Legislative Assembly of Manitoba

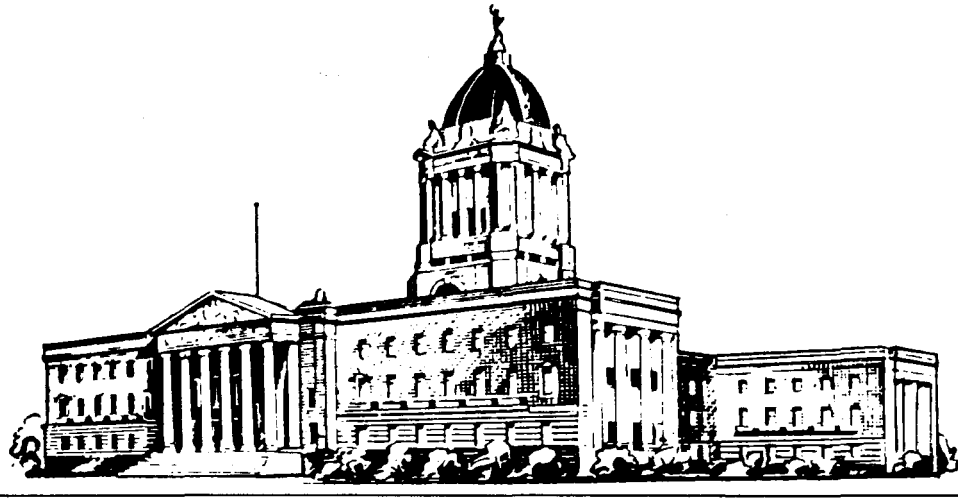
HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



TUESDAY, February 15, 1977. 2:00 p.m.

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TIME: 2 p.m.

MR. CHAIRMAN: Order please. Gentlemen, we have a quorum. The Committee will come to order. When we adjourned at 12:30 we had reached section 27 on page 130. Do you wish to discuss this in total or part by part? Mr. Adam.

MR. ADAM: Yes, I don't think I would say, "pass", I would like some explanation maybe from Mr. Silver or Mr. Goodman on the ramifications of the Minority Report, that is Commissioner Hanly. They have a separate recommendation of Commissioner Hanly on that particular section.

MR. GOODMAN: I take it that just deals with the unilateral opting out. Hanly's proposition, which is the recommendation of Hanly, is the same as, I guess, most of the submissions you heard from women's groups, that there shouldn't be a unilateral opting out, that it would have to be by agreement, with the consent of both parties, in effect.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Commissioner Hanly says that couples should not have the option of making the SMR apply only from the date the legislation comes into force, so that in every case the legislation would apply back to the time of marriage, that is, to all the assets going back to the time of marriage. And it says more than that, it gives general judicial discretion in all cases. I'm really not sure what it means except that it opens the thing up quite wide.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, my understanding and I could be incorrect on this, but I understand the SMR would apply to all marriages in the past, and that that is a recommendation of Commissioner Hanly. Am I correct on that? That if the legislation comes into force that all married people will come under this Act regardless if they've been married for 50 or 60 years past or whatever. Is that correct or am I wrong on that?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: It does, the whole SMR applies anyway to all marriages, no matter when . . .

MR. ADAM: Retroactively.

MR. SILVER: Retroactively. The question is only whether it should apply to those assets in a marriage that were accumulated between the date of the marriage and the date the legislation comes into force.

MR. GOODMAN: Yes, if you were married 15 years ago and the law comes into effect on, say, January 1, 1977, all of the assets that you have accumulated during that period, that's what Commissioner Hanly is saying.

MR. ADAM: Commissioner Hanly is saying that it should go back from the date of marriage.

MR. GOODMAN: Right, and there should be no unilateral opting out of that. In effect, the recommendation of the Law Reform Commission, the other Commissioners, is that — my example is: You've been married for 15 years by the time that this law takes effect and all the assets that have been accumulated during that period of time, either spouse may unilaterally opt out of the standard marital regime insofar as that period of time is concerned. From, let's say, those first 15 years of your marriage, and, in effect, the law, the standard marital regime would take effect only as of, say, January 1, 1977, or whatever date that the law comes into effect. And Hanly, he says that it should go right back unless there is an agreement between both spouses, otherwise . . .

MR. ADAM: . . . is that right?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: There's no distinction here between unilaterally opting out, in that limited sense, or an agreement by both. That isn't the issue here, the issue is whether . . . I mean as far as the recommendations are concerned only one party, by giving notice, can opt out. It isn't necessary for both to agree, but the only question is whether even that should be possible. And his conclusion is that the application should be back to all assets back to the marriage, universally. So that whether it is one party that opts out unilaterally or whether it is both parties who agree together to opt out, they would not be able to do it.

MR. ADAM: They would not be able to do it if we support the minority.

MR. SILVER: Under the majority they can opt out if one party wants to. I think the Government is suggesting that, in response to a number of briefs, that the opting out should be only by agreement of both, rather than by one.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Yes, just a follow up on Mr. Silver's comments. As I see it Mr. Hanly isn't opting for either the unilateral opt out or the bilateral opt out.

MR. SILVER: No.

MR. SHERMAN: The Commission is recommending that unilateral opting out be permitted. Commissioner Hanly is recommending that that concept not be considered at all, that once a couple is married the standard marital regime comes into effect and it applies universally and retroactively to all couples already married. There's no question of opting out, either with mutual consent or by individual option.

MR. GOODMAN: I don't read it that way.

MR. SHERMAN: But, he does go on, I think, in my view, to undermine the position that he takes with the qualifying clause at the end of his recommendation, "but any sharing upon termination of the SMR should be determined upon general judicial discretion in all cases."

A MEMBER: You can't have it both ways.

MR. GRAHAM: He has also suggested a saving clause at the end, "Notwithstanding anything contained in this Act the Court may in extraordinary circumstances, and in order to avoid great injustice or great hardship, vary the terms of any marriage contract or award, more or less than 50 percent of the shareable assets to any spouse."

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, does the recommendation of the majority consider the retroactivity?

MR. SILVER: Yes.

MR. ADAM: They do?

MR. SILVER: And then they don't opt out.

MR. ADAM: As far as opting out is concerned. What I'm trying to determine here is whether we are speaking of what happens to the assets from the day legislation is proclaimed, or what happens to the assets prior to the proclamation, that's what I'm trying to clarify?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well, that's the very thing that Commissioner Hanly disagrees with. The majority of the Commission says that parties should have the right to decide that the SMR should not apply to assets that they have gathered after the marriage but before the Act comes into force, before the Act is proclaimed. But Commissioner Hanly thinks they should not be able to do that, that the SMR should apply universally to everyone in the case of assets gathered before the Act comes into force.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think that what Mr. Hanly and also Mr. Gibson to some extent is saying is that in present legislation that we have, in very many cases, in fact I know of no cases to my knowledge where we haven't put some saving clause in whenever we introduce retroactive legislation — and I refer to the grandfather clauses that are brought in in labour legislation and things of that nature where we have made things retroactive — but we have always recognized the validity of existing legislation that has occurred up to that point. I think legal counsel may be able to give us some instances of legislation that has occurred that has been completely retroactive without any opting out clause, but I have to say that I don't know of any. Most of them have had a saving clause of some nature or another in there to recognize existing circumstances. Can we have the benefit of legal advice on that, whether you know of any cases where that has not been done?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Human Rights' legislation, right off the bat, eh?

MR. ADAM: What about *The Dower Act?* .

MR. SILVER: *Rent Stabilization Act.*

MR. PAWLEY: How was *The Dower Act* when it was introduced processed? Was there no opting out of that?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well, there is no opting out as such, but there is provision for release of dower which amounts to the same thing I suppose as opting out. But I would say that there are examples of legislation where the application is retroactive without any kind of saving provision. I'm pretty sure there are, I can't name any legislation but I think we could certainly find some.

MR. GRAHAM: Well, I think, Mr. Chairman, that where that occurs you will find an appeal procedure of some nature or another involved in the legislation.

MR. SILVER: Well, it wouldn't necessarily be an appeal from the retroactive aspect, if you know what I mean. It might be an appeal on the grounds that the subject matter in question perhaps does not qualify, is not subject to the Act; but if it is subject to the Act then, you know, it wouldn't be a case of appealing the retroactive aspect. If legislation makes it retroactive and if the subject matter is something that is subject to the Act then it's retroactive. It applies to that subject matter retroactively.

MR. GRAHAM: Mr. Chairman, I think somebody mentioned the Rent Stabilization as an example, but in that Rent Stabilization we recognized that there are extenuating circumstances and we have the Rent Appeal Board which is set up to allow for those types of things to occur. Again I say that I don't know of any legislation that doesn't have some avenue of appeal or escape if it's retroactive in its nature.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I'm concerned that if we leave an escape route here, Mr. Chairman, that I think that really insofar as bad marriage situations, you are probably only dealing with two, three, four percent, a very very small minority of total marriages, and if we allow that type of escape route I'm afraid the escapes will take place by one of the spouses in those situations to avoid responsibilities under this legislation unilaterally without mutual agreement, and that those marriages that there is no concern there won't be any feeling of any need for this. What worries me is that the only ones that will take advantage of that type of escape route would be those involved in marriages that are in the process of strain.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Could I ask through you, Sir - I'd like to ask the Attorney-General what is he referring to as the escape route. Is he referring to the unilateral right to opt out, or is he referring to the secondary clause of Commissioner Hanly's Recommendation, because the two subjects seem to have got mixed together here and I may be wrong, but I thought that in Mr. Graham's reference to an escape route he was going to explain what Commissioner Hanly had meant in his recommendation.

MR. PAWLEY: Well, I was actually thinking in terms of the unilateral contracting out, although I'd be somewhat concerned at the same development from Commissioner Hanly's proposal, because here he is seemingly trying to have it both ways. It applies universally and retroactively, he says, but at the same time he allows general judicial discretion, doesn't he?

MR. SHERMAN: Yes.

MR. PAWLEY: So he is proposing SMR with judicial discretion, and I don't think that's much of a step forward from where we are now in Manitoba law.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Mr. Pawley, first I thought I didn't understand it and maybe I still don't, but upon rereading the last part of Commissioner Hanly's sentence here, I think that the judicial discretion that he proposes is intended to refer only to the aspect of sharing of the proportion that is to be shared, whether it's to be 50-50 or some other proportion, perhaps with a view to balancing : out - I'm not sure about this, but perhaps with a view to balancing out the first part of his statement, the effects of the first part of his statement, but I don't know if they're really related.

MR. PAWLEY: But I don't see why it should be applied universally and retroactively if a couple together agree that they don't wish this applied to them. Why would we wish to apply this universally to even include couples who wish to mutually contract out? You know, I can't understand his reasoning, why we would want to impose this upon a couple who together agree that they don't wish this law applied to them. So then this really doesn't give the clear picture of what he is proposing then.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: I think maybe Commissioner Hanly's reason for judicial discretion is on the top of page 90 where he says, "I see no good reason to retreat from this earlier position. There may of course be exceptional conditions under which the resulting 50-50 sharing arrangements would be grossly unjust." Now I don't know what those conditions would be, but he says, "This could be rectified through a general judicial discretion as outlined in Gibson and Hanly's dissent on pages 100 and 101."

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, Commissioner Hanly is saying, it seems to me, what a lot of people have said, formally and informally, in and related to these Committee hearings since this study entered the public arena. It's been suggested by many persons on the Committee and appearing before the Committee, and in informal conversations that I've been involved in, that there certainly could be cases of the type referred to by Commissioner Hanly and by Mr. Graham, and that a 50-50 split is not necessarily fair either to one or the other party. But we have moved beyond that consideration to accept the 50-50 proposition, and if we find ourselves inclined to the Hanly view then I must agree with the Attorney-General, that what is being sought here is the SMR with judicial discretion.

I think that if you look at the distance that we've come, if it can be described as a distance, I think we've surmounted that potential obstacle already. We've taken the view that the 50-50 partnership, division of property, — it seems to me anyway that there's been a consensus that that's an acceptable principle.

The Hanly view moves sharply away from that principle. It says there is no 50-50 concept, it says that there will be judicial discretion. So I wouldn't want to get bogged down too much in the consideration of the Hanly position although I respect the view that he has formulated.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I think we may be losing sight of this, that a couple can, by mutual agreement, opt out of the whole thing or any part of it. The only thing that the Commission is saying in its majority report is that in this case you don't need the agreement of both to opt out of this aspect; one alone, of the two, can decide that he or she doesn't want it to apply to his other assets and can unilaterally perform this function of opting out. But if we go away from this unilateral opting out and require the agreement of both, then the general principle of both being able to opt out covers it. So, we're not really putting in anything new.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: I seem to be getting more confused here by the moment. I was under the impression that the Majority Report here gave a six month period during which time the two members to the union can assess and get legal opinion and then one can unilaterally opt out. Is that correct?

MR. PAWLEY: Under the Commission Report.

MR. JENKINS: I'm talking about the Majority Report, I'm not talking about the Minority Report. Now, the thing that I'm not quite clear in my mind now, is that just prior to the Act coming into force, the assets that were accrued before that, or what happens to the assets that accrue after that, do they become just like a standard marital regime?

MR. SILVER: They're automatically locked in.

MR. JENKINS: They're automatically locked in.

MR. SILVER: Yes.

MR. JENKINS: Oh, fine then. Well, speaking to the recommendation that is here I find nothing wrong with it except the one portion here with the unilateral opting out. I certainly don't buy the unilateral opting out because I think that you're going to have here perhaps more ammunition for people to start arguing over what assets they have accrued over this period of time, and if they have been living together for 15 years quite happily, as happy as two people can live together, I don't think that we should be giving them now some food for thought hereto sit and ponder for six months and maybe get into a hell of a ruckus over who is going to have the assets that have been accrued in the first 15 years. And so I would say I would go along with it if they both want to bilaterally opt out, fine I would go for that, but for a unilateral opting out by one or the other partner, no, I'm certainly not in agreement with that.

MR. CHAIAN: Any other opinions on that point? Mr. Sherman.

MR. SHERMAN: Well, my opinion is not entirely finalized on the point, Mr. Chairman, but there's still some questions in my mind about it. I accept the concept that once the legislation was proclaimed that from that day forward everything in the SMR would be shared on a 50-T0 basis and there would be no such thing as opting out. In other words, there is no opting out into the future. What this proposes is an opt out into the past for those who want to exercise it, on a unilateral basis within a six month period. I'm troubled by the fact, and I hesitate to put the

thing on a personal level, but I would say, for the record, Mr. Chairman, that I would have personally no intention of exercising my option to opt out, and I don't mind saying that for the record. But I don't think I have the right to take that option away from other people, to say that those who are already married, those moving into here from other jurisdictions, do not have the right to make that decision for themselves. I know what my decision would be, I wouldn't opt out, but they might want to opt out.

MR. ADAM: Including your wife?

MR. SHERMAN: I can't say whether my wife would want to opt out or not. That's what troubles me about it. The Law Reform Commission, the Chairman Mr. Muldoon, spoke to us about the Commission's desire to avoid what he called, and what the Commission referred to as inflicted equality, and this was part of their reasoning for allowing a unilateral opting out right for the first 147 05 15 02 77 SRO MCW ./ six months after the legislation came into effect. And I still find that question bothering me and I find it unanswered to date, whether or not by insisting on only bilateral opt out procedures we are not engaging, in effect inflicting equality on marriages that may be perfectly good marriages and perfectly good arrangements between the two parties at the present time, and that may be put under unanticipated strain by this kind of a provision.

The other question I have is what about the people who are about to become married? They, in fact, have the right to opt out. All they have to do is say, "No, I won't go through with it, I won't get married." That is a de facto opting out, but you're not permitting the same right of opting out to the people who are already married. You're permitting it to those who are contemplating marriage, that troubles me a little bit. Certainly I think that every marriage, once the law comes into effect, every marriage from then on should be governed by the no opt out regulation unless the decision is mutual and bilateral. But I'm concerned about the marriages already in existence and I don't know that we have the right to instruct those marriages and those people as to how they should live.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well my concerns are the same as Mr. Sherman's except I see the other approach as one that is more likely to bring about the type of situation that Mr. Sherman is worried about because if we have one of the parties unilaterally opt out, then I wonder how the other party, who obviously refused to agree mutually to the opting out, then, in fact, that second party has had a situation imposed upon him or her by the unilateral opting out of the other, and I can imagine the strain that that type of situation would create. I think that the principle of the legislation is good and I think that we ought to wish that there would be agreement together, a co-operative agreement, on the part of both the husband and wife if they opted out rather than allowing the one party, in fact, to unilaterally impose a different regime on the other party ' which in fact would be the situation of the unilateral opting out as opposed to mutual opting out. And for that reason th results I fear would be as Mr. Sherman painted them, but approaching it from the opposite direction.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think we have only looked at, and I don't like the word "opting out" as a phraseology, I think that what we are looking at here really is if we, by retroactive legislation, impose on a person a different set of standards than those that he entered an agreement on, are we going to give that person, either unilaterally or jointly, some form of appeal from the circumstances that we have imposed on him by that legislation? I know if society in its collective wisdom imposes a penalty on a person and incarcerates them for a two-year period or a life sentence, even under those conditions we allow that person the right of appeal. It seems to me that some place, somewhere in the legislation, if it materially affects a person, either beneficially or otherwise, I think that we have to give a person the opportunity some place to appeal the decisions that we, as legislators, impose on them. Whether it be to his advantage or his disadvantage I think that we should give that person that right of appeal. Now, whether it be to a court or what I don't know, but I think there has to be some vehicle somewhere that gives that person a basic right that we have traditionally written into any legislation.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: The only concern that I have, and I'm sorry that I had to step out, the second concern which I have in connection with the unilateral opting out again relates back to the fact that I can just see what group would opt out, it would be that very very very tiny minority that would unilaterally opt out. There could be a lot of mutual opting out because of agreements together, but anybody that would unilaterally impose a different formula upon their other spouse than the law introduced would seem to me to be one that would tend to be in a type of marriage that shaky — obviously would be pretty it would seem to me to be, if there couldn't be a mutual agreement. So that I would be concerned that the unilateral opting out would take place with most of those marriages that we are trying to aim at insofar as this legislation is concerned. Again, in three to four percent we might find a 50 percent unilateral opting out in that little tiny group, and the remaining 97 percent of the marriages I suspect that there wouldn't be any opting out except for mutual optings out, so I'm concerned about the practical consequences of just who would be unilaterally opting out and imposing the old law onto their spouse against their spouses wishes obviously, or else the spouse would have gone along with the opting out.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think we aren't maybe looking far enough and I have to here profess ignorance of all the various religious practices, but I would just ask a question, not knowing the answer. What would occur if we imposed a SMR on a Hutterite couple? Is there any legal significance in that? I don't truly know the Hutterite religious marriage ceremony at all.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I would assume that we wouldn't be. First I would assume that if they did find anything repugnant that they would mutually opt out, but secondly, I assume that a Hutterite community that ail is owned in common, and there are no personal assets, so there wouldn't be anything to divide, would there?

MR. GRAHAM: I just used that . . . are there others? What is the practice in the Mormon or other religious

groups?

MR. PAWLEY: I don't know, now we have a religious authority at the end of the table, but I would again think that if we do have a religious situation and obviously if a couple share in a particular faith, and some way or other this legislation was repugnant, which I couldn't imagine but I suppose it could be, that

MR. SHERMAN: Mr. Chairman, a question to the Attorney-General. He's concerned about a particular little group which he describes as probably a very small minority, people who for reasons ranging from self-interest to meanness to viciousness, would take advantage of this provision. I'd like to ask the Attorney-General whether he does not think that same group, those same people, would take advantage of it if the legislation were formulated and a proclamation date were to be set. If those same people knew that this legislation was going to be proclaimed on July 1, 1977, just to take an example, what would stop those people from exercising their opt out rights right then, by separating from their spouses right then. I don't think we're going to be able to control that kind of meanness of temperament no matter what we do with the legislation.

MR. PAWLEY: Yes, except that you would have, I would think, a situation by which those of that particular temperament, they themselves probably would tend not to wish a separation. It is probably their very meanness that leads to the other spouse wishing a separation.

MR. SHERMAN: If I could just ask a supplementary question. If they knew that as of July 1st there was no way that they could retain what they thought, in their own selfish way, was their full entitlement, in terms of the property acquired during the marriage, if they were still married at that time or if they were still living together at that time, if the SMR was still were still intact at that time, why would the separation not take effect in a de facto sense on the first of March so that that individual, whom we're considering, could retain his or her holdings? Is that not in effect opting out unilaterally?

MR. PAWLEY: Well, it is true what would be taking place there would be a much greater decision on the part of that spouse, it would be a decision to unilaterally try to separate, separate the marriage, rather than just to opt out of this particular type of SMR, and thus, I would think that the instances and the numbers would be much fewer and it would be in the latter. Certainly there may very well be some instances of that, but that person is certainly going to much greater extremes, and thus I would think the numbers would be fewer following that route than if we allowed anyone over a period of time to just, on their own whim, opt out regardless of what their fellow spouse thinks or feels.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, on this question. What happens to the present separations? What happens if there's already a separation?

MR. PAWLEY: It is my understanding that it would not apply to existing separations nor to existing litigation, parties in existing litigation, as per certain litigation according to *The Interpretation Act*. The existing separations, it would not apply, would it, if we used that word that we referred to earlier as maybe one that was necessary "co-habitation".

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I think, in the case of parties that are in a state of separation at the time the legislation comes into force, I think this would apply, the SMR would apply to their assets because they are married and the legislation will apply to every marriage, but Mr. Pawley is bringing in another matter, the matter of pending litigation. If there is a case that is before the courts, which is a different thing from just a case that is in a state of separation, now where a case is before the courts and some legal aspect is being dealt with by the courts, which legal aspect would be changed if the new legislation were in effect at that time, and I say that that case would be decided on the basis of the old legislation, but that's a different thing.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Isn't there some inconsistency there because we have recognized on several points throughout this submission that assets are distributed, etc. on the basis of the time when co-habitation ceased to exist.

MR. SILVER: No, well then this other thing we were just talking about, as to whether it applies retrospectively to assets accumulated prior to the legislation coming into force, that would come into play at that time.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: It seems to me, Mr. Chairman' we're in danger of setting up two classes of citizens here. The first class is the class that has already separated, their marriage has already broken up, or the group that is simply contemplating marriage, is just engaged. All those people have got certain rights. The people that are already married and have hung in there and have stayed married don't have the same rights and they're the second class citizen in this social frame. It seems to me that there is that danger. I'm not suggesting that I'm not prepared to be persuaded by the Attorney-General and I'm waiting for his eloquent and golden words to persuade me, but I'm not going to go down quietly, Mr. Chairman. I say that there are some considerations here that obviously have exercised other minds as well as our own, namely, the members of the Law Reform Commission, with the exception of Commissioner Hanly, and I am not entirely satisfied that we are all satisfied that this is justice. I agree that all marriages henceforward, that it is perfectly legitimate for a government to say, and for legislators to say, "Everything that happens from this day forward shall be subject to such and such laws of the land", but I am troubled when we say that this goes back and can affect things that were done before that without respecting people's individual rights. I, frankly, don't share the Attorney-General's fears that there would be a great rush to opt out. I know there would be that small group that he's thinking about and that would be painful for the affected spouses, the affected partners of that group, but I ask you whether it is not more painful to take away individual rights?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: When we discuss individual rights, though, it seems to me, as I thought earlier, that it involves

both ways here. We are allowing an individual to unilaterally opt out and thus deny to another individual the right to decide whether or not he or she wishes to accept the benefits of the legislation, that person loses that right, it seems to me, to indicate their preference for the standard marital regime, so that there is certainly a loss of right there on the spouse that finds his or herself being unable to accept the benefits of this legislation which I think we all stand by as to it being beneficial. And thus, I would like to have suggested therefore that any deviation from this legislation should surely be on a mutual basis rather than a unilateral, because, thinking of the Murdoch case I would assume that Murdoch would opt out immediately and Mrs. Murdoch would find herself unable to take the benefit of this law, which we say publicly and to the entire province, is law that we feel is good, it represents equal partnership in marriage, we're going to deny to Mrs. Murdoch the benefit of this legislation simply because Mr. Murdoch on his own decides to opt out without consultation, without agreement, from Mrs. Murdoch. So that Mrs. Murdoch is left in the same unfortunate position, type of position, she was in before, without right, in worse position because she knows that there is law that has been sanctioned by the provincial community which she is no longer able to take advantage of. That worries me a great deal in that case because we're not talking about one, but I think we would probably be talking about a number, and there would be the hardship cases where this would happen. Certainly the marriages where there is little friction or difficulty this is not going to happen because there will be either mutual staying in or mutual leaving. But where there is difficulty we are going to allow one of the two parties to decide unilaterally the road which that marriage is going to take in the future, even though it may be a road that we have indicated, as representatives of the provincial community, we feel is not the best type of arrangement.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, it seems to me, Mr. Chairman, and I appreciate the Minister's remarks, that there are two flaws in that line of argument. One is that, in my view, Murdoch would opt out now if he were in Manitoba and he were aware that this Committee on Statutory Orders and Regulations was meeting and considering this kind of legislative change, Murdoch would opt out now — Interjection — By throwing his wife out, that's right, and there would be nothing we could do to prevent that. So the Mrs. Murdochs of the world, it is only the future Mrs. Murdochs of the world who are going to be protected, we can't protect the Mrs. Murdochs that have already been created. And, number two, the second flaw, it seems to me is that — at the risk of being repetitive — what the Minister is saying is that there are a number of bad marriages around and we can do something to correct them. My feeling is that by permitting the unilateral opting out option you are not taking away anything from anybody because the people who are going to be affected haven't got anything right now, they're at a bad marriage right now. So you can't argue that by permitting unilateral opting out you're taking something away from that woman, she hasn't got anything now.

MR. PAWLEY: It would want to give her something.

MR. SHERMAN: Well, exactly, so what you are saying is you want legislation that gives her something and I am asking you whether we can do that. We can certainly guarantee that all marriages in the future and all SMRs from the date of the proclamation are subject to this 50-50 division, but in the case of the mean spouse you are talking about, his wife or her husband has nothing now so you are not taking anything away from them by permitting unilateral opting out.

MR. JENKINS: Mr. Chairman, we seem now to have come down to what is the nub of this legislation, what it is going to do, and I must say that I do have to share the concerns of the Attorney-General here and it may be quite true what Mr. Sherman says, that we are not going to do anything for the Mrs. Murdochs, but my worry is, and I'll state it again, that by leaving this option, and leaving this option unilateral, that we are going to create in the minds of marital unions in this province the suspicion of one partner or the other that one is trying to pull something over the other. Now they have been living together, I think, as we stated, 15 years for an example, quite happily. Mr. Graham says that if we do adopt this section with unilateral opting struck out that there should be some appeal mechanism. I mean, if he has that concern for the appeal mechanism on one side certainly there should be an appeal mechanism for the partner that is being disbarred here from having an economic benefit out of that. If you are going to have an appeal mechanism within legislation, and I'm not too happy about retroactive legislation, but I can see that in this case here, surely when two people married X number of years ago, they went together in — what was it somebody said the other day — the euphoria of marital bliss, their heads were in the clouds floating for I don't know how many months afterwards, but eventually about a year later —(Interjection)— well, maybe Mr. Enns would like to play the music with it. But hopefully they got together and got married because they wanted to share the things of life together . . .

A MEMBER: They were in love.

MR. JENKINS: Well, maybe so, but I can say that I've been happily married for over 30 years —(Interjection)— Yes, I was in love too, but I can say that I would not opt out unilaterally and I don't think my wife would either, but there is always that small minority, I think, that we have to try and do something for. If we give this option for people to opt out, and if you are going to give it to one case, if we have a bilateral opting out that one then has the right to appeal, then I think you have to give the same option to those who are forcibly opted out of the sharing of that SMR that has accrued prior to the enactment and coming into force of this Act. So if you are going to have that you can't have an appeal legislation only if we adopt non-unilateral opting out; if you are going to have opting out unilaterally then there has to be an appeal mechanism and there has to be judicial discretion on the part of that person who is being forcibly taken out of that sharing of an asset. One way or the other I don't think it is a bad idea to maybe have an appeal mechanism, and I would feel much safer with an appeal mechanism for those who have become part and parcel of a marital regime, the SMR, making an appeal on what a division will be, but for one partner to unilaterally say to the other after so many years, "Look, what we've accrued up to date is mine and it's mine alone and I'm going to keep it and to hell with you, and from now on we're going to share." I don't think that's

good for marriage and I certainly would not buy an argument such as that.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I'd just like express concern about the consequences of the unilateral. If we proceed on that route I think we want to, before we're finished, make changes to the *Devolution of Estates Act* and to *The Dower Act*. I think that in *The Devolution of Estates Act* we want to do something about that $10,000 limit to begin with, upping it possibly, and with *The Dower Act* we would want to maybe make some changes there too. It seems to me that in both those cases the only way that it could be done, and would be practical, would be to make it retroactive in the same way that's been requested here, because I don't think we could say, "Well it's a bad principle here," and do a different thing when we reach *The Devolution of Estates Act* and *The Dower Act* and I don't know whether Mr. Sherman would not make those Acts retroactive. Certainly I think every amendment in the past, to those Acts, have involved retroactive legislation.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: I'm not sure I follow the Attorney-General correctly, and that is, he's stating that you would change *The Devolution of Estates Act* to make it retroactive, and would that apply to cases that have already been settled under that?

MR. PAWLEY: No, it wouldn't apply to anything presently settled, but it certainly would pertain to existing marriages. Many of the briefs which we received, and I think they were right, that *The Devolution of Estates Act* is in bad need of updating, that the present business where the first $10,000 of an estate, where there's no will, goes to the wife and the remainder is held in trust. I think it's one half, and one half, and one third if there's more than the one child, is a provision I would think we would want to change and if we did change that — and I have thoughts when we arrive at that as to some suggestions for change — I don't think we would want to say that existing marriages can opt out of *The Devolution of Estates Act*. If they want to opt out of *The Devolution of Estates Act* then they simply make a Will.

MR. GRAHAM: That has no bearing on this though, has it?

MR. PAWLEY: Well, I think it is the same issue of retroactivity though, *The Devolution of Estates Act* would be retroactive.

MR. GRAHAM: I can't see how it would be retroactive.

MR. PAWLEY: It would pertain to all existing estates, all existing estates in Manitoba where there is no Will.

MR. GRAHAM: Those that are still held in abeyance?

MR. PAWLEY: Yes.

MR. SHERMAN: Not the ones that have been settled.

MR. PAWLEY: Not the ones that have been settled, but in all existing estates, there could be a death the day afterwards, two days afterwards, the new legislation would apply to them if there was no Will. If it says it applies to all existing marriages, that would apply to all existing estates.

MR. GRAHAM: Mr. Chairman, I've gone through the *Hansard* of the November 16th meeting with Mr. Muldoon here and I don't think we, at any time, really got into the unilateral opting out with Mr. Muldoon at that time. What he has in the report doesn't contain too much material, but I would like to refer you to page 157 of the Working Paper which was a little more detailed, and I have to say that at that time my reading of the Working Paper suggests that at that time they were agreed on the opting out process, and one of the reasons they gave, and I would like to quote from page 157: "During the course of our study we were reminded that some married couples of average to substantial means have made estate plans and arrangements for the disposition of assets in order to minimize the impact of taxation measures, which are in many circumstances contrary to the notion of marital partnership and sharing." Now that's the only mention they have made in there, but I don't know to what extent that has significant bearing on the marital relationship and the sharing. We haven't had the benefit of Mr. Muldoon's wisdom on this aspect of it at all and I was just wondering if we should perhaps have the benefit of further consultation with Mr. Muldoon on this particular aspect.

MR. PAWLEY: Well there was a strong desire to have Mr. Muldoon speak to this, I think it could be ar anged that he do appear again.

MR. GRAHAM: I don't see the significance of that, but that is the only reason he has given in that, as I read it.

MR. PAWLEY: In the example that you've shown me though, Mr. Graham, there would be no reason there why they would not mutually agree to opt out if it affected their taxation plans.

MR. GRAHAM: That's the only argument that I can find in there that . . .

MR. PAWLEY: And yet I'm sure 98 percent of those cases, if the taxation aspect was that important, the couple would just mutually opt out. But if you like we could call Mr. Muldoon back to further deal with that. I'm sure that he would slip over without any difficulty.

MR. GRAHAM: Well, Mr. Chairman, in the one period we did have with Mr. Muldoon, this aspect of the report was one that, as far as I can find, was not discussed at that particular time, and it appears to me that this is the one aspect of it where there does seem to be differences of opinion at the present time. It might be beneficial to get further clarification.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well, I certainly have no disagreement in calling Mr. Muldoon over and I'm sure that can be arranged with Mr. Silver for the next meeting. This might mean that we would require — of course, we could have him discuss this prior to the commencement of our meeting dealing with the report, and I'm sure we could arrange that if that's the wish of the Committee.

MR. CHAIRMAN: What is the wish of the Committee? Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, there have been various sections of this report that we have marked for

"hold", perhaps we could mark this section for review and continue.

MR. CHAIRMAN: Well what is your will and pleasure? We can attempt to contact the Chairman of the *Law Reform Commission* and see if he's available this afternoon or for our next meeting.

MR. GRAHAM: Yes, it might even be possible to get him this afternoon.

MR. CHAIRMAN: May we hold this over for a little while while a phone call is made and we can see if he is available?

MR. GRAHAM: Perhaps we can go on with the other recommendations.

MR. CHAIRMAN: Very well, we will hold then section 27, move on to section 28 on page 132.

MR. GRAHAM: That seems fairly straightforward.

MR. CHAIRMAN: Any problems with 28? Mr. Graham'

MR. GRAHAM: The only question I have here is, you would apply to the court, is that the court where the judgment is registered? I would assume that would be Family Court, would it?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: No, not necessarily Family Court, in fact, probably not Family Court, but that hasn't been decided yet. I myself envision that, under this Act, application could be made to — why does this say to appiy to the Court, application could be made to either the County Court or the Queen's Bench Court in the same way as the present provision in *The Marriage Settlement Act*

MR. GRAHAM: And that would just be a formality, would it?

MR. SILVER: Well, if by formality you mean there would be no trial and no argument against the application, I don't know, I suppose the other spouse theoretically could oppose the application.

MR. GRAHAM: No, but they have to jointly apply.

MR. SILVER: Yes, that's right, yes.

MR. GRAHAM: I was just wondering would that in effect . . .

MR. SILVER: I'm sorry, I was thinking about the next provision where one spouse actually refuses, i'm sorry.

MR. GRAHAM: Would that affect creditors in any way? They're the only ones I could foresee as opposing it and I couldn't see any valid reason for them opposing it even then.

MR. SILVER: I suppose it could affect creditors in some way, either way, I suppose it could affect creditors depending on who they're after, if they're after one spouse or the other. It might be to their advantage to have the judgment remain.

MR. GRAHAM: I would think it would.

MR. SILVER: On the other hand it might be to their advantage to have the judgment wiped out if they're after the other spouse, where the judgment is against the other spouse. However, I don't think the reconciliation would last very long in a situation of this kind because a new fight would start about applying to the court.

MR. GRAHAM: Two paragraphs down.

MR. CHAIRMAN: Are we then agreed on 28? (Agreed) Section 29. Mr. Sherman.

MR. SHERMAN: Mr. Chairman, section 29 in effect means you can't be tried for the same crime twice, is that right?

MR. SILVER: Yes. Also the SMR would start anew actually if they are still married and so on. So it starts from scratch again.

MR. SHERMAN: Right. Well, that's fairer, that's fairer, Mr. Chairman.

MR. GRAHAM: Come again.

MR. CHAIRMAN: Agreed? Section 30.

MR. GRAHAM: This gets a little technical.

MR. CHAIRMAN: Is that clear or would you like Mr. Silver to give you an explanation of it?

MR. GRAHAM: We need an explanation of that, I think.

MR. ADAM: Could we have an explanation Mr. Silver?

MR. SILVER: Well, all of these provisions that we're looking at now, I think, are simply methods of cleaning up the situation, ending off the existing SMR so that a new one can start, so that the application of the SMR can start anew, from scratch, without any entanglements of anything left over from the old one. Number 30 specifically refers to a case where they are reconciled and there is a judgment for equalizing payment and the parties are reconciled but the spouse who is to receive the payments under the judgment refuses them, he doesn't want to have anything more to do with it. I suppose he figures, well, we are reconciled and why should we worry about a judgment that you have against me. There can't be any more talk of you having anything against me or me against you, we're reconciled and we're together. But whatever reason he may have, he simply doesn't want to accept any more payments that normally would be due to him —(Interjection)— In (a). And if that continues for the space of one year, then the other spouse who doesn't want to be left hanging up in the air, she doesn't want the husband to come along later on, maybe ten years later, and say, "Remember this judgment? Now I want the money." She wants to clarify it, finish it off right away. So, all she has to do is give the other spouse notice and appiy to the court for a declaration that the judgment is to be considered to be satisfied as of the date of the last payment that she made and that the spouse accepted. That's one way. Or, under (b) she can pay into court the whole balance that is still due under the judgment.

MR. ADAM: How much interest?

MR. SILVER: No interest at all. Oh, yes, the balance of the principal sum and interest.

MR. GRAHAM: That's a pretty precarious way to live, isn't it?

MR. SILVER: Well, interest that would normally be payable under the judgment, presumably at the time the judgment is made. If the court says that the judgment can be paid off by

installments there will also be a provision for interest. I guess it would say, "the amount of interest would be

prescribed."

MR. ADAM: At the discretion of the court?

MR. SILVER: By the court, yes.

MR. CHAIRMAN: Any further debate on 30? Mr. Adam.

MR. ADAM: Could I ask a further question of clarification? Are we talking here of payments or dissipation of assets, squandering?

MR. SILVER: Pardon me?

MR. ADAM: Are we talking here . . . are we referring to the squandering of assets?

MR. SILVER: Well, no, although the judgment could have followed an application to the court made on the ground of squandering of assets, if you know what I mean. The squandering of assets could have been the original ground for the whole court application. Right now we are talking about the judgment.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, wouldn't it be simpler to say, "Look if you are going to get married again, you start all over again and any judgment that existed because of your previous marriage are null and void."

MR. SILVER: We're talking about the same marriage.

MR. GRAHAM: Wouldn't it be simpler just to say that without spelling out all these things in there?

MR. SHERMAN: We're dealing with the same marriage, aren't we?

MR. SILVER: Yes.

MR. SHERMAN: . . . reconciled parties . . .

MR. GRAHAM: They got married again.

MR. SHERMAN: they separated and then they have come back again.

MR. GRAHAM: The same two people have got married again.

MR. SILVER: No, no.

MR. GRAHAM: They haven't got married again?

MR. SILVER: They haven't been divorced.

MR. ADAM: They are just shacking up.

MR. GRAHAM: Oh, excuse me.

MR. JENKINS: You are bringing in a new element altogether, Mr. Adam.

MR. CHAIRMAN: Any further discussion on 30? Is it agreed? (Agreed). 31 . . .

MR. SHERMAN: Did we agree on (a) or (b), or both?

MR. CHAIRMAN: All of it.

MR. GRAHAM: Here we are back into that independent legal advice.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, could I ask a question through you of either Mr. Goodman or Mr. Silver. The legislation that we are proposing here, if these people resident in Manitoba, I'm not talking about non-residents because I want to clear this in my own mind, for residents of Manitoba, the time that this legislation comes into effect, and they have a marriage contract, and I realize that there are not too many of those in existence in this province because it is not the thing that seems to be in vogue in this country as it is some of the European countries; if a marriage contract is in existence and the legislation is as we are proposing it now, either unilaterally or bilaterally opting out, does that marriage contract still remain in force or what? Supposing it is a better contract than what we set up as a standard marital regime?

MR. SILVER: Their prior contract would not be affected by whatever they do under this legislation. What I mean is, if they opt out of this legislation they are still left with the other contract.

MR. JENKINS: They would have to mutually opt out of the S.M.R. and say, "We will remain in a marriage contract that we contracted X number of years ago."

MR. SILVER: Yes.

MR. SHERMAN: Under 31?

MR. SILVER: Under 31.

MR. GRAHAM: If they have a marriage contract they are automatically out of the S.M.R., aren't they?

MR. SILVER: No, they are given the opportunity to reconfirm their prior marital arrangement or marital contract and if they do, it governs; if they don't the S.M.R. governs.

MR. CHAIRMAN: Is that the same for marriage contracts presently in existence in Manitoba, a couple married in Manitoba, or does that only apply to moving in?

MR. SILVER: What you are saying is true but not under this provision, that is they can . . .

MR. CHAIRMAN: I think that is what Mr. Jenkins is asking. Have we got two different groups here?

MR. JENKINS: . . . residents of Manitoba, not for somebody coming in X number of years from now, or what? And they have a marriage contract.

MR. SILVER: No, this section we are looking at now applies only to people who come into Manitoba after the S.M.R. comes into force. As far as people who are in Manitoba already . . .

MR. GRAHAM: With a marriage contract.

MR. SILVER: . . . with a prior marriage contract, then this provision does not apply to them but there are other things that they can do. They can opt out of the S.M.R. entirely or by mutual agreement, but whether they do or do not, the S.M.R. does not actually nullify any previous agreement, except I would say that if there is any conflict, I presume it would be resolved in favour of the S.M.R. But they can opt out of this entirely and continue under the old arrangement.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: There is provision for unilateral opting out under this proposal.

MR. SILVER: Yes, just like any other case.

MR. SHERMAN: Is the Attorney-General satisfied with that?

MR. PAWLEY: With the first clause (a)?

MR. SHERMAN: With the fact that this proposal provides for the unilateral opting out option.

MR. PAWLEY: This applies in the case of the earlier mutual opting out, doesn't it, Mr. Silver, or there would be a direct contradiction between this and certainly what had been earlier.

MR. SILVER: Yes, this is consistent with the Commission's . . .

MR. PAWLEY: With their recommendation.

MR. SILVER: In their recommendation, right.

MR. SHERMAN: Once again we are into the unilateral opting out right. In this case it has to do with couples coming into the province.

MR. PAWLEY: Certainly my arguments would continue in 31 in the same way.

MR. ADAM: Where do you see unilateral for this?

MR. SHERMAN: In (b) and (c).

MR. ADAM: In (b)?

MR. SHERMAN: In (b) and (c).

MR. ADAM: But not in (a).

MR. SHERMAN: Well (a) doesn't have anything to do with it but (b) says, "If, within one year they have not mutually confirmed and if either spouse be dissatisfied that spouse may give the other written notice in simple statutory form, etc. etc."

MR. PAWLEY: I think that this is an area that would again be relevant to discuss with Mr. Muldoon since we have agreed to invite him over to our next meeting.

MR. GOODMAN: He's coming now.

MR. PAWLEY: Do you want to just carry on, Mr. Chairman, . . . 32?

MR. CHAIRMAN: I think we should, we've run into the same problem there apparently.

MR. PAWLEY: The same problem in 32?

MR. CHAIRMAN: 31.

MR. ADAM: We want to review that over again then, 31? We're holding it over for review?

MR. CHAIRMAN: I presume that we should do, that one and the previous one are so close together that they have to be taken together.

MR. PAWLEY: Are we down to 32 now?

MR. CHAIRMAN: Unless there are any other sections in there we can deal with, maybe 31 (a).

MR. PAWLEY: Is there any disagreement on 31 (a)?

MR. CHAIRMAN: It's straightforward, agreed?

MR. GRAHAM: The only thing in 31 (a) is that we seem to have some problem about independent legal advice.

MR. CHAIRMAN: That's the same provision there that we will use on the other one.

MR. GRAHAM: Yes, other than that there is no . . .

MR. SHERMAN: Subject to that . . .

MR. GRAHAM: Well, Mr. Chairman, are we now prepared to deal with 32?

MR. CHAIRMAN: Yes, (d) would seem dependent on (b) and (c), so we can leave that part too. We will then move on to 32, noting a dissenting opinion by Commissioner Hanly to 31. 32 then.

MR. GRAHAM: Well, Mr. Chairman, I think we are into a position here which Gibson and Hanly disagreed with, I'd like to know how the Attorney-General feels on this, whether or not the courts should have any discretion in the sharing of an estate. I think the intent of this legislation certainly points out to the courts the feeling of the Members of the Legislature, that we would like to see equal sharing but do we enshrine it in legislation and effectively tie the hands of the courts where there may very well be, in some exceptional case, a valid right for an unequal sharing. Do we want to deny the court the right to make a ruling on an exceptional circumstance?

MR. PAWLEY: The problem, as I see it, is when a court defines something as being exceptional and the degree of something being exceptional. What one court might feel to be circumstances not exceptional, another would consider to be exceptional. Then we get back into the whole question of degree and that's what worries me in connection with the allowance of discretion, particularly when you have provision that parties can enter into their own marriage contracts or they can opt out of this mutually. I don't know just what sort of extraordinary circumstances we would allow the court's discretion in, what one might consider to be extraordinary another might not.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, we're going to be setting up a unified family court which hopefully will stave off an awful lot of these circumstances. We sincerely hope that it will prevent a lot of divorce and separation. However, on the failure of reconciliation in a family court, one member of that marriage can unilaterally opt for the divorce proceedings. So we've preserved the unilateral opting out there and in that Family Court certainly there will be a lot of discretion used in trying to prevent divorce and separation, but if one member unilaterally opts out of that then we are saying that there will be no discretion used when you go to the finalization of the standard marital regime. That seems somewhat inconsistent to me.

MR. CHAIRMAN: Order please. I notice that the Chairman of the Law Reform Commission is in the room; I've also been advised that he can attend our next meeting next Tuesday morning. Do you still wish to bring up the subject now and to ask a few questions?

MR. SHERMAN: Does the Attorney-General have time to ask a few questions?

MR. PAWLEY: I apologize, Mr. Muldoon, I have probably created the problem here in that I have expressed

some disagreement with your respected Commission pertaining to the issue of unilateral opting out. I've expressed considerable concern about unilateral opting out, so there developed a desire to obtain your thinking in connection with this issue and the representations of the Law Reform Commission pertaining thereto and some comment pertaining to the minority report of Commissioner Hanly pertaining to that. Now probably we could just spend a few moments now before I have to leave and I must apologize because I had misunderstood. I thought we were going to invite you over next Tuesday and I am not fleeing the field just because you arrived and will be doing battle with some of the comments which I raised — for the airport in a few moments.

MR. CHAIRMAN: Mr. Muldoon, if you would take a seat at the end of the table by the microphone. The Committee was going through the recommendations of the Commission and had reached Section 27 on Page 130, carrying on to Page 131, and had become bogged down in its discussion of the six month unilateral opting out provision. There is some division of opinion between Members of the Committee and it was felt that the Committee would like to know the thinking of the Commission and perhaps some of the representations made to it in helping it come to an appreciation of the problem and probably a solution to it.

MR. MULDOON: Thank you.

MR. CHAIRMAN: By the way, before you continue, we found the same provision in Section 31 having to do with married couples coming into the province.

MR. MULDOON: Yes. Well, Mr. Chairman, the Commission itself was divided on this issue but not by such an even balance as it has been on other issues recorded in the report. Basically the thought here is that people who are already married, who may have done much for estate planning, who may have taken advice indeed for their estate planning or may have otherwise configured their property, their disposition of property, that it would be unjust for them to have a retroactive act passed to organize their affairs before they had an opportunity to organize them for themselves. Now throughout this report you will notice that the Commission was most emphatic about people being free to dispose of their affairs as they see fit. That's why our proposal for property disposition is called a standard marital regime, not a compulsory marital regime and not a monolithic marital regime, but a standard one so that people could vary that, they could have their own custom marital regime if they wish to. And so the Commission's view was that for those who have already made their dispositions, made their plans prior to the enactment of any law, it would be unjust to reach back into the past and say, - "You, whether you like it or not, we're heading up to 1977 when the law became this and it affects your past dispostions as between yourselves." That seemed to us to be unjust, so what we recommended was that, when and if the new law comes into force, people who are already married and living in Manitoba would have within six months to decide whether they would accept the standard marital regime for the past as well as the future, or whether they would accept it only from the date of enactment.

After all, there has been much discussion, over the past year at least, about the possibility of a new marital regime so that it seemed to the Commission that it's not unfair to say that from the date of the enactment of this legislation, here's the standard regime. And you must remember that those who are already married have less bargaining power than those who are merely contemplating marriage because they are already committed. The Commission thought that if the law said that from this day forward here is the standard regime and if you don't like that regime applying to your marriage, your property indeed, from the day you were married then you may give youi spouse a notice saying it is not going to apply to the property I acquired after marriage but before the law came into force, in which case, if there were then in such a couple, a split up, a marriage breakdown, there would be an equal division of the assets just as we

suggest there would be after the notice was given, after the law came into effect. Those assets would be caught by the standard marital regime unless they agreed otherwise. But if the spouse who had some expectation of doing better than that applied to the court, the court, we have recommended, would have a discretion as to the dispostion of those assets acquired before the law comes into force. Now I think if you read that you will see it makes sense, it's a little difficult to grasp when presented orally. A provision for those already married not to have this kind of equality, which the Commission recommends, inflicted on them by retrospective legislation but with a judicial discretion in the event that one of them indeed is oppressive. If one of them should be oppressive and the court decides that that person has been oppressive then we are not suggesting that the legislation shouldn't land on those who are oppressive but it shouldn't inflict equality, it should accord it.

MR. CHAIRMAN: Did the Commission suggest that that judicial discretion apply to all break-ups or only where there is opting out within the first six months?

MR. MULDOON: Only where there is opting out within the first six months. If the spouses, in effect, take no action to opt out, that is to say opt out for that time period prior to the enactment of the law but after they were married, then the Commission says, with all the publicity this has had, that's akin to saying we accept it, and so it should apply.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I wonder, Mr. Muldoon, if I could just outline some of my concerns prior to my departure, then I shall flee before you have a chance to answer, rebut. My concern is this: First I agree with you that there certainly should be a period of time in which the parties have opportunity to consider our legislation and to decide whether or not they wish this legislation, the S.M.R., to apply to them or whether they would wish some other type of arrangement. So, to that extent, I have certainly no disagreement. However, what does concern me is, first you used the words that you felt that a party to the marriage ought not to have a state of equality inflicted upon them; yet here I think we have legislation — thanks to a lot of difficult and hard work by the Commission we can be quite proud of — and I would sooner see an arrangement by which the parties would be required to coperatively together opt out of it. Otherwise, in fact what we are doing, it seems to me, by allowing one party to unilaterally opt out, is to cause that party to inflict upon the remaining party a loss of rights, benefits that we are providing by way

of legislation; so that, in effect, we are, through the actions of one party, one party to the marriage, we are allowing that one party unilaterally to determine by what law that couple will so order their affairs, their estate.

In practice what concerns me is that I think that in 95, 97 percent of the marriages there will be a mutual agreement but there probably will be in two or three percent of the cases a unilateral opting out where, in fact, there is some difficulty in the marriage relationship. And I would say to you that we might, in fact, be increasing that strain within the marriage relationship because one party can unilaterally at will opt out to the disadvantage of the remaining party, of an arrangement which we have indicated is law that we feel is critically necessary, equal partnership. I question therefore its fairness to that remaining spouse who, through no choice of his or her own, finds his or herself the loser of certain rights that we have introduced into legislation in the province.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Reasonable people can disagree, Mr. Chairman. It seemed to us, in view of the number of briefs which were submitted to us and people who spoke to us, and letters which came in to us, which wanted complete judicial discretion in the disposition of estates, the Commission came down, in fact, in favour, after much debate, of a clinical equal sharing with no judicial discretion. No discretion at all, it's an accounting problem in our view. But then we said there are people who will already be married or there are people who are married and who will move into the province, they may not choose even to move into the province, they may be transferred into the province — God knows how many RHOSP's, RRSP's or whatever, perhaps in a fit of generosity one spouse put all the property in the name of the other spouse, perhaps they don't have the same arrangements — whatever, they haven't been leading their lives up to now according to this notion. And so the Commission came to the conclusion that this would be occasion for judicial discretion. It's true that one would, by exercising the opting out provision which we have rnommend , one would be able to block a clinically equal sharing of property acquired from the date of the marriage to the date the legislation receives Royal Assent or is proclaimed. That's right, but we say in the event, though, that that's an oppressive arrangement and in the event that these two are in fact heading for a marriage breakdown, the one who is blocked from that benefit of equal sharing prior to the proclamation of the legislation may still ask the court to exercise discretion in awarding a portion of the other's estate. Still, still has a claim, isn't barred from a claim, but it isn't an equal sharing necessarily — it may be, the court may exercise its discretion in that way.

MR. PAWLEY: Excuse me, Frank. Would you not be back into the Murdoch situation there?

MR. MULDOON: I think it would be an unusual court these days, certainly in Manitoba since the Kowalchuk case, which would back into the Murdoch situation again. I can't guarantee that, of course, but I think it would be mighty unusual, mighty unlikely, especially if our recommendations were accepted and the legislation directed the court to consider the fairness of the distribution. The reason, of course, that the Commission backed away from discretion was, as I think I mentioned, Mr. Chairman, at our earlier meeting, the sad experience of the New Zealand legislation which meant that the economically weaker spouse inevitably lost and that's how the New Zealand legislation has now been interpreted by the New Zealand courts and there it stands until the New Zealand Parliament amends it again.

But, no, I think we will not again see a Murdoch case — I may be wrong in that but that's my educated guess.

MR. PAWLEY: I'm sorry I'm sorry that I don't think I can persuade the pilot to wait for me.

MR. CHAIRMAN: Tuesday ten o'clock. Do any other members of the Committee have any questions of Mr. Muldoon? Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I don't have any questions because Mr. Muldoon expresses the feelings and the position, on behalf of the Commission and himself, that I hold on this issue. I would like to thank Mr. Muldoon for coming and answering the few questions that the Attorney-General was able to put to him, and I'm sure the Committee looks forward merh m ch to dmeloping the discussion with him further next Tuesday morning. But I would have no questions of my own because I must confess that up to this point in our deliberations i share the same view.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, to get away from this six-month unilateral and bring to Mr. Muldoon's attention, a question that we have been tossing around here with quite a degree of confusion maybe, and that is in several places you have referred and suggested that independent legal advice oe sought by both parties, and coming from a rural area, and having been given the legal opinion that two members in the same law firm would not be independent legal advice, would this be considered a hardship in some areas in Manitoba?

MR. MULDOON: Well, Mr. Chairman, the Commission's view I think I can interpret to you. I can't always other than what is written in the report because we were not always in perfect agreement on everything, and we developed what we developed in writing there, and I think I can interpret this. The Commission's view was that independent legal advice meant two different independent legal advisors. That may be considered a hardship, but you know this isn't like getting something notorized, or getting even a transfer of land, which is a big transaction completed or signed. This is the sort of thing which the Commission thought would likely be a once in a lifetime type of arrangement between two parties. It is a matter of considerable importance to them because it has to do with their whole estate, and while the Commission realized that in some rural areas there may not be that many legal practitioners it thought it so important.

Let me give you an example, Mr. Chairman, of how the other thing works, where one is required to give advice, and that is on a dower release on a transfer of land under *The Real Property Act* of Manitoba, where the requirement is that the spouse who has the dower interest, the wife indeed not the husband — he is regarded to be more strong-minded by our *Real Property Act* than the wife. The wife is required to be advised in the absence of her husband so that the usual practice is that the couple come to sell the farm or sell the house or seii whatever it is they are selling and to sign a transfer of land, and if it be in his name, the property which is to be transferred, he

executes the transfer and then steps outside the office whilst the lawyer says, "This is a release of your dower rights, you won't have any dower rights anymore in this land once it is sold, the deal is made." There it may be difficult for a lawyer, unless he is asked pointed questions by the person he is advising, to do more than give that kind of general advice. He may indeed give true advice, he may say, "Yes this is an elimination of your dower rights, you lose your dower rights in this land because it is being sold. If it is to be sold you are required to sign your consent here." But that's about all which is said, and I think that's all the law probably requires.

The Commission envisaged more than a five-minute soliloquy by legal counsel. It envisaged something, well I couldn't put a time on it, but you know an hour, an hour and a half's interview, going over the ramifications, and our thought was that it would be most unlikely that people would do this more than once in a lifetime, but even if they did it twice in a lifetime, changed their arrangements one way or another, it would be a rare thing for them to do, it would be rarer than selling a house, it would be rarer than buying real estate or selling real estate, we think, it might even be rarer than making a will, we think. So that yes, there's the possibility that in an area where there are not many lawyers it might mean travelling a bit. It might mean that one would go to the local lawyer and the other would take the papers and go to a lawyer in the next town or village, or as near as possible, an entirely independent lawyer, to get independent legal advice. We thought this was important for people because of the importance of what they would be doing. They would be changing the disposition of their property. They would be changing it away from . . . , after all our recommendation is that unless one agrees otherwise one gets the standard marital regime. So, in effect, they would be changing away, likely, from some equal sharing arrangement, and that seemed to us sufficiently important that they should have independent legal advice, and if it's a rare thing in their lifetime then it may be that one of them may have to travel to the next town or so, to the nearest other lawyer, in order to get that advice and get it thoroughly, and thoroughly understand it. Our recommendation was that the lawyer certify that he had given that advice.

MR. CHAIRMAN: The Committee had noted the difference in the requirement in the *The Dower Act* and what is proposed here and had expressed the opinion that that inconsistency should be removed. However, they did see a possible problem if the independent legal advice provision was applied to *The Dower Act* provision. Would you care to comment on that?

MR. MULDOON: Only from this point of view, , and now I'll be speaking for myself and some other of my colleagues with whom I have spoken on the subject, but the Commission hasn't reported to the Attorney-General on that. I think that the provision should at least be equal in form, I think that it is just as possible to have a weak minded husband or a husband who doesn't know what he is doing, as it is a wife, and it would seem to me that it would be advisable that both, at least, should get the advice in the absence of the other. That's a form which has gone through, it would be the rare spouse, I think, who would say, "I've come all this way to the lawyer's office, the deal is on, my spouse has signed the transfer, but no, I'm not going to consent," and have a little row in the lawyer's office. That might be rare, but at least it satisfies the law if it doesn't satisfy reality, that a consent has been registered before someone who is entitled to certify that it has been registered.

So that, in regard to *The Dower Act* the only thing I would suggest is that the provision should at least be equal, and not have discriminatory provisions where the husband is entitled to sign before a witness only, but the wife requires advice, I think they both require advice. What little advice is required by *The Dower Act* I would suggest that that' at least, should be applicable to both spouses and not just the wife, I think that that should be equal. That may bear looking into, but there again, land transactions, dealing through the homestead are more frequently, I think, engaged in by people than what we would foresee would be a contracting out of the standard marital regime. So that you may say that people know what their dower rights are. I think that among tttthe people I've spoken to throughout the province there seems to be a better appreciation of what dower rights are than one might imagine from reading the technical language of *The Dower Act* , there seems to be a good appreciation of that. Perhaps it doesn't require independent legal advice, that is to say, with two different lawyers. Now that's an easy thing in the city, of course, where you have several law firms in one building and you can go across the corridor and get independent legal advice from somebody who is not associated with the first legal advisor. We recognize it could be a problem in the country, so that insofar as *The Dower Act* is concerned if it were equal it would be better, in my opinion and the opinion of some of my colleagues. Insofar as this is concerned we had foreseen two independent legal advisors on a matter as important as this.

MR. CHAIRMAN: Could I get just clarification of that, Mr. Muldoon. I take it then that you are not suggesting that independent legal advice be given to both parties when there is a *Dower Act* transaction, do I read you right?

MR. MULDOON: Not in the sense that we have recommended it for a contracting out of the standard marital regime, no, but I'm suggesting that it would be good under *The Dower Act* to have both parties be advised of what they are doing, each one advised of what he or she is doing in the absence of the other, that much at least, that's not much of a reform.

MR. CHAIRMAN: So you do not see the need for consistency in both of these cases?

MR. MULDOON: No, I don't. You have to ask yourself, I think, in a case like this how much hardship, how much travel, how much expense is tolerable and how much isn't. What I am suggesting, in relation to *The Dower Act* , would be some improvement in my opinion in that both the husband and the wife, who would be releasing dower rights, would be required to be advised, at least, what they are doing. At the moment, I couldn't speak on behalf of the Commission, but I would go so far as to recommend that the kind of caution which is given upon the release of dower interest should be framed so that it would apply equally to husbands and wives, and I would say that, at least, the kind of caution which is now reserved only for a wife should be applicable equally, because that at least has the spouse advised in the absence of the other spouse.

MR. CHAIRMAN: Thank you. Are there any further questions of Mr. Muldoon? Mr. Adam.

MR. ADAM: Mr. Chairman, through you to, Mr. Muldoon. I wanted to go back to the unilateral opting, a clause that the Law Reform Commission has recommended. In the briefs that this Committee has heard there has been overwhelming opposition to the position taken by the Law Reform Commission. There is oniy one major representation that we have heard that supported that position and I'm just wondering if the presentations that the Commission had received were similar to what we have received here, if you can recall

MR. MULDOON: Yes, I can recall Mr. Chairman, that some were, but not all. I can recall, if I can be an advocate for the moment and give the other side of the view, that the people who advocated no unilateral opting out provision asserted that if there are injustices ticking away like time bombs today, the legislation shouid attempt to cure them as well as those in the future, that the law shouldn't permit an injustice which is in being today or forming itself, gathering if you will today, to escape the salutory effects of the equal sharing provisions of the proposed legislation. I think that is the argument for those who say that there should be no unilateral opting out, that certainly was the argument of my colleague, Dr. Hanly in his dissent' and that was thoroughly canvassed by the Commission, and it is for that reason, of course, that we said, "Well that opting out wouldn't be a complete foreclosure of any rights in property acquired before the legislation would be proclaimed because one would presumably insert in the legislation some guideline to require the court to do justice in its discretion between the parties."

And that seemed to us to be as far as we wanted to go with discretion, because, as I said, other people came before us suggesting that property disposition should be founded entirely on judicial discretion, and we didn't go for that either. Those are the two polarities, I think, the ones who say, "complete, clinical, equal sharing by force of law from the marriage until the time the marriage breaks down, no matter when the legislation comes into effect," that's one side; and the other side said, "well like the New Zealand law, let the judge decide," and the Commission avoided both of those polarities, both of those extremes, in its recommendation. There were indeed some folk who suggested to us that there should be no option. After our discussion we could not, with rectitude, at least as far as we were concerned, make that recommendation, but we recognize that other people may wish to have it. I can tell you though that having met with my colleagues only yesterday, the Commission abides by its majority recommendation about the unilateral option.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I don't know whether Mr. Adam is finished or not, Mr. Chairman.

MR. ADAM: I'm not. I feel that the overwhelming opposition to that recommendation is really too much for this Committee to ignore, of course that will be up to the Committee, but the *Coalition on Family Law* were in opposition to that recommendation, the *Provincial Council of Women*, which presumably comprises 40,000 people, *the PC Women, the NDP Women, the Liberal Party, YWCA, the Board of Directors of Children's Aid (Western Manitoba). Brandon Action Committee on the Status of Women, the NFU, National Farmers Union*, and the only group that were supporting the Law Reform Commission's position, was the *Manitoba Association of Registered Nurses*. It was so overwhelming in opposition that we are a bit concerned how this came about.

MR. MULDOON: Mr. Chairman, if I may make so bold, that's usually a preview of somebody who is going to indeed say something bold perhaps to this Committee, if you will permit me and not hold me in contempt of the Committee. The Law Reform Commission considers itself certainly not a surrogate legislature by any sense of the word, but we consider that some of our duties are, to use the ideas of Edmund Burke, the great British parliamentarian of the 1700s, our position is somewhat akin to yours. We may hear recommendations, and yet if the recommendations do not make sense or justice to our thinking, then although we've invited recommendations we don't consider ourselves bound to pass those recommendations on to the Attorney-General in our reports.

I would repeat what I mentioned before, I don't know if again I am straying beyond the bounds when I say this, but we all hear recommendations from various interest groups and they are good and we're glad to hear them, but if you put the issue to your constituents, the people you represent generally, you might come up with a different answer. Our view of what we heard and the knowledge some of us have of life, with our various backgrounds, led us to the conclusion that it would be unjust to inflict something retroactively on people who had made their arrangements without any knowledge that it was going to become law. And that's the kind of thing the Commission regards as inflicting, not according

equality, but inflicting it. And that's why, as I say, Mr. Chairman, reasonable people no doubt can differ on this, but our reading of the situation, and of course what we are obliged to do under our statute, is try to get a reading on the public as well in formulating our recommendations, led us to the conclusion that it would be a greater boost to family discord not to have this safety valve, than it would be to have it. We think that with that, people may still stay together although the more materialistic may say "what's mine up to today remains mine subject to judicial discretion if we ever have a marriage breakdown", whereas it seemed to us that there might be some people who would be inclined on the eve of the proclamation of the law to do all sorts of crazy things when they might indeed become reconciled to the situation in time. That may be extravagant, I don't know, but what was apparent to us was the notion of inflicting an equal-sharing regime on people who had led their lives, had been married for many years, twenty years or more, up to the point the Legislature changes the law and say the change applies retrospectively, retroactively to you, even though you didn't know it was going to be changed. Retroactive legislation, you know, is one of the great anathemas of civil libertarians who say that people realiy should know what they are getting into and have an opportunity to deal with that and not have it sneak up behind them when they didn't know what was coming. I think I'm rattling too long now, but that's my full and compiete answer on behalf of my colleagues and myself for that recommendation.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Thank you. Mr. Chairman, I do have one question and I don't intend it to be as a leading question. I really want Chairman Muldoon's perspective on this for the Committee and particularly for myself, Mr.

Chairman, and particularly for those groups and delegations to whom Mr. Adam has referred. Mr. Muldoon, the basic argument that was advanced by those who opposed the Law Reform Commission's recommendation on the opting-out procedure in appearances before this Committee, if I can summarize it, was that to permit unilateral opting out would defeat the purpose, and I hope I am not misquoting the intent of most of the representations appearing in that argument, but I believe that it could be condensed as succinctly as that, that the unilateral opting-out provision would defeat the purpose of the entire legislation that we are considering here. I would very much appreciate your response to that.

MR. MULDOON: The short answer would be, "read the report I have signed" and that is my answer. The long answer would of course be to elaborate on that. I don't think it would defeat the purpose. Every session of this Legislature, when laws are enacted, you have transitional provisions, and that is what we regarded this opting-out feature to be, a transitional provision to permit people to become accustomed to it or to avoid it from in the past. With the judicial discretion, now, assuming that a marriage breaks down finally, and assuming that in that now broken-down marriage, the unilateral option has been exercised, with judicial discretion, it seems to me, and with a guideline in effect to direct the Court's attention at the whole scheme, the whole Act would be there, the legislative intent would be apparent in the Act, and with a sufficient guideline, we think that for those marriages already in existence at the time of the legislation, the judicial discretion would a kind of safety net. We didn't foresee complete and unfettered judicial discretion because that wouldn't really be giving the Court guidelines as to the legislative intent. Even in New Zealand where the intent, I thought, was well-expressed, it didn't work. But it would, for those marriages which are already in being because, you see, any gains acquired after the proclamation of the legislation would still come for an equal distribution, an equal sharing, under the SMR, unless of course they had contracted out. So it wouldn't defeat the whole purpose of the legislation. At the very worst you would still have the possibility to invoke equal sharing for any property acquired by the married couple after the legislation came into effect, and there would be a judicial discretion to divide property in some equal and fair way, which was acquired before. No, our view of course is that it would not defeat the whole purpose of the legislation but it would be a transitional provision to allow the community in effect to move into the new kind of marital regime, allow the whole community to move in, in a transitional way.

MR. SHERMAN: Thank you.

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

MR. F. JOHNSTON: During the Legislative Council, I asked what about marriages that are already separated? If those that are separated are in, as the Minority Report suggests — and there have been judgements, or whatever it may be, as to the amount of money paid to spouse or maintenance or anything — would those arrangements all have to be changed?

MR. MULDOON: No, I think that if the marriage were already broken down, if the dispositions such as they were, were already made, our assumption was that those stay. That's unfortunate but, you know, every time you enact legislation which can be considered a reform, you can't reach back a century and do justice a century earlier, or even fifty years earlier, usually. Arrangements which were already made would stay. But let me say this, that here is a couple who, at the time the legislation would be enacted are separated. They are not yet divorced — of course, divorce dissolves all their bonds — but they are separated. One might well say that one of them, perhaps the one who stands to gain most, would exercise the option and the other would say, "but that's all the property we have acquired because we are now separated". In a situation like that, if there were an application to the Court, the Court would be entitled to exercise its discretion in a case like that. But where their property dispositions have already been effected by a Court Order, one would say that that would stay. It would not be changed by the legislation.

MR. F. JOHNSTON: What I'm trying to get to, the lateral opting out, if we don't have that those couples who are presently married and would come under the legislation, and the spouses on the fifty-fifty basis and everything that is being suggested, are, you might say, being forced to come under the legislation by the Minority Report, which we say is a benefit to the fifty-fifty basis if you want to put it that way. All of a sudden you have a group of people that had things settled before the legislation came in . . .

MR. MULDOON: Might have been separated for five, ten years.

MR. F. JOHNSTON: It's sort of unfair to those people because you're saying although we're forced in it, those people aren't going to have the same privileges as I'm going to have under the legislation.

MR. MULDOON: Mr. Chairman, if they had no judgement of any Court, if they had no separation agreement, one would imagine that the one who considered it to his or her advantage would exercise the option and the very worst that would do would be to allow the Court to, again, since they have no judgement, have no agreement, those who have none, would allow the Court to exercise its discretion in a fair distribution as between them, of the estate. If they had a judgement in effect, or an agreement in effect, one would not expect the law to reach back and wring the neck of those agreements, those judgements. It would, as you have mentioned, the option would be some barrier to people who had been separated mainly may, for religious reasons, not have divorced, but may have been separated for five or ten years, the option would at least prevent the legislation from messing with their arrangements unduly. Certainly it wouldn't permit people who had been separated five or ten years, one of them to come before the Court and ask for equal sharing after that length of time. But it might, if they had no agreement, it might give the one of them the opportunity to ask the Court to

exercise some discretion in awarding a part of the other spouse's estate if their arrangement were not crystallized by an agreement or by a judgement. One would expect that an agreement or a judgement would bar the legislation reaching into that. Without those there might be some calls for judicial discretion. I suppose if the legislation were impending, one would see people hurrying to get agreements if they could, or judgements if they were able.

MR. F. JOHNSTON: Going back to your earlier statement where you said the Commission said this is a matter of accounting, to the decision as to . . . so you are going to have an accounting procedure to be fair to both sides with the new legislation. So we are all in that, except the person that had a judgement that might be a fairly unfair judgement. One or the other could have built up a business since that time or anything else, but that person is . . . those judgements, I don't suggest we reach into every one of them, God, no, but that seems that person might be in a bad position. Unless, I'm just saying, if we are all forced in it has to be equal all the way along the line.

MR. MULDOON: Mr. Chairman, the legislation we have recommended would say that you could get the marital regime terminated upon separation, for example. That is one of the occasions for termination. If people, when the legislation would be enacted, were already separated for five or ten years and one of them, after that separation, had amassed a fortune, the one who hadn't amassed the fortune would be in no worse position, surely, than if they separated today and got the regime terminated and the other one, freed from this unhappy marriage, went on to make a million, you see. So that if there were a judgement five, ten years prior to the enactment of the legislation which made a disposition and one of them built up a sizable estate since then, that seems to me that it wouldn't work any unfairness on the one who hadn't built up an estate because that could happen under the new law. You make your termination of your

regime and you go your separate ways. There is either a separation, a divorce or an annulment and one of them does very well. It may well be these days the wife who starts a business and really develops quite an estate. One wouldn't expect that her husband, who got his share when the regime was terminated, five years later sees that she is doing very well in her business and comes cry-babying back to say "I want a share of that too". She says, "I developed this since we were separated. This is what I have done on my own." And if you put that in the time-frame which I have just described that's after the legislation, put it in a time-frame before the legislation, it seems to me it comes out the same, with no unfairness.

MR. CHAIRMAN: Are there any further questions on this point or any other point that we have dealt with? Mr. Sherman.

MR. SHERMAN: There probably will be by Tuesday.

MR. MULDOON: Mr. Chairman, I don't know whether any of the questions could be even suggested to me now, but I would like to come before you in a thoughtful way and not try to find answers out of the ether to tough questions I'm sure are posed on the spot. I think I could be of more help to you if I had some idea of what questions you might have in mind, if I can be of any help at all.

MR. CHAIRMAN: Mr. Silver has been making notes of our discussions over the last two or three meetings and maybe you and he could get together and he could brief you on where we have been having difficulties, what we expect to be going back to in the future. Mr. Jenkins.

MR. JENKINS: That was the point I was going to raise, Mr. Chairman. There are some of of these recommendations here that we deferred a decision on one way or the other until we become satisfied in our own minds one way or the other how we would proceed. Perhaps, if you, as the Chairman suggested, are in contact with Mr. Silver, those would be the types of things — I'm not saying that the Committee is in disagreement, but it's not clear, our legal interpretation of it.

MR. CHAIRMAN: None of which would preclude any member of the Committee from contacting you between now and next Tuesday if there was something that he wished to ask you about at that time. Mr. Sherman.

MR. SHERMAN: For my own part, Mr. Chairman, if it's any help to Mr. Muldoon, my main concern is the determination of the manner in which we should go on the opting-out provision which has been obviously the subject under discussion for the last half-hour. I would be interested in a further development of the exchange between the Attorney-General and Mr. Muldoon, probably also Mr. Jenkins and Mr. Adam because they have generally followed a position somewhat opposed to the position that I have taken. So, if it's any help to Mr. Muldoon, my chief area of interest in his expertise, in his opinion is on that subject.

MR. JENKINS: I would appreciate some further briefing on this. I might state my point-of-view, through you Mr. Chairman to Mr. Muldoon, is not just the fact that we have had lots of briefs opposed to unilateral option to opt out, but notwithstanding estate planning — I can see estate planning — I can't really see that if a man and wife have set up an estate plan that there would be really one or the other partner saying "well, I'm going to opt out", because I think they would perhaps come to a mutual agreement to opt out. But marriages that are on very shaky ground, and I'm not talking about the Murdoch case in particular, but they have been in existence for ten, fifteen years, and all of a sudden now they are given an option whereby they figure that they can pull one over the other, and this will happen because, as you have stated, and what we have heard during the briefs, it can become a very acrimonious discussion that takes place, especially in Courts of Law when people decide to break up, and a lot of spite comes into effect. The danger that I see with unilateral opting out is the fact that one of these marriages that is just so-so, this could now start a lot of people thinking "well, by golly, what we have accrued together in fifteen or twenty years, I'm going to make damn sure that I get my share of it". You talked about judicial discretion, I would like an enlargement on that whereby there is some recourse for the partner that will be aggrieved, and there's surely going to be one partner who's going to be aggrieved if one of them unilaterally opts out. And I would like to have an expansion on that giving me the options that are available for the partner that would be in the lesser position.

MR. MULDOON: Mr. Chairman, may I ask, did your committee receive a brief from the Estate Planning Council of Manitoba? Guess they didn't come yet. We did.

MR. GRAHAM: Is that brief readily available for members of the committee?

MR. MULDOON: It is but for one thing. If you don't exercise all the muscle which I imagine a Legislative Committee can exercise, if the Estate Planning Council consents I'd be happy to give you a copy of their brief, but I think I should ask their consent because they made their submission to the Commission.

MR. GRAHAM: Yes, I think it would be valuable to the Committee to have that.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: I can tell you, Mr. Chairman, that there's some submissions which the Commission received that one wouldn't get the consent of the person who sent them for any public occasion at all because they didn't want to have them attributed, but I would ask the Estate Planning Council if they would consent and I could have sufficient copies sent to you before Tuesday if they do consent.

MR. GRAHAM: Thank you.

MR. CHAIRMAN: If there are no further questions of Mr. Muldoon, thank you for coming over on such short notice, Mr. Muldoon.

MR. MULDOON: It was great exercise, Mr. Chairman. Thank you for the opportunity.

MR. CHAIRMAN: It's ten minutes to five, gentlemen, and the Attorney-General has left. Do you wish to continue with this or leave it over until we convene on Tuesday?

MR. ADAM: I move we adjourn.

MR. CHAIRMAN: Move we adjourn. Those in favour? Committee adjourns and stands adjourned until Tuesday morning at ten o'clock.