at all clear that that is what this section says. He tells me that that's what it says; I'll accept that.

**MR. CHERNIACK**: Mr. Chairman, I apologize. I really didn't expect Mr. Sherman to bring amendments. I really meant proposals or reactions, and now that we have one, I am happy. That's all I really expected and I withdraw any suggestion I expected him to come with a written one. But I just want to add one thing. I stated the opinion that investments include these items. It is supported by legislative counsel, whose opinion is more important, I think.

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: Well, I will pass now, Mr. Chairman.

**MR. CHAIRMAN**: The amendment as read — pass; 1(b) as amended—pass. Close 1(b) as amended—pass. 1(c). Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, on a point of procedure, it may be that Mr. Johnston wants to debate 1(b)(ii), and I think that the practice is either you take the whole section or if anybody wants to debate any part of it, then we have a right to ask you to split it up, haven't we?

**MR. CHAIRMAN**: The amendment was one motion and is passed as such. However, if Mr. Johnston wants to go back and discuss either part of the motion . . .

**MR. F. JOHNSTON**: Well, Mr. Chairman, I was of the understanding that we were basically speaking on 1(b)(i) when we were talking about commercial businesses' assets. 1(b)(ii) — any shareable assets in money or cheque form — whether or not deposits are held in bank accounts, we are now getting into the area of the pay cheque. I read this as the pay cheque being a shareable commercial asset on break-up. Now, I would like to know how you are going to decide that particular shareable commercial asset when you break up. I don't know whether you have got to go back as long as you have been married to make sure that you have spent that 50-50 with one another or not. Now, am I misreading that? At the present time, I could see a problem if there wasn't an accounting done of all the money that came into a house and who had what.

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: No, Mr. Chairman, no. This would not involve that kind of accounting, as to what has come in in the past. It would only deal with the assets in existence at the time of the date of the equalization under 21(2): dealing with assets to be included in the accounting under this division shall be those assets that are in existence as at the applicable closing date, so would not involve us going all the way back taking in pay cheques for time immemorial.

**MR. CHAIRMAN**: Mr. Johnston.

**MR. F. JOHNSTON**: Well, I don't really see the sense of it, whether or not deposited or held in the bank, assets in money or cheque . . . okay. That's fine. So, in other words, it's some cheques lying around the house then?

**A MEMBER**: Or under the mattress.

**MR. PAWLEY**: Yes, if there is a cheque there at the time of the closing date, then that would be included among those assets to be equalized at the time of deferment.

**MR. F. JOHNSTON**: That doesn't again, as a self-employed person . . .

**MR. PAWLEY**: Or a whole bunch of cheques under the pillowcase.

**MR. F. JOHNSTON**: All you've got to do is to put your money in a can out in the backyard and you've got problems with that.

**A MEMBER**: Then you'd dig up the wrong can.

**MR. CHAIRMAN**: The amendment as read Mr. Johnston.

**MR. F. JOHNSTON**: Well, that's a boon to the commission salesman, I'll tell you that, the fellow who tunes pianos and other things.

**MR. CHERNIACK**: I would like to understand Mr. Johnston. Is he saying that those people who are able to keep their assets in such a way that could be hidden from the court and the spouse would be of benefit? If that's what he means . . .

**MR. F. JOHNSTON**: No, I'm not saying that.

**MR. CHERNIACK**: Well then I didn't understand his point. I withdraw the question.

**MR. SHERMAN**: Mr. Chairman, could I ask the Attorney General how the sharing of that shareable commercial asset in the form of income takes place. How is that carried out? At the point where the marriage breaks down and the application for division of property is undertaken, the income presumably is considered an asset, a shareable asset in many instances that would be the only asset in a household. How does the sharing take place at that juncture?

**MR. PAWLEY**: Mr. Chairman, it would take place as per the division for commercial assets in the equalization process.

**MR. SHERMAN**: Well, how much of the income is involved?

**MR. PAWLEY**: Only what's in existence at the time. I think there is some misunderstanding that the income takes in income that's been received over a period of time and thus involves tracing. No, the answer is that it's only the income that's in existence at the time of the closing.

**MR. CHAIRMAN**: Mr. Graham.

**MR. GRAHAM**: Mr. Chairman, speaking as a farmer, this intrigues me because I will pose a hypothetical case. Supposing I had delivered 4,000 bushels of wheat and I had a $12,000 cheque on that particular date. That would be shared, I presume, would it?

**MR. PAWLEY**: Yes, if it's the closing date, Mr. Chairman. It should be understood this is part of the commercial assets and therefore it would only be shared because it is a deferred sharing, it would only be shared at the time of the closing.

**MR. CHERNIACK**: After deduction of debts and everything?

**MR. PAWLEY**: Yes, after the deduction of all debts and liabilities.

**MR. GRAHAM**: Well, but the second part of the question is: One year later, I get the final payment from the Canadian Wheat Board on that money. Is that also taken back then?

**MR. CHERNIACK**: Mr. Chairman, I would like to answer Mr. Graham because I think that it is basic to everything that we are discussing, that on that divisible date, the parties mutually, or if they need to go to court, then the court, will determine the value of that business asset, that commercial asset, which will include cash on hand, accounts receivable, stock on hand, other assets on hand, less all the liabilities. If there is an account receivable, then I assume the court will take it into account. If it is an unascertained account receivable, then I think the court would, as it does in all partnership cases, either postpone the division for that purpose or put a value on it. And the Act does provide that the court may postpone a division until such time as it deems feasible and, in my opinion, that's what would be feasible is to postpone that division until it's known.

**MR. GRAHAM**: The final payment that would be coming a year later — and it is an unknown amount at that time — if there is such a thing coming, it would be brought back and declared part of those assets.

**MR. CHERNIACK**: If the court so sees fit.

**MR. GRAHAM**: Okay. That's all.

**MR. CHAIRMAN**: Mr. Spivak.

**MR. SPIVAK**: Yes, well in effect what Mr. Cherniack has essentially said is, that income payment of which is to be received later on, will be considered account receivable as a commercial asset or within a commercial asset.

**MR. CHERNIACK**: Not income but an account receivable.

**MR. SPIVAK**: Account receivable which will then be part . . .

**MR. CHEIACK**: That's an asset.

**MR. SPIVAK**: . . . as an asset and which will be or divided. There are probably situations — and you can think of probably some very outstanding ones — where in effect there are contracts for work that are actually amortized over a number of years — and this reflects particularly in professional sport, where if you apply this, you cannot really say until there is performance, that the moneys that have been owing and will be payable will be paid over a period of time. Now, I think you can think of some very interesting situations, and there are a number of cases which will not be covered. I think that should be very clear. There are earnings that will in fact be generated in one year that may be payable over a period of time as a result of an employment contract which in effect will not be covered as far as commercial assets for any equalization that may take place for a separation that will occur because they will not be considered an account receivable until there is performance; therefore, on that basis, they are not payable, yet they in fact have been realized and were realized during the actual performance in a given year.

**MR. PAWLEY**: Mr. Chairman, it if hasn't been performed and it comes due in the example given by Mr. Spivak after the termination of the marriage, then the court would have to place a value on that; it is a chosen action, and it would be necessary that the court would place some value upon that asset. You know, the court will have to deal with a particular case and will have to place a value on it which will relate to the time in which the asset was accummulating during the term of the marriage even if it doesn't come due until some time after the termination.

**MR. SPIVAK**: Well, Mr. Chairman, just dealing with professional sport, I question whether the Attorney-General's opinion is correct at this point. I think that the court will not make that determination. In effect, they will simply determine on the basis of the actual . . .

**MR. PAWLEY**: Excuse me, I should just emphasize that your question did not imply an inclusion of future earnings because we are not dealing with future earnings.

**MR. SPIVAK**: No, I'm not, but the problem in professional sport is that earnings, even though they are earned over a period of time, may be spread over several years for whatever tax benefits may occur, that's a common practice. Therefore, in effect they still will not be earned unless there is performance but the performance that is expected several years down the road is not the

performance for which they were actually being paid the amounts of income that they are receiving. All I'm saying is that I don't think that situation is covered and that will be one area in which I don't think the courts will interpret in the sort of liberal way that the Attorney-General is suggesting.

**MR. CHAIRMAN**: The amendment as read. Mr. Sherman.

**MR. SHERMAN**: Mr. Chairman, could I ask the Attorney-General what about the household in which the only income is the weekly pay cheque of $125.00? What I am not clear on is how that is shared at the point where the application is made.

**MR. PAWLEY**: Well, again, it is a future asset, and in respect to future pay cheques, that would not be included, that would fall under the maintenance bill if there was an order for maintenance payments. But certainly insofar as future pay cheques, they would not be an asset under our definition.

**MR. SHERMAN**: I realize that we have cleared subsection 1, but does that not include a salary cheque, a pay cheque?

**MR. CHERNIACK**: Already received, yes.

**MR. SHERMAN**: Already received.

**MR. PAWLEY**: No.

**MR. CHERNIACK**: Not in the future?

**MR. SHERMAN**: No, not in the future. I am talking about . . .

**MR. CHERNIACK**: Only when it's money.

**MR. SHERMAN**: So it would only be that one on that particular day.

**MR. PAWLEY**: Yes. Quite. And just to expand it, any from the past that the individual might have saved, under his mattress.

**MR. CHAIRMAN**: The amendment as read—pass. 1(c)—pass; Mr. Spivak.

**MR. SPIVAK**: Well, really again, it is a question whether we deal with this in the definition section or we deal with this when we talk in the other division. No, I would rather defer until we get to the other.

**MR. CHAIRMAN**: (1)(c)—pass; (1)(d). Mr. Spivak.

**MR. SPIVAK**: Well, again, family assets is everything excluded by commercial assets with the exception of number 1 and 2 of 1(a).

**MR. PAWLEY**: Section 9 defines what is included as shareable assets.

**MR. CHAIRMAN**: Mr Cherniack.

**MR. CHERNIACK**: It says family asset means a shareable asset that is not a commercial asset. A shareable asset is defined I believe under (f) as referring to Section 9 and Section 9 excludes a number of items which are not shareable, and we'll deal with that of course under 9(1) which is Page 6 of the Amendments.

**MR. SPIVAK**: Well, then I'll deal with that under 9 as well.

**MR. CHAIRMAN**: (1)(d)— pass; (1)(e). Mr. Jenkins.

**MR. JENKINS**: I move that clause (1)(e) of Bill 61 be struck out and the following clause be substituted therefor:

(e) "marital home" means, subject to subsection 7(3), a homestead within the meaning of The Dower Act;.

**MR. SPIVAK**: Mr. Chairman, just as a point of order, I'm assuming that what you're really talking about here is subsection 7(3) as proposed to be amended, not as 7(3) as it is now but as proposed to be amended. We're going to pass something that's going to be ultimately amended. I guess as a matter of record it will be all right but I think that should be clear now.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, we do that anyway. Whenever you have a section that refers to a section subsequent thereto, you still deal with the section but it doesn't have any meaning until you pass the subsequent one. Surely that will be the same thing in this case.

**MR. CHAIRMAN**: Mr. Graham.

**MR. GRAHAM**: Mr. Chairman, dealing with the definition of a "marital home" I have to take you back to the discussions that were held in Committee and the problems that we encountered there with the definition of a "marital home" as it was defined under the The Dower Act under Homestead. And I would think that it would be much more appropriate where we are now trying to differentiate between a "marital asset", a "commercial asset", a "family asset" and so on, that that type of definition did not exist when The Dower Act came in many many years ago. But now, I would suggest that with this change coming in and a definition of various types of assets, it may be more appropriate to define a marital home as including that property, the legal description of that property which includes the marital home only. If you go back to The Dower Act and the definition there, the definition of homestead means a dwelling house in the city, town or village occupied by the owner thereof and his wife as their home and the lands and premises pertinent thereto, and it's consisting of not more than six block lots or one block.

Now it is quite conceivable today that a person could have six houses on six lots in one block and, in this case you could get into some technical difficulty. I would prefer to see it as pertaining only to the land that is described in the legal description on which the marital home is situated. That may not appear to be such a great difficulty in the urban area, but in rural area the definition of a homestead there does not include the quarter section, only the quarter section on which the marital home is situated. It also includes one other quarter section if there happens to be one other quarter section; or if there happens to be several quarter sections, it is one other quarter section. If that marital home happens to be on one of those quarter sections which is isolated from the others, then the other quarter section is the one that is designated as such by the owner. I think there could be problems with that definition.

Now, we're dealing with commercial assets and marital home and family assets so I think that there's no question about the sharing anyway but if the rest of the farmland is going to be considered a commercial asset, then why do we have to tie up one extra quarter of land under the definition of a marital home when there's going to be a sharing anyway as we have indicated but the sharing will be on the basis of the rest of it will be on the basis of a commercial asset rather than as the marital home. If that sharing is going to be on the basis of commercial , it does free up for the operator of the farm and if they're both operating the farm jointly and equally, then it's no problem . But if one spouse is operating it does give him a little more leeway to operate his farming operation if he hasn't got a half section tied up in the marital home instead of only a quarter section. So it doesn't affect the sharing but it does affect the operation.

So I would suggest that the definition be only of the marital home , be confined only to the quarter section where the marital home is situated. Now I throw that out as a suggestion and I hope that other members will have some comments to make on it.

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: Mr. Chairman, I would have very much concern about changing the definition at this stage. It seems to me that particularly groups in rural Manitoba, the Women's Institute and other groups who might have very strong views upon any move to reduce the amount of farmland that would be included in dower rights, would have had real concern if they were aware of any attempt to change the provisions of The Dower Act and I think they might have had some comment in connection therewith. I don't feel, Mr. Chairman, that there should be any tying up or complications created at all for the fact that The Dower Act includes the entire home quarter section, plus another quarter section so designated. We have indicated that the farmland beyond that is commercial and I couldn't foreseee a situation where because of the fact that the homestead is included in the family asset that that would create a situation by which land would be tied up or there would be such involvement in the management that it would create problems in th the operation of that farm. I don't think realistically that would occur if that's what the honourable member was indicating. I don't know just in what way that could occur. If we reduce that which is included in The Dower Act then it means that we reduce the protection to the spouse in the event of sale of property, or in the event of death that life interest would be, that there would be some — I don't know what the honourable member is proposing — you're not proposing a change in the definition in The Dower Act, only in this Act? Is that. . . or in both Acts?

**MR. GRAHAM**: Mr. Chairman, perhaps I should elaborate a little further. When The Dower Act came in, at that time land was in all probability selling at anywhere from $300 to $500 a quarter section. Today good farmland is selling at $30,000, $40,000 and $50,000 a quarter section. If that farm operation and the farmer wants to enlarge on it, in all probability he hasn't got the cash and he has to use for security purposes other property that is held in that name. Now, if he is operating as an incorporated farm, or if he is operating in partnership with his brother or something of that nature, you can severely restrict his ability to operate. If he has to have a half section tied up under Dower, or under the official definition of marital home as we're not concerned about Dower, we're concerned about the official definition of marital home here — he is operating a commercial operation. I can foresee difficulties in getting the necessary credit that he would require because the other may be operating under a different name, it may be operated under a partnership. We We know that we did have great difficulty when we were dealing in Committee on partnerships and the problems that could arise. So, I throw it out to the Committee on that basis. We could be hampering the effective operation of that farm.

There is no question about the security available to the other spouse because she is going to share in half of the commercial asset anyway. She is guaranteed her share under the definition of the marital home. It's not going to affect the status of the wife at all. It could affect the status of the commercial operation.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Before I make my comments, I'd like to ask Mr. Graham a specific question. Would he not agree that the point he's making should be uniform and therefore any change made in marital home should also be a change made under The Dower Act.

**MR. GRAHAM**: I would think that is a logical assumption.

**MR. CHERNIACK**: Mr. Chairman, on that basis, I agree with the Attorney-General who is concerned about the fact that we would be making a very very substantial change in the whole concept of what is a homestead under The Dower Act.

Firstly, I want to correct one statement made by Mr. Graham. He used the example of a dwelling house and maybe five other homes on six lots. My reading of this definition is clear. It is only one dwelling house and the lands that are pertinent thereto which may not be more than six lots. So I do not accept. . .

**MR. GRAHAM**: Well, maybe there are no houses on them. I don't know.

**MR. CHERNIACK**: Well, that's right. If there are no houses then it's up to six lots. But, Mr. Chairman, I'm inclined to feel that Mr. Graham has an important point. That land is now not put to the same kind of use as was done when the definition of homestead was developed under the The Dower Act, but I would think that it would be ill-becoming of us to make a substantial change of that nature without having adequate debate and hearings. As a matter of fact I suspect that Mr. Jorgenson would object violently to that kind of an introduction in Committee without going through the readings of first, second, third and hearings to make such a tremendous change, because that's a basic change. It cuts out a great deal of land over which the spouse now has a right of veto under The Dower Act.

I must tell Mr. Graham, I've had very little experience with agricultural land in my law practice but I would think that I have not heard of any serious problem that has occurred up to now in the operation of farms by the fact that in giving security it is necessary to obtain the consent of the spouse under The Dower Act. If there was then it certainly hasn't percolated up to the legislative level and therefore I would say to Mr. Graham, I would encourage him either at this session or the next session if either of us is still here then, to bring it up as a change to The Dower Act and debate it to see whether or not it has merit and if it has, then by changing The Dower Act automatically this section would be confined down to The Dower Act. But, at least we would not be legislating such an important matter without adequate debate and notice as Mr. Pawley suggested. So although I don't quarrel with the statement except to the extent that I don't think there's been a problem in the past, I think it's too drastic a change he's suggesting that we incorporate through the back door, as I interpret it, by changing this definition.

**MR. GRAHAM**: Mr. Chairman, I don't accept that statement, by Mr. Cherniack at all. I raised the issue when we were hearing the briefs away last winter and we were debating or going over the briefs and trying to present a resolution to the House. The issue was raised then, so it is not something that is new. And I only bring it forward again as a suggestion.

**MR. CHERNIACK**: I'm sorry, may I just, to clarify. I don't differ with Mr. Graham on this statement. What I meant was that the public was not made aware of the possibility of this change. Although I'm inclined to sympathize with the point he makes, I don't believe that anyone outside of this room is really aware that that matter has been raised as a matter for discussion and I would like to think that we would hear representations on what I think is a very large, very basic change in definition. That's the point I made. I'm not saying he didn't raise it before. I know he did.

**MR. CHAIRMAN**: 1(e)—pass; l(e) as amended—pass; 1(f). Mr. Jenkins.

**MR. JENKINS**: Mr. Chairman, I move that clause 1(f) of Bill 61 be amended by striking out the word "An" in the first line thereof and substituting therefor the words "A shareable".

**MR. CHAIRMAN**: The amendment as read—pass; 1(g). Mr. Spivak.

**MR. SPIVAK**: Mr. Chairman, I have already spoken to the legislative counsel and I just want to indicate now, he has indicated there is another amendment that is going to be forthcoming and to be introduced which would clear up the situation with respect to a divorced person and their rights under The Marital Property Act. The definition section that refers to spouse where used in relation to another spouse, means a person who was married to that other person and spouses mean two persons who are married to each other. In effect, there will in fact be actions under this Act of people who are not married, that will take place when people are not married particularly in a divorce proceeding and the actions after that. There is an amendment to be proposed, I gather, which says that the action must be taken within 30 days of the Decree Absolute.

My only concern at this point would be really to clarify that so that there wouldn't be any problem later on as far as the legality of a claim afterwards and to understand correctly that insofar as The Marital Property Act is concerned, in terms of the government's position, that it applies to a case where a divorce application is made and there is a proceeding in a divorce case, or after a divorce, the application of the Act still applies.

**MR. PAWLEY**: Isaac, would you deal with that.

**MR. CHAIRMAN**: Mr. Silver.

**MR. SILVER**: There is a limitation period that would be effective after the date of divorce. During that period, a party can apply under the Act. However that should not be confused with the kind of assets to which the Act applies. The Act will still apply only to assets acquired before the divorce. To accommodate the fact that a spouse will no longer be a spouse during that limitation period after the

divorce, I think we refer in the few sections that refer to those situations, I think we use the word "person" rather than "spouse."

**MR. CHAIRMAN**: Clause 1(g)—pass; 1(h)—pass; 1 as amended—pass. Mr. Jenkins.

**MR. JENKINS**: Mr. Chairman, I move that Division 1 of Part 1 of Bill 61 be struck out and the following section and Division be substituted therefor: Application of standard marital regime.

2(1) The standard marital regime applies subject to Part II, in the case of every marriage, whether solemnized before or after the coming into force of this Act and whether solemnized within Manitoba or a jurisdiction outside of Manitoba. Void marriages.

2(2) The standard marital regime does not apply to a marriage that is void *ab initio*. Voidable marriages.

2(3) A voidable marriage that is annulled subsequent to the solemnization thereof is, prior to and until the annulment, a subsisting marriage for the purposes of subsection (1). Separated spouses.

2(4) 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 period of time as they continue living separate and apart from each other. Divorced persons.

2(5) The standard marital regime does not apply to persons whose marriage has, before the coming into force of this Act, been dissolved or annulled by a decree absolute of divorce or a decree of nullity, and the standard marital regime remains inapplicable in the case of each of those persons until the person remarries. Division 1 - Marital Homes: Joint ownership of marital home.

3(1) Where premises are the marital home of two spouses and only one of the spouses is registered as the owner of the premises, the other spouse is entitled, subject to section 7, to be registered as a joint owner thereof. Marital home registered in name of 3rd person.

3(2) Where premises are the marital home of two spouses and neither spouse is registered as the owner thereof, both spouses are entitled to be registered as the owners thereof as joint tenants and not as tenants in common, and either spouse may under section 33 apply to a judge for an order vesting title to the premises in the names of both spouses as joint tenants and not as tenants in common. Application of Part III.

4. Where a spouse is entitled to be but is not registered as a joint owner of premises under section 3, then, until the spouse becomes so registered, Part III applies to the premises, and the district registrar of the land ditles district in which the premises are situated shall not except in accordance with that Part register any document or instrument purporting to make a disposition of the premises. Incidental rights of spouse.

5(1) Where a spouse is entitled to be registered as a joint owner of premises under section 3, the spouse is also entitled to the same usage, possession and management rights in the premises as those that the other spouse has therein. Right of survivorship.

5(2) Where a spouse is entitled to be registered as a joint owner of premises under section 3, the spouse is also entitled upon the death of the other spouse to be registered as the owner of the interest of that other spouse to all intents and purposes as if both spouses had been registered immediately before the death as the owners of the premises as joint tenants and not as tenants in common. Mortgage sale of marital home.

5(3) Where a spouse is entitled to be registered as a joint owner of premises under section 3 and, before the spouse becomes so registered, the premises or a part thereof are sold under any mortgage, encumbrance, charge, lien or other security or under any legal process based thereon, the spouse is also entitled to ½ of any surplus of the purchase money arising from the sale after satisfaction in full of the claim and costs of the mortgagee, encumbrancer, chargee or grantee and of any other person having any right, title or interest in the premises in priority to the right of the spouse under section 3. Debt and tax liability.

5(4) A spouse who is entitled to be registered as a joint owner of premises under section 3 assumes, upon becoming so registered, liability for ½ of

(a) any indebtedness incurred by the other spouse in the acquisition of the premises; and (b) any tax that becomes payable by virtue of the registration. Joint ownership is non-severable by disposition.

6 Where premises are the marital home of two spouses and both spouses are registered or are under section 3 entitled to be registered as the owners thereof as joint tenants and not as tenants in common, the joint ownership interest of the spouses is, notwithstanding any law to the contrary but subject to section 7, not severable by the mere execution by one spouse of an instrument or document purporting to transfer, convey or otherwise dispose of all or part of the interest of that spouse in favour of a third person. Application of Division.

7(1) This Division apples to any premises in Manitoba, whether acquired before or after the coming into force of this Act, that are upon or after the coming into force of the Act the marital home of two spouses, but does not apply unless the premises

(a) are or were acquired after the solemnization and during the course of the marriage of the spouses; or (b) if acquired before the solemnization of the marriage of

the spouses, are or were acquired in specific contemplation of the marriage and in specific contemplation of the use of the premises as the marital home of the spouses after the solemnization. Disposition of contemplated marital home.

7(2) Notwithstanding subsection (1), where premises acquired within the meaning of clause (1)(b) are registered in the name of only one of two prospective spouses, that spouse may, until the proposed marriage is solemnized, make any disposition of the premises as if this Act had not been passed. Continuing application of Division.

7(3) Where under subsection (1) this Division becomes applicable to premises that are the marital home of two spouses, the Division remains applicable to the premises, *mutatis mutandis*, notwithstanding

(a) any subsequent change or cessation of the marital home that occurs by reason of an act or circumstance within the meaning of The Dower Act; or (b) any subsequent separation or divorce or annulment of the marriage of the spouses. **MR. CHAIRMAN**: Clause 2(1). Mr. Axworthy.

**MR. AXWORTHY**: Mr. Chairman, I have a couple of questions concerning this clause. One has to do with the adjective in the second line that says "every marriage." It seems to be a very all-encompassing phrase and as I read the clause through to line 4, "whether solemnized within Manitoba or a jurisdiction outside of Manitoba," it strikes me that the Legislature is quite overreaching itself, pretending that it can affect every marriage solemnized within or certainly "outside the Province of Manitoba." It would seem to me that a more selective wording might be established for that so that we don't get ourselves caught in trying to establish that we are applying to all marriages everywhere at this time, but something to the effect that marriages as they apply once the spouses, husband and wife, enter into the Province of Manitoba. I would suggest that someone could challenge it on those grounds.

**MR. CHAIRMAN**: Mr. Pawley.

**MR. PAWLEY**: Mr. Chairman, all that I can say, and Mr. Goodman confirms, that it would not extend jurisdiction to anybody outside the province; it would only include those resident within the province and it would be understood from this wording, to that effect, the same as any other Act.

**MR. AXWORTHY**: Mr. Chairman, I would have to take, I guess, the advice of counsel on that but it does strike me that the way the wording is put forward in this clause, that the interpretation could come that we are trying to extend the reach within it.

Going beyond that, Mr. Chairman, I also could question whether within the meanings of this clause for the application of the standard marital regime, how it affects situations where one spouse may decide to take residence outside of Manitoba, the other spouse is still in, and whether in fact then the application can be brought on there. Which jurisdiction then takes precedence? — (Interjection)— Well, but the fact of the matter is that separation doesn't have to be the only basis upon which this Act is enforced. We are also dealing with common property matters and so forth. — (Interjection)— The question I'm raising, Mr. Chairman, is that one of the spouses may decide to take residence outside of Manitoba. —(Interjection)— If that's the case, Mr. Chairman, then that could become a major dodge in this bill, that if someone wanted to avoid the bill, then one of the spouses could then simply hie himself off to Alberta, take up residence, and all of a sudden the standard marital regime ceases to apply.

**A MEMBER**: Sure, a separation.

**MR. AXWORTHY**: But there doesn't even have to be a legal separation for that to take place. Husbands and wives have been known to live apart and still stay married, as we all know.

**MR. PAWLEY**: It's a very very high price to dodge the bill.

**MR. AXWORTHY**: Mr. Chairman, I think some people are prepared to pay a very high price to dodge the bill, and it may not be so high as you think in some circumstances. But without doing it, I would suggest, and I could propose an amendment that would probably take care of that, that if further wording was added, something to the effect, if you read from the fourth line on after "Manitoba," while one or the other spouses are habitually resident in Manitoba and the regime shall continue to apply unless or until both spouses establish a marital residence outside of Manitoba. Just to eliminate that particular loophole or dodge that may be applied.

**MR. PAWLEY**: I would ask Mr. Silver to comment.

**MR. CHERNIACK**: Firstly, what about the point about jurisdiction outside of Manitoba?

**MR. SILVER**: Well, it's assumed in every statute that it can't possibly affect anyone outside of Manitoba except if they leave Manitoba with rights that accrued to them before they left, and that's another matter entirely. This Act is not trying to affect anyone and can't affect anyone who is not resident in Manitoba. I think if we start tampering with that section, we might run into all kinds of problems that will then complicate what, to us, appears now to be an uncomplicated situation.

**MR. AXWORTHY**: Mr. Chairman, I'm not trying to provide some anticipation, I'm sure there will be enough lawyers worrying of ways to find themselves or their clients outside the bill. But I am suggesting that in these circumstances — I'm giving free advice, I guess, if nothing else — but I am

suggesting that under the wording of this clause, that if someone feels so strongly that they do not want the Act to apply, they could then change and still maintain themselves in a marriage arrangement, they could then move themselves say to a jurisdiction such as Alberta, which at this stage may not have one. The problem would be solved if all provinces were enacting at the same time. Then the standard marital regime would not apply. Neither the family assets or the commercial assets would then be brought into the marriage even though the marriage still may be intact. It would be a way outside the bill. I'm saying that it should be clear, maybe through the rewording of this particular clause, that the matter only changes when both spouses in fact take up residence in another jurisdiction, then the SMR would not apply. But if one spouse took up residence outside the province and the other one was still in, the SMR would apply.

**MR. CHAIRMAN**: Mr. Spivak, to the same point?

**MR. SPIVAK**: I think the problem is a constitutional one and I think we have to address ourselves to it for the simple reason that we can legislate concerning people within the Province of Manitoba and we can legislate and impose a standard marital regime on those people who are resident within Manitoba, but that's the area of our competence. We can't legislate on a marriage that is outside of the province. The fact is, the marriage that is solemnized outside of the province is not within our jurisdiction nor can we legislate about it. All we can do is legislate as the people who reside within Manitoba are affected, whether they were married in Manitoba or whether they were married outside. I think that there may very well be a need to clarify that in the actual wording itself so that in effect our competence is determined. Because if not, then I think there is a challenge that could be made.

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, peculiarly, I don't have any problem with this. Mr. Axworthy used the expression, "the Act will not apply," but that is not correct. We are not talking about the Act. We are talking about the application of the standard marital regime and we are talking about the people who are affected by this Act to the extent that a void marriage is not accepted as being entitled to The Marital Property Act; a voidable marriage is for a certain period of time, until it is voided and there is some provision for separated spouses. But this speaks of the standard marital regime which is that period of time during which the couple are living together and therefore that's all it defines, so it says, in my reading, that no matter where they were married, as long as they were legally married, then the standard marital regime applies in Manitoba for the people who are under the jurisdiction of Manitoba, for such period of time until they are separated. What the section deals with is only the marriage. It says if the marriage were solemnized in New York or in Timbuktu, as long as it was a legal marriage, the standard marital regime should apply to them.

There is no policy issue that has been raised, it's just legislative wording that is needed and I suppose in the end we have to rely on Mr. Silver. I think 2(1) just says, if there is a valid marriage, then the standard marital regime is applicable to that marriage and of course, as Mr. Silver said, it can only apply to those people who come under the jurisdiction of Manitoba.

**MR. CHAIRMAN**: Mr. Axworthy.

**MR. AXWORTHY**: Mr. Chairman, I don't know if Mr. Cherniack is addressing himself to the second point I raised, which is, that in this day and age it's not unusual for people to have two residences. Many people I know, for example, may spend the winter months down south and establish a residence there, buy a condominium. Or, if someone even wanted to press a little bit further, a marriage is not separate simply because there is physical separation. Many people are separated for months on time and their marriage is still a good marriage. Now, under the wording of this Act, I would assume if someone said, "Heh, look, I just don't want to have this happen and we're going to set up residence in Alberta," I'm using it for an example, "and I'll still maintain a home and all my assets here in Manitoba, but I now come under the jurisdiction of Alberta and therefore the SMR doesn't apply even though the marriage is still in extant."

That has been I think, an issue that perhaps the Minister might address himself to because I would see it certainly as one way of avoiding the application of the standard marital regime even though the actual solemnization of the marriage still continues. Therefore someone could avoid having the Act apply to them.

**MR. CHAIRMAN**: Mr. Spivak.

**MR. SPIVAK**: In effect, aren't we really saying that spouses, whether married in Manitoba or outside, so long as they reside in Manitoba are subject to a standard marital regime. That is in effect what we should say rather than this. Because my suggestion is that this will, in effect, put into question the constitutionality of our ability to be able to deal with marriages outside the province because in effect we are not dealing with that. We are really dealing with people in the province itself and I think it would be far better to word it in the way that I suggested or phrase it in the way I suggested so that in effect it will apply as intended.

**MR. CHAIRMAN**: Mr. Silver.

**MR. SILVER**: I don't think there is any question that in order to ensure that it is the intention for the

standard marital regime to apply only to people residing in Manitoba it is not necessary to say that in the statute. If it were necessary, then it would be necessary to say that in every other statute and we don't. We don't say it in the other statutes; it's assumed that any statute that makes someone subject to some law, applies only to that someone while he is a Manitoban and not after he ceases being a Manitoban. The same principle applies here. If we were to enlarge the section and talk about establishing a residence elsewhere, it would probably draw us into all kinds of other areas such as when is the marital residence established outside of Manitoba; at what point does it stop being a Manitoba residence and commence being an Ontario residence and those are things that are better left up to existing case law and court decisions.

**MR. CHAIRMAN**: Mr. Axworthy.

**MR. AXWORTHY**: Mr. Chairman, I agree with Mr. Silver, but it may not apply in this case. We say the law usually applies to a person; in this case, though, we are talking about two people. The standard marital regime assumes that there are two parties to the marriage and one could reside outside of Manitoba and the other could reside inside Manitoba.

**MR. SILVER**: No, that's not true.

**MR. AXWORTHY**: Well, why not?

**MR. SILVER**: The standard marital regime applies only while they are cohabiting, while they are living together in the same residence, that means in the same province.

**MR. AXWORTHY**: So we are saying that it would be quite legitimate for an individual to decide that while they still want to maintain their marriage, it would still be a legal marriage, there would be no separation other than a physical one, no divorce proceedings, that someone could leave Manitoba and establish and so state that their residence is now in Saskatchewan or Pembina or something and then the SMR would not apply. Is that correct?

**MR. CHAIRMAN**: Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, I wonder if I could ask Mr. Axworthy, what would be the point of that. They could opt out bilaterally anyway; if they want to opt out, then they opt out. Why should they have to go through the whole pretence of establishing a residence outside of Manitoba to take them outside of the Act when all they have to do is sign an agreement to be out of it?

**MR. AXWORTHY**: I am raising it because many people in fact do establish two residences, one outside of Manitoba and some other place during the time so they have in fact two residences.

**MR. SILVER**: There is no such thing; in law there is only one residence, at least under this Act and under the Dower Act. There is only one residence at any one time, one homestead.

**MR. AXWORTHY**: So really we have an additional opting out arrangement, which is that if someone happens to have a home in another jurisdiction, whether foreign or another province, they can simply establish that as their residence and therefore the Act wouldn't apply. Is that correct?

**MR. CHERNIACK**: No, that's not what he said. He said it's not possible.

**MR. AXWORTHY**: Well, of course it's possible because then he would simply say, "Manitoba law does not apply. We are going to say that Florida is our place of residence."

**MR. PAWLEY**: That's not their principle residence. That wouldn't be defined as their principal residence.

**MR. SILVER**: Well, are you saying that they give up their Manitoba residence and take up residence in Florida? Is that what you are saying?

**MR. AXWORTHY**: Well, Mr. Chairman, people do that. I mean there are people who establish a residence there for four or five months, and now they will simply say, "We will say that's our residence as opposed to our home on Ash Street, or something, and therefore the SMR doesn't apply to us in any way."

**MR. CHERNIACK**: Well, Mr. Chairman, as long as they say, "It doesn't apply to us." My point is that as long as it's a mutual decision there is no problem. And if it's a unilateral decision then it does mean a separation. It means, sort of, a desertion.

**MR. AXWORTHY**: No, not necessarily.

**MR. CHERNIACK**: Well, if it's unilateral then it's a separation. If it is bilateral and they both agree then there is nothing wrong with it. This Act is not compulsory. It says both parties can agree to opt out.

**MR. AXWORTHY**: Come off it. What the hell are we here for if not to raise questions?

**MR. CHAIRMAN**: Order please.

**MR. AXWORTHY**: Why are you on the floor? Why don't you go on back to the caucus room . . .

**MR. CHAIRMAN**: Order please.

**MR. CHERNIACK**: Mr. Chairman, I just want to finish. I don't see any quarrel on any policy issue and, frankly, I would have to rely on legislative counsel in the end. If then he is not persuaded I think we ought to go along with his position. But, frankly, I don't even see the point of Mr. Axworthy's argument. Unless he is saying that this might be a trick that one person might use unilaterally to make it appear as if the marriage is broken. I think at that stage the marriage indeed is broken and at that stage the marital regime does end, and then the consequences follow under the Act.

**MR. AXWORTHY**: I would say, Mr. Chairman, that in the opting out arrangement there are very carefully prescribed rules by which one has to indicate and declare their opting out arrangements: independent legal advice, affidavits, etc. Here, we have simply eliminated that necessity.

**MR. CHAIRMAN**: 2(1)—pass? Mr. Sherman.

**MR. SHERMAN**: 2(1) a technical point, a drafting point, Mr. Chairman. It occurs to us that 2(1) should read **"The standard marital regime applies subject to Subsection 2(2), 2(3), and 2(4), and Part II, in the case of every marriage."**

**MR. CHAIRMAN**: Mr. Silver.

**MR. SILVER**: Well, I think a prior version did read that way but it cluttered up the section too much. And even if it doesn't say that it is subject, anyway, to those subsections . . . I mean if you read the whole section, you read all four subsections together, the net effect is to make them all subject. You're not going to read 2(1) and ignore the others if you want to know what the Act says. So while it wouldn't be wrong to say "subject to subsections 2, 3, 4 and 5," it's not fatal to leave it out and it probably reads better leaving it out. But we thought it was essential to say "subject to Part II" because Part II is far away from this section, and just in order to draw one's attention to Part II. But even if we didn't say Part II, once you look at Part II, it's quite obvious that this must be subject to that part. So it's merely for information purposes.

**MR. SHERMAN**: Mr. Chairman, if legal counsel considered it, had it in and took it out and felt that it was all right to take it out, then I have no objection. But I wanted to bring it to the attention of legal counsel as appearing, at least at first blush, to be an omission in terms of consistency of wording.

**MR. CHAIRMAN**: 2(1)—pass. 2(2). Mr. Cherniack.

**MR. CHERNIACK**: Mr. Chairman, I think Mr. Silver has the redraft of 2(2). May I just then say what it is intended to be? The concern was expressed that just the bald statement "does not apply to void *ab initio*" should not be assumed to in any way detract from the rights of a common-law spouse under any other law of the province, and common-law spouses do have certain rights for distribution of assets that they each contributed to. So that's why we ask that this additional variation to the clause be prepared. So I would ask that Mr. Jenkins read the amended version.

**MR. CHAIRMAN**: Perhaps that could be moved as a sub-amendment to 2(2).

**MR. JENKINS**: Mr. Chairman, I move that 2(2) be amended by adding thereto after the word *ab initio* the following, "but nothing herein derogates from any right that either party to the marriage has under any other law."

**MR. CHAIRMAN**: Is the sub-amendment understood? Any discussion on the sub-amendment? Is it agreed to? (Agreed) 2(2) as amended—pass. 2(3)—pass. Mr. Johnston.

**MR. F. JOHNSTON**: On 2(3), the word "subsisting" in the last line, shouldn't that read "a marriage for the purpose of subsection (1)."

**MR. PAWLEY**: You are suggesting, Mr. Johnston, that the word "subsisting" isn't required?

**MR. F. JOHNSTON**: Well, I am suggesting that it shouldn't be there.

**MR. PAWLEY**: Mr. Silver, could you comment on that?

**MR. SILVER**: I think what we wanted to say there is . . . You might say that subsisting has approximately the same meaning as existing; it's just for clarity. It provides additional clarity.

**MR. F. JOHNSTON**: Well, I'm like Mr. Sherman, if it's there for clarity . . . .

**MR. CHAIRMAN**: 2(3)—pass? Mr. Sherman.

**MR. SHERMAN**: It's a minor point, I guess, Mr. Chairman, but we just saw the term as unnecessary. Nowhere is it defined. Subsection (1) talks about the standard marital regime applying in the case of every marriage. This talks about voidable marriages that are prior to and until the annulment, marriages for the purposes of Subsection (1). It's very clear what a marriage for the purpose of Subsection (1) is. It says so in 2(1). It's a very minor point. It just seemed to us that it was an unnecessary adjective.

**MR. SILVER**: The word "subsisting" is used in its dictionary sense. That's why it isn't defined.

**MR. CHERNIACK**: Mr. Sherman, I understand the point that's made but if the legislative counsel likes it there then I like it there for that reason alone.

**MR. SHERMAN**: Yes, it doesn't matter.

**MR. CHAIRMAN**: 2(3)—pass; 2(4).

**MR. CHERNIACK**: There is some addition there, Mr. Chairman. "Who on May 6th, 1977" in the second line.

**MR. PAWLEY**: There is a clarification. In 2(4) after "who", we should add "on May 6th, 1977."

**MR. SHERMAN**: Yes, there's no date in there, right?

**MR. CHERNIACK**: No, it's an oversight.

**MR. JENKINS**: I would move, Mr. Chairman, that after the word "who" in the second line thereof the following be added "on May 6th, 1977."

**MR. CHAIRMAN**: Moved in sub-amendment by Mr. Jenkins. The sub-amendment, any discussion on the sub-amendment to add the date? Mr. Axworthy.

**MR. AXWORTHY**: Mr. Chairman, I was taking a major exception to this whole clause. I just think

that in some ways, and this is one case where the government did not let its best instincts apply itself. Because I think that there is certainly no reason in my mind why the law should not apply to those who are separated but do not have an agreement. I think it was Mrs. Bowman, who said in testimony before the committee, that someone was driven out of her home some time in April and no settlement has yet been reached. Why they are totally eliminated from the provisions of this Act, I've never heard a reason from the government why it should be. I would certainly propose a deletion of this amendment, in addition to others. But if time doesn't permit it, perhaps we can come back to that discussion later.

**MR. CHAIRMAN**: Order please. The time of adjournment having arrived, the committee will rise and stand adjourned until 8:00 p.m. this evening.