Legislative Assembly of Manitoba

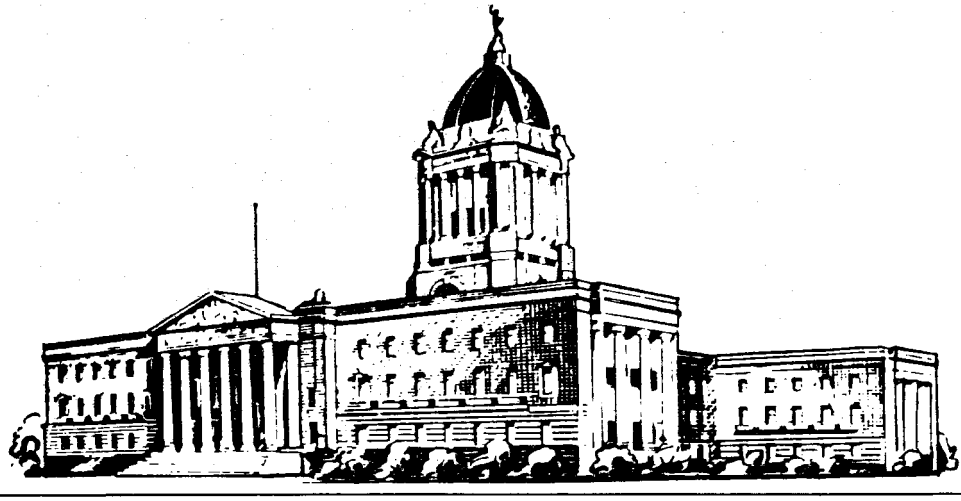
HEARINGS OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



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TIME: 2:30 p.m.

MR. CHAIRMAN (Mr. D.J. Walding): Order please. We have a quorum gentlemen, perhaps we could proceed. I wonder if I might ask Mr. Muldoon a question for clarification. You mentioned I believe this morning that the Divorce Act is Federal legislation. Can you clarify for me the two areas of jurisdiction here and whether you see any possible conflict between the two areas.

MR. MULDOON: There is a possible conflict, Mr. Chairman, we mentioned that in our Part I report on the support obligation. Let me put it this way, maintenance or support of either spouses or children is not mentioned in the British North America Act which parcels out the respective jurisdictions of parliament in provincial legislatures. You won't find it there. So by implication it's been considered for a long time that maintenance, certainly in a separation case, is a matter of proper civil rights if you will within the province and the provinces have had legislative jurisdiction over maintenance in separation cases.

When the Divorce Act was passed in 1968, it replaced a former British statute, statute of the UK Parliament which was in effect in Canada called The Divorce and Matrimonial Causes Act (1857) and for a long time, until 1968 from Confederation, 1867, parliament had not much if any exercised its jurisdiction in divorce so that the common-law provinces of Canada fell heir to the British law, the English law if you will, which was in force at the time they joined Confederation. Quebec never had any divorce law in the Civil Code so it didn't fall heir to the British statute because that applied only to the common-law provinces.

In 1968, parliament enacted a code for divorce and ousted the former British statute because parliament, under the BNA Act has legislative jurisdiction over divorce if it chooses to exercise it and it chose in 1968 to exercise it. Well then there were immediate constitutional attacks on the new Divorce Act. What was parliament doing making provisions in regard to maintenance on divorce. And the courts interpreted parliament's jurisdiction over divorce as having a necessary and ancillary, and I think those are the key words used by the courts, necessary and ancillary jurisdiction over maintenance on divorce. It was all one package and one should not granulate or fragment parliament's jurisdiction over divorce by denying it the right to make ancillary provisions for maintenance on divorce. So that maintenance on divorce is now firmly within the purview of parliament under the Divorce Act because it's part of the package of divorce.

But maintenance on separation is still within the legislative purview of the provincial legislatures and it's only to be the legislative jurisdiction of this provincial legislature that we address our recommendations in Part I. The very opening words of both the minority and majority are that while the province doesn't have any jurisdiction over maintenance on divorce, we would hope that the ideas we're formulating here might actually come to the attention of parliament and the guidelines be incorporated into the Divorce Act, or, that Manitoba judges, given a certain latitude of discretion, might adopt these guidelines in fixing maintenance, in establishing maintenance under the Divorce Act. But if neither of those happens, if they don't adopt those guidelines, if parliament doesn't change the Divorce Act, then one could have, true enough and it's one of the problems of a confederated country, one could have two sets of guidelines, two kinds of guidelines for maintenance, the one kind under the Divorce Act and the other kind under every other kind of maintenance which is within the jurisdiction of the Legislature. And we addressed ourselves to what we call the constitutional fissure in this subject.

As a mere Law Reform Commission making recommendations to a Provincial Legislative Assembly there is not much more we can do or farther that we can go in suggesting that either the judges should adopt the kinds of things where they have the discretion or that parliament should look at what all the provinces are thinking of in terms of maintenance and perhaps amend the Divorce Act. But we can't go much farther, short of a Federal/Provincial conference or an amendment to the BNA Act but that's not in the cards.

MR. CHAIRMAN: Would it be possible for a spouse to be in receipt of two sets of maintenance, one under a provincial law and one under a federal law on divorce, or would the maintenance under the separation procedures cease at divorce.

MR. MULDOON: That's the usual interpretation. It was thought that notionally it would be possible. The current interpretation, and I think that that's a fairly sound one, is that the maintenance awarded on separation will endure until the decree nisi, that is the interim decree of divorce is pronounced, and then if no mention of maintenance is made in the decree nisi, the maintenance continues. But if the divorce court makes some provision for maintenance in the decree nisi that overrides the previous one, it's maintenance on divorce then.

MR. CHAIRMAN: I see. Thank you. Mr. Graham.

MR. GRAHAM: Thank you, Mr. Chairman. This morning we covered some things, Mr. Muldoon, but one thing that has interested me to a fair degree has been the recommendations of the Canadian Bar Association, which I think is nothing more than guidelines for provincial action . . .

MR. MULDOON: The Law Reform Commission of Canada, pardon me?

MR. GRAHAM: . . . and in an attempt to get a fairly uniform approach to the Family Law problems. Now this morning I think it was fairly well established that the Law Reform Commission here in Manitoba is recommending rather than leaving it to the judicial process, that perhaps we should be enacting law that would spell out clearly what should be done.

Now one of the questions that has intrigued me, and I'm sure every member of the committee here will be

concerned, and it comes on Page 277 of the Canadian Law Reform Report where they're dealing with the question of children and the rights of children and the economic interests of the children and the safeguarding of those interests, and they recommend there that, or they state there that there are three basic ways to protect those interests: They can be protected by the present law of maintenance or by changes in the law of maintenance, or by a third method of giving the children a share in the property that is being divided. Now apparently your recommendations do not include giving the children a share of the property. So that leaves us with the other two alternatives, that is which are judicial, unless we change the laws of maintenance. And I was wondering if the Commission had taken a great deal of time in considering changes in the laws of maintenance of children in these situations.

MR. MULDOON: Well I'm sure if I went over the Minutes of the Commission's proceedings I could tell you how much time. I think it's fair to say that we took a great deal of time on each one of these recommendations and that's why the report took a great deal of time coming. I can recall that there was some impatience for the Commission to produce these reports before they were produced.

I think, Mr. Chairman, that Mr. Graham has raised two questions there about children, one is inheritance and the other is maintenance, and I think you have to keep those separate because inheritance deals with receiving some property or some share in property whether it's real property or personal property, stocks and bonds or a house or a farm or whatever; and maintenance has to do with the ongoing needs of the children or shelter, food, clothing and so on, even recreational money.

The law of Manitoba right now, the Child Welfare Act imposes duties on parents to look after their children and it sets out in what ways a parent fails. The child becomes a neglected child or a child, under the new Child Welfare Act, in need of custodial protection. I think that most jurisdictions have thought it wise to leave to parents their natural feelings of affection for children, their natural inclinations as to what the children will inherit from them.

Now there's a third statute — I don't know that I mentioned, yes, I did mention it this morning. We have already another statute on the books which overrides a will and that is The Testator's Family Maintenance Act. If a parent leaves a will which doesn't provide suitably for a dependent, a dependent in need, and the court determines from the evidence whether the dependent is in need and whether the bequest was suitable or not, then the court by order can override the will and leave a suitable bequest, if you will, to a dependent child or a dependent widowed spouse.

The Law Reform Commission of Canada perhaps felt because parliament doesn't have all the jurisdiction in this field, that it should canvass the whole area. And it goes a bit far as the jurisdiction of parliament is concerned when it speaks about the disposition of property. While maintenance was regarded as necessary and ancillary to divorce, no one but the Law Reform Commission of Canada so far has suggested that disposition of property is necessarily ancillary to divorce. Property and civil rights and the disposition of property are wholly and solely squarely within the jurisdiction of provincial legislatures. That's not a bad thing because some provinces have different property systems.

Recently we've heard plaints from the Province of Quebec that the Supreme Court of Canada sits on appeals from the Province of Quebec and most of the judges don't understand the civil law of Quebec. To a lesser extent I suppose one could make the same sort of plaint about the judges of other provinces who are a majority on the Supreme Court of Canada not fully understanding the Torrens system of land titles in Manitoba. Within the last twelve years or so — I think this is my own opinion for the benefit of the transcript — I think that the Supreme Court of Canada has made a grave error in one aspect of real property law in Manitoba because I think it did not understand fully the Torrens system of titles. So we leave property and put property in a different part of our recommendations and we leave property disposition to the provincial authorities. So that what do we have now? I don't know that we need to go so far as the Law Reform Commission of Canada does in canvassing the field and the whole field beyond the jurisdiction of the Legislature to which it reports to parliament.

We've said for some time, and some people urge upon us that the laws are pretty good and they don't need changing, that parents normally look after their children, they normally have an affection for their children and if they're able to dispose of property by will they normally do dispose of it in favour of their children. So we've said let's leave it to that except that where a dependent child in need isn't suitably provided for, the court can override a will. That's been part of our landscape in Manitoba for many years now under The Testator's Family Maintenance Act.

We're not providing in property disposition for any disposition of property to children for several good reasons and one is that a minor child has no legal capacity to dispose of property or to deal with property, that requires a person of the age of majority. Maybe you say that's a legal fiction but I'm not so sure that it isn't based on a sound reality. I don't know how many fourteen year olds are capable of getting, borrowing money on the security of land and paying off the mortgage when they borrowed it; or selling it, hiring a real estate agent to sell their property for them, so that normally if you did leave property, make property dispositions in favour of children, you'd have to involve trustees.

The Commission considered that it's safe enough in the normal course of human nature, if you will, to leave the expectancies of children to their parents, that if you divide values of property between parents, one or

perhaps both parents, perhaps the children will benefit from both shares, because both parents may very well have a natural affection for their children. And I hope I'm answering the question now when I say that's the reason we considered that we shouldn't make any recommendation about distributing property to children. Parents do that and usually quite well.

MR. GRAHAM: Mr. Chairman, I think that you have dealt mainly with one aspect of property only and that's real property. There are numerous other types of property, too, both tangible and intangible and personal of a nature tbat in cases of stress and the break up of a family, some of those things take on a very great significance. For instance a little boy might be very very fond of some particular piece of property of no significant value that belonged to his father only to find that the thing is lost in the shuffle of the property separation by the divorce proceedings, and here is where I have raised the question of where are the rights of the children protected.

MR. MULDOON: If I may answer that. Of course if the little boy never made that desire known I guess it could be lost sight of. Sometimes I find in my own home that the last couple of cookies are missing and my son or daughter had eyes on those but who knew, maybe I'm the culprit.

If the little boy made it known to a parent on spearation, let us say, and there is going to be a sharing of the value, remember not the assets but the value because when you share the value, one or other spouse will get the actual asset. To use the illustration this morning, one would hope they wouldn't saw the dining room table in half, one would take it and the other would credit the value. If I were the father of that little boy I'd make damn sure that I retained the possession of that article and I would credit my departing spouse with one half of its value as part of the share of value to make sure that I would have that article to hand over to the child.

There are some articles, I agree, of great sentimental value. They bedevil lawyers in drawing wills, not just a few times, I'm sure every lawyer knows somebody comes with a long list of silver tea services to be sent to a relative in New Zealand, and this . article, the old clock and that article, and ordinarily to serve the public you try to draw a will which does that. But common sense would say, either give those articles during your lifetime or simply direct that the property be sold and the proceeds divided because you can divide proceeds but you can't divide a grandfather clock very well. Those are the natural problems and perhaps the eternal problems of disposition of property. I think that when people, if our reforms were enacted, people would understand that what they're dividing is the value of property and not the property itself. The property may stay with one or other spouse but it's a share of the value which is divided. I would be very surprised if parents suddenly became perverse and didn't have an affection for their children just because of a standard marital regime. I don't think that'll change human nature, Mr. Chairman, and that's the best answer I can give to Mr. Graham's question. We considered that, we decided that it would be better not to try to get into detailed and what would ultimately be legally technically detailed provisions of law about the distribution of property to children because that would introduce complexities of manufacture again not necessarily of nature.

MR. GRAHAM: Well Mr. Chairman, again I say, have the rights of children been adequately protected in the considerations that we're presently involved in.

MR. CHERNIACK: Mr. Chairman, may I suggest just an additional question. Are the proposals, the recommendations here such as to make the rights of children worse than they are under the present law?

A MEMBER: I would think so.

MR. CHERNIACK: I'm asking Mr. Muldoon, this is a different kind of a legal ...

MR. MULDOON: With great respect, I think not. I think that the principles enunciated about both parents' obligation, ongoing obligation to support children certainly is not worse than the present law.

Now may I say — Mr. Graham's last question had to do with the matter we are considering now — the Commission three or four years ago made recommendations, of which we heard much this morning, about a court of integrated family law jurisdiction. And in that particular setup as an experiment the Commission suggested the institution of children's advocate because that's where the action is, that's when the warring parents who have issues in dispute which they cannot resolve and need a judge to resolve for them, in effect are going to be disposing of their children and their children's rights. And our suggestion as part of that pilot project was to try out a new institution in this province, somewhat new not entirely new, that of children's advocate.

Now we've had in this province for many years a kind of children's advocate called, The Childrens Aid Society, but the Childrens Aid Society is concerned with parental neglect. We were concerned to have children represented as best we could and many counsel have said to me it would be awfully difficult to get cogent instructions from a young child as to what's in the child's best interest. But we've suggested that. If that pilot project gets off the ground, we'll see how that works, that institution, new institution, children's advocate, where parents who are disputing custody for example, may have a third party intervening, a lawyer or a social worker, hopefully a lawyer, on behalf of the children. But all the law relating to children, the law relating to succession on the part of children, the law relating to maintenance, the law relating to child care and custody is all founded on one principle and it's a principle it would be hard to beat in legislation because unless you were going to have an encyclopedia of legislation for every conceivable case, you couldn't beat saying, that the court will dispose of the child's interest, the child's custody, the child's succession, according to the best interests of the child, which presumably a mature and adult judge would be able to perceive above the passions of the

warring parents. But that's the main thrust of children's law. What's in the best interests to the child? It may be that this parent will be heartbroken if this parent does not get custody of this child, but if that's not in the best interests to the child then we say in those cases of competing values, it's the child's interest which overrides even the broken heart of the parent, if we can see it in those stark terms.

MR. SHERMAN: Mr. Chairman, in the general area of maintenance I would like to ask Mr. Muldoon what kind of considerations the Commission had to wrestle with on the subject of enforcement of maintenance and how the Commission sees equity applied in the enforcement area. I know that there have been representations, there certainly have been representations to me, I'm sure to other members of the Legislature from parties interested in an enforcement program that would in fact set up an agency outside the courts itself and outside the financial activities of one or the other of the spouses to ensure that enforcement orders were carried out and to ensure that maintenance was paid, presumably by the taxpayer, even if the enforcement order could not be carried out and if the responsible spouse could not be found. As I say, I'm aware that some submissions have been made in this area and my own view, which is not important at this stage, is that it would be difficult, unpopular and unattractive probably to, at least in a political sense, to try to push for establishment of that kind of enforcement machinery. But I'd be interested in Mr. Muldoon's response to that to give us an insight into what the Commission felt about maintenance enforcement.

MR. MULDOON: The Commission, briefly to start off with, feels that maintenance enforcement has lots of room for improvement. It seems deplorable to the Commission that after the process of assessing and awarding maintenance that — what? someone's guess — that about 80 percent of the maintenance orders solemnly pronounced by the courts are not enforced or not enforceable in some cases. Now one starts from the old adage, which remains true, you can't get blood from a stone. But if there's blood there one should be able to transfuse a little bit of it.

The Commission that dealt with this problem in part in 1972 by our informal recommendation, No.2(d)"The automatic attachment of wages for maintenance orders." Now that's no global answer and I'm happy to report that the government and the Legislature responded by enacting our recommendation as part of The Garnishment Act.

One of the problems with maintenance at that time was that if the person who owed the maintenance were reluctant to pay, you had to get a new garnishment order every pay period. And that's not only disheartening and tiresome but it's inefficient, and if you forget, if you're late, you miss it that time. And our recommendation which is now enacted as part of the Garnishment Act was that if it's for maintenance, one garnishment order does and the employer deducts automatically, until further order of the court, every pay period to make up the amount of the maintenance.

I am told by people in the practising profession and by the referee in the Court of Queen's Bench and the Clerk of the County Court that that's working pretty well. Employees aren't being dismissed because of it, the employers are remitting pretty well in what we whimsically called "our ? everlasting garnishing order" and that it does work pretty well.

Many recommendations were made to us during our public hearings about establishing a new agency, about the state underwriting maintenance orders and then collecting as it could from the maintenance debtors. And we thought this, we had a report which the Attorney-General certainly indicated he was eager to receive and it was becoming quite lengthy and it was taking the Commission a good deal of time to consider every aspect in detail fully. So that while the enforcement of maintenance might be considered and justifiably part of the subject of family law, one could see that it could be detached and we decided to detach it. It could be detached because what is a maintenance order? It's an order by an authority of court that you will pay money to him or her. And from the point of view of enforcement, that can be considered a separate subject.

Since most of the briefs before us had to do with increasing welfare rates, adding to the Department of Health and Social Development by new branches of that department, we said to ourselves, we can honestly make a report on family law and detach that segment for the moment because it really broaches into welfare law and we were not prepared at the time to tackle that subject. Indeed we think that's a more appropriate subject for the Legislative Assembly than the Law Reform Commission in any event, not to say that we often think that the subjects aren't appropriate for us but sometimes we do. Taxation, generally speaking is one, rates of tax, welfare, we think, are matters better for the elected tribunes of the people directly than filtered through a Law Reform Commission.

One of the big problems in the enforcement in the maintenance, and I'm sorry to give you an over-long answer to this but it may be helpful if you're making a transcript, is the fact that we live in a confederated country. If the maintenance debtor skips across the border into Saskatchewan you have to start all over again because the writ of the Manitoba court doesn't run into Saskatchewan. And here, my colleagues and I in other forums at Bar Associations and National Association meetings have been urging this: action on the part of the Federal Government. Now here again are conflicts of interest, competing values if you will, but we have said, if the family are so important and if maintenance is necessary for whatever duration for the stability of a family of a dependent spouse and children, then that should be an overriding value.

When people leave the province and go somewhere, they're employed somewhere and somebody is remitting income tax from a salary; somebody is remitting unemployment insurance; most employees have a

social insurance number and somewhere in Ottawa there's a computer that says, where, what the source of those remissions is, where it is: Is it in Calgary, is it in Saskatoon? And we've been urging that at least, if not on a higher level than Law Reform Commissions, there be some sort of Federal-Provincial discussion on whether the Feds should say, okay you've got a valid maintenance order it's certified by a judge in Manitoba, there's no fooling around, it's got the seal of the court, it's valid, we'll ask the computer to tell you where the skipping maintenance debtor is, where the remissions are coming from, and go and nab them there.

The same might be said of another sacrosanct aspect of life in this country, the income tax return. How high is the value of the family as against competing values against the income tax return. I can remember one of the - just to give you an illustration one of the last cases I had in Family Court when I was acting for a lady who was seeking maintenance from her husband who was employed as a caretaker by the Winnipeg School Division. And of course in our Family Courts there is summary proceedings so there's no pretrial anything, no way to get at them. The only chance to cross-examine this bird was in court first day, first crack at the apple. Well he sort of rolled his eyes at the judge and said, "You know judge, I'm justa caretaker for the Winnipeg School Division, I don't have any money." And his wife was saying, "Well that dirty — expletive deleted so and so — he moonlights, he's a carpenter and he actually has some shares in a company which pay him dividends. Ask him about those. Sometimes you see the cartoons, the client saying to the lawyer,"ask him about." Well of course, I asked him about those and no, he didn't know anything about those. Was it perjury? Probably. But was there any way of getting at it? No. If we decided that the sanctity of the income tax return would yield to family considerations, if the family is the basic unit of society, we might say when maintenance is being assessed, a judge only would have the right to whistle up from the Taxation Office over on York Street copies ofe last three income tax returns. Then we'd know whether somebody was diminishing his income for purposes of having maintenance accepted or not. Now I say to you that's a question of competing values, and not everyone to whom I've suggested it has thought that the family maintenance was that high a value as against the sanctity of the confidentiality of the income tax return. Under present constitutional setups, those are the best ways I can think of, others more inventive may think of other ways, but that would require Federal cooperation and I'm sure that the Feds wouldn't cooperate unless that were going to be uniform in every province.

The other way in addition to our recommendations here of course, would be to establish a new branch of the Department of Health and Social Development or the Attorney-General's , an Enforcement Branch. We do have an enforcement agency at the Family Court in Winnipeg which helps wives who have maintenance orders in their favour to enforce them. It's not 100 percent and where it can't pay then nobody gets . . . you know, where it can't deliver, can't make an enforcement, the enforcement isn't made.

Sometimes the municipal welfare authorities require that the spouse go for a maintenance order which no one thinks there's a hope of collecting in order to satisfy their requirements to accord municipal welfare. And that's so that there would still be a right to collect over, collect back what they might pay out for the wife if ever the husband should turn up and turn up in a paying job.

Having said all that, I think I've canvassed most of the practical available opportunities for enforcement of maintenance. But whether you'll say when maintenance isn't enforced the state will underwrite it, the Commission thought is a matter for you elected representatives of the people more than the Commission because that's a matter of social policy, welfare policy. We are democratic enough to think it belongs in the hands of you elected representatives and not on the Law Reform Commission.

MR. SHERMAN: Well I'm glad to have that observation , that comment with respect to the Commission's view on that point' the question of possible state support for maintenance enforcement.

But just going back to your earlier remarks, I appreciate the distinction between maintenance and enforcement and the distinction that you would have determined in the Commission for yourselves in terms of your deliberations. But maintenance really becomes an abstraction without enforcement, doesn't it? I mean your Commission and this Committee , we could spend till the cows come home talking about maintenance but without enforcement it becomes a high sounding phrase without any meaning. So it's really unlikely that can get at the nub of some of the problems that we're looking at in the area of family law without tackling the enforcement problem too.

MR.MULDOON: Sooner or later, Mr. Chairman, you must tackle that problem. And again you'll come, if I may say so with respect, to competing values. It would be possible to devise a very authoritarian Draconian law that would make it impossible for anyone to wiggle out of a maintenance obligation, but at what price to the community, to civil liberties and so on until you get a howl from the people who are the spokesmen for civil liberties associations.

I think that it's possible perhaps a little at a time as that first example I gave you about just tightening up the garnishment proceedings and making them more enforceable, in many small ways to tighten up the enforcement of maintenance. But ultimately to get the blood out of the reluctant stone you're going to have to decide whether you want a new institution of government to do that. And if you do that I think you'll have to decide whether you want the state to underwrite maintenance orders and God Bless.

MR. SHERMAN: It has been contended, Mr. Chairman, that 75 percent of maintenance orders are uncollected and unenforced or unenforceable. Through you, Mr. Chairman, I'd like to ask Mr. Muldoon whether he would be able to tell the Committee in his experience and in his deliberations as Chairman of the

Commission, whether that is a realistic statement.

MR. MULDOON: Well, Mr. Chairman, from my experience as a practicing lawyer I'd agree that a deplorably large number of maintenance orders are not enforced or are unenforceable. As Chairman of the Commission in our public hearings I've heard the same figure, between 75 percent and 80 percent, not enforced, not enforceable. Now someone somewhere has researched that, someone with more means than this Commission has but I've heard that figure bandied around and it seems to be accepted by people, especially by young lawyers I know who are more actively engaged in Family Law than any other segment of the legal profession.

MR. SHERMAN: And so how then does the deserted spouse and the deserted children, the deserted family unit, survive? How do they survive? On welfare.

MR. MULDOON: Either the now single parent with the children gets a job and supports him or herself and the children that way or they go on welfare or on their relatives. Those are the main three options.

MR. CHERNIACK: There's an extra point in relation to this very subject. Firstly, if the majority of dependents who are not getting the moneys which are ordered by court are on welfare, then it would appear that it could be only a matter of bookkeeping for government to be paying the award rather than the welfare payment. But it poses two very important questions I should think, and that's something your Commission may have been discussing, therefore I'd like your views possibly other than a member of the Committee. Firstly is there not a probability that the only fair thing to do would be not to pay the amount ordered but rather one level which would have to be the welfare level. In other words if somebody is awarded let's say $200 a month, and someone is awarded $1,000 a month based on the ability of the husband to provide, but in neither case does the husband provide then surely an equity of the state is required to support the person because the husband hasn't provided it, it should not discriminate as between the spouse of the poor and the spouse of the rich since both husbands are denying that kind of support to the wife. In other words it seems to me that there has to be a different kind of a standard, not payment of the award but rather payment, let's say is a matter of right rather than welfare or whatever.

MR. MULDOON: Social justice.

MR. CHERNIACK: Social justice. Well welfare to me is the same thing as social justice. You know I really don't care whether you call it welfare or allowance or payment of support, the only thing is that when you pay support then the state does have the right and the obligation to try and collect it from the husband. But it would have to be sort of, it seems to me, a maximum which would also become the minimum that would be paid to the dependent regardless of the order itself. You know that seems to be self-apparent. I'd like comment on that.

The other one, is there any danger, and I'm cynical enough to believe that there might be, that the courts knowing that it is the practice of the state to pay these things automatically would just give automatic orders without assessing the ability of the husband to pay or where the rights are, where the fault is, if indeed fault is part of the consideration given in the order. Ancillary to that I said there's two problems, but it occurs to me that the third one might be that if the court decides that there is fault which is, and I don't think I agree with it but I don't know yet, and , because of the fault there should be less paid — and I know Mr. Muldoon said it should be stretched out longer if there's fault on the other side, but the recommendation I don't think says that, it says that it should be a factor — if there is fault assumed and the reduced amount paid, should the state take advantage of that by paying less than welfare. That hardly seems reasonable.

So there's some questions that occur to me on this point raised by Mr. Sherman.

MR. GRAHAM: Another one, and that is a further one. Supposing the court in its examination finds that the person is not able to pay at a rate which the state considers to be a bare minimum, should that person then still have to pay something and the state make up the difference?

MR. MULDOON: The Commission considered these matters, considered them substantively, before it decided not to formulate recommendations in regard to them. And indeed we spent some time at our public hearings talking with the people who appeared before us on these very matters. It appeared from most of the groups who appeared before us that if the state were to pay a flat rate less than the court awarded, that in effect Mr. Gotrocks would get off scot-free and he shouldn't because he can afford to pay more. Conversely other people who appeared before us said, "Well we resent as taxpayers that we should have to support Gotrocks' wife and kids when he can afford to support them, and so until you people" - as if the Commission were the state - "tighten up your act, clean up your act on enforcement, why should we support Gotrocks' wife and kids who need support?" And so if the state had a standard rate then I suppose in terms of the ability of the maintenance debtor to pay some people would do slightly better — I don't think many people would do much better in that regard — but some would do substantially worse. And the person whom the court had deliberately assessed as being able to pay would in effect, what? If it became the norm he might continue to reside in our midst safe from having maintenance enforced against him or could certainly move to another province if that were in the cards.

The next question is, would the courts in effect get lazy and assess only the state rate? I don't know if the courts would get lazy but I suppose it would be much easier and quicker for people applying for maintenance not to go through the trouble of bringing all the evidence as to what the ability to pay is and simply go for the standard rate, and if they did that the courts without the evidence before them would probably assess the state rate. I don't know that the courts would be lazy about it but I think that the applicants for maintenance

thinking, yes, we can prove he can pay more but is he going to, is it going to be like pulling teeth, ah! why bother with that when we're assured of a flat rate. And I think the applicans might tend not to bother to adduce the evidence for a higher rate.

If fault be a consideration and we ask this in our report in dealing with who should pay, who should bear the responsibility, one might say that the state could take advantage of any award less than a standard award because of the courts taking into consideration fault, or it might not, it may be generous. But what we're concerned with indeed is justice between the spouses. It may be just that this spouse should not be dinged for such a high maintenance rate to that spouse, but social justice may dictate that that fault should be borne by the people as a whole, not by this poor guy who's been pushed out of his house or this poor gal who's been beaten up, as between them it may be just to let fault be one of the factors in assessing the amount and duration of maintenance. But you may consider that it's not insofar as that person . . .

MR. CHERNIACK: Don't we have to acknowledge the fact, doesn't welfare make up the difference?

MR. MULDOON: Welfare makes up, no they don't make up the difference if the award is noticeably higher.

MR. CHERNIACK: No, no.

MR. MULDOON: Yes, that's right. In other words we share whatever element of fault would be assessed on that maintenance recipient, we as taxpayers, we bear that.

MR. CHERNIACK: At a minimum level though.

MR. MULDOON: Yes.

MR. F. JOHNSTON: Thank you, Mr. Chairman. On page 16 in your recommendations on spouses when we get to section family income earner's credit, to be disposed of according to the spouse's sole discretion; and a weekly or monthly sum of money for the spouse's own use absolutely, as a personal allowance; and the actual amounts paid under this provision shall be reasonable, taking into account the financial circumstances of the family and the actual amounts expended by the other spouse for such purposes." Aren't you really saying there, you know two people are living together, I quite frankly think if they get to this point they might not be, but you're really determining there whether they're living together or not what it costs, what is a reasonable amount for this spouse to have to live. So you're really saying if it's done while they're together; if they're apart that same section looks to me as if it would be what you'd have to consider. If you consider it while they're living together the consideration has to be there if they're apart. You'd almost sort of predetermine your formula here when they're living together.

MR. MULDOON: Well there's one difference, they are living together, the marriage hasn't broken down, presumably they're getting along. Now let me if I may, Mr. Chairman, give you the history of the formulation of this recommendation. These recommendations were much in the mind of the Commission even before we issued a working paper for people to criticize and comment back to us, and that was about a good year before the report was formulated. They were in the Commission's mind, they didn't appear in the working paper. The Commission concluded, well the only value to these would be a declaratory value, they wouldn't be very enforceable because in most cases to enforce them would be to break down te the marriage. When spouses get dragged into court most of them say, "Well that's it." Not all though, some people because of religious inclination or what not are not going to separate but they may need - I've certainly seen that in my practice. They've been to court and the judge has told one of them what's right to do and okay if that's what I have to do I'll have to do it, but the marriage doesn't - at least in the eyes of the neighbours and of an objective observer, doesn't break down. When we came to our public hearings something like this in the law seemed to be very desirable on the part of the people who were presenting briefs to us so we had second thoughts about that, and when we discussed it with those people who said, "you should have something like this in the law," we explained that we thought it wouldn't be very enforceable. And those people said, "have you not considered that it would just have some declaratory value, it would be establishing norms which might not be enforceable without breaking down the marriage, although some marriages would even survive that. Is there no declaratory value to the law?" And of course the Commission was hearing back what it had thought itself but decided that it would be more practical and not recommend something in the working paper which might not be too enforceable. And because of the force of those submissions to us, those briefs to us, we decided after all that the law does have, even when it's not enforceable, not enforceable in the sense that the marriage continues and they have the judge who washed them clean by saying what their obligations are, there does have some declaratory value, and we decided that if something like this does precipitate a marriage breakdown then of course it becomes very pertinent and that's why a subsequent recommendation there says how it could be enforced, how you could get from the employer what each spouse is earning, how you could find that out, by subpoena or warrant. And so not without some hesitation the Commission unanimously decided to recommend that for its declaratory value and for its use where the situation shifts from a doubtful marriage to one that's broken down. It could be a very useful provision there. Where the marriage isn't going to break down, maybe one or other of the spouses would decline to take action there, we think it would still have a declaratory value. As a norm what does the elected representatives of a civilized community think ought to be the norm in marriage.

I can tell you that when the report was finally issued some of the people who had come before us were highly

critical during the public hearings, an aspect of which I warn you now, if I may, you'll hear some pretty shocking things I think at your public hearings. Some of those people who were very critical were very lauditory of this, they said, "Aha you came around, eh, good, well that's fine." And in that regard we don't regret having made these recommendations because they've satisfied many people who came before us, those people knowing, at least from us, that they might not be useful in every instance, but that they would have only a declaratory value. And that's the history of our formulating these, we were vacillating because of course we didn't want to look like a bunch of impractical academics or ivory tower law reform commissioners and we decided not to include these in our working paper and then when we got the public response we decided well this seems to be what people want, it doesn't cost a hell of a lot, it isn't going to subvert the state or family law and it may have a value. And those people expressed themselves as very happy that these surfaced in our final report. What more about that I can tell you I don't know but that certainly is the whole process from beginning to end.

MR. F. JOHNSTON: Could we be looking at the monthly allowance kind of - I can see the non-earning spouse being almost treated like getting allowance the same as the children, and you know you could almost say, boy we're going to set a figure on this and it will be no more until my salary changes type of thing and I can legally do that. The Crown is bound by the four provisions above. I just get a little concerned that from that point of view . . .

MR. MULDOON: There, Mr. Chairman, we got into a field we don't normally, we actually gave an illustration of legislative drafting which the Commission tends not to do. All the Crown is bound by that means is that if the spouse is an employee of the Crown, if he's Mr. Goodman over there, Mr. Goodman can make sure that the Crown complies with this as well.

MR. F. JOHNSTON: But the allowance type of thing I just hesitate, I would ask this question. You said you had many submissions. I don't personally know everybody but I think . . . Is it more in the area where there is a larger income or a more wealthy income in a family than in the other income. My personal experience is the wives pretty well have the pay packet in many occasions. As one fellow said, "If I've got an extra 50 bucks in my wallet it's because she gave it to me." What is the reasoning for . . . ?

MR. MULDOON: Well hopefully it won't be held against me. If I were making an assessment of the people who recommended this sort of thing, and who are happy with the Commission's finally recommending it, I would say that they represent people whose marriages are not very happy. I would suppose that some of the ladies from what they told us, and they were mostly women, are married to or know the Archie Bunker type of husband who is the boss, who doesn't tell his old lady what he earns and "Christ, . you need a new dress, eh? Well you had one six months ago, what's wrong with that one?" Now some of these . . .

MR. FRANK JOHNSTON: It's only human nature.

MR. MULDOON: Pardon my colloquial expression but you'll hear that and more. Some of the ladies who said that they were satisfied with this kind of recommendation came to the Commission and made this kind of a submission to us, that every married person who is employed gets his paycheque drawn payable jointly in favour of himself, the employee, and his spouse and the employers have to do that. That's pretty far-reaching. Or every pay packet has on it the employee's name and the employee's spouse's name because we're going to have sharing right at the pay window. We considered that, we didn't dismiss it out of hand but we didn't recommend that either as a feature of the law. And so what weapon — here's Mrs. Archie Bunker and she hasn't had a new dress for a year and it's in tatters and she's stitching it up — is there any weapon the law could give her? Is there any threat? Well, this would be one, "Archie, you know if you don't let me have some clothing allowance I know someone who will order you to, a judge, a real judge. I'll go to a judge." Would that divert them from court? It might, it might have a declaratory value. The people who said they were moderately happy with this recommendation, since we didn't recommend that all married employees' paycheques be drawn in favour of the employee and the employee's spouse, thought that that would put a kind of a weapon — not a weapon necessarily to kill the marriage — in the hands of the spouse who had no means and no income. I think I've probably overexplained this, I'm not holding anything back, but that's the full story on those recommendations and the Commission finally concluded that nothing lost with those recommendations. They may serve a purpose. They wouldn't make the Legislature appear ridiculous. In fact they would perhaps give an aura of civilization to the whole thing, that here's a standard of reasonableness. In other words without telling the spouses how to live their daily lives, telling them that the lawmaker expects them to be reasonable. I would be overexplaining if I talked longer on the subject.

MR. BROWN: I was just wondering, there's a lot of difficulty in collecting maintenance. Now if maintenance orders were to be collected by the Federal Government, assuming that the person left the province and a maintenance order had been issued, would they not be in a better position to collect it than going province by province until you had covered all ten provinces?

MR. MULDOON: Yes, Mr. Chairman, they would but so far as I can see it would be utterly beyond the powers of parliament to enact laws in that regard. I think it would be ultra vires parliament to do that until we get a new constitution at least. What we're suggesting is that the Feds might well make the information which would assist in enforcement available. We have now a statute passed with good intention on the recommendation of the Uniform Law Conference of Canada, The Reciprocal Enforcement of Maintenance Orders Act, so that if a maintenance debtor skips to another province — it's a disheartening procedure because

it doesn't always work — you may apply in the Family Court or the Queen's Bench or whatever court issued the order in this province, the parallel court in the other province to enforce the maintenance order. The judge there has to hear what is said. First of all there is a hearing here, I'm not getting paid, the proof is made, I need so much. That and the proceedings go to the other province and the judge there hears that and he may either confirm an order or not, can confirm an increase or not, may demand payment. So that these laws and that Uniform Law Conference which recommends such laws and which provinces enact, gets around one of the flaws of a confederated country because it tries to get co-operative action on the part of all the provinces for a defect in the Federal authority. If we had a unitary state like the United Kingdom of course only one legislature would enact all the laws. But we don't. So that our recommendations there, if I may say, were directed more to the Feds providing the information which would help enforcement rather than the Feds enforcing because I doubt that they have the constitutional authority to do that. I more than doubt — if it weren't a public occasion I'd say privately I'm sure they don't have the constitutional authority to do that.

So that's the closest we could get to Federal co-operation, find out where is the guy, where are his remissions coming from, how much did he earn. Most people, knowing the evil propensities of the Department of National Revenue to prosecute, are honest with the Department of National Revenue. Now that's competing values again though which is sacrosanct. But that's how the Feds could co-operate, by giving the information. You'd have to persuade the Federal

Government to do that too.

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

MR. SHERMAN: Not on that precise point, Mr. Chairman, but I do have a question relating to another aspect of the recommendations and overall aspect of the law, and that is the area of responsibility for support and maintenance of children up to a certain age. The Commission has said that a parent need not be responsible for a child over the age of 16 years who has wantonly quit school and is either working or beyond parental control. I know the Commission has received submissions urging that that age limit should be 18 and that both parents should have a mutual responsibility for the support of their children until that age. I have my own views on the recommendation which no doubt will make themselves known during the course of our Committee hearings but I would be interested in Mr. Muldoon's comments in support of the Commission's position.

MR. MULDOON: Mr Chairman, the Commission started with the principle that parents, as a general principle of law, should be equally responsible to support their children up to the age of majority. And then with all such simply declarations of principle one thinks of circumstances where it might not be appropriate. We're thinking of the child who is almost to the age of majority, who is alienated from his parents, who is almost a blight in the family home rather than a participating member and we thought what an injustice it would be if those parents made heartsick by the behavior of their child then are hailed into court by the child saying "I've got to be supported man, I mean I've got habits, I've got all these things and you've got to support me." And so in looking at that we wondered if there were not some exceptions somewhere else and our exception there is drawn from and parallel to The Child Welfare Act where the child is beyond the control of his parents, in other words is a destructive element in the home beyond his parents control, perhaps a bad example for other siblings. We say well okay in that case the parents should be entitled to get relieved by a court from further support for this child; that child might well qualify as a child in need of protective custody under The Child Welfare Act in which case an organization perhaps better suited to look after such a child, the Children's Aid Society would be responsible for that child; and that happens.

You will remember in changing The Child Welfare Act a couple of years ago one of the plaints of parents were they had to take the fall and the rap for neglecting their children when really the children were in need of more care than they were capable of giving them, so many parents in order to get a child placed in proper care admitted that they were neglecting them, that the child was a neglected child when it wasn't, and the parents really just couldn't control the child in some cases. So that exception comes and is parallel with a similar provision in The Child Welfare Act simply because we thought that while the declaration is generally good there are going to be cases where it won't work, where it would be wrong for the child to enforce maintenance against parents in such a circumstance, a child rise up against his parents and say, "Yeh, I shoot a lot of pool and nobody feeds me there, I've got a motorcycle to fuel up or whatever and I'm not going to work. I've got my bed here and you're not supporting me in the style to which I want to be accustomed." Well there has to be a point where the parents say look, you've already alienated yourself from this family and with regret, sorry.

MR. SHERMAN: That's the example, Mr. Chairman, of one type of child and one type of family situation and I think probably that's the one that superficially we all become most sympathetic to in considering this question. But for my information and the Committee's information, Mr. Chairman, to Mr. Muldoon, what does the Commission feel about the opposite situation where there are parents or there is a parent who is deliberately and wantonly trying to get rid of a child, to get that child out of the house so that they no longer have to support them or put up with them, there may be a conflict of personalities, there may be any number of reasons. Is there not a danger here that a case could be contrived to work to the disadvantage of a child who was not liked by his or her parents?

MR. MULDOON: Mr. Chairman, there may be a danger there but the case Mr. Sherman mentions I think is a case for a Children's Aid Society who may, if the family situation is that bad, have to take the initial

responsibility for that child. But despite that exception which we've recommended, and we foresaw this, it might well be a case for the Children's Aid Society to get a maintenance order over against the parents so that they don't get relieved of their responsibility in that regard.

I suppose the situation mentioned is something like the current view of marriage, that there is no use holding people together if they're not getting along. And there are times I suppose where parents want to get rid of the kid. Is there some use in saying no, that child is going to live in your house and you're going to support him? I think that's a case for the Children's Aid Society to say we'll take care of the child but you'll pay the maintenance. It's hard cases but they're all hard cases.

MR. FRANK JOHNSTON: When you're speaking of maintenance that's one thing but would the parents still be responsible if the child went out and ran up some debts or bought a television set or a car and didn't pay for as under the law now he is. Would it have to be a special order that the maintenance of this child and the responsibility of debts are no longer the parents . . .

MR. MULDOON: No.

MR. FRANK JOHNSTON: . . . would have to come in as a special order on that child?

MR. MULDOON: Well actually, Mr. Chairman, we don't have a parents liability law in Manitoba. Parents aren't liable if their children rack up somebody's car or break a window. Usually they pay but they are not responsible for the deeds of their children as they are for the deeds of their dogs.

MR. FRANK JOHNSTON: I'll be damned.

MR. MULDOON: It comes as a surprise usually.

MR. FRANK JOHNSTON: Excuse me, I don't know the law that well but I would have assumed that we had some sort of a law in Manitoba that said if he ran up debts and everything I was responsible.

MR. CHERNIACK: Only for necessary debts.

MR. MULDOON: In other words what you could recover in maintenance, meals, clothing, what you could recover in maintenance shelter, but not others. Maybe it's a salutory thing for civilization in Manitoba that we don't have the law but most people think we do. Most parents settle . . . — (Interjection) —

MR. MULDOON: Yes, some do. But if he runs up a debt with a department store for a splashy 24-inch coloured television set with all the automatic controls, it's not his parents debt, the store is a damn fool for letting the kid have . . .

MR. FRANK JOHNSTON: I agree with that.

MR. SHERMAN: Could I just go back to my earlier question for one minute, Mr. Chairman, when Mr. Muldoon cited the case of a child's care and custody being taken over by the Children's Aid Society in the kind of situation that I referred to in an earlier question. Am I to understand, Mr. Muldoon, through the Chairman, that if this situation that you and I have been discussing hypothetically arose and the child was brought under the aegis of the Children's Aid Society that the parent in that case would be responsible for paying the maintenance, would be responsible for paying the Children's Aid Society rather than the taxpayers?

MR. MULDOON: Yes. Yes, that's a frequent case where the parents really are responsible and they haven't been acting responsibly toward their children. The Children's Aid Society may take a child into custody, and even an old child like a 16 or 17 year old, and when applying for an order of either permanent or temporary guardianship from the court, if the Society presents the case in such a way that it's obviously the parents fault and they're shirking their responsibility, the court has the authority to make a maintenance order over against the parents. The Children's Aid Society having the child in care is initially responsible for the payment of maintenance for the child but it in turn has an order for maintenance against the parent or parents and that's fairly common. Because that kind of situation does happen that would perhaps be an apt description of a neglected child. We moved to an euphemism for that because it wasn't always the child who was neglected, it was sometimes just a bad situation where no one was at fault. So we moved away from the neglected child. But in the case of a truly neglected child the Children's Aid Society can get an order for maintenance over against the parents and they do.

MR. SHERMAN: And under the recommendations of the Law Reform Commission, or implicit in the recommendations of the Law Reform Commission is the proposal that that would apply therefore from the age of 16 up to the age of 18?

MR. MULDOON: Yes, we're saying that the parents really shouldn't have any escape from at least making good maintenance for children until they're 16. The general principle is that the parents are responsible until the child attains majority. But the troublesome years are those last two years usually, where if the child becomes alienated, unco-operative, destructive influence in the family, if that's so found then we say the parents really shouldn't be stuck in those circumstances.

If it's the other kind of situation which Mr. Sherman mentioned where it's the parents who are neglecting their child, who want the child out of the house or are pushing him out, then the law it seems to me is flexible enough that they may not have the care and custody of their child any longer but they should still pay. I think that both under our recommendations and under the existing Child Welfare law, both situations could be justly accommodated by the law. Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: If I could just pursue the Federal Family Law Report with Mr. Muldoon, Page 40.

MR. MULDOON: I don't have it here but I'll listen attentively.

MR. PAWLEY: But if I could just read this paragraph because I would like your comments to it because it certainly does differ with the approach provincially to this question. It reads: iIT "Even if it were possible to write rules of law to cover the situation, there are few legal policies that are more cruel or ill-advised than the one giving married people direct financial motives to pursue their recommendations in public after love, trust and understanding have vanished from their personal relationship. Driven by financial threats, each party can only defend his or her interests by attacking the other's character, personality, fitness, as apparent in a general performance as a spouse. Such testimony is in any event notoriously unreliable. The selective memory and biased evidence in husband and wife cases is different in kind, not degree, from the other situations where a judge must weigh conflicting versions of past events and arrive at a factual conclusion. Nor do we believe this policy is defensible as is sometimes suggested as having some value as an emotional catalyst. Too much is at stake for persons having real economic needs for the law to justify what it does on the questionable grounds of providing incidental psychological benefits that most spouses would doubtless prefer to obtain in some less expensive and destructive manner." So what they're saying basically is that there's usually considerable fault on both parts and that the testimony of the husband and wife is hardly one which is free of bias, emotion, prejudice, therefore it's very hard to determine fault in any event. The federal report as I understand it is saying that there's no place for behaviour or fault in the weighing of the maintenance order. There's a pretty strong argument there. I'd just like to have your views, Frank, on that.

MR. MULDOON: Surely. I hope you have time. First of all the Federal Law Reform Commission's recommendations were published after ours, they're a later publication than ours. The Manitoba Law Reform Commission therefore didn't have the benefit of the batteries, the academics and social workers and sociologists like you wouldn't believe and you wouldn't want to pay for for a law reform commission in Manitoba, who were attached to the Law Reform Commission of Canada on two floors of the Varette Building which is slightly larger in area than the Richardson Building in Winnipeg, in Ottawa. That's where the Federal Law Reform Commission hangs out in all its splendour, and cost.

MR. PAWLEY: You got that off your chest.

MR. MULDOON: Yes, thank you. I feel a lot better now. I think our shoestring operation performs pretty well here.

MR. PAWLEY: Frank, are you attempting to give me another message here?

MR. MULDOON: Yes, you bet, Mr. Chairman. I know that's in vogue. I've spoken with and I heard only two weeks ago Mr. Ed Ryan who is one of the battery of experts the Federal Law Reform Commission has hired, was speaking at a meeting here in Winnipeg and took pains to quote from our report and say how they all disagreed with that. I know that's the vogue and I know you'll hear it. It's so much in vogue it's a slogan. I agree that reasonable people may differ on this but the Commission's view is that courts in this country have been determining fault for a longtime. They do so in every criminal case; they do so in every tort case in civil matters. It's not as if we had suddenly invented courts being put to the task of determining responsibility or fault because that's what they do most of the time unless the case is a question of pure law. We were not surprised when the Federal Law Reform Commission some month or two after our report was published came out with this report.

Our view is that if there be no element of fault in determining maintenance, especially in how long maintenance endures, one or other spouse can be a setup, a pushover for a determined person who is just tired of him or her but still wants a meal ticket. Now is that the majority of cases? I don't know. I think not. I think that has to be a very small percentage of cases. But I think that if the law panders to that, that number of cases will increase. I think if the law says it's possible you'll see it happening more than you see it now. I don't think it happens that much now but I certainly have seen those hard cases where one spouse is just tired of the other. He's not going anywhere, he's not a nice dresser, or she or whatever. I want out. Usually it's he because he pays the maintenance usually in our present social arrangement.

The other thing I think you have to notice from the Federal Law Reform Commission, and I think you should canvass this, if I may say so with respect, Mr. Chairman, when you consider no fault maintenance, is that they say that maintenance should be basically rehabilitative, that it should not endure long. To the extent that you say it's only short term, it's only in order to get the other spouse on his or her feet with job skills brushed up at a community college or back to school or whatever, I think we could all go along with that. In fact the Commission does go along with that. Rehabilitative maintenance could easily in our view be no fault maintenance. But where it sticks in our craw is to say that it can be no fault maintenance life long, a life sentence to paying maintenance. We say that's unjust. I'm not at fault if I've been pushed out of my home and alienated from my children because I'm plump and bald and a slimmer, better model comes along. Should I have to pay maintenance for the rest of my life? In my case perhaps we wouldn't get a divorce in those circumstances, wouldn't have access to The Divorce Act of Canada. How long should I pay maintenance? Maybe I'll take up with someone else; maybe I'll — and I don't mean to make this a public confession of course and it isn't I hasten to add. But one sees people like this, at least I did when practising law, who come through the doors. The longer one may be sentenced to pay maintenance without fault the surer it will be that attempts at evasion will be taken, skipping to another province making it hard to collect the maintenance. I say that that's one proof that that goes against our people's sense of justice. To say one day we separate; of course it doesn't matter who is at

fault, you will pay me, I've got a meal ticket. It's an unhappy circumstance but I don't have to do anything. I don't have to get a job, I can stay at home baking cookies or if I'm a penniless poet and she runs a thriving real estate agency I can stay at home composing poems. Why should I go out and work? Presumably if one is going to treat spouses equally it will work just as well for the guy who stays at home as it will for the gal who stays at home. I may have treated her rottenly but I'm going to get life long maintenance. She'll never divorce me, I know that; I'll never divorce her, why should I? I'll have my friends in, of both genders if you like, we'll booze it up and the meal ticket comes in. I think that goes against people's sense of justice.

I know that the articulate, well-educated, most of the middle class people, many of them who will come before you will say no, that's perfectly okay, no fault maintenance. That's the slogan. All I'm saying is that the Commission's perception of what most people see as justice doesn't involve utterly no fault maintenance.

MR. PAWLEY: If you don't mind, could I just pursue a further comment of the Federal Law Reform Commission particularly in respect to your suggestion that you feel that the courts can determine fault. On Page 39 of that same report the words that they use are as follows: *"The proper standard of conduct is not defined by law nor is the nature of the relationship between conduct and financial rights. Both these matters are according to one appellant court decision within the entire and absolute discretion of the trial judge. These inherently subjective standards lack the certainty that is essential if justice is to be done in determining the economic consequences of marriage breakdown where the outcome will often represent the fruits of the labour of the spouses' adult lifetimes lacked a certainty."* I see you disagree pretty firmly with that proposition.

MR. MULDOON: Mr. Chairman, the Honourable the Attorney-General is almost tempting me to an ad hominem response.

MR. CHERNIACK: What does that mean?

MR. MULDOON: I mean personal or subjective comparisons about the relatively large project staff of experts retained by the federal Commission to assist it to formulate its conclusions on the one hand, and our own Manitoba Commission operating without such resources, but being composed of lawyers in actual practice and therefore daily contact with our people and non-lawyers in no less daily contact with our people. Just as reasonable people can differ on issues such as no-fault maintenance, so it seems can Law Reform Commissions. But, Mr. Chairman, it may be pointless to make comparisons between differing law reform recommendations if one confines oneself only to their respective texts. The recommendations of the federal Commission express and reflect a current trend in academic and some other professional writing and thinking. My colleagues and I recommended inclusion of the fault ingredient for assessing the amount and duration of maintenance awards because we think it more just, and we think the majority of the people of Manitoba regard it as more just. There are certainly occasions for the law to lead public opinion with thoughts which come from the universities and the professions. But surely a new law which the populace regards as containing elements of real injustice cannot be hailed as a reform in a democratic society even if it follows so-called modern thinking. So, Mr. Chairman, since this committee is composed of elected legislators may I suggest that in addition to listening attentively to the many briefs which will be presented to you, the members should also canvass their constituents on this question. The Law Reform Commissions report their perceptions of just reforms, hopefully not divorced from the real ultimate consumers of law reform, but this committee, composed of elected tribunes of the people is uniquely fitted to test those perceptions both at public hearings and especially among their constituents. I respectfully recommend to members the latter course in regard to whether maintenance should be awarded against one spouse and in favour of the other spouse without regard to fault. Mr. Chairman, canvass the people in the members' home constituencies to determine where a sense of justice leads in matters of maintenance in regard to responsibility for marriage breakdown, amount to be paid, and duration of paying in terms of months, years or lifetimes.

MR. CHERNIACK: I don't want to make an ad hominem remark either, Mr. Chairman, but I did characterize Mr. Muldoon's minority opinion report as being emotional. I listened carefully — and it's sort of a challenge I'm making to Mr. Muldoon — I listened carefully to what he described might be a terrible situation with no fault support that drags on forever and I couldn't distinguish any difference between the problem raised whether there was fault or no fault. I agree completely with his description of the inherent injustice of burdening a person with payment for a long long time without it being rehabilitative and he keeps calling it no fault. I keep listening to what he is saying and I keep eliminating the words "no fault" and his argument still stands and holds just as much strength whether it's fault or no fault. I am therefore again asking him whether really he is imparting to this judgment of his or opinion a personal, emotional aspect to the extent that he and two others considered that the recommendation of the majority was not strong enough, that there should be paramount responsibility which is already weighting this whole decision very heavily, by the word "paramount". I'm wondering whether the majority decision may not have already become a compromise between a lesser decision and the minority's point of view. Was there no one in your Commission that wanted to say out loud that they don't really agree with fault even as the . . . just reasons for the amount?

MR. MULDOON: No, you have the honest opinions of the Commission set out in the majority and minority reports with nothing held back, Mr. Chairman. Believe me, nothing held back.

May I respond to this in two ways. Let me start off by saying I accept an element of emotionalism and that Mr. Cherniack has correctly perceived that but let me disallow it as personal emotionalism but rather objective

emotionalism, if I can put it that way, not subjective. From what I can see and my colleagues can see and from what we heard and I daresay, without being a wiseacre, from what you gentlemen will hear in your public hearings, the subject is emotional. It is emotional. That's one of the realities. Our people understand it as an emotional subject; the breakdown of marriage. It may be that the law can ignore that; it may be that the law can be so majestic that it will not take into account that marriage and the breakdown of marriage are emotional matters for the people who are either marrying or separating. I suppose there are no more two natural adversaries.

Now I'm not suggesting and the Commission isn't suggesting that the law should allow people to wallow in allegations of fault and how this one is bad and that one is good, how I am so good and how she is so bad. But our perception — and I guess I can't go farther but I want to say more on the subject, I can't go farther in this regard — our perception is that our people regard it as a matter of justice that a spouse who has behaved rottenly shouldn't get out scot-free. Now you may say the law need not take any consideration of that. The Law Reform Commission of Canada says that. It's very clinical. People are emotional. You will hear emotional briefs I think. We certainly did.

The other thing is this. What the minority is really saying there, in going to paramount responsibility, is not to ding someone, say to someone you've been awfully bad, but to recommend a law which would say maintenance isn't forever. The objective is to get you self-supporting as soon as you can get self-supporting by every lawful means and you don't get any long term maintenance unless what? Well what's the one thing which we heard people say is a matter of justice? You don't get long term maintenance unless the paramount responsibility for the breakdown of the marriage resides in the conduct of the person who is supposed to pay the maintenance. We say that may not often be found. Not every breakdown involves one person in a paramount responsibility for it and that's why we used the word "paramount". Paramount Pictures, the huge responsibility. That we think would probably not be found in every case, maybe not in many. So that means that maintenance would be rehabilitative. The minority you may say is hard-hearted but it says no. In a society where marriage breakdown is common, where it's the public policy to say, get people out of these situations and don't keep them together because that's the old-fashioned moralistic view, you never get out of it, the law and public policy, public demand has said let people out of this. The minority says all right, they have to make other lives so it should be an unlikely event that maintenance would endure long. Let the one who is maintained start up and get self-supporting and if that person can't then that's the place maybe where the state should pick it up. I hope I haven't sounded too emotional except to identify that it's an emotional subject.

MR. CHERNIACK: Are you suggesting that the majority report does not agree with the principle of rehabilitative support so that the people will go back to work whether they're at fault or not at fault?

MR. MULDOON: That's where we had our falling out. They don't say so that much. In fact . . .

MR. CHERNIACK: Well then it's the rehabilitative feature you're quarreling with not fault.

MR. MULDOON: Both majority and minority considered that fault should be an element. The majority's recommendations, and I should speak fairly on the majority's behalf as Chairman of the Commission, would make it more possible for life-long maintenance, they acknowledge that. They say that fault should be one of the factors which would be weighed with all the other factors. The minority, in effect by contrast says no, no maintenance to you, applicant for maintenance unless you were in a position where your spouse's conduct was utterly rotten, no maintenance over and above rehabilitative maintenance. In other words you may say that contrasted with the majority of the commissioners the minority are very hard-hearted because they say there won't be any likelihood of any long-term maintenance. The duty of people after a marriage breakdown is to pick themselves up and put themselves together and get to be functioning members of the community again, to become self-sufficient. That may seem hard-hearted and sometimes things which do seem hard-hearted work pretty well. Our experience is that there are lots of ladies who rather than take maintenance from their husbands would rather work in a hospital laundry, or whatever they can do, rather than have that business of will he pay or won't he; will I have to enforce it or won't I?

Maintenance, as most of the people who will argue probably in favour of no-fault maintenance will tell you, is debilitating. It creates dependence, it keeps dependence, and the minority's view is to the extent that people can be pushed out and made self-sufficient they should be; but those who can't be may have to be picked up by the state. That's the watershed of opinion. So relating to what we saw as a popular feeling, maybe the people are all wrong, maybe we should be very cold-blooded and lofty about assessing maintenance and maybe leave the people as some people say or ignore them. We sense the best we can and that's what we're required to do by statute but we have no scientific means of doing it, we sense that people think that fault is an element and that the person who's behaved rottenly in whatever few cases or many that may be, shouldn't either get off scot-free or get a free meal ticket. Now others disagree with us I agree.

MR. CHERNIACK: Mr. Chairman, I'm sorry to belabour this but this is becoming very important to me to try and grasp fully. Firstly, I agree with Mr. Muldoon that marriage and marriage breakdown are indeed very personal emotional subjects. I have difficulty looking at the support requirement as being emotional. I think that that's hard realistic fact. That when there is a breakdown in the marriage and one person is capable of supporting another and the other person is not capable of self-support and needs assistance that there should be that kind of assistance. I don't consider that emotional, I consider this a requirement. Then I go to the next step

and I don't see whether it shouldn't in all cases be designed to be a rehabilitative period of time. That is in all cases, whether there's fault or in many marriages I know of where I could not lay fault. As a matter of fact I wish I were as simplistic as to be able to say that in my years of practice, and they were not inconsiderable, that ever did I find a case where there was clear-cut fault. Never did I find a case where I could say this or the other spouse is clearly and completely at fault, because even when I've seen a husband leave his wife, walk out on her, go to shack up with some other lady or gentleman did I not find that there was something in that marriage that was basically insecure or unsatisfactory or contributed in some way by the relationship between the two. So that I have difficulty in assessing this although I seem to agree with Mr. Muldoon in a number of cases, and I'm still aiming it at him and not trying to provoke a general discussion because we do want to try and keep an open mind while we're listening to all the briefs that will yet come to us.

But I want to try somehow to understand Mr. Muldoon, and let me finish Frank, because I start out by saying I agree with support, I agree that it's essential and therefore I do not consider it as emotional as the great sentimental feeling I have whenever I see a marriage breakdown, that I consider it a need and I consider that all support should be rehabilitative. I think that the person supported should be given every opportunity and assistance to become self-supporting and independent of this need of dependence on someone else who is no longer a spouse, so I agree with rehabilitation which Mr. Muldoon says the minority group wanted and they are the harder and tougher therefore I become harder and tougher, but I still have to say that where there is a breakdown where there is no fault attributable that there should be the same efforts to bring about a rehabilitative situation as where there is fault. That is where we seem to be somehow playing with the concept of fault rather than the consequences of an order of the court for support.

I am prepared to set aside the thought of fault and I am jarred by the statement that the majority position was one which was less concerned with rehabilitation than it was for just a non-fault continuing support which I gather he feels that the Canadian Law Reform Commission recommended. If that is the case then I agree with Mr. Muldoon except for the fault feature and say by all means let's have a constant review and let's do everything we can to get that dependent person back on his or her feet to be independent. Are we really at difference, you and I in the consequence or effect?

MR. MULDOON: Not so much. Mr. Chairman, Mr. Cherniack has invited a response, let me take another swing at this if I may.

The majority of my colleagues were of the opinion that it would be scandalous that after however many years of married life she — let's speak of it in terms of the usual situation in our society — she, who hasn't worked for a few years might have to find something to do and that he should pay for her, and that he should continue to pay for her as long as she needs him to pay for her. Well, the minority thought she'll need him to pay for her as long as he pays for her, that's how long she'll need him to pay for her. So the majority purposely kept it as an implication of their recommendation that she might stay home and receive maintenance for a long time if not for a life-time. They don't say that that would be good for her to do that. , she would be much better off finding something to do and getting out of this dependent situation, but they leave that open as a possibility in the kind of law they would recommend.

The minority think that fault might not be needed in the equation if you had a — let me put it this way — a hard almost brutally finite period for rehabilitative maintenance and that's it. After all if both contributed to the marriage breakdown then once one has said, okay here's a springboard to get back into the labour force, that's the end of the responsibility surely.

Now, Mr. Chairman, I agree with Mr. Cherniack that if you want to make a detailed psychoanalysis of people, and I'm not saying that in any pejorative sense, you may find that he left to shack up with this lady but there must have been something she was doing wrong, something that caused him. I suppose it depends on your threshhold of toleration. For some people that will be the break-up of the marriage; / for others people will subliminate, they will be more self-sacrificing, they'll stay firm to their marriage commitment despite that and won't go walking off with that lady.

Now so long as we regard marriage as a commitment I suppose one can say that the person whose tolerance for something not going well at home is low and walks off there's fault when others stick with it , when others stay firm to their commitment. When the ideal of course is staying firm to one's commitment even at some inconvenience or self-sacrifice. I don't think that in those circumstances wbere one uses the concept *paramount responsibility* one poses a difficult task — I don't think that's simplistic because I think in many marriages one wouldn't find a paramount responsibility; one would say it's about equal in most cases.

MR. CHERNIACK: Doesn't our present law challenge your concept of commitment, our divorce law, that's after two years separation?

MR. MULDOON: It does. It's public policy, there's no rolling that back even if one wanted to, is there?

MR. CHERNIACK: In fact your concept of commitment is no longer the concept as I see it of our present law.

MR. MULDOON: Well if that be not, you know, I don't know what is then the concept of marriage. I think that there must be notwithstanding the Divorce Act some standard of commitment, me to you, you to me, what are the traditional words, for better or for worse?

MR. CHERNIACK: No, it's S.M.R. during that period of time. You adopted that concept of S.M.R. Is

that correct?

MR. MULDOON: Yes, that's it. Yes, that's a property disposition thing to achieve equality when and if, and God knows the Manitoba Law R Reform Commission recognizes that Parliament passed a Divorce Act and that it's legally easier to get a divorce and people are doing it. At worst you have to wait five years.

MR. CHERNIACK: It's not easier, that there need not be false prudence.

MR. MULDOON: Well, legally easier because you see even the deserter can get a divorce now whereas at one time there was good reason for common-law marriages, for example, because my wife won't divorce me' divorce. therefore I can never get a divorce / But / Parliament has changed that. The deserter, for example, can get a divorce now, one can be divorced whether one wants to be or not, whereas under the old dispensation one could not always get a divorce. I agree that's in accord with public opinion. If one said, I don't want to be in a position of being seen to horse trade, but if one said maintenance is for a brutally finite period of time and that since we may both be somewhat responsible for this marriage breakdown is my offer of a springboard for you to get self-sufficient too, and that's the end of it, then I would say that's fine, no-fault maintenance. Indeed the minority does say that' for the rehabilitative maintenance.

MR. CHERNIACK: Thank you, Mr. Chairman. I appreciate the time that was given to me on that.

MR. F. JOHNSTON: I don't want to pursue this any further either, or I think the word *no-fault* maybe is not as appropriate in Family Law as it is in car accidents, you know. If you have a couple who had agreed not to live together anymore and they cannot come to an agreement over payment to one another themselves, if they can it's a desirable thing, but if one or the other says and the girl in this case says, *"I am going to need maintenance for 15 years"*, and he says, *"No, you're not, you're a graduate nurse,"* I don't think that the word fault comes in there, I think that there has to be somebody who sits down and says, now you can have it for five to get back into the . . . and I don't think you're really getting into a fault situation here, you're getting into a situation where we want to get people back into their own way of life, let's put it that way.

If you have a couple where the girl just walks out and the guy is doing everything you say here, giving her an allowance, she knows the salary and providing a good home and there's a separation, I'd first like to ask who decides that there's a separation here? The fellow might say I didn't send her away, she went. Now if you're going to give into an argument on maintenance on that circumstances somebody has to say who's at fault because they're not going to settle it themselves.

On the other hand if the guy walks out and everything is satisfactory around the house and be's the money earner he has obviously got to be responsible for the children and he's got to be . responsible for her, I think in that basis you have to look at fault too, she should have maybe a longer period of time than the others.

You know I really think that there is an area where you're going to have to have decisions made on who was to blame and who wasn't versus the people who are compatible just saying, we're not going to live together, and a decision has to be made by somebody as to how long it's going to be. I'm wondering if the word no-fault is the right one when we're logically thinking this out.

MR. MULDOON: Well, Mr. Chairman, fault refers to grounds for separation and I have just made a list of some of the statutes on which maintenance can be provided under the authority of Provincial legislation.

In the Queen's Bench Act there's an action for alimony and that action can be founded on the grounds on which an ecclesiastical court in England in 1857 would have given alimony. Basically that's something which the Commission hopes to make recommendations to you about, modernizing those concepts. In fact our view was that if one adopted one standard for maintenance these things would become obsolete.

There's part of the divorce in Matrimonial Causes Act of the U.K. Parliament, 1857, still in force in Manitoba dealing with judicial separation. What are tbe grounds, the fault grounds for judicial separation, and tbat imports the right to have maintenance by the way, desertion for two years, adultery, persistent cruelty. That is for the wife's maintenance only.

Our own Provincial Statute the Wives' and Children's Maintenance Act has fault grounds, assault, desertion, habitual drunkenness, persistent cruelty, non-support, a wife is entitled to get maintenance.

MR. CHERNIACK: Those are causes for separation they're not for maintenance.

MR. MULDOON: Well, under the Wives and Childrens Maintenance Act, Mr. Chairman, the Statute says that if those are proved the court may make an order for maintenance.

MR. CHERNIACK: The court may make an order for separation which may be followed by a maintenance order.

MR. MULDOON: For separation, maintenance and custody.

MR. CHERNIACK: But not independent of each other.

MR. MULDOON: Well, there's an exception there because if the wife charges desertion, let us say, and asks for an order for separation and maintenance, but the husband comes back and says, aha, but she's committed adultery or in fact my desertion is a constructive desertion, she drove me out of the house, then the Act specifies she gets no maintenance and under The Child Welfare Act it seems that even a father can get maintenance for a child or children vis-a-vis the maintenance provisions which are within the purview of the Provincial Legislature. They're all maintenance virtually except maintenance on divorce. Those are the fault grounds. The Commission has recommended in any event unanimously that those grounds be wiped out, that one should not have to prove desertion for two years rather than one year and 360 days or habitual drunkenness. But they have

said that fault should be an ingredient. consonant I think that that's with people's sense of justice. Fault is an ingredient. However, I think there is getting to be an element of d2ejla vu about the back and forth, Mr. Chairman.

MR. F. JOHNSTON: Well you just can't have a situation where one of them says, we're not going to live together anymore and you're going to pay me. Are we saying in that in order to have the separation recognized, one of those has to be proved now?

MR. MULDOON: Yes, and of course it's only with a separation that one is entitled to maintenance. If one doesn't have a separation order one isn't entitled to maintenance.

MR. F. JOHNSTON: And the other way is, if one of them says we're not going to live together anymore, so it's automatically you're into a maintenance situation.

MR. MULDOON: It could be yes, if there's nothing to tie the maintenance to —(Interjection)— the children but let us say a childless couple; if you can just walk out and you know what the proposals before parliament are /for further amending the Divorce Act' virtually unilateral divorce.

The old view was that you were bound by a commitment and that the law would enforce that commitment. The modern view is that whatever commitment you made, the law isn't going to necessarily enforce it. You can walk out. You can't be forced to live in a place where you don't like living, you don't like living with this man or this woman. And if maintenance follows upon that, then it can be an oppressive thing, it / can be an unjust thing.

For example, you know it's unseemly these days for welfare workers to go around and see if there's a man living with this lady who's on welfare. The notion being that if she's having the comfort of a man in her bed, she should have the comfort of his paying for the bread and welfare authorities are relieved of the responsibility. And quite honestly, that does seem undignified and unseemly to me. But how many husbands have found that he's paying maintenance and we're having a party here. And I suppose when society changes enough that some wives will be paying maintenance and find lingerie in the husband's apartment, they too will get the same feelings, they'll stop paying, they'll skip, they'll evade. I think that's just natural. I don't think it's unjust. And it seems to me to have some element there of behaviour of being related to behaviour.

I don't agree with the idea that a wife is entitled to maintenance only while she remains chaste, but I think that when you're assessing maintenance, people will look to the conduct before the marriage breakdown. If there are no grounds for separation, there may be no grounds for maintenance. And I agree with Mr. Cherniack, Mr. Chairman, if that maintenance is rehabilitative and a reasonably brutally short finite duration, a reasonable opportunity, okay. But how long? She may say, I need maintenance for 20 years, I need maintenance for 25 years. Well, should he have to pay that?

MR. SHERMAN: Mr. Chairman, through you to Mr. Muldoon, and I guess to Mr. Cherniack. I, at this stage of the hearings anyway, at this stage of Committee's work I don't have any particular difficulty with the fault concept but Mr. Cherniack has opened up an area that I would suggest will probably become an area of wide attention and wide concern to the members of the committee itself even when we go beyond the public hearing stage to the point where we are formulating our own recommendations. I think there probably will be a very thorough going examination of the opinions and perspectives of committee members on that subject and I appreciate the fact that Mr. Cherniack has opened it up at this point. I think that the difficulty that arises for me in equating and assimilating all the views on this particular subject that have been before us today lies in attempting to fit no-fault maintenance and no-fault divorce into the same basket. I would say that on the basis of the exchange of the last half hour it becomes apparent to me that the concept of no-fault divorce with which I have no argument, becomes merely an academic subject. Because if we are going to admit, and obviously not all of us do, but if some of us are going to concede that there should be an element of fault, the concept of fault should be contained within our maintenance legislation and our maintenance viewpoints, then it seems to me that the concept of no-fault divorce is meaningless. If you're going to have no-fault divorce then how do you move on from that stage to a point of argument and settlement of a maintenance situation that includes within it the concept of fault. I just pose that question to you.

The other thing that I wanted to say was that with respect to the concept of fault being contained within the maintenance perspective, I see that as being consistent with the answer you gave Mr. Johnston a little while ago with respect to Section B of the report having to do with the rights of spouses, on pages 16 and 17, where you said that those rights were spelled out because they had a declaratory value, which I think is very valid. Could we not go beyond that to say at least as an addition, an addenda to the exchange between you and Mr. Cherniack, that the Commission feels that containing the concept of fault, maintaining some degree of concept of fault in its maintenance proposals and its maintenance decisions that it's there for the declaratory value that it has, in the same way that the rights of spouses are spelled out for their declaratory value?

MR. MULDOON: I think that one must concede that there is an element of that because when one gets away from specific grounds and refers to fault as an ingredient, one moves from a more specific to a declaratory. But I think that it would be fair to say that neither the majority nor the minority intended that the fault aspect be merely a declaratory thing but that it be a functional part of assessment of maintenance. It would indeed have a declaratory value, I think, as well. And it becomes more declaratory, as I say, when you get away from desertion for two years, persistent cruelty, habitual drunkenness and so on, those are eliminated. But it

also becomes functional as well as declaratory because it's one of the ingredients the court would take into consideration in assessing maintenance the liability for maintenance, how much and for how long. But I concede that it becomes more declaratory, yes.

MR. SHERMAN: Well would you agree that if we are able to come to the conclusion that there should be an ingredient of fault attached to maintenance or come to the conlusion that we should have no-fault maintenance, then there's no point in concerning ourselves with the concept of no-fault divorce, because by definition you are working on the practical settlement, the practical solution of the separation by working in the ingredient and the concept of fault.

MR. MULDOON: Well, for some people, some few people Mr. Chairman, the attribute of maintenance isn't the big thing, it's to be free of the other one, so that I think you still can compartmentalize the order or decree of separation or divorce, which is not our business here, on the one hand and the basis for awarding maintenance on the other hand.

No fault separation for example, may be a reform. People may say there's no use in the law binding people to live together when they cannot live together. So for some people whether maintenance is in the picture or not, that decree, that pronouncement of the court that you are separated may be of great importance. And it may be fault or no fault and the Commission isn't recommending the fault basis for separation because the Commission's view is that if people say they can't live together any longer then what's the law going to say? Do it anyway? Not likely. But when you take maintenance, it seemed to the Commission that you can properly add that ingredient of fault there to determine how much and for how long. But some people won't be concerned with maintenance at all. For example, he has a good job in a factory, a couple I remember, and she is an Airline stewardess and they have no children. They're interested in getting a separation and ultimately a divorce and maintenance doesn't matter because each is self-sufficient already.

MR. CHERNIACK: So really what you're saying is that — is what I'm saying, I'm interpreting you as saying where you have a fault factor in determining maintenance, you are keeping together, and I say that based on experiences with lots of clients and friends, that you are keeping together a couple who other than for that fault feature would be separated. There are women who do not dare to leave the home in what they consider an untenable, unhappy marriage because of the fact that they are afraid that they will walk out and become destitute by the machinations of the husband who will use the fault factor. And really much of what you've done here is to make it easier for dependent women now to acquire a form of independence that will make it possible for them to separate.

By bringing in the fault feature you're saying okay as long as he is very careful, as long as he manages his affairs so that you cannot put blame on him he can be as mean as can be in private to his wife to the extent that she is miserable, but as long as she can't show that he's being mean she dare not walk out because the minute she walks out it's her fault and bang you have your brutal, you know all that description you have there.

MR. MULDOON: No, no, Mr. Chairman, in a sense we're not indifferent to that situation but we're really throwing the challenge back to the MLAs, we're throwing the challenge back to the Legislature, as between him and her, for how long and on whose paramount responsibility should he be pay, compelled to should she be entitled to receive. But nowhere did we suggest that if life is intolerable it's a good state of law that she should dread walking out because she'll be destitute. Nowhere. That's a challenge which we've said specifically here we leave to the state. What will you do? Will we all as taxpayers pick that up even though she may be at fault? We think that he should pay for that as a taxpayer too but maybe not . . . spouse. It's a question first of all of some sort of justice between them and then some distributive justice so that even if she be at fault in regard to her husband, even if he be at fault and she can't prove it, nowhere do we suggest that that poor miserable woman should have to stay there and not walk out because she fears to be destitute. We say in our report, tell us, let the Legislature tell us how close to this profile of maintenance the state will come. Will the state pick her up there? Is there a possibility? Even if she couldn't prove paramount responsibility on the part of her husband she shouldn't have to stay in that position. But as between them, one may be at fault and one not, one is at fault, one isn't in many instances, the justice between them seems to dictate to us in our recommendation that the one at fault should bear the financial responsibility. Once you get out of that one and one relationship, the state probably should bear some responsibility.

MR. CHERNIACK: . . . prepared to make the state a party to the actions because it has a stake now in fault.

MR. MULDOON: It frequently is, at least the City Municipal Welfare Department frequently . . .

MR. CHERNIACK: Oh no, that's not during the hearing that's afterwards. Well seriously, if the state can prove fault on the part of the husband, then the state is better off than to permit the wife to be found at fault. I'm just pursuing the recommendations of the Commission. I shouldn't be because that's a small part of the total.

MR. MULDOON: Mr. Cherniack has pursued us right off the end of the course on that one.

MR. JENKINS: Mr. Chairman, through you to Mr. Muldoon. I was quite interested in the recommendation here of rehabilitation and I think it's a good one, but did the Commission give any thought to age or sometimes physical disability of one or either of the spouses to be able to be rehabilitated and what again would be the responsibility then for maintenance of the one or either of the spouses. I can quite understand from the latter reply that you gave to Mr. Cherniack that you somehow are saying now that that throws it into

the lap of the legislators and they're going to have to make a decision one way or the other whether we pick this up as a welfare situation. But really in some cases there are — well an example of a woman who is 62 years old and the old man decides he's going to take off. I mean, how are we going to rehabilitate this person back into the work force,because you know, at that age it's pretty well impossible for her to find a job or physical disability may be such that she will not be able to get a job that would be of sufficient remuneration to keep her.

MR. MULDOON: Well Mr. Chairman, if she's 62 and the old man decides to take off, I suppose we should first ask ourselves does the law bless him for taking off or not. Not that that matters in any metaphysical sense but is that something that's proper conduct in the eyes of the law, should the law be designed to prevent him from taking off in some way? For example, should he be brought back and perhaps under some penal sanction be required to stay here and earn his living here? If the fault, the responsibility for this marriage breakdown resides in his conduct, then the Commission unanimously would say that should be taken into consideration because she is old, she isn't able to get a new job that easily. But supposing she's been the one who really has made life a hell for him and he's taken off in desperation, as between them is it just to say, "Sure she made life a hell for you but you pay anyway." I think not. And I think that the law should say there is a limit to how long you have to pay. She won't benefit from any rehabilitative maintenance, she's a candidate right now for welfare. I think that I could say that is the view of the Commission generally.

MR. ADAM: Mr. Muldoon from time to time you see in the newspapers where a husband, in more cases than the wife, the husband puts an ad in the paper stating that . . .

MR. MULDOON: He's not responsible.

MR. ADAM: ... well his wife having left his bed and board that he is no longer responsible for any debts incurred in his name. There is no causes given, you know she may have left because he was a dirty bugger. So how does the law apply now, you know he seems to be getting away with something, I don't know.

MR. MULDOON: Those ads, Mr. Chairman, are a waste of money. They don't mean a darn thing. The only way that you could say that that ad would be of any use is if you could prove that the merchant who might try to ding him for responsibility for her debts saw the ad. The assumption of law is, that's the very origin of the term Mrs. or an abbreviation for a mistress, the mistress of one's household, is that the mistress of one's household is entitled to pledge one's credit for necessaries. So long as she is living with him as the mistress of his household, the origin of the term Mrs., the law said she was entitled to pledge his credit for necessaries. But if the merchant has been habitually selling her tngs on her husband's credit and the last time he does it there's been an ad in the paper, unless you can prove that he saw that, and you can't, it's not worth a thing. It may indeed constitute a defamation against his wife and the Legislature has already accepted one of our recommendations that spouses should be able to get redress from each other for defamation for tort. That was one of our original Family Law recommendations. I think you're seeing fewer of those ads now because more lawyers are telling people who place them, "Your wife might sue you for defamation, you've really not done a good thing about her character in placing that ad." Anyway the law regards those ads really as worthless unless you could prove that the merchant saw it and understood that this lady to whom you've been giving credit is this lady mentioned in the newspaper, and nobody can prove that. So, they're worthless, they're defamatory perhaps, and of course under the present dispensation of law once she's no longer the mistress of his household she's no longer entitled to pledge his credit.

MR. ADAM: Just a few more, there's another question if I could find the page, but it's on reference to — and I don't think we've discussed this very much Mr. Muldoon —that is of non-marital cohabitation.

MR. MULDOON: Uh huh.

MR. ADAM: That hasn't been too much of a topic here today.

MR. MULDOON: No it hasn't, Mr. Chairman, . . .

MR. ADAM: Perhaps we should be talking about this because it seems to me that today's society is changing a great deal in that respect. And you've also given us an article that appeared in the Globe and Mail. Now if it's possible for a couple to opt out of the present legislation, at the present time as far as property rights are concerned and support maintenance, if they are able to opt out now why are we setting up legislation to protect them with?

MR. MULDOON: Well the Commission's view on the opting out is that people should be free to dispose of their affairs as they see fit, but many people don't do anything and as a result of that the present law creates injustices, so the Commission's view was that there should be a standard regime for those who don't make some disposition.

In the case of non-marital cohabitation or what is frequently called common-law marriage, which is a misnomer because there's no common-law divorce or separation, and one could hardly counsel these people to make a go of their common-law marriage. The majority of the Commission makes its recommendation on page 23, it says, *"If there be a child or children born as a result of the union, or if the union has impaired the economic self-sufficiency of the applicant spouse, either permanently or temporarily, either of them may apply to a judge for maintenance on the same terms as if the parties to the union were married to each other."! And the majority says that they're not talking about one night stands or temporary dalliances, but something which resembles marriage. The minority say that if they've made no commitment to each other which is objectively proveable they should be free to walk away from each other, while of course being responsible to maintain the children.*

No one has ever suggested that there's any exemption from parental responsibility for maintenance for children. But as between themselves the minority says that if they've made no commitment to each other then the law shouldn't be so moralistic as to force a commitment on them because that's their choice.

The minority made a recommendation which I shouldn't over-emphasize because it is a minority recommendation but it's unique insofar as I can see in all the law reform literature, and that is this: That some people say we're not going to play society's game, we're not going to get married, we don't want to be married, and that's their right. The minority says if they make some objectively proveable commitment it could be a declaration before others that they're going to look after each other, that this is as if they were married, it could even be something so formal as writing. The minority suggests that the law should take cognizance of that. It doesn't now. That's an agreement contrary to public policy now. The minority suggests that the law should take cognizance of that and that commitment should be honoured. But the minority finally says if they steadfastly decline to make any commitment to each other then the law shouldn't force one on them, and there is the difference between the majority and the minority positions in that case.

The majority's opinion on non-marital cohabitation is on page 23 and the minority which is wordier in this report on page 36 and 37. Actually starting at the bottom of page 35.

MR. ADAM: The wording of the paragraph on page 35, at the bottom of the second paragraph where it's suggested that the law could not preserve such people from their own thoughtlessness.

MR. MULDOON: Uhuh.

MR. ADAM: Now what would be thoughtlessness of a common-law marriage if they decide ? that's the best way for them

MR. MULDOON: Oh yes. May I suggest that the minority there went through the circumstances in which people decide to live together without marrying. We were told at the public hearings in Winnipeg some feel so alienated from Manitoba society that they will not pander to it by playing society's game through any formal solemnization of their union. Some who are less polemical, less determined to say that they're not going to play society's game, and perhaps more practical, realistic, simply decline to be committed or bound to a lawful spouse in order to preserve their freedom. Still others enter into such unions because they are temporarily not free to marry, they're waiting for a divorce.

All of the above people, all of those people understand that they're not bound by any legally recognizeable commitment. Then we come to the others.

Finally we are reminded at the Commission's public hearings that there are some people who just drift or even rush thoughtlessly into non-marital cohabitation with no heat at all about the ramifications. And that's where we speak of people —how can the law protect people from their own thoughtlessness. That's that final group we've identified who find themselves living together. Some do so because they don't want a solemnized marriage, some do so to preserve their freedom, some do so while waiting a divorce, but some just drift, and those are the ones whom the Commission referred to, that the law just can't preserve such people from their own thoughtlessness, they'll do it anyway. You could make a law saying that people shall not engage in sexual intercourse outside of marriage. What a foolish law, they'd do it anyway. That's what the Commission is saying there, that you can have what the minority is saying, have what the Ontario Legislation presents, and that is: After two years it's as if you made a commitment even though you didn't. And the minority says no, unless there's some evidence of the commitment people should be free to walk away because they've declined to make a commitment. The majority says if there's a child been born or if one of them has had economic self-sufficiency impaired then they can apply to a judge for maintenance on the same terms as if they were married. And there again is a competing value; should the Legislature say whether you've made a commitment or not it will be as if you did, or should the Legislature say it won't interfere. If you didn't make a commitment there's no legal obligation then.

MR. CHERNIACK: I keep looking for that "make a commitment" in our law and I can't find it.

MR. MULDOON: Marriage is a commitment, Mr. Chairman, it's an exchange of vows they say, it commits one person to another to live together.

MR. CHERNIACK: For how long?

MR. MULDOON: For life or divorce.

MR. CHERNIACK: Or separation.

MR. MULDOON: Or separation, yes.

MR. CHERNIACK: Like a partnership eh?

MR. MULDOON: Yes, and a partnership is a commitment and usually it's attended by some formality to show that this person did indeed make a commitment to that person. That if I say I enjoy your company . . .

You can have a partnership without a written

MR. CHERNIACK: document can't you?

MR. MULDOON: I think you have to have some objectively proveable commitment, not necessarily in writing but something that somebody can say yes, objectively I can see there was a commitment there.

MR. CHERNIACK: Living together.

MR. F. JOHNSTON: You can walk away from living responsibility if you haven't got a document it's a partnership . . .

MR. CHERNIACK: No. Joint ownership.

MR. MULDOON: No, I think, Mr. Chairman, that living together doesn't show a commitment, it shows a sexual perhaps or a social association. Many people of the same gender live together to share expenses but they've made no commitment to each other.

MR. CHERNIACK: What's the difference between a social commitment in marriage and a social commitment in common-law arrangement?

MR. MULDOON: I think that the common-law arrangement doesn't necessarily involve a commitment, it may be absent to commitment.

MR. CHERNIACK: What about in marriage — today.

MR. MULDOON: Marriage is a formal commitment.

MR. CHERNIACK: To live together until you separate.

MR. MULDOON: Well, that's not even part of any ceremony I know or any words which draw people's attention to the commitment they are making when they get married.

MR. CHERNIACK: It's more than a living union.

MR. MULDOON: It's to provide society, comfort, sexual facilities, arrangements.

MR. CHERNIACK: To share a life together for the time being.

MR. SHERMAN: There's more at least to the liturgy than that.

MR. CHERNIACK: Oh, the liturgy isn't part of the law that I'm aware of.

MR. SHERMAN: But that's part of the commitment.

MR. MULDOON: But the law does recognize a ceremony and an act on the part of two people which is called marriage. Indeed the Legislature makes rules as to how it may be solemnized.

MR. CHERNIACK: That's right, and I'm not sure . . . (inaudible).

MR. MULDOON: Unless Mr. Cherniack is asking me what's the difference between marriage and non-marriage or is there a difference between marriage and non-marriage, . . .

MR. CHERNIACK: The ceremony.

MR. MULDOON: . . . or are you married once you live together. Well I suppose some people have different views as to what marriage is, and I acknowledge that, but I think that the law of this Legislature still says that marriage is a certain act, an exchange of vows, a commitment solemnized in a certain way.

MR. CHERNIACK: That's the word commitment it doesn't say anything about. .

MR. MULDOON: Well it doesn't use the word "commitment" I don't think, I haven't looked at . . .

MR. CHERNIACK: I'm sorry, I'm philosophical.

MR. F. JOHNSTON: As I understand really you're not making this commitment tough, you're not saying you've got to go through a marriage, you're just saying stand up in front of anybody that's a witness and make a commitment.

MR. MULDOON: Yes.

MR. F. JOHNSTON: Go down to the City Hall and sign a paper that you've made a commitment, and if you don't do that — if you do that you are protected with everything, if you don't they could walk out. Now that's not making it very tough.

MR. MULDOON: I don't think so. **MR. CHERNIACK:** No, but Frank is saying if you don't make that kind of declaration then there's no obligation as between the spouses.

MR. MULDOON: Right. That's what the minority is saying is . . .

MR. F. JOHNSTON: I'm not going to argue with the different positions . . .

MR. MULDOON: There's no obligation as between the non-spouses.

MR. CHERNIACK: Well, they're partners.

MR. F. JOHNSTON: The way we're talking today I'm going to get a contract this long.

MR. CHERNIACK: Now let me explain that we renew our review of things like that.

MR. SHERMAN: Renew our vows.

MR. CHERNIACK: We reconsider what vows we would need.

MR. CHAIRMAN: Are there any further questions? If not the Committee has one other thing just to formalize, but before that can I thank Mr. Muldoon for subjecting himself to the questioning of the Committee for a day.

MR. MULDOON: Thank you, Mr. Chairman, I'm grateful for the opportunity, I think it does me good to have the exchange with you.

MR. CHERNIACK: This is why the Government's choice was you.

MR. MULDOON: I didn't realize that was at stake today, Mr. Chairman, but thank you. Thank you.

MR. CHAIRMAN: The decision that the Committee has to come to is for our trip to Thompson on December the 2nd. We made a few enquiries and we find that there is a regularly scheduled plane to Thompson, one that leaves Winnipeg at seven in the morning, another one that leaves at 6:15 in the evening which arrives in Thompson at 7:25 which is a little late for an evening meeting that evening. The flights back from Thompson leave at 8:30 in the morning and at 7:45 in the evening. The second one of those is a little early if we are to start our day's hearing at ten o'clock that morning. The other possibility is to travel up on Government Air Service; it would require three planes and would give the Committee that flexibility to extend its hearings or to leave early

if they happen to be short. It would also obviate a second night's stay in Thompson.

MR. PAWLEY: Have we any idea what the cost comparisons would be?

MR. CHAIRMAN: Yes.

MR. PAWLEY: What would be the comparison cost?

MR. CHAIRMAN: Okay. The cost of travel by Government Air Service is estimated at $3,200.00.

MR. PAWLEY: What would be the total of the tickets if they all went by Transair?

MR. CHAIRMAN: You're asking me to do some quick arithmetic here. Fifteen at $100.00 per person you're looking at $1,500.00 plus two night's accommodation plus meals, estimated at $400.00 times 15 a night?

MR. CLERK: Roughly $25.00 per person for 15 people.

MR. CHAIRMAN: Oh, that's total?

MR. CLERK: Yes.

MR. CHAIRMAN: So that's $800.00 plus 15, $2,300.00 and that's for one night. Okay.

MR. CHERNIACK: Mr. Chairman, I'm not clear on why you have to say two nights if we travel by Government plane. Couldn't we leave in the morning and come back at night, have a full day including the meeting.

MR. CLERK: If I may for a moment, please. I understand that the air speed of the Government aircraft is much lower than the Transair, so that we'd have a longer flying time which would mean we are going to leave very early in the morning, and if you fellows are like me the idea of getting out of bed at five o'clock in the morning to get out to the airport to leave at seven, because we've got two hours flying time we need an hour to get from the airport to the hotel to get you fellows checked in and then out to a meeting. So you know we're looking at seven o'clock in the morning. That's the only reason I suggested leaving the night before.

MR. CHERNIACK: Well if we leave at 6:15 p.m. I gather it is, arrive at 7:25, there's no reason in the world that we can't start the meeting at 8:30, is there in the evening, and then all of the next day and leave at 7:45 in the evening? Why does it have to be two nights?

MR. CLERK: You're going to arrive in Thompson at 7:25, Mr. Cherniack. Roughly it takes you about an hour to get from the airport to the hotel.

MR. CHERNIACK: Does it?

MR. CLERK: It's quite a distance away. I would imagine you'd want to be registered in the hotel and what not; you're looking at a nine o'clock meeting at the earliest I think.

MR. CHAIRMAN: There is equipment to be set up too for the transcribing.

MR. CHERNIACK: Oh, I'm sorry. The equipper could leave earlier.

MR. CLERK: That's right. I'm not worried about the equipment, but I'm still thinking of us. It would be 9 o'clock in the evening before we're ready to start.

MR. CHERNIACK: Yes, but it's an hour and ten minutes flying time, surely we don't need a hell of a long refresher in our hotel rooms. Why couldn't we go to a meeting? I'm trying to argue against two nights. You're suggesting two nights either Transair or by Government planes.

MR. CHAIRMAN: No. By taking Government Air Service it would enable us to do this with a one-night stay-over.

MR. CHERNIACK: Then you said it takes so long to fly in a Government plane that . . .

MR. CLERK: I think it's about a couple of hours flying time as opposed to an hour by Transair. Frankly, Mr. Cherniack, believe it or not I'm thinking of you early in the morning, if you're like me you're hard to get up.

MR. CHERNIACK: Mr. Chairman, may I again state my point of view. I personally would want to regardless of how the committee decides to go, I would rather go Transair than government plane, and I would rather go earlier and waste time if necessary in Thompson than to take the Government plane back and forth at midnight and twice the length of time and more expensive. I wouldn't like to get up at 7 a.m. but if necessary I'd rather do that than fly in the Government plane.

MR. CLERK: The Transair flight leaves at 7 in the morning. That means you've got to be out at the airport at 6:30.

MR. SHERMAN: How many flights a day does Transair have?

MR. CLERK: Two, 6:15 in the evening.

MR. CHERNIACK: We could do it that way.

MR. CLERK: That's what I say, go up one night, then you' ve got all day.

MR. PAWLEY: Well, you have that choice between going up at night or going up in the morning.

MR. CHERNIACK: All right, Mr. Chairman, why don't we agree to go at 6:15 in the evening on the previous day; we arrive at 7:25. I still think we could have a meeting if necessary at 8:30 or 9.

MR. CLERK: You're talking about 7:25 at the airport in Thompson; you're still an hour away from it.

MR. SHERMAN: We can have the meeting at nine.

MR. CHERNIACK: All right, so we meet at nine for two hours, we can do that. We could meet the following day and catch the 7:45 home that following evening.

MR. SHERMAN: Sure, because that day's hearings we could run them to 5:30 or 6 o'clock if we had to.

MR. CHERNIACK: Yes, and keep the transportation ready to go back, and that would limit our time but I don't think that matters so much. If there are briefs left over, surely there wouldn't be that many. Tell me what

was the experience of the Law Reform Committee?

MR. PAWLEY: How many briefs did you have in Thompson?

MR. MULDOON: One written brief and three oral presentations.

MR. CHERNIACK: I wonder if we're even going to have to meet in the evening.

MR. SHERMAN: No, you shouldn't have to have an evening meeting.

MR. CHERNIACK: Can we advertise now that people who wish to appear should notify the Clerk a week in advance, and then let's be flexible that night when we're there and take on more if we can accommodate it; and if we can't tell them, well you didn't register so send in your brief in writing.

MR. GRAHAM: We'd have to hold the lead meeting first, though.

A MEMBER: If there are no briefs we shouldn't have to go.

MR. F. JOHNSTON: Well, . . . possibly have a good time.

MR. CLERK: We should go up by Transair and examine . . .

MR. CHERNIACK: Mr. Chairman, I'd like to move — I think that Bud and I are prepared to second each other if necessary.

MR. CHAIRMAN: Order please.

MR. CHERNIACK: So we go by Transair the preceding evening which I think is December 1st; and that we ask the Clerk to advertise in such a way that we request registrations but to request that they notify you a week in advance so as to have that kind of protection saying we're not going to be there longer than this period; and if by then the Clerk sees or we see when we're in the airplane that it's going to be extensive then we agree to meet in the evening preceding tbe day, 9 o'clock to 11, two hours is still of some value, but the chances are we won't have to — Frank and I will be in the pub, I don't know where you guys will be — and then the following morning we start at 10 or even 9:30 and we know in advance that we won't stay longer than say 5:30 for the briefs and anything else to be submitted in writing. That's fair.

MR. CHAIRMAN: Is that agreed? Agreed and so ordered. Is there a motion to adjourn? Moved we adjourn.