Legislative Assembly of Manitoba

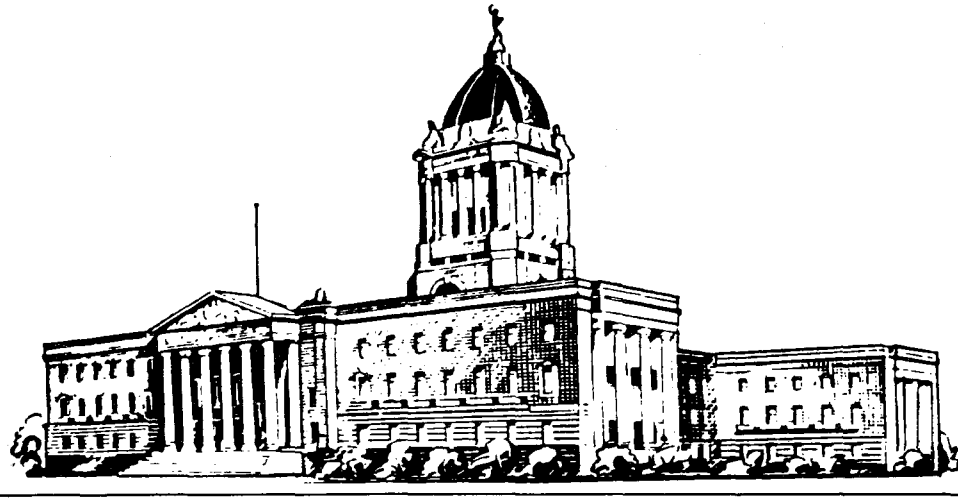
STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. Warren Steen
Constituency of Crescentwood



Monday, July 17, 1978 8:00 p.m.

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Hearing Of The Standing Committee On Statutory ~~Rules and~~ Regulations and Orders

Monday, July 17, 1978

ime: 8:00 p.m.

HAIRMAN, Mr. Warren Steen.

R. CHAIRMAN: Kindly come to order. Members of the Committee, it's been suggested to me iat we might deal with these bills in reverse order, starting with 42 and working our way back) 38. Is that agreeable with members of the Committee? I would imagine that we leave the more fficult ones to the end, the ones that are time-consuming, you can get the other ones out of the ay. Reverse counting. Is that all right with members of the Committee? (Agreed).

Ready and prepared to move on? We are starting, Mr. Spivak, in reverse order, Bill 42 and working it way to the front. Mr. Pawley, are you prepared and ready to go?

R. PAWLEY: So, they have all our amendments related to the two larger bills.

R. CHAIRMAN: They have not been distributed yet?

R. PAWLEY: You can go ahead with the smaller bills.

R. CHAIRMAN: Okay. Bill 42. There are amendments on that particular bill that have been stributed.

Bill 42, Section 1—pass. Mr. Cherniack.

R. CHERNIACK: Mr. Chairman, I think it would be advisable if Mr. Mercier and Mr. Tallin should st give us a brief explanation.

R. CHAIRMAN: Of what? The proposed amendments of each section?

R. CHERNIACK: No, no, section 1.

R. CHAIRMAN: We better get another mike for Mr. Tallin. All right, Section 1. A brief explanation. r. Tallin.

R. TALLIN: The purpose of Section 1 of the bill is to give additional authority to the County ɔurt judges as local judges of the court, except in the eastern judicial district. The County Court dge is the local judge of the court in any judicial district and in the eastern judicial district any ɔunty Court judge is a local judge for the purpose of dealing with matrimonial causes. Up to now, e section dealt with the County Court judge's jurisdiction as a local judge only with the judicial strict in which he was appointed.

R. CHAIRMAN: Mr. Cherniack.

R. CHERNIACK: Mr. Chairman, who will now determine which judge will hear whatever matrimonial use is filed in court, and which court?

R. CHAIRMAN: Mr. Mercier.

R. MERCIER: The litigant.

R. CHERNIACK: You mean the litigant? No. The litigant will file in Q.B., presumably, who will en determine who hears that, the local judge of the County Court, or . . .

MR. MERCIER: . . . answer that, because he's been dealing with the judges on the matter.

MR. GOODMAN: It'll be up to the Chief Justice, but certainly the Chief Justice of the Court Queen's Bench and the Chief County Court Judge judge have been consulting with each other wi regard to these amendments. I have been consulting with them.

MR. CHERNIACK: So that this being a Queen's Bench Act, will the litigant decide which court select or will it go to the Queen's Bench and then the Chief Justice of the Queen's Bench v determine who will hear the case?

MR. GOODMAN: Well, of course, it will have to be lodged in the Court of Queen's Bench, a the County Court judges being local judges in the Court of Queen's Bench, can hear any matrimon cause.

MR. CHERNIACK: So it will be set down by the Chief Justice of the Queen's Bench as to wl will hear it?

MR. GOODMAN: Yes. Right. But a matter that's set . . .

MR. MERCIER: Excuse me. It won't be set down by the Chief Justice, it will be set down by t litigants.

MR. CHERNIACK: It will be determined by the Chief Justice.

MR. MERCIER: Yes. And if it's in the Western Judicial District, that's where the action will conducted, unless they ask for a change in venue under normal procedures in the . . .

MR. CHERNIACK: **Yes. Will there by any actions launched in the County Court?**

MR. GOODMAN: What sort of actions?

MR. CHERNIACK: Actions under the Matrimonial, or the Marital Property, or the Fam Maintenance . . .

MR. GOODMAN: Well, the purpose of this, of course, is to allow County Court judges to hear a matter relating to a matrimonial cause, as local judges of the Court of Queen's Bench. Let's s in The Divorce Act or dealing with partition and sale, that matter has to be launched in the Co of Queen's Bench but a County Court judge can hear it as a local judge of the Court of Queer Bench, with these amendments, throughout the Province of Manitoba.

MR. CHERNIACK: So the clarification I want is that a litigant in the Eastern Judicial District w wants to start an action, does that litigant have a choice as to which of the courts to select, will it all be Q.B.?

MR. GOODMAN: Well, of course, the whole purpose of the amendment is to ensure that if a litig commences an action let's say under The Family Maintenance Act or The Marital Property Act the County Court, and there's further action which must be commenced in the Court of Queer Bench, then the matter can be heard in the County Court by a County Court judge as a local jud of the Court of Queen's Bench, but any matter such as divorce or petition has to be launched the Court of Queen's Bench.

MR. CHAIRMAN: Okay. 1, subsection 9(1)—pass; subsection 9(2)—pass; Section 1—pass. Secti . . .

MR. PAWLEY: Mr. Chairman, the Member for Wellington has an amendment for Bill 42.

MR. CHAIRMAN: For which one? Sorry.

MR. CORRIN: One amendment for Bill 42. I do apologize for being late, Mr. Chairman.

MR. CHAIRMAN: What section? Maybe that would . . . There is one for Section 6 distributed of now.

MR. CORRIN: Excuse me. It's for Section 6 in 41.

MR. CHAIRMAN: All right.
Section 2—pass; Section 3—pass; Section 4—pass; Section 5—pass. 5(2)(1)—pass; 5—pass. Section 6. This is where we have the amendments.

MR. CORRIN: We are dealing with Bill 41 are we, Mr. Chairman?

MR. CHAIRMAN: It will be a new subsection. Section 6.1.

MR. CHERNIACK: Mr. Chairman, did you pass Section 6?

MR. CHAIRMAN: No, because 6.1 will be part of Section 6.

MR. CHERNIACK: Should we pass Section 6 first and then deal with this amendment.

MR. CHAIRMAN: Oh, I see, okay. 6—pass; 6.1 — .

MR. MERCIER: I'll move the amendment as distributed' Mr. Chairman. The intention of the amendment is to simply provide for the transfers of actions between the various courts.

MR. CHERNIACK: What does the existing 6.1 say Mr. Chairman? 106.1(1), what is that?

MR. TALLIN: A transfer between the Q.B. and the Family Division of the Provincial Judges Court as well as between the Q.B. and the County Court.

MR. CHAIRMAN: Moved as distributed. Mr. Corrin.

MR. CORRIN: Well, I'm about to ask an uninformed question, Mr. Chairman, and so I apologize in advance . . .

MR. CHERNIACK: Don't.

A MEMBER: We're all in the same boat.

MR. CORRIN: Perhaps I'll get an uninformed answer and I won't have to apologize. I'm wondering, first in terms of the logistics of this, certain courts have in the past made claim that they are overburdened with work. In the report that we dealt with during the Attorney-General's Estimates from the Provincial Judges Court, the Provincial Judges Association, for instance, there was mention of the criminal division of the Provincial Judges Court being very badly overworked and members felt that there was a need for some new systems to assist the progress of matters before those courts. I'm wondering whether or not the Attorney-General could comment on whether or not he has conferred with the courts that are set out in this amendment and what responses he has received from the representatives of those courts respecting this particular amendment and the placing of actions, litigation before those courts. Have any of them evinced a concern, for instance, that they might become overburdened, or have any indicated that they feel that it's in some sense might reduce their jurisdiction, or are there any such concerns that have been made known to the Attorney-General?

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Well, Mr. Chairman, I don't think the question is really so much with respect to this particular amendment as a general question. There have been discussions with my department with all three levels of the courts. Certainly there is some concern probably at each level that they will get all of the work under the new Act, but we expect that that will be resolved over the course of time. Certainly the County Court has had a significant increase in its duties with a large increase in the number of speedy trials and the work under The Marital Property Act may very well, again, increase its work. But it's expected that that matter can be resolved between the Queen's Bench Court and the County Court.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: A supplementary to that. I was wondering whether the effect of this amendme to Bill 42 would confer any jurisdiction on Provincial Judges Courts to deal with actions pendir under Bill 38, The Marital Property Act. I take it, then, that all actions just to clarify — I want be clear on this point, I think — all actions pertaining to The Marital Property Act will have to b convened or conducted either in the County Court or the Court of Queen's Bench.

MR. MERCIER: Yes.

MR. CORRIN: I was wondering then, as a result of that, whether or not the Attorney-General wou share my concern that there would possibly be a significant increase or appreciation in the numb of cases being heard in those two courts, the County Court and the Court of Queen's Bench, a result of the rather expansive jurisdiction that they will have pertaining to marital law in the provinc I suppose I am concerned that a lot of litigaants — I should say their counsel — will choose have cases heard in either of those two forms simply because they will be able to do so in a mann that is consistent with the winding up of all the marriage affairs, proprietary affairs and the oth affairs respecting custody of the children and maintenance, things of that nature. And I was wonderi whether the judges, particularly in the County Court, were at all concerned.

I understand, for instance, that the County Court will soon have the jurisdiction to handle divor matters as well. So they will, in effect, be a unitary Family Court, although of course they still w have jurisdiction dealing with speedy trials and criminal matters, and civil litigation of all sorts am wondering whether that court feels that it has sufficient resources to be able to sustain su a heavy workload.

MR. MERCIER: That is a distinct possibility, but it's one that I don't think that we can accurate forecast until the actual experience has gone ahead. But I have to admit that that's possibility.

MR. CORRIN: A supplementary, Mr. Chairman, to that. I was wondering whether or not there w be, in view of the fact that we're introducing this legislation and there will be this new format a this new option with respect to the County Court particularly, whether or not the Attorney-Gene contemplates at this point reviewing the situation in the immediate future. We know that he w be monitoring the impact of the legislation in general, because he told us that during the wo brief hearing portion of the Committee's but will the Attorney-General then be keeping a watch the situation as it relates particularly to the County Courts of the province, andwill he consid if the situation warrants, making recommendations that there be additional County Court judg appointed by the Federal Government?

MR. MERCIER: Yes, Mr. Chairman.

MR. CHAIRMAN: 6.1—pass — Mr. Cherniack.

MR. CHERNIACK: One minor question; the other is more serious. The word "plight", is that a wo with a legal definition? The dictionary definition is a little off this. I'm not familiar with that wo Is that a term that has a legal . . . ?

MR. RAE TALLIN: It has been used for years in these sections.

MR. CHERNIACK: In these sections, and it has not coloured the state of the actions by havi the connotation of a bad state of affairs?

MR. TALLIN: No.

MR. CHERNIACK: No. All right, Mr. Chairman, I accept Mr. Tallin's comment. I'd like an explanati that in the first portion you say that where all parties agree then the courts "shall" change to t County Court or Provincial Judges Court. Then you say where any party wishes, a judge "ma transfer the action to the Queen's Bench. I'd like that distinction clarified.

MR. CHAIRMAN: Just a minute, Mr. Cherniack, so we can get this microphone No. 14 over front of Mr. Tallin.

MR. TALLIN: Well, if all the parties agree to having it changed then I don't think there is any reas why the courts perhaps shouldn't be required to change it to whatever court the parties wish have it heard in.

MR. CHERNIACK: Mr. Chairman, may I interrupt on that point. There is no indication here that all the parties may agree to transfer it from County Court to the Queen's Bench and therefore it shall be done. Is there somewhere in some other Act, The County Court Act, or somewhere? Is that right?

MR. TALLIN: That would be in the Statute Law Amendment bill.

MR. CHERNIACK: Have we got it yet?

MR. TALLIN: No. But in any case that would be in The County Court Act because it's telling the County Court judges what. . .

MR. CHERNIACK: . . . realize that. Is it in The Provincial Judges Act? I haven't looked at that yet.

MR. TALLIN: Yes.

MR. CHERNIACK: So now what we are saying is that regardless of where the action was launched if all the parties agree in the middle of the action, the courts shall, when all parties agree, transfer it to the court to which they agree to move it, and it will be the same plight.

MR. TALLIN: Yes.

MR. CHERNIACK: Okay. Then what about the other? Why is it in the other cases . . . ?

MR. TALLIN: Well, because in the other cases one of the parties might object to it being transferred and therefore the court should be given some discretion to hear the motion and any opposition to the motion.

MR. CHERNIACK: And they have a similar one in the other courts?

MR. TALLIN: Yes.

MR. CHERNIACK: And the County Court will have the same right — will it have the same discretion if the parties do not agree?

MR. TALLIN: Yes. It's descended down.

MR. CHAIRMAN: 6.1—pass; 7 . . .

MR. CHERNIACK: Oh, you mean you passed all the subsections already.

MR. CHAIRMAN: I said 6.1—pass, and nobody interrupted me.

MR. CHERNIACK: No, no, I thought you then said 7, so . . .

MR. CHAIRMAN: I was going to go on to 7. 7—pass; Preamble—pass — Mr. Cherniack.

MR. CHERNIACK: What is the intention in regard to assent? What is the Attorney-General planning to do about . . . ? Are the courts ready to work within this tomorrow if tomorrow . . .

MR. MERCIER: No, they're not ready.

MR. CHERNIACK: And the same applies to all the other Sections.

MR. MERCIER: Okay.

MR. CHAIRMAN: 7.—pass; Preamble—pass; Title — Mr. Corrin.

MR. CORRIN: Mr. Chairman, I think my question is probably better directed at Mr. Tallin but I'll direct it through you, Mr. Chairman. If Mr. Mercier wishes to respond he can and, if not, I will respect the need for Legislative Counsel to respond. I'm wondering about situations where actions are

say in the Provincial Judges Court, and there has been no opportunity afforded either of the litigant to examine for discovery. Perhaps Mr. Tallin can advise me. I believe that the right to examine fo discovery is not accorded the litigant under The Marital Property or The Family Maintenanc Act.

MR. MERCIER: Well you won't, it's not possible to start an action under The Marital Property Ac there . . .

MR. CORRIN: Oh, excuse me, under The Family Maintenance Act.

MR. MERCIER: . . . will be an opportunity for Examination for Discovery.

MR. CORRIN: There would be.

MR. MERCIER: Under the rules.

MR. CORRIN: Okay. I think that satisfies my concern. So that under this legislation, Examinatio for Discovery would be available regardless of the jurisdiction of the court you said. You know, a actions under The Family Maintenance Act.

MR. MERCIER: Yes.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I'm not satisfied with that answer.

MR. CORRIN: I must admit I did not recollect . . .

MR. CHERNIACK: The answer was yes, and I would like to carry it forward. I was waiting un we get to Bill 40 but are we into that?

MR. CHAIRMAN: No. All right, Mr. Cherniack, do you want to wait until 40 to get an answer f your question? Okay.

Preamble—pass; Title—pass. Bill be reported.

I might point out that the recording people have said that it would be far easier for them wi the short questions and answers if perhaps we each paused for a moment and I recognized tl speakers. He's having a great deal of difficulty keeping up with us.

MR. CHAIRMAN: Bill 41, the Clerk informs me there are no amendments to Bill 41.

Mr. Mercier.

MR. MERCIER: I think the Member for Wellington indicated he might have an amendment for E 41.

MR. CORRIN: Yes, that is an amendment that the Legislative Counsel was so good as to ass me in preparing. It deals with Section 3 of Bill 41.

MR. MERCIER: Did you make any changes to what I prepared?

MR. CHAIRMAN: Has Mr. Corrin distributed copies?

MR. CORRIN: I can give you, Mr. Chairman, one copy and perhaps you could have it copie

MR. CHAIRMAN: I was asking Mr. Mercier really if he has one, is what I meant.

All right, Section 1 on Bill 41—pass; Section 2—pass; Section 3 — this is where we have c amendment, Mr. Corrin, right?

MR. CORRIN: Yes. Basically this amendment provides for those situations that we discussed dur the hearing of briefs where a widow's right of succession would be short-circuited or circumvent by the present provisions of the law. You remember we discussed the right of the wife to succe the husband in title should the husband die intestate, in other words without a will, under provisions of the bills before the committee. It appeared to the persons submitting briefs, and course to myself as well, that widows would not have a right, in those circumstances, would

have a right to inheritance of the same estate in the property as the husband held. It appeared that resulting from the provisions of The Dower Act, that a woman would only be entitled to receive a life estate, that is an estate that would subsist for the term of her natural life, as opposed to a full estate in what lawyers call "fee simple" which basically means full ownership rights, registerable and full ownership rights.

So with the assistance of the Legislative Counsel amendments were prepared that would relate to The Dower Act — well to Bill 41 and through Bill 41 to The Dower Act — Section 14, and to certain Schedules of The Dower Act, particularly Form C of The Dower Act.

As a matter of interest, Mr. Chairman, although I'll place the amendment before the Committee, would like as well the Legislative Counsel to look at Section 22(1) of The Dower Act in relation to this amendment, not because I think that it necessarily will have any profound impact, the amendment would have any profound impact or effect on 22(1), but rather because I am concerned that it may possibly have some impact which would be adverse to the right of a separated spouse. But in any event, I would be willing to defer to the learned opinion of the Legislative Counsel in that respect.

Mr. Chairman, would it be appropriate for me to present this to you? It's in written form.

MR. CHAIRMAN: Yes.

MR. CORRIN: Should I sign it?

MR. CHAIRMAN: Give it to the Clerk. He says not necessarily.

MR. CORRIN: It's so moved, Mr. Chairman, by myself and seconded by the Member for Selkirk, Mr. Pawley.

MR. CHAIRMAN: As distributed

MR. CORRIN: As distributed.

MOTION:

That Bill 41 be amended by adding thereto, immediately after Section 3 thereof, the following section:

Subsec. 14(1) of Dower Act rep. and sub.

3.1 Subsection 14(1) of The Dower Act, being Chapter D100 of the Revised Statutes, is repealed and the following subsection is substituted therefor:

Wife to have homestead on death of husband.

14(1) Subject to Section 4, upon the death of a married man whose wife survives him, the wife is entitled to an estate in fee simple in his homestead as fully and effectually, and to the same effect, and under the same conditions, as if he had left her the estate in 8 fee simple by will and every disposition by will of a married man of any interest or estate in his homestead otherwise than to his wife is void and of no effect.

MOTION:

That Section 4 of Bill 41 be amended by striking out the word "and" at the end of clause (b) thereof, by adding thereto at the end of clause (b) thereof, the word "and",8 and by adding thereto, at the end thereof, the following clause:

(c) by striking out the words "life estate" in the 2nd last line thereof and substituting therefor the words "estate in fee simple."

MOTION:

That Bill 41 be amended by adding thereto immediately after Section 6 thereof, the following section:

Form C of Schedule am. 6.1 Form C of the Schedule to The Dower Act is amended by striking out the words "life estate" where they appear in the 2nd line of the body thereof and again the 5th line of the body thereof and substituting therefor, in each case, the words "estate fee simple."

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Well, Mr. Chairman, it's an intriguing idea and I think it's one worthy of serious consideration. I indicated in introducing this bill in the Legislature that basically the only change we were making in this bill, and the comparable one last year, was the arbitrary increasing of the

annual income provisions of Section 16(2) by which one spouse could avoid the provisions of th Act. That's contained in Section 5 of Bill 41. I indicated at that time that I was, and have sinc referred The Dower Act to the Manitoba Law Reform Commission for a thorough review and I a certainly, Mr. Chairman, prepared to recommend that this particular proposal be referred in additic to the Law Reform Commission for its thorough report. I think it has some appeal but I think it one, unfortunately having been introduced at this late moment — and I don't in any way comme adversely on the Member for Wellington for introducing it at this late stage, because this is th manner in which all of these amendments are being considered. But it is a serious one and farreaching one and is deserving, I think, of consideration by the Law Reform Commission as w as the whole of The Dower Act. Perhaps their report could be made prior to the next Legislati session.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the Attorney-General says it's intriguing and is farreaching ar deserving of consideration and all sorts of other heart-warming comments. Mr. Chairman, this not a new subject — it is a very important part of the whole concept of division of property, ar has been discussed. As a matter of fact, there has been discussion in answer to some of the brie that were presented that would sort of indicate — well, The Dower Act is still in place, The Dow Act protects women, to the extent where I wouldn't bother to go back to the transcript — ar we don't have all the transcript, to my knowledge — where it was almost implied that there is deferr sharing in the marital home. I think that some people came away with the impression that it w deferred sharing but still a joint tenancy that was created, with right of survivorship.

Mr. Chairman, the Attorney-General surely need not be reminded that he had to be considerii this very subject when he decided to dump the present legislation, because there, Section 3 ar Section 6 seem to me to indicate that it was clearly in last year's Act and in the present statu which is about to be repealed, that there should be immediate joint sharing of the marital hon with joint ownership and the right of survivorship — unless I don't read it correctly, or don't rememb it well. It seems to me that what Mr. Corrin has done is come back to that basic principle whi nobody, to my knowledge, fought against openly in the House, in debate, or in Committee her And he is now saying what you cut out of the present legislation he thinks you ought to put ba into the bill before us, so as to ensure that at least the marital home in which you are not prepar to give immediate vesting, there should be deferred vesting to the extent that the marital hor shall be the right of survivorship so that when one spouse dies the other one automatically becom owner of that home. And I just challenge the Attorney-General's suggestion that it's an intrigui thought that deserves further study, and that he might refer it to the Law Reform Commission. No I have not gone back to the recommendations of the Law Reform Commission, but I have a ve vague hunch that the Law Reform looked at it, commented on it, and I suspect, recommended So I'm really wondering why we can't deal with it, in its full intent and not in a general way saying, "Well, it's a new idea, let's think about it."

MR. CHAIRMAN: Mr. Corrin.tm

Well, I think I'd like to reinforce the remarks made by my colleague, Mr. Cherniack. Mr. Chairma he's quite right in saying that this, in effect, just would re-invest certain rights in perso throughout the province that were taken away from them as a result of the suspension or repe of the former legislation. I don't think at any point in this hearing, or in the House, for that matt have I heard anybody suggest that there was not to be a principle of equal sharing of the mari home. I would suggest that to not deal with this particular amendment would be discriminato and that it would affect a certain class of citizens, those who, of course, are least able to defe themselves, particularly widows who have had their husbands pass on without making a w a situation that probably applies to many people throughout the province, have the l discriminate unfairly against them. I think it's only proper, since we are making provision immediate sharing by way of this particular legislation, that we deal with appropriate revisi to The Dower Act in order to make The Marital Property Act and The Dower Act consiste in substance and concept, one with the other. And I would suggest that to do otherwise w only lead to a situation where the Attorney-General has before him, in a very short time, ma very deplorable and sad circumstances involving women who are prematurely widowed and fi themselves unable to gain ownership of the family home.

I should point out that a life estate — and I think there is some confusion on this poi I know in legal circles there's always been a contentious debate as to the relative merits o life estate versus a fee simple. Basically, that argument, Mr. Chairman, devolves about t saleability of the two types of ownership. Some people suggest that a life estate can be so

but I would argue that it's very difficult in practice to do that, simply because to do so requires the consent of all the ultimate beneficiaries of the deceased's estate. And for a widow to obtain consents of all those people in order that she can dispose of this life estate, you know, give a full estate to someone else, is very often almost impossible, because you do get situations where members of family, particularly children, are not getting along, one with the other, they're not enjoying good relations, and very often, as a result of the untimely death of a senior member of the family, squabbles do arise, and there's acrimony and discord, and it has to be the most inappropriate time for a widow to be involved in that sort of very confused and contorted situation. So I would think that in order to rectify even the possibility, in order to assure us that such a possibility will not arise, we should bring forth the amendments to the bill dealing with Section 14 of The Dower Act contemporaneous with our deliberations with respect to the other Acts relating to marital property.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I want to help the Attorney-General in that, but I don't want to make it appear as if I'm being cynical about it or sarcastic; I'm not. He referred to the Law Reform Commission; I have the Law Reform Commission Report. There are five pages devoted to the marital home, and I'll read only a couple of sentences: "We suggest that in the absence of any contrary agreement between the spouses, the marital home should be and become by standard operation of law, the jointly owned property of both spouses." I will continue further. "Our original proposal and our working paper concerning joint ownership of the marital home attracted general approval on the part of those who wrote to us and appeared before us. Among those who appeared was Mr. Gerald O. Jewers, Q.C., Chairman of the Manitoba Branch of The Canadian Bar Association who presented a resolution passed by the Manitoba Bar at its 1975 annual meeting, which is: Resolved that the matrimonial home and household furnishings and equipment be deemed as a matter of law, to be held in joint tenancy from the date of marriage, unless the parties otherwise agree by written agreement executed on independent legal advice at any time.

And finally, there is the specific recommendation that every legal or equitable right, title and interest of the spouse in a marital home acquired before the solemnization of the marriage and in contemplation of the marriage, or acquired after the solemnization, is, for all purposes of law, held jointly with the other spouse, whether or not it is so recorded in any deed, etc., etc.

So, Mr. Speaker, the Law Reform Commission which dealt with the entire question of family property law, dealt with this at length, considered it, of course. There is no dissenting or minority position that I have noticed, and strongly recommends exactly what Mr. Corrin's amendment proposes, and therefore it's not new and it is highly recommended and I haven't heard any argument against it. So I would like to invite the Attorney-General and his colleagues to accept the proposal by Mr. Corrin and make law what I have heard said said in debate has been the practice so frequently with so many people that it is assumed by many that it is already the law, and to the extent that the law makers follow behind custom and society's idea, then it is time we caught up with what society thinks as expressed by the Law Reform Commission.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, I was just going to suggest that I think the case has been made about the value of the amendment. I also understand, in part, the hesitation of the Attorney-General in making a quick, off the cuff commitment to a fairly major change in the law. I was wonderingif it is quite likely this committee will be continuing its deliberations tomorrow, whether this particular clause can be reserved for the opportunity of the Attorney-General to consult with others of his colleagues and gain their agreement and then come back and accept the amendments, so that if he needs some time to take it under advisement by his officials, in other words, and come back to see if there are any particular problems with it and at least give some time for perhaps some more cautious assessment. But I would agree with Mr. Cherniack and Mr. Corrin that I think the case has been made. I have certainly heard the case made many times about the need for this and that there is a present injustice if we allowed it not to be introduced considering the fact that the family property law doesn't incude community property as part of its element. It would seem to me that this is only a proper compensation. I wonder if the Attorney-General would be prepared at least to take it under advisement and then bring the consideration of this clause back for review when committee reconvenes.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, while I have some sympathy with the proposal I think we have to respect the fact that what we are dealing with here is what happens on death, not what happens

on marriage breakdown. Having just been presented with this particular motion I can think c circumstances, and I'm sure others on the committee can, where there are situations which occu or could occur where the intention may be that the wife has the life estate, perhaps more . . . secon or third marriage, and the children have the rights thereafter. I am not prepared at this momen Mr. Chairman, to accept the amendment without giving it further consideration.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I will now' like Mr. Corrin, make a comment about which I ar not that sure, but my impression is that the law as it would be changed by the proposals alread before us under The Marital Property Act as proposed by the Attorney-General, provides that i the case of the marital home acquired even before the marriage, and long before the marriage the spouse acquires a right to live in it for the rest of her life, and in addition, has a half interes in the property itself under The Dower Act, and under The Marital Property Act, for the home, acquire a half interest in it. So it is beginning to look to me like — and I want to be corrected on this Mr. Chairman, because I have not thought it through so I'm not sure — it seems to me that o marriage breakdown, under the Conservative law, the wife acquires a half interest in the home an the wife has a right to live in it for the rest of her life, and on the death of her husband, I thin she acquires a half interest in his half interest — I may be wrong about that — I am wrong, ar I? Yes. So that under the Conservative law as it would be when this is passed, the wife acquire a half interest on breakdown and a half interest on death of her husband, in his home, plus th right to live in it for the rest of her life, and what is now being denied that wife by rejection c this amendment is her right to the other half, that is, to the estate in remainder, of the other ha interest. She owns estate remainder of one-half interest; she owns a life interest of all of it; sh owns half of it, which is the estate remainder and the life interest, and all that she is being denie is the estate in remainder. That is, what happens to one-half the property after her death, she doe not acquire the control of that.

I would like to know if I am right about what we are dealing with now, and that all I think M Corrin's amendment is, is to give to the wife a right to determine the half interest, one-half interes of what would remain the value of the home after her death. And that of course means that sh does not have the freedom to deal with the property as she sees fit in her lifetime. She may acquir this estate in remainder to half, and the life estate to all, of a house that is completely unsuitabl to her, and she would not have the right to sell the house and change it into some more suitabl accommodation. That is really, I gather, what is being denied her by this, and it's not a new matte I think Mr. Axworthy was very kind and I would go along with him and say yes, if you need mor consultation, by all means take it, but surely this has been a matter of detailed review by th Conservaticve caucus, or whoever makes decisions.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, the Attorney-General has indicated at this point he is not prepare to proceed with this. There has been indication in the previous Marital Act, which in fact veste the rights, and therefore in effect superseded The Dower Act, although The Dower Act provisior were not changed or altered in the sense that they were not eliminated. If I am correct, there no jurisdiction in Canada would have a similar provision, but that doesn't necessarily mean tha this amendment shouldn't proceed, but I think that if his position has been, and I think it is expresse to this point, that he is not prepared to proceed, there is an opportunity for that amendment t be introduced for consideration in third reading in the House, and at that point, the position o the government can be stated pretty clearly at that stage.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, in fact, I was going to suggest that, that what Mr. Corrin has propose is what the former law reflected and certainly the Attorney-General has indicated the acceptanc of that. And rather than seeing Mr. Corrin's amendment voted down at this stage, I would hop that we can keep the Attorney-General's options open and that he review this and then we coul at this point, serve notice that at Report Stage we would be introducing such an amendment unles the Attorney-General preceded us with a similar amendment at Report Stage. I would suggest - I'm just making a suggestion to my colleague — that he withdraw it at this stage with th understanding.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: I'm amenable to that, Mr. Chairman. I think that the Attorney-General should have an opportunity to discuss this, particularly with Legislative Counsel, in order to discuss the full impact and full breadth and scope of the amendment. I will advise him, though, that this amendment was prepared on my instruction by Legislative Counsel. I think that is important to know that it wasn't something that I just prepared and cooked up myself down in my office, but it was properly prepared by Legislative —(Interjection)— It does. I would never, with all due deference, I would never use a word like "plight," Mr. Chairman.

MR. CHAIRMAN: Mr. Corrin, are you withdrawing the amendment for the time being.

MR. CORRIN: I am withdrawing the amendment.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I think he needs consent to do so, so before I give consent, may I express regret that I haven't heard an argument against the amendment? But I suppose that's the way it is.

MR. CHAIRMAN: Does the me (Agreed) er have consent to withdraw the amendment?
(3)(a)—pass; (b)—pass; 4, is there an amendment to Section 4, Mr. Corrin? That was all one amendment, eh?

MR. CORRIN: That's one amendment, Mr. Chairman.

MR. CHAIRMAN: 4 (a)—pass; (b)—pass — 4 (b), an explanation, Mr. Tallin.

MR. CHERNIACK: Just clarification.

MR. TALLIN: This is the section that deals with the one-half interest and it says that it will be the one-half interest, in effect when added to any benefits that the person gets under The Matrimony Property Act, so that the concern of some people who have appeared before the committee that a spouse would get one-half of the family and commercial properties under The Marital Property Act and then get one-half of the remainder under The Dower Act, is not quite true. She may, indeed, get one-half of a greater group of assets under The Dower Act than she or he did under The Marital Property Act, but the assets which she acquired under The Marital Property Act would have to be taken into consideration for the purpose of calculating how much he or she was to get under The Dower Act.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: This means, then, that on a death of a spouse the other spouse is entitled to one-half the estate, less the value of what may have been received under The Marital Property Act.

MR. TALLIN: Yes.

MR. CHERNIACK: And the value, how was that to be determined? Would it be the value as of date of death, or the value as of date of division?

MR. TALLIN: I would think that the court would have to make a decision on that. It is not expressed specifically in the amendment.
The division under The Marital Property Act was a division based on values at the time of the separation or the marriage breakdown. I would think that on The Dower Act division that would be considered to be an absolute unchangeable value, and would be taken into consideration with respect to the value of the estate of the deceased at the time of the deceased's death. So that although there might be an appreciation of value on the portion of the assets which the deceased retained or was granted, under the division, the surviving spouse then would get a share of that appreciation of value with perhaps not having to take into consideration any appreciation in the value of the estate, or the portion of the assets which the survivor had already received.

MR. CHERNIACK: Mr. Chairman, I agree with Mr. Tallin as to what it should be, and I wonder if we can't get agreement with that and ask Mr. Tallin to draft clarification so that it is that way. In other words, if we decide it should be that way then why worry about our interpretation of what

a court may interpret. It is a decision of policy, and I agree with it because it means to me tha if the spouse gets a certain asset, and either depletes it or increases its value by good judgmen or good managemnnt, that that benefit should not pass to the other spouse because there wa a division and there was, for the first time, separate ownership and control.

I'd like to suggest, Mr. Chairman, to Mr. Mercier, that that is what Mr. Tallin described as logical proper, and that since he felt that it would be a matter that would be left to the interpretation c the court, that we do use whatever words Mr. Tallin deems advisable, so that the court will kno the intent of the Legislature, rather than grope for it. —(Interjection)—

MR. CHAIRMAN: To the members of the committee, Mr. Tallin would like to speak again.

MR. TALLIN: My own feeling is that that might cause some difficulty with the courts because i those cases where the courts actually made a division of the assets themselves, for instance gav half of a group of shares to one spouse and half of a group of shares to the other spouse, if yo valued the group of shares that went to the survivor as of the date of the evaluation for the divisio and the value of the shares that went to the deceased as of the time of his death, that would perhap give more than a half interest to the survivor, or perhaps in some cases less, vis-a-vis the rest c the estate, because under The Marital Property Act the court may make an actual division of th assets and direct that the certificate for 1,000 shares in some company be split into two — on for 500 shares and the other for 500 shares. When that was done, it would seem to me to be unfa to then treat the value of one-half of that as of the date of the deceased's death for valuatio and the other half as of the date of the division, which may be 10 or 15 years apart.

MR. CHERNIACK: We're dealing with two separate concepts. One is, the right of the spouse t acquire half of the assets that have been acquired by the couple during the marriage as a matt of right and recognition of the role that spouse has played. That's one thing.

Now, The Dower Act says that on the death of a spouse the other spouse is entitled to one-ha of the estate, and I recognize and I agree with the concept that the portion already received cou be charged back against the half of what the total entitlement is, but, Mr. Chairman, it is not fa to entail that first portion received, because that became outright, the ownership, under the ownersh and control of the spouse as something as a matter of right and should not be entailed for futu distribution.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, at the time of the distribution of whatever assets have been mad that would represent a percentage of the assets at that time, and if in fact, for the sake of argumer it was a 25 percent distribution of the total assets, then, in effect, all that you would be dealir with in the remaining part is 75 percent, and all you are going to be dealing with in the one-ha is 25 percent of that 75 percent, or one-third. Now, that's in effect what you are really basica saying. But the problem is, I don't know how you are going to be able to in legislative wordi to be able to put that through, but that's basically what you're saying.

MR. CHERNIACK: There's no problem of saying that the value, as of the date of distribution, sh be the value, the amount used in determining the amount by which the entitlement on The Dow Act will be reduced. It becomes an arithmetic thing, it is really quite simple.

MR. SPIVAK: That's going backwards.

MR. CHERNIACK: I think, Mr. Chairman, that it's really a matter of policy, what is right — wh is fair, and I support that, I have no argument against it, so I don't know. —(Interjection)— We Mr. Tallin is the expert on it.

MR. CHAIRMAN: Well, Mr. Tallin said he couldn't.

MR. CHERNIACK: Oh, he didn't say he couldn't. I have yet to see something he can't do, drafting.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: I wonder, Mr. Chairman, I don't know whether this is usual or unusual, but I wonc if we could leave this matter again until third reading, and Mr. Tallin and I will attempt to see wl change could be made in the wording.

MR. CHERNIACK: Yes, Mr. Chairman, except that the rules I think determine that an amendment for third reading must come in ahead of time and be distributed so that if we are to deal with it then we have to have something with which to deal. If Mr. Mercier undertakes to bring in an amendment along that line for discussion — I don't say he has to commit himself to voting for it, but if he and Mr. Tallin discuss this and bring something in — then we can discuss it on third reading by all means. There's no point in holding up this until they've had the chance. I would think that's a good idea.

MR. CHAIRMAN: So, Mr. Cherniack, we pass it as is. until it's redrafted?

MR. CHERNIACK: I would be prepared to pass it as is, on the understanding that Mr. Mercier will come back at third reading with wording such as Mr. Tallin could draw in setting up that principle, but then later, he could by all means say, "No, I don't go along with it, but here it is," to give us a chance to debate it. But I'm sure he doesn't want to foreclose the opportunity to debate it.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Well, Mr. Chairman, that can be done with or without my undertaking. Mr. Tallin can draw an amendment, I just don't want to undertake to propose it.

MR. CHERNIACK: Mr. Chairman, can we agree that either Mr. Mercier or I will propose on report stage, an amendment to be drawn by Mr. Tallin, and leave it to Mr. Mercier to decide whether he wants to put it in, or doesn't. If he doesn't, I will. How's that?

MR. MERCIER: That's fine.

MR. CHAIRMAN: 4(b)—pass; 5(a)—pass; 5(b)—pass; 5(c)— pass; 5(d)—pass; 5(e)—pass; 6—pass; . . .

MR. CHERNIACK: I'm sorry I've not read 16(2). Is that The Dower Act?

MR. MERCIER: That's The Dower Act, yes.

MR. CHAIRMAN: 6—pass; 7—pass; 7(7)—pass; 8—pass; 9.1—pass; (9)—pass; 36.1—pass; 10—pass — Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I would like to hear an explanation as to the reason — 10 and 11 and really 13 — the reason that it is proposed to have this kind of a deadline date.

MR. CHAIRMAN: Mr. Tallin.

MR. TALLIN: The reason for it? I'm afraid that's a matter of policy.

MR. CHERNIACK: That's right. I wasn't asking . . .

MR. CHAIRMAN: Mr. Mercier, then.

MR. MERCIER: Well, Mr. Chairman, that's correct. It is a policy decision, that is the date that we hose. We felt that those could be brought in on a specific date and we chose October 1, 1978, ·ankly, because, for one reason, that may be the possible date that all of the Acts can be brought ıto force.

MR. CHERNIACK: I understand that there may be a delay in bringing in The Marital Property Act nd The Maintenance Act, I'm not sure about The Maintenance Act, we will be discussing that; but he Property Act provides for agreements, bilateral agreements entered into to vary and to exclude rovision of it. But here we are talking about the grim reaper, Mr. Chairman. We are dealing with ɔmething that is beyond the expectation or planning of the individual, and it seems to me that the principle is right that there should be a change or a progressive and inflationary view of it, r a greater sense of fairness or consideration for the survivor, that that should not be determined y the time somebody dies. As a matter of fact, people have written the greatest mystery stories ıat are so popular, based on determining in advance when a person shall die, based on what the

inheritance shall be, and boy right here you have got the making of a mystery story, or a detective story because it may be that you decide that it's to the advantage of some survivor that a death take place before October 1st, or vice versa, then there is a great story where some body is kept locked away somewhere and hidden and not discovered until after October 1st. You know, there are such stories written. I can't give you the name of the author or the title, but —(Interjection)— No, that's a different person.

But I am not really jesting or making words about this, Mr. Chairman, it seems grossly unfair that the Legislature this week is about to make a decision to change The Dower Act by increasing the value of certain guaranteed successions by one spouse. So why should there be an October 1st date? Really, why should somebody say, "Just because my husband died on September 30th I don't get the benefit," or worse, somebody says, "Here the Legislature passed a law, which they thought in all fairness and right they ought to pass, and on August 1st, the day after the Legislature has prorogued, a husband dies and, boy, that doesn't take effect."

I really would urge the Attorney-General to consider that that should really take effect on the date of Royal Assent, not even proclamation. Because it's either fair or it's not fair. Frankly, I'd then want to argue as to why make this bill at all subject to coming into effect on proclamation I'm not sure I understand it. Maybe Section 1, which deals with another Act that may not have been proclaimed, but The Dower Act is older than any of us present in this room and could well be — if it's right, and I assume it's right — passed right away. So I'd like to urge that that be the case.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, perhaps we under-estimated the length of the session.

MR. CHERNIACK: That's one that doesn't go in the record.

MR. MERCIER: The previous Act was to come into force on a day fixed by proclamation. It was never proclaimed into force by the previous government. I, frankly, have all that is required. Maybe a couple of weeks or days . . . There is no magic to October 1st, 1978.

MR. CHERNIACK: I think we're dealing with two things. One is the date that the Act comes into force and proclamation could be the day after it receives Royal Assent. —(Interjection)— Yes, but I figured . . . The Attorney-General has pointed out that part of the Act comes into force on October 1st. —(Interjection)— Yes, but the point is that they come into force on October 1st, but regardless of when they come into force — that's sort of the second question. The first one is I don't care if they don't come into force for two years, providing we recognize that if a person dies the day after it receives Royal Assent that the spouse of that person is not adversely affected by a late death. That's my argument. You know, the proclamation date or the automatic date is of less concern to me than the need for a person to die or live after October 1st. That's a bad principle. I'm sure it's a bad principle, Mr. Chairman. I really think it ought to be that that date ought to be the date of Royal Assent, or, say, August 1st, or, say, July 1st.

Mr. Chairman, while we're waiting, I don't remember what date — I don't have to remember — what date Mr. Mercier introduced this bill for a second reading, or even for a first reading. Why shouldn't that date be the one that's effective? It was June 16th first reading, July 5th second reading. Why shouldn't Jly 5th be the date then. Once the government made public its decision to create a greater benefit for the spouse under The Dower Act and Devolution of The Estates Act, then why shouldn't that date be the effective date? It makes sense. I don't know any other date that makes more sense.

Mr. Chairman, shall I move that the date set out in 10 and 11 be changed — and 13 — the dates referred to as October 1st, 1978, shall be replaced by the words "the date of Royal Assent" I forget the exact correct wording but the day it receives the Royal Assent.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Tallin will have the correct amendment, but that's acceptable to me.$

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: . . . to the amendment but I guess more to the general concept of what is being discussed. I've had a little experience, of course, in drafting legislation, and probably in view the fact that at least we studied the drafting of legislation in Law School but we of course never had the opportunity to study actually making it. I have a question which I would be interested

eceiving a reply to, although I'm not sure that the Attorney-General, given that he has had a little nore experience than I have in this area, will be able to do so. But if anyone feels compelled to rovide a response I'd be pleased to receive it. The question, Mr. Chairman, is this: Is it not a general rinciple when one approaches the drafting of new legislation, that one should presume that people overn their affairs in such a way as to be in accordance and consistent with the existing law, the resent law. So, just by way of example, if I were considering whether or not, for instance, I should o out tomorrow morning and make a will or leave it be, even though perhaps I was desperately l and perhaps imminently to die, but should I be faced with the determination of whether to make will or not to make a will and should I, of course, be that reasonable citizen who, of course, would ave taken the proper steps and consulted legal advice and so on, shouldn't we presume that people's ffairs in this province are governed by what is while they are alive. And, having made that resumption, not retroactively legislate in such a way that would remove or otherwise reduce or ust change the rights that would have otherwise accorded to a person while he or she was alive. low, I'm not sure that I made myself very clear, but what I'm saying, I suppose, in brief is that it proper to retroactively legislate in such a manner that people could not possibly have put their ind to the possibility or the probability of certain laws coming into force or certain laws ceasing be in force.

I'm wondering because you know the fellow or the woman who died just after October 1st may ell have — if he or she were asked — may have said, "Well, the law is such and such, and I ould prefer, for instance, to have my estate pass under the terms of the Devolution of The Estates ct. I don't want to make a will varying those provisions." I would not feel very good about creating ws that would circumvent people's expressed intentions. I am saying, though, that we presume at such intentions were expressed, given that that reasonable citizen who of course always is miliar with the provisions of the law.

But could anybody address themselves to that question, because I think that's really the substance what we're discussing.

R. CHAIRMAN: Mr. Cherniack.

R. CHERNIACK: I would be prepared to address myself on the basis that what we were agreeing was to make it effective as at date of Royal Assent, so that's not retroactive.

R. CORRIN: No, but Mr. Cherniack, or Mr. Chairman, through you, I agree with the intention Mr. Cherniack's motion and I am saying I do. But I just was wanting some clarification as to ny such provisions are made in legislation. You know, whether there is any reason for such a ovision. Obviously, October 1st was prior to the October 11th election, or excuse me, October t is subsequent. It is next year. If somebody in this particular instance is unable to see ahead that point, is s it proper either to go retroactive, or — what's the word? — prospective. I think at the same rule applies.

R. CHAIRMAN: Mr. Mercier.

R. MERCIER: Mr. Chairman, the suggested amendment is that Bill 41 be amended by striking t the word and figures October 1st, 1978, in Sections 10, 11 and 13, and substituting therefor e words "the date this Act receives the Royal Assent."

R. CHAIRMAN: Agreeable? (Agreed) 10—pass; 11—pass; 12—pass; 13—pass; Preamble—pass; le—pass; Bill be Reported—pass.

Bill No. 40, An Act to Amend the Provincial Judges Act(2). There were amendments distributed. . Mercier.

R. MERCIER: Mr. Chairman, the amendments again provide for the . . . of Bill 42, the transfer one action to another court. On the third page of the amendments substitute for the existing ction 1 of the bill . . .

The only changes, Mr. Chairman, from what was in Bill 1 and what is on the third page of the endment or in paragraphs (c) and (d) — if you compare them, there is a period after "courts" w, and all of the provisions for the transfer of actions is in the previous sections of the amendment; d), some of the reference to special examiners, etc. is taken out of that because that is contained other . . .

. CHAIRMAN: Mr. Cherniack.

. CHERNIACK: This is the place where I was going to deal with a question about examinations

for discovery, etc., and Mr. Corrin already raised that. I was going to deal with it under 25. 3(1), which will be on Page 3. I am not through reading Page 2 so I don't know how you want to proceed with it; do you want to give us time to finish reading it?

I'm ready to deal with this now and I want to stop on Page 3. I don't know about others.

MR. CHAIRMAN: Mr. Cherniack, you said that you were prepared to deal with something on the third page of the . . .

MR. CHERNIACK: Mr. Chairman, I just indicated to you that since we were each reading these individually, that I for one was ready now and I have no concern with Pages 1 and 2. I want to deal with Page 3. So if other members are ready, I . . .

MR. CHAIRMAN: Will the Attorney-General move them as distributed?

MR. MERCIER: I so move.

MR. CHAIRMAN: Section 1—pass?

MR. CHERNIACK: No, Mr. Chairman, Section 1 is everything.

MR. CHAIRMAN: I was getting some help from the solicitor and he said that we've got to go through them one at a time. Okay, of Section 1, Section 25.1(1)—pass; 25.1(2)— pass; 25.2(1)—pass 25.2(2)—pass; 25.2(3)—pass; 25.3(1) — Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I'm not too sure that this guarantees that there will be the same provision — examinations for discovery, discovery of documents, etc., such as raised by Mr. Corrin as we now know in the other courts. We know the rules of the other courts, but here the Provincial Judges Court, which may or may not have rules now — that may be academic — I think should be required to make rules and to make special provision for the proper examination of documents and of people as set out in the other courts. We want to ensure that the same opportunities are given for proper pleadings and proper practices as are known in other courts. My suggestion was going to be, and I guess it still is because there is no real change in this section, to say that the courts "shall" make rules, and under (a) regulating the pleading, practice and procedure in the courts and is set out there, including — I don't know how to describe it in technical terms — examinations for discovery, discovery of documents, etcetera. That would take care of the concern that I had and also the concerns that have already been expressed by some of the briefs we have heard.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Tallin points out, Mr. Chairman, that it is done in the County Court under similar section which allows the judges to regulate the pleading practice and procedure in the courts Mr. Tallin has no concern.

MR. CHERNIACK: But the point I made is that we know that it exists in the Queen's Bench, we know it exists in the County Court, so the fact that the wording is the same is of academic interest because they already have it. But since the Provincial Judges Court does not yet have it — and I'm not accustomed to it and have not had it in the past — I think it merits using some particular wording that spells it out and I see nothing wrong with that.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: This may, Mr. Chairman, well be the best argument — maybe not the best, but one of the good arguments — for the establishment of a unitary family court, the fact that this sort of problem would not arise. Perhaps some would say it is a technical problem. Maybe I'm wrong and the Attorney-General will disagree, but I think it is possible that we will have different sorts of rules as between the courts, although I think we would all agree the County Court and the Court of Queen's Bench have a consistency as between them. However, it is possible that there will be a differentiation as between the rules of the Provincial Judges Court and the County and the Queen's Bench Courts, and this sort of problem would be neatly circumvented and nipped if there were a unitary sort of division. This is why I asked earlier, Mr. Chairman, as to whether or not there was going to be provision for examinations, for instance, for discovery, not only examination of documents but also for discovery. I am concerned that the privilege that is accorded on people

to transport with consent, their actions may be more of a paper privilege as opposed to a real one. It may not really afford a real substantial opportunity to many litigates. —(Interjection)— Please address yourself; you are looking quizzically at me but I think you would agree that it is possible that the Family Court rules may be at variance with, for instance, the County Court rules and as a result we may have conflicts. Is that logical? I think it is.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, we of course don't have any final rules of procedure in Family Court yet, and until there is an Act that is passed, we won't. But they have been addressing themselves to that particular situation and I think will attempt as much as possible to develop uniform rules of procedure.

MR. CORRIN: Mr. Chairman, Mr. Cherniack can correct me, I thought Mr. Cherniack was suggesting that we not leave this thing wide open, that we make an attempt to direct them, to channel them through the legislation in order that they be well aware of our intention. It seems to me that no harm can come to anyone if we were to do that. I think Mr. Cherniack's argument is compelling simply because we have seemed to have done that with respect to other courts, so if in fact we do that with respect to —(Interjection)— Is that not true? Have we never made provision that the other courts direct themselves to those things?

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: I read out the authority for the County Court to enact their rules of procedure, which is the same as we have here.

MR. CORRIN: I see. How about the Court of Queen's Bench?

MR. MERCIER: Mr. Tallin thinks it is the same.

MR. CORRIN: But it is hypothetically possible, Mr. Chairman, that the Provincial Judges Court may in their wisdom decide to go another route, and that may cause problems.

MR. MERCIER: They might' and you have to appreciate, I think, that's a court that holds hearings n vastly different forms. In northern Manitoba compared to Winnipeg, we'll probably have to allow or some ability to adapt to their particular circumstances.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, there is a person who presented a brief so recently describing ow she made an application to the court — I think she said it was her first time before the court — and how the court arbitrarily said, "I wouldn't think of doing that; I won't listen to that kind f evidence; I will do exactly as I have been doing up to now." That's fine, that's what a court as the right to do. But, Mr. Chairman, that very case probably would have been different had there een an examination for discovery, had there been information given as to the assets of the upporting spouse, the earning spouse, and then it would have been a much more clear-cut resentation of the case saying this guy has so much and he is earning so much and he can afford o give so much, rather than have the court deal with it in a summary fashion.

I'll have to ask the Attorney-General a very direct question. Does he believe that in the Provincial udges Court there should be those preliminary procedures such as examinations for discovery, roduction of documents, etcetera? Does he believe that ought to be the case?

MR. MERCIER: Yes.

MR. CHERNIACK: Mr. Chairman, I knew he would say that. Any lawyer should say that. One would ink any judge would do that. But if we believe it ought to be done and we know that there is o such rule in the court today — the courts might be quite happy with the way they have been perating up to now — if we believe it should be done, why do we not say that it should be done? herefore, I would want to say that it should be done. That's it. And then the courts will do .

MR. MERCIER: Mr. Chairman, we have looked at The Queen's Bench Act, which has similar rovision again as a County Court and as we are proposing for the court to regulate the proceedings.

If it is any comfort to the Member for St. Johns, in some very preliminary draft rules, the Family Court is proposing that in the procedure, the parties each have the right to obtain from the other any or all of the following: examination for discovery, interrogatories, and particulars. I have only indicated in introducing this legislation that the specific procedure does not have to be set out in the Act, that it can be in the rules, and it will allow the court the flexibility to make the necessary rules.

MR. CHERNIACK: Mr. Chairman, I pointed out earlier that The County Court Act, The Queen's Bench Act, both say apparently that the court may make certain regulations. We know that the court did make those regulations, so to me now it is academic whether it says they "may" or they "must." What I am saying is that we are now saying to the Provincial Judges Court, you "shall" do something. —(Interjection)— No, we are not. We are saying, you "may" make rules. They could have made rules before, I assume. Maybe they didn't have jurisdiction and we now give them jurisdiction. But if in fact we want them to, we believe they should, and Mr. Mercier agrees they should, and if in fact we are told in an advanced way that they are already thinking in those terms then I say we should say that and I would be glad to include the words Mr. Mercier used, which I think said examinations for discovery, interrogatories — I forget — but particulars — those exact words. I would say it is simple to just just put it under (a), regulating the pleading, practice and procedure of the courts, including provision for — the same wording Mr. Mercier used — I'd like to include that. And then we know that what we want them to do they will do.

MR. MERCIER: Mr. Chairman, the provincial court did not have the authority before to make the rules. That was set out in the Act, and informations were laid under The Wives and Children's Maintenance Act. This gives them the authority to make their rules. Their draft rules that we're aware of to date include these rights; I'm satisfied that they will continue to include these rights. If by some strange quirk of fate they did not, then I would be prepared to amend them at the next session of the Legislature.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: I was just thinking, I must admit that at first glance when Mr. Mercier suggested that the judges of the courts have traditionally, and almost by convention, always had jurisdiction to make their own rules, I must admit that I immediately succumbed, and then I thought about it and I had been pre-conditioned to succumb. It's almost a presumption; it's a presumption to a people who practice law that the judges should be in that position of authority, and now, I guess I'm just questioning whether or not it's a decision that's been made — been the by-product of reasonable thought and consideration or whether or not it's just a knee-jerk reaction. It seems to me in this particular instance that there is a possiblity, however remote, that there could be some havoc as a result of this sort of a delegation of responsibility and authority, and if that is the case I don't see why we as legislators can't take the bull by the horns and make some decisions. We know that it's in the best interests of people to have uniformity and consistency, that is why the former government continually spoke of and was in the process of implementing a unitary family court experimental program. I think we understood the value of it and many people who are involved in the courts expressed that value. I'm not sure that we should do anything that would detract from as uniform a procedure as is possible in the circumstances, and given that we don't have a unitary court, given that we're going to continue with the old subdivision, subdivided jurisdiction, even though it's less now than it was a year ago or it will be less than it was a year ago. I'm not sure that we should kowtow and fall back on our old preconceptions of what is proper. I would move that we give consideration to this motion, and I'd put it on the table for consideration, seconded by the Member for St. Johns.

MR. CHAIRMAN: You don't need a seconder in Committee, Mr. Corrin. What is your motion though?

MR. CORRIN: Well, that we insert the word "shall" instead of "may," and I am wondering whether I shouldn't defer to the Legislative Counsel, because I think what I would like to do is specify the nature of the regulations dealing with pleading and practice.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I'd like to suggest some wording along the lines Mr. Mercier used. I would suggest at the end of (a) to add the following words: "including provision for examinations for discovery, interrogatories and particulars."

MR. CHAIRMAN: A question, Mr. Cherniack, from the Chair to you. Are we still talking about Mr. Corrin's taking "may" and turning it into "shall" as well?

MR. CHERNIACK: I guess they should be two separate motions.

MR. CHAIRMAN: Yes. We can deal with them separately. I'm just waiting for the Attorney-General to ready himself. Mr. Mercier.

MR. MERCIER: This is to include "shall," the amendment will include "shall?"

MR. CHAIRMAN: No, the motion by Mr. Corrin is that we replace the word "may" with the word 'shall." Right? In 25(3)(1), the third line.

MR. CHERNIACK: The practice is to make the amendments to the subs (a), (b), (c), etc., and then go back to (1). It seems to me that the amendment first should be (a).

MR. CHAIRMAN: (a). The one that Mr. Cherniack has is (a).

MR. CHERNIACK: I think procedurally that that's the more conventional way.

MR. CHAIRMAN: I think, Mr. Cherniack, the legal counsel is writing (1) out right now. Do you want to read it in?

MR. CHERNIACK: Well, it's really Mr. Corrin's. I think it should be satisfactory to him.

MR. CHAIRMAN: Under Section 25.1(1)(a) we have an amendment. Mr. Corrin do you have the amendment written out, and if so, would you read it into the record?

MR. CORRIN: Yes. The first amendment, Mr. Chairman, would be that Section 25.3(1) be amended by striking out the word . . .

MR. CHAIRMAN: Well, we'll do that one after we've gone through (a) to (f) and then we go back to . . .

MR. CORRIN: Oh, excuse me. In keeping with Mr. Cherniack's admonition you're right we'll do rear to front.

MR. CHAIRMAN: Okay.

MR. CORRIN: That Clause 25.3(I)(a) be amended by adding thereto the words "including procedures for discoveries, interrogatories and particulars."

Mr. Cherniack may note one change, and that was I was queasy about the word of the use examinations for discoveries," because I was considering "discoveries" dealing with documents as well, and "examinations" as used in legal parlance.

The second amendment, Mr. Chairman . . .

MR. CHAIRMAN: Well, no, we have to deal with them individually. Mr. Mercier, did you want to speak to the amendment?

MR. MERCIER: Yes, Mr. Chairman. There seems to be prevalent, even among those who continually speak of a unified family court, that the Provincial Court is inferior to the County Court, and the County Court is inferior to the Court of Queen's Bench. We have a situation where the County Court and the Queen's Bench each have a similar authority, and they make rules regulating the pleading practice and procedure in the court. As Mr. Cherniack has indicated, he certainly appears to be satisfied with the procedure that has been developed and approved in each of the Queen's Bench and the County Court. I see no reason to distrust the Provincial Court in establishing similar satisfactory rules of procedure, and I therefore am not prepared to support either of the amendments.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I reject the word "distrust." I reject the value content of what

Mr. Mercier said. The point I made was that we know what the rules are in Queen's Bench and County Court, we don't know what the rules are in Provincial Judge's Court, because there are no rules. So that to talk about inferior courts or superior courts is not relevant. What is relevant is that we believe that the rules should provide for procedures for discoveries, interrogation and particulars. We agreed, Mr. Mercier said he agreed — as a matter of fact, Mr. Mercier even had a veiled threat, he said, "If they don't do it then in the next session we can do it for them." Those are not his words, but they are awfully close to his words. So why should we bother to worry about whether the judges read Hansard or don't read Hansard, do the right thing — and I use the words "right thing" in the sense of what Mr. Mercier agreed is desirable. Well, why don't we just tell them this is what we expect of them because we think it's right? They may say, they didn't have to tell us because we knew; fine, let them say that. But why shouldn't they do it? We think they should do it, they may think they should do it, let's say that they should do it and then it will be done rather than have to say, "Well, next year, if they won't have done it we'll pass an amendment." I think that it's much better to do it now. It's not a question of trust at all, it's a question of telling them what we think they ought to do. There's nothing wrong with that; that's why we were elected that's why we were brought here. That's why we have certain decisions to make, and I think we should make them.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: Mr. Chairman, I would submit that it's only proper that these rights be conferred on litigants in the Provincial Judge's Court. It's particularly important because the fault principle the question of conduct, is still implicit in the main area of this court's contention, The Family Maintenance Act. And as long as that is the case I would submit that there is going to be a need for full exposure in dealing with evidence. There is going to be a need for an extended practice procedure in the courts. This is, of course, what we, the former government, were attempting to eliminate from the practice with respect to marital law and disputes relating thereto, but we were unsuccessful in doing that, and there has been a re-institution, as I said, of the fault principle. That of itself, and in itself, is sufficient to warrant significant consideration by the court, because the finding of fault is going to have significant and dramatic repercussions one way or the other, and I can say that if I were either a litigant or a lawyer appearing before that court I would want to be sure that I had the same rights in that court as I might have in either of the other two courts. I'm particularly concerned in this year of cutbacks, and I say this in all sincerity, I think that having seen what has transpired with respect to Legal Aid freezes and Legal Aid policy directions and changes in the past six to eight months, I would suggest that it's not inconceivable that we may well see the day when Legal Aid applicants who want to bring applications, have to bring application under The Family Maintenance Act, may be forced, compelled, to bring those actions in the Family Court as opposed to the Provincial Judge's Court. And I'm not sufficiently trusting in the present members of the Board and the government, the present government, to allow any differentiation as between the courts, because if, for instance, the Provincial Judge's Court should have reduced procedure, then I would imagine that would only act to encourage the present government to make such a revision of the regulations, to make it a requirement that legal aid applicants, for instance bring all actions before that court in order to cut costs and economize. But I would point out, any event, in any event it is never a necessity that there be an Examination for Discovery or an exchange of documents, that's never an absolute requirement, it's a matter of discretion on the part of the litigant and his or her counsel. I have to presume that litigants before the court will respect the court's process if for no other reason but their own pocketbooks. I have to presume that a person will not waste his or her money by way of extending the action before the court just for the purpose of doing that, and for no other good reason. So in order to assure us that there will be consistency and continuity as between the courts and that we don't get any more high-handed arbitrary rulings from Legal Aid Manitoba with respect to the right of individuals appearing before the court, I would suggest that the imposition of such a requirement, mandatory requirement, would be proper and should recommend itself to the Members of this Committee.

QUESTION put on the amendment and defeated.

MR. CORRIN: Mr. Chairman, on a point of order. The recent outbursts from the audience might suggest that the Chairman may well recommend it to the Premier that there is Cabinet material in the room, untapped Cabinet material.

MR. CHAIRMAN: (a) as distributed—pass; (b)—pass; (c)—pass; (d)—pass; (e)—pass; (f)—pass. Now, we have another amendment on 25.3(1). Mr. Corrin, do you have it in front of you?

MR. CORRIN: Yes, Mr. Chairman.

MR. CHAIRMAN: Would you like to read it into the record?

MR. CORRIN: That subsection 25.3(1) be amended by striking out the word "may" in the third line thereof and substituting therefor the word "shall".

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: No, I can't support that.

MR. CHERNIACK: Mr. Chairman, I just want to know is this a case where "may" means "shall" or "shall" means "may", or "may" means "may" or "shall" means "shall"? I'm not clear on just what is meant.

MR. CHAIRMAN: Who are you directing your question to, Mr. Cherniack?

MR. CHERNIACK: Well, it's Mr. Mercier's . . . I have no right . . . Well, I can ask the legislative counsel, but it's Mr. Mercier's bill.

MR. MERCIER: This is a case, Mr. Chairman, where the word "may" means "may". But as I have indicated, we have a similar authority in each of the other courts. We had satisfactory rules. In fact, I am aware already that tentative rules are in the process of being drafted by the provincial judges in anticipation of the legislation, and subject to the final form of the legislation, and I see no reason, in view of the action that has been taken, to insult them by making it "shall".

MR. CHERNIACK: Mr. Mercier is again using words that are completely unjustified. If I wanted to insult the courts, I wouldn't hesitate to do so. I don't need his interpretation to decide what I should do. Mr. Mercier says "may" means "may". I would wonder if Mr. Mercier will tell us what will happen if they don't make the regulations. Is he going to come back next session and say, 'The court didn't do it, so we will have to say 'they shall make the rules'." Is that what he proposes?

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: Following that line of thinkigg, Mr. Chairman, it is of interest because again I related earlier my problem with knee-jerk reactions, Pavlovian preconditioned reactions and responses, and this is a very good example. "May" obviously does mean "shall", but because of some polite tests, some courtesy that the Attorney-General wishes to make as a gesture to the courts and that's very nice. It's very nice that we have a polite Attorney-General, a man who is obviously given to diplomacy in his relations with his equals, should want to couch his language in this fashion, but I think that since "may" does mean "shall" I think that we should be explicit. —(Interjection)— Yes, he said "may" means "may" but he presumed that the rules were going to be made and he defended the courts on this basis. He, like us, Mr. Cherniack, I think would be highly distressed, quite distressed, if the courts were to tell him that they were refusing to make rules; that they were not going to regulate the pleading and practice anymore ; in their court in this respect that they were not going to deal with the regulation of service out of the province; that they were not going to prescribe forms; that they did not have time or see any utility in their doing that.

Obviously, the Attorney-General is presuming that they will, and I think that we all fairly do. But as a matter of precision, " "may" should read as "shall" and go forward on that basis. I think it's our responsibility to make the law and their responsibility to interpret it, and they certainly have always attended to their responsibilities, Mr. Chairman, much to my detriment.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, when you look at the Acts, it will be a virtual impossibility for the court to operate without making rules.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, there is really no point. This section is a similar section to other Acts which the courts do make rules. So I think that it's just nonsensical to suggest something different, because there is nothing we can suggest . . . that's different. So, it occurred to me that we should

go with the question and finalize it.

MR. SPEAKER: Mr. Corrin.

MR. CORRIN: This may be a holdover, Mr. Chairman, from the old English tradition in which we are rooted, of course, of law lords. I think one of the reasons formerly that legislation such as that was couched in that language was principally because the court was constituted of members who were very often of the gentry. They were peers of the realm, and it was deemed socially unacceptable that language in legislation should be directed to them in an imperative fashion. So this sort of wording is a convention and I don't think the Attorney-General if he were to try and distinguish this particular wording from that used and eloyed in other pieces of provincial legislation would suggest that he would be willing to confer the same sort of latitude on other groups, boards commissions, agencies. I don't think that that would be the case at all. It may be a small point but I'm not sure that it isn't somewhat relevant. I think that we have to decide how society will be priorized and it's our responsibility, as has been decided, that we make the law. We make it and they interpret it.

QUESTION put on the amendment and defeated.

MR. CHAIRMAN: 25.3—pass; 25.3(1)—pass; 25.3(2)—pass; Section 1 as amended—pass; Section 2—pass; Preamble—pass; Title—pass — Mr. Cherniack.

MR. CHERNIACK: May I ask the Attorney-General what is his plan in regard to proclamation of this bill? Is there any reason why there is any holdup?

MR. CHAIRMAN: You are speaking on the motion the Bill be Reported?

MR. CHERNIACK: No, on Section 2. I told you you went a little too quickly for me. Is it 2 or . . ? Yes, Section 2. I don't know if you called Section 2 . . .

MR. CHAIRMAN: Yes, I did.

MR. CHERNIACK: . . . but if you did, it was because I was looking for it that I couldn't . . .

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, just as soon as we can get confirmation of the rules of procedure and the necessary forms are ready, then I would think we could bring it in. I don't expect that that would be too long.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the Act says the court "may" make regulations.

MR. MERCIER: We can't act. We can't act. You know, I don't know how long we're going to play this game, Mr. Chairman. I have indicated it's virtually impossible for the court to operate under the legislation without rules. The court has already drafted preliminary rules. They are ready to be approved as soon as the final legislation has been passed.

MR. CHERNIACK: They are ready to be approved as soon as the Act is passed.

MR. MERCIER: Depending on the final form of the Act.

MR. CHERNIACK: Mr. Chairman, we now know the final form of the Act. That's pretty clear. We voted on all the sections except the one about commencement of the Act. —(Interjection)— All right, I didn't hear what he said.

Mr. Chairman, the Attorney-General says that the . . . Is he suggesting that this bill would not be proclaimed until the rules provided for in Section 2 are brought in, because they can't be proclaimed. The rules cannot be passed by Lieutenant-Governor-in-Council until this Act proclaimed. I want to understand his timing. Is he suggesting that somehow the Act will have be proclaimed concurrently with the rules?

Mr. Chairman, I wonder if the Minister can explain what he means by the game that he is playing I wasn't aware that we were here playing games.

MR. MERCIER: Mr. Chairman, as soon as the final rules and forms are prepared and the courts are ready, we will then be in a position to proclaim it. I don't expect it will be very long, indeed, if that's a concern of the Member for St. Johns. Is he asking for a specific date?

MR. CHERNIACK: Mr. Chairman, I was asking for an understanding as to why it is necessary to delay the proclamation, or the commencement of this Act, and now I gather that he wants to delay the proclamation until he has the rules prepared and ready to pass by way of the Lieutenant-Governor-in-Council. I assume that's it, or don't they even go through the Lieutenant-Governor-in-Council. Maybe the court just makes rules. How do these rules become rules that have the same force and effects as if they are embodied and fom part of this Act. Do they have to be passed by the Lieutenant-Governor-in-Council or just by the courts themselves?

MR. MERCIER: My understanding, Mr. Chairman, is by the courts themselves.

MR. CHERNIACK: Well then the court will pass them and then the Attorney-General intends to proclaim this Act, is that the way it works?

MR. MERCIER: Mr. Chairman, I believe it's the same as the other two courts and they're published in the regulation, in the Manitoba Gazette.

MR. CHERNIACK: But as I understand it, the Attorney-General does not intend to proclaim this Act until after the rules are ready.

MR. MERCIER: Right, and filed, Mr. Cherniack.

MR. CHERNIACK: And filed.

MR. MERCIER: We followed the same procedure as last fall, Mr. Chairman. Under the previous government.

MR. CHERNIACK: The Attorney-General relies on what was done last year, last fall he says. I don't know what procedure they followed last fall.

MR. MERCIER: The one for bringing the Act into effect and proclaiming it.

MR. CHAIRMAN: Section 2—pass; Preamble—pass; Title—pass. Bill be reported—pass.

MR. CHAIRMAN: Well, now that we got through the difficult bills, let's get on with the easy ones.

BILL 39 — THE FAMILY MAINTENANCE ACT

MR. CHAIRMAN: Mr. Pawley. Before we get going, clause by clause?

MR. PAWLEY: Mr. Chairman, we have an amendment which is to serve as a preamble insofar as Bill 39 is concerned, The Family Maintenance Act. I note, Mr. Chairman, that the Attorney-General . . .

MR. CHAIRMAN: Mr. Pawley, would we not follow the same procedure and do the preamble last?

MR. PAWLEY: Well, I'm in your hands, Mr. Chairman, on that. I will not debate that. I thought that to deal with the preamble was natural to deal with it at the beginning but . . .

MR. CHAIRMAN: Well, when we deal with bills, from my limited experience, we deal with Preamble, Title, and then report the bill.

MR. PAWLEY: Okay, I won't argue with you.

MR. CHAIRMAN: Okay. All right. Section 1. I don't have a complete list and I haven't read through all the amendments so . . . Okay. (Section 1 was read clause by clause and passed.)
Section 2(1)—pass; (2) — Mr. Mercier.

MR. MERCIER: Mr. Chairman, with respect to Section 2(2), in the amendments that we'v distributed, I moved the first amendment to Section 2(2). There was concern expressed throug the hearings that conduct should not be considered as to whether an Order should be made unde Section 5(1) or Section 21 which is a variation Section. We are, therefore, proposing this amendmer in substitution for the existing 2(2) which will clearly set out that in determining whether to mak an Order under this part, or Section 21, "the court shall not consider the conduct of the spouse in respect to the marriage relationship."

The balance of the Section is the same as it was before so that conduct can be looked at i determining the amount of support and maintenance "having regard to a course of conduct tha is so unconscionable as to constitute an obvious and gross repudiation of the marriage relationship. But the amendment clearly points out that conduct shall not be a factor as to whether an Orde should be made.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, we oppose the principle of conduct being utilized in this manne We have objected to the use of the words "unconscionable as to constitute an obvious and gros repudiation of the marriage relationship." I think that the briefs which have been submitted hav clearly indicated concern with respect to the use of these words. A number of references were mad to the cases that had been relied upon earlier by the Attorney-General in arriving at the use these words which have been used in English cases. It's our view that 2(2) is a backward ste that it reintroduces conduct in its own way back into The Family Maintenance Act, pre-separatio and we certainly do not intend to vote for 2(2) either in its older form or in the form which th Attorney-General has amended it because the basis remains the same regardless of th amendment.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Well, Mrs. Bowman, in presenting the Manitoba Bar brief indicated that in her opinio or at least in the opinion of the group that she represented which is the Manitoba Bar, that son conduct should be included with respect to quantum.

A MEMBER: Why?

MR. SPIVAK: Well, that's what she said . . .

A MEMBER: Well, can you tell us whether . . .

MR. SPIVAK: . . . and in her determination of some conduct, she said it would be better to tal conduct as it was determined in The Divorce Act which would simply say that conduct of the partie if I'm correct, and that was the exact wording, and to use the case law in that respect. I think the is a vast difference between that suggestion and the suggestion of "a course of conduct that so unconscionable as to constitute an obvious and gross repudiation of the marriage relationshi On that basis, I believe that this is a far better section than is being proposed. It is to define sor conduct in a way in which there would be the extreme situations in which for quantum purpos the judge will in fact be determining the actual relationship and course of conduct between t parties for the determination of the amount to be given. I think it's unrealistic not to believe th that would not happen in any case when quantum is going to be dealt with.

So in effect, by stating and very specifically that it has nothing to do with the entitlement b it does deal with quantum, we would in fact resolve what will occur in the actual practice ever the proposals that Mr. Pawley wanted were accepted.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Mr. Chairman, I still haven't heard anyone explain why the term, where t consideration of conduct is put forward with respect to the amount of maintenance — this 2 seems to indicate that it won't be used to determine whether there should be maintenance bu will be used to determine whether in fact maintenance should be zero, which is a logical possibi after this amendment that you put forward. I thought maintenance was something that to me conno need and it doesn't connote punishment. Now if in fact maintenance is to connote punishment, le bring in 2(3) where we give punishment to people for their conduct. But surely let's not ha maintenance which, to me, is something connoting need determined by conduct. And I've yet

have a clear explanation from people as to what they mean by conduct. I thought that maintenance would be provided to someone depending upon what their needs were. That doesn't seem to be the case now and we are introducing some type of a notion of punishment, or we're enforcing the notion of punishment. I don't know whether in fact we're going to get into the debates regarding other forms of deterrents or deterrents for other types of activity. But is that the intent of this particular amendment, to confirm the concept of conduct as punishment? Is that what it's intent is? Because I think we're, you know, this is I think the crux of the matter with respect to this particular section. Are we talking about maintenance which is something that relates to need or are we talking about conduct which is going to be used to determine punishment?

MR. CHAIRMAN: Mr. Cherniack, followed by Mr. Axworthy, and then Mr. Corrin.

MR. PARASIUK: I was wondering if I could get an answer in the course of the discussion from the Minister on this.

MR. CHERNIACK: Mr. Chairman, I would have liked to have persuaded my colleagues to let this amendment pass before they debated the Section because it contains a principle which I had wanted to move an amendment to and that is a clear statement that conduct shall not be a factor considered under this part. I like that, so I would like to see that go in and then I would like to speak against the amended section. Not that it matters much, but just in . . . It would have taken on that slightly different improvement, I think, and that is the clarification proposed in this amendment. It doesn't matter when we discuss it; we're going to discuss it anyway.

I wanted to ask the Attorney-General a couple of specifics in relation to this. One is, why he is not including Part II, or Section 13, in this description — Section 13 being the one dealing with the maintenance of the child. Under 13, it does read: "The court shall consider the following factors and any additional factors it deems relevant." I don't want to get into a debate with Mr. Schulman in his absence as to whether this is confining or broadening, I just want to say that I would say that conduct in the marriage relationship, which is the wording in this proposed amendment, should not, in my opinion, be a factor at all in determining whether or not to make an order under Part II. So I do ask Mr. Mercier, why not include Part II in this?

The second question . . . Well, maybe I should . . . Well, I'll . . . The next question was: Does he not in his mind — and now I'm debating with him something with which I don't agree and that is the conduct in the marriage. Does he make a difference in his own mind as to the differentiation between conduct before separation and conduct after separation? Surely there is a tremendous difference between conduct when a husband and wife are living together and behaving in some way or other in relation to each other, that's one form of conduct which may well determine the separation or influence the separation. It seems to me after the separation there's hardly any reason I can think of where conduct in the marriage relationship should be a factor except the one that was implicit in the former statute that we passed which said that whether or not she is applying herself to becoming a dependent, which I think is really covered under 5(i), — is it? — yes, under 5(i). So that once 5(i) is there, I really . . . You know, now I'm debating something I don't really agree with but I think we ought to clarify it that even if my point of view fails, at least the majority point of view should be clear.

So my questions, specific ones to the Attorney-General are:

(1) Why isn't Part II included in this since Section 21 is? And

(2) Doesn't he see — and these are two separate questions. Doesn't he see an important difference between conduct before separation or while they're living together, and conduct after? And shouldn't there be a different weight, although I know that he considers that the circumstances in either case would be bizarre or very extreme were his words.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Well, there's an Order, Mr. Speaker, I'm making a note of the . . .

MR. CHAIRMAN: All right. Mr. Axworthy.

MR. AXWORTHY: Well, Mr. Chairman, I agree with the way in which the amendment separates out the two decisions relatdd to separation, but I obviously disagree with the second part of it and frankly am curious. We've never really had what I consider to be a proper explanation from the Attorney-General, speaking on behalf of the government, as to the rationale for using this particular concept to be used as a formula for determining the quantum of support. On the other side of the case, there has been an enormous amount of evidence presented particularly from the, I guess you wanted to call it the social side of the argument, not the legal side, indicating that the ability

to judge and make judgments as to what would be considered to be unconscionable conduct is virtually impossible in the marriage situation because there is such a close and intimate interaction between the two people that for someone in a social work position or a counselling position to try to make those judgments and advise the court is virtually impossible according to those who came from those professions. I asked them if they were prepared to provide expert testimony and they said they could not provide that kind of testimony in a court if anyone asked them. I think the point raised by Mrs. Sisler in her recommendation, and it said, in other words, and it's lawyers making judgments about social relationships.

Considering the concern expressed by the Attorney-General in presenting the bill and in public statements about the way in which he didn't want this legislation to affect the family, to affect the children, to affect the relationships, it seems to me that in this area, again there is a pretty substantial weight of evidence that suggested that this would even exacerbate the problem and make relationships worse, provide for more acrimony, provide for a delving into the most minute corners of the long married period to bring out whatever peculiar aberration of behaviour that might be used in order to save $5.00 on a monthly payment. It would come down to that fact, that there would be this kind of intense combat over the most particular and perhaps unforuntate circumstances I have been frankly puzzled, Mr. Chairman, about the professed commitments of the Attorney-General personally, and I think of his government generally, that they didn't want to use legislation that would interfere with or intervene with personal or human relationships, and yet the weight of evidence by the witnesses or people who came before this committee was in fact that this was what you would be producing, by this particular reason.

So I think, Mr. Chairman, the Attorney-General really owes the committee a fair degree of explanation as to why he still sees this as being such an important component for the determination of the amount of support that should be required. What particular justification is there that would be so important to maintain it as part, in fact a key part I, bil when there has been such an enormous weight of evidence contrary to that from a variety of people who have been working in the field of domestic relations? I am curious as to what the explanation for that fairly steadfast and over position is at the present time.

MR. CHAIRMAN: Mr. Corrin, then Mr. Parasiuk.

MR. CORRIN: Mr. Chairman, I would like to endorse the remarks made by all those who have spoke before me. I think all those remarks are directed at the basis of the problem and I simply cannc see that this particular amendment and/or the concept which is embodied in it will give effect t the type of law that we, as legislators, wish to propogate within the Province of Manitoba. I thin that the essence of law, if it is to be successful and if it is to provide the sort of assistance tha we have in mind to our society, is that it first be respected, that it be capable of fairly read understanding, at least in terms of basic principles, and therefore it would be respected by everyone I think that this sort of law is just calculated to fall into disrepute in rather short order. I think w can say in this sort of law that virtually every litigant is going to have a very different standarc No two people in this province are going to be able to agree on what is an obvious and gros repudiation of a marriage relationship. The standards in contemporary society vary dramatically fro region to region, from street to street, from group to group, and given the fact that we have disparate, pluralistic society that is the sum of many different components, many different input I don't think it is possible to put this sort of burden on a court of law within our province. I thir it is inhumane from the point of view of the courts. I think it is a burden that just simply can be borne.

First of all, the people who sit in judgment in the courts that have this sort of jurisdiction ar I think, without exception all lawyers. Some of them may have backgrounds that lend themselve to the arbitration of such determinations, but I would suggest that most of them have been traine to interpret law and as my colleague, Mr. Axworthy, said, we are talking about very very intricat detailed human interrelationships. We are dealing with problems that defy ready solution. Even tl most experienced professional, somebody who has a background in the humanities and the soci services, would find it very difficult to provide any guidance as to what sort of conduct might l construed as being obvious and gross repudiation of a marriage relationship.

So I think we are very soon going to find ourselves with a situation where the law truly will l undefinable. I don't think you are going to find that a body of jurisprudence will, by virtue of precede accumulate. I think what is going to happen is you are going to have very different judgments ma by very different judges. I personally don't think that that's correct; I think that that is going work a hardship on a lot of people. Frankly, I just see it I suppose — on the bottom line and the final analysis, I see the whole exercise as being rather childish and immature. I don't see w this province should encourage people to go through that sort of anguish and agony when th relationship dissolves. I don't see why we should put them to the expense, both emotionally a

financially. It makes no sense to me; it makes no sense at all. If somebody could show me where the benefit will lie — will the benefit lie with stronger family units? Will the interests of young children be served because their parents have had a real good fight in the Family Court of Winnipeg? Will that give effect to child welfare in the interests of children in our province? I don't think so. So what if a mother who otherwise is — and it happens all the time — a mother who otherwise is absolutely without fault in terms of her mothering abilities, her ability to nurture her children, her dedication, her effort — if such a person as this is to commit one act that is construed by one judge to be an obvious and gross repudiation of the marriage relationship . . . If somebody can tell me why those children should have to possibly be put to the hardship of not receiving an adequate maintenance, should not be afforded a maintenance that is of a standard that will enable them to maintain themselves with the necessities of life, why should those children be penalized? I don't understand why the sins of the parents, if that's the game we are playing, should be borne by the children. It makes absolutely no sense.

We hear so much concern about expanding Legal Aid costs. If the Member for Wolseley were here he would give us a dissertation on the subject. Well, what we are doing here is we are just exacerbating, we are just doing all that is humanly possible, anything that somebody could conceive to promote expensive, useless litigation — well, we are doing it. We're passing a law that will invite everybody in Manitoba to fight and it makes no sense; they have already fought; they have already had their innings. A day in court in this case will not provide any final judgment because neither party will ever be convinced, regardless of the judgment that is brought down, neither party will ever be convinced that they received justice. It is not like the Criminal Code where you have a burden of evidence and the burden having been proved before the court, the court brings down a judgment. It is not that sort of situation at all. It is all very arbitrary. If client X asks lawyer Y, what will the burden of proof be against me? The lawyer will say, I don't know, it depends whether Judge Smith or Judge Jones is sitting today, I suppose. I really don't know because who knows what his or her position might be on the day we appear.

Why do we want to encourage this? It is pointless. It is not effacacious; it does nothing. We took the fault out of auto insurance and that was long overdue. Why can't we take it out of family law? It is amazing. We can take it out of a commercial acitivity, you know, we seem to be sufficiently rational to be able to deal with that one. But here, because I suppose that this deals with something that we all have so many fundamental prejudices about, we can't seem to escape our old preconceptions; we can't escape the old lessons we have learned, and we insist on taking this damn fault thing with us wherever we go. We rattle it about like a ball and chain, and it is not doing anybody any good. I can assure you the court's time would be much better spent dealing with the substance of the application. If the court could spend all its time dealing with the needs of the children and the division and disposition of the property, all of which are complicated matters, sufficiently complex unto themselves, and less time dealing with this darn fault concept and all of the acrimony and all the difficulty that that will undoubtedly provide, the court's time would be much more efficiently spent. The concept is borne out by unworthy emotions; it is bred of unworthy emotions, jealousy, hate, envy, all sorts of emotions that I think we in our more rational moments would dispense and put aside are being encouraged by this particular bill.

I would submit that there is no argument. I will wait to hear what the Attorney-General poses because I think it is absolutely fundamental now that he give us some solid rationale as to why we have to continue with the fault concept. As other members have suggested before me, if he fails to do that, in the absence of such a rationale being produced and presented to the committee, would suggest that it is indefensible. No member of this committee, regardless of political affiliation, no member of this committee can endorse this particular section and this concept. It is time — and I look not only to the Attorney-General, because that is unfair — the Attorney-General is a spokesperson for his party, true, but I don't see why he should bear all the responsibility — I look across the table to the other members and down the table to the other members who have not yet spoken to this matter. I think that they should make their opinions known. Some of them have had this matter before them for a very long time; some of them many years. I think it is time that they went on the record. I don't think it is irrelevant. We have had many interested people, 54 or 55 briefs presented by various deponents. Those people were representative of literally thousands of Manitobans. I was astounded to see the number represented. I would not think that it would overstate the case to suggest that some 40,000 to 50,000 people were represented by those 55 depositions.

I would suggest that in view of the fact that such interest has been generated throughout the Manitoba community, I would suggest that it is incumbent on the four or five or six members of the government caucus who are here tonight to go on the record once and for all. Let's get it out on the table and if need be, let's debate the darn thing to dawn, but let's deal with it.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: There were quite a number of questions asked and I'll just speak very briefly because I expect the Attorney-General will deal with these questions. Specifically, I hope he can determine or define to us what this course of conduct is or might be, when is it relevant, before the marriage breakup or after the marriage breakup, and the general defence of it being considered at all? I hope he will deal with those very direct questions.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I think to a great extent there has been a misinterpretation of this particular clause. I have tried to say on a number of occasions that the vast majority of cases which occur will not be affected by the principle embodied in this section, that we are dealing here with a minority of cases, and the judgments that I have cited on a number of occasions support that contention. $

The financial need is the basic criteria under Section 5.(1), and this section is discretionary: "May" take into consideration in determining the amount — and that has to be viewed in the context of the premise underlying Section 5.(1) that financial need is the basic matter to be dealt with.

Mr. Cherniack referred to Section 13 of the Act and enquired as to why it wasn't made clear that conduct was not to be considered a factor affecting an order for maintenance of a child. Mr. Speaker, I don't believe that conduct ever has been or ever would be considered a factor in determining the amount of maintenance to be paid for a child. It has never been so in my experience and there is no suggestion here whatsoever that conduct should be considered a factor in determining the amount of maintenance to be paid for a child.

The reference to Section 21, I believe that was the Section that was referred to. Section 2(2) now clearly says conduct is not to be considered a factor either in the initial application or interim order or Section 21 which is a variation of an order.

Mr. Chairman, the purpose of this Section is not the purpose of punishment as was suggested Mr. Chairman, but more one of encouraging a basic sense of responsibility as the cases that we have sighted indicate, that in the case in which a reasonable person would consider it a complete injustice for any moneys to be paid. I think those cases, Mr. Chairman, will be pretty rare considering the provisions of Section 5(1) which I maintain established that financial need is the basis of the Order for Maintenance.

Mr. Chairman, again this is very similar to a Section included in the Ontario legislation so that we will have the benefit of being able to monitor the cases decided in Ontario on their Section as well as our Section and I'm not suggesting that any of this legislation is to be written in stone There are, Mr. Chairman, in a general way, great improvements taking place in matrimonial reform legislation. Different provinces have each gone, some only certain distances, not all the same. I think we have to monitor the developments in all provinces with respect to this Section, particularly those cases in Ontario, and it may very well be that as a result of changes in society which have occurred and which are occurring and will occur, that the changes will have to be made in the legislation in the next few years. But for the present time, Mr. Chairman, we feel we've gone a considerable distance in removing conduct from consideration in the vast majority of cases while maintaining it only for a very small number of cases which would simply not be accepted by many in society today. But that may very well change, Mr. Chairman, in the future.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, a couple of questions. Firstly, where is the provision for an order for custody? I mean, what does it provide that the court shall decide as to custody?

MR. MERCIER: Section 8(1)(d).

MR. CHERNIACK: 8(1)(d). That comes under Part II.

MR. MERCIER: Under Part II, yes.

MR. CHERNIACK: Does it?

MR. TALLIN: That's Part I.

MR. MERCIER: Part I.

MR. TALLIN: That's Part I.

MR. CHERNIACK: I'm sorry for the delay, Mr. Chairman. So that we are saying that conduct, of either spouse, shall not be considered in determining custody and that, I believe, is the point. We are saying that conduct shall not be considered in the decision as to custody.

MR. MERCIER: Or maintenance.

MR. CHERNIACK: No, not maintenance. Under 8(1)(d), and that's Part I, so the Attorney-General is saying that — and I hope he isn't changing his mind — that the order under 8(1)(d), that conduct of the parties shall not be considered a factor in determining custody. That's what he's saying. That's fine, I agree with that.

MR. MERCIER: Mr. Chairman, I'm saying that conduct is not to be considered, or has never been c considered a factor in the amount of maintenance and support to be paid for a child. The principle of the law has always been, and it will continue to be with respect to custody, that custody is determined on what is in the best interest of the child. I'm not saying that conduct will not be considered in determining that. Certainly there was no provision in the previous legislation that there was to be any change in that. In fact, I said last fall that I think in custody cases you probably have the worst instances of where conduct is used by both sides against the other. I said at the time the legislation we had, that the previous government drafted, did not do away with that form of conduct or allegations of conduct and unfortunately that still remains.

MR. CHERNIACK: Mr. Chairman, I suppose I shouldn't have launched into the subject I did launch into because I really wanted to compliment the Attorney-General for removing conduct of the parties, in respect to the marriage relationship, from a determination as to custody and I don't think it belongs. The conduct of the parent in relation to the child should be a question in determining custody, but it ought not to be, in my opinion, and I think it isn't under the Attorney-General's legislation, that conduct in the marriage relationship would be a factor in determining custody. So I'm complimenting him.

Having done so I'd better move on lest he change his mind to ask him to comment on my question as to whether he does not distinguish about the unconscionable conduct as to whether it occurs before or after the separation.

MR. MERCIER: Mr. Chairman, the provisions of Section 21, I think, is what Mr. Cherniack is referring to.

MR. CHERNIACK: Not at all.

MR. MERCIER: You're not referring to variations of order after an order has been made?

MR. CHERNIACK: No, no, no. I'm sorry, if I may just clarify. I'm talking about 2(2) where it says the guantum that the court may look into the conduct of the parties in the marriage relationship and if it determines that it's unconscionable to the degree described there, the quantum may be affected. I'm asking whether the conduct before the separation, while the people are living together, should not be considered differently than the conduct after the separation. In other words, I suppose I can give an example, the couple live together and the spouse, either spouse, never comes home, is hardly ever at home, never does any of the household duties . . .

MR. CHAIRMAN: Must be in politics.

MR. CHERNIACK: . . . of either spouse during the marriage. Now there's a separation and the same thing applies after the separation. But surely nobody's going to care one bit if that spouse who is now separated doesn't come home to that old spouse's house. So here you have what may be considered wrong conduct during the marriage and perfectly okay after. So I'm asking whether the Attorney-General doesn't distinguish between the two.

I could be more dramatic and talk about adultery. I could say that adultery during a marriage would be considered differently than adultery after the separation. You know, it might be viewed differently.

MR. MERCIER: Mr. Chairman, I stand to be corrected on this but I think that the primary focus of the legislation after marriage is more with respect to their economic circumstances and changes in economic circumstances that may result from whatever actions they may take.

MR. CHERNIACK: That would be under 21.

MR. MERCIER: Yes.

MR. CHERNIACK: Mr. Chairman, that would be under 21, I assume, but when I'm looking at 2(2) as amended, and as I say I approve of the amendment, it says: "Having regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the marriage relationship." Now I want to suggest to the Attorney-General that the wording there would imply that after the separation there is now the debate on quantum and I don't think it makes much difference as to whether or not the conduct was such as to repudiate the marriage relationship because, in my opinion, it has already been repudiated. So, I am under the impression that the intent of 2(2) with which I disagree — I don't have to say it all the time, but I don't agree with the intent — but I have to include that the intent is the course of conduct during the marriage. When I say the marriage, I mean during the time they're living together, before the separation and not after. If that's the case, I'm wondering why it doesn't say so. But again, if that's the case, and I think it is, how can the Attorney-General say it's not punishment to Mr. Parasiuk. Surely —(Interjection)— Well, then I have to ask the Attorney-General, does he agree with my interpretation that quantum to be determined by course of conduct would include the possibility that a supporting husband is required to pay double what is necessary as a form of punishment because that seems to me implicit in 2(2).

MR. CHAIRMAN: Mr. Mercier. Mr. Parasiuk.

MR. PARASIUK: Mr. Chairman, I waited for the Attorney-General to answer a number of questions and I find that his answers and then some of his answers to Mr. Cherniack have succeeded in confusing me completely. If indeed he is implying, and I infer from his statements that that's what he implied, that conduct will be considered in determining maintenance, this will be the conduct during the course of the marriage. Now the difficulty with that is that we are now going to have lawyers and judges defining causality in describing social behaviour and we've had people come before us saying that that's really difficult to the point of being impossible. It then is something that is not known and understood as truth, is something that is debated and you try and debate it as hotly as possible and you try and dredge up as much as you can of a sordid nature and you try and establish causality without ever being able to prove causality. You just can't do it in the social sciences or in describing social behaviour.

So if in fact we're talking about conduct during the marriage, we're trying to determine fault and maybe we should have used that terminology to clarify to people what we're talking about even though just about every expert we've had come before us, who is an expert in human behaviour and social behaviour, has said that that's virtually impossible to determine as the fault and the cause of a marriage breakdown. There are a whole set of different causes and to try and pick out one person for a blatant act you'd have to look at a whole set of psychological situations, you'd have to look at a whole set of sociological pressures and you would have to look at a lot of things that I don't know whether the court is in a position to do that right now or do it well.

MR. CHAIRMAN: Mr. Pawley.

MR. PARASIUK: Wait a second, I'm not finished yet. I don't know whether in fact we're talking about it after marriage, because if we're talking about it after the marriage breakup, then the only way in which I can see it having some effect and I can see it having an effect if it reduces the spouse's attempts to make himself or herself financially independent. But we have a clause in 5(1) and we have Section 4 which provides for that so we don't have to spell it out as conduct. I think that's covered well enough in 4 and 5(1)(i).

So I wonder whether in fact it isn't punishment as such. The only justification we've heard from the Minister has been this loose one that somehow is going to encourage responsibility. I don know if we want to encourage responsibility. Let's not financially penalize people, let's get into some better forms then, let's talk about some other forms of deterrent or some other forms of punishment and if we put them forward, I think people would realize that they'd be ludicrous. You know, let' bring back shaving peoples heads. Let's bring back the lash. Let's bring back other forms of deterrents, but we wouldn't want to do that, because it's not particularly civilized or humane. W will penalize the person financially. Now I think when we say that conduct isn't being used to penaliz children in terms of their maintenance, I think we're really misleading ourselves, because if a mothe — assume that a mother gets custody of the children, and the children get a certain maintenanc allowance, which is determined by their needs, but the mother, because of her conduct, perhaps she herself needs something in the order of $300 a month, but because of her conduct, that's reduce

to zero — or we'll be a little more generous and say it's been reduced to $100, — so she's $200 short per month. Well, she is living in a household with her children. That household, then, is short $200 a month. Why? Because of penalties. Now, I wonder, how will that household exist, and aren't, in fact, the children then penalized? What is she going to do? Is she going to say, "Well, the children got their straight maintenance, so therefore they are, in fact, going to eat regular meals, but seeing as how my maintenance is reduced, because I've somehow been conducting myself in a manner to be a gross repudiation of the marriage relationship, because my personal maintenance is reduced, we are now going to have a situation where I serve my children a certain set of meals, and I will feed myself differently. I will lodge them in one way, and I will lodge myself differently; or I will clothe them in one way, and I will clothe myself differently." Obviously that's going to be averaged out for that particular family, and it will mean that the children are indeed affected.

I don't think that the Minister's statement, that somehow basically the financial needs will be the major factor affecting the quantum of maintenance for the spouse. There is that much fruit, because I've noticed a tremendous resistance on the part of the Minister, and possibly on the part of his caucus to ensure that conduct is kept in place, because it provides the leverage with which one can, in a sense, keep the weaker spouse in her place.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I'd just like to comment on another comment by the Minister. The Minister had indicated earlier that Section 2(2) would only relate to a small minority of cases before the courts. Mr. Chairman, it may be that the courts will find obvious and gross repudiation in only a minority of cases, but I think the fact remains that in the vast majority of cases, we will still be dealing with legal counsel, who will be attempting, through the presentation of evidence to show to the court that there is obvious and gross repudiation in each and every case. So I don't know what the Minister has accomplished in suggesting that conduct has been eliminated insofar as family Family Court cases. In the vast majority, I submit that that will still be the case, under 2(2), as it has been up to this date. It may be that the courts will find only in a minority of cases that there has been gross and obvious misconduct, but it will still be an applicable element in all cases.

And I'd like the Minister also to comment in respect to the Bar submission, on Page 13, when they asked a question which I thought was quite valid — and I don't see where the Minister's amendment has altered the situation at all — dealing with the conduct on the part of the respondent spouse — the Bar asked, "What relevance does the conduct of the respondent spouse have?" I don't know to what relevance the conduct of the respondent spouse has, so I read 2(2), the conduct of the respondent spouse is still a factor, and could the Minister justify the involvement of the respondent spouse in any way, shape or form insofar as the weighing of conduct?

MR. CHAIRMAN: Mr. Pawley, you were referring to the . . .

MR. PAWLEY: Page 13 of the Bar submission report dealing with the conduct of the respondent spouse, is the specific question that I asked, which I thought was a good one that was posed by the Bar Association to us, in their brief.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Well, Mr. Chairman, the Bar Association brief went on to say, in dealing with that particular section, I believe Mr. Spivak dealt with this an hour ago, and they recommended that the conduct of the parties be included as a factor in determining whether and what amount of maintenance should be granted to a dependent spouse, and unless I misunderstood Mrs. Bowman in her presentation, as I recollect — and I could be wrong — when pressed as to what form that conduct should take, she went back to the provisions under The Divorce Act. And conduct is very much a factor in a divorce action, as to whether or not maintenance is to be paid. Certainly, conduct has not been removed from that particular piece of legislation. I would suggest that it has been much more removed from separation proceedings under this legislation, to be applicable, I suggest, to a small nuer of cases. It would be much more removed from this legislation than it exists in the federal divorce legislation.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I agree with Mr. Mercier. I do think that his proposed legislation with the amendment we are dealing with now, does remove conduct a little further away as a factor as compared with divorce legislation, but I'm not dealing with his legislation. I believe that he said, and I don't know whether the record will show it or not, but I believe he said that he does not

see how a court can consider conduct under 2(2) for the time after the separation. I don't think he said that, but I think he agreed with me when I said, "I don't see how it could be a repudiation of the marriage relationship after they are no longer living together." Of course, they are married, so maybe it could be, I'm not clear on what he meant.

The other thing I'm not clear on, and he really hasn't answered it, does he intend that under this section, a court may decide that the supporting spouse also known as the respondent spouse, should have to pay more than is needed for support if he behaves in an unconscionable way? And I haven't heard the answer. I'm told that the Press heard an answer, but I didn't hear an answer — whether or not an unconscionable action by the supporting spouse should penalize him to pay more than is needed by his dependent wife? I don't know his answer.

MR. MERCIER: Mr. Chairman, I don't believe that's the way the law of maintenance has evolved. I think what would occur, generally, is an assessment of what, and considering the fact that in 99.9 percent of the cases there is never enough money — well, maybe that's an over-exaggeration — but one of the delegations made a submission that, in most cases there is not sufficient money to operate two household — the procedure would probably be that the amount of maintenance the respondent has the ability to pay, is determined, and that is the amount that would be ordered because as somebody else indicated, that you can't get blood out of a stone — there simply is a limit on the amount of money that can be paid for maintenance, and available to both parties The answer to the question is, I don't believe that maintenance payments would be increased, that that would not happen.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: This is a section brought in by the Attorney-General on behalf of the Conservative caucus. They must have wanted to say something, and I think we are trying to find out what they want to say. We don't agree with what they are saying. If we can figure out what they want to say and if we can persuade them to change it, to modify it, to spell it out, that is the function we perform But, if we don't know what is the intent, if all we're getting from Mr. Mercier is an impression as to how it would work, then how are we really legislating, when we don't even know what the majority group want to make it work — how they want to make it work — and Mr. Mercier says that he doesn't believe that it will effect that, but I read this and it says,

"In determining the amount, the court may have regard to a course of conduct." It doesn't say a course of conduct by the petitioner — if that's what it means it should say that, because I think it implies that the respondent — the supporting spouse, usually the husband — that the amount he pays, may be influenced by his course of conduct.

And Mr. Mercier says he doesn't think a court would have to adjudicate on that, he says that the vast majority of cases wouldn't involve 2(2), but is it the intent that they should be that? If it is the intent, then there is punishment, obviously, in spite of the fact that we checked him; if that is not the intent, then why doesn't he spell out what the intent is, so that there will not be doubt in the minds of the lawyers and the litigants and the court.

So, I again ask him to say, do they want to impose an additional burden on the paying spouse because of his unconscionable conduct?

MR. MERCIER: I did answer the question.

MR. CHAIRMAN: Are you ready for the question?

MR. CHERNIACK: Well, Mr. Chairman, I don't know if that's on record. Mr. Mercier thinks he answered the question. I don't know who else could agree that he answered the question, because the question was very direct, and I think stated in a clear manner, but he has not answered it by saying what his intent is, or that of his caucus. And what he has said, is that he doesn't believe the court will be involved, because he thinks there's not enough money to go around anyway, and therefore they wouldn't really order a person to pay more than is needed.

But this section says that the court may — may order an amount, an amount which would be based on its consideration of the unconscionable conduct. I have to conclude that this is the intent that if a supporting husband behaves in an unconscionable manner, as described in this section that he will be punished by having to pay more than is needed. I'm concluding that because Mr. Mercier has not denied it, and I'm concluding that because it's consistent with the grammar, it consistent with the reference to either spouse — it does not say the dependent spouse — and therefore I have a right to conclude what I read into this is what it is, unless legislative counsel will tell me that I'm reading it wrongly, in which case you know that I would be strongly influenced by his opinion.

But here, Mr. Mercier is not telling us what he intends, there is no one on his caucus who is prepared to tell us what they intend. The reading that I give to it I think is the only logical reading, because it says, "either spouse," "unconscionable conduct," and if Mr. Mercier wants to leave it, he is not responding, or he did respond by saying he doesn't believe that it's going to work. Maybe that's the answer. Maybe it's a token section shoved in here by certain people who like to see it there. It makes them feel good. It solves their sensibility — their sense of proportion. They don't believe it means anything anyway, which is their right but let me tell you, Mr. Chairman, it's there and I think it means something and I think court will now have to interpret it the courts way and not the way the proponents of the bill want it to be. Court won't know what they want it to be unless they read it my way, or any other way, but the Legislature is not going to give them any help whatsoever in suggesting to the court what they really mean. And if they know what they mean they should say it, and if they don't know what they mean then they should leave it as it is.

MR. CHAIRMAN: Question? Mr. Parasiuk.

MR. PARASIUK: Mr. Chairman, I had wondered whether in fact the situation couldn't arise where children could get maintenance sufficient for their needs; where the mother would have custody of the children but she would not get maintenance sufficient for her financial needs, which would then mean that the household would have insufficient maintenance for the household's needs. We have had people come before us saying that this type of clause, this type of section, takes food out of babies mouths. Now, I am asking the Minister specifically whether in fact this particular section, 2(2) couldn't take food out of babies mouths in the way I have described.

MR. LYON: Regardless of the answer, you'll say it anyway.

MR. PARASIUK: No, no, you know we have had someone just join us right now who obviously is speaking from his seat again. Now, I wouldn't mind that person . . .

MR. CHAIRMAN: Speak to the amendment, please.

MR. PARASIUK: Okay, I will, Mr. Chairman. I wouldn't mind that person enter the debate because behind the scenes that person has been going around whispering. If he wants to join the debate, I invite him to join the debate.

MR. LYON: You better stick to planning and not . . .

MR. PARASIUK: No, not really. I'm perfectly pleased to let the Premier partake in this discussion. Why do it from the seat of his pants?

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I have indicated on a number of occasions that the primary basis of Section 5(1) is the domestic . . .

MR. CHERNIACK: Mr. Chairman, I can't hear the Attorney-General. I'm much closer to him but I can't hear him because of other noises going on.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I have indicated the primary basis of an order under Section 5 is financial need.

MR. CHAIRMAN: All right. Are you ready for the question now? Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, Mr. Mercier has clearly indicated that the basis of 5(1) is financial need. He has also clearly indicated that conduct shall affect the amount that is paid, but he did not explain to us whether he intends that to apply both ways or only one way. Does he mean that the amount will be affected by the unconscionable conduct of the supported spouse, or does he also mean that the unconscionable conduct shall influence the amount payable by the supporting spouse who has behaved unconscionably? That's the question he hasn't answered.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I wanted to just also suggest that the question that was raised by the Member for Transcona has not been dealt with. It's one that has concerned us throughout this debate, and if the Attorney-General is prepared to affirm the case example given by the Member for Transcona as one in fact that can affect a situation where there is a mother with children or not. I think the Attorney-General owes it to the Committee to indicate whether he feels that the example posed by the Member for Transcona is a plausible one or isn't.

On the other hand, I haven't received any comments from the Attorney-General in connection with the fact that this clause will not prevent, still, conduct being a matter of evidence to be fought over and chewed over still in the vast majority of cases which will be dealt with in our Family Court. And I think it's misleading, therefore, to indicate that only a minority of cases in the Family Courts will be affected by this particular section.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I stand by what I said.

MR. CHAIRMAN: Are you ready for the question? Mr. Parasiuk.

MR. PARASIUK: Yes, Mr. Chairman, I am not that experienced with the law and how it's applied, and we're asking the Attorney-General — I was asking the Attorney-General — whether specifically there haven't been instances of one of the spouses getting custody of the children, the children having maintenance set at a certain level; the mother, who is part of the household, not having maintenance set at a level sufficient for her financial needs, which means that the household itself will have insufficient maintenance, which means that the children's maintenance will be affected.

Now, if that's the case and if it's possible, I would like to know whether in fact that is possible and whether in fact it happens in the, legal system as implemented today. Beyond that, because I know that the Attorney-General has had an internal task force looking at the whole question of maintenance and enforcement of maintenance, if in fact that household has insufficient maintenance, where does that household then turn to to get sufficient maintenance? Does it turn to the state through welfare to get the maintenance that's sufficient for that household?

You know, when we had people come before us making presentations and we were a bit curious to get some information from the Attorney-General, we were told by you, Mr. Chairman, that we should wait until we get into clause-by-clause so that we could ask the Attorney-General specific questions, rather than asking him questions when groups and delegations were coming before us to present material. We are now at that stage and we are now asking questions, I think reasonable questions, of the Minister, and I think it's incumbent upon him to provide it, and provide justification for the amendments that he is putting forward.

MR. MERCIER: Pardon me, Mr. Chairman, I've been discussing a change in our particular proposed amendment and Mr. Spivak will, I believe, move an amendment to it. So that in the fourth line we will delete the words "part or Section 21" and we will substitute the words "Act for support and maintenance of a spouse" so that it will read "the obligation under subsection 1 exists without regard to the conduct of either spouse and in determining whether to make an order under this Act for support and maintenance of a spouse a court shall not consider the conduct of the spouses, etc."

The word in the sixth line, the word "the" should be inserted after "of" at the end. "The amount of the support and maintenance."

MOTION presented.

MR. CHAIRMAN: All right. Mr. Cherniack. Mr. Spivak has moved it, for the record. Mr Cherniack.

MR. CHERNIACK: Mr. Chairman, I think this is my fault. I think this amendment came about because I pointed out what it meant, and I'm sorry because I wanted it to mean what it meant, and now it has been taken out and it's been made worse. Let's get clear what this amendment means. It means now that when I asked the question about custody I apparently made the Attorney-General and his colleagues, or some of them, realize that he was following a progressive approach of saying that in the interests of the children, as to the custody of the children, the conduct of the parties of a marriage relationship should not be a factor, and I thought that was very understanding socially correct and in the best interests of the child. And when he has now taken out the general reference and made it specific, relating to the support and maintenance, it is another tremendous backward

step because now he is saying that they can bring up all the dirty linen that we talked about and they can get involved in all the fault as between the two parties when they deal with custody of the child, unrelated to the child's best interests, which was what the Attorney-General said earlier. They can now bring up all that activity as between the spouses and their marital relationship and use that to try to influence the courts to make a decision on custody.

If I'm wrong let Mr. Spivak explain just why the change in the wording, becaue the because the wording, I think, was very clear and the wording now, I believe, is glossed over and I think the intent is as I described it. Now, I'd like to hear Mr. Spivak tell me I'm wrong and explain why the change in wording.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, you know, as progressive as Mr. Cherniack wants to make himself appear when he and his government introduced the legislation last year they didn't deal with this problem and, as a matter of fact, they couldn't cope with it, nor did they resolve it with respect to the custody of children, and fault was in fact, conduct at least, was a factor in the determination of the court.

In one sense, I think it's pretty unrealistic not to believe that in determining the action that the court will take the conduct of the parties during the marriage relationship will not be considered, and I think that what we intended to do, and the Attorney-General intended to do, was to clarify that with respect to conduct insofar as spouses in respect of a marriage relationship it did not affect their entitlement to a maintenance order, although it would have some bearing with respect to quantum, particularly in the situation in which it would be so unconscionable as to constitute an obvious and gross repudiation of the marriage.

I think this clarifies the particular section and meets some, but not necessarily all, the arguments presented by the people who appeared before us, and I think Mr. Cherniack is now dealing with something that was not intended and which he may have read into it, and may very well have been read into it, which was not intended by the government and certainly not intended by the people who appeared before this Committee.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I thought Mr. Spivak, in his first few comments agreed that the purpose was that the intent was that conduct in the marriage relationship should be considered a factor in determining custody. It seems to me he justified it, he said yes and he said that the NDP in its legislation didn't exclude that, and he may be right about that part of it. But I'm saying that the only reason for the change in this wording is to clarify, when I read into it, and I think correctly, that the order made under 8(1) would not take into account the conduct of the parties in their marriage relationship, that this was designed to exclude Section 8 and deal only with Sections 5 and 21. Instead of saying this part or Section 21, they really meant Section 5 and Section 21.

If that were not the intent, I don't think there was any need to make the change Mr. Spivak made. Now, I think that they now are saying that yes, conduct in the marriage relationship should be a factor in custody.

I don't think it should be. I think that the best interests of the child . . . Let me tell you, Mr. Chairman, I once lived through a court case which left a scar on me, because I was fighting for the custody of a child and the case was determined by the judge weighing two factors. One was adultery, a common-law relationship of the mother, and the other was the fact that the father on one occasion had given his seven or eight year old child a drink of rye while sitting around the table on an afternoon, and the court decided that the drink of rye was not as bad as the common-law relationship and found that the boy was better off with the father than with the mother. And, Mr. Chairman, I really thought that was a terrible decision, even though I won it. It was terrible that these were the factors that the judge weighed. He didn't even talk to the child to find out what the child wanted and whom he loved best and whether he cared for his mother's common-law husband. And I'm saying that this brings us back and Mr. Spivak has not clearly admitted the intent of his change in wording. He just said it makes it better or clearer, but I think it makes it clearer that it excludes from the judge's consideration this limitation from the question of custody and therefore makes custody part of the fault concept, and that that is the only change.

Now, Mr. Chairman, I have to appeal to the Attorney-General or to Legislative Counsel to clarify me the difference in meaning between what it says here, this part of Section 2, and the words "this act for support and maintenance of the spouse." I'd like to have a legal interpretation because I don't think I can get one as to intent.

MR. CHAIRMAN: Mr. Tallin.

MR. TALLIN: Well, I think the effect of it is that the court would be able to examine conduct for the purposes of deciding whether to make an order under 8(1)(b), 8(1)(c), 8(1)(d), 8(1)(e), etc.; not 8(1)(f), it wouldn't really be material to costs, and 8(1)(g), conduct wouldn't really be much concern there because that's . . .

MR. CHERNIACK: Well, Mr. Chairman, Mr. Tallin has confirmed exactly what I said. Mr. Tallin has confirmed that the words . . . I don't know, he doesn't know what the reason is, that's not his job, but he has confirmed that the effect of the amendment to the amendment, the effect of Mr. Spivak's amendment is to bring conduct right back into Section 8 dealing with a number of factors which includes custody and therefore I think it's a retrogressive step, a real backward step, and I'm wondering if the Attorney-General really meant to do that. If he did, he should at least say so, Mr. Chairman. Mr. Spivak should say so . . .

MR. CHAIRMAN: Mr. Mercier first, then Mr. Spivak.

MR. MERCIER: Mr. Chairman, as I indicated earlier in reply to Mr. Cherniack, conduct has always been considered in custody cases in an attempt by the court to decide what is in the best interest of the children. I indicated last fall and this evening that it is, in my experience as a lawyer, it's a very depressing situation. The unfortunate aspect is, aside from the fact that the previous government's bill did not deal with that, and I don't criticize them for that, we're not aware of a better method or a way of giving the court jurisdiction to deal with what is, in the cases in which it occurs, the most vital and emotional subject probably in their lives. I just don't know how the court can deal with it without dealing with a conduct of the spouse. How can you decide what is in the best interest of the children without knowing what the wife's or what the husband's conduct has been? You know, it's very difficult. I'm sure the court would love to not have to deal with it. Lawyers would love to not have to deal with it. But until someone comes up with a better method of dealing with that particular situation, it would be improper for us at this stage to wipe out conduct as a consideration because it's at the present time the most important consideration of the courts.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, although Mr. Cherniack continually tries to blend everything together, the previous legislation of the former government did not have a provision that conduct would not be a factor in the determination of custody and therefore conduct would be in fact a feature of custody. The particular amendment that was originally proposed, and he highlighted it by dealing with that particular Section, has to be read with respect to Section 2(1) and 2(2) which clearly deals, Mr. Chairman, with the maintenance and support of the spouses to each other. I think that the amendment that we now have, the amendment to the amendment, will clarify it very clearly and will in fact allow the courts to determine the question of conduct with respect to custody. Now he's suggesting that that shouldn't happen, but that was not their proposal, and I think for good reason, when they were government, and I suggest that in a very real sense it would be difficult for determination of custody to be made in isolation of the conduct of the spouses because that will be one factor.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I just want to attempt to clarify the remarks I made. In looking at what we had previously, it referred to conduct of the spouses in respect to the marriage relationship. Probably at worst that was only ambiguous as it relates to conduct in the custody issue because there you are talking more about, not custody so much in the marriage relationship as between spouses, but as conduct that affects the interest of the child. So I want to qualify that remark to a certain extent.

MR. CHAIRMAN: Mr. Parasiuk and then Mr. Cherniack.

MR. PARASIUK: Mr. Chairman, I don't have the same emphasis as Mr. Cherniack on this particular issue. We are now talking about whether conduct will be used to determine the custody of the child but I still haven't received an answer to the question that I posed about six times now. I think that the reason why I'm not getting an answer is that maybe you can have a situation where conduct may be looked at in determining the custody of the child and the child is given to the mother

MR. MERCIER: In most cases.

MR. PARASIUK: And that household then, because when conduct is applied in determining the level of maintenance, is looked at somewhat differently because the courts tend to award custody of the children to the mother but look askance at the mother's conduct when awarding levels of maintenance, so that household is then left without enough money to live on. We've had person after person come forward and say that our present maintenance system takes— and you know their most graphic expression is "food out of the mouths of babies." Now I've asked the Minister whether in fact that situation doesn't exist. Will this clause that he's got here, 2(2), prevent that from happening? And he hasn't answered that question. I think it's a critical question and, you know, I think that if you have a situation where custody has been awarded, then it's imperative that that household, not just the two or three children, but that household has sufficient maintenance to meet its financial requirements. I think there are situations where that isn't the case. I think that that's a situation that surely if we're considering this legislation at this stage, we have to try and define and try and prevent because I think we would all be in agreement that once the court awards custody, that if custody is awarded to a particular spouse, then it's important that that spouse has sufficient maintenance — if that spouse requires maintenance — to ensure that that household as a whole has sufficient money to live on.

MR. CHAIRMAN: Mr. Cherniack, then Mr. Johnston.

MR. PARASIUK: . . . Mr. Chairman, can I get an answer from the Minister? I think that's a fair question that has been asked a number of times.

MR. CHERNIACK: I'll be glad to give Mr. Mercier an opportunity to respond.

MR. PARASIUK: It's been raised so often.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: And I think I've replied so often, Mr. Chairman: That I see Section 5(1) as establishing the principle that financial need is the main premise upon which an order should be made, so I don't see an order taking food out of a baby's mouth.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, all right, we know that the Minister has answered that that way. I agree with Mr. Parasiuk. He's aiming at something — I don't know if it's more basic but it's just as important, and it's different from my point — that we are being forced to debate both points at the same time' which makes it difficult but I think we're capable of doing that.

Let me get back to my point then. Both Mr. Mercier and Mr. Spivak are quoting as a precedent and an authority the fact the that previous legislation did not take care of it. So what? So what?

MR. MERCIER: I didn't criticize that. I said I didn't criticize that.

MR. CHERNIACK: Well, but both of you are saying, "Oh look, it didn't." Why do you refer to the fact that it didn't if not to support your case for not doing it now? I haven't yet looked at that last year's legislation in order to agree or not agree that it didn't do it. I know that in last year's legislation, conduct was not a factor at all except in a very remote sense as between the parties. However, if that was overlooked, I only need quote Conservatives for saying that our bills were not adequately drafted, and now we find draftsmanship here which invites a comparison with last year in terms of changes being made. So don't use as an argument: You didn't do it, so we don't have to do it.

MR. MERCIER: I never said that.

MR. CHERNIACK: Well, Mr. Mercier referred to it, and Mr. Spivak even more so.

MR. MERCIER: I didn't.

MR. CHERNIACK: Let's brush that aside as being unimportant.

MR. MERCIER: I didn't criticize it.

MR. CHERNIACK: Mr.Spivak did not agree that it was the intention to bring conduct into it a a factor of custody. He said, "Well, this really clarifies 2(1) and 2(3)," but then . . . —(Interjection)— Yes, he said, "Well how can you keep conduct out?" I find it absolutely abhorrent, Mr. Chairmar that there should be the slightest doubt that custody of the parents in the marriage relationshi should have nothing whatsoever to do — did I use the word "custody"? — I meant conduct c the marriage relationship should have absolutely nothing to do with the custody of the child. Wha is in the interest of the child is paramount, and conduct of a parent in relation to the child is absolutel an important factor. I would never want to leave out from the court the opportunity to review th conduct of the parent in relationship to the child.

MR. MERCIER: That's why I clarified my remarks.

MR. CHERNIACK: Yes, but you didn't clarify the legislation. The Attorney-General did say he didn' mean conduct of marriage relationship as between the two parties should be a factor for conduc but I say it's in here, it's in here. He clarified his remarks but he didn't clarify the legislation i here. I had already complimented him on clarifying the legislation by saying that conduct . . . Le me come back to it. Conduct in respect of the marriage relationship should not be a factor unde 8. And I complimented him, so once I've complimented him, he now spoils it — I was going t use a stronger term — spoils that — and makes me take away my compliment because now h expressly does what the Legislative Counsel interpreted correctly what I said he did, and that i to bring it in in (d) as a factor. Now I don't know whether Mr. Spivak meant it that way or no I can't tell you. I believe the Attorney-General didn't mean it that way but please don't ask me ask the Legislative Counsel and it is his job to tell us that.

Firstly, do you, the politicians, the policy-makers, the Conservatives in this group who are makin this law, do you believe that conduct in the marriage relationship should be considered in decidin custody? If you do, then ask the Legislative Counsel, but I believe you leave the law as Mr. Spiva has amended it: if you believe that conduct of the marriage relationship should affect custody. you believe that conduct as between parent and child and not as between parent and parent shoul be a factor, then change the law, change the wording. It's not too late. So determine what yo want and then go to Legislative Counsel and find out what he says you should do to get the la straight. But at least be honest with yourselves and with us to indicate what you believe in term of the conduct as it relates to custody.

And I want to tell you that you have not yet made it clear whether you believe in my interpretatio of the wording that an unconscionable paying spouse should pay more, because I say your legislatio says he should. Even if it costs him money, even it's difficult for him, I think that 2(2) says he shoul pay more. If it doesn't say that, then you are punishing the dependent spouse and not the othe That, you haven't answered. At least tell us what do you believe is so basic, Mr. Chairman, is s important to determine what shall be the factor in custody. Shall it be the conduct in the marriag relationship, or shall it be the conduct as between parent and child. And if it's the latter, I plea with you, again, say what you mean and then have the Legislative Counsel do the job for you

MR. CHAIAN: Mr. Johnston.

MR. JOHNSTON: Mr. Chairman, we have kind of mixed this section up, the conduct for maintenanc to the spouse and conduct refering to custody of the child. I would try to comment on what M Parasiuk said. In my opinion any lady or man that won the custody of the child would probabl be in the best financial position. First of all, if you can prove that you get custody of the child unde the present legislation that we're bringing forward and looking at at the resent time — and that' what we're looking to.

Now, if Mr. Cherniack wants me to say that I don't think there is any other way to decide custod of the children other than by conduct, I will say to him, you would have to tell me another wa It isn't money; I could be a millionaire but not be the best parent. I would have to pay to see tha that child was taken care of. So if you are going to talk custody of children, there is no other wa other than to look at conduct of those two parents. Now, if he can come up with another wa I'd be glad to hear it.

MR. CHERNIACK: May I ask you a question?

MR. JOHNSTON: Certainly.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I know I have been using strong words but I really, in all sincerity, want to come to a conclusion as to what's best. Mr. Johnston posed the question then to me. I can give him this example. A husband may beat his wife and may love his child very dearly and care for the child. I would say that the beating of the wife, after a separation, should not be a factor in determining the custody of the child. The love and affection and care for the child should be the factor, and that's why I distinguish between conduct as between the two parents who are now separated.

MR. JOHNSTON: What is all this talk about beating your wife after you are separated?

MR. CHERNIACK: No, I mean before.

MR. JOHNSTON: Oh, if you're saying before, any guy that goes home and beats his wife maybe shouldn't have the custody of the children, whether he loves them or not. If he doesn't love his wife enough to stop beating her, how does he love his children? Now, let's face it. If it's going to be on the basis of conduct — and I don't see any other way it is — it has to be taken into consideration. And I'd love to avoid it, like the rest of you.

Last year when I spoke on this bill, we talked maintenance and I said, fine, if you can have no-fault maintenance to the spouse, go ahead and do it. Keep the children out of it, but somebody will have to tell me how you will decide custody of those children without taking conduct into it.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, unfortunately we are dealing with two separate matters, but that's the way we are involved. I want to reiterate the concern raised by the Member for Transcona. I am wondering if we could not clarify this particular provision to deal with that concern. None of us, certainly none of us, wish conduct to play a part that would at all disturb the level of maintenance that might be paid to a family unit in which there are children as part of that unit and what Mr. Parasiuk indicated as a situation where, although the children might very well be awarded maintenance, the spouse might not receive a proper level of maintenance because of that spouse's conduct; nd though that spouse has custody of the children, we would have a situation where the children are directly hurt as a result of the spouse having custody having misbehaved sometime in the past.

So I'm just wondering, Mr. Chairman, if to resolve that problem we could not simply add a few words. And I don't pretend to be any draftsman but I do believe that it could be resolved to remove any uncertainty in this respect if we added after "and gross repudiation of the marriage relationship where the spouse does not have custody of the children" — if you want to leave in "repudiation, gross and obvious misconduct," fine, but let's not do that where there are children involved in the family unit.

So I'm trying to exclude situations where there are any children involved in that family unit, in that situation where the spouse that has been awarded custody has children. So would that be a help? That particular point would be clarified, because it seems to me that Mr. Mercier is seeking the same thing as the Member for Transcona, as I am seeking, and Mr. Johnston, and it seems to me all we have to do is to clarify that when we talk about conduct here we're not discussing conduct in relationship to the family unit that has to still bring up the children, that the behaviour in the past of the one spouse should not detrimentally affect the capacity of that spouse, which has been awarded custody to raise the children.

MR. CHAIRMAN: Mr. Johnston.

MR. JOHNSTON: On that point, Mr. Chairman, I think we're coming now to something that's very basic maybe between the two parties or the two governments. We do belive, or I believe, there has to be some fault, and I don't believe that in this day and age that you just walk out one morning because you have had a fight the night before over some stupid thing, and go in the next day and say, "Let's break it all up." There's got to be some sort of responsibility and fault when you're breaking up or separating in a marriage. So if we want to get to that basic, and if we're there, that's fine; we're there.

MR. CHAIRMAN: Mr. Cherniack wants to ask you a question.

MR. JOHNSTON: Certainly.

MR. CHERNIACK: I think Mr. Johnston may be prepared to answer the question which Mr. Mercier I think, didn't answer.

MR. JOHNSTON: I am not prepared to make any statements on behalf of the Attorney-General It's his piece of legislation and he is very capable of taking care of himself.

MR. CHERNIACK: No, no, I understand that, Mr. Chairman. There is no entrapment involved ir this. Mr. Johnston spoke about fault being a factor and I now take him back to Section 2(2)where it says that the amount payable may be affected by unconscionable conduct. The question I raisec was if the husband, who is supporting the wife, has behaved in an unconscionable manner, does Mr. Johnston feel that a court may consider correctly that he pay more than what the court considers is the need of the wife, because he has been unconscionably at fault.

MR. JOHNSTON: Mr. Chairman, I would answer this this way. Mr. Cherniack keeps talking abou an unconscionable manner. But let's finish it, "to constitute an obvious," which is glaring, it's go to be darned obvious or else don't go to court. It's gross, which has to be big, big glaring, if you want it, repudiation of the marriage act. Now, let's get the whole thing in there.

MR. CHERNIACK: Okay.

MR. JOHNSTON: Then, would you say under those circumstances that a supporting husband whc behaves in that way should have to pay more than the court feels is the need of his wife, as a form of punishment? Because that's the way I interpret this section to read.

MR. JOHNSTON: No, I don't interpret it that way.

MR. CHERNIACK: Okay.

MR. JOHNSTON: I certainly don't interpret it that way.

MR. CHAIRMAN: We have now spent one hour and a half on this one aspect. It's a non-debatable item. Mr. Spivak just moved that the question be put. It's a non-debatable item. 2(2)as amended Mr. Spivak just moved the motion. Correct, Mr. Spivak? That the question be put.

MR. SPIVAK: The Attorney-General wants to withdraw it, but it seems to me that we're just going back and forth. And as a matter of fact, I am debating the motion and I can't do that.

MR. CHAIRMAN: It's a non-debatable motion. If Mr. Spivak wishes to withdraw it, that's fine; if not, I will proceed and put the question. The question on the sub-amendment?

MR. CHERNIACK: Just a minute, Mr. Chairman. Mr. Spivak said — I don't think he said, "I wi withdraw it," but I think he put a condition on it. So let's find out. Is it withdrawn or isn't it?

MR. SPIVAK: Well, I can't debate it, Mr. Chairman.

MR. CHERNIACK: No, no, no, that's not a debate. Either it is withdrawn or it's no withdrawn.

MR. SPIVAK: Mr. Chairman, I believe that the question should be put.

MR. CHAIRMAN: It's moved?

MR. SPIVAK: Mr. Chairman, I am prepared to withdraw it if the Attorney-General has a response but it would seem to me, Mr. Chairman, and I say this very directly, that there has both been repetitio of the debate, and in addition to repetition of the debate there has been something that has bee included that has now been clarified and it would seem to me that we can go on and on and or and we can cite every kind of example and every kind of situation and we're not going to resolv it.

MR. CHAIRMAN: The question now is on Mr. Spivak's sub-amendment.

MR. SPIVAK: I will withdraw it if the Attorney-General is going to be entering the debat again.

MR. CHERNIACK: Mr. Chairman, I am, too.

MR. CHAIRMAN: The Attorney-General said he is not prepared to enter into the debate.

QUESTION put on the sub-amendment and carried.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I was about ready to end that discussion, and really I was just about giving up, but the thought that Mr. Spivak feels that we have run out of discussion seems to show that in spite of the fact that we thought we were starting to understand each other and making some progress, we were frozen out of that decision and therefore we now know that conduct as in the marriage relationship is going to be a factor in custody, which is contrary to what Mr. Mercier said he wanted.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: I don't want to intrude but I wonder if the member would . . . He indicated quite awhile ago he would like to ask Legislative Counsel his definition of marriage relationship.

MR. CHERNIACK: Are you suggesting that I ask him? I invite Mr. Mercier to ask him, but by all means I would suggest that he do it.

MR. MERCIER: I would ask then that Legislative Counsel give us his opinion as to that definition of marriage . . .

MR. CHERNIACK: I do believe that if Mr. Tallin has a contribution to make that he should make it any time he wants to, because he can help us.

MR. CHAIRMAN: Mr. Tallin.

MR. TALLIN: Well, I would suspect that in looking at the marriage relationship, the court or the judge would go somewhat beyond just what the conduct of one spouse was to the other spouse. It would be, I would think, any kind of conduct which the spouse performed which affected the feelings between the two spouses.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: That's an interesting approach, and one with which I don't quarrel. I do think that what Mr. Tallin is pointing out is giving us support for opposing 2(2)altogether, because indeed the way he is describing it, it really opens us up pretty broadly. Now we're talking in more terms. Marriage relationship is also affected by a gross repudiation of the marriage relationship.

So we now have quite a different concept and one which . . . I don't think it helps very much, Mr. Chairman, because I still think that in spite of what the Attorney-General said was his wish, we are now back to conduct generally, without a limitation, this is going to be a factor now in custody. That means conduct as between the husband and wife, because we don't even have this unconscionable aspect as it affects the custody. It's wide open. The custody question is completely wide open.

I suppose really we can debate it again under Section 8 and maybe come back to the point that Mr. Parasiuk was working on, that is, what about the suggestion — I think Mr. Pawley suggested that we limit it, that this unconscionable conduct should be used in determining a situation where the children are not in the custody of the person whose conduct is being attacked. Now, I don't know whether that shouldn't be pursued.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I would like to move — and again I don't want to force my suggestion to a vote and have it rejected. I would be happy if the Attorney-General indicated he would review this with either he or I introducing it at report stage. But I would like to add, and I move the amendment —(Interjection)— Well, I wonder if the Attorney-General would take as a suggestion of mine that he consider and review prior to Report Stage, clarification to this section to make it quite clear that where there are children involved as a dependent of a spouse who is receiving

maintenance, that that maintenance will not be affected due to conduct of any form or other, i children are involved in that family unit. Now I hope I have made myself clear. I'm not nearly sc concerned about the question of conduct where the spouses are on their own and no children are involved, then at least it is only a question of the spouses hurting themselves individually, but where there are children that are involved, children who are dependents, then this whole question of conduc causes, I believe, many members and I'm sure many members on the government side, a grea deal of concern.

So I would like to restrict this question of conduct to where there are children involved. I don' want to force that to a vote and have it rejected now if the Attorney-General indicates that he is prepared to give it serious thought.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: You don't have any suggested wording, or are you suggesting it in concept?

MR. PAWLEY: I was going to propose that the words, "where the spouse does not have custod of the children," be added to that section.

MR. MERCIER: Where? !

MR. PAWLEY: That after "relationship," the words be added: "where the spouse does not have custody of children." I am sure Legislative Counsel could improve upon that.

MR. CHAIRMAN: I would like to get an answer for Mr. Pawley.

MR. MERCIER: I'm prepared to look at that, Mr. Chairman.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: I would just like to speak to that a bit because I think that there is a fair degre of consensus on that particular point and I have been able to check with some people in term: of determining whether in fact a spouse, specifically a woman, hasn't been awarded custody o children. Even though there might have been what some people might call misconduct, but the wif has been awarded custody of children, but then, in determining maintenance, conduct has beer used against that person so that that family unit has received insufficient maintenance to live on That is a situation that exists and I think it existed in the case of West and West, which is a cas that the Attorney-General cited so he could look through his own documentation on that and I woul hope that we could make that type of progress so that at least the children aren't affected.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: I think if there is agreement, we can go on to the questions and leave this matte to be considered and we will go on to the question on the amendment.

MR. CHAIRMAN: I am under the impression Mr. Pawley is satisfied.

QUESTION put on the amended amendment, MOTION carried.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I just want to say, on this Section 2(2) as amended by the various amendment today, that we have discussed today, we have clarified the fact that there are some pretty fuzz concepts. Fault is here; punishment is here no matter what you call it, it is clearly punishment. I is an invitation to go beyond the entire question of need, what is right under the circumstance set out in 5.(1) and we are introducing an element of punishment and it is unrelated to what i in the best interests of the two people. As a matter of fact, if you read some of Mr. Mercier' comments when he introduced the bill, it is as if a couple is being told that you may not be gettin along very well but the fact is that you have an obligation. What is the obligation? To avoid bein accused successfully of being at fault in some way.

I don't believe that that's the way to keep marriages together, frankly. I don't believe that marriage is kept together by a threat, a money threat. It relates it pretty much to the kind of fin that the rich pay easily and the poor can't pay at all, related to almost any action that we hav legislated in fact. It is unwholesome; it is vindictive; it is wrong.

MR. CHAIRMAN: 2.(2)—pass.

MR. CHERNIACK: Question, Mr. Chairman.

MR. CHAIRMAN: You want it recorded?

MR. CHERNIACK: Yes, please.

MR. CHAIRMAN: On 2.(2), all those in favour of 2.(2) as amended.

A MEMBER: We already voted.

MR. CHERNIACK: You voted on the amendment; you now want to vote on the section as amended.

MR. CHAIRMAN: . . . on the sub-amendment, then the amendment, and now as it reads. 2.(2), all in favour, please indicate.

MR. SPIVAK: Mr. Chairman, just on a point of order. Subsection 2.(2) was substituted for the subsection which we have just approved, so in effect . . .

MR. CHERNIACK: Mr. Chairman, I don't know if we want to explain it to Mr. Spivak.

MR. CHAIRMAN: My understanding, to the members of the committee, was we voted on Mr. Spivak's sub-amendment, then we voted on Mr. Mercier's amendment, and now we have 2.(2) as amended to approve.

QUESTION put on 2.(2) as amended and carried.

MR. CHAIRMAN: 3—pass; Section 4—pass; 5.(1)(a), that's the first one we'll deal with — Mr. Cherniack. We'll deal with the various sections and then go back to 5.(1) and pass it.

MR. CHERNIACK: All right. I can handle it that way.

MR. CHAIRMAN: (a)—pass; (b)—pass; (c)—pass; (d)—pass; (e)—pass; (f)—pass; (g)—pass; (h)—pass; (i)—pass; (j)—pass; 5.(1) — Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I move that the proposed subsection 5.(1) of Bill 39 be amended by striking out the words "All the circumstances of the spouses, including the following," in the fourth and fifth lines thereof and substituting therefor the words, "Only the following circumstances and no other."

Having moved that, Mr. Chairman, it really was a very interesting exchange we had with Mr. Schulman and Mrs. Bowman, and I think with some others, and that was the whole question of whether or not it is interpreted that when you say, as this bill does, "A court shall consider all the circumstances of the spouses, including the following," Mr. Schulman said that's not really what it means. What it really means is only these and no other. That was his interpretation of the law. Mrs. Bowman, on behalf of the Manitoba Bar, interpreted it differently, and she said, "Not at all." I'm under the impression that the Attorney-Generally doesn't really want to have any other circumstances considered than (a) to (j) inclusive, and I don't want any other circumstances considered other than (a) to (j). I think those are the real factors. Therefore, in the light of both Schulman and Bowman, who took two sides of the question but both did agree that they believed that there should only be these circumstances considered and no others, then I think we ought to say so.

Therefore, in the amendment I have brought, we are saying so. We are saying that both Schulman and Bowman are right, but we're making it clear that these are the circumstances that should be considered and no other circumstances. That's why, it seems to me, that this should be acceptable as being a proper interpretation of what is intended.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, we made a point of bringing forth an amendments to Section 2.(2 to ensure that conduct was not to be a factor in the consideration of an order for support anc maintenance, with the exception for the gross conduct. So I'm not prepared to accept the amendmen because I think we have done away with the objection by excluding the reference to conduct.

MR. CHERNIACK: I don't know whether Mr. Spivak's calling for a question as a warning that we are going to have debate cut off pretty soon so I've got to jump in quickly unless he immediatel asks for the previous question . . .

MR. CHAIRMAN: I'll try and be fair with you.

MR. CHERNIACK: Well, no, I want you to be correct. If Mr. Spivak wants to foreclose debate he has a right to do so and I think you have to give him that right. But, you know, Mr. Mercier has said that he has removed conduct from 5.(1) and that answers the objection. My objection goes beyond that. I feel that I can't think of any other circumstance a court should look at and I don' think that the court should look at any other. I think this is descriptive of what a court should conside and I am buttressed by the fact that Schulman and Bowman, on two sides of the same question both gave an indication, as experienced lawyers, that that is all the circumstances that should be looked at. Mr. Mercier seems to think that having ruled out conduct, that that has taken care o all the other circumstances. Well, if he says that, then he should agree with my amendment, bu if he feels that there are other circumstances beyond (a) to (j) and beyond conduct, then I thinl he owes it to us to tell us and to justify his legislation because in the end, it is his legislation an that of the majority of the Legislature. I really would ask him to clarify what other circumstance he thinks ought to be considered, or admit, as Schulman and Bowman said, that there are no othe circumstances that should be considered.

MR. MERCIER: Question, please.

MR. CHERNIACK: Mr. Chairman, maybe Mr. Mercier has no other comment to make, some othe member of the committee . . .

MR. CHAIRMAN: Seeing none, Question has been called for.

MR. CHERNIACK: Mr. Chairman, then it is clear that the majority is intending to support this 5.(1 keep it in, in spite of the fact that Mrs. Bowman said on behalf of the Manitoba Bar, this open it up wide, if all circumstances can be brought in — now, I agree, conduct is not a factor — bu anything else. Mrs. Bowman said everything else can be brought in, and she doesn't think it shoulc and Mr. Schulman said, nothing else can be brought in, and I don't think they should. Now w are in the position where the Attorney-General is ignoring both pieces of advice, Schulman an Bowman, and is leaving in what the Manitoba Bar has indicated in its brief opens up the questio widely. And he won't even tell us whether he believes it should or shouldn't and I think that tha is an affront to the legislative process.

MR. SPIVAK: Mr. Chairman, I move the Question be put.

MR. CHAIRMAN: Mr. Spivak moves that the Question be put on the amendment.

MR. CHERNIACK: I thought Mr. Pawley . . .

MR. CHAIRMAN: Well, the Question was moved.

MR. CHERNIACK: Mr. Chairman, do you mean the Question can be put before you . . . the othe speaker.

MR. SPIVAK: To debate the point, I'll indicate that he has repeated himself three times, M Chairman. He is trying to stir up his own people . . .

MR. CHAIRMAN: Order. The question is not debatable. We are now going to conduct the vot on Mr. Cherniack's motion. On a point of order, Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I don't know if you saw it, but I saw Mr. Pawley signalling fc your attention.

MR. CHAIRMAN: No, I'm afraid . . .

MR. CHERNIACK: Well, then, are you looking at Mr. Spivak for your motion? I mean, is he the only one you saw?

MR. CHAIRMAN: He is the only one I heard.

MR. CHERNIACK: Heard?

MR. CHAIRMAN: And saw. I'm afraid you were talking so my vision was in your line of direction.

The Question has been asked for. The vote is on Mr. Cherniack's amendment.

QUESTION put on the amendment, and lost.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I hope you'll see Mr. Pawley next time he signals, just because you're looking at me. But let me point out that Mr. Spivak is using a parliamentary device that doesn't do him one bit of good, because there's nothing to prevent our continuing to debate this question. I am still saying that no one has had the courtesy to this Legislature to clarify whether they believe that they want other circumstances to be made available, like as Mrs. Bowman said they would be, or whether they want to do as Mr. Schulman indicated would be the law, and limit it to these. And they haven't said it. All Mr. Mercier has said is, "We have now taken conduct away," which implies to me that if they hadn't taken conduct away, then Mrs. Bowman's interpretation would be right, and that could have been considered. Which means now that if Mrs. Bowman is right, this is wide open, and she said it was wrong, on behalf of the Manitoba Bar, and Schulman said it was wrong — the legislation that you have before you. Schulman's only explanation was that it's wrong to consider other circumstances, but his interpretation of the law is, it wouldn't be.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I just hoped that we could get some policy indication from Mr. Mercier so we would know better how we treat this. If it is intended that in fact other factors besides those that are listed be included in consideration, then we know, but if it is intended that only these factors be considered, then it would seem to me to be the height of reasonableness that we would guarantee to ourselves that the opinions of the eminent legal counsel that has appeared before us would be weighed, and that we would restrict consideration to these factors. I would like to see the restriction. I'm uneasy because of the submissions given to us by members of the legal fraternity. It seems to me that it ought to be easy to remedy that concern by simply adding appropriate words after following, indicating "and no other," so there can't be any question. I think Mr. Mercier does wish to restrict the considerations to these ten factors. Then, let's remove any doubt whatsoever on that if that is the intention, because if you have two legal counsel appearing before you and they indicate that it does open the floodgates, eminent legal counsel, and we accepted their views on so many matters, then surely it is not unreasonable to wish to plug the hole here as well.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, there was nothing in the brief of the Manitoba Bar Association with respect to this provision opening up the floodgates that I can find, or that I recollect. There was a concern expressed that perhaps conduct might be considered in determining whether or not an order can be made, and that was one of the reasons why we have made the amendment that we have made in Section 2(2). I believe that this section is really referring to various financial circumstances. I don't know whether (a) to (j) covers every possible financial circumstance that could and should be considered by a court, and I think when you look at it you see that every one is a financial circumstance. I don't know what other factors Mr. Pawley or Mr. Cherniack are concerned about that might be considered, but we have ruled out the basic objection of conduct, and I believe that these cover financial circumstances. And because, Mr. Chairman, I'm not aware whether, in outling (a) to (j), all of the possible financial circumstances have been covered, for that reason I would not approve the amendment.

MR. CHAIRMAN: Can I interrupt the proceedings for a minute and ask the Committee to take a very brief recess while we change the tape?

mr. Spivak and Mr. Johnston and Mr. Parasiuk were trying to get my attention. Mr. Johnston.

MR. JOHNSTON: Mr. Chairman, I was just starting to say to Mr. Pawley, I didn't know that the tapes were back on. But I would like to say that Mr. Schulman and Mrs. Bowman are in the minority. Most of the delegates that have come before this Committee this year and last year, and for three-and-a-half years that I've been on it, have been saying that there are so many things that constitute a marriage breakdown. There are so many things that have to be taken into consideration How could anybody know them all? And that's what this says. We take in all circumstances, plus these. Now, if Mr. Cherniack thinks that he thinks those are the right ones, that's what he thinks How does he know they're all the right ones, or how does Mrs. Bowman or Mr. Schulman? It says "all circumstances," and that's what most of the delegates have been pressing when they come before us talking about circumstances of marriage breakdown, nobody knows them all.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Well, before I start my questioning, because I think maybe it'll hinge on whether in fact the Minister has the same interpretation of this as Mr. Johnston. My interpretation of what the Minister was saying was exactly the opposite, that he and Mr. Schulman were basically in agreement, that the circumstances that were going to be considered were these ten; they were the guideline ones. That they weren't going to . . .

MR. CHAIRMAN: We've actually voted on those, you know.

MR. PARASIUK: Well . . .

MR. CHAIRMAN: We haven't voted on 5(1) as a whole, though.

MR. PARASIUK: Yes, but I think it's possible to have (k)— it's possible to have (k), surely. And (k) might be, "conduct should not be considered." That could be one that could be put in there.

MR. MERCIER: That's already done.

MR. PARASIUK: Well, the Minister says that that's already in, but I read 2(2) —(Interjection)— Pardon? I read 2(2), and 2(2) is in there, and there was a difference. 2(2) really hasn't changed with respect to that. It says, " exists with (sic) regard to the conduct of either spouse." But a court may, in determining the amount, look at conduct, but not in issuing the court order. But yet, when we had other counsel here before — other lawyers here before us — they all indicated there was a difference, a substantial difference between them, as to whether in fact conduct could or couldn't be included by the court under 5(1). The Minister has said that he wants it excluded, he assumes it's excluded; we would like to make that assumption explicit. And if the Minister assumes that then I would think that he wouldn't have any great objections to our making that exclusion explicit It might be redundant to a degree — I don't think it is if that's in fact what the Minister was saying If the Minister is saying that really this is just the start — if it's only these 10, and what Mr. Johnston is saying is true, then we could have a whole set of other ones as well. And then I think we have to clarify that, and I'm hoping that the Minister would indicate whether in fact he sort of agrees with the position put forward by Mr. Johnston, or the Member for Sturgeon Creek, or whether indeed I am correct in believing that he wants conduct excluded from consideration under 5(1). I believe he said that in the House.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, similarly Mr. Mercier said that he doesn't see anything here other than financial, and I believe that's the way he wanted it to be, and I think that's correct because now we're talking about the separation that has taken place. We've agreed it is no longer a matter of interest, even, as to who was at fault, because generally I think we have agreement that you can't determine fault in a marriage breakdown. So the marriage has broken down, there's an order to be made, the order is under Section 8 — sets out all kinds of parts that the order shall contain — but I think Mr. Mercier has said that — now I think he said that and I'm calling on him to clarify it — I think he said that he only sees the financial circumstances as being a factor, and he said "Well, how do we know that these 10 describe all the financial circumstances?" So, I have a simple question. I do believe that the amendment to 2(2) has taken conduct out of 5, but I then com

to him and I say, why not then say that the court shall consider all the financial circumstances of the spouses, including the following? It won't make me entirely happy, but at least it makes it clear that what Mr. Mercier said is what the law will say. Now, I don't know whether that's really what he intended; I think that's what he said.

MR. SPIVAK: Mr. Chairman, I move the question be put.

MR. CHERNIACK: Well, Mr. Chairman, I have an amendment to make. Now, are you going to let Mr. Spivak run this closure operation or not? Mr. Chairman, let's get this clear. I asked Mr. Mercier a question. He did not . . .

MR. SPIVAK: Mr. Chairman, on a point of order.

MR. CHAIRMAN: Mr. Spivak on a point of order.

MR. SPIVAK: Mr. Mercier can be asked all the questions in the world. There's been a repetition of the same arguments over and over again. He's already stated the government's position, and it's unnecessary for him to simply answer every question that's put by the members because they are in one way or the other basically stating and repeating the same statements that have been made before. So Mr. Chairman, if in fact Mr. Cherniack has an amendment, that's fine; let him move the amendment, then we'll deal with it. But without any notice or declaration of that, it would seem to me that there's just a continual repetition of the same arguments over and over again. The position of the government has been clarified by the Attorney-General, and there's no need for a repetition by him of the answer.

MR. CHERNIACK: On the point of order, Mr. Chairman, you notice Mr. Spivak has just been debating his motion, which he's not clearly put, but he's been debating the motion of closure. I am speaking on the point of order. Mr. Chairman, if Mr. Mercier does not want to respond to my question, then of course Mr. Spivak is right, nobody can force him to, but I say to you that I was looking at Mr. Mercier and he was going to respond. Now, maybe I'm wrong. I think he was going to respond, and I think he has to respond to be as reasonable as I think he's been up to now, because he has been responding. And I'm saying if Mr. Spivak wants to foreclose Mr. Mercier the opportunity to respond, he will do as he's already done, and you will put his question, but —(Interjection)— I'm still speaking on the point of order. I asked him, Mr. Parasiuk asked Mr. Mercier, does he believe that should only be financial, and I said to him, "Would you consider the word 'financial?'". And I think he was going to answer, and Mr. Spivak jumped in. So, I will move . . .

MR. CHAIRMAN: Just a minute. The Chair recognizes Mr. Mercier first, and then Mr. Cherniack for a motion, and then we'll accept Mr. Spivak's motion.

Mr. Mercier seems to indicate that he'd like to respond. Mr. Mercier.

MR. MERCIER: Mr. Chairman, in Section 5(1), is dealing with what is reasonable under Sections 2, 3 and 4. Section 2 deals with the responsibility for support and maintenance, Section 3 deals with personal expenses, and Section 4 deals with financial independence, all of which are financial maintenance matters. I therefore consider that under Section 5(1) where it sets out (a) to (j), which are all financial overtones, that the reference to all circumstances of the spouses can really include no other but financial circumstances, and that the amendment is not necessary, and I see no need for it.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I will make the amendment, and let me point out that when you are practising law you have to interpret law as you read it and how you think a court will interpret it. When you're making law you can say what you want and not worry about how a court is likely to interpret it, but rather tell the court what you want interpreted. Mr. Mercier has now made it clear to me that he believes that only financial circumstances should be considered. If I am clear that that's what he means, I think the court should have the benefit of his opinion, and therefore I would move that we insert in the fourth line of 5(1) preceding the word "circumstances," the word "financial," and thus do exactly what Mr. Mercier indicated he wants to do.

Now, if the Conservative caucus suddenly freezes on this because it's 12:30 at night and they want to get it over with, okay, let Mr. Spivak foreclose debate, let him bring in closure and we'll have to vote on it. But I think it's very foolish, because we are now dealing with really very basic,

fundamental issues, and I think we make a lot more progress sitting around a table debating in a friendly way, as much as is possible since we have different points of view, than to have Mr Spivak crack the whip, but if he wants to crack the whip, you and I know he has the right so t do.

MR. SPIVAK: Question.

MR. CHAIRMAN: Mr. Spivak has moved that the question be put. All those in favour of Mr Cherniack's amendment, please indicate.

QUESTION put on the amendment and defeated.

MR. CHAIRMAN:
Question on 5(1)—pass; 5(2)—pass; 6. 6(a)—pass; 6(b)— pass; 6(c)—pass; 6—pass — Mr Cherniack on 6.

MR. CHERNIACK: I don't have the wording that I would like to introduce, but I would like t introduce the principle and have it disposed of in some way, that I want to give this committe an opportunity to reinstitute the basic right of a person to find out the earnings of his or her spous from his employer or bookkeeper. We've asked questions; we've found a nuer of employe representatives appear before us and none of them found any objection to getting that informatio from a spouse who won't give it; and I say that tuat is something that is basic, and therefore, possibl Mr. Chairman, I could move that Legislative Counsel be instructed to draft a . . .

MR. CHAIRMAN: Mr. Spivak on a point of order.

MR. SPIVAK: I have no objection to Mr. Cherniack moving the amendment, certainly he is entitle to do that. If he hasn't got the wording of it now, then I would suggest that he deal with the Legislativ Counsel and get the wording. The members have prepared amendments on both the governmer side and the opposition side, dealing with particular sections, and if we're not prepared to dea with this because he is going to move the amendment, then I think that we can leave this and com back to it, but I don't think that instructions for the Legislative Counsel to move the amendmer and then to vote on whether those instructions should or should not be given, is really the basi way in which we should deal with it.

My suggestion is that Mr. Cherniack deal with Legislative Counsel, come up with whatever wordin he proposes, and then introduce that and we can deal with that, in which case I would sugges that this be left, and let us move on.

MR. CHAIRMAN: Mr. Pawley, did you wish to speak on Mr. Spivak's point of order?

MR. CHERNIACK: I did, Mr. Chairman.

MR. CHAIRMAN: Well, he was indicating, and I just wondered.

MR. PAWLEY: Well, I really feel that Mr. Spivak's suggestion is going to bog us down even more that we should issue instructions that are clear, and surely we're voting on the substance of thos instructions. The intention would be clearly expressed, and to have to await exact drafting of th wording of it . . .

MR. CHAIRMAN: It wouldn't take too long to do it.

MR. CHERNIACK: I know it's right here. If Mr. Spivak would relax a bit and take his time it wi be all right with me.

MR. PAWLEY: Mr. Chairman, I think it is going to cause a great deal of unnecessary delay. I woul just like to also repeat that the information that we received from those submitting briefs, is tha this would not be a problem. uMR. CHAIRMAN: You are stretching the point of order. The poir of order was how it could it be . . .

MR. PAWLEY: Well then, I'll speak to the amendment later. I just do not feel that Mr. Spivak' suggestion is one that's going to speed up the processes of this committee.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: It may not speed it up, but if Mr. Cherniack has, in fact, an amendment to introduce and he has the wording in front of him, he should introduce it and then we will deal with it. I'm not really aware that we've operated in the previous years on the basis that any suggestion by individuals can be brought forward on the basis of principle, and then on that basis there could be a determination by the Legislative Counsel of the wording, and that could be introduced.

There have been occasions where there has been agreement in dealing with a section or an amendment where that has happened. But that has not been the general practice, and all I'm suggesting to Mr. Cherniack and the others, who may want to follow that example, is that if in fact there is a specific amendment to be introduced, to introduce it and then we deal with it. If the legislative wording is not completed, and he is not ready, he can sit down with the Legislative Counsel and work it out, and then we can at least proceed with committee. If Mr. Cherniack has the wording now, that is fine, he should have introduced that in the first place.

MR. CHAIRMAN: Mr. Cherniack.3

MR. CHERNIACK: I'm sorry Mr. Spivak has to waste so much of our time, Mr. Chairman. I almost moved the previous question, except I realized that's what he wants to do.

Mr. Chairman, I can give the wording. I thought that possibly Legislative Counsel could have improved on it, but I'll give the wording, because I expect Mr. Spivak to call the previous question and vote it down immediately without consideration, but I'll move it.

I move that after Section 6, that we change Section 6 to Section 6(1), that we add thereafter Section 6(2) as follows:

"Where a spouse refuses or neglects to provide a statement requested under Clause 1(b), the employer, partner or principle, the spouse, or the accountant or bookkeeper of any of the foregoing, or of the spouse, as the case may be, shall provide the statement upon the request of the other spouse."

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I would like to speak to that amendment. This is one that I do think is imminently reasonably. We heard no objection from any that presented briefs to us, about the need to obtain information from one spouse to another spouse, without having to consume court processes in order to undertake same. Mr. Chairman, I see no reason that we should add to delay, we should add to costs, we should add to frustration, by requiring a Court Order. I can see what will be the present situation, is that when a spouse seeks to obtain information from the employer of the other spouse, that under the existing legislation the employer will automatically say, "Get a court order and I'll give you that information, upon production of the Court Order." So Mr. Chairman, what we really will be doing, will be adding a great deal of unnecessary burden on to courts; we'll be adding to the delay of one party seeking information from another; frustration, the agitation that will be created by forcing people to enter through the portholes of court; and it seems to me, Mr. Chairman, that it would make much more sense to provide for the wording of obtaining this information in a way that the earlier legislation had provided for.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: Well, Mr. Chairman, I only want to signify my support for this particular amendment. I would be interested in hearing the opinion of the Attorney-General should he find the amendment, which I believe is very straightforward, very simply worded and certainly does not require any sober second opinion from Legislative Counsel or caucus. I think it's rather straightforward. I would be very interested in hearing his remarks and observations pertaining to the amendment, and particularly should he not be willing or able to accept this.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, by enacting the clause that we have in Section 6, and providing further on in 8.(1)(g), that an order of the court can be made in the event — is obviously in the event that the spouses don't provide the information, we are providing that important remedy without involving so-called innocent third parties in the process.

I appreciate the intent of this section. I think that with that section in there, there is obviously no defence to the particular section; the section having brought to the attention of the offending spouse, it is difficult to conceive that the section would not be complied with. I think that we should give this clause as it stands an opportunity to be in operation for some time, and see what objections

there are to this provision. I think it is a clear statement of the law that parties have to follow and with the provision for the Court Order, it is very difficult for me to understand why some one who has it brought to its attention wouldn't comply with it.

MR. CORRIN: My main concern, having heard the Attorney-General's remarks, my main concer is for the spouse who finds him or herself in a financially underprivileged situation. Such a part may not have sufficient funds to hire a lawyer and go off to the court for an order, under Sectio 7, subsection (1). I can't see in view of what the Attorney-General has said, I can't see the problem I don't perceive the employer as being an innocent third party in the sense that its interest woul be impaired by the amendment suggested by my friend for St. Johns. I can't see an employer bein put to no expense by the suggested amendment. I can't see the employer taking the position tha such a demand, if received, would be onerus, or difficult to comply with. I think that most reasonabl employers would simply photocopy whatever records they have on hand, and I presume that a employers do have fairly substantial records, provide them to the wife or the husband, dependin on the nature of the applicant, and that would be the end of the matter. I don't see why this shoul be a difficult matter, why it should necessitate a court action being introduced, why a person shoul have to hire a lawyer, why the court's time again should be wasted by these sorts of application For the life of me, I don't know what the courts are going to do with this. They are going to spen a good deal of their working time trying to deal with this legislation. If the purpose of this legislatio was to minimize litigation to streamline the processes, then I would suggest that that purpose woul be affected and enhanced by deleting all these possible contentious court applications. I just don think it holds water. You have to remember, I think it's particularly important to remember tha the spouse who would most likely be approaching the courts in these circumstances, under 7(1 would be the spouse who has been denied an ownership interest in family assets, somebody wh has not received a fair share of the family savings — or for that matter, under the current law has not been made aware of course of the nature of the — earning party's paycheck so why furthe handicap that person, why make life difficult for that dependent person. It makes no sense. Let' simplify the whole process and go along with what Mr. Cherniack has suggested. Then we'll fin out, we'll assess that, instead of assessing the court, the nus, er of court application and the disposition will assess the track record from the other point of view, whether or not employers hav indeed, found it onerus to give out that information. If briefs and petitions are received by th Legislature to that effect, then we'll reconsider, and maybe we will put the burden on the court But in the absence of that, I think that we can probably get by quite handily with the other.

QUESTION put on the amendment and defeated.

MR. CHAIRMAN: 6—pass; 7(1)—pass; 7(2)—pass; 7(3)(a)—pass; 7(3)(b) — Mr. Cherniack.

MR. CHERNIACK: 7(3)(b) provides that the courts shall look back on the negotiations that too place at the time the agreement was entered into and look into the circumstances of the spouse at the date of the agreement. Now, I don't know if that's deliberate or not. The old Act spoke abou the date of the application and I think that makes a lot more sense, because it may well be tha circumstances, health or otherwise, may have altered substantially, and in the light of th circumstances of both parties as at the date of the application have changed radically so as t justify a change in the amount.

Let's bear in mind that this is a couple that are not divorced. They are separated. They hav not taken the final step. There is no divorce. There is still a marriage relationship. They are marrie and they have entered into an agreement where one of them may have been ill-advised. One o them may have somehow not taken separate counsel, or have changed, and therefore I don't kno whether it was intended this way to limit it, because I see the next proposal which deals only wi protecting the public coffers and not the individual. And I'd like to think that it wasn't really intende that the court should go back to the agreement itself and make a change because of circumstanc which were inadequate as of the date of the agreement. I'd like to think that they mean the da of the application.

So I'd like to propose an amendment that we substitute the word "application" for the wo "agreement" in the third line of 7(3)(b).

MR. CHAIRMAN: Question on the amendment? Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, if I may, rather than looking at that, if you look at old 7(2), th is the present Act which is being set aside, it says, "have changed significantly since the date the agreement." I'm just afraid the word "agreement" was put in here with a rewording but th intent has been changed. Now, I don't know if it was deliberate, but the old Act said "chang

since the date of the agreement" and this one says "as of the date of the agreement." I don't believe that what you intended is what you said.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I believe the 7(3)(b) does accurately refer to the date of the agreement and that they're in fact referring to a separation agreement where either all of the financial circumstances were not known to each party, or the provision for maintenance was inadequate in relation to the amount of financial circumstances. The appropriate time for ascertaining that was the date of the agreement.

MR. CHERNIACK: Well, you know, this opens up to the court even the obligation to go back behind the agreement and look at whether or not they struck a good bargain, and look at whether or not they each knew enough about it, and look whether or not they obtained independent legal advice, which isn't required of them. And it really invites the court to look into that agreement that might be five years old, and see whether or not that agreement was adequately done to take care of those circumstances.

Well, you know, I don't see the point of that because times change, and if that's what you want, well enough, but really isn't that not contrary to what is the intent of making sure that the changed circumstances should indicate to the court need.

Suppose you find a person who was able to work, who was able to support herself, who had a good job and therefore under the circumstances — there was a split in property and there was a maintenance agreement provided that was nominal — and four or five years later this person becomes completely incapicated due to illness or accident, or whatever. Then, according to 3(a) or (b), there is no opportunity to go back to it and (c) says they have to be a public charge. Well, if they have to be a public charge, Mr. Chairman, it's no longer a matter of interest for the dependent spouse to make the application at all. It might be up to a social welfare worker who is trying to protect the taxpayer's dollar to do that, but what advantage is there to that? Is it really that the government is going to make that person be bound by terms of an agreement — as I say, they may not have been adequately done — and be bound by those terms, even though the circumstances have changed significantly.

I am really surprised. I thought that I had found a typographical error. But if I haven't then that's the position that's . . . I have made my amendment.

MR. CHAIRMAN: Question on Mr. Cherniack's amendment. Could you repeat the amendment, Mr. Cherniack?

MR. CHERNIACK: It's to replace the word "agreement" in the third line with the word "application", which of course updates the whole thing.

MR. SPIVAK: Question.

QUESTION put on the amendment and lost.

MR. CHAIRMAN: All right, we do have an amendment to (b). The amendment has been moved as distributed. 7(b) as amended—pass; 7(c)—pass; 7—pass — Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, am I correct in saying that what they're doing here is saying that only a destitute spouse can get more money, and if more money, can we say that it is intended that the destitute spouse should only receive as much as public assistance will provide?

Mr. Chairman, here we have the possibility of a couple with the wealthy husband being instructed to pay $1,000 a month to his spouse — not instructed but by agreement paying $1,000 a month — and then she becomes in need in some way and he doesn't pay that. Now, I guess that's not to — $100 a month — and she now is in need and you're saying, "Well, if she becomes a public charge, we will give her more money, but if she's not then whatever circumstances we won't do it." What is the purpose of this if it isn't to protect the public purse? Is that the purpose?

Mr. Chairman, are we in the position where somebody moves an amendment and doesn't even support it or justify it?

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, this amendment was recommended in the Family Law Review Committee report and has been recommended by the Minister of Health and Social Development.

It was previously in the Wives and Children's Maintenance Act. We are dealing, I suppose, Mr Chairman, with agreements entered into between spouses in all three of these circumstances. This is a step following 7(3)(b), where if you can show that the support maintenance was inadequate the spouse can be opened up.

In a similar case, it has been recommended that under (c), where a spouse has become a public charge, the agreement should be opened up. I suppose, to put it bluntly, the rationale is protection of the public purse.

MR. CHERNIACK: You see how reactionary this has become. What they're saying is you can't open up that agreement, regardless of changed circumstances, you can only go back to the old agreement in relation to the circumstances as at the date of the agreement. You can only look at that if it were unfairly done. But any change in circumstances doesn't count for one bit. A person can become completely incapacitated and that's not a factor. What is a factor is protection of the public purse and now we know from the Minister of Health and Social Development, that progressive measure is brought in here to protect the public purse, without regard for the individual.

MR. SPIVAK: Question.

MR. CHAIRMAN: 7(c)—pass — Mr. Corrin.

MR. CORRIN: I'm just playing devil's advocate, Mr. Chairman. I'd like to throw some question to the Attorney-General. I'd be interested in some responses. What about a situation where a spouse in receipt of maintenance by virtue of a written separation agreement sets out on a determined course of dissipation, and having dissipated his or her moneys, his or her support maintenance finds him or herself in a position where he or she becomes a public charge, or, as it says here "a person in need of public assistance." I don't know what that means, Mr. Chairman. I suppose I could understand it if the amendment said "or a person qualifying for public assistance." I can quite differentiate. I can't understand why they would say "a person in need of public assistance. I mean, I suppose, a lot of people may feel that they are in need, but of course they may not qualify. So I think that we should probably be a bit more precise in our language if we are going to accept that amendment, and I would ask the Attorney-General if he could explain to me, well, first of all whether he considers the present language "in need of" as being sufficient, and whether he thinks the words "qualifying for" might be a better drafting term.

In any event, dealing with our dissipating spouse, do we really think in those circumstances that it's fair to bring the non-offending spouse back into court, a person who had made a good deal, a fair deal, a perfectly just deal, confronted with a ne'er-do-well spouse who is dissipating his or her maintenance? Do we really think that it's conscionable that we should bring that individual back into the judicial forum?

As I said, I'm playing devil's advocate, but I suppose hypothetically that's quite possible, and I'm wondering whether we should open the door. I can certainly see the need for 7(3)(b) frankly. I am actually quite pleased that there is going to be an opportunity afforded to spouses to get a second kick at the cat. Over the years a lot of people have been misled terribly in terms of execution of separation agreements, and it is high time that something like that was afforded individuals who were so aggrieved. But I don't quite understand 7(3)(c). I could see it being used deceitfully; I could see it being used in a manner that was inconsistent with the ends of true justice. I would wonder what the Attorney-General thinks in that respect.

MR. MERCIER: The answer to the question is no, I don't think it would be fair.

MR. CORRIN: You don't think it would be fair to have the clause?

MR. MERCIER: To bring the paying spouse back, under those circumstances you enumerated

MR. CORRIN: But you would still think that the matter should be capable of being removed from the court.

MR. CHAIRMAN: 7(c)—pass; 7—pass.

MR. CORRIN: Mr. Chairman, I was trying to attract your attention. I was going to, before we passed 7(3)(c), I was going to move an amendment and simply delete the words "in need of" where they appear in the fifth line.

MR. CHAIRMAN: Of 7(c)?

MR. CORRIN: Yes, and insert the words instead thereof, "qualifying for." As I said earlier, I don't think that the words "in need of" provide any assistance to a person trying to interpret the subsection and if it deemed necessary by committee, I would suggest that it be passed on to the Assembly in a form that would be more pertinent and more expressive of the wish of comimittee.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: I would think, Mr. Chairman, that there is no real difference in the meaning of the words, "in need of" means to qualify for under these circumstances.

MR. CORRIN: I take exception to that. I don't think that the words or the terms are synonymous. I think a person in need of public assistance may not qualify for public assistance in the sense that a person may deem him or herself needy, but not be capable of being qualified or ruled eligible for it and that might cause problems as far as people who can come to the court. There will be arguments about that.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: To further amplify, Mr. Chairman, I understand that the words "in need of" are the words used in The Social Assistance Act in order to qualify for public assistance.

MR. CORRIN: Regarding that section, I think if I wanted to overturn a ruling or I was representing a client who wanted to make his or her spouse's life a bit miserable by opening up old wounds and coming back to court, I think that we would attempt to use the broad interpretation of those words and I think that is fair game and I don't know what the court would do but I think that one way of closing off any access to persons who want to play that sort of tactical game, and I assure you that there are a lot of lawyers who will play that game, they are paid to do it and are trained to do it, is to make sure that wording is expressive of the intent.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Question, Mr. Chairman.

MR. CHAIRMAN: Question on Mr. Corrin's amendment.

QUESTION put on amendment and defeated.

MR. CHAIRMAN: 7(c)—pass; 7—pass; 8(1)(a)—pass; 8(1)(b)—pass; 8(1)(c)—pass — there is an amendment.
Mr. Mercier.

MR. MERCIER: Mr. Chairman, the purpose of the amendment is to simply include in the possible orders that the judge may make, the additional order outlined in (c)(1) that one spouse will not molest, annoy, or harass the other spouse or any child in the custody of the other spouse. I think it is an additional order that is sometimes required in various circumstances and people who have been involved in family law litigation, I think, will attest to its necessity and I hope that it would meet with the committee's approval.

MR. CHAIRMAN: 8(1)(c)—pass as amanded — Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, I agree with the amendment. I am just wondering if the Attorney-General could explain what sanctions or penalties would be available by the court for those who trespass against this particular part of the law.

MR. MERCIER: The penalties section is contained in Section 26, to which we have a small amendment, but basically it provides for a fine of not more than $500.00 or to imprisonment for a term not exceeding 30 days, or to both, such a fine and such imprisonment.

MR. AXWORTHY: It would be applicable to this clause, then?

MR. MERCIER: It would be applicable to this clause.

MR. AXWORTHY: Thank you.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: I think I should reserve my remarks until we are dealing with the clause as a whole rather than the subsections, Mr. Chairman.

MR. CHAIRMAN: 8(c) as amended—pass; 8(1)(d)—pass; 8(1)(e)—pass; 8(1)(f)—pass; 8(1)(g)—pass — Mr. Cherniack on 8(1)(g).

MR. CHERNIACK: On 8(1)(g).

MR. CHAIRMAN: On a point of order, Mr. Spivak.

MR. SPIVAK: Mr. Chairman, just on a point of order, I don't believe that you passed 8(c)(1) and I think just for the record that that should be passed and then we can go on to (g).

MR. CHAIRMAN: Sorry. 8(c)(1)—pass; 8(1)(g) — Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I don't know why they have left out the accountant or bookkeeper of the spouse for whom the information is sought. Usually a self-employed person should have the access by the court. Now, what we are doing here is saying they can't get that direct, they have to go to the court. Well, the court should have the opportunity to go to the accountant or bookkeeper I don't know why they were left out and I would suggest that we add them after the word "employer," that one spouse or the employer, accountant, bookkeeper, partner or principal of one spouse. . .

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, in the event that the spouse does not comply with the order, he is subject to the penalties section that we have referred to, Section 26.

MR. CHERNIACK: . . . no, I don't want to call it that, Mr. Chairman. I just want to say that i the employer, partner or principal, are you going to send them to jail, why not the bookkeeper? It seems to me so simple to say to the bookkeeper for the spouse, "Come on in, bring your records give us the story," just like you could do for the employer, partner or principal.

MR. CHAIRMAN: To Mr. Cherniack, are you going to leave it as a question to Mr. Mercier, o do you wish to make a motion?

MR. CHERNIACK: Well, I haven't got an answer. I don't know if I'm getting one.

MR. MERCIER: Mr. Chairman, the spouse — I suppose what Mr. Cherniack is talking about i a sole proprietorship — he has control over his accountants and bookkeepers and if an order i made, he will have to comply with that order and direct them to provide the information, otherwis he is subject to the penalty provisions under the Act.

MR. CHERNIACK: I understand that. I just don't see that it is advantageous to threaten somebod who is going to jail or paying a fine when you can just get hold of his books through his accountan and examine them. However, I guess I'm not going to push it. It's that important to me, if th government is satisfied not to have that opportunity to the court.

MR. CHAIAN: 8(1)(g)—pass; 8.1 . . .

MR. MERCIER: Mr. Chairman, there is another amendment to add Clause (h). This arises out o the representations the other night. I'm not sure which delegation it was now.

MR. CHERNIACK: If not the Chamber, I don't know who.

MR. MERCIER: The delegation who opposed the legislation as going too far. That any informatio accounting, etc., shall be treated as confidential, in the discretion in the judge. It appeared to hav met with approval by all members of the committee that evening, as I ascertain it. Perhaps Mr.Chairman, we might learn from members of the committee whether it was received with unanimou

approval.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I don't like to feel that the Chamber of Commerce was completely wrong but, Mr. Chairman, I don't what they said that was of any value. Here they are so concerned with protecting some partner, apparently, as to be prepared to jeopardize the position of the applicant spouse. I don't know if Mr. Mercier was joking or not when he talked about it appeared to capture the attention, but, Mr. Chairman, I remember rather vividly how shocked I was, and I think I expressed it, that Mr. Shead was saying that the lawyer shall not be permitted to consult with his client —(Interjection)— Yes, he said that the court shall determine whether or not a lawyer shall tell his client what he learned and receive instructions.

MR. MERCIER: But that's not what we said.

MR. CHERNIACK: Well, that's what Mr. Shead said, and Mr. Mercier said it seems to him there was unanimous consent to that. —(Interjection)— But that's what Mr. Shead said on behalf of the Chamber and that, to me, was so self-protective as to be rather shocking, that the court would deny a lawyer that opportunity to learn that. Now we are saying that we are not even going to make it part of the public record.

I understand, and I'm looking for it, is there not a section somewhere that the court may, under certain circumstances, have a hearing in camera?

MR. MERCIER: Yes.

MR. CHERNIACK: It is there. So now we need further protection. Now we are saying it shall be obliterated from the records of the court, that what took place apparently didn't take place. " any information, accountings or documents ordered to be provided under (g), and any examination or cross-examination thereof, shall not form part of the public record of the court." I would like to know what other procedures in court have this kind of secrecy attached to it other than the Acts that concern the safety of the State, or whatever the correct term is.

MR. CHAIRMAN: Mr. Johnston.

MR. JOHNSTON: Mr. Chairman, I would just like to know why, because two people have a separation, that the third person should have his business spread all over the floor too. I think there has to be some consideration for that third person.

MR. CHERNIACK: Mr. Chairman, I would have to tell Mr. Johnston that there are all sorts of circumstances that appear in court, that are reviewed in court, that involve third people.

MR. JOHNSTON: . . . another rule in this case?

MR. CHERNIACK: No, I think that we have to maintain —(Interjection)— Mr. Chairman, I think that the interests of justice have been recognized as being something where you have an open hearing and where the information has to be discussed in open court where, need I say, justice is seen to be done, not only intended to be done.

MR. JOHNSTON: The interests of justice applies to the innocent party as well.

MR. CHERNIACK: Mr. Johnston should now make a study of legislation that we have before us which provides for open hearings, and in this particular case, there is a provision — I haven't found it yet, I don't remember just where it is but somewhere there is a provision, that a court may hear - I wish I could find that Section. May I appeal to counsel to indicate the Section that does give the court . . .

MR. MERCIER: 23.

MR. CHERNIACK: 23. Thanks Mr. Mercier. It's a bad copy I have here. Under 23 apparently, there is some provision that protects — "A court hearing an application may exclude all or any members of the public from the court room for all or part of the proceedings." That's considered pretty dangerous in many respects that courts deal in the open and the Chamber is more concerned, as Mr. Johnston apparently, to treat confidentially any information received. And let's see what this

says, it's not quite what the Chamber said but it also says, not necessarily a third party. An employ in giving information as to the earnings of the spouse, the information he gives is secret. Now that not even a third party. The principal in giving information as to earnings, that's kept secret. Do the Attorney-General make it that broad? Did the Chamber really dictate this legislation so th it's broadened beyond the third party? —(Interjection)— Because that's what it is, Mr. Chairma It's the information provided by a spouse shall not form part of the public record. Information provide by an employer as to the earnings of a spouse shall not be part of the public record; partner principals shall not be part of the public record." These aren't third parties. Some of them are tl spouse himself. He produces documentation, it's not part of the public record. How is that appeale Mr. Chairman? What happens? Not you, Mr. Chairman, I wonder if Mr. Mercier would clarify, hc is this part of a review under an appeal if it's not part of the public record? It means that the are secret records kept?

MR. CHAIRMAN: Mr. Mercier. TF250

MR. MERCIER: Mr. Chairman, I somewhat share the concern of the Member for St. Johns. I wond in the discussion of this particular item he might indicate whether he has any concern at all th there will be some confidential information revealed in attempting to determine the ability to p of one of the spouses, whether he has any concern that any of that information should be confidenti Is it a question of compromising this particular Section or does he take the position that none the information that is revealed about third parties, who may just happen to be a partner or a busine relationship with one of the spouses, that because of that innocent act, all of the confident information of a business will be revealed in court and be part of the public record?

MR. CHERNIACK: Well, Mr. Chairman, if somebody has an accident and is suing for damages a has to prove loss of earnings, that's not secret information. Nevertheless, his partner's priva information becomes a public record. When he's revealing the damages he suffers for loss earnings, inability to earn money, that becomes public record. A person who is injured and su for specific damages, pretty soon you know his doctor, you know how much his doctor charge you know how much his doctor was involved in treating his case. I don't know off-hand if I c give you more examples. I am just talking about a principle which I thought was so important th you get Myrna Bowman speaking on behalf of the Manitoba Bar and saying, "Hold. At least the ought to be . . .," I think she said the press involved even in hearings in- camera and rely on t press to use its ethical and moral responsibilities to do it properly. I don't know, Mr. Chairma how much we are prepared to abrogate a pretty important principle in the administration of justic I'm not prepared to do that and I regret the fact that people's private lives are exposed in cou innocent people's private lives are exposed in court in many respects.

You talk about a man who's charged with rape and the whole background of an innocent par a victim, becomes to a large extent still, I think, even with the change in law, a matter of pub record. A man is beaten up and robbed and before you know it . . . I remember a friend of mi who was robbed, beaten up in his premises and suddenly we knew how much insurance he carri and we knew what he lost. I'm sorry, I just don't see that this is that important that it be ke not even part of the public record. So that's all I had.

QUESTION put on the amendment and carried.

MR. CHAIRMAN: 8(1)—pass — Mr. Corrin.

MR. CORRIN: Mr. Chairman, I was concerned about the use in the first line of the word "may I have been presuming that in all such circumstances where an application had been made to court, that the court would be obliged to make an order containing at least one provision. I ca see circumstances, and I would be interested to know if anyone else here can, where the co would have a discretion not to make any order at all. In other words, not make an order that t spouses, for instance, be no longer bound to cohabit with each other. I was of the impression th conduct was not germane to any proceedings under this Act with the exception of those we've alrea dealt with, with the exception of the question of quantum of maintenance in certain exclusi circumstances. Therefore, I don't see why the word "may" is or would be appropriately used this Section unless this is another "may" that means "shall", of course. We've had numerc instances of "mays" that mean "shall". If I'm wrong, of course, the Attorney-General can . . . Her an opportunity to save time, to capture the moment and ensure that no precious committee ti will be wasted discussing or debating the import or interpretation of this particular clause. S would advise the Attorney-General, through you, Mr. Chairman, that I would be moved if he unwilling to amend the word "may" where it appears in the first line to the word "shall" in orc

) make it mandatory that the court make an order. $
It's of some small interest to note that I would have to presume that where there was an application)r separation and there was a custody application made concurrently therewith, that there would ave to be an order with (d.) as well. I would presume that at the very least the court would have) make a determination of custody as well as separation. Unless it is the intent of this legislation 1at people have to make a separate application under The Child Welfare Act in order . . .

IR. CHAIRMAN: Would you permit Mr. Tallin to comment on your question of "may" versus shall"?

IR. CORRIN: Certainly.

IR. CHAIRMAN: Mr. Tallin.

IR. TALLIN: I'm not so sure I should enter into this debate. I wasn't asked any question or nything.

IR. CORRIN: Well, the Chairman, actually volunteered your services, Mr. 8 Tallin.

IR. MERCIER: I volunteered them to the Chairman.

IR. TALLIN: I see, well, I was just wondering, did you anticipate that the court would be bound) make an order of a kind for which no application had been made?

IR. CORRIN: Well, presumably everybody coming before the court will have made an application)r separation.

IR. TALLIN: Why?

IR. CORRIN: Well, because I can't imagine a circumstance. Perhaps you can relate an example f a circumstance where an individual would come before the court not having made an pplication.

IR. TALLIN: Well, I think several submissions talked about requiring maintenance where there was) separation.

IR. CORRIN: Separation where there is no separation?

R. TALLIN: If there was an application for maintenance where the parties didn't want to separate 1d the court found that there was no need on the part of either, would you still require the court) make some kind of an order. They say, well, we're not going to make one under (a) because 1ere is no need, both the parties seem to be financially able to look after themselves. They don't 3em to want to separate so we don't want Under (b) there are no children, so we can't make 1e under (d). I suppose they could say, "Okay, we will find it and make an order under costs," ut why would you require them to make any order necessarily?

R. CORRIN: Well, I think you've raised an interesting point but of course it goes back to the d question of what the intent of the legislation is.

R. TALLIN: It seems to me the intention is that the court will use its reasonable discretion in anting orders.

R. CORRIN: But you're telling the court, in couching this particular Section as we have, we would 3 telling the court that when confronted with an application for separation they may well have scretion, within the ambit of this particular Section, legislation not to confirm such an order. I as of the impression that the court was to be instructed that separation was now a matter of ght.

R. TALLIN: If you want to take separation out of 8(1) and make a separate subsection that would 3 one thing, and ay upon an application for separation the court shall make an order that the)ouse is no longer bound to cohabit and deal with it that way, that's fine. But it seems to me at the other ones you shouldn't say that just because a spouse applies for maintenance the court ust make an order for maintenance, even though they find there is no need.

MR. CORRIN: I don't think I can disagree with that, Mr. Chairman. I think it makes good sense because I do think that a non-supporting spouse, hypothetically could be brought before the courts as Mr. Tallin has suggested on an application by a spouse in financial need. I suppose hypothetically it's possible that someone may wish to contend with those circumstance and just obtain some sort of court order. But I would then suggest that we instruct — and I say "we" being the committee — instruct unanimously the Legislative Counsel to prepare an amendment that would deal with that other situation. . .

MR. SPIVAK: Are you introducing an amendment at this point?

MR. CORRIN: Well, what I'm doing is actually discussing a format by which we could all unanimously come to a consensus.

MR. CHAIRMAN: To the members of the committee and to Mr. Corrin, Mr. Spivak made a point of order earlier where he said that he personally didn't like the idea of us generalizing on amendments and leaving it up to Legal Counsel to draft them and I must agree with him on that. Either you move a positive amendment or not.

MR. CORRIN: Excuse me, Mr. Chairma, that's absurd. If we all agree, if sitting around the table — I'm on the point of order now — if we come to a consensus of opinion, we agree with Mr. Tallin that it is our intention to give a specific directive to the courts when dealing with applications for separation and we want to embody this no-fault principle — Mr. Tallin has suggested he could if he were instructed by committee, prepare a small amendment dealing with it under Section 8 — if that's the consensus and will of the committee. Now that can be determined very simply by just asking the committee's opinion which can be done within a few seconds. I see no reason why we have to go through this torturous time-consuming process that Mr. Spivak would have us o having Mr. Tallin prepare an amendment and then bringing it before the House and then introducing it at that point. I seems to me that if we can deal with it tonight, right now, we all agree it's a simple point. Bring it forward, have the amendment prepared and so much the better. It expedites proceedings. I don't know why, we're going to be confronted with a raft of amendments that we haven't had an opportunity to review together which is only going to create havoc at the third reading stage.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, on a point of order. Mr. Corrin is comparatively new to the committees and although in effect what he is suggesting has been given effect in certain circumstances where there has been an agreement, and it's come forward on that basis, that has taken place, that is the exception and not the rule. The rule is, of course, that amendments are brought forward and the amendments are then dealt with in substantive ways, and if in fact a member of the Committee wants to introduce the amendment, then he has the opportunity of speaking to the Legislative Council Counsel and having them help assist him in drafting it and then proposing it.

Now, I don't see that there's a consensus here, and I really don't believe that. I think the Attorney-General's getting — well, all right. Then the point that should be brought, rather than the suggestion at this time, is to determine whether in fact the Attorney-General is prepared to proceed on that basis, in which case he can instruct the Legislative Counsel to do that. If in fact he is no prepared to, then there is no consensus. Then, I suggest if he wants to introduce them, then le him bring forward the actual amendment, and let us proceed. Tuere's no point in talking abou a consensus if it will not come about.

MR. CHAIRMAN: Mr. Mercier.

MR. CHERNIACK: A point of order, Mr. Chairman.

MR. CHAIRMAN: Mr. Mercier, I think, is on the same point of order.

MR. MERCIER: No, I'm not.

MR. CHAIRMAN: Okay. Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, Mr. Spivak explains it out that Mr. Corrin is new to committees and then he lectured him on how committees operate. I don't think I'm new to committees, bu

can confirm Mr. Spivak's statement that there have been occasions where there is general greement on the change, and that it is left to the Legislative Counsel to carry it out. Now, how lr. Spivak can find out that there is no agreement before there has been an opportunity to explore ıe possibility — or to attempt to persuade someone that there should be agreement — is beyond ıy consideration. And therefore, Mr. Chairman, it seems to me that it is well to explore whether r not there could be an agreement, and then Legislative Counsel would be instructed to do

The other thing that Mr. Spivak, who is not really new to committees, ought to know, is that ometimes when you try to save time, like he's doing, you end up by wasting a lot of time.

IR. SPIVAK: Mr. Chairman, on the point of order. Mr. Cherniack has wasted far more time than have in this Committee, almost deliberately — and I would say that to you. I don't have to be ;ctured by him, and if he wants to continue in that way, then I am prepared to argue and debate ıith him. Mr. Corrin said that the instructions should be given to the Legislative Counsel, and I uggest that the question that Mr. Corrin has to put, put to the Attorney-General to determine whether ı fact there is any agreement. If there is an agreement, then the instruction could be put; if there's o agreement, then, if Mr. Corrin wants to bring that amendment, he can bring it forward. The fact ;, Mr. Chairman, that the honourable members of the opposition have the opportunity to in fact repare the amendments and bring forward those amendments for consideration, and obviously, ı many cases, they cannot consider some of the arguments and debates that will take place, and ıerefore additional amendments could be put forward.

But the practice is, and I think I am correct in this, that in the main, it is up to the individual ıembers who are presenting the particular amendments to bring them forward in proper form for onsideration by the Committee.

IR. CHAIRMAN: Mr. Mercier, in reply to what Mr. Corrin was suggesting.

IR. MERCIER: Mr. Chairman, I think there is one difficulty with using the word "shall" even just ıith respect to the court making an order for separation, because there is subsequently in the ;gislation the paragraph which deals with the possibility of reconciliation. I think if you were to make ıe word "shall," then you are ruling out the possibility of reconciliation. Now, the previous Act sed the word "may," and I know there was some concern expressed by some people as to that iscretionary use of the word "may." I hate to say it, but this may again be a case where the word may" almost does mean "shall" with the exception of the possibility of reconciliation. Perhaps Mr. awley might want to make a comment on why the word "may" was used in the previous legislation, ut I think with the possibility of reconciliation, it would be a mistake to use the word "shall."

IR. CHAIRMAN: Mr. Corrin.

IR. CORRIN: As far as the reconciliation goes, Mr. Chairman, as I understand it, it's within the urview of the court to adjourn the proceedings prior to an order being made. I think that there a maximum time of 30 days — I'm not absolutely sure — but I think the hearing has to be resumed ithin 30 days. I don't see a necessity for utilizing the word "may." Either a reconciliation will be ffected within that time period, or it will not be, and I think when the judge actually has to broach ıe question of the order, then the discretion conferred upon him or herself would be very limited, xceedingly. There would be no discretion — that's my understanding, if I have been hearing the ;marks made by the Attorney-General correctly. I don't see any reason whatsoever why we cannot ake a specific, imperative direction to the court which in effect will only confirm the intention of ıis Legislature that separation be by way of right on application, as opposed to on any other basis all. I am very concerned that again, this may open a loophole, this may provide a loophole for igants to argue the fault concept.

In view of the fact that other amendments have not been accepted, and in view of the fact that think there are some ambiguities on the face of this legislation, I think that it's quite important at we clarify the intent of the Legislature by making specific provision in this respect. I can't see hy anybody would be reluctant to specify that an order should be forthcoming in circumstances here an application for separation has been made, and frankly, I think that if that is the case, ıd particularly if reconciliation — which is of course, a "motherhood issue," is used as the rationale, would suggest that I am very concerned. I am very concerned about what the intentions of the overnment truly are. At least I am concerned about what sort of information has been disseminated rank and file caucus members within the government. I am quite concerned as to what their ıderstanding of this legislation is, because I suppose somebody might feel that they would only ; able to support this legislation if there was a fault concept tied to the vesting of a separation der, to the issuance of the separation order. And they were shown Section 8(1), specific provision

that the court only may make an order — it doesn't have to make any order at all. I suppose th would placate and satisfy such an individual. I'm not sure that this isn't a bit of a mousetrap, a I'm not sure that we haven't taken the cheese and are about to have our necks broken. I thi I have been alerted to the possibility that there is something untoward, that we are labouring a Committee under a few misconceptions, and I would very much like to know why we can't conv that "may" to "shall." I think that it's important that we consider this until we have a good reas a proper rationale.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I appreciate the concern the member is raising, but it's interesti to note that Section 13 of The Wives and Children's Maintenance Act states that the judge magistrate, if he finds a complaint made under Section 4 proven, may make an order or orde containing any or all of the following provisions. And there it states clearly that even when he fin the acts proven, he may make an order. I'm not aware of any —(Interjection)— Well, I'm not awa of any instance where I didn't find an order, having proved — especially having proved one of t grounds for complaint.

MR. CHAIRMAN: 8(1). Mr. Corrin.

MR. CORRIN: Well, Mr. Chairman, before Mr. Cherniack addresses the Committee, I would sugge that that's simply not an argument. I mean, I would suggest that The Wives and Childre Maintenance Act as it presently is constituted may require some amendment. I don't think that can simply say, "Well, it's tried and true," and leave it at that. This is new legislation; there is track record whatsoever. There are no precedents, there is no compendium of jurisprudence; are into an area where the waters are truly uncharted. I would suggest that for the purposes clarity and for the purposes of true justice to the people who are going to be utilizing this particu legislation, there is absolutely no reason why we can't clarify such wording if, in fact, t Attorney-General and the Progressive Conservative caucus are applying themselves in a spirit good will, good faith and bona fide to this question, the question of fault. I don't see it as bei something that defies ready solution; I see it as something rather simple and something that requi virtually nothing to repair, to set right, and the fact that people are digging in their heels, the fa that the Attorney-General is entrenching on the subject matter, is grounds for suspicion.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, I am just inclined to comment that the Attorney-Gene is appealing for justification on the basis of a law which we repealed last year, which the Conservativ re-instituted last year, and which they are now proposing to repeal, where Section 4 referred and Section 13, is absolute fault of a very strong nature, and said, "Well, then, a judge, if he fin this fault to be proven, may make an order." He says, "Oh, goody, here's a good precedent me." Boy, that's one of the worst precedents, Mr. Chairman.

MR. CHAIRMAN: 8(1)—pass.

MR. SPIVAK: Page by page, Mr. Chairman.

MR. CHAIRMAN: Page 1, it's been moved that it pass with the various amendments that ha passed.

QUESTION on 8(1) as amended carried.

MR. SPIVAK: Page by page.

MR. CHAIRMAN: 8(2)—pass; 8(3).

MR. CHERNIACK: Mr. Chairman, there is an amendment. I'll be glad to move that amendme Mr. Chairman.

MR. CHAIRMAN: Mr. Cherniack is prepared to move the amendment, that Bill 39 be amend by striking out Section 10 thereof, and by renumbering subsection 8(3) thereof, after subsecti 9(1).

MR. CHERNIACK: As subsection 9(1).

MR. CHAIRMAN: As subsection. I have difficulty reading at 2:00 o'clock. . . . by renumbering subsection 8(4) thereof, as subsection 9(2) and by renumbering Section 9 thereof as Section 10. All agreed? (Agreed).

So, 8(3) as amended.

MR. CHERNIACK: Mr. Chairman, are you now asking for 9(1)? A new 9(1)?

MR. CHAIRMAN: 8(4) as amended.

MR. CHERNIACK: I'm sorry, Mr. Chairman, I'm not clear on what you're calling. Are you calling or the new 9(1)?

MR. CHAIRMAN: Yes, 9(1) is renumbered; sorry.

MR. CHERNIACK: On 9(1), Mr. Chairman, I'd like to know whether the Attorney-General has looked into the point raised by the Manitoba Association for Social Workers, two points. One is just semantic, and I don't know how important it is, but they're suggesting that this be called conciliation rather than reconciliation. I think it makes sense, but I don't think it's terribly important.

The other much more important one was where they suggested that as in The Divorce Act, Section 21 and 22. That's fine, Mr. Chairman. What about the suggestion of conciliation, rather reconciliation. I know it's semantic, and yet, why not?

Mr. Chairman, if Mr. Tallin isn't pleased with it, then I don't want it.

MR. CHAIRMAN: Mr. Tallin.

MR. TALLIN: . . . all the way through. It seems to read very awkwardly. At least, my idea of what conciliation is — "exists of their conciliation."

MR. CHERNIACK: Yes, I see your point, that's right. I am satisfied Mr. Tallin.

MR. CHAIRMAN: 9(2)—pass; 10—pass; 10(2)—pass; 10(3)—pass.

A MEMBER: That is renumbered.

MR. CHAIRMAN: These are the renumbering. Another amendment under 10(3).

MR. MERCIER: That subsection 9(3) as printed and renumbered as 10(3) of Bill 39 be amended by striking out the words and figure "subject to subsection (2)" in the first line.

MR. CHERNIACK: Could you give an explanation?

MR. CHAIRMAN: Mr. Cherniack wants an explanation. Mr. Tallin, please.

MR. TALLIN: It was pointed out to us that subsection (3) deals with a different matter altogether from subsection (2). Subsection (2) talks about the postponement of a sale and subsection (2) is telling you about the right of occupancy, and the two don't fit together when you say one is subject to the other. The two must stand on their own, I think.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: What does 10(3) mean, with or without that subsection (2)? Why is it necessary to say that? Is that not a statement of what the law is?

MR. TALLIN: I think it is a statement of what the law is. I presume that it's to forego any argument that the right of occupancy overrules normal rights of title to have possession as well.

MR. CHERNIACK: How could it? If it's owned by somebody else aitogether then what right of occupancy can exist? Is this a loophole of some kind? I don't know if this plugs a loophole or creates a loophole.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, this is virtually the same provision that was in previous legislati In fact, I think it's the same wording, with the exception that we're introducing this amendm to Section 9(3) to strike out subsection 9, subject to subsection (2).

MR. CHERNIACK: You seem to have applied it, because you don't understand it but because th did it, we'll do it.

See what concerns me, Mr. Chairman, on the broader principle, if I may, is that we are say that the occupancy of a residence may be awarded to the non-owning spouse. I believe that's corre under 10(1) now, then we're saying that a judge may include an order that such rights as the otl spouse may have as owner for partition or sale be postponed. So that guarantees the right a longer period of time. Well, but somewhere or other, we say that a person is free to dispo of his property. Is that correct? Somewhere or other, it seems to me, we say that. Does this th mean that there can be a sale made? Not a . . . Well, it says postponement of a sale, but c there be default under a mortgage, say, and a foreclosure of some kind, and does this then s say, all right, then, the ownership having changed hands, there is no right of occupancy?

I ask why one has to state what is the law unless one creates a loophole that way.

MR. MERCIER: Mr. Chairman, I think it's just a statement, as Mr. Cherniack may have said earli of the obvious, that where a spouse's interest as owners or lessees are terminated then there can continue to exist a right of occupancy. It's not a breach of the order.

MR. CHERNIACK: Mr. Chairman, all I point out to you is that earlier in this bill we pleaded the government to make clear their intentions so we could spell it out, and we failed. Here th is no justification for that section other than they found in the last Act so it is being kept, a the last Act was the one that they attacked as being poorly drawn. So now they copy from t poorly drawn last Act in something here that they now say is the restatement of the law. Well, their Act.

MR. SPIVAK: Question.

MR. CHAIRMAN: 10(3)—pass, with the amendment. 11—pass.

MR. CHERNIACK: Mr. Chairman, which 11? That's not a new . . .

MR. CHAIRMAN: That's somewhere on Page 5.

MR. CHERNIACK: You have already crossed out 10.

MR. CHAIRMAN: 10(1) 10(2).

MR. CHERNIACK: On 11, Mr. Chairman . .

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: . . . I do have an amendment. My note says that Ms. Fung of the Family Servic agreed with the point. This is one that Mr. Spivak will be pleased to know I have got lots and can have extra copies, so he may see it, and I move it, Mr. Chairman.

MR. CHAIRMAN: Because you don't have enough copies for all members, would you like to re it into the . . .

MR. CHERNIACK: Sure, I will be glad to read it. Section 11, Bill 39, be amended by number the present section as subsection (1), by adding thereto at the end thereof the following subsecti Entering Upon Premises 11(2). "Where a man or woman who are not married to each other ha cohabited for a period of one year or more, either the man or woman may apply to a court an order under this part, containing a provision of the kind mentioned in Clause 8(1)(c)" — I gue that number might have to be changed — "and for the purposes of such an application this applies mutatis mutandis as though the man and woman were married to one another."

A point to this amendment, Mr. Chairman, was made earlier and that is that there are occasic where the enforcement officers treat a common-law situation as a domestic situation and will bother to prevent a scrap taking place between the two parties to a common-law marriage. If th is a court order, then there is a penalty, but there is no provision for a court order to be ma

where there is no child of the marriage — of the union, rather — and yet there might be a good justification for a court order, such as we dealt with earlier, dealing with under 8(1)(c).

Now, the important thing here is that the enforcement officers should look at this as a court order and not as a domestic situation, which they may well do. Now, I only hope we don't have reference . to the fact that it wasn't in last year's Act, because we are truly trying to upgrade the draftsmanship. But this was a new point raised, to me.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I don't believe that we need to have the common-law wife apply for a court order to prohibit the man from entering the premises. They are not married. Surely that should be, and if it's not, I'm prepared to review that matter with the Police Department, but he has no legal right to be on her premises at all. That's trespassing.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: The Attorney-General has stated the law as I know it. He has also stated the recourse, as I know it. What he has not done is know the practical application of it and the fact is, and Ms. Fung confirmed it, and you do remember, I trust, that she is the Executive Director of the Family Bureau and said this is a real problem, and I know of it as that problem and I haven't had that much experience with entering on premises — trespass, as you refer to — by a common-law spouse. But the fact is — and I even think we had another witness refer to it in their brief — that there are occasions when there is a common-law arrangement and the spouses separate and one spouse wants to get back and enter the premises of the other spouse, and they phone the police and say, "Keep this guy out of here," and the police say, "Oh, you live together; it's a domestic arrangement and we will take our time about it."

The point, Mr. Chairman, is that when you have a separation agreement and the court order, then the police will enforce the court order, but here there is no court order. There is just the general principle of trespassing. Why on earth is this not an acceptable precaution to take to make sure that a court may order. It may make an order with all these sections in 8 if there was a child of the marriage. But what I'm saying is that where there is not a child of the marriage the problem of access to the premises may still exist.

MR. MERCIER: Mr. Chairman, I'm not that much opposed to it. I would suggest in the amendment we might want to make not only an order under 8(1)(c) but an order under the other clause that we added in, 8(1)(c)(1), which refers to molest, annoy or harass.

MR. CHERNIACK: Absolutely.

MR. MERCIER: You will add that to your amendment and take a poll of my colleagues, who are indicating agreement. We will accept the amendment, with that change, I take it. It is understood that that 8(1)(c) . . .

MR. CHERNIACK: Mr. Chairman, when I asked the Legislative Counsel to draft this there wasn't in 8(1)(c)(1). By all means, it should be . . . And I marvel at the begrudging aspect of it.

MR. CHAIRMAN: Okay. We have an 11(a) now — 11(1), sorry, pass. We now have an 11(2) as amended, making that correction to a previous referral—pass; 11—pass. Clauses 12 and 13 were each read and passed.

14, there is an amendment on 14 as distributed. Is that all right with the members of the committee? Okay.

MR. CHERNIACK: Can the Attorney-General clarify that, Mr. Chairman? I'm not sure.

MR. MERCIER: Mr. Chairman, this arises from the Manitoba Bar Association brief, where they indicated that, as the section stood, no one including the parent could make an application for an order for maintenance of a child unless the other parent of the child were not providing reasonably for the child's maintenance. An application under this part is separate from the application for separation, etc. Conceivably, a parent who is awarded custody under Section 8, could not get an order for maintenance if the respondent spouse has providing reasonably for the child since the date of separation. This appears to be an oversight, we would suggest that Section 14 be amended to provide that an application may be made where there is a breach of an obligation towards a child under Section 12, or where the applicant has applied for custody.

MR. CHAIRMAN: Okay. 14. The amendment to 14—pass — Mr. Corrin.

MR. CORRIN: Mr. Chairman, I guess this falls into the realm of not a silly question but perha a misguided one, but I feel compelled to ask it because it's important to me, and I think cou be important to others.

It is a very general question. In circumstances, it appears to me — and please correct me I'm wrong, I know the hour is late — but it appears to me . . .

MR. CHAIRMAN: Ask the question in thirty seconds.

MR. CORRIN: I'm trying, Mr. Chairman, I'm trying to put the question. You keep interrupting. a court is faced, under this legislation, with a situation where an application is made for suppo of a child of a common-law union, and there is proof adduced before the court that the parti lived together for a full year, but there is insufficient proof of parentage. As you know the hospita for instance, in the case of common-law unions, will, as a matter of practice, refuse to show t father's name on the birth certificate without his endorsing a consent, so in those circumstanc parentage is not proved definitively. What I'm wondering is whether or not a person, in tho circumstances, will be able, by way of right, having proved only that he or she lived with the oth person for one full year, to an order providing maintenance for the support of the child. You s there is a problem, because I could perceive circumstances, and as I said I may be wrong a: may not have read this legislation quite as closely as I should have, but a person could confro circumstances where they had lived with a person for a year, there was a child of the union b that was very difficult to prove, that there'd been no proceedings taken under the The Child Welfa Act, no filiation proceedings proving parentage, that there'd been no order by the Family Cou in that regard. So the person was confronting a situation where the other party, the deserti common-law spouse for instance, was deserting and refusing to acknowledge his parentage of t child, his fathering of the child. I was wondering, in those circumstances, would you be able to assu me that I would have no need to be concerned about the obligation of the deserting spouse maintain that child, and the rights of the custodial parent to obtain such maintenance? You se right now, as I understand it, it's a very simple matter under the Act if you simply prove one yea co-habitation, and prove secondly, that the child was born within the period of co-habitation, th is sufficient from the point of view of the current legislation to require the court to make a maintenan order. I'm not sure that this wording is exactly of that sort and nature. I'm concerned that a pers could quite literally skip out and say, "I'm sorry, I may have lived with you but I certainly was the parent and you should have taken proceedings under The Child Welfare Act in order to establi the parentage." And of course, as some of the lawyers know, there is a limitation period on th six months after the birth of the child. So that sort of provides a Catch 22 in tho circumstances.

MR. CHERNIACK: The Wives and Children's Maintenance Act says, "he's the father of any ch born to".

MR. CORRIN: So it would have to be established.

MR. KOVNATS: There was a marriage, the child was born two months after the marriage, the moth claims that the fellow that she married was not the father of the child, they have separated a the mother has taken the child — I guess they've got a legal separation — the father wants custo of the child, even though he knows it's not his natural child. Where would I find this in t law?

MR. CHAIRMAN: They didn't make provision for him.$

MR. KOVNATS: And, in fact, would he have to pay maintenance?

MR. CHAIRMAN: Mr. Tallin.

MR. TALLIN: To begin with there's a presumption of legitimacy for every child born of a marr woman.

MR. KOVNATS: It's a presumption or . . .

MR. TALLIN: It's a presumption. It can be rebutted.

MR. KOVNATS: With six months, because that's what got me interested?

MR. TALLIN: Well, no, the six months I don't think would apply to that situation because they are married, there is a responsibility to support any children born while married, whether they be your children or whether the married parents are the natural parents or not. There is still the obligation to support it. There's still the right, I think, to ask for custody even though he wasn't the natural parent of the child, because even if he wasn't the natural parent, but he would have been a person who stood in *loco parentis* to the child, and that's included in this bill.

MR. KOVNATS: Thank you. It's important. I didn't mean to take up your time, but I do know of an actual case.

MR. CHAIRMAN: Section 14, the amendment to 14 — Mr. Corrin.

MR. CORRIN: I would suggest that there is a distinction as between the current legislation and the new legislation. The current legislation, The Wives and Children's Maintenance Act, refers to — in that case the man having lived with the woman for a year — it says, "that where he is the father of any child born to her", and I think it's arguable. and the court has actually interpreted the section, that it's satisfactory that that person stand in *loco parentis,* in other words, having satisfied to the court's satisfaction that that person has stood as a father to the child. The court does not go further, the court does not delve into the parentage. Under the legislation, the bill before us, it says, "that where there is a child of the union", and I would suggest that there is a difference in the wording. I would suggest that the onus would be on the common-law wife and mother to prove that that man was the father, that that child was of the union, and I suggest that that can be very difficult. That is a very difficult burden to discharge, because if you haven't taken proceedings under The Child Welfare Act to establish parentage, if you haven't done that — and there is a deadline, I believe it's six months limitation — although I think there is provision for court extensions. —(Interjection)— I thought it would enhance my agrument if it came from this side of the table. I certainly hasn't done anything to enhance my powers of reasoning.

In any event, I would suggest that there is a difference, and one that will probably fall prey to the legal representatives of the litigants before the court. I would be loath to put common-law mothers in that sort of situation, I think it's grossly inequitible. I think that if a person has assumed the responsibility, if a person has assumed the father's responsibility, then that should be sufficient. I think it's fair enough to presume that if a man lives with a woman for one year and he has assumed responsibility with respect to a child, that that is his child, and I don't want to see anybody coming to the courts saying, I'm sorry, I think she played around during the course of our common-law relationship, or that she was pregnant when the relationship actually was formalized when we moved in together, and I really was never certain it was my child. You get into a very very dicey area because it is very very hard to prove parentage. It is exceedingly difficult to prove parentage.

This is one of those situations that will affect a lot of people adversely, because I think we should use the same wording as we used under The Wives and Children's Maintenance Act, because we know what the court did with that and I think Legislative Counsel would agree.

MR. CHAIRMANr. Tallin.

MR. TALLIN: A parent, under this Act, by definition, includes a person who stands in *loco parentis* to a child. Under The Wives and Childrens Maintenance Act, that is not the case. It flowed only from the interpretation that is being given to the word "father", and I'm afraid I don't know what the case law on that is, but in this bill, a parent includes a person standing in *loco parentis* and a person standing in *loco parentis* therefore has the obligation to support the child, under 12(1). So, in fact he took the child into his premises and looked after the child, he's the parent of the child for purposes of 12(1).

If he hasn't done that, but he lives with the mother in a common-law relationship, then under 12(3) he undertakes an obligation to look after her children.

MR. CHAIRMAN: Mr. Corrin.

MR. CORRIN: I would argue that, Mr. Tallin. I would argue and say that legislation obviously makes provision for such an individual's opting out in the sense that presumably he would rely, in the first instance he would argue that the obligation to support the child was subject to The Child wWelfare Act, and therefore, since there are proceedings in that legislation providing for application for affiliation orders, then he would refer to 12(3) and suggest that his obligation to support is secondary

to the child's natural parents, he would probably just suggest that or if there is a natural pare that party should be the responsible party.

MR. TALLIN: I didn't say that it was a prime one , but I don't think that it makes much differenc as long as the child is being looked after, whether it's the natural parent or the person who stanc in the position of the common-law husband of the mother, under 12(3) does it?

MR. CORRIN: No, except that sometimes the natural parent is virtually impossible to get back a particularly since an order would have to have been made within a time limit — six months.

MR. TALLIN: Well, in that case, then there was no obligation of the natural parent, so he the becomes the first person with the obligation.

MR. CORRIN: Well, I suppose we'll know very shortly, I think, within a year or so we'll have decisio and we'll know whether there's any distinction in the court's mind, so I would be willing to live wi it for a year and see what happens.

QUESTION put on the amendment 14 and passed. .

MR. CHAIRMAN: 16.(a)—pass; 16.(b)—pass; 16.(c)—pass; 16—pass; 17—pass; 18 amended—

Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I am wondering about the reasoning for old 19 having been l out, that's a hearing by a party who failed to respond. As I understand it, 19 in the Act that about to be repealed, provided that under certain circumstances, a spouse could appear at a hearir and I visualize that there may be an separation order agreed to, maintenance agreed to, but argument about custody; or everything acceptable, but an argument as to maintenance. I think th is old 19. Could I get clarification as to why it has been left out.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: . . . procedural, Mr. Chairman.

MR. CHERNIACK: I'm sorry, Mr. Chairman, I don't understand enough about that to understa what it means by procedural. I don't know what that answer means.

MR. MERCIER: Mr. Chairman, it has been my experience, for example, in many cases under T Divorce Act, that the respondent will not file an answer but somehow turn up at the hearing a the judge will allow him to be heard and in fact may allow him to file an answer and take p in the proceedings.

MR. CHERNIACK: Mr. Chairman, what's wrong with saying so? It's procedural, but this grants right. The old 19, or the present Act, 19, grants a right. It says that where there has been failu to file an answer, a respondent may still appear at the hearing and be heard to all intents a purposes. We are now dealing with pretty important basic issues: custody of children, maintenan separation. We're not fooling around here with anything light or easy. We are dealing with fam relationships and I think that the old 19 gave a right. I don't think we should rely on the judgm of a court as to whether or not, on a procedural basis, to permit a person to be heard. It's r good enough for me to hear that the reason is procedural. I think that there is validity in havi it and I don't why it shouldn't.

May I just add, Mr. Chairman' here we had 9(3), or some section where we all agreed that tl is the law and nobody knows why it is in there except that it was there and it is left there. Sect 19 is not necessarily the law and if it is right, it should be the law. I really don't know why it w left out. Or let's put it differently, I don't why it is not put in. You will notice 18 is strictly procedu 18 is the one that I tried to persuade the Attorney-General to include and he didn't accept tl on the basis that he is sure he will be done. But 19 grants a right.

MR. MERCIER: Mr. Chairman, the advice that I have from Legislative Counsel with respect to t section is that . . . I know there is no statement of such a right in the County Court and the Co of Queen's Bench. This basic right is in fact given under the proceedings and pleadings a procedure. —(Interjection)— That's right. This is not the exact way that they will do it, but it a matter that is done under their rules of procedure. I'm of the view myself that this is a mat

at the court will be able to deal with through its procedural rules. It is a basic carrying out of e system of justice and I don't think it is one that would be denied by the courts.

R. CHERNIACK: Is it in the Q.B. rules?

R. MERCIER: No.

R. CHERNIACK: Is it in the County Court rules?

R. MERCIER: No.

R. CHERNIACK: Well, then there is no assurance then — it is very unlikely it will be in the ovincial Judges' rules.

R. MERCIER: Pardon me, I thought you meant in their Acts.

R. CHERNIACK: No, rules.

R. MERCIER: There is provision. it seems to me. for applying for an extension of time to file nswers, to file statements . . .

R. CHERNIACK: That's right, but that isn't what is 19. Mr. Chairman, 19 says that the court need ot require them to file pleadings; they don't have to declare themselves as a contestant. A person an come in and say to the court, "There is one point that I want to be involved in; I want to be eard. You are dealing now with the custody of my child, or the separation; or you are dealing th a right of access, or whatever," and the court may say, under this section, "You had better e some pleadings; we will have to adjourn the case." I believe that that is the procedure. But e're dealing with human problems. All we are saying in the old Act is a person has a right to ome in and ask to be heard, and I'm not aware that under any proceedings — I've never been at active in civil litigation to speak with certainty — but I'm not aware of any situation that I have een, other than the divorce court, where they will hear a person who is a party to proceedings at has not filed an answer. I don't think that it is an automatic right and I don't know that the ovincial Police Court is going to make provision for it.

Having said that, Mr. Chairman, this is not a political, philosophical argument I'm giving you. has got nothing to do with my political concerns. It is sensible to me, and if you reject it, all ght.

R. CHAIRMAN: Mr. Mercier.

R. MERCIER: Mr. Chairman, perhaps I could undertake to review this matter with Legislative ounsel and prepare a proposed amendment either to be introduced by myself or Mr. Cherniack the Report Stage.

R. CHERNIACK: That's fine, sure.

R. CHAIRMAN: 19—pass; 20—pass; 21, amendments . . .

R. CHERNIACK: Mr. Chairman, there was a point made about 21 and I don't remember by whom, at there was a suggestion that it should say, "May upon application therefor by either party." I st wrote it down and I don't remember who said it. It may have been the Bar Association brief, at I'm not even sure that I know why the point was made. I know that Mr. Mercier has an amendment hich seems all right to me, but somebody raised that point, it should say, "may upon an application erefor by either party."

R. MERCIER: I have no record of that particular comment, Mr. Chairman.

R. CHERNIACK: Well, I do have the record but if Mr. Tallin doesn't think it is necessary, I wouldn't ish it further.

R. MERCIER: I don't have any record of that suggestion.

R. CHAIRMAN: 21, as amended, now to be 21(a)—pass; 21(b)—pass?

MR. CHERNIACK: It's not (a) and (b), Mr. Chairman, there are two amendments there. You ha no (a) or (b) in 21, it's just changing the wording.

MR. CHAIRMAN: I'll put the question on the amendment. Do you want a recorded vote, M Cherniack, on the amendment? Okay.

21 as amended—pass; 21—pass; 22 — Mr. Mercier.

MR. MERCIER: There is an amendment, Mr. Chairman, at the top of Page 4. I move it as distribute (Agreed)

MR. CHAIRMAN: 22 as amended—pass; 23—pass; 24(1)—pass; 24(2)—pass; 25(1) — M Pawley.

MR. PAWLEY: We had a number of submitters during the public hearings that proposed chang to this section, and I was certaintly impressed by the strength and weight of their arguments, the extent that the provision as presently worded is too loose and that an order "ought" to made and the exceptions to the issuing of such an order should be on very very rare occasio Those rare occasions should be in extreme situations where undue hardship would result.

So I do think, Mr. Chairman, that this section should be tightened up and I'm wondering, bef I move an amendment, if Mr. Mercier would be prepared to review this and possibly review it the extent that "may" would be deleted in the first line thereof and substituted by the words "sh except where an undue hardship is caused."

MR. MERCIER: . . . prepared to review that, Mr.Chairman.

MR. PAWLEY: Possibly I could just leave it that Mr. Tallin prepare an amendment and if M Mercier's review is positive, then he could introduce it. If not, then I would wish to introduce tl amendment.

MR. MERCIER: I'll look at that first thing this morning.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: In addition, I would like to consider a (c) to that, for provision of any other fo of security. What we have here is a cash deposit or a bond with or without sureties. But I thi it would be of some value if, in addition to that, the court had the right to provide for, let's s a chattel mortgage on the car owned by the person, or on anything else he may own, so that cannot dispose of it or take it out of the province, legally I mean, there would be a legal barri That would be a discretion of the court but there is no provision, I think, for the court "may" or that unless it is given that authority.

So I would like to suggest that we add a (c) to that providing for such other security as t court may seem advisable. You can file an order, I think, against property, I believe you can that. I don't know where, under The Real Property Act, maybe. In here, Mr. Silver indicates tl there is provision — yes, nuer 27. You can file an order in the Land Titles. Why shouldn't you able to file the order to have effect just like a Sheriff's certificate or, say, a chattel mortgage. Tl should be an additional protection, because what we're talking about in enforcement here is wl is complained about. The figures are, you know, varied but are very substantial in terms of t nuer of people who cannot enforce orders. This seems to me to be reasonable, that a TV set car — a car is probably the kind of thing that —(Interjection)— It depreciates too quickly? E people lend money on cars. Banks lend money on cars, don't they? Banks have pretty astute busine people. There's some validity to it. I think that as we get our personal property procedure in pl — I'm not too familiar with it, there should be a way, just as registering in the Land Titles off — to register it as a lien or a general lien against chattels owned by the person against wh an order is made. Would the Attorney-General look at that as well?

MR. CHAIRMAN: Mr. Mercier has agreed to look at it, on the suggestion of Mr. Pawley. Who want to put a (c) in? Mr. Cherniack?

MR. CHERNIACK: Yes.

MR. CHAIRMAN: Do you want us to pass — to the Members of the Committee — pass 25(1 and (1) 25(b) and then go back to . . . ?

IR. CHERNIACK: Any way, Mr. Chairman.

IR. MERCIER: I wonder, Mr. Chairman, if Mr. Cherniack could agree to leave (c) to give me an pportunity to review it with Legislative Counsel? I have been looking at the Ontario and British :olumbia Acts, and although our Acts are very similar with respect to security, there is some provision or security against real estate which may go further than simply filing an order in the Land Titles)ffice. Perhaps we can draw an amendment to be introduced either by myself or Mr. :herniack.

IR. CHERNIACK: That's fine, Mr. Chairman.

IR. CHAIRMAN: Mr. Spivak.

IR. SPIVAK: . . . if Mr. Mercier doesn't agree, then Mr. Cherniack at the Report stage can draw ıe amendment or it can be drawn so that it can be introduced at the Report stage.

IR. CHAIRMAN: It would be introduced by Mr. Cherniack.

IR. SPIVAK: Yes, so that in effect we pass the provisions of the Act as it stands it now.

IR. CHAIRMAN: 25(1)(a)—pass; 25(1)(b)—pass; 25(1)-pass; 25(2)—pass; 25(3)—pass; 26 — Mr. 'arasiuk.

IR. PARASIUK: I am wondering if the Attorney-General would consider that a Section 25(4) be ıcluded which would read as follows: "The Lieutenant-Governor-in-Council may make regulations especting (a) the establishment of a central registry system where maintenance orders would be lled; (b) interim payment by the province of the maintenance to a level at least equal to the prevailing ocial assistance rates, or the full value of the maintenance order, whichever is less; (c) collection y the province of the full amount of the maintenance, and (d) payment by the province of the ıaintenance collected which exceeds the interim maintenance payment."

Now, I am putting forward that suggestion to the Minister because I think that despite some f these other changes that are going to be made — well, conceivably made — with respect to 5(1), the problem of enforcement of maintenance still exists. It is a tremendous problem and I 'ankly could raise a whole nuer of issues, but I do believe, and I know that the province has greater esources than the applicant spouse to locate the defaulting spouse and then enforce the order. think that if the government is involved in pursuing the defaulting spouse, that there is a far greater kelihood that that will happen. I put that forward as a suggestion. I'm hoping that the Minister ill consider it and I'd like to get an answer from him on that. —(Interjection)— I'm putting it forward s a suggestion to see what his response is.

IR. CHAIRMAN: Would you care to reply to his suggestion? Mr. Mercier.

IR. MERCIER: Yes, Mr. Chairman. I have been looking at this question of a central registry and ıe report is not yet completed, but it would appear to be an area in which we should proceed long with automatic enforcement of maintenance orders, the problem being, with summer holidays, ome of the people are away who should be involved in working on this and the review probably ron't be completed for some time yet. But I don't think we need legislation to proceed with a central egistry.

The second aspect of the motion, I think, dealt with basic payment of . . .

IR. PARASIUK: It's an interim payment by the province of the maintenance to a level at least qual to the prevailing social assistance rates, or the full value of the maintenance order, whichever ; less.

IR. MERCIER: And what was the balance of . . . ?

IR. PARASIUK: Well, the balance would be collection by the province of the full amount of the ıaintenance order and the payment by the province of the maintenance collected which exceeds ıe interim maintenance payment. That would be passed on to the applicant spouse as well. This ; a system whereby, in a sense, the task of enforcing the order falls upon the province, with its esources and, in a sense, its as opposed to being carried out by the applicant spouse. I have looked t the material put forward by Alice Steinbart to your department' which you were kind enough) give to me last week, and having looked at the various alternatives, I think this is the most sensible.

I think that there is no escaping our coming to grips with this particular problem. This won't de with it entirely because I think that you have the whole question of interprovincial discussions, b frankly, I think that there is probably a greater incentive for the province to pursue this matter interprovincial co-operation if it has the onus of enforcing maintenance orders. I think that this kee the issue alive for the province. It is in its interests to pursue it and I think there may be a tenden for other priorities to take over if this particular legislation is passed the way it is right now.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I want to speak in support of the suggestion by the Member f Transcona. The Federal Law Reform Commission made a number of recommendations pertaini to enforcement of maintenance orders and basically they narrowed down to a central registry syste by which there would be first receipt and disbursement of moneys due under court orders, t maintenance of records and accounting systems, the taking of action to ensure that any defa is explained and where appropriate, made good, and the development — I think this latter important — the development of an effective system of tracing a spouse or parent who h disappeared.

So, Mr. Chairman, I think there are a number of areas of improvement. The previous governme had intended to make changes and it was for that reason that we were establishing a committe I only wish that we had greater time to deal with this very important area because the prese government members voted against the previous legislation on the basis that the enforceme provisions were not adequate. There has been no change there, so I think that it is incumbe if we failed when we were in government and if the present government is failing, that some ve positive steps are taken. So I would like to add my voice to that of the Member for Transco and hope that the Attorney-General will take the suggestion in mind and ascertain whether or r he can develop some proposals that probably can be reflected in the law. I think it is very importa to indicate that there will be changes, real changes. It may be necessary to assure ourselves a those who are concerned about this, that that change will be taking place by way of it being reflect in this legislation.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Mr. Chairman, I have indicated that I have had this review under way within t department with respect to the whole system of enforcement of maintenance orders. I think v in our government, recognize the seriousness of the problem as do members of the previc administration. I believe there are a number of areas in which we will have to move when the rep is completed. A central registry is one of them. I don't believe that we require legislation, that th is more of an administrative procedure to be taken. I think we have to move in the direction automatic enforcement of maintenance orders, particularly giving priority to those parties who a receiving social assistance, and we have to look towards overall improvement in the administrati of the collection of maintenance orders. As the Member for Transcona indicated, the enforceme of out-of-province maintenance orders is an important area to be looked at.

I certainly cannot, at this point in time, as did the previous government, cannot make commitment to the province assuming full responsibility for the collection of maintenance orde and the payment of same. So, Mr. Chairman' I am simply not authorized to accept this particu amendment.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Mr. Chairman, I'd like to move it —(Interjection)— Yes, it does, right in front him.

MR. CHAIRMAN: Mr. Johnston.

MR. JOHNSTON: Mr. Chairman, what the honourable member is putting forward is one that . You know, I think he has to realize that you are talking a lot of money here. If he has the sa information that I was given, he has been reading the outline of the matrimonial and child supp insurance plan, new law on maintenance that was done by Alberta. Unless, and it says here: "I feel that no amount of improvement in mechanisms for enforcement of maintenance would h the needy spouse or family, because there often is no money to be collected from the other spou One of the most disturbing problems is the enforcement of support orders raised in cases wh the husband remarries, etc. We believe that the reform law of support as between a husband a wife would not be fully effective and indeed would have rather limited effect on the main proble

'hich appears to be money."

Just the figures that they give of the collections — less than $10,000 a year was 42 percent f the moneys . . . collected. Between $10,000 and $14,000 was 26.7; $15,000 to $19,000 — 17.5; nd $20,000 to $24,000 — 7.1; and $25,000 — over 6.1.

But the program that the honourable member is presenting is very very expensive and something iat can't be considered in this bill, it has to be considered by Treasury. In 1975-76 the assistance iven in Alberta was $52,700,000, and they collected $2,600,000. Now, to ask us to approve legislation f that within a piece of legislation without it being studied by Finance and Program, and everything iat the Attorney-General is doing, it just can't possibly be done.

IR. CHAIRMAN: Mr. Pawley.

IR. PAWLEY: Mr. Chairman, I would just like to suggest that the costs would not be as exorbitant s the Member for Sturgeon Creek has indicated, because when he deals with those that have efaulted, spouses defaulting, the mothers or wives in those instances would be already drawing ɔon the Treasury, or would shortly be drawing upon the Treasury for social assistance. So I suspect iat the costs overall would not vary a great deal under the proposal introduced by the Member ır Transcona, and the present situation I think all that would happen in the Province of Manitoba that there would be a rationalization of the process so that payments would be made automatic y the Treasury, rather than being after the fact, the social assistance paid after the fact. Here ıe payments would be automatic.

So to that extent I think that any difference would be much less than that suggested by the ıember for Sturgeon Creek.

R. CHAIRMAN: Mr. Parasiuk.

R. PARASIUK: Mr. Chairman, I read that material and I saw the dollar magnitude in Alberta and struck me that that is the amount that is being paid right now by government. That is the amount iat is being paid right now by government. Unfortunately, very little of it is being recovered. It's ɛing paid as social assistance, and the government isn't pursuing the collection of that oney.

Now' what I'm saying is that if in fact the percentage of that money was paid for as an interim ayment, as maintenance, and the Crown pursued those individuals who could in fact pay, the public ɔuld, over the course of a year, save money rather than spend more money. Because the way is right now the applicant spouse doesn't have the means or the savvy, or what have you, to ırsue the person, the spouse that should be paying maintenance. Now, I know that you can't squeeze ood out of a turnip, and there will some instances or many instances where people will not, in ct, be able to pay maintenance. At that stage, at least when that is determined, fully, then surely ıcial assistance would take over then.

R. CHAIRMAN: Mr. Johnston.

R. JOHNSTON: Mr. Chairman, as the member says, you can't get blood out of a stone. I am ɛll aware that this is what they are paying.

R. CHAIRMAN: Mr. Spivak, on a point of order.

R. SPIVAK: Mr. Chairman, the amendment before us happens to be a money bill and I believe is out of order.

R. PARASIUK: I checked with the legal counsel as to the wording of that particular amendment at I put forward . . .

R. CHAIRMAN: No, but you're asking the government to spend more money.

R. PARASIUK: I have put that forward; it's in the form of regulations. I checked it out specifically d I asked legal counsel on it, and my impression, having talked to him, that it was in order. I afted it in consultation with the legal counsel.

R. CHAIRMAN: Mr. Johnston.

R. JOHNSTON: . . . that there's 50. He is quite right. The province is spending money now, but carry on with this report, it's a suggestion of different ways of using that money to set up a

particular scheme to be able to pay for it, such as an insurance scheme, and those are the thing that are being looked into. You just can't place it in this legislation that fast overnight. I think th previous government was looking into it, and we are, too, and I don't know why you would it legislation without full reports.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, on the point of order, I would like to have a ruling from you. Th motion says: "The Lieutenant-Governor-in-Council may make regulations respecting th establishment of a central registery, interim payment by the province and maintenance to a lev of at least equal to prevailing social assistance, collection by the province."

Mr. Chairman, I suggest that this is a money bill and is not within the privy of this committe this amendment.

MR. CHAIRMAN: It's my ruling that the motion is out of order, because you're asking th government to spend money.

MR. CHERNIACK: I appeal your ruling, Mr. Chairman.

MR. CHAIRMAN: Committee must rise. Committee rise.