Legislative Assembly of Manitoba

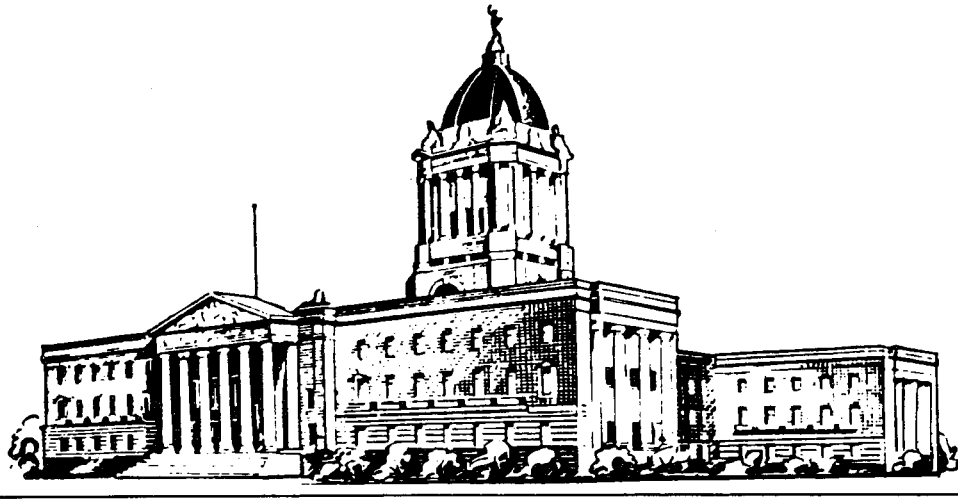
HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



WEDNESDAY, June 15, 1977 8:00 p.m.

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TIME: 8:00 p.m.

CHAIRMAN, Mr. D. James Walding

MR. CHAIRMAN: Order please. We have a quorum gentlemen. The Committee will come to order. It seems to be the disposition of the Committee to maybe take Part III at this time. It's on pages 16 and 17 and if there are any questions of Mr. Lamont by members of the Committee. . . Are there any questions of Mr. Lamont on this part?

MR. SHERMAN: Not on 31(1), Mr. Chairman, but there are in the section further on unless somebody else has questions on 31(1) and (2) and the early ones. I have a question on 31(5).

MR. CHAIRMAN: Go ahead.

MR. CHERNIACK: Well, did we pass (1), (2), (3), (4)?

MR. CHAIRMAN: No, it was my understanding that we would look at the whole section, discuss it generally before we got down to clause by clause. Mr. Sherman.

MR. SHERMAN: I have a question, Mr. Chairman, on 31(5) and in fact it involves 31(6) as well. My question is: the way this is drafted can a spouse not phone in and in effect oust a third party or remove a third party from his or her status as a joint tenant on the title. 31(6) would indicate that one spouse can take this kind of action alone and that gives rise to the question in my mind.

MR. LAMONT: I don't agree with that interpretation of 31(5). It says a request executed by both the spouse who is registered as owner of the land and the spouse who is entitled under Part I to be registered as the owner of an interest in the land. This is the request, so it has to be executed by both parties. Now, later on there is a provision for going to a judge if one party unilaterally wants to become registered owners. Supposing they're at odds or for some reason they don't agree, then the unregistered spouse can go before a judge and get an order which can then be filed and we'll make the endorsement then or issue a new title.

MR. SHERMAN: Well, it seemed to us that that was a possibility under 31(5) and (6) and the same problem also exists according to my notes on 31(7) (a) and (b).

MR. CHERNIACK: Mr. Chairman, I really don't understand Mr. Sherman, but maybe it doesn't matter. If Mr. Lamont is answering him it's okay. I don't understand why he thinks that it could be a unilateral act without notice or knowledge of the registered owner.

MR. LAMONT: The initial request has to be signed by both parties under Section 31(5). Now under Section 31(6) one party can go to a judge and say, "My wife doesn't want me to be joint owner but this is the marital home and I'm entitled to be and would you give me an order." And that can be filed.

Now, under 31(7) if they come in with a mortgage, there will be an affidavit with the mortgage saying this is the marital home. The mortgage also will be executed by both parties as being entitled to be the registered owners of the land, one being the registered owner and the other being entitled to be. We will then make an endorsement on the Certificate of Title showing them as joint tenants and not as tenants in common or as owner of an undivided one-half interest as the case may be. We'll then proceed to register the mortgage. Thereafter they will then be registered owners, so they have three ways of going about it. They can file a request which they both execute. They can get a judge's order which one person can apply for unilaterally, or they can register a document, the most common one would be a mortgage, then they would become registered as owners as joint tenants. The same thing would apply if they were going to transfer the land out of their joint names. The endorsement would go on the title and then the transfer from the two of them as joint tenants would go to the purchaser.

MR. SHERMAN: I understand the intent, Mr. Chairman, and I don't question the intent, but it was a question of drafting . Our legal advice in examination of the clauses with our legal advisors raised the question of drafting as to whether it was drafted properly to convey that intent or whether it left open the opportunity for a spouse to take the kind of action that I've suggested. Unfortuantely I don't have that legal advice with me at the present time and if Mr. Lamont assures us that their drafting is air-tight then I wouldn't want to pursue the thing to any great length.

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

MR. SHERMAN: No, that was all I had on that section, Mr. Chairman, thank you.

MR. CHAIRMAN: If there are no further questions then on Part III, perhaps now that Mr. Silver's here we can go back to 5(4). (Inaudible) Would you use the microphone, Mr. Johnston, please?

MR. F. JOHNSTON: You're dealing with the old system and new system of land. The new system of land you can apply and if it's wrongfully filed to have it removed under the section of 149 of The Real Property Act. Under the old system of land it seems that there's no way of getting rid of a marital property notice. Even if somebody had opted out they could file notice. How would you get rid of that caveat if it's under the old system?

MR. LAMONT: Interests under the old system documents are registered for what they're worth and a person searching that abstract would have to satisfy himself that this was no longer of any force and effect. Now, it might become of no force and effect for various reasons, I guess.

MR. SILVER: If I understand Mr. Johnston correctly, he is saying that there is no way of getting rid of a marital property notice. —(Interjection)— Well, Section 32(5) provides a form to be registered which would discharge the notice.

MR. GRAHAM: Will that be part of the deed?

MR. SILVER: It's a separate form that's registered whenever it's desired to remove the notice, to discharge the notice. Page 20, in the top section.

MR. LAMONT: What we're looking for is some way to force someone to remove the notice.

MR. SILVER: Oh, I see.

MR. LAMONT: I think that the only provision, like any other registration under the old system, is to go to court on a motion before a judge to vacate the registration.

MR. CHERNIACK: Mr. Chairman, may I presume to discuss the old system in the presence of experts but from the practical standpoint as I know it. The province does not guarantee title under the old system. It does under the new system called Torrens title.

As I understand it — and I would like Mr. Lamont to interrupt me the minute I go off-beam — as I understand it, any documents purporting to be a document relating to land in question can be registered and the Land Titles Office will not vouch for its validity. I could register a mortgage on a piece of property of old system and I don't think they check that document. They just let me register it. And then somebody relying on the mortgage will have to go and search the register all the way back to when the Queen granted the patent to the land to somebody, and then follow that chain of title all the way through and come to the conclusion that that mortgage is or is not valid, and rely on their own judgment. That's why the trend has been, over the years, to get more and more land under the Torrens system because there the province guarantees the title and therefore vouches for it.

In this case, as I understand it, anybody can register a notice of any kind, including a marital property notice, against any land and nobody rejects it. Because it's just registered for what it's worth. And I believe that the only way to have it removed without the consent of the person who did the registering, is to apply to a court for an order vacating it. I don't know how difficult it is because I have never had an occasion to deal with it, but I think it would be very simple. Because you go to the court and say "Here is a document filed under the old system. It 'sits there. There is no basis for it." Give notice to the party who has registered it and show the court that this document has no valid claim against the land and then, I believe, the court would just say, "All right then, having heard the facts, I vacate it."

The old system is so different from the new system that most lawyers have no respect for it and I guess they like to get it into the Torrens system as quickly as possible.

But I think, really, 32(5) is the way it is properly done by the person who has registered it removing it. Failing that, I don't know of any system other than going to court to have the notice removed. But the point I make is that this could be a mortgage. It could be a deed of transfer of land and still not be effective. It could be a caveat. It could be almost any document that somebody chooses to file. So it's no greater problem to have a marital property notice vacated that it would be to have a vexatious caveat vacated.

MR. GRAHAM: Mr. Chairman, you mentioned the change from deeded to Torrens. How do you change from deeded to the new system?

MR. LAMONT: You make an application called a real property application which you apply to have the land brought under the operation of The Real Property Act. At that time, the District Registrar will go through all of the deeds right back to the original grant from the Crown, and he will make requisitions usually on the lawyer who filed it, asking him if there is anything that has to be cleared off the title. Let us say there is an undischarged mortgage; or there is a gap or a deed missing or something — he'll ask to have these things filled in. Some things can be cleared up by quit claim deeds or things like that. Once he is satisfied the person has a safe-holding holding title, then he'll issue you a guaranteed title under the Torrens system.

MR. GRAHAM: Well if there is an automatic half-interest under this proposed thing, that would have to be a mutual consent of both parties to change it, wouldn't it?

MR. LAMONT: Yes, it would. We now, for example, are required to get dower evidence in every case where the applicant has given, for example, a direction to someone else, so that before the land would be brought under the Act under this situation, we would require evidence whether or not it was the marital home. There may be a loophole missing in the drafting there, I am not positive on that score. There's nothing that says we have to require that but I think that it would be normal procedure to take that precaution.

MR. GRAHAM: This has really nothing to do with this bill, but I understand that we are trying to move towards a total Torrens system of registration. As I understand it, we had proposed changes in the setting up of a computerized system; I imagine it would take several years before that occurs yet. But are we going to be causing any undue difficulties with this?

MR. LAMONT: No, this won't make any difference.

MR. CHAIRMAN: Any further questions under Part III. Mr. Sherman.

MR. SHERMAN: Mr. Chairman, could I just go back to 31(6) for a minute, because I think I have my question straight now. And if Mr. Lamont answered me in his earlier response, I won't subject the Committee to rehash that. I'll read it in the transcript. But can I put the question to you this way, Mr. Lamont. Does not 31(6) provide a spouse with a unilateral right in terms of registration? That is what is involved in my original question, as to whether or not the drafting would permit a spouse on his or her own to oust a third party from his or her status as a joint tenant on the title. Or is 31(6) totally dependent on 31(5)?

MR. LAMONT: Yes, the key is that it has to be a judge's order. And the intent for putting it in that manner was that I felt that the District Registrar certainly shouldn't be in a position of deciding on a unilateral request if someone came in and said, "I am the spouse of so and so, and this is the marital home. I am entitled under the Act to be registered as owner, so register me." Put in a request — so we felt we should . . . In one case if they both signed the request, fine; that's an indication of consent on the part of the other spouse. But if the other person who is entitled to be registered owner is anxious to become registered owner, then he can go to a judge under this section. There's something that's missing there to indicate that it doesn't require an order?

MR. SHERMAN: The way that I read it in 31(6), "Where in the case of land that is subject to this part by virtue of Part I, a judge makes an order under Section 33 declaring that a spouse is entitled to be registered as a joint owner of the land or as the owner of an undivided one-half interest in the land, as the case may be, or vesting title to the land in the names of both spouses as joint tenants and not as tenants in common, and the order contains a description of the land, the spouse or spouses may file the order in the proper Land Titles Office." I just raise the question whether the drafting does not provide the opportunity for a spouse to do it unilaterally.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHEIACK: I think that the spouse must get the order. Once a spouse has a judge's order, then obviously the spouse can file it unilaterally, but the judge's order would only come under Section 33 where the court would determine the procedure. There isn't the slightest doubt in my mind that the court would require notice to be served on the other party in the court hearing. But Mr. Lamont did say that all he wants is to have either both parties sign, or a judge ordering it to be signed and then when it says, "a spouse may file," anybody can file a judge's order as long as the judge's order is clear instruction to the land title. So I think the main thing about this is that only a judge's order may be filed and under 33, I believe, only a judge is going to make that order in accordance with the rules of the court which will mean notice to the other party.

MR. CHAIRMAN: If there are no further questions on Part III, Mr. Silver advises me he has the wording now for the changes to 3(1) and (2). We then go back to Page 3 and Mr. Silver, perhaps you would read the wording.

MR. SILVER: In 3, Sub (1), in the third line, I would strike out the words "is entitled" and in the last line I would add after the figure 7, I would add these words: "Is deemed to be and is entitled." So the net effect of those changes would be that it would read as follows: "Where premises are the marital home of two spouses and only one of the spouses is registered as the owner of the premises, the other spouse, subject to Section 7, is deemed to be and is entitled to be registered as a joint owner thereof." Okay on that?

MR. CHAIRMAN: Mr. Sherman moves that as a sub-amendment? Is that agreed. (Agreed)

MR. SILVER: Mr. Lamont, does that appear to be in order?

MR. LAMONT: I wanted to look at what Section 7 said.

MR. SILVER: That explains that there are some marital homes which are acquired before marriage but not with marriage in mind, but later they become the marital home and they are not covered. This doesn't apply to them.

MR. LAMONT: They wouldn't be "deemed" to be either. That was the only point I wanted to check.

MR. CHAIRMAN: Sub-amendment agreed? (Agreed) 3(1) as amended—pass; 3(2). Mr. Silver.

MR. SILVER: 3(2) in the third line after the word "spouses," I would add the following words: "subject to Section 7, are deemed to be and," and that's all. So that it would read as follows: "Where premises are the marital home of two spouses and neither spouse is registered as the owner thereof, both spouses, subject to Section 7, are deemed to be and are entitled to be registered as the owners thereof, as joint tenants . . . " The rest remains unchanged.

This also is subject to Section 7. That should have been included before because obviously it is not intended to apply to every marital home; subject to the same exception as the first one.

MR. CHAIRMAN: Sub-amendment moved by Mr. Sherman. Is that agreed to? (Agreed) 3(2) as amended—pass.

MR. SILVER: Mr. Lamont, do you see any problems there offhand?

MR. LAMONT: No.

MR. SILVER: Now, also to cover the point raised by Mr. Lamont about a case where two spouses are indeed the registered owners but not as joint tenants, rather they are registered each as to an undivided one-half interest, or each as to some other interest, as to an undivided one-quarter

interest, another one as to an undivided three-quarter interest — things like that — then they are also entitled to be registered both as joint owners. So I have drawn up a section very similar to 3(2) to cover

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MR. CHERNIACK: Is it as long as that?

MR. SILVER: It's just as long as 3(2), maybe a little longer. I would insert it as 3(3). Unfortunately I wasn't able to get it typed up.

MR. CHAIRMAN: Would you read it for the record, please, and for the members.

MR. SILVER: The subheading would be: "Spouses as owners of undivided interests." As I read it, I would very much appreciate Mr. Lamont letting me know later, after I have read it' whether this is the kind of thing he has in mind.

"Spouses as owners of undivided interest in marital home.

3(3) Where premises," and this is a completely new subsection, "where premises are the marital home of two spouses and both are registered as the owners of the premises, each as to an undivided one-half or other specific interest therein, both spouses, subject to Section 7, are deemed to be and are entitled to be registered as . . ." and then it continues in exactly the same way as 3(2). The rest of it is exactly the same, word for word as 3(2).

MR. CHAIRMAN: Mr. Lamont.

MR. LAMONT: I just have one observation, Mr. Silver. It is also possible that they could be owners as tenants in common. I think it is generally accepted that persons who own undivided interests are tenants in common, but we do have certificates of title that are silent as to the division. For example there may be just two persons who are registered as owners, and under The Law of Property Act, unless it is specified otherwise, they own as tenants in common. So I would suggest that perhaps your wording might be something along the line where they are registered as tenants in common for a specified interest or otherwise.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I would like to throw out a suggestion that it could read "are registered as owners other than as joint tenants not as tenants in common" which I think would take care of any other kind of an interest, as long as they are the owners then. How would that . . . ?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: It make sense. You are suggesting that it read "are registered as the owners of the premises other than as joint owners thereof."

MR. CHERNIACK: And now it says, "then they may be registered as joint tenants and not as tenants in common." I mean, it seems to me what you want to do is to provide that where they have ownership in any way other than as joint tenants, they have the right to be owners and joint tenants. Does that make sense?

MR. SHERMAN: Both are registered as the owners of the premises, but not as joint tenants.

MR. SILVER: Can we omit "not as tenants in common?" —(Interjection)—

MR. CHERNIACK: "But not as joint tenants and not as tenants in common."

MR. SILVER: We leave that out. We just say "but not as joint tenants," right?

MR. LAMONT: And then go on and say that they can be registered as joint tenants and not as tenants in common.

MR. SILVER: Okay. Then both are deemed to be and are entitled to be registered as joint tenants, and not as tenants in common of the premises — something like that.

MR. CHAIRMAN: The amendment as read read, moved by Mr. Graham.

MR. GRAHAM: I want to know what I moved. It would read then, "Where premises are the marital home of two spouses and both are registered as the owners of the premises, but not as joint tenants, then both spouses, subject to Section 7, are deemed to be and are entitled to be registered as . . ."

MR. SILVER: Right.

MR. GRAHAM: That's the word.

MR. CHAIRMAN: That meets your concern, Mr. Lamont?

MR. LAMONT: Yes.

MR. CHAIRMAN: Any further discussion on 3(3)? Mr. Silver.

MR. SILVER: And it will continue with the same provision as to an application by either spouse under Section 33 for a court order, right?

MR. CHERNIACK: As in 3(2).

MR. SILVER: Does that appear to be in order, Mr. Lamont?

MR. LAMONT: Yes, that's fine.

MR. CHAIRMAN: 3(3)—pass; Section 3—pass.

Turn the page, then, to Page 4, under Section 5(4). Mr. Barrow, would you read the amendment? Mr. Turnbull.

MR. TURNBULL: Mr. Chairman, I move Sharing of Debt and Tax Liability. 5(4). A spouse who is entitled to or acquires an interest in premises under Section 3 is liable to the other spouse for one-half of (a) any existing indebtedness incurred by that other spouse in the acquisition of the premises; (b) any existing or subsequent indebtedness incurred by that other spouse for the improvement, repair, or maintenance of the premises; and (c) any tax that becomes payable by that other spouse as a result of the entitlement or acquisition under Section 3.

MR. CHAIRMAN: Any further discussion on that? Questions?

MR. SHERMAN: No, that, I think, Mr. Chairman, satisfies the point that was raised on our side and which Mr. Cherniack concurred in last evening which reinforces or guarantees the concept that the sharing in the asset includes sharing in responsibility, and that entitlement is the point at which that equal sharing should take place. So that is acceptable to us.

MR. CHAIRMAN: 5(4) as amended—pass.

MR. CHAIRMAN: Section 6 is not marked off on my list. Did we pass that last night?

MR. CHAIRMAN: Section 5 as amended—pass; Section 6—pass. Section 14(4), Page 9—pass; 14—pass. Section 15, would someone care to read the amendment?

MR. TURNBULL: Mr. Chairman, I move that the existing Section 15 be deleted and substitute the following: Sharing of debt and tax liability. 15. A spouse who is entitled to or acquires an interest in an asset under Sectio13 or 14 is liable to the other spouse for one-half of (a) any existing indebtedness incurred by that other spouse in the acquisition of the asset; (b) any existing or subsequent indebtedness incurred by that other spouse for the improvement, repair or maintenance of the asset; and(c) any tax that becomes payable by that other spouse as a result of the entitlement or acquisition under Sections 13 or 24.

MR. CHAIRMAN: Sub-amendment moved by Mr. Turnbull— pass. 15 as amended—pass. 16(1)(a). Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, may I suggest that since Mr. Lamont doesn't have to suffer like the rest of us, maybe we should find out — is there anything that Mr. Lamont would be needed for other than the Part III that we've already dealt with.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: he only other area is family assets, if there are any questions under the family assets section. —(Interjection)— Has that been dealt with? Very well — if there are no other questions, then . . .

MR. LAMONT:. . . in connection with 14(1), but I don't know whether you've already dealt with it — and that was whether it should also have this deemed provision in with respect to half interest, you know.

MR. SILVER : The same as 3(1).

MR. LAMONT: The same as 3(1).

MR. SILVER : Yes.

MR. CHERNIACK: Mr. Chairman, could we then agree to re-open 13(1). I would be prepared to move at the end of the second line, the addition of the words, "deemed to be and is entitled to be."

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: To make it uniform with the others sections, I would say in 13(1), "The other spouse, subject to Section 16, is deemed to be the owner of an undivided one-half interest in the assets." Since there's no registration there, we don't have to talk about being entitled.

MR. CHERNIACK: So, "The other spouse, subject to Section 16, is deemed to be the owner of an undivided one-half interest . . ." — instead of saying "entitled." Shall I read it then, Mr. Chairman, as a motion?

MR. CHAIRMAN: Proceed.

MR. CHERNIACK: That 13(1) read as follows: "Where a spouse has or acquires ownership of a family asset in a form other than that of real property, the other spouse, subject to Section 16, is deemed to be the owner of an undivided one-half interest in the assets." I so move.

MR. CHAIRMAN: The amendment as moved by Mr. Cherniack. (Agreed.) 13 as amended — pass. 14(1).

MR. SILVER: We will also have to amend 13(2). Where an interest in an asset arises in

favour of a spouse under subsection 1.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, didn't Mr. Silver just say with respect to 13(1) that we didn't need the entitlement clause . in there, because this is dealing with personally; and so is 13(2) dealing with personally. So why would it not be reasonable to approach 13(2) by saying' "Where a spouse is deemed to be the owner of an interest in a family asset" Why are using the term "entitlement" in there.

MR. SILVER: Well, we're now taking it out.

MR. CHAIRMAN: Mr. Silver, do you have the amendment?

MR. SILVER: Well, I don't know if you want this done, but I am going to have to really look at every one of these to see if the wording fits and we may have to change . . . we certainly have to change 13(2) and we probably would have to change others to make the wording conform. So my recommendation would be to put it off until tomorrow to give me a chance to look at them all.

MR. CHAIRMAN: Would that be agreeable by the Committee to defer this until tomorrow, to get the wording precise? Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, we defer confirmation of those parts of 13 and 14 which Mr. Silver will bring back to us tomorrow with any revisions. Would that not cover the decision?

MR. CHAIRMAN: Is it agreed by the Committee? Mr. Sherman.

MR. SHERMAN: I just raise the question, Mr. Chairman. In the original form in the amendments, Mr. Silver used the term "entitlement" — and I am not challenging that — but we'vetaken the term "entitlement" out of 13(1), which means he is now going to have to go through it and take it out of a lot of others. And maybe it isn't that bad to leave it in 13(1), but put the term "deemed" in there too, and it wouldn't be necessary to take it out of all the others.

MR. CHERNIACK: I'm inclined to agree with Mr. Sherman, but if there's any desirability for cosmetic reasons to polish it a little, and Mr. Silver wants to do it, then I'd be inclined to let him do it — although I agree with Mr. Sherman, I think it's covered. However, why not give him a chance to look at it?

MR. CHAIRMAN: May we continue then? Page 10, Section 16(1)(a) — pass. Mr. Spivak.

MR. SPIVAK: This is the new section, the amendment, not the . . .

MR. CHAIRMAN: Yes. Page 10 of your amendment sheet. 16(1)(a)— pass; 16(1)(b)— pass. 16(1)— pass. 16(2) — Mr. Spivak.

MR. SPIVAK: This is not the same as in the Act itself. The wording is not the same.

MR. CHERNIACK: Mr. Chairman, could we deal with 16(2) and then move on to Part III to accommodate Mr. Lamont? 16(2) completes Division 3, and it's the same as in the original bill. I don't know — when I say the same, it's the intent or the import is the same. I wonder if we can deal with that and then move to Part III.

MR. CHAIRMAN: 16(2)— pass; 16— pass. On Page 6 of your bill, Section 17 — (Interjection) — Order please. It has been suggested to the Chair that we might move on to Page 16 of your amendments, Part III, that Part that might involve Mr. Lamont since the Parts before that do not. May I have the agreement of the Committee?? Mr. Axworthy, would you like to read the motion No. 15 on Page 16?

MR. AXWORTHY: Mr. Chairman, I would move that Bill 61 be amended by adding thereto, immediately after Part II thereof the following Part: Part III.

MR. CHAIRMAN: Perhaps the Committee would waive the reading of it — it does go to four and a bit pages. 31(1)— pass? Mr. Spivak.

MR. SPIVAK: I just want a chance to look at it.

MR. CHAIRMAN: Mr. Lamont please.

MR. LAMONT: There's just a question in my mind as to whether the form makes any reference to a family asset under Section 14(1). It provides negative evidence in the case of the marital home — unless subsection (4) covers it, does it?

MR. SILVER: What was your question?

MR. LAMONT: Well I was wondering if we had any negative evidence there with reference to the summer cottage type asset, the family asset.

MR. SILVER: In the form?

MR. LAMONT: In the form, yes. It does say, "or such other evidence as the District Registrar may require." But I wonder if we should go out of our way to add something, or whether it should perhaps be one clause covering that point. The difficulty is this whole Form A is going to have to be dovetailed with dower evidence and everything else in the actual documents that are registered. It's going to be quite lengthy when it's printed.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: We've made a change in Form A. I don't know if it resolves the matter you are raising, but we've taken Paragraph 4, and in the second last line thereof, we struck out the last three words, "and no person," and put a period after "The Marital Property Act. Then we have a new paragraph No. 5, which will contain what was formerly the last line of No. 4, and will read as follows: "No person is now entitled to an interest in the land referred to in the instrument above or within written or hereto annexed under The Marital Property Act." "No person is entitled," take out the word "now." It made sense before when it was . . . "No person is entitled to an interest in the land referred to in the instrument above or within written or hereto annexed under the Marital Property Act." Would that resolve the problem?

MR. LAMONT: Well, it's certainly wide enough to cover. . . I'm just wondering if it's so wide that it's meaningless with reference to family asset. When you've already specified the marital home, I think you should specify the family asset as well in the negative sense.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Two questions, but just going back to that one first, it would seem to me that we should have a specification of family asset, because that's in effect what we are talking about. There may be other entitlements you know with respect to the Marital Property Act, with respect to the commercial assets and arrears. It's an entitlement in that sense. I think that's one thing.

The second thing — I just want to understand in terms of this Act — are we saying if a couple who live in a marital home make a separate agreement with respect to that marital home, that the home is not considered to be a marital home? Are we saying that notwithstanding the fact that they make an agreement which will opt out of the Act in some form, possibly the marital home, I'm not saying that ' but will opt out of some of the agreements and will basically change the arrangements, are we saying that it's not considered a marital home per se or can you not have a marital home in which one spouse has opted out or has given up her rights. It's still a marital home, isn't it?

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, it may have been before Mr. Spivak came in. I think we did change the flexibility in that it wasn't an automatic 50-50 sharing. It could be a one-quarter interest or something in the marital home.

MR. SPIVAK: The marital home is defined as the same thing as that assigned to homestead in The Dower Act, that's the definition section of the marital home. Now what I'm saying, because I think it has a direct bearing on what you're saying in that affidavit, because my belief is that you could have a marital home with one spouse who has opted out as a result in the agreement.

MR. SILVER: I'm sorry I don't follow you, Mr. Spivak.

MR. SPIVAK: Well, a marital home is defined here as the same meaning as that assigned to homestead in The Dower Act. And if in fact, a couple have opted out of The Marital Property Act either in full or in part affecting the marital home — are we saying that there is no such thing as a marital home? Because when we go to the affidavit dealing with this in Form A, "no part of the land referred to in the instrument above or written or hereto annexed, is now or has ever been the marital home of me." Well it can still be the marital home notwithstanding the fact that the spouse has opted out.

MR. SILVER: Aren't those Spivak, the alternative, Mr. those sections? . . . something like the affidavit under The Dower Act where you strike out the one that doesn't apply in the particular situation?

MR. SPIVAK: Then that would mean that you still can have the marital home with an opting out, and unless there is some documentation registered in the Land Titles, you're going to insist on something from the wife if it's a husband and wife and the wife has opted out or from the husband in the opposite way.

MR. LAMONT: I thought 4 was meant to cover the situation where they had opted out. It was at one time the marital home but is not now.

MR. SPIVAK: But it still can be the marital home I think if one person has opted out. It may not for the effect of the Act, in terms of its entitlement, because there's an opting out but it's still a marital home.

MR. GOODMAN: It's not a marital home under the Marital Property Act.

MR. SPIVAK: Marital home is the same meaning that is assigned to the homestead in The Dower Act.

MR. SILVER: Mr. Spivak, what you're saying is that because of the way marital home is defined in the definition section, even where the spouses have opted out of the

standard marital regime, completely or at least only with respect to the marital home, still it remains a marital home within the meaning of The Dower Act, even though the SMR does not apply to it. Is that what you are saying? It's a matter of semantics, I guess — a semantical problem. Well, I think we would have to interpret the phrase here within the meaning of The Marital Property Act, as meaning that it is subject to the Marital Property Act. Perhaps we should add here the words, "within the meaning and subject to the Marital Property Act," if anything at all is necessary. Because if they opted out, you wouldn't say that the marital home is subject to the Marital Property Act — not subject anymore.

MR. SPIVAK: My point would be then, in terms of registration, one spouse swearing this affidavit essentially does not have to prodsimply a pronouncement to him that in effect, there's no application of The Marital Property Act with respect to that particular transaction. That's all he's looking for at this point. So therefore, that's all we dower release or something like that, don't we still say in the affidavit —"is not a homestead within the meaning of the The Dower Act" even though there is a release and therefore, you might wish to say as you are saying here that it is still a homestead within the meaning by definition, within the meaning of The Dower Act, but the wife has simply released it. So if you have a problem here, you should have the same problem over there, in the form of the transfer of land under The Dower Act. I suggest that if it is not a problem there then it should not be considered a problem here. In fact I think now in reconsidering it, that if we add something like, "subject to The Marital Property Act," somebody's going to wonder you know, what kind of additional meaning should be imputed because of that addition, whereas if we leave it alone, people will read The Dower Act and will see that it's just like it and there will be no problem.

MR. SPIVAK: That really is a question for Mr. Lamont. I'm just bringing the point up. I mean realistically, it really is a question because in effect, the decision will be made by the Land Titles.

MR. LAMONT: Well, the difficulty is I think and the same thing applies in the case of The Dower Act, that when someone comes into the lawyer's office, there are situations where the lawyer does has difficulty advising his client how to swear the affidavit. Even the dower affidavit is a very general application and there are very fine points of distinction as to whether land is or is not homesteaded in the meaning of The Dower Act, witness the number of court cases on the point. So that it sometimes is very difficult to advise them on what they should swear to. But from the Land Titles standpoint, once we get something that's conclusive — as I say it isn't the marital home within the meaning of the Marital Property Act — while the lawyer may have great difficulty in advising his client what to swear, we don't know what reasoning they arrived at to come to that conclusion. If he says it isn't the marital home within the meaning of this statute, and we are protected by that other section that says that we don't have to inquire as to the truth of any of the allegations, then we are in a better position than a solicitor in his office. But he may be in a very difficult position and I do have some misgivings on this section, but I don't know just how to improve it personally.

MR. SPIVAK: But the problem is again, whether the marital home exists even though one spouse has opted out. Obviously the law that is being enacted with respect to the marital home, and that's why we say "subject" doesn't apply, that is the marital home exists in law even though one spouse has opted out. If that's the case, then I think you're really dealing not just within the meaning and subject of the Act — that's all I'm saying. —(Interjection)— I'm saying as a result of an agreement. What I'm trying to avoid is that the necessity and requirement after this Act is passed of opting out agreements to have to be filed in the Land Titles simply because it's not certain enough and there is a concern. I think that that would be an error in terms of the practice and the public policy that we want. That's all I've been talking about — so that there is no further requirement asked by the Land Titles because of their concerns.

MR. CHEIACK: Mr. Chairman, I was discussing this with Mr. Graham and I came to the conclusion that he who has no experience with these things didn't realize that these are alternate methods by which one disposes of the need for another person to sign and therefore, they would be crossed out and as long as one of these clauses remains in the affidavit, that it disposes of the need to require a second signatory. Therefore, as I read it, if this new 5 says, "no person is entitled to an interest in the land referred to in this instrument under The Marital Property Act," then that takes care of the fact that it may be a marital home under the definition, but that the other person opted out or died, and that's why it seems to me that recognizing that you cross out those which don't apply, it would still leave the one that's in. The only other thing that might be, if you want you

could say that, "my wife opted out." But, frankly I think that No. 5 would take care of it, because that's clear, "no person is entitled to an interest in land under The Marital Property Act."

MR. SPIVAK: Then what you're saying is that 3 and 4 would be struck out and 5 would remain?

MR. CHERNIACK: 2, 3 and 4 would be struck out. Just like under The Dower Act you know, you strike out what is not relevant. —(Interjection)— That is single choice, not multiple choice.

MR. LAMONT: This is a little more difficult I think in that if this 5 were used alone and not in conjunction with one of the other four, it's the only one you need. You could put that clause in every case you know. You wouldn't need the other four. —(Interjection)— Well, I think as a solicitor you would realize that if people have to swear to something specific, they take a great deal more care with it than if they are swearing to something in very general terms. That's the reason probably these dower evidence. . . mind you, we will still have dower evidence. It will still require to say whether it was or was not the homestead within the meaning of The Dower Act so maybe this is sufficient.

MR. CHERNIACK: In any event, as I understand it Form A is not a requisite, it is the nature of it because it says, "may be in Form A or to like effect, and by such other evidence as the district registrar requires." So it seems to me that what we want to do is to say to the registrar-general, "what do you want here; if you're not sure, you still have the right to add to it, whatever is missing," and I think that really all we can do is shift the responsibility to him to decide what he wants. Maybe what he wants is a sixth clause that says that this was a marital home, but my wife has opted out.

MR. SHERMAN: Maybe you could do it by shifting clause 5 up, and making it clause 2 — renumbering the others — and 1 and 2 would be questions which it would be mandatory to answer and 3, 4, and 5 would be the optional ones. You would attest that you were the person named in the instrument. You would attest that no person is entitled to an interest, etc, and then by choosing one of the other three, you would demonstrate why.

MR. CHERNIACK: I'm sort of shifting our responsibility to Mr. Lamont. He's got to decide really what evidence he would want.

MR. SPIVAK: I just want to make it clear that from his point of view, he would consider that this was the case. There should be no requirement that any agreement between spouses which are either partial or complete opting out of the marital regime would have to be filed and that's one thing that I want to ensure, that that really is private as between the couples, and should not be a matter of public record unless it's required in court. So long as that's not required, then that's clearly understood and I have no objection to it, but obviously what he's suggesting is in terms of simplicity, the last line would probably be the only line that's required.

MR. CHERNIACK: Mr. Chairman, I would suggest that we deal with the sections now, and by the time we get to the forms, we ask Mr. Lamont what he wants. I think that's a practical suggestion. I think he has had several, one of which is either as Mr. Spivak says, that one clause or if Mr. Lamont wants to force them to say why, as Mr. Sherman suggests, we add a clause saying that this was a marital home but my spouse has opted out — I don't know what word to use for "opted out."

MR. CHAIRMAN: 31(1)—pass; 31(2)—pass; 31(3)—pass; 31(4)— pass; 31(5). Mr. Spivak.

MR. SPIVAK: I wonder just here — we talked about this yesterday and Mr. Lamont is here, just to understand — if there is a judgment against one spouse and the other spouse either is without a court order or as a result of simple application, applies for the title to be registered in her name or in both names as joint tenants, what will the net effect be? Will that transfer be allowed to go through?

MR. CHAIRMAN: Mr. Lamont.

MR. LAMONT: The judgment is against . . .

MR. SPIVAK: The husband, say.

MR. LAMONT: . . . the husband. I suppose the judge would have no knowledge that the judgment was there probably when he was making the order, but he would make the order that a title issue is subject to it. The statute would have the effect of reducing the judgment creditor's security, but that is done by saying they are deemed to be owner of the joint interest.

MR. SPIVAK: We are talking really about two different situations. One would be a judge's order. The other would be just a normal request which a wife in this case would be entitled to make, asking that she be registered as a joint tenant in the marital home.

MR. LAMONT: The wife and the husband jointly would have to both sign that, or whoever the owner was.

MR. SPIVAK: No, let's understand something, because my understanding in terms of this would be that one spouse has the right to request — not necessarily both spouses. Both spouses have to request, then the one spouse who wants the title to be registered in her name, as well as her husband's, needs her husband's signature on documentation to do this, and the only other way she can do it is by going to court.

MR. CHERNIACK: Or, I believe, she could file a caveat just showing a claim, but that caveat would be subject to fourteen-day notice, I suppose.

MR. SPIVAK: So she would file and the husband gets a fourteen-day notice then.

MR. CHERNIACK: Well, then, she would have to go to court.

MR. SPIVAK: Well, I know, but when you go to court, then you are already starting your proceedings, I guess.

MR. CHERNIACK: Well, that's right, so . . . .

MR. SPIVAK: But what we are really saying then is for the wives who, at this point, without wanting to affect their marriage, but at the same time concerned about the degree of protection, they must take the legal action of filing the caveat, or take action of filing a caveat or putting their husband on notice that they want their rights enshrined, realistically, in the Land Titles, so that they will be joint tenants. And that, by its very nature, even though those rights are given under this Act, can cause, I would think, great problems, particularly in the situation where in fact there is a judgment that could be against the husband of the spouse. The judgment could have arisen prior to the marriage and simply isn't registered in the Land Titles.

MR. CHERNIACK: Mr. Chairman, I am not sure who is adversely affected by Mr. Spivak's scenario, as he calls them, because the creditor should be protected and the wife is protected from any disposition, any voluntary act of the husband's, unless he perjures himself. So it seems to me she doesn't have to do anything, but we agreed earlier that she is better off to get on the title so it's . . . .

MR. SPIVAK: But she can only get the title . . . .

MR. CHERNIACK: By consent or by court order.

MR. SPIVAK: By consent, by court order, or by filing a caveat, which in effect gives notice that she has taken action.

MR. CHERNIACK: Well, just that she has recorded her right.

MR. SPIVAK: Yes, she has recorded her right. My impression before, and maybe because I didn't read it that thoroughly, was that she would have an automatic right to ask for it without asking her husband.

MR. CHERNIACK: No.

MR. SPIVAK: So that in effect the marital home can be affected by the debts and obligations of the husband, not necessarily acquired or even related to the purchase of the marital home and the financing of the marital home.

MR. CHERNIACK: Isn't that the law today?

MR. SPIVAK: Yes, I know it is the law.

MR. LAMONT: The certificate of title might be encumbered with things that had no bearing on the family home, but might be security which was for some other debt incurred by the spouse which registered as a mortgage. There might be mechanics' liens. There might be all sorts of things . Of course mechanics' liens probably might have something to do with construction, but there could be other emcumbrances so the spouse couldn't get out of assuming those, unless it was the intention of the Legislature that the joint interest would go clear of encumbrances, but that would be an unusual . . . .

MR. SPIVAK: No, no, but the point is that insofar as the spouse's rights are concerned, she is really acquiring an entitlement to 50 percent of the marital home and to have it registered in her name, recognizing that there may be liabilities not attached to the marital home which her husband has which may be registered in the Land Titles which will prevent the marital home from realizing, if there is a sale, or from providing the interest that she believes to be really 50 percent. It is really 50 percent of the marital home, plus the indebtedness now registered against her husband. Now we are not talking about a couple starting out, we are talking about 150,000 marital homes right now, maybemore, I don't know, in which the wife's entitlement is there, but there may be an additional liability not known by her and not really part of the family liability *per se*.

MR. CHERNIACK: Mr. Chairman, I really don't understand that this is a problem, because she surely should not get any more than his equity, and if his equity is subject

to his liabilities, then surely the creditors should not be adversely affected. And her claim is only to what he has in the marital home. I think that is only fair and right. The only thing I would think of is that from the time of registration, then future debts would not go against her interest. Am I right about that, Mr. Lamont? Well, then, that is why she ought to be registered. But if she neglects to be registered, or if her husband, who should want her to be registered for that very reason, doesn't do it, then she is taking a chance, but how is she worse off?

MR. SPIVAK: Let me just talk about future debts. If in fact there is no judgment and she is now registered as a joint tenant and a judgment then is registered against the husband afterwards, will that not prevent the transfer?

MR. CHERNIACK: What transfer?

MR. SPIVAK: Suppose there is a sale of the marital home afterwards. Will that prevent the transfer unless that judge was . . . .

MR. CHERNIACK: Sure, for his interest.

MR. LAMONT: It would be subject to the same consideration as in the case of where you apply for partition and sale now to sell under execution under a judgment. You could sell the half-interest and sever the joint tenancy, I presume.

MR. SPIVAK: But what I am saying here is this. A husband may have guaranteed an account of somebody else at the bank. It has nothing to do with the marital home. It has nothing to do with any acquisition of family assets, and all of a sudden there is a lawsuit and a liability and a judgment, and therefore it is registered. And it affects directly the marital home on this basis. It affects the husband, there is no question about it. But now it affects the marital home as well, and affects the wife.

MR. CHERNIACK: No.

MR. SPIVAK: Well, it does, because in effect . . . .

MR. CHERNIACK: Not if she is registered.

MR. SPIVAK: Well, no, but is she isn't. But we are now talking about the situation where people in the main may not be registered and now there are going to be applications to be registered to bring them in line with what is intended by this Act, and they are going to be liabilities that . . . .

MR. SILVER: Mr. Chairman, if it is a liability that the husband has incurred , we will have a definition of this position which will include all kinds of charges, liens, and by way of judgments and otherwise, that come against the property. And we have a section, 13(2) or something, that where the registered spouse makes a disposition of that kind, which, in.your example, would mean encumbers the property or allows the property to become encumbered by means of a judgment for a debt, then he is accountable to the other spouse. The other spouse has a right of action against him, but is liable to the other spouse.

MR. SPIVAK: I accept that that really affects future transactions. But what we are really saying is that for those who believe that in effect they are now acquiring a 50 percent interest in the marital home as a direct result of this Act, there may very well be encumbrances such as .a judgement which are against the individual spouse that in effect are going to basically dilute the interest, for lack of a better word, of the spouse acquiring the marital home.

MR. LAMONT: Are we concerned with the intervening period between the time the land becomes the marital home and the time that the spouse has become registered as owner? Because it might be possible to invoke the provisions of Section 72 of The Real Property Act that says that where an instrument is presented for registration, and a judgment or lien or so on appears to have priority, if they are not equitably entitled to priority, it may be possible to invoke that provision, but I don't know whether it is clear or not. But if that is what you are pointing at . . . .

MR. CHERNIACK: Mr. Chairman, I am not sure I understand what point Mr. Spivak is making, so let me build from this. I am the owner of a property ; it I get married is our home. I want to give my wife a half-interest — I want to, it is not that I am required to — I want to, under today's law, give her a joint tenancy in that home. I give it to her. There is a judgment registered against me for my debt. Then she can,t qet anhml had to give away, and therefore that judgement stands against the property ahead of her claim and of her equity and my equity. So we own jointly the net equity in the property. That is one case. No harm done. The judgment creditor is entitled to his protection, and my wife isn't entitled to any more than I could give her, that is, a joint tenancy in my equity.

Now, suppose the same thing. I own property; I get marrid married; we live in it. Two years later I give her a transfer as joint tenant. She doesn't register it for awhile. A creditor files a judgment against me, against my name, and then she registers it. Now

there is a problem. She was entitled to register it. She didn't. Mr. Lamont says maybe Section 72 could be used to do that, right? There is an argument there, she can say that. All right, that is one thing.

The third possibility. I have that property; I register a transfer to my wife; I have a later acquired debt. Now that later acquired debt only goes against my name. And, as I recall, I think it was the Brookland's Lumber case, the decision by Judge Williams — has it been changed? — it is still the law, that when a judgment is registered against a joint tenancy, that in effect turns it into tenants in common, and therefore all the judgment creditor can go after is the half-interest of the judgment debtor.

Now, in all those cases, the law is already clear. Now, how is the law made uncertain by what we are doing here, or made unfair to any party?

MR. SPIVAK: I now want to give you the example of — the only example that has to be given now. This would apply to all those who are now married, are living in a marital home as defined by this Act when this Act is proclaimed. A marital home that has clear title, the wife knows it has clear title, she now goes to register her 50 percent interest. There is a judgment against the husband for something that has nothing to do with the marital home, for any number of reasons, but not related to the acquisition of the asset, not related to anything else. It is a judgment against the husband. She, insofar as the marital home is concerned, is penalized, because she is still subject to that judgment, and therefore her transfer has to be registered on that basis, and therefore her interest is really the interest in the marital home, which may have been clear title, less the amount owing by her husband, whose debt is not related at all to the acquisition or the acquisition of the marital home, but a debt of her husband's.

MR. CHERNIACK: But, Mr. Chairman, she is not worse off, because until this Act she would have been . . . .

MR. SPIVAK: She is not worse off.

MR. CHERNIACK: You said she is worse off.

MR. SPIVAK: No, I shouldn't say she is worse off. She is in this position, she is not getting what I think a lot of women believe that they will be getting by this Act. That is all I am saying. They are not going to be getting a half interest in the home. They are getting a half interest in the home subject, in many cases, if there is a registration of a judgment, of the debts of her husband.

MR. CHERNIACK: Well, yes, Mr. Chairman, she is getting a half interest, sharing with him equally in his equity in the home, which is a great stride forward from where it was. —(Interjection)— Now, let me finish. Then, if he has the good sense and opportunity and ability to pay off the judgment, she will then have it clear. If he is unable to do it, she is certainly better off than she would have been had we not passed the Act, or had he not voluntarily given her joint tenancy.

If Mr. Spivak is now saying, "Ah, but she believes that she is getting clear title and isn't," then surely she ought to register that request jointly with her husband and she will quickly know whether or not . . . or search the title and she will know. She is no worse off. That is the important thing.

MR. SPIVAK: It is only a question of an understanding of the Act and the limitations of what we are capable of doing, and I think that has become very important, because I think that there may a general misunderstanding of this in terms of what a spouse will acquire. They will not acquire just a 50 percent interest in the home. They will acquire a 50 percent interest in the home, in the equity of the home, but the equity in the home is not just the encumbrances against the home. They will include any encumbrances against the husband or the spouse, any registered encumbrance against the spouse. And that is all I am trying to say. I think if that is what the policy is, we should understand it and everyone else should understand it because it is very different I think from the general impression that has been created on what really is being obtained, or really is going to be the result of this legislation.

MR. CHERNIACK: Mr. Chairman, that's very helpful what Mr. Spivak said. I would go further. I think that we have said from the beginning — and we should assert it loud and clear — that no third parties, creditors of either of the spouses would be adversely affected by what we're doing. That's even more important to my way of thinking that people should have the security of knowing that their security is not adversely affected, and if it isn't loud and clear, then what Mr. Spivak says should be made known. I believe it is logical but what should be more clearly established creditor of that husband should not is that any have to worry that that husband, through the Act, suddenly acquires less property which incidentally is the position that the Chamber of Commerce seemed to establish and which Mr. Spivak yesterday seemed to describe, and as banks or other

creditors suddenly are finding out that they have a lesser claim against the husband than they thought they had because of the Act. So I am glad he made it loud and clear that wives cannot acquire more than a joint interest in the equity of the husband — and that means subject to his liabilities — and by the same token, that creditors are not adversely affected by the action of this Act for creditors at the time of the enactment of this Act.

MR. SPIVAK: Well, I think that one has to then say that to those creditors who have not registered their judgment, you better register the judgment, and that's my guess of what will be happening or at least complete whatever is required so that your judgments will be registered. I think that that, to a certain extent, waters down the total effect of what was being proposed here and that's fine. At least that part I think is clear now.

MR. CHERNIACK: Mr. Chairman, I'd like to ask Mr. Spivak whether he feels that the spouse should be entitled to a half interest in the property excluding and ignoring and denying the creditors, legitimate, registered creditors of the husband. Because you said it's watered down and I want to know whether he thinks it should not be watered down, but the wife should get more than the half-interest of what the husband has.

MR. SPIVAK: I guess the problem I face in this is that judgments could be for many reasons. In one sense, it would seem unfair. I don't want to penalize the creditor, I don't want to penalize the other spouse. But certainly it would be an unfair situation to have a spouse who makes this application in effect have absolutely no equity — and that could be the situation — in their own marital home. Now the liability can still exist. There are certain rights that flow to judgment creditors, but I don't think the judgement creditor has the right of the acquisition of the marital home.

MR. CHERNIACK: Like now, that's the law today; that's your law today.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, this may not be particularly pertinent, but it is a question for information. Is the Crown bound by the same provisions as anyone else when it comes to a marital home? —(Interjection)— I'd give you an example. Supposing a house was jointly owned or is jointly owned according to this Act, and I, as the unregistered and unlicensed driver of an automobile, got into an accident and there's a $50,000 judgment against me. Can the Crown register that against the entire property or only against the one-half interest?

MR. CHAIRMAN: Mr. Lamont.

MR. LAMONT: They would only be able to register it against the interest . . .

MR. GRAHAM: The one-half interest?

MR. LAMONT: Yes.

MR. GRAHAM: Thank you.

MR. CHAIRMAN: 31(5)— pass; 31(6)— pass; 31(7)(a). Mr. Spivak.

MR. SPIVAK: I just want to understand the actual practice that will occur within the Land Titles Office. When you say that what will happen here . . .

MR. LAMONT: We had a discussion where Mr. Goodman, Mr. Silver and myself and Mr. Gibson were trying to come up with the simplest possible way and the least expensive way of enabling the spouse to become registered owners on the certificate of title. And it was my suggestion that we do it by endorsing memorial and not charge too much for it. In most cases, this would expedite the Land Titles work as well as keep the costs to a minimum . In a case where the certificate of title might be complicated for other reasons, for example, it might be cluttered up with memorials of discharge and mortgages or something, it might be advantageous to make use or request to bring it forward at that time, rather than just simply endorse a title that was already badly cluttered. So for that reason, I suggested that we leave the option for the District Registrar to issue a new certificate of title on the request as well.

MR. SPIVAK: Will that have the same effect as being registered as joint tenants in the event that there is in fact a future sale and a judgment that comes about?

MR. LAMONT: Yes.

MR. SPIVAK: There won't be any problem about that in terms of following the procedures that we talked about . . .

MR. LAMONT: There is a provision now in the The Real Property Act which provides that upon the registration of any instrument, we can make the endorsement by memorial, and it has the same effect as if we . . .

MR. SPIVAK: All right. So that there's no problem with that.

MR. CHAIRMAN: 31(7)(a)—pass. 31(7)(b)—pass. 31(7) —pass. 31(8). There is a typographical omission on the second line after the word "title," put in the word, "is," to read "the title is issued." 31(8), Mr. Lamont.

MR. LAMONT: I just noticed now you used the word "memorandum" instead of "memorial" in two places. It should be consistent.

MR. CHAIRMAN: Change "memorandum" to "memorial" in the third line and the sixth line. 31(8)—pass. 31(9), Mr. Spivak.

MR. SPIVAK: Again, I just want to understand this part, "Where land is subject to this Part by virtue of Part I and the spouse who is the registered owner of the land or the spouse who is entitled to an interest in the land under Part I dies," how do we determine whether there was a spouse entitled to an interest who is dying?

MR. LAMONT: We would invoke the provisions of Part III that would require a judge's order, unless there is a request signed by both parties. Since one of the parties is no longer able to execute the request, I certainly wouldn't recommend to any District Registrar to make the assumption that it was the marital home or that the regime applied. So we would need the judge's order in that case to establish it was.

MR. SPIVAK: I see. So therefore, unless a judge's order is filed with you, then that would be . . .

MR. LAMONT: Unless the judge ordered us to enter them as joint tenants we wouldn't accept the survivorship request for registration. I thought about it, whether it should be specifically spelled out, but I looked at Part III and it looks as if we really didn't have any choice.

MR. SPIVAK: But then I think what you're doing is you are relying on the affidavit of one person that the property is not the marital home, then it would go through automatically. You wouldn't necessarily know that it's a marital home or that the spouse has died. What I am saying is that a conveyance could be made in effect where a death has occurred, where the spouse has not been registered, and there's no memorial in the title, and there's no notice in the land titles and the only thing you are relying on is the affidavit.

MR. LAMONT: No, the only person who could make the affidavit is now dead, we wouldn't accept an a non-registered spouse's affidavit to provide this information.

MR. SPIVAK: No, but the person who died was the spouse who was entitled to an interest in the land. The one who is registered lives. That person could transfer that land right through. No, it's to intents in any case, that's right.

MR. LAMONT: So he would have to say that it wasn't the marital home . . .

MR. SPIVAK: Yes, that's fine.

MR. CHAIRMAN: 31(9)—pass. 31 as corrected—pass. 32(1)(a)—pass. 32(1)(b)—pass. 32(1)—pass. 32(2)—pass. 32(3)—pass. 32(4)—pass. 32(5)—pass. 32—pass. Amendment as moved — pass

MR. SPIVAK: Before we pass 32 *per se* at least have agreement on the forms.

MR. CHAIRMAN: Well, we would normally come to them when we have completed the other sections, unless there is some reason why you want to go to them at this stage.

MR. SPIVAK: Well the only reason is that the very sections that we passed include the forms themselves, and it is a question whether we are really passing the forms at the same time. Now it may be that they want some time to look at it.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I would suggest as far as the forms are concerned because Mr. Lamont, under the provisions of the statute, has the opportunity to put them in such form as he finds necessary for purposes of the Act. I would suggest rather than us deal with the forms tonight, that we do give him ample opportunity to deal with the forms. I don't think we're under pressure to complete the forms tonight, that we could just as well leave the forms and let Mr. Lamont spend time improving them on his own.

MR. SPIVAK: No, he can spend all night.

MR. CHERNIACK: May I suggest seriously, he has six months in which to do it because if we pass the forms in whatever form they are in now Mr. Lamont will still, but when the Act comes into force be able under what we have just passed, be able to vary them to accord with what his needs are. And therefore, I don't really think you ought to spend a minute tonight to do it, as long as the principle is clear — and I think we've discussed that enough — then I do think he has six months in which to refine it just like the courts will have all their time to refine their procedures.

MR. SPIVAK: I have no objection to that, but that means that you are going to have to change what we passed by the elimination of the forms because we haven't really passed the forms. All you are basically saying is that . . .

MR. CHERNIACK: Oh I think we should pass the forms today in the present form.

A MEMBER: Would that vary it substantially . . .

MR. CHERNIACK: I think so.

MR. PAWLEY: You have that authority, as I see it, under the . . .

MR. CHERNIACK: "By such other evidence or proof as is unsatisfactory to the DR. 31(1) . . .

MR. LAMONT: But you have to require this evidence as well as the other. I don't think we would want to start coming up with something different from what was passed . . .

MR. CHERNIACK: But you can add what you need.

MR. LAMONT: . . . but you could add something else.

MR. CHERNIACK: By all means, I'd be happy to issue a challenge to Mr. Lamont and say that we're going to be here probably at 11:00 o'clock tomorrow morning if he wants to bring in variations, by all means, we could pass them then. I'm assuming we'll be here at 11:00 in the morning or 2:00 in the morning.

MR. SPIVAK: I don't think the session will finish tonight.

MR. LAMONT: I have a meeting tomorrow, but I guess I could get out of it for something of this nature, yes. I'll try to see if I can come up with some slight variations.

MR. CHAIRMAN: We have now completed Part III. Does the Committee wish Mr. Lamont to stay any longer with us?

MR. PAWLEY: As far as I know, Mr. Lamont could go, Mr. Chairman, unless some other member of the Committee sees some needs.

. **MR. SPIVAK**: Well if Mr. Lamont is going to be here at 11:00 tomorrow and if we do need something that maybe requires some information, we can always ask him then, but it's unlikely.

MR. CHAIRMAN: Hearing that, thank for coming, Mr. Lamont. I refer honourable members then back to Page 10 on their amendment sheets. Page 6 in the bill, Section 17. Section 17—pass. Mr. Spivak.

MR. SPIVAK: We're saying that a spouse has a right to ask for an accounting, an equalization of commercial assets, just by a simple request at any time, whether they are cohabiting or not.

MR. CHERNIACK: But there's Section 19. In any of the events under 19.

MR. SPIVAK: Well come back then to 19(e) where the other spouse is dissipating commercial assets. So what really happens is that you're going to have a situation where, it's alleged that the spouse is dissipating assets, they can be cohabiting, they have not separated and there could be a request for an accounting and equalizaiton.

MR. CHERNIACK: And the rejection by the court on the basis that it's not dissipating.

MR. SPIVAK: Yes, but in order to be able to do that, they would have to then have an examination of the assets to be able to determine whether the dissipation has occurred or not.

MR. CHERNIACK: But, I think, Mr. Chairman, an examination of the allegation that there is dissipation first.

MR. SPIVAK: Let's look at a situation with respect to what we are talking about. The wife may only have her impressions of what is happening, based just on her limited knowledge, but her concern is that there will be dissipation. I want to come back to this. Are you saying that she simply has a right to go to the court and say — well, she doesn't have to go to the court. She can just simply serve notice on her husband that she wants an accounting and equalization.

MR. CHERNIACK: Then she can only enforce it by getting a court order.

MR. SPIVAK: She can only enforce it, but the husband has the obligation for an accounting and equalization to his wife on the commercial assets.

MR. CHERNIACK: No way.

MR. SPIVAK: Why no way?

MR. CHERNIACK: Mr. Chairman, I am sorry to get into this dialogue. I was trying to avoid it, but I am trapped into it again. I don't mean that in any . . . I don't want to be misinterpreted by the use of that word "trapped." The spouse has a right to serve notice that she or he requires an accounting; and then it says the nature of the accounting; and then under the enforcement section, it deals with how that accounting is achieved. And when Mr. Spivak says the husband is required to, all the wife says is, "I would like an accounting," and he then can only be forced to give the accounting when the court orders him so to do. And the court must then first, I believe, establish one or more of Section 19 events having occurred before the court will make that order. To me that is an obvious sequence. Now we know today that any husband can sue his wife at any time for damages, for a beating up, for anything. A statement of claim can be issued. That

doesn't mean that it does more than just bring the matter into court, and by giving the written notice, how else do you establish the right to go to court for an order for accounting, except by giving notice?

MR. SPIVAK: Yes, but you see, the problem is you are not dealing in reality with respect to the whole range of situations that arise where in effect the request for an accounting and equalization, the actual request, and the potential and the possibility . . . and they are now cohabiting, they are not talking about separation at this point . . . and the possibility that there will be a court review of that can be almost disastrous to the husband in the handling of the commercial assets that he has — and just the mere threat in itself is a very severe power for any type of negotiations that can take place afterwards. Now it may very well lead ultimately to a separation; that can happen.

What I am saying to you at this point, is where the other spouse is dissipating commercial assets — and I want to get back to that when we come to that, because I really am going to have to ask the government to explain how they expect that to be determined — and the mere allegation by a wife that in effect there is dissipation, I think, would be sufficient to have a court adjudicate as to the accounting and equalization. And not necessarily to equalization, but it certainly is to accounting, to determine whether dissipation has occurred, and that in itself can have the direct effect of destroying the spouse's ability to deal with the commercial assets. And that may very well be what is intended by the spouse who, at that point, is concerned with damaging the ability of the other spouse to deal in the commercial field. That may be one result, not equalization, but just damage.

I fail to understand how this is going to work and I really think that the implications are severe for those who in fact have not made the decision to separate; that the implications are severe in terms of the relationships that will develop and which will probably ultimately lead to separation afterwards.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I just wanted to say that when you called Clause 17 and I said pass — and I don't know whether it wa recorded or not, but if it was, I just want to say for your information, Sir, that the only reason I said that was because I felt that we had to get to Section 19 probably, before we could consider these problems. And certainly the one that Mr. Spivak raises is very important. I think there are many of us that are concerned about 19(e). The only merit to passing 17 at this juncture would be simply to acknowledge the fact that this action would be subject to what is laid out in 19, and then we would examine all those conditions in Clause 19. But if we are going to be able to criticize 19(e) now, then I am sure a lot of us have a lot of things to say about it.

MR. CHAIRMAN: The Chair did not initial 17. I agree with the honourable member it might be better to reserve that debate until we get there. Could we proceed to 19(e) then? Would that be agreeable? Mr. Cherniack.

MR. CHERNIACK: Are we passing all the items down to 19(e)? I mean, are you calling them, and then we will stop at (e)?

MR. CHAIRMAN: I am about to.

MR. CHERNIACK: I am sorry. I misunderstood.

MR. SHERMAN: It is not just 19(e), I mean 19.

MR. CHAIRMAN: Section 17—pass; Section 18—pass?

MR. SPIVAK: Mr. Chairman, I must say that depending upon what happens with 19, I am not so sure that 17 should be passed. I think that there is an amendment that should take place.

MR. CHERNIACK: What kind?

MR. SPIVAK: Well, because I think it has to do with 19. I am just simply saying that to pass 17 on the assumption that there is going to be a correction in 19, fine. But if that correction doesn't take place, I think the whole 17 has to be argued. It can be rejected by the government . . . .

MR. CHAIRMAN: Order please. I believe that the Committee has been flexible enough in the past to be able to go back to sections where a change was indicated. I hope we can proceed on that basis and get to 19(a).

19(a)—pass; (b)—pass? Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I am just not certain of the need for 19(b). It is my understanding that under present legislation, you can go into the family court, lay an information complaint and get an immediate accounting. Am I right or wrong?

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Accounting is not involved at all in The Wives and Childrens Maintenance Act. That is only maintenance.

MR. SHERMAN: That's only maintenance, is it?

MR. CHERNIACK: There is no separation of property that is involved, no law at all.

MR. SHERMAN: Well, then, 19(b) is necessary.

MR. CHERNIACK: Yes.

MR. CHAIRMAN: 19(b)—pass? Mr. Graham.

MR. GRAHAM: Mr. Chairman, not dealing with 19(b) in particular, but dealing with a spouse may at any time give written notice, how many times in a year could that be done if there are problems here? It seems to me that it is quite possible that the spouse could, for various reasons, effectively tie a person up in court all the time if they wanted to — for vexacious reasons. Is that possible, Saul?

MR. CHERNIACK: Mr. Chairman, Mr. Graham has directed the question to me, and I would say you can give written notice all you like, but if you go to court with a vexacious matter, the court will slap you down. If you come back the second time with just a — what's the term — a very light frivolous matter, that the court will really slap you down. So I don't see any danger of keeping a person in court time and again. The court would pretty quickly dismiss a motion which doesn't have a good foundation.

If, on the other hand, these causes, events or circumstances are proven, then the court will deal with it, I would think, once and for all, surely.

MR. GRAHAM: Mr. Chairman, without referring to the maintenance bill, I think there is something in there, isn't there, about once every twelve months?

MR. PAWLEY: I think there is a limit to that, is there not? Because we agreed that an artificial limit like that might impose some hardship and we would be better to leave that to the court's discretion, allowing the application to be made to vary at any time where there were reasonable circumstances.

MR. CHAIRMAN: 19(c)—pass; 19(d). The last word in this section, the spelling should be corrected. And one other typographical error in this section, by the way, in the heading "Accounting and Equalization." It should be "Notice for Accounting and Equalization" to make it different from the next one. 19(d)—pass? Mr. Spivak.

MR. SPIVAK: There is an amendment here which would give a time limit with respect to proceedings, and I want to ensure that that applies. A decree absolute has been given, as I gather, a proposal that proceedings must be commenced within a month. —(Interjection)— absolute. —(Interjection)— Well, I think when we come back to that, I would like to suggest that it should not be within 30 days, but no later than the decree absolute. I think the question of the accounting and equalization has to be very much a part of the procedures that we are talking about, and the time limit we will talk about when we come to that — but so long as it is agreed, at least, that the proposal is a 30-day or a limit afterwards in terms of time. I don't think the time should be long. It should be part of the proceedings immediately, that is, not necessary part of the divorce proceedings, but an action taken simultaneously, if that is going to be requested.

MR. CHAIRMAN: 19(d)—pass; 19(e), Mr. Spivak.

MR. SPIVAK: Well, here, Mr. Chairman, I think we are dealing with an item that will have the most serious consequences with respect to this bill. The implications of it I am sure going to debate, but I guarantee you we are not going to in any way even touch the implications of what this section really means — terms of the nature of the case law that will be developed on this, in the nature of the new aspect that we are going to be creating with respect to the relationship between spouses who are living together, and the whole question of what dissipation means.

When the presentations were made here, there was some concern that dissipation of commercial assets was in effect the use of the commercial assets in some way for a third party who may very well be responsible for the separation, and that somehow or other those commercial assets should not be used because that really belonged to the husband and to the wife. But we are not saying that now at all; what we are talking about is going to be a question of fact dependent on the circumstances of each situation. It is going to create, I think, havoc in relation to determining it. The threat by and the ability of the spouse to be able to suggest to the other that you are now dissipating my commercial assets, and simply write a letter and say that, you know, I have a right, I want you to know it, now I am going to enforce it in the court. If you don't comply, it has serious implications because the dissipation may or may not be there, and in the case of a wife who has really no knowledge of her husband's affairs, but only finds certain information out by hearsay, just the threat of an accounting before the court can have its implications.

I wonder whether we really want to get involved in this kind of situation, or whether we want to develop all the kinds of scenarios that can occur and will occurr — will occur

— with respect to this. And then the problem we are going to have in all of this is the ability of the court to be able to determine that, and the accountability that really is going to be required by living together, and the whole question of what dissipation means.

When the presentations were made here, there was some concern that dissipation of commercial assets was in effect the use of the commercial assets in some way for a third party who may very well be responsible for the separation, and that somehow or other those commercial assets should not be used because that really belonged to the husband and to the wife. But we are not saying that now at all; what we are talking about is going to be a question of fact dependent on the circumstances of each situation. It is going to create, I think, havoc in relation to determining it. The threat by and the ability of the spouse to be able to suggest to the other that you are now dissipating my commercial assets, and simply write a letter and say that, you know, I have a right, I want you to know it, now I am going to enforce it in the court. If you don't comply, it has serious implications because the dissipation may or may not be there, and in the case of a wife who has really no knowledge of her husband's affairs, but only finds certain information out by hearsay, just the threat of an accounting before the court can have its implications.

I wonder whether we really want to get involved in this kind of situation, or whether we want to develop all the kinds of scenarios that can occur and will occurr — will occur — with that presumption of an interest, an equal interest, should not have the equivalent right that a creditor would have to go after assets in a hurry if it can be shown that the assets are being dissipated. Now it may be that Mr. Spivak would say, "Well, strike out (e) because the people are cohabiting. Because they are cohabiting, then they will rely on dissipation." Well, then, the very first thing that would happen, I assume, when a wife comes to her lawyer, as she will have to do, I suppose, and say, "Look, he has got most of the money now. He is down in Vegas. He is gambling it away, and I hear he has already put the commercial asset up for sale to convert to cash. What can I do?" And the lawyer would look at, say, 19(e), and he might say, "Well, we will start immediate proceedings under (b) for a separation order, and then we will bring that into effect." The important feature is: Do we want the spouse to have the right to step in quickly? I would like to refer Mr. Spivak — I have no doubt that he has reaei aybe more than once — to Page 73 of the Law Reform Commission Report, 1974 and 1975, as to the reasons they give for feeling a concern on behalf of a spouse who sees the danger of the assets to which that spouse has the equal sharing presumption being dissipated. Now, if there is any other way that Mr. Spivak can suggest that, fine, but I think that — of course it is a dramatic action, and yet it might not necessarily damage the commercial relationship of the spouse who owns the asset with his commercial people that he deals with because in the end, whether it's a separation or a dissipation or a divorce, in the end the court has the right and the obligation to decide the extent to which the equalization shall be immediate or deferred , to arrange for payments over the long run and the purpose is not to jeopardize the jointly owned assets. But surely the purpose is under (e), to make sure that there are assets to debate and if there isn't the opportunity to come in quickly and say, "my husband is dissipating the assets," then before long there won't be any assets and there won't be any discussion if the court so decides.

So I don't see . . . I would first like to clearly ask the question: Does the Conservative Party agree with the principle that the wife has an equal interest in commercial assets that is deferred for certain things? And secondly , if that is the case and it must be because we've already passed four circumstances, should it not include dissipation as suggested by the Law Reform Commission?

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Yes, well Mr. Cherniack can invoke the Law Reform Commission as his supporting position because he's not invoking the Law Reform Commission with respect to this Act, so I mean. . . .

MR. CHERNIACK: I am to a very large extent. . . .

MR. SPIVAK: Well no, that is a frivolous argument, because you use it when you think there is an advantage to your position and then when you don't, you just ignore it.

MR. CHERNIACK: No, I don't ignore it. I disagree with it.

MR. SPIVAK: Well, you disagree with it , all right.

MR. CHERNIACK: Do you disagree with it?

MR. SPIVAK: Well, I'm going to come back to the situation because I think there has to be some degree of sanity with respect to the situation. A husband handling the

commercial assets will make a decision that he's going to do something and the wife says, "I don't like that" whether she knows anything about it or not, her claim will be that you're going to dissipate my interest. That's all she has to say. She serves notice immediately that you're going to dissipate my interest, because you're going to be handling the commercial transaction whatever it may be which is involved. Her husband may be a professional person and say, "I'm going to leave this firm and I'm going to go to another firm," and she may say, "Well you're dissipating my assets, I don't want you to leave and go to the other firm." It's not his decision to make, it's going to be her decision to be a part of it, and I do not believe that that puts her in a position as a creditor to actually effect the date of the operation of the decision-making that has to be made by him. The value of being a partner in a profession may be one thing, the desire on his part to change may come about for any number of reasons which relate to the nature of work and things that he may want to do. You are simply suggesting that the wife as a creditor has the right to essentially say immediately that you're going to dissipate the commercial assets by leaving that partnership and the potential or the interest that is vested in that partnership by simply going and practicing whatever your profession is somewhere else. That's absolute nonsense at this point — it really is.

This is not what is intended here and it's necessary for some rational discussion to take place with respect to this. Otherwise, if we pass this, the implications will be severe and as I say, the direct requirement will be that every lawyer in the province will be advising people of avoidance of this because of the severe implications. It just simply does not deal with the reality of the day to day operations in commercial and professional and employment. . . forget about that situation , in direct employment. A person may have a particular job with a pension plan, which is part of the group pension plan which is a commercial asset and a decision may be that I want to leave my job and I want to go to another job because I think my work there will be more interesting to me, and the wife says, "You can't do that because you're going to be dissipating the assets because you have a pension plan in which their is vesting by the payments of the employer as well as yourself and if you leave all your going to get is the amount of money that you put in the pension yourself' therefore, you cannot leave and go to the other job." I don't think that we are talking about that person as a creditor having a right at this point to claim dissipation simply because the person wants a change. And what I'm saying about it is really . . . the determination directly related to this section.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I think that if one first would read the dictionary meaning of dissipation it might clear up some of the concerns of Mr. Spivak and might suggest to him that his concerns are excessive in the circumstances. Dissipation: to expend aimlessly or foolishly, to squander, to be extravagant or desolate in the pursuit of pleasure, to drink to excess. Now let me say that insofar as the determination of that, it wouldn't be a matter in which the wife , to quote Mr. Spivak , would determine on her own and just serve notice and say, you're dissipating the assets and then there would follow an accounting and equalization. The court would have to determine whether or not in fact there was dissipation, and therefore the court would have to determine whether or not there was an expenditure which was in fact aimlessly or foolishly or there was squandering of assets, a vanishing of assets, a scattering of assets, and just what standard the court uses of course will be determined by way of case law. But I would be very concerned if we took away from our Act the power for the court upon application to prevent the squandering or the wasteful expenditure, the aimless spending of assets by one's spouse. I can think of the hardship that could be possibly created by that type of situation, and as Mr. Cherniack indicated, the creditor has certain protection as against one who proceeds to dissipate assets, to vanish assets, and I would think that we would want to provide the spouse with no less by way of protection than we would the creditor in that instance. I think the definition of "to dissipate" is very. . . pardon?

MR. SPIVAK: Where are you reading it from?

MR. PAWLEY: From the dictionary, Webster's Dictionary.

MR. SPIVAK: What about the cases?

MR. PAWLEY: Well, I don't think we have case law established yet, and I think we have to depend upon our courts to in their wisdom develop case law. But certainly the courts would commence from the dictionary meaning of "to dissipate." I would assume that the court rulings would be reasonable and would be in line with the definition. To do otherwise, I can see many. . . I don't know what Mr. Spivak would suggest as an alternative to this in order to protect the spouse that might be very sadly and very grossly victimized by the type of circumstances that could be created by dissipation of

assets.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, it seems to me that in looking at this issue that Mr. Spivak has raised a point that all kinds of transactions that could take place, that someone who perhaps is vindictive could interpret as being a dissipation, and I think that there are some dangers. As he was speaking the idea flitted through my mind that we would probably have, all of us, great difficulty in attracting political candidates, because every wife would say, "You're dissipating your resources, you dumb . . . you know," and democracy would probably grind to a halt because no one would dare dissipate. . .We all know the total dissipation of resources that is. —(Interjection)— That's right. Perhaps that would be a good thing then we could all go home early. But on the other side of it, I heard both you and Mr. Cherniack say, there has to be adequate protection as a consequence where the marriage is breaking down, that someone needs to have the protection against someone going out and . . . . I think your dictionary term was having a wild time drinking and all that kind of stuff which sounds like a lot of fun.

T question I would raise is one of the ways of resolving it if your looking for alternatives, because I can see that you may end up in an awful lot of challenges in this issue of what is defined as dissipation, if there was a way of connecting the act of dissipation as a consequence of a marriage breakdown that that would be the basis for it. In other words if you tie in . . . one spouse would have to demonstrate a dissipation is taking place as a result of marriage breakdown at this point in time. —(Interjection)— Or it could be. I'm just looking into. . .—(Interjection)— Allied with breakdown would be a way therefore on of providing a limitation the definition of dissipation so that it would not be as broad gauged, or as broad brushed as Mr. Spivak described it, and I think that there is a real possibility there that a whole multiple number of transactions and activities may in fact, or could be interpreted certainly in the early runnings of this law until a case law built up and precedents were established, that you really would provide for a kind of a free for all in many cases. But if we could indicate through legislation that there is an alliance between the notion of dissipation and the marriage breakdown and if there is a way of righting it, then it would provide that qualifier that may serve to eliminate some of the problems that Mr. Spivak posed.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: The problem here is that in effect dissipation really means diluting of the assets, it's not just the question of wasteful expenditure. Realistically, that's what you're talking about. There is in effect a dissolving of what one has and that's contained within the definition of dissipate here. I'm suggesting that the point , realistically the decisions that are going to be arrived at are severe, and what I'm saying to you that the right that the creditor now has, because the wife is the creditor and this is the position, of being able to say to someone who is her debtor, and the husband in this case would be the debtor, that I want an accounting, is fairly severe for its implication simply on the basis that, up to this point there are thousands and thousands of situations where the spouses have no idea of what has happened in the commercial field or in the handling of the commercial assets or even with respect to the income that is being produced by the employment that's taking place, has no idea, now they are going to be able to ask direct questions, in the course of it, they are going to be able to demand accounting and equalization and a threat of that in itself has its implications. I'm saying that you are going to be affecting a whole range of things, I think that in the course of this there is no case law that we are going to be citing, it's going to develop and I think that to suggest that it can happen without the other aspects of separation that we are talking about, will have a very severe impact and will create in many situations tensions that should not be there.

The entitlement that we say with respect to joint tenancy still requires the act of the spouse. There is an act that has to . . . the rights are there. I'm not saying that in the case of a marriage breakdown or a separation that there shouldn't be the right for the accounting and equalization to take place, and the claim could be made at that point, that in fact, assets were handled improperly and there is entitlement to a review. But I don't believe it an automatic right that the creditor can demand immediately by notice, an accounting and equalization. That in itself will I think, have a direct effect, and that will be an attempt to indirectly affect the decision making with respect to the commercial assets that the spouse has management of. We've accepted that he or she . . . that spouse has the management of it, and I don't believe that that creditor should have the ability to be able to indirectly affect that decision making by simply saying, I want an accounting and equalization. If I don't get it, I go. . . whether I proceed with separation or not. I think those implications are pretty severe.

MR. AXWORTHY: Mr. Chairman, I didn't suggest I may be for it. All the other clauses (a) to (d) have within them the element that there is a form of marriage breakdown taking place. It is only (e) which does not, and therefore, I think that's why that element has to be built into it to indicate that.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Firstly, I have to accuse Mr. Spivak of ignoring what he ought to know of the process of law. And therefore I have to accuse him of using the term, "an automatic right" wrongly. He has a right under this division to require an accounting. She has the right to give him a written notice saying, "here, because you are dissipating commercial assets, I want an accounting." This is not a public issue yet. This is not a great big front page headline story. She gives her husband a notice saying, you're dissipating the assets, I want an accounting. He may give her the accounting , he may not. If he does not give it to her, an accounting and equalization, if he does not, what is her recourse? She goes to court and she asks the court to enforce her rights for an accounting and equalization on the ground that his is dissipating a commercial asset. The court then must establish whether or not her ground is valid — Is he dissipating, and if he is the court can then make the order. That does not mean that there is an automatic right nor does it mean that third party's are affected, nor does it mean that if they don't believe that there is dissipation that they have to rush off and start worrying about it. It means that the court will adjudicate.

Now I want to point out to Mr. Spivak, that not only once have I looked at the Law Reform Commission Report, it has been open beside me here at all times. I think that the report is the foundation of a great big body of law that we are now dealing with and which we have dealt with in previous Committees of which Mr. Spivak did not have the benefit of being a member and the fact that we are, as a government caucus, not agreeing with all of the recommendations, it must be recognized that we have read them, and when we disagree with them or go beyond them, we do it with knowledge of what they said, not in ignorance of what they said. So we do not ignore what they say, but that doesn't mean we have to agree all the way.

Therefore, I would like, Mr. Chairman, to read the relevant part of what they say in this aspect mainly to deal with what Mr. Axworthy raised which on first blush seemed to me to be illogical, until I reminded myself what the Law Reform Commission says. They say on Page 76, "One can however foresee, perhaps as an incident of a reconciliation agreement, that one spouse would think the time had come to invoke the sharing provisions while not actually wanting to institute separation or divorce proceedings. In an instance of addiction to gambling or other species of extravagance or squandering, one spouse would have good grounds for seeking the security of an equalizing payment. One might speculate that in many instances such action would likely precipitate an action at the instance of the other spouse for separation or divorce, if grounds for the same existed, or might precipitate a worsening of marital relations, but and I underline, but not necessarily so in all instances. There are instances where the alcoholic spouse, for example, finally realizes that he or she cannot be appropriately trusted to manage . any money matters involving the family, and the other spouse would nevertheless stand by the afflicted spouse if only some proper management could be implemented for family financial security. Many such people cannot live up to an oral agreement concluded with their spouse, but want and need a court order to make them adhere to their undertaking.

We therefore propose that even though still living together, either spouse should be entitled to apply to terminate the SMR, resulting in judgement for an equalizing payment upon proof or admission of the other spouse's addiction to alcohol or other drugs or addiction to gambling are of such a nature or extent that there is a great risk of dissipation of assets, or the other spouse's squandering of assets, of which the applicant has an expectant interest.

The above-recited dolorous grounds for termination serve to illustrate, but not to limit, the kinds of circumstances that we have in mind. Our recommendation, which is both broader and more concise, is"that either spouse should be entitled to apply upon consent or upon satisfying the court: (1) that the other spouse has made or intends to make a substantial gift or transfer of assets for markedly inadequate consideration, or that there is undue risk that the other spouse will dissipate or lose assets to the applicant's detriment."

Mr. Chairman, as I read (e), that's the least of the incidents in a marriage difficulty, because that is the one instance where a spouse can say, "I am not looking to break our marital relationship. I am just trying to protect the assets which the family owns." And

therefore where she could, under (b), commence proceedings for separation and go right ahead — and we have already agreed that that is a valid reason — she can take a lesser step and say, "Let's not necessarily break up the marital relationship. Let us just deal with the assets."

That is where I saw that I would like to differ from Mr. —(Interjection)— Did somebody say, "Why?" —(Interjection)— Because it is quite possible that we have heard instances of ladies that came to us and presented briefs . . . I remember one vividly saying, "My husband was an alcoholic. He contributed nothing to the house, but we lived together for the sake of the children and brought up our children in the marital home." And that was something that she did that she didn't have to do it but she saw value in maintaining the marital relationship for the children or for their arrangements with each other, but she found it necessary to secure the assets. And therefore, as I see (e), that is the one instance where a spouse could try to keep the marriage together and yet keep the assets secure.

I can think of an example of a person who is of limited income who, with his wife's help, has saved up $10,000 or $20,000 in government bonds — I hope Province of Manitoba bonds — and they are sitting there and he is working and she is doing whatever is her part in the marriage, and suddenly for some reason, he does something. It could be alcohol, it could be gambling, it could be a girl friend, it could be any sorts of reasons that are harmful to the relationship, and start spending money, and she might say, "If I can only bring him into line, if I can stop him could stop him drinking, if I could stop his gambling, if I could get a control over the asset, we could still live together." Then she would use (e), not the others. And therefore I am suggesting to the Committee that (e) is the one occasion when they might yet keep the marriage together, and if it doesn't succeed, as the Law Reform Commission suggests it may not, then automatically (b) comes in, or (a), or any of the other reasons. So therefore Mr. Spivak says that this nasty wife who is still cohabiting with her husband will have a whip over him; she has the whip over him simply by saying, "I am going to apply for a separation order." And then the same effect exists.

So I do not see that we should not protect her and give her this opportunity, which she is being given, without having to break the marital home. And I still don't know whether the Conservative Party, and now I start stressing it, believes that she is entitled to protection in the event of dissipation or not, because Mr. Spivak is arguing strenuously that (e) should not be included, which means that the wife is not entitled to claim her rights unless there is an actually separation. And if that is the case, then I believe that the Conservative Party — and I say that advisedly, again — is forcing that marriage to break up because of the possibility of dissipation.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Walding, Mr. Cherniack has covered much of the area I wanted to cover, but I wanted to emphasize from first premise that this legislation of course is based upon the equal partnership, the 50-50 division, with some limited degree of discretion. And if one spouse is able to circumvent the equal division by extravagant, wasteful and reckless expenditure to the extent that that expenditure in the view of the court would be dissipation, would in fact threaten the assets of the marriage relationship, then I think the courts should be able to grant an order recognizing two aspects: (1) the need for speed in dealing with this situation caused; and (2) to provide an alternative to the spouse requesting the order from having to commence separation proceedings. We heard so much in Committee from briefs stressing the importance of attempting all possible means to preserve the marriage relationship, the importance of conciliation, the importance of counselling, the very sanctity of marriage, and I think that to eliminate 19(e) would be to say to a spouse faced with such a situation, as so well described in the report read by Mr. Cherniack, that your only alternative is to proceed under 19(b), that they would be placed in a very very difficult position, a position of having to decide whether to ignore the fact that there is reckless waste which is dissipating the assets of the marriage, which can be due to many many causes, or proceeding with or having to proceed with separation.

I think there is an alternative, and that is why I think the proposal, the provision, in 19(e) is reasonable.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: It seems to me that bott Mr. Cherniack and Mr. Pawley are way over their heads at this point, because, you know, this Act is The Marital Property Act. We have already recognized that we are going to find it impossible by this Act to keep

people together and for them to be able to cohabitate in a different manner, or going to in any way encourage or discourage what will take place.

I think a very legitimate argument — and I say legitimate in the sense of the validity of the argument — can be advanced that what this Act will do, it is going to cause a tremendous number of separations and divorces in this province. I think that argument can be made but I am not saying that we do not deal with this Act because of that. I simply say that we have got to deal with the Act on the basis of what the intent is.

Now it seems to me that there is a responsibility, because I have heard the definition of this reckless waste for us to define dissipation. Let's define it, put it in the Act, and let's know what we are talking about, and that would be one aspect. And secondly I think, because we have already done this in relation to other situations, in the case of the spouse who is claiming it while the cohabitation is taking place and may very well have to go to court, then I think that we should state that the onus of proof is on the spouse so claiming. We have said that the burden of proof with respect to a person claiming an asset is not a shareable asset within the meaning of this decision, has the onus of so proving. It would seem to me that that onus then should be put.

MR. CHERNIACK: I think that is the law and I don't see anything wrong with that.

MR. SPIVAK: But I would want to see a definition of dissipation and I think that is going to be very very important in relation to because, you see, when you talk . . . even in terms of reckless waste the arguments that will be advanced there are going to develop a case law which may very well change the nature of what is intended. That I don't know. But my concern at this point, and I am saying this to you, is to suggest that in terms of the decision-making that is taken on a daily basis by people dealing with commercial assets, if the spouse at any given time says, "I am not satisfied with it," without intending at all, other than to exercise a prerogative of decision-making on this, which really is not the right that we are giving to her in terms of the decisions. We are saying that if there is a dissipation, yes, but not in terms of decisions, that in effect this clause will be used as a means to enforce, to alter, a decision, or to enforce another opinion. And if we start getting involved in that, then there is a whole range of things that are going to happen. So let's define dissipation and let's stress the onus and the burden of proof with respect to that in terms of an application before the court, and maybe then that will change part of the effect that I think this will have.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, dealing with the Law Reform Commission report, I wanted to point out one or two areas that concern me a great deal at the time. In the Law Reform Commission report, they spelt out three grounds. They suggested alcohol, drugs or gambling as grounds. However they went on further and they also spelt out grounds of intention. They listed two grounds of intention, and I suggest, Mr. Chairman, that when they list intention as a ground that they are going a little bit too far. But they had suggested that the other spouse has made or intends to make a substantial gift or transfer of assets for remarkedly inadequate consideration. —(Interjection)— No, but I think that recommendation quite naturally would have to be thrown out, because it is a presumption, or cannot even be proved in court, because it includes an intention. And the second one was that there is undue risk that the other spouse "will" dissipate. So those two quite naturally had to be ruled out. Therefore I would suggest that the dissipation here should only include alcohol, drugs or gambling.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, Mr. Cherniack has asked the Conservative Party three questions and I would like to answer them. He has asked whether the Conservative Party believes in a legal recourse afforded the creditors where there is evidence of dissipation.

MR. CHERNIACK: I did not ask about creditors.

MR. SHERMAN: The Conservative Party does.

He asked whether the Conservative Party believes in the right of a wife or either spouse to an accounting and equalization of assets, and I want to assure him that it does.

He asks whether the Conservative Party believes whether a wife or either spouse has the right to protection against dissipation, and I want to assure him that it does. The question is: What is meant by dissipation, and that is what Mr. Spivak, Mr. Axworthy, Graham and many others have zeroed in on, and that is the question that has not been answered by Mr. Cherniack or his colleagues on the government side of the Committee.

Mr. Cherniack said —(Interjection)— Well, I will defer to Mr. Axworthy's point of privilege, but I just want to complete this point before I do, Mr. Chairman. Mr. Cherniack

says that the major provision contained in this section that we are looking at does not mean that there will be an automatic accounting, that it is not an automatic result of the right that the spouse has to request an accounting. That is perfectly correct, but it does mean that there will be an automatic examination by a court or a judge of the husband's or the spouse's, whichever the spouse is, of the husband's commercial record. —(Interjection)— Right. All he has to do —(Interjection)— No, but all he has to do is refuse to go to court and there then follows an automatic examination by a court or by a judge of that spouse's commercial record.

MR. CHERNIACK: No, of dissipation.

MR. AXWORTHY: Mr. Chairman, that is the question that I would have. Is the court in this case going to have a hearing to determine whether the claim on dissipation is an acceptable one or not, so that that would be in a sense a prior step. Before they would order the application, they would say, "is in fact" or would they say, "Is it a frivolous, vexatious kind of actitn?" So that is very clear then. Okay. —(Interjections)—

MR. CHAIRMAN: Order please. —(Interjections)— Order please. Let's just have one member at a time. Mr. Sherman.

MR. SHERMAN: Having deferred to Mr. Axworthy because I took his name in vain earlier, I would like to continue. I am not prepared at this juncture to defer to Mr. Johnston or Mr. Spivak for a moment, Mr. Chairman.

I go back to my point, that if it gets to the point where a request is made to a court by a spouse for an accounting, there then has to be a determination by the court or the judge as to the validity of that request. And there is no way that a court or a judge can adjudicate the validity of that request without an examination of the performance, in a commercial sense, of the spouse who is being so accused.

I think Mr. Cherniack is unrealistic if he shakes his head at that in denial of that. How is the court or a judge going to determine the validity of the request, the validity of the allegation, without going through some form of examination? And at that point, I say that it is totally unrealistic for Mr. Cherniack and the Attorney-General to suggest that this kind of provision is going to strengthen marital relationships. What it is going to do is, it is going to threaten marital relationships, because Mr. Cherniack, I think, starts from the assumption that all people are perfect, and unfortunately I think we are all aware that that is not the case. There could very often be situations where that kind of action was undertaken and it amounted to little more than harassment, but evidence could be presented to initiate that first step of examination, and the examination itself could turn out to be a very vexatious harassment for the spouse who was being so examined. And the result of that, Sir, will be pressure that will be sufficient to seriously impair that marital relationship. The result will be a harmful effect on many persons in a marital relationship, rather than the beneficial effect that Mr. Pawley and Mr. Cherniack seem to think will be there.

I also want to refer to Mr. Cherniack's references to the legal protection or recourse provided to a creditor in such situations, or perhaps it was Mr. Pawley who referred to it. I have to suggest, through you, Mr. Chairman, to the Attorney-General, that surely there is a difference, one would expect a different shading and a different nuance to be placed on the recourses that are afforded a creditor and the recourses that are afforded a spouse. In one case you are dealing with hard-nosed business. In the other case you are dealing with the most intimate of personal relationships. And there would be, there would naturally be some differences that one would expect in impact of a measure of this kind. And to just say that because it is there in the case of a creditor and it should be translated *en toto* to a spouse, I think, ignores the differences in the relationship, the marital relationship, as opposed to what I describe as a hard-nosed commercial relationship. I don't think that there is a solution here that is satisfactory at least at this juncture to me, Mr. Chairman, that falls short of a very specific definition of what is meant by dissipation because we recognize the right to protection against dissipation, but we also recognize that people are different. There can be many causes of dissipation. Mental illness could be a cause of dissipation. To suggest that it's always going to be a legitimate claim that's brought by one spouse against the other is ignoring the realities of life. In some cases it will be undertaken as a step that is intended to create difficulties for the other spouse, to put a strain on the marriage, to create unnecessary harassment. Those are the areas for which there is no protection under this section as it is presently written.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I think we were getting somewhere in this debate. I would just say that I must take the position that I would protect more the spouse than I

would that hard-nosed commercial relationship, because I think that a hard-nosed commercial relationship carries with it a creditor who, being hard-nosed, will take the protection that he can in carrying on a business, whereas the spouse who is easily influenced needs more protection.

Having said that and I think we've come to the end of a debate, I see no reason why if it is necessary or if it is not necessary — somebody quoted Doug Campbell the other day, that if you're in doubt you can put it in — that if it appears necessary, then I have no objections to spelling out dissipation as being, not the cause but the effect of it, the result of what it is. Then I think that dissipation is a squandering and I think that a millionaire can spend money, can spend $10,000 foolishly and that is not squandering, but a person of limited means can spend $1,000 and it could be squandering, so it would be up to a court. And therefore I would say — the words I picked out without looking too far in the Law Reform Commission was — "a species of extravagance or squandering," addiction to gambling which is also possibly that, but I think squandering might be enough. Maybe instead of saying dissipation, we should say squandering. And having done that, which means spelling it out, which seems to be the position they want to take, I would be prepared to restate what I believe is the law, and I believe that the law is that the person alleging a cause for action has the onus of proving it. I believe that is the law. But if Mr. Sherman will feel more comfortable if we say so, then by all means, I don't mind saying so if there is any doubt. But I do feel that — I just want to correct one other thing — I did not suggest that (e) would make the marriage more solid. I suggested that (e) makes it possible for an order to be made, just possible, and still keep the marriage together, not stronger but not broken as (a) to (d) inclusive contemplates, a break in the marriage relationship. That's why I argued that (e) is an easier step which still carries the possibility of an arrangement which would protect the assets and still make the marriage exist to the extent it can. But I think if we are reaching a stage where we could agree on a definition and the onus, which I think is just redundant, but nevertheless I've restated if that would make it more acceptable, I think that Mr. Silver is already working on that. Could we hear what he is gestating? Sir, we are talking about cohabiting, gestation is suitable.

MR. SPIVAK: If there is agreement on this, then I want it clear that what we are really talking about — if we can be as precise as we can — is really squandering at this point. What you are saying is excessive use of the commercial assets, not the judgments that have been made with respect to commercial assets.

MR. CHERNIACK: Oh no, if you mean if a person in the stock broker, apartment block business . . .

MR. CHAIRMAN: Mr. Cherniack, could you use the microphone please?

MR. CHERNIACK: Well I interrupted; I had no right to do that.

MR. SPIVAK: No, no, but I think this is important, I think that this style existed because — just let's look at a person who trades in stocks, and decisions are made, the choice of one stock over another, you know, that there's an element of gambling there.

MR. CHERNIACK: Buys Tantalum.

MR. SPIVAK: No, he invests in Chemalloy which is worse. —(Interjection)— The question at this point is is it really dissipation or not. Well, I know but we're not talking about that. I am assuming that we are not talking about the choices that are being made in the handling of the commercial assets. What we are really talking about is squandering really in a limited sense that we've talked about with respect to the Law Reform Commission and what has been expressed. Now if we can be precise in this so we can bring this down and I'm not sure that squandering *per se* will do it, I think that we've got to try and bring this down.

Then I think we are talking about an area that is of concern, the onus still being that if they are cohabitating, that if a request is made to the court alleging such dissipation, that in effect there has to be some proof. The requisition for an accounting cannot come unless there's a *prima facie* case. Now that's fine, that's —(Interjection)— Well I think we've already stated it with respect to shareable assets, so I don't think there's anything wrong in saying it now. We've stated this.

MR. CHERNIACK: There is no need to argue this.

MR. SPIVAK: Well then the question will be the ability to be able to define this correctly. Again , just while Mr. Silver is working, I mean it should be clear that we're not talking about change of employment by a spouse who makes the decision for whatever reasons, but who, as a result of the change, may very well directly affect those commercial assets.

MR. CHERNIACK: Mr. Chairman, I couldn't think that there was ever any argument

that it could be, other than what is clearly known as squandering, and dissipation to me is not a result of judgment but complete abandonment of any effort to use judgment or to use care. You know, I think that's what it means.

MR. SPIVAK: Well , maybe that's a better definition.

MR. CHERNIACK: Well I don't know, but to me dissipation does not mean making bad judgments of the normal course, unless it can be shown that that person's judgment has been damaged and that is also referred to here. Something here, where it says that a person has shown that he could not longer manage the normal financial affairs, and that could be, as somebody said, mental instability or drugs or drunkenness or just losing control of his senses. And since we seem to be in agreement as to what we think dissipation means, we could find out what Mr. Silver thinks it means.

MR. CHAIRMAN: While we're waiting for Mr. Silver to complete that, Committee recess for five minutes.

MR. CHAIRMAN: Order please. We are on 19(e). Mr. Silver indicates that he has an amendment which would come as a separate sub-clause 19(1) and 19(2). However, if he'd like to read it and it's acceptable, we can pass 19(e). Mr. Silver.

MR. SILVER: Section 19 would become 19(1), there'd be a new Section 19(2) headed Onus of Proof on Dissipation, reading as follows: "The onus of proving that a spouse is dissipating assets is upon the spouse alleging it." Then a third subsection with the heading, Presumption. "19(2) The onus of proving that a spouse is dissipating assets — don't try to write it down now. I am reading it quickly so that you get the sense of it and after that I will read it again very slowly so you will be able to write it down. — The existing Section 19 will become 19(1), there will be a new subsection numbered 19(2) with the heading:

Onus of Proof on Dissipation.

19(2) "The onus of proving that a spouse is dissipating assets is upon the spouse alleging it."

Then there will be a third subsection with the heading: Presumption of Dissipation. "19(3) A spouse who is squandering commercial assets" — and I keep talking about commercial assets because that's the framework within which Clause (e) is effective. Presumption of Dissipation. 19(3) A spouse who is squandering commercial assets or dealing with commercial assets in an extravagant or wasteful manner, or expending commercial assets aimlessly or foolishly, or acting or behaving in a manner or following a lifestyle that results in a wasteful or dissolute loss of commercial assets."

The point of this last one is that the spouse may not be doing these things directly but he may simply be following a lifestyle, the indirect result of which is: "a wasteful or dissolute loss of commercial assets." So a spouse who does any of these things is presumed, for the purposes of clause (1)(e), that is subsection (1) (e), to be dissipating commercial assets.

MR. SPIVAK: I haven't got it in front me, I haven't written the whole thing, I'd like to write it but before I do it, I wonder just the terms of technique. Rather than a presumption of dissipation, why don't we put dissipation in the definition section? And really what we are really talking about is squandering, and really the abandonment in decision-making This incorporates a number of other things, with respect to life-style and everything else, but it's very different from what we've talked about or are talking about.

MR. SILVER: This can be worded as if it were simply a definition and presumption would not be mentioned, that can be done very easily. But as long as it's felt that the relevant terms are acceptable, like squandering, extravagance or wasteful manner, expending aimlessly or foolishly and so forth.

MR. SPIVAK: But going back to what Mr. Cherniack said and trying to narrow it down if we can to what we are really talking about, or at least what I think we may be agreeing to. We are essentially saying where there's been an abandonment in the handling of the commercial assets, which can come about simply because — a strict abandonment — because they don't care or because of illness or because of the use of alcohol or drugs. I mean those are things we've talked about specifically. That's really what we're talking about. You're bringing in the question of lifestyle.

Now lifestyle is a relative thing at this point and are we really going to talk in terms of the court adjudication; with respect to the decisions that are made; with respect to the way in which someone operates in a professional way, or operates in terms of the nature . . . —(Interjection)— Well, nature of business, the changes that occur with respect to it. Do we really want to get ourselves involved in it, because I think the real area that

we're talking about is waste where it occurs as a result of the abandonment. It's not waste that occurs as a result of errors in judgment or the exercise of judgment and there may not be errors, but ta s been exercised by the spouse. We're talking about an abandonment in the decision-making or in the decision that the spouse should be making which is invalid because he has either abandoned that responsibility or in fact is ill and suffering from any of the number of things we have talked about.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, just a few things. Firstly, I don't think we should be discussing the cause such as drunkenness or drugs. I think we should be discussing the effect or the result of what is happening. And I agree with Mr. Spivak. I'm not thrilled with the thought of looking at the lifestyle, although there is enough qualification in that clause dealing with lifestyle that does describe the kind of a lifestyle which would produce that, and therefore I would be quite happy to use the kinds of words that show squandering in a positive way. Squandering or extravagance — I don't remember, I didn't make a note of the words that were used — but I did think intemperate living could have been there, that that would be — not lifestyle but intemperate living — which means to me, again squandering. We may be just repeating the same words again. Maybe we're being redundant. But I don't think we should talk about the cause of it, but the result of it, squandering and whatever other words, and I don't think it has to be too extensive as long as they're examples of what we're meaning.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Would Mr. Silver read 19(3) again? Presumption of Dissipation.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: 19(3)?

MR. SHERMAN: Yes.

MR. SILVER: "A spouse who is squandering commercial assets," in fact I've got these divided into clauses, okay? "A spouse who is,

(a) squandering commercial assets, or

(b) expending commercial assets" and that can mean money, of course.

"(b) expending commercial assets aimlessly or foolishly."

MR. SPIVAK: I'm sorry, aimlessly?

MR. SILVER: "Aimlessly or foolishly," and that's from the dictionary. Or,

"(c) dealing with commercial assets in an extravagant or wasteful manner, or

"(d) acting or behaving in a manner or following a lifestyle that results in a wasteful or dissolute" — dissolute I take to mean unrestrained — "in a wasteful or dissolute loss of commercial assets."

MR. CHAIRMAN: Mr. Axworthy. **MR. SILVER**: I'm not finished. That isn't the end of the . . .

MR. AXWORTHY: When you say there's enough in it, I think there's more than enough. It sounds like a description of a lost weekend or something, you know, I almost want to turn into a tea-totaller just by the mere mention of it. I'm wondering if we didn't become a little too florid in our attempt to to describe dissipation and I just refer back to the Law Commission Report which is becoming our text.

MR. SILVER: Well now let me finish.

A MEMBER: He hasn't finished yet.

MR. AXWORTHY: I think he has finished.

A MEMBER: No.

MR. AXWORTHY: You mean there's more? I'm depressed enough as it is.

MR. SILVER: I have finished the florid part of the section. Now I reach the unflorid part.

"Is presumed," that is a spouse who does any one of those things, "is presumed for the purposes of Subsection 1, clause (e) to be dissipating commercial assets." That's the end.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, that's my reaction. I know what the intent is doing but I think by writing this thing into law it will turn the bill itself into a bestseller. People will buy it just for its language. I'm just wondering, there are some definitions in the Law Commission Report that seem to be perhaps more applicable and the one that strikes me here is this, that they talk about grossly irresponsible squandering which affects the financial security of the household. I'm wondering why we just can't make that the presumption that there is grossly irresponsible squandering that affects the financial security of the household and that becomes the presumption upon which the judge

would so decide. That's the phrasing being used in the Law Commission Report.

A MEMBER: Well where is it?

MR. AXWORTHY: Well, I'm putting two phrases together but it's on Page 77 in the top two paragraphs.

MR. SILVER: You would have saved me a lot of work if you had read it before.

MR. AXWORTHY: I am sorry. You got me so excited by the rest of it. What you're doing is describing my lifestyle and I had to protect myself. —(Interjection)— Well, if it was a definition term it would be "grossly irresponsible squandering that affects the financial security of the household."

A MEMBER: That's good. I like that.

MR. AXWORTHY: Irresponsible squandering that affects the financial security of the household.

MR. PAWLEY: What about jeopardizes?

MR. AXWORTHY: Jeopardizes, okay.

A MEMBER: Jeopardizes the what?

MR. AXWORTHY: Financial security of the household.

MR. CHERNIACK: No, the household affair, the regime . . . I think that's good, Mr. Chairman. I don't want to hurt Mr. Silver's feelings.

MR. SILVER: Oh no, no. That,s okay. I thought you wanted something . . .

MR. AXWORTHY: That would then be the presumption which would guide the deliberation of the court but that onus would have to be demonstrated in terms of the application.

MR. SILVER: Now do you want it to be worded as a presumption or merely as a definition?

MR. AXWORTHY: I think Mr. Spivak would be happier with a definition and I think probably I would be as well. But on that point of law I would defer to those who know.

MR. CHERNIACK: Mr. Chairman, why did we have to use the word "dissipation" then?

MR. AXWORTHY: No, no then we wouldn't.

MR. CHERNIACK: Well, why can't we say, "(e) where the other spouse is grossly irresponsibly squandering the," why don't we just say that and then we don't even have to define . . .

MR. AXWORTHY: "So as to affect the financial security of the household and . . .

MR. CHERNIACK: Yes, so as to jeopardize.

MR. AXWORTHY: So as to jeopardize, yes.

MR. CHERNIACK: Where the other spouse is — that's the wording of (e) — grossly and irresponsibly squandering the commercial assets so as to jeopardize the financial security of the household.

MR. SILVER: Where a spouse is squandering commercial assets in so grossly irresponsible a manner that . . .

MR. AXWORTHY: As to affect the financial security.

MR. CHERNIACK: I wouldn't like to qualify squandering. I mean if it's squandering it's squandering. I want to stick with Mr. Axworthy's . . .

MR. SILVER: Well, that's fine but there's a grammatical problem.

MR. CHERNIACK: No.

MR. SILVER: If you care about grammatical . . .

MR. CHERNIACK: Grossly and irresponsibly. Grossly and irresponsibly squandering. Yes.

MR. SHERMAN: In such a manner as to jeopardize.

MR. AXWORTHY: That's right.

MR. SILVER: Where a spouse is grossly and irresponsibly squandering commercial assets — what's after that?

MR. SMERMAN: In such a manner as to jeopardize.

MR. SILVER: You've already described the manner. Grossly and irresponsibly.

MR. AXWORTHY: So as to jeopardize the financial security of the household. **MR. CHAIRMAN**: Can I ask Mr. Silver then to read the whole amendment?

MR. SILVER: Well, before that, do we want the onus provision?

A MEMBER: The onus provision still stands.

MR. SILVER: All right. So this will be 19(3) — I'm sorry, I'm sorry. This will be (e). This will replace the existing (e). So it will read as follows: "Where the other spouse is grossly and irresponsibly squandering commercial assets so as to jeopardize" — the grammar bothers me.

MR. SHERMAN: Mr. Silver, without detracting at all from the impact of Mr.

Axworthy's proposal, if to say, "Where you turned it around would it satisfy you on grammar the other spouse is jeopardizing the financial security of the household by gross and irresponsible squandering of commercial assets."

MR. SILVER: By a gross and irresponsible squandering.

MR. SHERMAN: Where the other spouse is jeopardizing the financial security of the household by gross and irresponsible squandering of commercial assets.

MR. SILVER: Okay.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: I just want to make sure that's acceptable before we conclude this, that where "dissipation" is used as an example in 23, we will essentially express the same thing. We're basically defining' I mean, we do not have to use the word "dissipation" *per se* . We're going to use this as well. —(Interjection)— Yes. Well we'll come back then when we deal with the various clauses, but I suggest we might as well deal with it now so that we're clear on that. We're taking dissipation really out, we're really placing this as the situation.

MR. SILVER: Well that's true. Some of the other sections that use the word "dissipation" will have to be changed.

MR. SPIVAK: The possibility exists that you can use that as a straight definition and then you don't have to worry about it.

MR. SILVER: We can put it in this section here. We can have it as a definition.

MR. SPIVAK: Dissipation for the purpose of . . .

MR. SHERMAN: Instead of saying . . . dissipation, couldn't we say definition of dissipation.

MR. SPIVAK: For the purpose of this section.

MR. SILVER: Yes, but I'm not sure if dissipation is mentioned only in this Division or only in the Part or whether it's mentioned in other parts of the Act. If it's mentioned only in this Section, then the definition would be contained only in this Section, but if it's mentioned elsewhere in the Part — (Interjection)— 36? However, it may be possible to refer to this by the clause number in the other section rather than by mentioning the word "dissipation."

MR. SPIVAK: Even if it was placed in the definition section, where would the concern be? It's not used with respect to the family assets *per se* . Is dissipation used with family assets?

MR. SILVER: No, probably not.

MR. CHERNIACK: No.

MR. SILVER: But I would have to look through the Act to make sure. It probably isn't used anywhere.

MR. CHERNIACK: We have the definition now and I think we can call it a definition so you wouldn't have to change all the other sections.

MR. SILVER: You mean leave (e) as is and have a definiton somewhere in an appropriate place.

MR. SPIVAK: Mr. Chairman, we have 1(h) as the last definition section and we could bring this in as 1(i).

MR. SILVER: It would have to follow alphabetically.

MR. SPIVAK: Oh, I see. I'm sorry.

MR. SILVER: Have to follow at (e) but that's no problem.

MR. SPIVAK: Well, I can agree that we will just agree to that and that can be changed although it has to be reworded. But I would like to, if I could, get the definition of dissipation.

MR. SILVER: Well, if the concept is dealt with only in this Division, then it could be put in here. 36(2)?

MR. CHERNIACK: It's in the enforcement as well.

MR. SILVER: So it should go in therefore in Section 1.

MR. CHERNIACK: Mr. Chairman, I wonder if we can't agree on that?

MR. CHAIRMAN: What?

MR. CHERNIACK: That the definition of "dissipation" go into Section 1 in the right alphabetical order and that Mr. Silver now define that "dissipation" means, "jeopardizing the financial security of the household by gross and irresponsible squandering of commercial assets." Okay? Is that all right?

MR. SHERMAN: Dissipation means, jeopardizing the financial security of the household . . .

MR. SILVER: Why not go back to the first plan to have a subsection under 19 saying something like this, that a spouse who jeopardizes the financial security of the

household by grossly and irresponsibly squandering commercial assets — or something like that — is deemed to be dissipating commercial assets within the meaning of 19(e). Then we don't have to worry about putting a definition far away from this section where nobody will know what it refers to.

MR. CHERNIACK: Will that apply to 36 then?

A MEMBER: Yes.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: . . . definition part at the front of the Act and then any then made. other cross references could be

MR. CHERNIACK: Mr. Chairman, I don't have any feeling about it. I just like to think that the person who is the ultimate author of this should have a say in how it fits into the structure of the Act.

MR. SILVER: But it's of no consequence to me. Either way it would work, both as a definition in Section 1 and as a separate subsection here.

MR. CHERNIACK: I don't care enough to . . .

MR. SPIVAK: I'd opt for the definition section.

MR. SILVER: Pardon me?

MR. SPIVAK: I would opt for the definition section.

MR. SILVER: I just thought that it might be a little lengthy and cumbersome for a definition because we don't have complete sentences there. . . well, I guess we do. But however, it will be all right. We can work it out.

MR. SPIVAK: But then if we're doing that, again as I have it here and as it's been read, I assume that is the definition.

MR. SILVER: More or less. Depending on minor changes to make it fit. What I would suggest is that you leave it with me until tomorrow. I don't know if you're intending to carry on very much longer tonight. First thing tomorrow morning I'll read it to you.

MR. CHERNIACK: You want your signature, you want your name there some place. I think by the time we're through Mr. Silver will refuse to put his name to it, so it will be . . . —(Interjection)—

MR. SPIVAK: Mr. Axworthy says, as a result of this bill in any case he intends to practice law.

MR. CHAIRMAN: If we have then agreement on Section 19, perhaps we can come back to it tomorrow and continue with Section 20. Mr. Axworthy.

MR. AXWORTHY: Well, Mr. Chairman, I don't want to take this happy consensus and break it but I did want to add an additional question in relation to Section 19 and that has to do with the application of accounting and equalization. The one thing that did seem to be avoided was the right upon death for this kind of accounting to take place. So that half the assets would therefore be accounted and any other things that would come under the normal testament or will would then be applied and that would be the question I would raise at this stage.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the bill does not go that far. The Law Reform Commission didn't go that far and I would be prepared to go that far if the Committee is prepared to go that far. I didn't know that we were prepared to say that the standard marital regime may terminate on death, which means that the deceased person can dispse seeiuss it and agree on it, I for one would be quite prepared to deal with it. Mr. Pawley I think just said the same thing.

MR. AXWORTHY: The reason I brought it. . . again going back to trying to establish some consistent principles to this and I try to avoid anomalies, and it would seem to me that if a dissolution of a marriage takes place by a legal act, that is divorce or separation, then the wife or spouse has a right to half the assets. It would seem to me, that the occasion of death is also an ending of that marriage and that the same principle should apply.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: This is really another matter. I just want to settle at (e) and then come back to that if I can. (e), as it stands will remain; 19(2) will be introduced — (Interjection)— I'm sorry? — the onus clause will be introduced; and the definition section will be brought forward and it will be introduced. That's agreed and the onus section as read by Mr. Silver. . . Are we going to vote on it or is it understood that we voted on it? All I'm considering in that part, unless. . . and then in turn I would want to deal with Mr. Axworthy's point.

MR. CHAIRMAN: Yes. if it's the wish of the Committee. we could move. . . no, we can't. Mr. Axworthy is considering 19.

MR. AXWORTHY: Yes, if my point was to carry through ahave to be an additional clause in 19(f) I guess.

MR. PAWLEY: The concern we have just at this moment is the extent of any implications this could have on other legislation. Now, if we could evaluate that, and as Mr. Cherniack has indicated we haven't caucused it, I think we would have to see what our caucus felt in connection with it. But the only difficulty we have I think at the moment is just what would be all the legal implications of including death. Would this proposal then supersede other Acts? — the Devolution of Estates Act for instance and Dower. This would supersede those Acts. I'm not saying that it would not be. . . I think we'd need a little time to consider this and review them. I must say that I was impressed by the suggestion that it should be included and I'd like to hear what other Committee members, what their sentiments are.

MR. AXWORTHY: Well, Mr. Chairman, I don't want to make a large case of it because I agree that it may be something that would warrant further thought, but it struck me going through it, and having listened to the briefs, that we are talking about marriage is an equal partnership, and we are saying that on a separation or anything of that marriage, then each partner is subject to an equal sharing but we exclude anything in the marriage by death of one of the spouses and say then all those other Acts apply and it would seem to me that that breaks the concept or breaks the principle of equal sharing. It would certainly seem only the logical extension of that principle to carry it through and then any disposition of the remaining 50 percent of the assets would become liable to the other Acts and the other testament wills that would be left. But I would think that the equal sharing should apply in those cases if we're talking about what happens as a result of the equal partnership of people in a marriage. That's the only reason for bringing it up. I'm not going to insist on it tonight because it may mean that other groups would want to think about that and come back to it. It may also be that it might be introduced in another part of the bill but I think that we should, before we pass this bill from Committee, at least take a look at that issue very seriously and see if it should be included at this time.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, while Mr. Axworthy was speaking I glanced through quickly a copy of the letter which the Chairman of the Law Reform Commission sent us, a copy of a letter sent to someone else entitled "Dear Ms." and I don't know who got that letter but it was a copy dealing with this question. But all they deal with is the one side of the impact on the estate in the event of the decease of the owner of the asset. Then they point out The Dower Act, Devolution of Estates Act, Family Testator's Act as being adequate. But they don't refer to the other side of it, which is I think what Mr. Axworthy referred to and which I did, the possibility of a spouse, let's say the wife, dies without any assets in her name and by the mere assumption that the regime ends on her death she could, by will, leave her half, which she has not yet acquired but which by her death she is entitled to acquire, leave that by way of a will in which case The Dower Act will protect the owner of getting half of the half that she has got and then she could dispose of let's say the quarter of the estate which would be free for her to deal with. I personally favour it but I ignored it in this discussion mainly because the Law Reform Commission didn't deal with it and the bill was not drawn along those lines because our committee never dealt with it. If the committee is disposed to deal with it, that's fine, we'd have to go back to caucus. But there is no point unless the Conservative group is prepared to do it and it does introduce a new concept and as I said earlier I was prepared to leave it for next year and deal with it in the interval. It has ramifications.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, to what extent would it affect the ability of an individual to leave his estate in the manner that he so chooses? We know under The Dower Act he has to leave half to his wife as far as the marital home and all that, but in the commercial field I think there is a greater degree of freedom than what would be available if we included the suggestion of Mr. Axworthy.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: In my opinion the spouse who does not have the assets in her name — and I say "her" name — if she is a surviving spouse then The Dower Act will give her what the standard marital regime would entitle her to get if there were no death. So that I think that what would pass to the wife, who has no assets, under The Dower Act would be the equivalent of what she would have received had she declared the termination of the marital regime the day before her husband died.

But the concept that I think we're really developing is that if the person who would be

entitled to but didn't claim a separation of property dies, then if the marital regime ends on her death she could, by her will, dispose of a part of the asset that she would have received had she exercised her right before death. That is, I believe, what Mr. Axworthy is talking about and which I favour and which I'm sure we in the government caucus would be prepared to take back and review in caucus if there was any indication that it would receive a measure of support.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I'm just wondering, Mr. Chairman, in answer to Mr. Graham's question, and I'd just like some response, if I would be right or wrong in this, that if the estate was for $100,000 and there was a $50,000 equal division and say the wife passed away, under this basis then she could I gather bequest $25,000 to somebody else which could create implications here. I'm not sure whether I'm right but if it was a business for instance it could jeopardize the business, the commercial asset. I just wonder if I'm wrong in that interpretation. If I'm not then this could have potential implications that we'd want to take a longer time to look at.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, it's an interesting concept but I would have to say, I think I could say that our caucus would want to look at it very carefully. It's difficult enough to deal with some of the clauses of the amendments and the bill that is before us right now at this stage of the session and I would not want to suggest to Mr. Axworthy or Mr. Cherniack that they should be entirely optimistic about our speedy acceptance of the concept. I think we'd want to study it and we might find ourselves in the same position that Mr. Cherniack is in. He has obviously anticipated it and he has suggested he wants basically to think about it for a while . . .

MR. CHERNIACK: No, no, I want to . . .

MR. SHERMAN: No, but I think Mr. Cherniack said earlier that he had thought about it and decided it would be something that he might leave and deal with a few months down the road.

MR. CHERNIACK: Perforce.

MR. SHERMAN: Perforce. It does introduce a new concept that would have to be examined pretty carefully by our caucus, I just want to make that point to help Mr. Cherniack and Mr. Axworthy at this stage of the examination.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, I want to indicate very directly that while at this point I think all of us are trying to make this bill work, there are going to be absolutely horrendous problems with this bill and the ilications of it are severe as well as the other bills that we are going to be dealing with that are before us now.

If we were not in an election year I think the government would have probably listened to the advice of some and would have given themselves the opportunity to review the bills with more of the professionals who are involved in the field to try and overcome some of the very obvious difficulties that have been suggested and I believe there are many more that have not been discussed. I think that the very nature of our procedures prevent the adequate and proper and thorough discussion and investigation and public participation, particularly by those who have a contribution to make as a result of their experience in the profession and training.

I want to suggest that as we leave this bill and go into family maintenance we're going to be met with this in a much more severe way and that sound judgment would have said that we in fact deal with this and come up with a comprehensive program but which is at least well thought out and understands the implications of what we are doing.

There has been an attempt on our part to try and make the bill work as best it can but I don't want to in any leave any impression from my own point of view, and I think this has been expressed by the other members of the Conservative Party and others who are concerned, that in any way this is going to work The amendments that are going to be forthcoming next year will probably be more extensive than the bill itself after this thing starts. The implications, I think, are really not understood and I think for us to start to deal in other areas without the knowledge — you know we've spent a period of time here; there has been a study that has been undertaken; there has been a draft bill presented but the draft bill does not really contain a lot of the recommendations and a lot of the thinking that was proposed by the Law Reform Commission or by the presentations that have been made.

In the process of sifting through everything to be able to draw the legislation at this point, and to understand its implications, I think one would have to say — you know the government is adopting this and I think adopting it because of its peculiar position but I

think greater caution should have been used and still can be used in dealing with this. I think the ultimate result would be a better bill and a better result.

Having said that it would seem to me if we are going to start in the other areas then we really have to give ourselves that opportunity and allow those people who are professionals to become involved and my sense of it, and I've had contact with them and they've been here, is that there their utter frustration of really being able to impress those who are responsible for the policy with . . .

A MEMBER: Who?

MR. SPIVAK: . . . those who are responsible for the policy with the reality of what is really taking place out there with respect to the kinds of things that are affected as a result of this bill, they've just simply thrown up their hands and accepted that it's going to be rammed through no matter what happens.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, I did not want the occasion, the sort of the kind of Cassandra-like prophesies, that wasn't my point. I was just taking a look at the bill and trying to carry it through to some logical extension but I can see that there may be implications that may be thought out and it would be something that perhaps, if there's an opportunity for members of the committee to consider it over the sleeping hours, then it should be done. I think we are trying to pass a bill that encompasses the principle of equal partnership in marriage and I would think that that partnership, I guess depending on one's degree of religious belief, sort of — death at least is the end of the temporal partnership if not the spiritual and it would seem to me that this regime should equally apply and should not be — we shouldn't just look at one form of dissolution. I can certainly understand the quandary it places members into because it has not been discussed by committee or had representations on it. I still think it should be seriously looked at and if there is a way of resolving it now I'd like to do it but if we can't, if it seems to be difficult, then I'm not going to hold the bill up for that reason.

MR. CHAIRMAN: Order please. The Chair has some procedural difficulty here. We have reached 19(e) and there's been an indication that the amendment following is now ready. If the members of the committee do not wish to pursue Mr. Axworthy's suggestion on 19 perhaps we can continue. Mr. Pawley.

MR. PAWLEY: Maybe we could just give some thought to it over the night and before returning tomorrow morning — I want to just say to Mr. Spivak that I think that some way or other he's been misinformed as to the effort and work that has gone into the bill before us. He hasn't had the advantage of sitting on the original legislative committee meetings and I don't know how informed he is as to the Law Reform Commission hearings that have taken place. From his remarks I would gather that he has not been well informed in this respect. We've gone through now three rounds of hearings and tonight and the past two days we've been reaping the benefits of very extensive briefs to us from the very group of people that he refers to, the legal community, rather than they being frustrated they ought to . . . And let me say to Mr. Spivak that I've heard from several of the lawyers that were most critical in their comments to us in Committee, that they are impressed by the number of suggestions which we have accepted and are inserting into this legislation by way of amendment. And I think this has been the most worthwhile exercise.

There have been Law Reform Commission hearings; there have been Legislative Committee hearings; there are these Committee hearings; there have been briefs; amendments that have been distributed in advance. We probably have received $100,000 worth of legal advice which has been very worthwhile, and from that we have made a number of changes, and we've been very very open, Mr. Spivak, throughout insofar as this bill is concerned, and to the extent that we have not locked ourselves into a position and have listened to all the public representations. I think we're proceeding along with a bill which is really much improved for it all, and I'm afraid that Mr. Spivak's been misinformed.

MR. CHAIRMAN: 19(e)—pass? Mr. Axworthy.

MR. AXWORTHY: I just want to clear something up. I did make a wrong statement. I understand that representations to committee have been made concerning the application upon death and on those grounds I would have wondered why that particular measure, you know, in terms of consideration have not . . . I think Mr. Cherniack said, "have not been considered." It would seem to me representatios have been made on those grounds and I would like to know what the reasoning was in terms of not including it considering that it had been . . .

MR. CHERNIACK: It wasn't considered by the Law Reform Commission as far as I

could see.

MR. AXWORTHY: Yes, by the Law Reform Commission. But it did come up in hearings?

MR. CHERNIACK: Yes, Mr. Chairman.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, just in response to Mr. Axworthy and Mr. Cherniack again, I wish to emphasize, I did not say that our caucus would not consider. it. I simply said that I would caution them that we couldn't offer them any optimism with respect to it at the present time.

I think that in all fairness all members of the Committee and you yourself, Sir, would admit that we've had a considerable number of amendments to consider in a relatively short period of time, and this is a concept that was not contained in those amendments. It's going to be difficult, I suggest, to give it the caucus consideration that I'm sure it deserves. That was my only caveat on it.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Chairman, I want to make one remark. I appreciate the fact that this has been a continuing matter for some years and I believe that we are now fulfilling the legislative process for this bill which is similar to the legislative process that we've fulfilled with respect to every bill' in terms of scrutiny line by line.

I recognize as well that a number of amendments have come as a result of representation, but I want to suggest, in spite of what the Attorney-General suggests and notwithstanding the fact that some have made representations here, I think that there are substantial numbers within the legal profession who are people who practice family law, and who are involved on a daily basis, who really believe that to achieve the maximum result there should have been a postponement of this bill and the opportunity for a much more thorough review; so that even what we're producing would be better than what we're producing; and would in fact at least give the benefit to the government of far more knowledge based on their experience than has been presented so far. And I think that that statement is a correct statement of the position of substantial numbers, many of whom have, one way or the other, been in contact with the government.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, it's obvious to me that Mr. Spivak is not aware of the presentations that were made by lawyers who practice family law at these hearings. Apparently he's not aware that Myrna Bowman presented a brief on behalf of the subcommittee, the Family Law Subcommittee of the Manitoba Bar and Mr. Spivak is apparently not aware that she made a number of suggestions. He may also be unaware that on behalf of that subsection, she urged that this bill we're dealing with now should be passed with improvements. Also, I guess he's not aware that her recommendations on behalf of the committee were studied extensively and when I remember complimenting Mr. Silver on the work that had been done on the amendments, the comment was made by him or by one of the others there, that Ms. Bowman should get some credit too because, although she was not present at the drafting, her suggestions were substantially accepted.

So that it's wrong to leave the impression which Mr. Spivak seems to have, based I assume only on his lack of knowledge of what we've gone through. People like Arthur Rich and Ms. Bowman and others, except for a young lady named Miss Halparin, seemed to be quite well satisfied with the fact that they were giving us a pretty good review of what was needed and which we used. Now if there were lawyers who practise law who were not prepared to give us the benefit of their opinions, then I can only deplore the fact that they didn't think it worthwhile doing and that they were able to talk to others than the committee, such as the Chamber of Commerce, which didn't even have the courtesy to appear before us.

MR. CHAIRMAN: Order please. Can I remind honourable members of the Committee that we do have a rule that remarks must be pertinent to the clause before the committee, not on general matters.

19(e)—pass. Mr. Silver would you read the proposed amendment, 19(2).

MR. SILVER: Oh, well, that has already been read and passed. The onus provision, but I can . . .

MR. CHAIRMAN: I don't recall it was passed. Would you read it again, please?

MR. SILVER: Okay.

Onus of Proof on Dissipation. 19(2) The onus of proving that a spouse is dissipating assets is upon the spouse alleging it.

MR. CHAIRMAN: So moved by Mr. Cherniack. Is that agreed? (Agreed) And the

definition.

MR. SILVER: And this also means that Section 19 becomes 19(1). And the definition of "dissipating commercial assets" will appear as Clause (d) of Subsection 1 and the remaining clauses as numbered will have to be changed accordingly. And it will read as follows: "Dissipating commercial assets means, jeopardizing the financial security of a household by grossly and irresponsibly squandering commercial assets."

MR. CHAIRMAN: Moved by Mr. Axworthy. Mr. Sherman.

MR. SHERMAN: One minor point, Mr. Chairman. Would that not be Clause (c) and would Clause (c) not become (d)?

MR. SILVER: The reason for that is that there is another definition that I have yet to work out that will become Clause (c) and that's the definition of "disposition". So, alphabetically, that would precede "dissipating".

MR. CHAIRMAN: Moved by Mr. Axworthy. Is that agreed? (Agreed)

MR. SILVER: And I hope to have the definition of the wording of "disposition" tomorrow morning.

MR. CHAIRMAN: 19(2)—pass; Section 19—pass. —(Interjection)— There is a later amendment to come before the committee dealing with that.

Section 20. Mr. Cherniack would you read the amendment. It's 8 on Page 10.

MR. CHERNIACK: I move THAT Section 20 of Bill 61 be amended

(a) by renumbering the section as subsection (1); and

(b) by striking out the word "service" in the 1st line of subsection (1) thereof and substituting therefor the word "serving"; and

(c) by adding thereto, immediately after the section as renumbered, the following subsection:

Transfer of asset in lieu of payment.

20(2) In lieu of a payment or part of a payment under subsection (1), a spouse may with the consent of the other spouse or, in the absence of that consent, upon the order of a judge made under Section 33, transfer, convey or deliver to the other spouse an asset in a form other than that of money but having a value equivalent to the amount of the payment or the part of the payment.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: . . . suggesting that if there is an application in 19(e) and they are not obligated, but a notice given under 19(e), that there is an automatic requirement for payment.

MR. CHERNIACK: Mr. Chairman, I think it's in plain English, it says that the spouses shall have an accounting and upon completion shall pay to the other and the proposed new subsection 2 takes care of the possibility that rather than payment there should be an equivalent other than money and that is what was expected. Now what follows after that, as I understand it, is that if that is not done then under the enforcement part of the bill the court will do it.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Let's go back to 17. Under 17 a spouse can give notice to the other spouse that they want an accounting and equalization because of 19(e), because there's alleged dissipation. All right? Under 20 you're saying that that notice having been done and the accounting and equalization information being supplied, the wife is immediately entitled to that 50 percent at that point.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, you know, I think we keep coming back to Mr. Spivak's impression, that you have to run to court right away. The law sets out what are the rights of the parties and if those rights are not exercised and recognized, then you go to court. I didn't draw these sections but they make sense to me. They set out what the intent is, what is expected of a spouse to comply with the intent and then, if it is not done, there is a section that deals with enforcement. Now I can't think of laws and I don't know them that well, that don't provide what the right is, what the remedy is, and the procedure to be followed.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, on the point of trying to get this straight, I would like to say to Mr. Cherniack: When we were talking about section (e) awhile ago you were arguing that it was an accounting that was available to a spouse on the basis that it might hold marriages together. The accounting can be held and after they know the assets that doesn't mean to say they have to separate. But I read 20 as saying that after the accounting the money must be paid out. I don't necessarily see them parting the waves, but if they don't separate, because of an accounting — which is possible but I

must say I don't think it's all that possible. But if they have an accounting and the wife says "Well, I'm satisfied that you weren't squandering," and he says, "Well I forgive you for forcing me into this," and they stay together, I read 20 as saying if they have an accounting, the money has to be paid. That worries me.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I go back to 17 and if we use the word "accounting" and didn't use the corollary word which 17 says, accounting and equalization, then it was only an abbreviation that was used because we are talking here about sharing. We're not talking about accounting, we're talking about sharing, which means an accounting and an equalization.

Now Mr. Johnston said that she said she wants to know what's going on; he gives her a report; she says, "Oh, then you really weren't dissipating," and they kiss and make up. Well, then of course, at that stage the proceeding stops but if they don't kiss and make up and she relieves the notice, she waives the consequence of the notice, then there is provision for an accounting to take place and an equalization, which according to this means payment or under subsection 2 the equivalent.

Now what this means to me is if they own bonds, then the wife would have a right to say, "Register them in both our names," and if it's an apartment block, she would say, "Register it in both our names;" or if it's shares in a business, she would say, "Register it in both our names." And he might do that, or he might say, "No, I am not dissipating," or any of the other reasons. And in that case, if she still wants to assert her rights, she then goes to court and she says, "My husband was dissipating and I gave him notice." So the court then says, "You allege that he's dissipating. The onus is on you to satisfy the court that he was dissipating." And then she proceeds and succeeds in satisfying. Then the court says, "All right, since he did not equalize with you then we will do it for you." And that does not mean necessarily payment because the subsection that's brought in is to take care of the transfer of the equivalent. And to me all this is a logical sequence.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: No, I can't see it as a . . . What we're saying here is then, if the squandering — as we just put it in the amendments — is proven and there is an accounting . . .

MR. SHERMAN: And that's the end of it.

MR. F. JOHNSTON: Well, you're saying that they could be living together as they were before but the business is split in half.

MR. CHERNIACK: No. It's owned equally. That's right. They each own an equal interest in it.

MR. F. JOHNSTON: Well, why can't they go back to the way they were living before.

MR. CHERNIACK: Well, of course they can, if they want to. It says she shall pay.

MR. F. JOHNSTON: . . . on completion of the accounting, each shall pay the other.

MR. CHERNIACK: Mr. Chairman, I am stopping my lectures in law. It's seems to me that we all know that bilaterally you can arrive at any agreement.

MR. CHAIRMAN: Order please. I have just been informed that we are running out of master tape. If the committee can recess for a couple of minutes, and get it changed.

A MEMBER: I would suggest, Mr. Chairman, that maybe we should rise after we finish with this Motion. I was hoping that we could finish with this Motion before we leave Section 21.

MR. CHAIRMAN: Now proceed, Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, if there's a disposition to rise, I wouldn't want to fight it but if we can finish 20, that's also fine.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well I wasn't going to speak to that point, Mr. , unless it is unacceptable Chairman, but I think to members, it would seem to be reasonable to complete this Motion, because there will be considerable discussion on 21 and that starts a new motion and I think the Attorney-General felt we could pick that up starting tomorrow.

But on this point I must say that I think Mr. Spivak has raised a very valid point for at least those of us who are not as familiar with the application of legal wording as Mr. Cherniack is. There is no indication here that accounting and equalization can be separated. Mr. Cherniack seems to feel that accounting and equalization are two parts of the same activity and if that's the case then it certainly puts a different cast on what would be done under 19(e). In 19(1)(a), (b), (c) and (d) you're dealing with a marriage that is in the process of dissolution or an arrangement that is in the process of dissolution and people of course would want the pay-out. But in 19(e) we're dealing with

one that, in Mr. Cherniack's own words, might be salvageable and that being the case it would seem that that purpose is defeated by any formal pay-out of amounts to bring asset sharing up to an equal level. Once that step is taken I suggest the marriage is then in the process of being dissolved, the arrangement is in the process of being dissolved and it goes without saying that the business may well have to be dissolved. It turns on that precise wording, "upon completion of the accounting each shall pay." If it were to read, "upon completion of the accounting and equalization," that might satisfy us on this point. But surely there's a difference between an "accounting" and an "accounting and equalization."

MR. CHAIRMAN: Mr. Cherniack.

MR. CHEIACK: Mr. Chairman, if there's a possibility that we're just not understanding each other it would be better to try and understand each other. I thought there was a disagreement here. Mr. Sherman seemed to say that an accounting followed by an equalization is acceptable. Is that not the case?

MR. SHERMAN: No.

MR. CHERNIACK: Well all right then.

MR. SHERMAN: Well that is what I said but that isn't the case in the way that clause is written.

MR. CHERNIACK: The way I understand this clause is that there has to be an accounting in order to know how much equalization takes place. The accounting includes a statement of the assets held by each.

MR. SHERMAN: Yes.

MR. CHERNIACK: So that they would be thrown into the one pot so that one could divide it in half for calculation purposes and then determine the amount that each is entitled to. Now first we start with the fact that any two people can, by agreement, change or stop the procedure that takes place here. We even have provision for bilateral opting out. We know that. —(Interjection)— What?

MR. SPIVAK: Their agreement can but not their conduct.

MR. CHERNIACK: All right. So we start here with a spouse alleging something and saying I want an accounting. The husband can refuse to give an accounting and then she has to go to court. The husband can give an accounting and she can then say, "Thank you, I'm satisfied," or she can say, "Okay I want equalization now." He can give her an equalization or he can refuse to give her an equalization. If he refuses to give her an equalization she can accept his refusal or she could take him to court. When she takes him to court then she still has to prove dissipation or the other grounds and if the court agrees that it's proven then the court can order an equalization. Now this is still a money argument or an asset argument.

Now in the case of a business which operates as a grocery store, or a business that operates as running apartment blocks, or a business that operates as a real estate agency, or I don't know what other kinds of businesses, the business can still be owned equally and they can still be cohabiting, but at least the wife has acquired the security of knowing that the financial stability of the family is being secured at least to the extent that half of it is in her control. They can still continue to live together or they can refuse to. The decision to do something together is one that has to be bilaterally arrived at. When there is no agreement then the law here is the one under which the decision will be made. Now I, for one, understand that that is what this is and I would like to know from Mr. Silver or Mr. Goodman if I'm wrong and if I'm right I frankly don't understand the problem. — (Interjection)— By all means.

MR. GRAHAM: If the one spouse insists on an equalization and the other spouse says no and they have to go to court, in the court is it possible that the court would decide that it might jeopardize the commercial asset if that equalization was forced at that time?

MR. CHERNIACK: I'm very glad Mr. Graham asked me that question because I know we are going to be coming to Section No. 35 which provides exactly that, where the court can say yes, she is entitled to an equalization but the payment or the transfer is delayed for whatever period of time the court thinks it should be. I think the court would then provide that it can't be further dissipated, he would put a stop on it. But 35 is the section which is designed to prevent — I mean nobody wants a business to be smashed, it's to nobody's advantage and therefore the court is given that right.

MR. GRAHAM: I have no problem.

MR. CHERNIACK: Thank you.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I understand and I believe we all understand what

people can do. Mr. Cherniack has told us what one or the other of the spouses can do. What we're concerned with here is what the section says they shall do and that's quite a different thing. Is Mr. Cherniack telling me that accounting and equalization are one and the same action or are they two separate actions?

MR. CHERNIACK: One precedes the other of necessity. By logic, by any consequence, you have to have an accounting before you can have an equalization.

MR. SHERMAN: But can you have an accounting and not have an equalization?

MR. CHERNICAK: If the parties don't require an equalization, of course. Mr. Chairman, I am not an expert in writing laws, but I am interpreting what is the intent, that if Mr. Silver says that what I have described is not possible, then by all means he has got to rewrite it.

MR. SHERMAN: I am not an expert in writing laws but I think I can read English, and what the English says here is that "upon completion of the accounting", and Mr. Cherniack has just now told me you can have an accounting without an equalization. It has two separate steps.

MR. CHERNIACK: It is not required.

MR. SHERMAN: But it says here in this clause, Mr. Chairman, "upon completion of the accounting each shall pay to the other", so that means that under (e) a spouse can go on the grounds of dissipation for an accounting, and once that accounting is completed each shall pay to the other such amount as the accounting shows to be necessary to give them equal shares.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: The reason why the word "shall" is used is that we have to provide a basis for possible court action. If we said only "may", then it would mean that the spouse is given discretion to do as he wishes, and if he doesn't wish to do as the other spouse wants him to do, she can't take him to court for it. But if we say "shall do so", then if he refuses and they can't come to any agreement, then the other spouse can take him to court and say that he is in breach of this Section.

MR. CHEIACK: May I ask Mr. Silver, does the word "shall" mean that regardless of whether or not a wife wishes him to, he must equalize the assets even though the wife says I'm satisifed with the statement. I no longer require an equalization. That's the interpretation Mr. Sherman is giving it, do you agree with that?

MR. SILVER: No, I don't.

MR. SHERMAN: That may not be the interpretation Mr. Silver is giving it, but that is the interpretation that the English language gives it. If this clause said, "in accordance with this Division and, where an equalization is requested, upon completion of the accounting each shall pay...." etc., it would do what Mr. Cherniack says it would do without creating the damage that we say the existing clause will create. If it said that where . . .

MR. CHERNIACK: I don't think we should pay much for that legal advice.

MR. SHERMAN: . . . an equalization is requested upon completion of the accounting" each shall do this. But to just state baldly that "upon completion of the accounting each shall pay", I suggest, Sir, is plainly comprehensible in the form in which it is written. It means what it says the way it is written.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Let me, you know, Mr. Cherniack is sort of being a little bit sarcastic. Now maybe he is a little bit tired, but maybe at this point he should have some sleep, it may improve his disposition.

But, Mr. Chairman, I wanted to say something — on the basis of this Act as it is now developed with the amendments, a wife can serve notice of dissipation on a spouse, on the basis of that there is an obligation for an accounting in equalization which he may very well provide, on the basis of that he shall then pay her such accounts, to give her the equal share. Now at that point if he does not give her her equal share, she can apply to the court for her equal share without having to prove dissipation at all. She applies on 20. The accounting having been given to the spouse, notice having been served, the accounting having been given, she is entitled to her equal share.

MR. CHERNIACK: I'm going to ask the Law Society to . . .

MR. SPIVAK: Well, tell me where I am so wrong? You know, it is not as if this government has introduced legislation that has been valid, as such it hasn't been challenged.

MR. CHERNIACK: It is not as if Mr. Spivak's contributions in the legal side have been that helpful.

MR. SPIVAK: Well again, Mr. Chairman, I again say that a spouse can serve notice

alleging dissipation, as a result of that the husband gives an accounting, and as a result of the accounting the wife then says I'm entitled to have that half and can ask for the half based on 20, rather than having to prove him dissipation.

MR. CHERNIACK: In all apparent friendliness, may I ask Mr. Spivak if he believes that a court when approached to enforce that equalization will then proceed to order the husband to equalize it only on the basis of Section 20 without considering the allegations in 19. Is that his belief?

MR. SPIVAK: My belief is that the court will look at the legislation and the wording of the legislation and will interpret that, and will deal with that, not with the overall intent, but with the actual wording that they are dealing with, the applications made in 20. Yes, I believe they can.

MR. CHERNIACK: So Mr. Spivak believes that when the wife goes to the court and asks the court to rule, that there shall be an equalization, that for that occasion the court will say, "Well, once the husband gave his statement then he is bound to do it and we will order him to do it without enquiring into the justification for her application".

MR. CHAIRMAN: Thank you. Mr. Johnston.

MR. CHERNIACK: Do our lawyers here agree with that, Mr. Chairman?

MR. SILVER: That possibility exists, yes.

MR. F. JOHNSTON: Mr. Chairman, I think one of the problems with this 19 and 20, even with our amendments, is that (a), (b), (c), and (d) of 19 all really say you have quit — separation agreement, separation, living apart for six months, decree of absolute divorce. (e) is the one that throws the thing out of whack. (e) is the one that throws it out of whack. So, you know, 20 as far as (a), (b), (c) and (d) are concerned as far as I see are fine, but 20, the way it is written with (e), is not good.

MR. SPIVAK: Well, Mr. Chairman, I want to make a point. Neither the words nor the actions of Mr. Cherniack, or the sort of suggestions, are going to intimidate me with respect to this. I believe that this interpretation can be placed and I believe that there would be lawyers that would support that position. The thing that I have been trying to avoid from the beginning is the frivolous actions that can be taken by a spouse with respect to the commercial assets, which was never really the intention with respect to the Bill, and which I think have got to be considered and protected. Therefore, I think the wording has to be considered, and a change has to take place.

MR. SILVER: I don't know, what was the question directed to me? What was that question? I didn't hear.

MR. CHAIRMAN: Mr. Spivak, I wonder if you would make that point again. Mr. Silver didn't get it.

MR. SPIVAK: Well, my point being again that I think that that situation can arise, than an application could be made under 20 based on notice that has been filed on the basis of dissipation, the husband accepting that the notice has been given and in fact providing the accounting, at which point she will be entitled, the spouse will be entitled, to have the equal share either transferred or payment made.

MR. SILVER: Well, I would say if the court is able to find that the notice served on the ground of dissipation was accepted by the spouse in such a way that he has waived, he can be estopped, he has estopped himself from raising the issue of dissipation later. In other words, if the court finds that he admitted to the allegation of dissipation, then I think this would be a fact that the court would not have to adjudicate on again. But, if however the spouse said, "You are giving me a notice on this basis. Okay. I don't want to agree with that ground. I'm not admitting that I am dissipating assets, but let's not fight about it. I don't mind having an accounting and giving you an equalization. But if we have to go to Court later, I reserve the right to raise this issue." If he does it that way, then he can't. So it is a question of evidence I would say.

MR. SPIVAK: Yes, but the normal course would be . . . Well, the husband would say, "All right, fine. Here is the accounting". And he would provide the information without any acknowledgement or denial with respect to the question of dissipation, and on the basis of having provided the accounting, then I think he would be entitled to her 50 percent at this stage.

MR. SILVER: But, I don't understand what the bearing of all that is . . . or is it just academic?

MR. SPIVAK: No, it is not academic because I think you are not dealing in real situations and you know you are not talking about what really will happen with respect to husband and wives and those who are involved in businesses and professions, where, in fact, a wife has a means of trying to harrass or trying to achieve an objective, will, in fact, use that particular clause. And all I'm suggesting is, that there has to be some way

that the right comes as a result of a court action with respect to the pay-out, not as a result simply of his acquiescing in the first stage with respect to accounting whether he admits it or not, because in many cases they would just do it. In some cases they will do it for the simple reason that they do not want any public disclosure of their position.

MR. SILVER: I don't understand your question, if that's what it is. I'm sorry.

MR. SPIVAK: Well, I'm saying that a husband who complies with the request and provides an accounting can now then be asked for the distribution or the payment of the half of the accounting, of the information that's been supplied, and at that stage the issue of dissipation has disappeared completely, just simply because he has in fact provided the accounting.

MR. SILVER: Well, okay, I've given you my opinion on that. I say it's a matter of evidence and it depends on the case. It is possible that what you're saying . . . .

MR. SPIVAK: Yes. Well, it is possible. I think it's quite likely.

MR. SILVER: Yes, sure, I agree.

MR. SPIVAK: I think we should change that to ensure that at least the question of dissipation still has to be proved, notwithstanding the fact that the husband has in fact complied with the request and provided the accounting.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I just wanted to ask Mr. Silver to look at Mr. Sherman's suggestion to see whether he sees anything wrong with it' I don't. I don't see that it's a necessity and I see nothing wrong with it.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Mr. Chairman, I know they would probably go to court to argue it, but I can't see where the judge would have any other decision to make but to pay it if he reads that legislation. I mean Mr. Silver has mentioned evidence and I certainly respect his opinion, but I don't know why there is even . . . there might be all kinds of evidence, but if you complete the accounting . . . It says, "Each shall pay to the other such amount." I don't know what other way the judge could interpret it.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Maybe the recommendation that should be made would be, that at the end of 20 there would be a sentence which would relate to (e) and simply say — because it doesn't in the other cases that stands — where it relates to (e) that in any application to the court the issue or the question of dissipation has to be determined.

I mean the fact that there's a compliance with an accounting should not in itself give that right. The allegations of dissipation must and should be proved if there is in fact a court application. That's all I'm saying.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I believe Mr. Sherman put forward a suggestion for a possible amendment which I believe would solve most of the problem that has arisen here, if it is acceptable to legal counsel.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I just want to say this, Mr. Chairman. I don't think there is any disagreement about the intent. I do find that Mr. Spivak and now Mr. Johnston are giving legal opinions. I admit I've been giving legal opinions, but in the end I want to defer to the person or persons who are responsible for drafting the legislation, and I want to respect the opinion of those people, that if what they say is the correct interpretation the way we agree it ought to be then I don't want to get into an argument about the words. Now they do. I just understand what we're talking about. I don't think there is disagreement; I don't want to start practising law. I don't get paid for that; I don't demand competence.

Now Mr. Johnston and Mr. Spivak are saying, well, that's the way they read it and that's wrong. So I would have to defer and say if Mr. Silver finds he can reword it to restate what we think is right in a different way, okay. And if he says that this is the correct way and satisfactory then frankly, Mr. Chairman, I will vote in support of whatever Mr. Silver says is right after this kind of a discussion, and I don't care what it is.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well, I was going to say something along the same lines, that certainly if what Mr. Sherman has proposed does no harm to the intent of the paragraph and only clarifies the paragraph, then I have no difficulty. But I don't feel that it's right for us to impose a drafting — because that's really what we are doing — a drafting change upon . . . and neither Mr. Goodman nor Mr. Silver feel that it is necessary and in fact feel it would be, I gather, counter-productive. .

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mr. Silver, though, has acknowledged that the situation that I have

brought forward could occur and the judgment could be made on that basis and for that reason' I think that maybe there should be some consideration of tightening it up. Because all I'm simply saying is that the notice which is served on the dissipation part and the accounting that's given without any acknowledgement of acceptance of that, should not allow for an automatic right unless the question of dissipation is proved.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well, this is not a matter of drafting, it's a matter of policy. But the first thing that has to be decided is whether, as a matter of policy, the Committee wants that situation. When you decide what the policy is, I will of course be very pleased to draft up something. If the present section does not accord with that, then I will change it.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: But I think what I'm saying really is the policy. I think the intention is that if there's an issue of dissipation raised and an accounting is given, that in any court case that would take place that the question of dissipation has to be proved that it's been alleged. That's the basis on which the accounting has been made, not just the accounting itself.

Now if that's not included in the wording here, and I think that's the case, then I think at least you should agreement on that, and then maybe the changes that I'm talking about may be forthcoming.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: No, that is indeed not included and was not intended to be included in this section, and any change would have to follow a change in policy, it seems to me.

MR. SPIVAK: Well, then I'd like to know what the policy is then?

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, I visualize, as I've said many times already within the last half hour, that there could be an accounting and there could be a waiver of the equalization. Mr. Spivak is now raising a point which . . . I suppose what he means is that the giving of an accounting shall not be assumed to be an acknowledgement of the circumstances set out in the notice as being correct, that seems to be what he's saying. And Mr. Silver seems to think that that's a policy decision . Is that it?

MR. SILVER: Yes. I say the way it is now all we have to do is follow conventional rules of evidence. But what Mr. Spivak is suggesting would involve changing those rules of evidence and saying that, no matter how a spouse accepts the notice, even if he says to the wife . . .

MR. CHERNIACK: "I'm guilty."

MR. SILVER: You know,"I don't want to fight with you, but if this ever gets to court I want you to remember that I'm going to raise this issue and I'm going to deny a dissipation of assets." Mr. Spivak suggests that even when a husband says that. . . no, no, no, I'm sorry, it's the other way around. If he doesn't say that and there's no problem and the spouse accepts the notice and they go along with the accounting and everything else and somewhere in between there is a problem and they go to court, then the issue of dissipation — What do you want to say — is automatically raised?

MR. SPIVAK: Yes. All I'm saying and that's the only case where it would apply, is that where a dissipation has been alleged and the notice has been given on that basis and the accounting is forthcoming and an order then is requested from the court for the equal share — the accounting having been made — the dissipation still has to be proved. That was the basis on which the accounting was given.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I can visualize the different approach. I could visualize a statement which need not be in this section, but could be in this section, that the having of an accounting between the parties is not presumed to be an acceptance of the causes set out in 19.

Now, could Mr. Silver look at that and see whether that would not possibly make it possible for every so often for two spouses to say, "Well, let's see where we stand with each other. Let's measure it up and see how we are." And the fact that they do that should not be assumed to have anything else. I wonder if Mr. Silver could think about that and if he wants to think of it overnight, I'm prepared to stay here as long as the other members of the Committee but I don't see the need to, really.

MR. CHAIRMAN: On that point, I wonder if members would be prepared to leave this until tomorrow. Mr. Johnston.

MR. F. JOHNSTON: One thought and I'm not trying to give law, Mr. Cherniack. I'm speaking of a person who is a practical person for quite awhile in municipal and in

politics and when I see the word "shall", can I just say that if this notice is served and he says, "Come down to the office. My accountant is there and you can have the whole bit." — now, once that's done, the accounting. it says it's done and they're happy. But if it says, "Upon a completion of accounting each shall pay." — now I don't think that that's really what we want.

MR. SILVER: That's it.

MR. CHERNIACK: Well, it's a draftsmanship thing. I think we ought to leave it and ask Mr. Silver to think about the drafting.

MR. CHAIRMAN: Committee rise and report. Do you want to rise?

MR. CHERNIACK: Do you want to rise? You don't want to rise.

A MEMBER: Well, do whatever you want. Rise.

MR. CHERNIACK: Yes. Committee rise.

MR. CHAIRMAN: Committee rise.