[Chairman: Mr. Musgrove] [1:30 p.m.]

MR. CHAIRMAN: We have a quorum, so we'll call the meeting to order. We have circulated the minutes dated August 14. Has everyone had a chance to peruse those minutes? We'd like a motion for approval. Jack Campbell moved it. We don't need a seconder. All in favour? Carried.

You have also been circulated the minutes of October 16. Is there any discussion? Do we have a motion for approval? Ron Moore. All in favour?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: We have some organizational procedures to discuss. Dates and times of subsequent meetings: I believe we have budgeted for approximately six meetings, counting this one, until the spring session starts.

MR. R. MOORE: Mr. Chairman, do we want to get six in? Is that necessary?

MR. CHAIRMAN: We have 11 topics to discuss. I suggest that if we're to cover anywhere near all of those, it would require six meetings.

MR. R. MOORE: Can we get in more than one topic in a meeting?

MR. CHAIRMAN: Hopefully, yes. As I said, we have 11 to do. We're required to report on this sometime early in the session, and hopefully we'll get most of those covered before that time.

MR. R. MOORE: So we're looking for dates for possible meetings, then.

MR. FISCHER: When do we have to have our six meetings in, Tom? By the end of March?

MR. CHAIRMAN: Yes. I believe the date set for the committee to report is early in April.

MR. COOK: Mr. Chairman, for our rural members would it make sense to have, say, two or three meetings back-to-back in the same week? They might avoid travel time. Might I also suggest that we look at the months of January and early February, perhaps the last two weeks of January and the [first] two weeks of February being prime time?

MR. CHAIRMAN: Any problems with that?

MR. COOK: Mr. Chairman, if that sounds reasonable, we might look at something like Tuesday, January 22, and Wednesday and Thursday, and the following week, the 29th, 30th, and 31st. That would give you six meetings. That's January 1985.

MR. CHAIRMAN: The budget includes five meetings after today.

MR. COOK: I understand that caucus has been scheduled for the week of the 22nd. Would it make sense, then, to go to the last week of January, the 29th, 30th, and 31st, and then the following week, the first week of February? That would give us time, if we have problems, to pick it up.

MR. FISCHER: Mr. Chairman, I kind of like the idea of having, say, a Tuesday afternoon and Wednesday morning kind of thing, not going for three days. Three days puts a big hole in your week.

MR. CHAIRMAN: Suppose we set some tentative dates for January 29 and 30. These might be subject to something else that comes up. In that case we may have to change them. Jack?

MR. CAMPBELL: Mr. Chairman, I suggest that it should probably be at the call of the chairman. To discuss this and come up with a suitable date that will take care of this committee would probably be an exercise in frustration.

MR. CHAIRMAN: Do you favour having two days back-to-back?

MR. CAMPBELL: Two days back-to-back.

MR. CHAIRMAN: Okay. And preferably in late January and early February?

MR. CAMPBELL: I'm in agreement with that.

MR. CHAIRMAN: Could we have a motion to that effect?

MR. CAMPBELL: I so move.

MR. CHAIRMAN: Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Transcripts and minutes of meetings. Maybe you could tell us what this is about.

MR. CLEGG: Yes, Mr. Chairman. It's open to the direction of the committee whether they wish to have transcripts produced by Hansard for each meeting or whether they merely wish to have minutes recorded. Many of the committees, particularly those receiving evidence and discussing detailed matters, do have transcripts. That enables the committee to review the evidence on a research basis afterwards. If I were to be asked, my recommendation to the committee would be that they should instruct Hansard to prepare transcripts of each meeting.

MR. CHAIRMAN: And up until now we have had transcripts of the meetings.

MR. CLEGG: Yes.

MR. CHAIRMAN: Discussion by the committee?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Agreed.

Budgetary requirements to March 31, 1985. As I said, we have a budget that will probably cover the cost of six meetings, including today. The budget is presently at $11,550, which will cover whatever we require in the way of research and will pay for the

members attending the meetings. Is there any discussion on that?

MR. BATIUK: Mr. Chairman, if the attendance is going to be like it is today, I don't think we should have any difficulties with our budget.

MR. CHAIRMAN: Yes, it might even cover an extra meeting if it's required. Agreed?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: At our last meeting we had a motion to cover all the suggestions by the Institute of Law Research and Reform except the Uniform Evidence Act and the Uniform Sale of Goods Act. Some of you might wonder why four were taken out and it was reduced to 11 topics instead of 15. When our House leader brought the motion to the floor to cover our subsequent meetings, he suggested that some of the topics we were about to discuss were in litigation and that we take them off the present priority list and, if we wanted, include them in a priority list sometime later. There had been some recent legislation discussed on some of them, and he thought we should probably defer those for awhile. Those four were Interspousal Tort Immunity, Contributory Negligence and Concurrent Wrongdoers, Guest Passenger Legislation, and Consent of Minors to Health Care. So those are not now part of our mandate but can be brought back on the list at a later time.

MR. CLEGG: Mr. Chairman, I'd just like to make it clear to the committee that those reports were actually listed in the motion the Assembly passed, but the advice the chairman received from the Attorney General really amounts to advice to give those low priority. The committee probably wouldn't get around to dealing with them, but they are included in the motion of instruction from the Assembly.

MR. CHAIRMAN: Right. Our first discussion today is Defences to Provincial Charges. I now ask Mr. Hurlburt to bring us up to date and advise us on what discussion is to take place.

MR. HURLBURT: Thank you, Mr. Chairman. First I should say who's here. My name is Hurlburt; I'm director of the Institute of Law Research and Reform. The chap on my right is Jim Robb, a member of the Faculty of Law at the university, who actually did the work on the first report we're talking about and who actually knows something about the subject. He's a well-known defence lawyer and very highly regarded law teacher. On my immediate left is Clark Dalton, who is a member of the board of directors of the Institute of Law Research and Reform and is also the Attorney General's director of legal research and analysis. Next to him is Dick Dunlop, another member of the Faculty of Law, who did the work on the second item, Debt Collection Practices. In the rear we have Don Bence, who is the administrator of collection practices in the Department of Consumer and Corporate Affairs. The only people who are likely to be involved in the first one are Jim Robb and me.

MR. CLEGG: Mr. Chairman, my advice to the committee is that the gentlemen who are here today should not be treated as witnesses in the normal sense and sworn, because what they are offering to the committee is argument and expertise.

MR. HURLBURT: Very politely put, Mr. Clegg. I'll try to make it not too much argument and a fair amount of expertise, but for that I have to tender Mr. Robb.

Mr. Chairman, I might start with a word about what I think we're doing here. You can set me right if that isn't what you think you're doing here today. This institute is in a sort of way an adviser to government and the Legislature. It's maintained by the government, the university, and the Law Society for that purpose, in connection with recommending what one hopes will be useful changes in the law to get around problems, avoid injustices, bring things up to date, and generally do something toward keeping the legal system in good operating order.

The way the institute operates is — I won't go through our overall working method, which would take rather long. Basically the intention is that we will do legal and other research, talk to people, get advice, and work out suggestions which we say are well thought out and are appropriate things for the Legislature of Alberta to do. It's usually legislation; it can even be administrative practices. But generally speaking, our responsibility is to produce and put before government and the Legislature well-researched, well-thought-out proposals. Of course, there is no responsibility on the government or the Legislature to accept those proposals.

The attitude of mind that we hope you bring to these is: here are some people who have been appointed or chosen or what have you to do this job; we're prepared to regard them as having done what I've said — tried to do a job. The product of that job is before you. In a sense I'm here trying to sell you my snake oil, but I'm not going to sell it too hard. I think you'll find that we'll give you a fair story both ways. Certainly we will try to resolve any doubts you have, answer any questions, and so forth.

All this has been committed to you by the Legislature. My impression is that the committee is working toward a report to the Legislature. It may say with regard to a given institute report: "It's good; we think it would be useful to follow it," or "It's bad; we wouldn't have any part of it" or "So much of it is good, but you should either drop this or change that or so on." I propose to try to put before you what a particular report is trying to do, the problems it's trying to meet, the means it has taken to meet them, and if necessary some of the problems that even the solution will cause.

The first item on the agenda is the institute's report 39, Defences to Provincial Charges. It really became first because I recommended it. The reason I suggested it come first is not that it's the most important or most urgent of the reports on your list. It is important, and it's desirable that it be dealt with. But since this is a learning process — the committee will want to learn about us and how we work; we have to learn what the committee wants, how it's going to go at things, what it needs, and what we should do for it — this seemed to be a relatively straightforward one. It's not highly legal. I think intelligent nonlawyers can understand legal things,

but this one isn't too dreadfully technical. It seems to be something that's particularly appropriate for the Legislature to think about, because the Legislature is always enacting Bills that create offences. One of the main things about this report is to see that the legislation tells the citizen something it doesn't always tell him now.

I'm afraid I have to talk a little bit about criminal law and provincial offences. Any time you get tired of hearing me talk, please tell me so. The criminal law is something that should be reserved for things that are truly reprehensible. They're bad; they're things that should be punished, that should be denounced, that people should be stopped from doing. On the other hand, about 100 years ago the English courts started to see another kind of offence, something that's against the law but is not really such a terribly bad thing in itself. The law isn't really setting out to denounce this kind of conduct. The law wants to influence behaviour so some social objective will be achieved. What you're really trying to do is sort of regulate human conduct so they will do whatever it is you want done: the factories will be kept safe or the highways will be kept safe or something. But the conduct you're looking at, the conduct you're trying to get at, isn't necessarily something that somebody would say is terribly, morally wrong. Society would just be better off if you did it this way.

The English courts then said that because of the special nature of this regulatory law, we won't require the Crown to prove that you really intended to do what you're charged with. One of the main aspects of criminal law is that not only must I have done something but I must have intended the wrongful thing that's prohibited. For example, I walk out and pick up Jim's rubbers on the way and wear them home. Now, taking things is theft, and if I intended to take them, I stole them, even if they're only a pair of rubbers. But if it turns out that there were four pairs of rubbers exactly the same and I just put on the wrong pair, not only aren't you going to charge me, because it would be nonsense, but I'm not guilty. I didn't mean to take his rubbers; I meant to take my rubbers. So my mind was perfectly innocent, and I'm not guilty of a crime. That's the true criminal law.

The courts said: "Well, that sort of reasoning doesn't apply." We're talking about trivial things and so on. If you did it, you're guilty. Boom. It doesn't really matter that you didn't intend to do it or that, within some limits — Jim may throw me out on this — you really couldn't avoid doing it.

MR. CHAIRMAN: [Inaudible] some of these things.

MR. ROBB: Which things?

MR. CHAIRMAN: The difference in what you could avoid doing yet did. Were you working up to that?

MR. HURLBURT: Mr. Chairman, I'll just throw back at you the example you gave me before the meeting. A constituent who was a trucker picked up gravel at one government establishment or quarry or something, was loaded by the government, delivered it somewhere else to the government, and was charged in between with being overloaded. Maybe he could have told that he was overloaded. But under those circumstances it's a little tough to convict him of driving overloaded when the government put it in, told him how much to take, and told him where to go. Is that a fair example, Jim?

MR. ROBB: Yes, it is. With regulatory offences one of the other things that has to be kept in mind is that very often the person who is charged is not the person who actually did the deed. If I can give you an example, take a small-business man who has 10 or 12 employees, and somebody dumps off some garbage on a highway. The owner of the business isn't there at all. He's not there to say, "Don't do it," yet he would be charged under this notion that "if it's done, you're guilty." As the employer he is liable for the acts of his employees, yet he would not have been in a position to have avoided the commission of the offence. I think that's what we're trying to get at in this report.

MR. HURLBURT: Courts of various countries have been struggling with this sort of problem. A few years ago the Supreme Court of Canada said that if you could prove that you did try to avoid it or that you did what you could or that you were under a mistake of fact and on the facts as you understood them you weren't doing anything wrong but that on the facts as they existed you were, then in some cases you would be acquitted.

In the first main point in this report — we've been talking as if this were the whole report; this is the first and probably the most important of about four points — we've basically said that the norm, the usual case, should be that if you're charged with an offence under provincial statute, and they all fall within this regulatory category, you should be able to come in and say: "I tried my best to avoid committing this offence" or "I understood the facts, and I was reasonable; here's what they were, and here's why I understood them this way" or "The facts seemed to indicate that I was doing right". We think that should be the usual case.

Sometimes on the one hand the Legislature or the legislation says that it's wrong if you do something knowingly or intentionally or something like that. That puts you off on one side in what looks like a real criminal offence. Then the Crown or whoever is laying the charge is going to have to prove that you intended not only to do the thing but to commit the whole of the offence, whatever that is. The Legislature can say that if it wants to. On the other side there may be some cases in which the whole scheme of the legislation means that people should be told: "You've got to do it, and it's no excuse that you didn't mean to do it or tried not to do it or what have you; you're going to be convicted anyway, baby." But what we're basically saying is that in those cases — and we would expect them to be most cases — in which the legislation just says that it's an offence to do so and so, the citizen would be able to come in when he's charged and say: "Here's what I did to avoid it. I tried to avoid it, I was duly diligent to avoid it, but nonetheless I fell into it." We say that that should be a case for acquitting.

Our actual proposal is that an amendment be made to the Summary Convictions Act which would say that if the legislation says it's an offence to do something knowingly or what have you, like Criminal law, the Crown would have to prove that you meant

to do it and had a guilty mind. If on the other hand the Legislature said that it's an absolute offence and there's to be no defence of due diligence, then that would be the case. But in the other cases, the great bulk of cases and the cases in which nothing was said, it would mean that the citizen could come in and say, "I tried my best, but I didn't make it."

Do all members of the committee have the draft of the proposed legislation? If you want to take the time, I think it would be useful to look at sections 3 and 4. They set out in clear language — I'm sorry; there's one problem. It does use the term "mens rea", which you will come across. I should say that my normal position is that if I can't tell somebody all about a legal point in good, clear, understandable English, it proves that I don't understand the legal point. If I have to use jargon to explain it, it means that I don't understand it. Actually the drafting is Jim's, but he and I have been throwing it back and forth at each other. We couldn't really figure out a way to say what he was going to say better than to use the term "mens rea". That's the guilty mind. If mens rea is part of the offence, it must mean that I intended to commit the offence or that I had some intention that was reckless, that I didn't care whether I committed the offence and went ahead, that you could look at me and say, "You must have had a guilty intention of some kind." That's what that word means.

The institute usually drafts legislation and puts it in its report. This does not mean that's the way it will go through, even if everybody agrees with it. Legislative Counsel will come in later, look at the drafts, and basically do what they want with them. We believe it's very useful for us to do our own homespun drafting. Number one, by the time we've tried to put it into legislative language, we understand a lot more about it than before we started. That's one way to find out whether your thinking is clear. If you can't put it in legislative language, it isn't, and very often it throws out problems. Secondly, we hope it helps the government a bit.

If you look at the green slip, you'll see section 3(1). That says that if the Legislature chooses to say something is not an offence unless you meant to do it, then basically that's the way the courts should apply it. By the way, J'm, if you wouldn't mind chipping in anytime I go wrong . . .

MR. CHAIRMAN: Do you have any questions until now?

MR. FISCHER: Is that not what judges are for — to make those decisions on whether or not the intention was there?

MR. HURLBURT: Very much so. The judge is to decide whether the intention is there, but the courts shouldn't have to decide whether the Legislature meant that you should be convicted without an intent. The legislation should tell the court, "You have to find the guilty mind" or "You should accept this defence of due diligence" or "You shouldn't accept any defence except that he didn't do it." Yes, it is for the courts to decide whether I intended to do it, if that matters. But the legislation should tell them whether or not it matters.

MR. ROBB: Perhaps I could chip in on that point. In 1978 the Supreme Court of Canada issued a decision involving the town of Sault Ste. Marie. It was a radical new decision and established three levels of offences. You people pass a law saying that it is an offence to do whatever. The courts then have to look at it and decide whether or not the Legislature intended that the guilty mind has to be proven, which is the first level of offence. A second type of offence is one in which it doesn't matter whether or not you were at fault; we call that an absolute liability offence. The third one is the in-between position: it doesn't matter if you actually intended that consequence; the real question is whether you took all reasonable steps to avoid the commission of the offence. So you have three kinds of offences, and the problem is that the Legislature gives no guidance to the courts.

In reviewing the cases — and we reviewed literally hundreds of cases — you end up with all kinds of conflicting decisions. For example, somebody sitting in Lethbridge can take a look at a section and say, "Well, this is obviously an absolute liability offence." A judge in Fort Chip can say, "This is obviously a strict liability offence." Now I have the law being applied differently in two different parts of the province. If they go to appeal, eventually you will get it resolved. We're saying that it's an awful lot neater and better if the Legislature sets the rules at the outset. That's the legislative scheme we've proposed. We've given certain magic words which would mean, "This is a full mens rea offence." If you want to make it an absolute liability offence, say "This is an absolute liability offence." Otherwise everything falls into that middle category, where people can be prosecuted and convicted even though they didn't actually intend to commit the offence, but they would be acquitted if they took all reasonable steps to avoid the commission of it. That's what we're trying to get at.

If it's a mens rea offence, the easy answer to your question is that the court has to decide on this fact situation: did the person have the intention? The difficulty is that you look at a section and say: is this a mens rea, absolute liability, or strict liability offence? There's one famous case floating around now in which a court found three different kinds of offences in one section which had four subsections — the usual thing. People just can't understand the law. The average layperson looking at the section doesn't know what level of liability they're facing. What we're saying is that the rule should be fixed, predetermined by the Legislature. I don't know if that answers your question or not.

MR. FISCHER: I've been trying to think of an example. Would you put different offences in different categories?

MR. ROBB: It would be attached to the offences section itself. Let's take an offence like polluting a river as one example. If the legislation said, "You shall not pollute a river, and this is an absolute liability offence," it would automatically tell the courts that proof of fault is not necessary. If the offence said, "You shall not intentionally pollute a river," then under our scheme that would automatically tell the courts that the Crown would have to prove the mens rea element, the guilty

mind. If it simply said, "You shall not pollute a river," under our scheme it would automatically tell the courts that this is a strict liability offence, that the Crown would simply have to prove the fact of pollution. Then the onus would be on the accused to establish that: "Yes, it occurred but not through any fault of mine. I did everything a reasonable person would have done to prevent it." That's the way the scheme would work. Under our scheme you would look at the words used in the offence section and would automatically be telling the courts what kind of offence it was, rather than leaving it open to the present situation, which is just a mishmash of cases going all over the map.

MR. FISCHER: It appears to me that it would be relaxing the law. Do you think you would find many people guilty? They would always have an excuse.

MR. ROBB: That's not the case. The courts are presently categorizing the majority of offences as strict liability, and the world hasn't collapsed around us. That argument has been raised in report after report. The actual empirical studies that have been done on it have found that the Crown and government agencies generally tend not to charge unless there is some evidence of fault. For example, with occupational health and safety legislation you'll very often find that the investigators will give a warning: "It's the second time around; you've known about it, you haven't done anything about it, and now we're going to go after you." That's one aspect of it. The second aspect is that we are proposing putting the burden of proof on the accused. It's not enough just to say, "I've got an excuse." You would actually have to lead evidence that that was in fact the case.

The third aspect is that studies have indicated that having absolute liability — that is, leaving open the possibility for someone saying, "It wasn't my fault" — increases respect for the law. That's important in the courts. Faced with an absolute liability offence, judges generally have bent over backwards to acquit. In that way they have sometimes found whole departments have been affected. You have a situation in which suddenly the judges say: "They're dragging before me people who are faultless. I'm a little suspicious of this department." The Americans and the English have done a number of empirical studies on this kind of effect. Generally speaking, no one has been able to point to a study saying that the strict liability offence has caused guilty people to go free. What it really comes down to is: if the person was not really at fault, why convict them?

MR. COOK: I have a question. It seems to me that if we adopt this principle, we're then going to be plugging up the courts, wrestling with the question of whether or not there was a guilty mind. We cited the example of the garbage being dumped on some property and the company owner being ticketed for having untidy premises. As this proposal stands, he could go to court and say, "I really didn't intend to have that done," and we could get into a lengthy process, trying to determine whether or not he had a guilty mind. Is that not the case?

MR. ROBB: It wouldn't be, unless you people said, "This is a mens rea offence." The courts would not be able to do it. You would have to use one of the magic words. You would have to say, "You shall not intentionally litter the highway." If you don't use one of the words we've set out in our proposed statute, which under the present law would make it a mens rea offence, then you don't get into the question of the person's actual intention at all.

If he wanted to escape liability, he would have to show not only that he didn't intend that result but that he took every step a reasonable person in his position would take to prevent it from happening. That's a very different proposition. Again, that principle was put in place in 1978 with the Sault Ste. Marie decision, and I don't think anybody has ever really been able to point to this jamming up the courts. The reason it hasn't jammed them up is that the burden of proof is put on the accused. That's an important principle in our scheme. It really makes it difficult for the accused to advance that defence unless he has evidence to back it up. It's not simply a matter of "I didn't intend." It is: "I took every step a reasonable person would take to avoid its commission." Once a court finds that the person has taken every step a reasonable person would take, are you really achieving anything by convicting him? You're simply saying, "Yes, we recognize you're without fault, but we're going to convict you anyway." That's something the courts have avoided doing, if at all possible. They haven't liked it. I don't know if that answers your question.

You have a very real problem now, and I can point to a case called the Queen and Ballman, a hunting case. It was a grizzly bear case. It was alleged that some hunters shot a couple of their packhorses as bait to attract grizzlies. The grizzlies came along, and they shot the grizzlies. They were charged with baiting; it's an offence under the Wildlife Act. Simply based on the wording, the Alberta Court of Appeal decided that this was a mens rea offence. That's one of the problems you have now: the courts determine what you people intend to do, what level of liability you intend to establish. You get these cases going all over the map, with conflicting decisions. In that one you had to prove that when the packhorses were shot, it was with the intention of attracting grizzly bears — a pretty difficult burden of proof to meet. The conviction was quashed in that particular case.

That would not have occurred under our scheme, unless you as the Legislature deliberately decided to use one of the words which means under our proposed Act that it would be a mens rea offence. That's the difference. The control is moved back into the Legislature and out of the courts.

MR. CHAIRMAN: On that point I recently read in the Alberta Report of a particular incident parallel to that. Some people who came upon a dead moose were subsequently charged with using that as bait. There are two different charges. They alleged that the moose was dead and that because grizzly bears came to it, they were innocent of baiting. Those are two different, similar cases where this could be used.

MR. FISCHER: I'd to use an example in the transportation law. We're taking a load of grain to town, and we're too heavy. How are you ever going to accuse anyone of intentionally being overweight?

MR. ROBB: There are certainly situations that I can

envisage where people do overload intentionally. The difficulty has always been one of proof. So you're never going to use the words "intentionally overload". For example, you're simply going to use words like: "You are not going to overload a truck beyond a certain weight." Then it becomes a question of whether the person took reasonable care to prevent it from happening. Did they make use of the scales on the highway, for example? Is there not some method of measurement that would tell them whether or not they were overloaded? In other words, if they were negligent, if they made no effort to prevent the commission of the offence, then you might convict them.

Let me use this example under the absolute liability category. I've got a farmer who loaded up his grain and went to a scale. It told him he was within limits, so he drove out on the highway. The scale was wrong. Under absolute liability he would be convicted, although there is nothing more he could have done. In the middle category he would have a valid defence. In other words, it doesn't become a matter of "I intentionally did it" unless you people say that's the level of proof you want.

MR. FISCHER: What I'm saying is that there is no scale. You load up your truck and go into town. You have a rough idea every time you put on a load, and you crowd it to the limit. How are you ever going to accuse anyone?

MR. HURLBURT: I think you just said it. Did you use the truck before? Was it loaded? How heavy was it? If you know you're getting near the limit, obviously you're not being reasonably careful if you keep on loading. What did you actually do? Why did you think it was under limit? Certainly if you get to the point of "I know the truck is pretty close to the limit one way or the other, and I didn't think I was over," that's no excuse. That's not due diligence.

MR. CHAIRMAN: Let's take an example. Suppose a person was hauling barley in his farm truck and it weighed 40 pounds to the bushel. Then he pulled in to a different bin and got a different kind of barley that weighed 50 pounds to the bushel, and he was overloaded. Would that be due diligence?

MR. HURLBURT: What should he have known?

MR. CHAIRMAN: He would probably know that that was a little heavier grade of barley.

MR. ROBB: The person who makes his best guess at the weight of the barley would probably have the defence of reasonable mistake of fact that we've been talking about.

MR. CLEGG: Mr. Chairman, it may be well understood, but I'd like to make a point just for clarification. I understand that the institute is not recommending that all statutory offences should have a particular categorization but that each time this Legislature creates an offence, the issue should be addressed. We are creating this offence. Do we want to make it absolute liability: you did it; you're guilty? Do we want to make it strict liability, which is a bit less tough: you did it, and, unless you build in the defence that there was good reason for it, that you took all reasonable steps, you're guilty? Or do we want to go further and build in a mens rea or guilty mind: you knew jolly well what you were doing, and you knew it was an offence, but that has to be shown before they can make a conviction? My understanding is that the institute is recommending that each time an offence is created, the Assembly itself should decide what label to put on that offence: is this to be an absolute, strict, or mens rea offence?

Obviously some members feel very strongly that some of the issues we have discussed this afternoon shouldn't be strict offences, but there are other offences which obviously should be strict. Not many people would feel that there are many excuses available for speeding offences. If you were doing 70 miles an hour on the highway and it was only a 50 limit, they don't mind if you're in a hurry or that you didn't bother to look at the speedo. There's no real excuse that they're interested in setting up. Many offences created here are intended to be strict. The point they're making is that for many of the offences created in this Assembly, if the Assembly had thought at the time, "How do we want this to be dealt with?" you wouldn't have intended it to be either absolute or strict. You would have felt that the just way to deal with this would be to have a case where it was necessary to prove a guilty mind.

MR. FISCHER: One more question. This has been used in some of the other countries you mentioned. How is it working?

MR. ROBB: Based on the readings we did, it's working out fine. It started in Australia. The Americans have adopted it. The English are the last holdouts. I should also remind you that it really is in place in Alberta at the present time. You have the three classifications based on the Supreme Court of Canada's decision in Sault Ste. Marie. It applies to all your offences. You have it now. As I indicated, we certainly couldn't see anything to indicate that the place was collapsing as a result of it. The real difficulty is that the courts are determining how serious you are about the offence, not the Legislature. It's too vague at the present time. I think the advice you've just received is very accurate. It really is something you would be addressing. You would determine the level of liability when you created offences.

MR. HURLBURT: Every specific legislative bit now has to be looked at when a charge is laid under it. The court has to go through some extraordinary, elephantine motions in order to try to put an intention in your minds, because you didn't say what it was. So every time a charge is laid, somebody may raise this thing of due diligence. Then the court has to sit down and look at it and say, "Well, the pattern of this Act is one or the other, so we think that what they meant was that either there is a defence of due diligence or there isn't." Or they say, "This Act would be difficult to administer unless you had absolute, absolute liability." You don't know which kind until you get at least to the Court of Appeal. This is what Mr. Clegg and Jim are saying. Actually you're clogging up your courts on questions they shouldn't be answering.

MR. COOK: Mr. Chairman, don't we as a Legislature really have three options? One is to move to neutralize the Supreme Court decision by saying that notwithstanding the Sault Ste. Marie decision we don't want our courts being clogged up. Summary convictions are exactly that — bang, option 1. Option 2 is to do nothing and let the courts get into this second-guessing. The third option is for the Legislature to determine what kinds of offences, as you're describing them, would be given this third level of intent. Is that a fair comment? So we really have two ways to move and one to do nothing at all, which is a kind of decision as well. How practical would it be for us to simply pass legislation saying that we don't want the courts second-guessing us?

MR. ROBB: I think your real difficulty is going to arise in part because of the Charter. There is presently a case before the Supreme Court of Canada, a reference re their Motor Vehicle Administration Act, in which the whole question of absolute liability — that is, "If the offence is committed, we don't care if you're without fault; you're guilty, and we're going to fine you or send you off to jail" — and some of their provisions have been challenged under section 7 of the Charter of Rights and Freedoms. If you had a blanket piece of legislation saying that everything is absolute liability, because that's in effect what you would have, I think you would find an awful lot of Charter challenges pursuant to section 7. Then you'd obviously have to look at the opting-out procedure in terms of the Charter, which is a whole further issue. That's one potential drawback to that.

The second one is frankly more philosophical. Do you as a Legislature ever want to convict somebody who is without fault — not that you can't prove he is without fault but he is in a position to prove that he was without fault. Do you really want to convict that sort of person? Does it really achieve anything for the law? The empirical studies in the report indicate that it really has very much the opposite effect and usually ends up in increasing disrespect for the law. So those would be my two answers to that one.

MR. CHAIRMAN: Any other questions? Would you like to carry on, Mr. Hurlburt?

MR. HURLBURT: I was going to look at the draft legislation, but I'm not sure that's necessary anymore. We've probably thrashed it out on that point. I think we've dealt with it adequately. The sections in the draft that deal with that are sections 3 and 4 of the proposed amendment to the Summary Convictions Act.

There are a couple of other points which are of some importance. The first one in the order we're coming to them is the lesser of the two. It has to do with offences against regulations which have not yet been published. The Regulations Act requires that regulations under provincial statutes be published in the Alberta Gazette and that bylaws of municipal corporations be filed with the municipal clerk. This proposal is that the general rule be that until a regulation is gazetted or a municipal bylaw is filed with the municipal clerk, it should not be possible to prosecute for an offence against it. The basic, general reason is that if you not only didn't but couldn't know the law, you shouldn't be convicted under it.

The proposal would go on to recognize the emergency case where a regulation is passed because somebody is damn well doing something or about to do something and you know it; it's got to be stopped, and you can't wait around until the Gazette comes out. It would be possible to put a provision in the regulation that it is to be enforced before it's published. Then the authority would be under an obligation to do whatever it reasonably could to bring it to people's attention. If those things were done, the conviction could be entered. Have I got it right, Jim?

MR. ROBB: Yes.

MR. HURLBURT: Basically you get back to: every man is presumed to know the law. Of course, no one does. If we didn't let anybody go on the bench who didn't know all the law, you wouldn't even have any judges. But the only way you can carry on is that everybody is presumed to know the law. You can't get off just by saying that you didn't know about it. But there is this comparatively small case in which a regulation has been made, a bylaw has been passed, but it hasn't yet been made public. What we're really saying is that until that happens, in the usual case you shouldn't be charged. It shouldn't be an offence, but a means should be left open by which immediate action could be taken if needed.

MR. CHAIRMAN: For instance, if municipal bylaws are advertised in the paper, is that considered "made public"?

MR. ROBB: That would normally follow filing with the municipal clerk in any event, which is the test we've set out in our scheme.

MR. HURLBURT: Unless you're talking about notice of an intention to consider a bylaw, which doesn't mean it's law yet.

MR. CHAIRMAN: If a bylaw is passed by a municipality and advertised in the local newspaper, is that considered adequate notice of that bylaw?

MR. CLEGG: Not unless it's filed with with town clerk as well.

MR. HURLBURT: Well, there'd be two possibilities. One is that it has been filed, in which case that's all right; it doesn't matter whether or not it's advertised. But there'd be a second case: if the bylaw said "notwithstanding that it hasn't yet been filed, somebody can be charged under it." I don't know why a bylaw would do this, because I would think you could run it across the hall to the municipal clerk pretty quickly. If they've done what they can, and advertising would certainly be doing what they can, that would be all right too. I can't think of a bar to a bylaw being filed with the municipal clerk within half an hour of it's being passed, so I wouldn't think there's a problem.

MR. CHAIRMAN: Perhaps I could give you an example. A county that I am well acquainted with passed a bylaw that it was an offence for water

truckers to load water from a municipal or secondary road. It was advertised in the local newspaper, but the enforcement authorities said that it wasn't a well-known enough bylaw for them to try to enforce it.

MR. ROBB: One of the problems we're trying to address with this amendment is to make it very clear what level of notice is required. I think the enforcement officers were going a bit far with that advice.

There are some decisions in which some people have been able to convince a judge that they just didn't know about the existence of a bylaw and the judge — again this bending backwards process — has let them off, but generally speaking, advertisement would be enough. Under our legislation, however, filing with the municipal clerk would cinch it. That would be enough. Then advertising, steps that you would normally take anyway, would be more like icing on the cake.

MR. CHAIRMAN: Another question is: where there's some confusion in the interpretation of a provincial regulation, does the first court case set the standard, or is that still up to . . .

MR. ROBB: Personally I've always thought this was one of the silliest legal rules we've ever devised. The present law is that the citizen has to know the law better than a judge. If a Provincial Court judge says, "Here's my decision," and people rely on that decision and later on a higher court judge decides that the first judge was wrong, then those people are convicted. They can't plead ignorance of the law.

There's a very famous case from Alberta involving — dare I say it? — a stripper who, relying on a trial judgment, decided she could go so far. The Alberta Court of Appeal decided that the first judge was wrong, and therefore convicted this person who had been relying on the initial decision. Later on, the Supreme Court of Canada decided that both of them were wrong, but on their interpretation of the law, she would be acquitted in any event. But you get an incredible situation in which people really are expected to know the law better than a judge.

We've tried to address that in our report by saying that if I rely upon a decision, as long as I wait for the normal appeal period to expire and it has expired, I now have what appears to be a definitive statement to the law. It's reasonable for the average citizen to rely upon that statement to the law, and he shouldn't be convicted because another judge somewhere down the line says that the first judge was wrong.

MR. CHAIRMAN: I can think of an incident that I've had a lot of feedback from my constituents on. It pertains to a certain kind of agricultural trailer. They call it a four-horse trailer. It's generally about five and a half to six feet wide and 16 feet long. Someplace in the highway regulations it says that a trailer carrying over a certain weight must have a certain kind of brake. That is, if your trailer comes loose from the vehicle you're pulling it with, an automatic electric brake goes on and stops it. It goes on to say that if it's a certain weight and if it's pulled by a certain vehicle — it's so confusing that I've had several phone calls with the Solicitor General's department, and they haven't been able to give me an answer on whether or not it is necessary to have that brake on this specific kind of vehicle. I know that people have been charged and convicted under it, yet our own department doesn't know what the regulation says. There are quite a few "ifs" in it that could make the person guilty or not guilty.

MR. ROBB: It doesn't really strike you as being fair.

MR. CHAIRMAN: Right.

MR. ROBB: I know I'm getting ahead of Mr. Hurlburt, so I'll just very briefly mention that that relates to another defence that we refer to in our report and in our legislation, called "officially induced error". We think this is what it means. If one of your constituent truckers went to the department and got advice and relied on that advice, he would have a defence. If he didn't go to the department, he just said, "Aw, to heck with it; I'll do what I want," he wouldn't have a defence. But if he did what a reasonable person would do, went to the government department and got what they thought was the best interpretation, then under this scheme he would have a defence.

MR. CHAIRMAN: Any other questions or observations?

MR. HURLBURT: That's basically that point, Mr. Chairman, as far as we're concerned. If there are no . . .

MR. SHRAKE: Mr. Chairman, on that same point. I had a situation where a fellow asked me a very simple thing: if he could buy an old slot machine. They have some antique slot machines in Vegas or somewhere in the U.S. I guess it's against the law to have slot machines, but this is one of the old ones that you put nickels in, a very pretty old thing and so on. I inquired at the Attorney General's office, and they told me verbally, "sure". They didn't think there was a problem, because this would be more like an antique. I sent them a memorandum asking for a letter, and I'm still waiting for the letter. How valid is this verbal permission or interpretation?

MR. ROBB: Again, the Supreme Court of Canada, in a couple of decisions within the last couple of years, has indicated that if I can prove that I actually received the advice and relied upon it and that the advice came from a responsible person within the department or ministry which is in charge of enforcement, then what it really comes down to is that that same department ought not then to be able to turn around and say, "Gee, we changed our minds. We've decided this is the law today, and now we're going to charge you". But I would have to be in a position to prove those elements. If I could, I would have a valid defence both under the existing law, based on what the Supreme Court of Canada has been saying, and under our scheme.

MR. HURLBURT: Jim, would you then be able to keep the slot machine? By that time, you now know that . . .

MR. ROBB: I think you'd have to give up the slot machine.

MR. HURLBURT: We're only talking about the charge for things past. We're not talking about the future. That is, what the Attorney General says, with great respect to Mr. Dalton, means nothing insofar as what the law is. You can get it in writing from the Attorney General, and it doesn't mean it's the law.

MR. SHRAKE: Mind you, I have never yet received anything in writing to my memorandum inquiry.

MR. ROBB: But if you did, just assuming that fact situation, then I think there would be a valid defence. Really what it comes down to is a notion of fairness. It just isn't fair to charge and convict that person when they have received and relied upon advice from the department or group that is responsible for administering and enforcing the law. It really comes down to that basic notion.

MR. HURLBURT: Indeed, that's all this report is really about, treating the citizen fairly. He should be convicted without fault only if there's a strong public interest that says this offence is of such a kind that the only way we can deal with it is by saying, "It doesn't matter what you meant, baby; it doesn't matter what you thought, baby; you did it, and you're for it." No doubt there are cases in which the Legislature would do that. But we're saying that if I tried to conform to the law, it's usually unfair to charge me with an offence and convict me. Conviction means a great deal to some people; it certainly means costs of lawyers, fines, and everything else. You shouldn't convict me under these extreme circumstances, and similarly with the unpublished regulation, which is really the one that matters.

We've already started into officially induced error. I think Jim mentioned both these parts. The next point, and I think it's the last major point, is what we've called — it's not original — the defence of officially induced error. The proposal in section 7 of the draft is that if the accused person, the person who is charged, made a diligent attempt to ascertain the law relating to the conduct upon which the charge is based, or conduct of the same kind, and honestly and reasonably relied upon a statement of the law made to him by an official of the government or municipality acting within the course of his employment and the scope of his authority, and the law as stated would have made it all right, then he shouldn't be charged. So you go to the planning department, and they say it's all right to go ahead; you go ahead, and then they charge you — that sort of thing. You don't really need to convict the person to uphold the law. If government in one of its aspects has told him one thing, then government in another of its aspects shouldn't charge him with what he did in reliance on that. Again, once he learns it's wrong, he has to stop. But during the period of time in which he reasonably thought he was acting properly, having done his duty as a citizen, then you shouldn't charge him.

In fact, one thing we should be trying to do with the honest and reasonable citizen, the chap who wants to obey the law, is getting him to go in and find out from what appears to be the proper authority what he's entitled to do and what he isn't entitled to do. We want to get him talking to the government people who are administering the thing. I think there's a public interest in that, because (a) it will help to make him conform, and (b) it's a service to the citizen, if you like, so that he can get some idea of what he's supposed to do. Most citizens don't really have recourse to lawyers. Maybe they do, but lawyers cost money, and you don't want to go to a lawyer every time you decide whether or not to turn over in bed. The government is the logical and reasonable place to get information about what the government, the administrators and so on, is trying to do.

That's one part of reliance on official information. The other one, which Jim mentioned, is that if there is an Alberta judicial decision which hasn't been overturned and hasn't been appealed, then it's not unreasonable for the citizen to rely on that. As Jim said, it's not fair to the citizen to expect him to know better than the judge or judges, as the case may be, that made the decision — or his lawyer, because usually he will find out about judicial decisions through his lawyer.

If the citizen is advised by his lawyer that a court in Alberta has said X, and that decision at that time hasn't been appealed and it's not within the time, then it isn't fair to charge him with that, even if it turns out that the Court of Appeal thought otherwise. As Jim said, we have one judge who to the citizen is the embodiment of the law, telling and speaking the law, saying what it is, and it is not fair to expect the citizen to know better. I think that's the point.

So we've proposed a defence with two branches. First the accused must prove that he made a diligent attempt to ascertain the law, that he tried to find out what it was and, number two, that he either got information from a government or municipal official whose business it is to give that kind of information or, alternatively, that he relied on a statement of the law made by an Alberta judge, which apparently is "the law". Once he has tried to conform to the law as he understands it and in effect has been misled by government, a judge, or a court, then he shouldn't be guilty of an offence. Again, once he finds out what the law truly is, he's got to stop doing whatever it was, but until that time he shouldn't be charged for acting on this kind of information. I think that's the point. Do you want to add anything to that, Jim?

MR. CHAIRMAN: Any discussion or questions?

MR. FISCHER: When a judge finds out that I'm guilty but it was unintentional, what does he do with that in today's court? Am I prosecuted anyway?

MR. HURLBURT: I'll pass that to Jim.

MR. ROBB: Normally if you're before the judge, that by definition means you have been prosecuted. You can have a prosecutor who looks at a file and says, "I'm not going to prosecute it, because it's plain and clear on the file that this person wasn't at fault." But generally speaking, you will have a prosecution. If they hear evidence that it was unintentional, about all they can do at the present time is take it into account on sentencing, unless you can go that step further and say that you actively tried to prevent the commission of the offence. If you're in that middle category, you would have a valid defence.

Otherwise, that's a situation in which you tend to get into nominal fines as the penalty.

MR. HURLBURT: But you're talking about "unintentional", and we aren't proposing to change that. Under our proposal, the accused would have to show a positive intention not to break the law. I think that's really stating it. The mere fact that he didn't know it was the law, or didn't realize the thing was an offence, would not be a defence under our proposal. I don't think it's a defence now. He'd have to go further and show something actually positive: "I thought this was all right; this is what the facts are, and to any reasonable person those facts mean I'm all right."

MR. FISCHER: Suppose we show this positiveness, what happens today? We just make the penalty so gentle that it's almost acquittal. Is that right?

MR. ROBB: Again, keeping in mind that there are these three kinds of offences you can get, if the court were to decide it was a strict liability offence, there would be a complete defence. If it were an absolute liability offence — that is, it really doesn't matter if you tried to prevent it — then it would be dependent on two things. One, does the statute set out a minimum fine, in which case the judge can do nothing at all. Or, for example, is it zero to $500, in which case you've probably just spent $500 to $600 prosecuting someone, and the judge is going to impose a $5 or $10 fine and suggest very strongly to the prosecutors that they ought not to be bringing that before them.

MR. HURLBURT: On those facts, the judge is going to have to go back and rummage in his legal briefcase. He's going to decide that there are all those things with the label "mens rea offence", and this is one of those. Or he's going to have to say that it's one that fits into the slot marked "absolute liability offence", and the one which is very confusingly called "strict liability", which doesn't mean strict; it means less than absolute, which I'm afraid is lawyers' jargon but we're probably lumbered with it. But the point is that in the face of a statute that doesn't say how the Legislature regarded it, the judge nevertheless has to say how the Legislature regarded it. He's got to try all sorts of tests, wingle and wangle around, and come up with an answer.

We say it's best that the Legislature attach the label, because the Legislature, the government, or whoever drummed up the legislation should know better what is intended by it than a court later on, and if you say so, you don't have to rely on the court later on. We also say that we would extend the middle category by making it the norm, but you could adopt our proposal and still make everything absolute liability. All you have to do is say so. We would then hope that you would have thought about it and would have said, "Now, even if some poor sod tried to conform and failed, we think he should be nailed." As long as you had a reason, that's fine. You're the Legislature; your business is legislating. If we don't like it, we can lump it. But we do think you should turn your minds to it.

Actually we would say that the government — the Attorney General or somebody — is probably going to have to, because you have the Supreme Court of Canada case that says that there is this category, and it's a substantial one. If you really want your laws to do what you want, you've got to either decide, as Mr. Cook suggested, that they're absolutely wrong and you're going to reverse them or look at your statutes.

MR. COOK: Mr. Chairman, could I ask either of the gentlemen before us how we would go about reviewing our legislation to determine what falls in that category and what does not? Have you done that for us?

MR. HURLBURT: [Inaudible] legally in it now, or which bag you should put it in?

MR. COOK: Your provision under this amendment Act is forward looking. It would suggest to the Legislature that any future legislation ought to be specifically designed to fall into one of these categories. What about the stuff we did in 1906?

MR. HURLBURT: Again, I would say that you should be doing it anyway. The Supreme Court of Canada has changed the rules, so on reading your statutes of 1906, you don't know what kind of an offence they've got.

As to how to categorize them, I suppose it depends to some extent on your bias. Mine is very clearly to narrow the ones for which you can be convicted without fault. But yours might be the other way around; I don't know. I suppose you would have to say to the Attorney General's department, "You look at all the statutes and tell us, having consulted with the administrators." Or alternatively you would say to the Attorney General's department, "Here are our policy guidelines; you tell us which fits within which category." It would be a fairly extensive job, but to my mind, it would be a useful one.

MR. ROBB: At first blush, it seems like a major task. I sat on a federal committee which was examining federal regulatory offences, and you might be interested to know that the last count we had was that there were over 73,000 federal regulatory offences. You're not in the same league as that, if I can put it that way. That's just regulation gone wild. But that was managed over about a two-year period.

In terms of your legislation, we actually started that process in our report. You have a number of decisions since Sault Ste. Marie which give you some rough guidelines — and I emphasize the word "rough" — as to how the characterization has been made by the courts. I don't think it would be an extraordinarily difficult task for the Attorney General's department to start their review process with that legislation which has already been decided and determine whether they agree with the courts. I think that would probably be the beginning of the process. You can operate on the presumption that the courts are going to find a lot of it strict liability in any event. So it could be done, and it has been done at the federal level.

MR. CHAIRMAN: In your proposal I notice that under this subsection the accused "shall bear the burden of providing defence". I also notice that you haven't addressed anything to do with appeals by the province of a court case where a person has been

acquitted. Is that beyond our mandate?

MR. HURLBURT: I'd say that it is beyond the scope of our project, and we haven't thought about it. It's the sort of thing we could consider, but we haven't considered it. It's certainly, beyond question, within the scope of the Legislature.

MR. CHAIRMAN: This would have to be done as a different topic then, would it?

MR. HURLBURT: I'm afraid so, Mr. Chairman. I couldn't even tell you what the practice is. I'm almost always willing to tell you what anything should be, but I'd have a little trouble on that without talking to people and trying to consider things. I'm inclined to think that the Crown should accept the judge it gets, but that's just an opinion that I haven't . . .

MR. CHAIRMAN: This is not always the case. In some particular incidents where they have been appealed, the cost of the fine that is provided is not as high as the cost of a defence of the appeal. This has brought some criticism.

MR. ROBB: I can remember that we used to console prosecutors, if they lost one of these cases and thought the person was really guilty, by saying, "They're about to receive their real punishment; I'm rendering my bill tomorrow." The real difficulty in a lot of these cases around the appeals is that the legal fees mount up in relative proportion to the fines. But I agree with Mr. Hurlburt that that would be beyond the scope of this particular project. That would have to be a separate project.

MR. CHAIRMAN: Did you want to say something about the defence of insanity?

MR. HURLBURT: That's a sort of small point, if you like, Mr. Chairman.

MR. CHAIRMAN: You had something . . .

MR. HURLBURT: It's certainly in the report. Strangely enough, and it will sound strange to you on first reading, we propose that the defence of insanity be abolished for provincial offences. I think it would be extraordinarily rare that any accused person faced with a conviction and punishment for a provincial offence would think it worth while to prove that he was insane at the time he committed it, simply because the consequences of being proven insane, even temporarily, are very much worse than any normal conviction for a provincial offence. Provincial offences are not usually the sort of thing for which you raise that defence. The suggestion is made more because if the Crown were to allege that the defendant is insane or something like that, it's a means of getting him off under mental health laws and so on and into an institution. It's really just to remove an unnecessary and possibly unfortunate wrinkle of practice. Jim, maybe you want to say something about that?

MR. ROBB: First of all, I think it reflects reality. I suppose the scariest scenario would be the insane person representing himself. The reason I raise it is that there have been instances in other provinces where people on summary conviction offences have ended up being found not guilty by reason of insanity. Obviously if you have somebody who's insane, you would be able to use the Mental Health Act. We think that's the appropriate forum, rather than this incredible defence of insanity. And it does accord with reality.

We reviewed the common law defences — this is one that sort of stuck out as a sore thumb as being inappropriate to regulatory offences — and thought we should clean up what appears to be a loose end.

MR. COOK: I would have agreed with you until Friday afternoon, but I had a strange case that I should maybe send over to you. A constituent of mine who was in the General hospital psych ward was released on a day pass, jumped into his car, was involved in an accident, and couldn't produce an insurance card because it had expired. He's now about to be severely dealt with by the courts. Anyway, that's a small anecdote.

What about the defence of drunkenness? Society seems to be leaning more and more to the view that being in the care and control of a vehicle is just . . .

MR. ROBB: It isn't specifically in the statute. We spent quite a bit of time discussing it. We decided that drunkenness should not be a defence. The reason there isn't anything in the statute is that the present law would have it that it is only a defence to mens rea offences. Within that category it is a defence to only certain kinds of mens rea offences; that is, an offence which requires proof of what we call specific intent. It's not just enough that I recognize that what I do may lead to the commission of an unlawful offence but I actually want to achieve that particular result; that's my end goal. That's the very, very restricted category in which drunkenness can be a defence.

Secondly, it is a defence only if it can be proven that the person was so drunk that he would not have the capacity to form the intent — not even that he didn't have the intent but he literally didn't have the capacity. Starting with that proposition, the next step was to see if we could find a case in which drunkenness had been advanced as a defence. I just couldn't find one. In part it's because it's very clear that drunkenness applies to a kind of offence that would be very rarely found in the context of a regulatory offence.

To try to summarize, our intent is that as a general rule it should not be a defence, in part because doing things like driving or wheeling around in a motorboat while you're drunk is really some evidence of negligence to begin with, I would think. The behaviour we're trying to catch in our major category is negligent behaviour. So by definition, you would fall within it.

MR. HURLBURT: Mr. Chairman, I suppose I should have mentioned that we've put a provision in the draft legislation and it is our proposal to let the common law rule except in the cases we've mentioned; that is, we're proposing that the law not be changed in other cases.

MR. CLEGG: Further on that point, Mr. Chairman, it would seem that the defence of drunkenness would

only really be relevant to mens rea offences. If the categorization is made in the way the institute suggests, you wouldn't necessarily have to prove you were drunk; you'd only have to prove that you had not formed the intent. The drunkenness might be incident to that situation, but you might have just said that you wandered out of the room and picked up a coat because you felt cold. It just happened. You didn't form the intent of stealing it, and the reason you didn't form the intent was that you happened to be drunk. You're not advancing drunkenness as a defence; you're saying that you just took the coat because you were cold and didn't intend to deprive a person of it. Of course, I'm using a criminal example, and we're trying to avoid Criminal Code offences here.

MR. ROBB: That again is part of the difficulty; thinking of a regulatory example is extremely difficult. It's not even just that it applies to a mens rea offence; we cut it down even farther in law. It applies only to a very narrow category of the mens rea offence: the specific intent offence, which is very rare. That again would be a matter that would be within the control of the Legislature. You'd have to go a long way and create the words to create a specific-intent regulatory offence.

MR. CHAIRMAN: That's the end of your . . .

MR. HURLBURT: That's really about it, Mr. Chairman.

MR. CHAIRMAN: Do you have a summary of what you would like to see agreed to?

MR. HURLBURT: Just the three major points we've talked about and the defence of insanity. Again, the one that the Summary Convictions Act be amended so that it will be clear whether the Crown has to prove there is intent before there is an offence, which is what we've been calling the mens rea offence; that it would be labelled that or would be labelled an offence in which, however without fault, as long as you did the act you're guilty. The third category, which we would recommend be the residual category, where things fall unless it's otherwise stated, the Crown would not have to prove intent, but if the accused could bring positive evidence to show that he had taken reasonable care to avoid committing an offence or that he reasonably believed in a state of facts — the emphasis is on "reasonably", and he'd have to explain why this was so — under which his conduct would not have been an offence, then he should be acquitted. That's a major point.

Again I remind you that it's the law — and a good part of the law now — that you can't tell until you've been to see the judge, and possibly until you've been to see three more judges and conceivably until you've gone to Ottawa and seen five more yet, and that this is an aspect in which it would be a good thing if the Legislature would simply declare itself. It would also mean that whichever your view is, it would then be in the statute. That's a major point.

Secondly, the unpublished statute or regulation: the general rule would be that if it isn't in the Gazette or hasn't been filed with the municipal clerk, you shouldn't prosecute under it unless the regulation specifically says so and the authority has done what it could to bring it to the attention of the people involved. Of course, if anybody knew about it, he'd be guilty anyway.

Third is the defence of officially induced error, in which the accused would be able to say: "Here are the steps I've taken to find out what the law is, and there are the steps that a reasonable person in my position would have taken. I received such and such advice from a government official whose business it is to give that advice, and I relied on it." Or alternatively, "I or my lawyer read this judgment of Judge X that said that that's what the law is, and I conformed to it, even though it was afterwards upset."

Finally, as you point out, the point about the defence of insanity. Those are the points that are in the report.

MR. CHAIRMAN: Comments or questions?

MR. COOK: Mr. Chairman, on a procedural point, should we be disposing of the recommendation now while it's fresh, or should we be mulling it over and considering at the next meeting what the committee would like to do by way of a report at the spring session?

MR. CHAIRMAN: Mr. Clegg, would you like to . . .

MR. CLEGG: Mr. Chairman, it's open to the committee to do either. Many of the committees on different subjects in this Assembly have received representations or evidence and have almost invariably, unless the matter was extremely clear-cut and simple, deferred a decision to a later time, because it's better perhaps to think over things. I can frame a series of resolutions which would go on notice to the committee to enable the committee to make decisions as to which of the recommendations should go forward. My advice to you is to adjourn debate on this topic at this time and bring it up for a decision session at a later stage.

MR. COOK: I would prefer that too.

MR. CHAIRMAN: Do you want to adjourn debate on this topic?

MR. COOK: I move that we adjourn until we next meet at the call of the Chair.

MR. CHAIRMAN: Agreed?

HON. MEMBERS: Agreed.

[The committee adjourned at 3:16 p.m.]