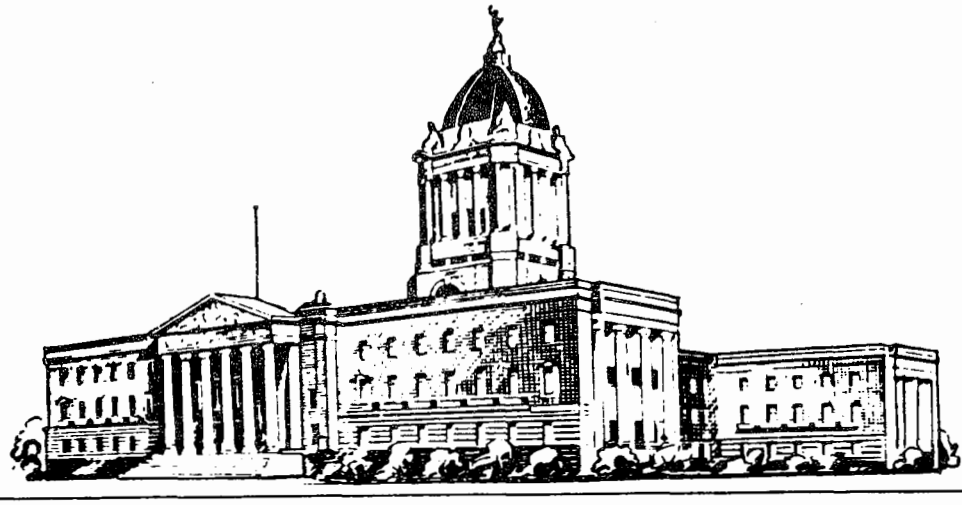
Legislative Assembly of Manitoba

HEARING OF THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



WEDNESDAY, June 15, 1977, 10:55 a.m.

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TIME: 10:55 a.m.

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

MR. CHAIRMAN: Order please. We have a quorum gentlemen. The committee will come to order. Before the committee is the amendment, Motion 6 on Page 5 of your amendment sheet. Section 8—pass; Section 9(1)(a)—pass.

MR. CHERNIACK: Mr. Chairman, I think Mr. Sherman would know whether or not he wants to go ahead.

MR. SHERMAN: 9(1)(a) sorry.

MR. CHAIRMAN: 9(1)(b). Mr. Sherman.

MR. SHERMAN: Mr. Chairman, 9(1)(b) raises a number of questions in our group in any event. We feel that it could turn out to be very inequitable for some spouses. It's hard to say whether it would be more inequitable for a wife or a husband. It would depend on the person on whom the asset was conferred. But just let me give you an example and take the position of a husband' for example, whose income derives mainly from an apartment block, let us say, which was an inheritance from his parents or was gifted to him and the income for the marriage derives mainly from that inheritance. Now the wife might share with the husband, with her spouse in the administration of that building, but this sub-clause seems to cut her out of any financial share and it could work the other way around. I just take that as an example. There would be situations not only relative of apartment blocks but any commercial and revenue bearing items. It could be a farm, it could be a business, where that was the income that the marriage had and where the wife did, in fact, share in the administration of that particular item. This sub-clause doesn't seem to take that into account.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I think that's a valid comment and I would like to give my reaction to the examples in order to see whether it's — you know I am more inclined to feel that it should be shareable but on the other hand I want to give my interpretation of what this means and how these examples would apply.

Firstly, I think that all these exceptions — and I think many of them come under the Law Reform Commission recommendation — many of these exceptions are considered to be items which are not earned by either spouse really during the time of the marriage and when I say earned, I mean worked for it, developed by either spouse during the marriage, they are gifts given and there are benefits derived from it and therefore, if a gift is given then the gift is presumed to be given to the individual receiving it for his or her own use and the income thereof would then follow and so would the appreciation of it.

Now the examples given by Mr. Sherman are germane because he says, but suppose it's something like an apartment block or I suppose a business, where they both manage and both work at it and therefore really it could be assumed that this is part of the benefit of their effort rather than just the inherited windfall that happens to them and I would then say, looking at Section 11 to which this is made subject, "an asset of the spouse that is not a shareable asset but is held, used or dealt with during the marriage in a manner indicating an intention on the part of the spouse that should be treated as a shareable asset, is deemed to be a shareable asset." So now if the circumstances of the use of that asset is such that would indicate the probability that it is held, used or dealt with in a manner indicating an intention that it be treated a shareable asset, would then be assumed to be, and of course that would be judicial discretion; and then under 12 "the burden of proof, is that a person claiming that an asset is not a shareable asset has the onus of so proving." So now it would be a question of: Firstly, the gift and the expressly applied intention that it was to benefit that particular spouse; secondly, the way it was used. If it was used jointly the way Mr. Sherman describes it, then I would believe it would come under 11 as being intended to be shared and then under 12 the onus would then be on the person claiming it as not shared but really, you know, really mine, that it would come in. If you don't mind my relating my personal handling, is that my wife and I each inherited some assets from each of our parents and there is no doubt from the way we've used those assets that we've each thrown them into the common pot — there isn't the slightest doubt of it — and therefore although what we receive would come under (a) and therefore (b) would follow. All our records, all our manner of use of it would indicate that 11 would apply and we would each have a very tough time under 12 to deny it.

Just one other point and that is that I do believe that the reason for this being here is the case of, let us say, a non-earning spouse, let us say the wife inherits from her parents or receives a gift of some size which is given to her to give her security in her marriage, to give her the feeling that she is secure regardless of what breakdown may occur and I think that under those circumstances she is not only entitled to it but it would be unfair to throw that into the common pot and say, "Well she inherited it from Daddy", and now the mere fact that it is there, the income from it being used by both makes it all shareable. I think the income being used by both does not mean that the asset itself is designed to be

both. Now I don't know that there is any disagreement as to the intent of this, I'm just — I see Mr. Sherman is questioning whether it's clear enough and I'm wondering if my answer is adequate.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, yes, Mr. Chairman, I think Mr. Cherniack's answer explains the situation to me. I'm wondering whether we should not then reword clause 9(1)(b) to say subject to sections 10 and 11 the income from or accrued.

MR. CHERNIACK: . . . the preamble covers all of this, 9(1) right up to . . .

MR. SHERMAN: For the purpose of divisions 3 and 4 but subject to subsections 2 and 3 and section 11. Every asset acquired . . .

MR. CHERNIACK: So it covers the works, it makes everything subject.

MR. SHERMAN: Oh, I'm sorry, I said 10 and 11, I meant 11 and 12. I'm sorry, I'm sorry, Mr. Chairman.

MR. CHERNIACK: Mr. Chairman, that draftsmanship, frankly, I don'tthink it's necessary because 12 just states the fact that it applies not just to (b) but it applies in all cases that if we have any earned money that's set aside which is clearly shareable by definition, a person may still claim that it is not a shareable asset but then the onus is on that person to prove it. So 12 really applies to everything and if the legislative counsel thinks it should be mentioned, I see no objection to mentioning it. Although I don't see the need for it, I don't see any objection to it and if Mr. Sherman likes, we could set it aside for Mr. Silver and just ask him what he thinks of that, just to say yes or no.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: Relating to the same topic that Mr. Sherman was talking about. If an apartment block was gifted or a farm for that matter and then, let's say, this couple lived in that apartment block, this was their place of dwelling or their homestead, would it then become shareable?

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I'm sorry, may I interrupt, I see a homestead under the Dower Act, it had to be a separate dwelling. There is a case law that says an apartment block can not be a homestead.

MR. BROWN: All right. Yes. Okay. Then my question then is, let's say in an instance of where a farm had been gifted to one person specifically and they were living on this farm, would that then become shareable?

MR. CHERNIACK: Mr. Chairman, in the absence of Legislative Counsel I'll try and answer that. I think, therefore you're not talking about it being a marital home, you're talking about it as being a business. The marital home, we've already covered that. If it's acquired other than by purchase then it is not a marital home, therefore it doesn't come under the Act. Say the farm is inherited, and they marry and they move in, then under what we've already finished dealing with, it's not a marital home because it was brought into the marriage.

Now, as to whether or not it's a business, that would be determined, I believe, by Section 11 as to whether or not it was used in such a way as to indicate that it would be shareable. I think it might be different for each of a number of cases. It might be a case where the efforts of both parties are such as to build that farm up from where it started, I think it would be then declared the intention was to make it a shareable asset; or if it was a place they lived on but he was out working for the CPR all day and she managed the farm, then it could be interpreted that it was maintained as hers always. That's where I think the court would adjudicate on the special case rather than in any general way. I don't know if that answers Mr. Brown, but I'm trying.

MR. BROWN: Well, yes, I think that in circumstances such as this, if some discretion could be left to a judge, I'll say that . . . .

MR. CHERNIACK: I believe it's entirely left to a judge to adjudicate within these definitions, and I think that 11 really makes it a matter for the court, and 12 determines how it shall be done.

Again, I don't want to express a legal opinion which may be doubtful. I'd rather it came from the Legislative Counsel, who is on his way up, I assume. I mean, I don't want you to rely on my legal opinion, put it that way.

MR. BROWN: Just another point. Mr. Spivak had to leave for a minute or so. He had some questions on this particular item, too. I wonder if we could get back to it .

MR. CHERNIACK: Sure.

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

MR. SHERMAN: Mr. Chairman, I wonder if I could just go back to my conversation with Mr. Cherniack for a minute, because here it comes into the legal wording and the ability of a person of average mind — not better than average but hopefully not too far below average — to comprehend what's being said in the language. I accept Mr. Cherniack's answer. It satisfies the point I raised' and I agree with him that simply the fact that the income deriving from an inheritance of a spouse is spent collectively should be no demonstration, no proof that that inheritance is to be regarded as a shareable asset. That would not be fair, I agree with Mr. Cherniack on that point. There has to be more than simply the pooling, let's say, of the income.

But I'm not sure that the way9(1) is worded that it really satisfies the point that Mr. Cherniack and I

feel has to be emphasized, because the way I read the section with an untrained legal mind, the exceptions are excepted from the conditions that are laid down in the Preamble: For the purposes of Divisions 3 and 4 but subject to subsections 2 and 3 and Section 11, every asset acquired is a shareable asset . . . but then you have comma "except the following." Now, what I'm really asking I guess is a technical legal question. Is the wording sufficient to ensure that even the following are subject to subsections 2, 3 and 11?

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I'd suggest we get the Legislative Counsel who's expert in draftsmanship . . . that one point, I just think we should have him answer this.

MR. CHAIRMAN: May we proceed with Section 9, but not pass it until that answer has been given to Mr. Sherman? . 9(1)(c)?

MR. CHERNIACK: There are two words to be added there, Mr. Chairman. At the end of the second line: "Award or settlement is compensation," that's a typographical miss. After the word "settlement" the words "is compensation" should be added. Have you got that . . . ?

A MEMBER: Yes, I've got them, thanks. .

MR. CHAIRMAN: 9(1)(c) with the correction—pass; 9(1)(d) —pass; 9(1)(e)—pass; 9(1)(f)—pass; 9(1)(g)—pass; 9(1)(h). Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, I want to point out what I think is a problem with this particular clause, and that is that in exchanging one asset for another or using the proceeds, and perhaps the Minister could resolve it. As I read this particular ilause it would mean that if someone had an asset, let's say for the sake of argument, a summer cottage or something that was valued at $10,000 prior to marriage, after the marriage it increased in value, say, to $20,000 due to inflation; if the cottage was held then the extra $10,000 proceeds would be subject to the 50-50 division. If, however' the person who originally owned it sold that cottage for $20,000 and bought a yacht for his own personal use, the yacht itself would not be subject to that division because it is being exchanged for the value of the original asset. I would suggest that it may be that we would want tc add a line perhaps near the end which should say that the home is not subject to standard marital regime except to the extent of the accrued appreciation of the asset.

I wonder if other members of the Committee see the same problem that I do.

MR. CHERNIACK: Inaudible)

MR. AXWORTHY: Well, what I'm saying is that you can take an original asset that appreciates in value over time, even after say a marriage had been solemnized, and it's not subject to the standard marital regime if it's exchanged or with the proceeds or sale of another asset it is not a shareable asset, which means then you could take that asset, have its appreciation, turn it in for something else of equal value and not have it subject to any division, in the example that I used.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, we should get Mr. Silver into this and he's not yet ready to consider it, I believe. It just occurs to me that the example is not a marital home. The example given by Mr. Axworthy is a summer cottage which is not the marital home, therefore it would be the first portion that would be dealt with and then that summer cottage . . . I don't know whether I'm being sidetracked by thinking of it as a summer cottage or whether the example is, to my way of thinking, not apropos.

Suppose it were an apartment block that is clearly a gift and therefore not a shareable asset, and suppose it accrues in value and is then exchanged for a yacht — I don't know if that's a good example, but assuming it is — then is Mr. Axworthy saying that the increase in value should form a shareable asset because they lived together during the time it went up? How about during the . . . . suppose it depreciates . . .

MR. AXWORTHY: I'm saying there's more of an anomaly here, that if someone had just simply . . . if that particular home, say, or apartment block, condominium or something, was maintained and then there was a separation took place, then the increased appreciation would be subject to a division. If however, it's exchanged, it is not.

MR. CHAIRMAN: Mr. Silver, can you answer that?

MR. SILVER: I still don't know what the question is. I don't fully understand the question yet.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Well, let me try it again. I'm saying that if the asset is brought into the marriage and appreciates in value, nothing is done to dispose of it, then whatever accrued appreciation from that point of time from the marriage on is subject to a division. If, however, in between times the person decides to exchange it in on something else of higher value, then it's not subject to division. So in a sense you are penalizing those who hang on to that particular asset as opposed to those who try to exchange it in . . . . ?

MR. SILVER: No, I don't think that follows.

MR. AXWORTHY: Well, that's the way I read it. That's why I want to get it clarified.

MR. SILVER: If your question is based on Clause (h). . .

MR. AXWORTHY: That's right, that's what it is based on, yes.

MR. SILVER: Clause (h) is just talking about an asset that is not shareable in the first place. If that accrued appreciation were not shareable, but it is shareable, if it were not shareable then anything exchanged for that accrued appreciation would also be not shareable, but it is shareable. (h) doesn't say that that isn't shareable.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: What we are really saying is, as an example, if there was a gift to a person, which would not be a shareable asset, and that gift was ultimately sold and somebody else purchased, it is still not included, that's all, basically what (h) says.

MR. SILVER: Yes, that's not included because neither the gift nor the accrued appreciation thereof is shareable to begin with.

MR. SPIVAK: That's right, so that's what (h) says.

MR. SILVER: So what's the question? Or does that answer the question?

MR. CHAIRMAN: Mr. Axworthy. 9(1)(h)—pass. Mr. Spivak.

MR. SPIVAK: I gather that there had been some indication that I wanted to speak on 9(b), there was just one example. . .

MR. CHAIRMAN: Yes, I'll go back to that, anything further on 9(1)(h). Mr. Axworthy.

MR. AXWORTHY: Mr. Chairman, the question on 9(b) hasn't resolved anything and I think it affects what happens in (h) as well because it does deal with the question of accrued appreciation.

MR. SHERMAN: We delayed passing (b).

MR. AXWORTHY: Yes, I know, well then (h) is contingent upon it, is it not?

MR. CHAIRMAN: Okay, . . .

MR. CHERNIACK: Can't we go to (b) and then deal with (h)?

MR. CHAIRMAN: Mr. Sherman had a question on the Preamble to 9(1) and 9(1)(b). Mr. Sherman.

MR. SHERMAN: Yes, thank you, Mr. Chairman. My question arose out of the postulate that a husband, for example, inherits, or is gifted an apartment block, let us say, and that apartment block becomes, in fact, the source of income for the family, for the marriage. The wife might participate in the administration of that apartment block, but under this clause as I read it, it seemed to me that she had no claim to a shareable participation in that item. Mr. Cherniack points out to me that that problem is taken care of by clause 11, "Certain assets deemed shareable" but I go back to the Preamble 9(1) and I am confused by the legal wording of that Preamble. It seems to me that the way the clause is written this section not only excepts — looking at the last phrase — it not only excepts the following from being considered shareable assets, but it also excepts them from the whole Preamble.

MR. SILVER: No, it doesn't.

MR. SHERMAN: It doesn't?

MR. SILVER: It makes an exception, subject to section 11. It is all the following, (a), (b), (c), etc., are exceptions, but subject to whatever section 11 says to change that, that's what it means.

MR. SHERMAN: And that applies to the exceptions as well as the inclusions?

MR. SILVER: Right.

MR. SHERMAN: Okay, Sir.

MR. CHAIRMAN: Your question have to do with including 12 in there as well, Mr. Sherman? Along with 11.

MR. SHERMAN: Oh, yes, thank you. I was concerned as to whether clause 12 should not be included in the Preamble, subject to subsections (2) and (3) and sections 11 and 12.

MR. SILVER: Well, it wouldn't hurt to include it. I would want to study it further before saying that it must be included. I don't think it must be right now. There are other aspects in this part, you see, 12 applies not only to . . . You see, then we would also have to do the same thing with 9(2) and 9(3), etc., in every one of them we would have to make every one subject to section 12. I mean, as I said yesterday, in connection with a similar question that arose, it is not in this case; there are situations where if you don't make a section subject to another section it is fatal, and there are other cases where it isn't fatal, where it is just informational. I think this is a case where it is just informational. I say that if we could say in 9(1), subject to 12, but then I would also want to look at the remaining sections of that division to see whether we should not do the same to the others. If we do it to one we should consider doing it to the others. If we don't do it to any of them, then there is no problem. I don't think it is essential to mention section 12, because if you read that division as a whole it is obvious that 12 applies to the whole thing. It is a matter of evidence.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: The one concern I have on this is that to a large extent the legislation we have today comes about as a result of the Murdoch case, and in effect, we have what I'm afraid is going to be a situation in which the discretion of the judge becomes the key factor in relation to this. If we take (b) and we have a family farm gifted to the male spouse, that, under (b), would be not a shareable asset; we then would move to 11, if in fact, they lived, and the wife lived on the farm and participated in the

farm, then it would be deemed a shareable asset. And the onus of proof under 12 would be on those who claim it isn't.

Now, I understand that, but what we really are doing here in this situation is bringing it back to a case where, in effect, a judge will have the discretion, and even though there may be a presumption here — which is really what 11 is saying, and it may be necessary even to make it more stronger than that, I don't know that — the problem I see is that we are getting ourselves still involved in that situation where the judge will have the discretion. And, here we get involved as to whether the conduct, during any period of time, really warrants consideration of it being a shareable asset or not, in the sense that they may have lived on the farm for a period of time, and then she may have moved off, there may have been any number of problems with respect to it. My concern, at this point, is whether there is really any — whether I am right, I mean I may be wrong on this and if I am then that's fine; I would like to know that. Or, if I am right, how we correct that so we don't have ourselves legislating and putting it back into that position.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, I agree with Mr. Spivak that it is in the hands of the court to use its discretion, and I was one of those who wanted as little as possible in the form of discretion, but then there were others who presented briefs who wanted complete discretion, and Mr. Sherman's proposal of changing the Married Women's Property Act certainly would grant complete discretion to a greater extent than we are now discussing under this Division 2, because this only applies to items such as gifts, inheritance, or trust benefits, and therefore, eliminates the purchase of the farm which may have been made . . .

MR. SPIVAK: No, gift of the farm.

MR. CHERNIACK: . . . I'm saying, so it is much more limited than the proposal that Mr. Sherman brought yesterday morning where the proposal was that all assets come under that kind of discretion as to contribution. So, I don't know how better to secure the rights of the spouse who does not have any ownership, and it clearly is a matter of discretion, it is a matter of evidence, and if Mr. Spivak thinks we can improve on 11, to make a stronger presumption then I would agree with him all the way. An asset of a spouse is not shareable but is held, used or dealt with during the marriage in a manner indicating an intention — I don't know how to make it stronger because the presumption is there. The word presumption isn't used, but clearly, it would be for the court to say that it was held, used, or dealt with.

I don't know, when Mr. Spivak suggests that we use the wording that Mr. Sherman had suggested, which I haven't found yet, but which, "they shall be taken into account or consideration in respect of contributions of the parties, not only those contributions or actions which may be directly related to the acquisition, but also contributions and actions monetary or otherwise by either party." If that would make it stronger, then I am with him. The only thing I wanted to do, or I believe was wanted here, is to protect that person who may have inherited something for security. The parents of a wife, for example, saying, "Here you have this, and no matter what happens in your marriage, on breakdown you've still got it." So, if Mr. Spivak feels that we can strengthen 11 somewhat, possibly in the words that were previously suggested, I would like to hear counsel and see whether there is any disagreement with that.

MR. SILVER: Well, I would just like to add to that, that a prudent spouse would, of course, make sure that he has something in writing. But, on the other hand, if, for example, we changed this section to require something in writing, it would deprive a spouse who just overlooks getting something in writing from having the benefits of this section when he should really be entitled to the benefits of it. So, I don't know if there is any other way to arrive at a better compromise than that contained in the present section.

MR. CHAIRMAN: Are you referring to 11?

MR. SILVER: Yes, 11.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: What my concern would be here, I think the only area in which the wording may have to be changed, it may not be, is that in the question of discretion of the court with respect to the intention on the part of the spouse that it should be treated as a shareable asset, it would seem to me that the question of fault can arise — I am not saying will arise — can arise. with respect to the course of conduct, even though there may have been a sharing of the asset at one time, but, the course of conduct afterwards. And, I think that there is realistically an essential loophole for a judge to say that it is not a shareable asset. Now, I am not saying that that will in any way be the case law, but if that case law develops, then we will have to deal with the Act then, or we will have situations where there, I think, may be an attempt to avoid it by the direct gift as opposed to the purchase.

All I am saying to you, at this point, is that this is the thing that would be concerning me, is that that discretion, which really is what we are trying to eliminate insofar — I am not saying that the courts shouldn't have discretion and that they should not, under the other sections, have those rights — but with respect to a patently obvious case where, in fact, it is a family farm, inherited, and they both have

lived on it and they have shared and they have contributed, then we don't want to go through, I think, the other situation where you have a Murdoch judgment coming through.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I wonder if Mr. Silver could give us an opinion on this. The point that Mr. Spivak raises is because discretion is given to a court under 11. If 11 were not therethen this asset would not be shareable. Mr. Spivak is saying . . . Well I think he is concerned about the extent of the discretion being enlarged by a complete fault-finding argument as to, "Did you or did you not wash the dishes?" kind of a thing. It seems to me that that problem would relate only to (b). I think (b) is the only one that has that kind of — I think you called it a possibility of a loophole or the possibility of abuse, I suppose, would be a way of putting it. I am wondering then, to Mr. Silver, whether 11 could relate, as it does now, to all of it and go on to say that in regard to 9(1)(b) the decision shall take into account all contributions, and etc., using the wording I'm looking at that Mr. Sherman had given us in the morning.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I personally see no need for that, in fact, I think that it introduces all kinds of complications, and I don't know if it is the intention to have those complications. I don't see that anything in the existing wording requires that kind of change.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Well, it is not the intention of our introducing other complications. What I really am concerned about is the court interpretation which may, in fact, complicate it, and, I think, one of the concerns certainly expressed here with respect to the Murcoch case, was the fact that judges will vary and exercise their discretion as they deem fit based on the facts. And, realistically what we are talking about are the facts of the situation. Now, the facts of the situation can vary in a situation in which maybe the wife didn't do the dishes, or the wife refused to assist on the farm and just simply tended to the house. It could be any number of things. You know, these are the problems, I think, that become of issue at this point. I think the whole object in the legislation was to avoid this if we could.

MR. SILVER: I don't see how those factors can become involved in these considerations.

MR. CHERNIACK: Mr. Chairman, we are dealing only with a gift, we are not dealing with a farm acquired in any other way, . . .

MR. SPIVAK: No, that's right.

MR. CHERNIACK: . . . and when we are dealing with a gift we are talking about — under section 11 — "held, used or dealt with in a manner indicating an intent." Well, I don't think in reconsidering it, that the question of whether or not the wife did anything on the farm or did not do anything on the farm would be an indication of intent. I suppose, what would be more vital to this discussion would be did they keep the bookkeeping in such a way that they both shared in it, or was the account in both names, was she a signatory to . . . I don't know enough about farming to indicate an example, but if there was a shipment made or a purchase made for the farm in which she participated, then I think that would be a declaration of intent not a deserving as earlier referred to as to the nature of the contribution, but rather how did the people deal with it. I think that it is possible that if she had done nothing whatsoever to help the farm grow, but the husband who had received the farm as a gift dealt with it in such a way as making it show that his intent was that it was to be a shareable asset, then that is the point. It is intent not deserving that is covered by 11. It seems to that is the point — whether the person receiving the gift wanted to keep the gift or intended it to be used jointly and I can't think of any other way than to leave it to a court to decide that.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: I made the point, you know, I accept the legislative counsel's position at this point, but I just register a caveat now that it would appear to me that we are leading ourselves into that possibility. It will be something that we will have to see when it comes. The problem would be that if in fact a situation arose as I indicated and we do have a case like that, then I think to a certain extent we have defeated what we are trying to do.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, following up Mr. Spivak's position, I think that it cuts both ways. It is equally weight in terms of protecting the spouse, let's say the wife, who inherited the farm or the apartment block. The term indicating an intent seems to me to leave itself wide open to quite a variety of interpretations and you could find going back to the analogy that I started with, but reversing the positions, where a wife let's say was gifted an apartment block by her parents as a form of security. In the normal course of the conduct of the marriage, in their marital affairs, it is quite likely that the husband would be involved to some extent, even if it was only doing some of the bookkeeping. Does that indicate an intent to treat that asset as a shareable asset? If that is the case then the security intention of the gift is abrogated, because the wife would not be able to claim or maintain total ownership. I think it cuts both ways, and I think the difficulty lies in the term "indicating an intention." How do you indicate an intention, and what is an intention?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well, I would just say that in order to satisfy that question, we would have to write a book pretty well. I think we all recognize that not everything can be written down, certainly not within the confines of a statute that is shorter than a book. Very often in an effort to make things simpler by setting out more and more rigid rules we make things much more difficult. The problem has been expressed that the whole Act will at times work very very harshly in its application. So in answer to that, a general discretion section is being inserted in Section 37, which we will see in due course. But what is being said right now appears to be quite the antithesis to that, that even though these Sections rely on discretion rather than on rigid rules, the opinion is being expressed, if I understand correctly, that now we should not have discretion, but should have rigid rules notwithstanding the fact that in some cases they will work hardships on people. So that would just be my general comment in support of these clauses drafted the way they are drafted.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I want to just assure Mr. Silver, for the record, that I am not opposed to the introduction of the discretionary aspect. I am gratified that discretion is being introduced into it. I am just looking for guidelines for the application of that discretion, and I am not sure that we have terminology that is properly protective of legitimate interests when they are subjected to a discretionary decision.

MR. CHAIRMAN: 9(1)(b)—pass. Mr. Spivak.

MR. SPIVAK: I have nothing to say, except the caveat has been registered and I think we should know that, you know, in effect that combined with 11, the court discretion, I believe, is wide enough, will be wide enough, to be able to make judgments that will maybe be as severe as Murdoch. I am not saying that they will, but that is my impression. And maybe that is all we can do, I don't know that, but I think, you know, that is one thing we at least should be — now if there is a difference of opinion in my interpretation, then that is fine. We will wait and see what happens.

MR. CHAIRMAN: 9(1)(b)—pass; 9(1)(h). Mr. Sherman.

MR. SHERMAN: I don't know whether Mr. Axworthy had any questions on that, but I think that that can pass from our point of view.

MR. CHAIRMAN: 9(1)(h)—pass; 9(1)—pass; 9(2)—pass; 9(3)—pass; 9—pass. Section 10 — one typographical error on the third line, 9(a) should be 9(1)(a). Mr. Sherman.

MR. SHERMAN: I would just raise the question with legal counsel and government members of the Committee as to whether the term "deemed *prima facie*" should be reconsidered. It was our view, and I can't stipulate a specific or firm position on it, but some of us felt that the term should be "presumed", that "deemed", in fact, leaves no room for a discretionary decision; that it should read: "an asset acquired by a spouse by way of a gift, inheritance, or trust benefit, is presumed for the purposes of clause 9(1)(a)" etc. That once you say "deemed *prima facie*", that that is it. That that in fact eliminates the concept of discretion.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well, I would say quite the contrary. If we had the word "presumed" — presumed is a much more definite, is a word with a much more definite meaning than "deemed *prima facie*". Because the words *prima facie* clearly indicate that it is deemed only superficially, so to speak, not superficially, more than that, but is deemed on the surface or at first blush. But if we just had the word "presumed", it would not necessarily convey that. I am not saying that presumed would be wrong, but I am saying that the expression *prima facie* goes a little further than "presumed," in the direction in which Mr. Sherman would like it to go.

MR. SHERMAN: Well, maybe the term *"prima facie"* is all right, but I find it difficult to accept the suggestion that "presumed" is a stronger word than "deemed". I would say just the opposite.

MR. SILVER: Well, yes, if "deemed" were used alone, without *"prima facie,"* I would agree with that, but since it is modified by the expression *"prima facie."* However, I personally have no objection, strong objection to using "presumed" instead of the expression "deemed *prima facie."* But I think "deemed *prima facie"* is better, because it indicates more clearly than the word "presumed" alone would indicate that it is open for showing that the picture is not as it appears *prima facie.*

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: To the extent that I can make a contribution of any value, *prima facie* means to me, that's the way it is, and I think it is stronger than presumed. Now, frankly, I didn't hear what Mr. Sherman said, so I don't know if he wants to make it stronger or less strong. I would guess that as between "presumed" and "deemed *prima facie",* that this is stronger, but that's English, I guess it is legal language, *"prima facie"* would be. I don't have any strong feeling either, I wonder if Mr. Goodman has? Do you want him as an arbiter. "Deemed *prima facie"* or "presumed", which is stronger?

MR. GOODMAN: Well, I would say "presumed" is stronger.

MR. CHERNIACK: There you are there's another.

MR. SHERMAN: Mr. Goodman is saying that "presumed", as Mr. Silver said, that "presumed" is

stronger than "deemed *prima facie.*" Well, if that is the meaning of those terms, then I withdraw the suggestion. I would rather stick with the weaker impositon, because the stronger the imposition, the less discretion is available. But I must say that I will have to go back to fourth year Euglish, because I would have thought that "deemed" was a much stronger word than "presumed" is.

MR. CHAIRMAN: Section 10—pass; Section 11.

MR. SHERMAN: The same question on Section 11, Mr. Chairman. We would have liked to propose that "presumed" be substituted for the word "deemed" in the fourth line thereof. In this case "deemed" is by itself and doesn't have the qualifying *"prima facie"* phrase, so I would put the same question to Mr. Silver and Mr. Goodman, which is the stronger, "deemed" or "presumed"?

MR. SILVER: I would have to objection to inserting after the word "deemed" the words *"prima facie"* to make it uniform with Section 10. The reason they are not uniform now is that Section 10 was drafted and inserted at a much later date than Section 11.

MR. SHERMAN: Well on the basis of the interpretation of the term "deemed *prima facie",* that Mr. Silver and Mr. Goodman have given the Committee, could we ask legal counsel to insert *"prima facie"* after the word "deemed" in that Section.

MR. CHAIRMAN: Is that agreeable to the Committee? Mr. Cherniack.

MR. CHERNIACK: Just as a matter of interest, I shouldn't take up the time of the Committee, but I will just tell Mr. Sherman. The dictionary says that "deem" is to come to think or judge, and "presume" to raise a presumption of, to expect or to assume. And I therefore have to back away from my opinion. I think that "presume" is stronger than "deem." I will have to agree with the other lawyers from this, that there is a greater element of assumption in "presume" than "deem."

MR. SHERMAN: Well, that is interesting and acceptable, Mr. Chairman, as long as we can have *"prima facie"* in there the second time, in Clause 11 as well as in 10.

MR. CHAIRMAN: Sub-amendment then by Mr. Sherman to include the words *"prima facie"* after the word "deemed" in the fourth line of 11. Is that agreed? (Agreed) Section 11—pass.

Section 12, there is a correction. The words "subject to Section 10" after the last word in the second line, after the word has, the words "subject to Section 10."

MR. SILVER: Mr. Cherniack, I think we should also say, "subject to Section 10 and 11."

MR. CHERNIACK: Yes, I thought that 12 modified 11 and I didn't see the need for it, but if you have any doubts, by all means . . .

MR. SHERMAN: So how will the clause now read, Mr. Chairman? "A person claiming that an asset is not a shareable asset within the meaning of this Division has..."

MR. CHAIRMAN: " . . . subject to Sections10 and 11."

MR. SHERMAN: Thank you.

MR. CHAIRMAN: Sub-amendment moved by Mr. Cherniack. Mr. Brown.

MR. BROWN: Well, Mr. Chairman, I have a little bit of difficulty with this, why should the person who had this gift, why should the onus of so proving be on that person, why should it not be the other way around? That the person who claims to share in that gift, why should the onus not be on that person of proving so, rather than upon the person who receiving

MR. SILVER: Because the tenure of the Act is to try as much as possible to permit and to require sharing, rather than to restrict sharing. I don't recall, but I think that this is one of the recommendations of the Law Reform Commission.

MR. CHERNIACK: Mr. Chairman, can I offer another reason I would think would be that, except from (p) which is taken away, 12 does not apply to (b). Right? We have agreed. Or 12 does not, . . . well, which is No. 10. There the onus is on the person who claims that it is a shareable asset, but for 12 to apply to all the others, (a), (c), etc., I think that one reason could be that the proof of it is expected to be in the hands of the person who alleges that it is not shareable because the receipt of it is to that individual. Therefore I think that the evidence is more readily available to that person. I think, if we take almost any example, well the gift inheritance, the proof that it was a gift is in the hands of the recipient not in the hands of the person who might want to say, "Well, I believe that it's shareable but I haven't got proof of that." I wonder if I'm making myself clear on what I think is a practical obligation posed on the owner and the contender that it is not shareable. I don't know if I'm making myself clear on it.

MR. CHAIRMAN: Mr. Graham to the same point.

MR. GRAHAM: Well, Mr. Chairman, I think I have a similar concern as expressed by the Member for Rhineland. I think that when we look at law — and I'm not just looking at this particular section — but what has been occurring in the past decade or two with laws that we've passed, I think that we're moving away from a very fundamental principle that has been enshrined in the English law for many many years, centuries in fact. The onus of proof should lie with the person that is making the assertion and it does concern me, Sir, that we see this occurring time and time and time again in various statutes — I think the Highway Traffic Act is one that is an excellent example — where we're finding that the person that is accused or the respondent has to prove the other way. He has to prove himself innocent, rather than the proof of guilt or that occurring and it is a concern of mine, Mr.

Chairman, that we seem to be moving away from that aspect of it. That in today's society all you have to do is stand up and make the accusation and the onus of proving it not to be there, lies with the person where the finger is pointed at and I think it's a very dangerous precedent that we're — I wouldn't say precedent, — I think it's a very dangerous move that we're taking. I would like to see in all our legislation that we re-assert the fundamental principle of English law, that the person that makes the assertation has the onus of proof on them.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I'm very interested in what Mr. Graham said because I agree with him in general and I, too, deplore the trend. I believe that this Section 12 is in accord with the principle he establishes because the tenor of the Act, as Mr. Silver said, is to say that everything is shareable between the parties except . . . and therefore, the person who says it is not shareable is the one who has to prove something. That's why I said earlier I think that that person is the one who is more likely to have the proof that it is not shareable. So I'm saying that he is now saying it's not shareable, therefore it's up to him to prove it because of the tenor. So I think that in this case 12 is in accord with the principle which he promotes, which I share with him.

MR. CHAIRMAN: Section 12—pass. The amendment as read—pass. Division 3, Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I would move THAT Division 3 of Part I of Bill 61 be struck out and the following Division be substituted therefor:

Division 3 — Family Assets

Instantaneous sharing of personalty.

13(1) Where a spouse has or acquires ownership of a family asset in a form other than that of real property, the other spouse is entitled, subject to section 16, to ownership of an undivided ½ interest in the asset.

Dispositions of personalty.

13(2) Where a spouse is entitled to ownership of an interest in a family asset under subsection (1), any disposition of the asset made by the other spouse in favour of a third person without the consent of the spouse who is entitled to the interest is valid and effective as between the spouse making the disposition and the person if the disposition is bona fide and for value; but the disposition is wrongful as between the spouses and the spouse making the disposition is liable to the spouse who is entitled to the interest for the wrongful disposition.

Limitation period.

13(3) A liability for the wrongful disposition of an asset under subsection (2) is not enforceable after the expiry of 2 years from the date of the disposition or, if the person seeking to enforce the liability did not know of the disposition at the time of its occurrence, from the date when the person learned or ought to have learned of the disposition.

Incidental rights of spouse in personalty.

13(4) Where a spouse is entitled to ownership of an interest in a family asset under subsection (1), the spouse is also entitled to the same usage, possession and management rights in the asset as those that the other spouse has therein.

Mortgage sale of personalty.

13(5) Where a spouse is entitled to ownership of an interest in a family asset under subsection (1) and the asset is sold under any mortgage, encumbrance, charge, lien or other security or under any legal process based thereon, the spouse is also entitled to ½ of any surplus of the purchase money arising from the sale after satisfaction in full of the claim and costs of the mortgagee, encumbrancer, chargee or grantee and of any other person having any right, title or interest in the asset in priority to the right of the spouse under subsection (1).

No survivorship right.

13(6) Where a spouse is entitled to ownership or becomes the owner of an undivided ½ interest in a family asset under subsection (1) and is predeceased by the other spouse, that subsection does not of itself confer upon the surviving spouse the right to ownership of the interest of the deceased spouse by reason of survivorship.

Instantaneous sharing of land.

14(1) Where a spouse is or becomes the registered owner of a family asset in the form of real property, the other spouse is entitled, subject to section 16, to be registered as the owner of an undivided ½ interest in the asset.

Application of Part III.

14(2) Where a spouse is entitled to be but is not registered as the owner of an interest in a family asset under subsection (1), then, until the spouse becomes so registered, Part III applies to the asset, and the district registrar of the land titles district in which the asset is situated shall not except in accordance with that Part register any document or instrument purporting to make a disposition of the asset.

Incidental rights of spouse in land.

14(3) Where a spouse is entitled to be registered as the owner of an interest in a family asset under

subsection (1), the spouse is also entitled to the same usage, possession and management rights in the asset as those that the other spouse has therein.

Mortgage sale of land.

14(4) Where a spouse is entitled to be registered as the owner of an interest in a family asset under subsection (1) and, before the spouse becomes so registered, the asset is sold under any mortgage, encumbrance, charge, lien or other security or under any legal process based thereon, the spouse is also entitled to ½ of any surplus of the purchase money arising from the sale after satisfaction in full of the claim and costs of the mortgagee, encumbrancer, chargee or grantee and of any other person having any right, title or interest in the asset in priority to the right of the spouse under subsection (1).

Debt and tax liability.

15 A spouse who is entitled to ownership of an interest in a family asset under section 13 or to be registered as the owner of an interest in a family asset under section 14 assumes, upon acquiring the ownership or becoming so registered, as the case may be, liability for ½ of

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(a) any indebtedness incurred by the other spouse in the acquisition of the asset; and

T (b) any tax that becomes payable by virtue of the acquisition of ownership or the registration, as the case may be.

Application of Division.

16(1) This Division does not apply to a family asset unless it is situated within Manitoba or, if not so situated,

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(a) is in a form other than that of real property; and

T (b) was acquired within Manitoba, or had been brought into Manitoba by a spouse while habitually resident in Manitoba with the other spouse.

Foreign assets.

16(2) Where pursuant to subsection (1) this Division does not apply to a family asset, Division 4 applies thereto to all intents and purposes as if it were a commercial asset.

MR. CHAIRMAN: 13(1)—pass? Mr. Axworthy.

MR. AXWORTHY: I just wonder if, for sake of clarification, if the Minister might describe what would be included now as a family asset. What sort of tangible items would be so described?

MR. CHAIRMAN: Use the microphone, Mr. Pawley, please.

MR. PAWLEY: Well the family asset would include all the furnishings within a home, a car, a summer cottage, a boat, any personal property that was being used jointly by the husband and wife for their mutual benefit, including the home. The home is in a separate section. I think that covers the general nature — furnishings, cottage, boat, car, jointly used personal property.

MR. CHAIRMAN: 13(1)—pass; 13(2). Mr. Sherman.

MR. SHERMAN: 13(2), Mr. Chairman, appears acceptable to us in that it seems to take the third party off the hook in disposition transactions by spouses, where the original bill seemed to lay an unfair responsibility and obligation on the part of a third party who could be completely innocent of the relationship between the vendor and his or her spouse. Are we correct in reading the amendment as having this effect?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Yes, I would say that's correct.

MR. CHAIRMAN: 13(2)—pass? Mr. Axworthy.

MR. AXWORTHY: One of the questions I have about this clause is the phrasing, "this disposition is wrongful". Now I don't know what the exact interpretation of law is, but it would seem to me that that's a fairly strong term. "Disposition is wrongful" — now does that carry any penalty with it, or does it simply mean again that it does give wide allowance for one spouse to do exactly as they want and all they're doing is getting, in a sense, a statutory slap on the wrist.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I don't think there are any penalties set out in the Act for a breach of the Act. This term "wrongful" here is simply to provide a basis for the entitled spouse to take action, civil action, against the other spouse under Section 33 to recover what he or she has been deprived of by this disposition to a third party.

MR. AXWORTHY: Does it affect, Mr. Chairman, in the case of someone on one of these chattels that we have, taking a loan on it or how is that affected by one of the spouses deciding that they want to put up their summer cottage or, can that be done unilaterally? No?

MR. SILVER: No, it cannot be done unilaterally because we would consider that to be an action within the meaning of disposition. It is encumbering — for purposes of this section it would be the same as selling.

MR. AXWORTHY: But the recovery for that would have to be through a civil action. I mean that particular activity could still take place. One spouse could make use of it, but the other spouse would

have to go into court to, or try to recover whatever receipts back on it that there . . .

MR. SILVER: Oh, oh, it can take place and the third party if, instead of a purchaser, he's a lender, you know, who lends money on the security of it, provided the whole thing is *bona fide* and for value and if he somehow doesn't care about any possible interest of the other spouse or is willing to risk it, then as far as the lender and the borrower, the lender and the borrowing spouse, it's valid but the other spouse would have a right of action against the husband for this encumbrance.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: May I just say that when we discussed this, and I think it was in the forerunner to this committee, but it may not have been there, we felt that it was unfair to require third parties to look into the ownership of an asset that can be easily considered to be individually owned. That if I took a stick of furniture from the house and I took it down to a second-hand store and proposed to sell it, it would be unfair and cumbersome to expect the second-hand dealer to enquire into whether or not it was really mine or not and that the wrong deed — and I guess I'm using that word in the same sense — is not insofar as my dealing with that third party, that stranger, but really I'm doing a wrong insofar as my wife is concerned because I am depriving her of her interest in that, and therefore I am accountable. I think that that is really why we got around to saying we do have a protection here that a stranger who deals *bona fide* for value shall not be adversely affected by this wrong thing, therefore we have to say: Well, however, this fellow who did the wrong thing is accountable to his wife to share in it and the only way you are accountable is in the long run when you have a distribution and she says, "Where's my half of that?" And I think, therefore, the word "wrongful" here is not only correct but is necessary because it's used again at the end of this sentence because it says, "the disposition is wrongful" and as between the two there is a liability for this wrongful disposition and to me this first use of "wrongful" is a definition for the second use of "wrongful disposition".

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I would like to suggest that probably it would ease Mr. Axworthy's concerns if we examined the possibility of defining "disposition". The ordinary dictionary definition of "disposition" deals only with transfer of property from one to the other and the definition in The Dower Act is wider than that and certainly intended to be wider than that in the bill before us to include encumbrancing, mortgaging and what not.

I'm just wondering if we ask Mr. Silver to examine the definition of "disposition" in The Dower Act, I think it would require some refinement from that which is in The Dower Act. Would you like me to read the definition in The Dower Act? "Disposition includes every grant, transfer, sale, agreement of sale, grant of an option to purchase, mortgage, legal or equitable, encumbrance, charge, lien, lease for more than three years, in every other disposition of the homestead by act, *inter vivos*, every device or every disposition thereof made by a Will but does not include the registered certificate of judgment within the meaning of The Judgment's Act, or the lien or charge on lands created by the recording of registration of a Certificate of Judgment, or a lease made for a period not exceeding three years, or a Mechanic's Lien under the Mechanic's Lien Act."

Now I think that would have to be altered somewhat. I don't think we could — a great deal Mr. Silver says — but probably it would be better to try to do something like that then to proceed without a definition otherwise we would be dealing with a limited — (Interjection) — yes, as per the dictionary definition. If we could ask Mr. Silver if he could attempt to examine this definition and try to develop something that would be a little bit more appropriate for disposition under this Act.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: I may be wrong, but doesn't this seem to open up a whole new ball of wax here? When Mr. Cherniack uses the example of a family chair and a stick of furniture, conceivably you could be in court cases with your wife when the division of assets come, as he says — this really means an accounting of almost everything.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well, Mr. Chairman, . . .

MR. F. JOHNSTON: We're now getting back to where, I think in Committee, I said if my wife has a car that's a family car, I wouldn't even presume to think she couldn't do what she likes with it. Yet if there is a separation after, one or the other spouse could have an accounting and be accountable for half of that money.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: I'm not trying to develop picayune examples but an example does come to mind where, let's say, it's not just a stick of furniture but it's a particularly valuable piece of furniture, an antique of some rare quality and all of a sudden the Act comes into effect and the other spouse says, "Well, I can get my hands on it and whip it down to the second hand store." And he gets a helluva good price and his wife or husband says, "Hey, you know, that's unrecoverable. It's something that is of personal and rare value to me." What is the recovery factor in that? I mean, you say there's no liability on the part of a third person, which I agree with, but in this sense the disposition of it is only —

presumably any redress is through cash. You say, "Okay, I'll share the proceeds with you." But the other spouse says, "I don't want the proceeds, I want that thing back because it's really, you know, now that it's half mine. It used to be mine in a sense but now you've run off with it and sold it to that second hand store. I want that piece back because it's one of a kind or something."

Now, are we going to get into those kind of problems and how do you enforce them? Or do we end up going back to the courts again to worry about who recovers, who gets the antique?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, of course, 13(2) deals with ordinary commercial transactions, so I feel that that covers that particular aspect of the concern, but insofar as the tracing the assets, the chattels or the goods, there is the two year limitation and the period of going back does not precede May 6th, 1977, so that there is certainly a limited period, which was reduced from six down to two years insofar as the tracing back.

In respect to Mr. Johnston, let me say I think most of us in our own homes today couldn't identify what belongs to wife, what belongs to husband, what is joint, it's such a pool, that I think that today furnishings would be very very difficult to identify, and I think the accounting. So I question whether in practical significance, there would be that much change from the present situation when it is very very difficult to identify, husband and wife, as to what belongs to who, which, from what is proposed here with the restricted going back to a period of not greater than two years and not preceding back prior to May 6th, 1977.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think again to get personal I'll relate a case of my own family. Just a short time ago my wife had trouble with the washing machine. She just called the store and told them to take it out and got a new one and charged it to me. I had purchased it sometime before, but I don't think that was a wrongful act, in fact I think it would be a more wrongful act to send the kids to school with dirty clothes than to have gone out and spent some of my money to buy a washing machine. —(Interjection)—

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I'd just like to add that when Mr. Graham told me that story I said, however if she had traded in a small car for a Cadillac, then he would have been pretty incensed, and he agreed with me. So it's a question of degree and it's a question of discretion, and it's where people don't agree that they're in trouble and when they don't agree that's when they should have rights. I just feel that Mr. Axworthy's example of a valuable antique, I don't think that anybody buying it would take a chance on doing it without knowing pretty well where it came from and what is the title to it. Therefore, I don't really see that much of a problem, just as in Mr. Johnston's case if a registered car is sold by the registered owner, then there is no reason in the world for a purchaser not to feel that good title has been given, but then it depends. I would think that in some family relationships it's considered okay, that's your car, you do what you like with it, trade it in for a ballroom gown. In other households the family car is of such value that the spouses would expect to consult and that then means that it's accountable but not necessarily enforceable if the party doesn't want to do it.

So consent could be implied, I assume, and therefore it's only if it was really considered wrongful by the affected party that would bring this 13(2) into play. In the example given by Mr. Johnston, the consent is implied enough so it would not be considered wrongful, he said so. And therefore, although there may be vexatious problems occur, it would really happen today because as Mr. Pawley said, very few people know in a household what belongs to one and what belongs to both. That is why I think that most loan companies, when they take a chattel mortgage on the household effects, just say, "We want both signatures on there," just so that there would not be an argument as to title.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Again, Mr. Chairman, I want to refer to 13(3) because it relates to what we are talking about, wrongful disposition. Wrongful disposition is wrongful as between the spouses, and that's what we're saying. It's not as between the third party. We're accepting that there's nothing wrongful in one spouse selling to a third party, something for a *bona fide* value. We're accepting that. So either spouse at any time can take any article that's a family asset and sell it without question, and can give title.

MR. CHERNIACK: Not by this Act.

MR. PAWLEY: As long as it's *bona fide* and for value, Mr. Spivak.

MR. SPIVAK: Yes, *bona fide* for value, they can give title.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I don't know if Mr. Spivak will agree to my interpreting him. I don't think this Act gives me the right to sell something that belongs to me and my wife. What it says is that if I make a sale that is *bona fide* for value, then the purchaser is not accountable to return the goods and that I don't think changes the law at all. I don't think this Act should be designed to change the law. I think it's only designed to clarify the relationship between the two spouses who are the owners of it.

MR. SPIVAK: Can you visualize finance companies telling wives, if you sell any of your furniture to us, we will give you money? Because, in effect, that's what you're saying. You are essentially saying at this point that they will be able to finance by simply bringing articles of furniture and simply selling it.

MR. CHERNIACK: Isn't that what they can do now?

MR. SPIVAK: Well, I don't think they promote it in that way.

MR. CHERNIACK: No, but I'm not saying they would do it otherwise. It's still a question of title.

MR. CHAIRMAN: 13(2)—pass. Mr. Johnston.

MR. F. JOHNSTON: As the Attorney-General says, in most cases there are no problems. But in the cases where there is a family problem or a family problem may be developing, this could get right into a real hassle type of thing if there's any breakup. But the other thing that bothers me is you could be going along very happily married and a year and a half from now you're not and everything that was done back to the date when we've got here, you know, you're in a position of not being able to make a move on a lot of things without making sure your spouse has consent. I maintain that in the family home, even in the happy ones, there are things done daily that one spouse doesn't even question the other on but could become a real hassle under this particular section.

I don't know how you can really say that all of the family assets around the house — you know there's hundreds of family assets around the house. In fact I'd even say thousands of family assets around the house. All of a sudden you're going to have to be accountable, which means you've got to check with your spouse nearly on every transaction you want to make if it concerns the assets around the house and there's everything. There could be valuable pictures, there could be anything around the house. Say a person was an art collector and he decided to dispose of some of his paintings or her paintings or something of that nature, we would then be into a real problem. I just think it opens up a real ball of wax into the fact that we're really going to create problems, I'll tell you that, when you have a happiness situation that breaks down say a year and a half later. I can visualize you have to ask to do anything you want around the house, or to sell anything you want around the house.

MR. CHAIRMAN: Mr. Pawley.

MR. F. JOHNSTON: Is that basically what that says?

MR. PAWLEY: I think Mr. Silver has a suggestion that . . .

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I don't really understand what happens today as being any different than what Mr. Johnston describes it. If I am the sole breadwinner in my family and we buy things for the household then I don't know whether today there wouldn't be a discussion as to what happened with some one of a thousand items that is no longer there. I don't know how any household is not concerned with that unless we have an autocratic household where one member just does as he or she damn well pleases and doesn't ever account to the other. That may be but it seems to me that if that's the case then there ought to be protection.

MR. F. JOHNSTON: Well, Mr. Chairman, I'll tell you this, that I don't expect to ask my wife if I want to trade in a perfectly good old lawnmower that's still working and buy a new one and pay more money for it. She could conceivably say after the marriage breaks down when you're in an argument and you're not happy anymore, he had a lawnmower that was perfectly good and he paid double for a new one. Now there ought to be an accountability and I'm saying there are thousands of things around the house. .

MR. CHERNIACK: That's a bad example.

MR. F. JOHNSTON: That's not a bad example. There are hundreds of things around the house. I assure you that if my wife decides that she wants to buy something new I don't even presume to question her on it unless you're talking about large amounts of money. But there are hundreds and I'll say thousands of things around the house that I wouldn't even want her to bother me with.

Now the other thing is that if the family breaks down and we get into an argument then there's an accountability and I should have asked her everything, or she should have asked me. I assure you that that's creating problems.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Yes, I think there are certain items in the home that accumulate over the years and I refer particularly to heirlooms or items that have been left by one's grandparents that they had and it was handed down to them from their parents and so on, that are left to grandchildren or great grandchildren. It seems to me that on such items' and I know we have some in our home, that in the event of a breakup of the marriage I would think that it would be perfectly normal for the offspring or the grandchildren of the parents who left this item to normally expect to be able to take that with her. I would like to know if maybe there might be some exclusions for this type of an item because I can see that there may be some problems arise out of that particular item. I'm sure that Mr. Cherniack has some in his home because I think I've seen some, probably left from grandparents.

MR. CHERNIACK: Mr. Chairman, I believe that Section 9(1)(a) would exempt that. It's not a shareable asset. An inheritance, a gift of that kind of thing is not a shareable asset. Coming back to

13(2), Mr. Chairman, the point of 13(2) is not to adversely affect the purchaser or the recipient for *bona fide* and for value. That's the intent of it. It isn't. It isn't the intent to create friction between the two people, it is really to protect somebody who should not be bound to enquire into ownership. And if it is felt that it is going to create a problem then I hate to suggest that we should not be concerned with protecting third parties who are acting in a *bona fide* way. That is the intent of 13(2). The only thing we could do — and I think it would be unfair — but we could do is to eliminate that last portion which gives the accountability right to the other spouse. But let's remember 13(2) is there to protect the third party dealing *bona fide* and then after that it says, "however, as between the spouses there should be accountability." I don't know whether we shouldn't separate the two and debate the two separately maybe.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: As Mr. Sherman said, we were satisfied that the third person was off the hook. But then when we got further into the discussion the accountability comes up between spouse and the decision of disposition has to be made if it's so requested. That starts to be a different ball of wax entirely. Maybe that's right. We should debate it separately because if we're taking a third person off the hook then the debate as to whether the accountability between spouses or whether a person should have to get permission to do everything he wants around the house, I don't know. I just tell you there's a $600 new vanity arriving in our bathroom this morning and I haven't even asked my wife nor do I care .

MR. CHERNIACK: What was that?

MR. F. JOHNSTON: There's a $600 new vanity arriving in our bathroom this morning and I don't even care nor did I ask her.

MR. CHERNIACK: You became a half owner of a $600 vanity.

MR. F. JOHNSTON: Quite frankly I was quite capable of washing my face in the old one. Now if we get in a fight a year and a half from now, I can say why. I've used my own example because I think there's hundreds of them.

MR. CHAIRMAN: Order please. The hour of adjournment having arrived . . . Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I wonder if we could just remain here a few minutes because I want to make a suggestion. May I? (Agreed)

Firstly, Mr. Johnston's point is not related to this. This is a disposition, this is a selling of that vanity not the acquisition of the vanity. Since money is not equally shared and if she spends her money or his money with his consent then he acquires a half interest, if she sold it then it would be. I would say that if it is felt that those last three lines will create a problem, I don't see the need for it to maintain because we are saying that it belongs to both of them.

All right then we take out this disposition which Mr. Johnston seems to feel will create a problem. I don't think it will damage the main purpose of the Act which is that fault should not be carried forward into the third party dealing.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I'm just apprehensive that if we take out the last three lines then somebody might interpret *bona fide* as meaning that. . . No, no I'm sorry, because it does say up above "without the consent of the spouse." No that's fine. I'm sorry. I agree that if we take out the last three lines that in itself will not take away the rights of the spouse to try to recover, realize or have an accounting on what was disposed of.

MR. PAWLEY: Is that agreed then?

MR. CHAIRMAN: Would that meet the agreement of the Committee? Mr. Sherman.

MR. SHERMAN: That's agreeable, Mr. Chairman.

MR. CHERNIACK: Mr. Chairman, I don't want to mislead anybody about what I'm thinking. I'm thinking that if it's something valuable then they would still have the right to say, "I want an accountability." —(Interjection)— Yes, okay, that's fine. Then we agree that I am not misleading anybody. That's the important thing for me.

MR. CHAIRMAN: Mr. Cherniack has moved in sub-amendment to delete all of the words after the word "value" in the third line from the end. Is the sub-amendment agreed to? (Agreed) 13(2) as amended—pass.

It would be a convenient time for Committee to rise? Committee rise and report. Committee rise.

BRIEFS SUBMITTED — NOT READ

THE WINNIPEG CHAMBER OF COMMERCE: The Winnipeg Chamber of Commerce, representing over 1200 member firms in the Winnipeg area, questions the proposed legislation for Marital Property, being Bill 61 as amended, as it affects all of the assets accumulated by the spouses since the marriage.

The Act is not concerned with fairness. Where a marriage relationship ends, there is an accounting required of all assets, commercial and family, and an equalization of these assets is then made.

What does this mean to the business community? Because most businesses have conducted themselves on the basis of the present law, they probably have some dealings with financial institutions based on their present assets. Should this Bill pass in its present form, every financial institution will require an extensive review of all of their loans as most of the persons will only be able to guarantee 50 percent of the assets they hold, as 50 percent of their assets are potentially lost.

The implications of this legislation in every business cannot be fully grasped unless it is realized that the majority of assets in the business community are affected and, therefore, all businesses must reconsider their financial positions in light of this legislation.

A marriage break-up in a partnership immediately affects that partnership. No consideration respecting the viability of the business or its ability to generate money to pay off the new creditor (i.e. the spouse) will be considered. This business will now have a substantial creditor that came into being with no fault on the part of the business.

Because this legislation is deaf, dumb and blind as to the facts in each situation and treats all commercial assets, however acquired since the marriage, as requiring division, no plea, however poignant, can be made that the division in this marriage is unfair, or may create a hardship.

It is submitted that this legislation is unfair because of its retroactivity and because it affects blindly persons who have nothing to do with the marriage. Partners, business associates and creditors who have no right to or should not have to look into the marriage relationship may be adversely affected by it.

This Bill, by being blind to equity and by dividing commercial assets, according to a set formula, in marriage breakdowns, adversely affects the desirability of doing business in Winnipeg and in Manitoba.