[Mr. Topolnisky in the Chair] [10:02 a.m.]

MR. DEPUTY CHAIRMAN: Now that we have a healthy quorum, I'll call the meeting to order. The first order of business is approval of two sets of minutes, February 5 and February 6, 1985. First, are there any errors or omissions in the February 5 minutes?

MR. R. MOORE: I move their approval.

MR. DEPUTY CHAIRMAN: We have a motion to approve the February 5 minutes. All in favour?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Carried. Minutes for February 6, 1985. Moved by Mr. Batiuk. Any concerns or questions? All agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Carried.

Mr. Hurlburt, we'll continue the discussion of the Family Relief Act.

MR. HURLBURT: Mr. Chairman, I'd better start by backtracking a bit from yesterday, even though this will probably add fuel to Mr. Lyson's concerns. I think I was talking as if the continuance of an order for support or maintenance under divorce past the death of the paying spouse would be automatic. It actually isn't automatic. It's quite possible, and it does happen. But it has to be specifically provided for and arranged, and that doesn't always happen. So I think I would have to agree that there might be cases in which our proposal would bring in the divorced wife and in which she might not be brought in otherwise. I'm talking about a rather muddy legal situation. Legally, the order can go past death. In fact, it doesn't always do so.

I've actually made my pitch on this subject. I just shifted a little bit, and then I've had my say. Number one, it is a claim that is outstanding at the date of the death. Our position is that something should be done about it and that this is the place to do it; that yes, you can find bad scenarios if you do it, and you can also find bad scenarios if you don't. If the divorced wife is in fact dependent on the order and you cut it off, that's not good either. But I've made my pitch on that subject, and that's all I can do.

MR. CLEGG: Mr. Chairman, just for clarification. Is it the institute's proposal that the divorced wife would be able to make an application only if the order under which she receives support provided specifically that support was available after death?

MR. HURLBURT: That is not our position, Mr. Chairman. It's conceivably a position that the committee might take, but it's not our position.

MR. CLEGG: Your position is that if she has an order under which she is currently receiving support at the time of death, then she can make an application to the court, whether or not the order deals with the death situation.

MR. HURLBURT: That is our recommendation, Mr. Chairman.

MR. CLEGG: Thank you.

MR. R. MOORE: Mr. Chairman, I'm just trying to gather my thoughts from where we left off yesterday. Mr. Hurlburt, maybe you covered it. It's on page 3, where you have When is Need Determined? You list a date of application in your proposal. A lot of these proceedings go on for years, and needs change from time to time. Shouldn't you have a limitation on this? At the time of death there was probably no need, so nobody applied. But three years down the road, just when you're finalizing everything, somebody says, "My need is very great and I need a chunk of the action." It allows them to come in at any given time. Don't you think there should be a time limit from the time of death for them to declare their need?

MR. HURLBURT: Under the existing Act the application can be brought at any time there's still property in the estate. If the property has been distributed, there's nothing to apply about. The estate must not be administered, in the sense of distributing of property, for six months after letters probate or letters of administration are started. So there is a time limit within which the dependants can come in and be assured that the property is there, that

any property the deceased had would still be there. After that they can still come in, but they may have missed the property. What we have to say wouldn't change that. It might suggest that needs that previously wouldn't have been met would be met, and in that sense that may be what is troubling you.

I would rather hate to suggest cutting off the right to make the application. If you wanted to choose a different date for when you assess the need, that could be done. But it wouldn't be later than some time or other — shall we say the six months? I don't think I'd suggest it, but I can understand your position. That would be something you could do. Instead of saying that need would be determined whenever you get to court, you could say it would be determined at some date like the end of that six months, if that were a concern.

MR. LYSONS: I would like to question who can claim. There's a term, quantum meruit. It's not in here, and I suppose it could be explained. Could you . . .

MR. HURLBURT: It doesn't quite apply to this circumstance, Mr. Lysons. Quantum meruit is another of these legalese things that people, lawyers particularly, should never use, but we haven't devised an English phrase for it. It applies in something like a contract situation. I have done work for you; there was some sort of understanding that I didn't do it for nothing, but for some reason we haven't got a legally binding contract that would stand up as such in court. Then the court sometimes will say they will pay on a quantum meruit — however much the person deserves, how much he merits. But that's a sort of legal claim against an individual, which is somewhat different from this support claim. The Family Relief Act isn't based on how much you've earned, really, which is quantum meruit, but on a sort of presumed obligation to support and on the basis of need rather than merit, if you like, in the narrower sense. I don't know if that helps.

MR. LYSONS: In other words, you're saying it's an unwritten contract, if you like, or an implied contract where there could be a claim?

MR. HURLBURT: Something in that general area. Mr. Clegg may know as much or more about it than I do, but moving over towards a contract. It's like a contract claim, except that for some legal reason you haven't really got a formal contract or a contract the court will recognize.

MR. CLEGG: Mr. Chairman, just to add something on this, and I don't claim to know more about it than Mr. Hurlburt. I think that where a claim for a quantum meruit, an amount which is warranted, might be made would be for a claim against the estate by somebody who had done some work for the family. It might be somebody who had worked for the family, a housekeeper or somebody who looked after the family. It wouldn't be on the basis of family support; it would be a claim for work done against the estate. It might be from a garageman or a farmer or a gardener or a housekeeper. It's not the kind of situation which could arise when somebody is saying, "I need some support from the estate because I am connected by family to the deceased."

MR. LYSONS: So it would have to be almost a provable amount or a stated amount.

MR. HURLBURT: I can think of an example. There's a case in the Supreme Court of Canada where the nephew had agreed with an aunt to look after her, do certain things for her, throughout her life, and in exchange she agreed to leave him her house in the will. She didn't do it. The nephew sued on the contract. The court said that the sale of land is a kind of contract that has to be in writing. It wasn't, so they couldn't enforce the contract. But because this chap had put himself out at her request, they awarded him $2,000 or $3,000, or something like that — the value of the services he had in fact provided. That is, he thought he was providing them under a contract, the contract was unenforceable, so the court said, "They'll give you something for your trouble; they'll give you what you've earned."

MR. LYSONS: Or an executor of an estate could do that as well?

MR. HURLBURT: You mean do the work or make the payment?

MR. LYSONS: Make the payment.

MR. HURLBURT: An executor has to stay

fairly close to the law. He would have to pay because he thought there was a valid claim.

MR. LYSONS: Agreeable to everybody else.

MR. HURLBURT: If the people all agree, anything can be done.

MR. DEPUTY CHAIRMAN: Any other concerns or questions? Continue, Mr. Hurlburt.

MR. HURLBURT: I had dealt to the extent I could with the divorced wife. I think that's where we were. The additions to the list: that is, under the existing Family Relief Act the people who can apply are the surviving spouse and the minor children and an adult child who is physically or mentally handicapped and therefore unable to earn a living. Property can be set aside from the estate in order to provide support. In addition, there's one qualification on the illegitimate child of a deceased man. The child can claim only if he's been acknowledged or found to be a child in affiliation proceedings. We suggest what is really a minor change there, that we've already dealt with in the status of children Act, that if a somewhat different kind of court order is got, the child would also be able to apply. That isn't really much of an addition.

With regard to the minor child we have suggested that, times having changed and many young people going on and being expected to go on to secondary education of some kind — university, NAIT, that sort of thing -- if the child is in fact continuing his education, then you could provide for the support of that child until he finished it up to the age of 23. I can't quite remember now why the magic number was 23. I think that was our estimate of when a child who is not going to be a perpetual student might reasonably be expected to finish his education.

We're influenced here by the divorce Act, under which a child of the marriage can be required to be supported without age limit. The courts have basically held, I think, that while the child is part of either spouse's household and continuing an education, an order on divorce can require either spouse to provide for the child's support even though the child is now an adult. So we are suggesting an addition to that extent. We think it should be clear, basically, that the parents' obligation, if you can call it that under this Act, generally expires when the child ceases to be a child, that is, at the age of majority -- we think that's what the law is now, but it isn't absolutely clear — but that there should be this possible extension while the child is going to university or NAIT or getting a postsecondary education.

We would also add — I'm on the right-hand column on page 2 — a child whom the deceased has treated as his own and who is dependent at death, with the 18-year-old limitation. There can be quite a difficult choice if somebody has taken a child into the household and really raised him as his own child but without the child being his own child, whether legitimate or illegitimate. Because the deceased was benevolent, in effect, there's a question whether you should load his estate with an obligation to continue the benevolence. We concluded that on the whole it's reasonable to think that in most cases somebody who thought about it would do something about it. That is, if the "parent" who takes the child into his household thought about it, he probably would do something to see that the child got at least up to a reasonable age. Having taken him in, he probably would want to look after him. Sort of on that basis, we suggested that that child should be built in also. Again, this is just support until the child reaches his majority, which is 18.

Finally, we've also added parents and grandparents if they were dependent on the deceased person and had been for three years. Under existing Alberta law there is a statute, although it's very rarely used, that says that during lifetime, if a parent or grandparent is indigent, it's the child's obligation to support him. I don't know that that statute has been enforced very often, if at all, but it's there. It does say there is a legal obligation of some kind, during lifetime, to look after your parents and grandparents. We've cut it back a little bit to the case in which the deceased person was in fact supporting his parents or grandparents, but we then suggested if that were so, they should come in and be able to claim support from the estate.

We did not go on to suggest that grandchildren should come in — and we've been told by some people that that's pretty parsimonious -- more or less on the grounds that a parent may be said to choose to become a parent, but a grandparent doesn't choose to

become a grandparent. He or she may want to be, but it isn't something that's under his or her control. Therefore, we didn't think that the estate should be obliged to make provision for the grandchildren.

As far as who can claim, that's our recommendation: some extension; we hope not too much. I don't know whether you want to stop there, Mr. Chairman.

MR. CLEGG: Just for clarification, could I ask Mr. Hurlburt what the position of the foster child is?

MR. HURLBURT: A foster child simply means a child whom I take in. Are you talking about the technical kind where the department . . .

MR. CLEGG: Yes.

MR. HURLBURT: That would not impose any obligation. A foster child who is placed by the Department of Social Services and Community Health would not have a claim under this. I think our report specifically says so.

MR. CLEGG: I just wanted to clarify that for the record. A foster child who was taken in and fostered voluntarily but not by arrangement with the department would come up against the test as to whether the deceased person had formed and demonstrated a settled intent to treat as his child, whether or not he had gone through adoption.

MR. HURLBURT: That is it. If I were to take into my household and treat as my own child somebody else's child and was supporting him at the time of my death, then under our proposals that child would be entitled to ask for support from the estate. If the child were placed with me under some arrangement in which I were being paid for looking after him, the same thing would not follow.

MR. DEPUTY CHAIRMAN: Any other questions or concerns?

MR. HURLBURT: Toward the bottom of page 2 there's just a very minor detail that we've suggested. Under the present law the surviving spouse and an adult child who is handicapped are to have their opportunity to claim under the Family Relief Act explained to them, but only if they live in Canada. We've suggested that even those outside Canada should be entitled to an explanation, if those inside Canada are entitled to an explanation. This might add some burden to the estate administration, but we don't think it's very much.

Moving over to the next page, under the present Act the judge is to determine what is adequate provision and proper maintenance. The Act doesn't tell him very much what to think about. It does say that the court can consider the reasons why the deceased person didn't provide support, or more support, if those reasons are known. If you write in your will: "I don't want anything more to go to my wife because she belongs to some religious group of whom I don't approve" or something like that, the court can look at it and see whether it thinks that is a reasonable enough sort of thing or whether it isn't. The court can also refuse on the grounds of the applicant's character or conduct. If I've been declining into my old age and my nearest and dearest have refused to have anything to do with me, then when I die the judge is entitled to look at that when my nearest and dearest say that they would just love to have part of my estate turned over for their support. That's what the present Act says.

If you look at the right-hand column at the top of page 3, we have suggested that the Act set out a number of things that the court really should look at. Actually, it's fairly similar to what the courts have looked at, and we think it's a reasonable thing and would add something to the Act and help the court.

MR. LYSONS: I would like to ask you, Mr. Hurlburt, through the Chair: if a man divorces his wife, she gets half, or vice versa, but if someone dies, they need to leave their spouse only a third. How is this fitting in?

MR. HURLBURT: Apart from the Family Relief Act, you don't have to leave your spouse anything. The Intestate Succession Act will distribute the property if you don't make a will, but apart from this you can do what you want by your will. If there's a divorce during lifetime, the Matrimonial Property Act applies. That's your half, although it may or may not be half. It isn't half of all assets; basically its only half of the accumulation during marriage. But the Matrimonial Property Act does not apply on death; there's no division

of property between the estate and the survivor on death, except if proceedings have already been started or something. But generally speaking, there's no division on death.

So this is the only thing you're looking at: if I die intestate, leaving all my property to the province of Alberta or to the Standing Committee on Law and Regulations, the only thing my spouse can do is to come in and say, "He didn't make adequate provision for my proper maintenance." Mind you, in my case it might be the other way around.

MR. CLEGG: Mr. Chairman, I'd like to ask whether the institute's recommendation intends to remove the basis of character as a ground. I may have been reading this too fast, but it doesn't seem to be mentioned in the list.

MR. HURLBURT: I think that would be an indication that my list is deficient. "Conduct" of dependant is there.

MR. CLEGG: It says "character or conduct" in the present Act. Maybe we should leave that in, to avoid the implication that you're changing that judgmental standard.

MR. HURLBURT: I'd have to go back and see whether my summary is wrong, but I don't think I have any objection to it. I think bad character will always be evidenced by bad conduct anyway, so it may be redundant. But no problem.

The next point is the one Mr. Moore mentioned: when is the need determined? He may want to say something about that.

The next point is Contracting Out. The present statute is silent, but the court says you can't waive your rights. Our recommendation says that an agreement waiving rights to claim under the Family Relief Act wouldn't stop the court from making an award for support, but it would be something the court should take into consideration. It may be that under the circumstances it's a perfectly fair . . . If it's part of a divorce settlement under which property is passed, for example, it may well be that the court would say, "That's the end of it. You've made your deal and that's it." On the other hand, if the circumstances were a trifle shady and it looked as though the agreement was improvident on the part of the person who signed it, then the court could still go ahead and provide for support.

The next point is blindingly technical, I'm afraid. It doesn't happen too often, but it does happen. It may turn out that the deceased person made a contract to leave property by will. If the will does leave the property, under the present Act the court can still look at whether the deceased got the right amount for it and use the excess for support. That's what the courts have held; the statute is silent. If you got $1,000 and the property is worth $10,000, the court can use the $9,000, which is still in the estate because it's only left by the will, and treat that as being available for support. If the deceased got $10,000 for $10,000 worth of property, the court would not be able to make that award.

We have suggested that if there is a contract to make a will leaving property to somebody -- it may be the housekeeper or the son who has worked on the farm -- the court couldn't use that property if there was other property in the estate; that is, it would first look at the other property. If the other property weren't enough, however, the court could use the property left by the will to the contracting party, having regard to the items I've listed in the second column: the value of the property; the value the deceased received; the surrounding circumstances, like then life expectancy; the expected value of what the other party would deliver; and the amount of deficiency in the estate. We've said that if you run into those specific circumstances, first look at the other property and then do what's just with respect to the rest, having regard to these various things.

If the deceased has agreed to leave property by will and doesn't do it, then for the purposes of this Act we have said to let the other party get damages up to the value of whatever he supplied. It's an attempt to protect the legitimate interests of the other side to the contract and the legitimate interests of the dependants, who should be supported. So that's what we said to cover that rather technical or detailed situation.

At the bottom of the page we go into another area that we've already dealt with in a similar way under matrimonial support, which you looked at a couple of weeks ago and which is also dealt with in the Matrimonial Property Act. It is the case where, in order to defeat all these claims, I give away all my property during my lifetime or make sure I don't have an estate

for people to claim against anymore.

We suggest that there are two or three different situations. One is in cases where I've put property into a joint tenancy or a life insurance policy, or something, that won't come into my estate. Under the present law those things can't be touched at all. As far as property given away is concerned, that now can't be touched at all. We have suggested that if other property in the estate is insufficient, if there has been any form of disposition or transfer of property which left the deceased in possession of it and with the benefit of it, or if there is a joint bank account or a beneficiary under pensions, annuities, insurance, and so on, within three years it should be possible to go to the donee, the person who received it, and have the court order some payment back into the estate for the purpose of providing support. I think this is the same pattern that's in the Matrimonial Property Act and the matrimonial support thing we went through last week.

There are some small points of detail. If necessary, the court should be able to hold off the administration of the estate, or part of it. It might do that if a claim can't be perfected for awhile. It would have additional ways of providing support from the estate, by having property transferred or what have you. Finally, under this heading, at the present time the support has to come from the whole of the estate in proportion, ratably or pro rata. This would allow the court to say, "Well, obviously some bequest or other was number one in the deceased's mind, so we'll protect that one and take the support award out of the residue" or something like that. That's just to make it more flexible and try to protect the people that the testator or the deceased would have wanted to protect.

Finally, we've suggested that it should be clear that the Crown is bound by this Act, because on an intestacy the Crown is the ultimate heir. If there are no next of kin, if you can't find anybody related, then it goes to the Crown and the benefit goes to universities. The Crown sometimes says it's not bound by statutes. It could conceivably say, "You can't provide for support out of this estate because it's our property," and we're saying that the Act should cover them like anybody else.

MR. CLARK: Just for clarification. Did I hear you say that at the present time, if you have a joint ownership or a joint bank account with somebody, that cannot be touched; that under the changes, that joint bank account or joint ownership of property you have with someone else would not fall to the person in joint but that the whole property would go back into the estate? Is that what you're saying?

MR. HURLBURT: No. Number one, let's suppose that I put property in my name and my son's name, as joint tenants, in order to beat out my wife. Under a joint tenancy the survivor takes all, so that if I die the property immediately belongs to my son. We are not saying that my son would have to put the property back into the estate. What we are saying is that if my wife made a claim for support from my estate and if there weren't sufficient assets in the estate already, then, and only then, the court would be able to say to my son, "Pay some part of your benefit into the estate for the wife's support." It wouldn't be a case of returning the land to the estate, it wouldn't be a case of taking away all the benefit, and it wouldn't be a case of taking away any benefit unless the estate had been made too small — and this is only if it happened within the three years before death.

If you find that I've taken a substantial piece of property and put it in joint tenancy with somebody much younger, who might reasonably be expected to outlive me, probably I'm doing this in order to strip my estate. So we would give some right to go after it, but only after everything else had failed and only to the extent necessary to make the support order, and only if this had happened within three years before death.

MR. CLARK: If it's been going on for five or 10 years, then it doesn't apply.

MR. HURLBURT: It's too late.

That's all I have, Mr. Chairman.

MR. DEPUTY CHAIRMAN: The question arises whether we want to deal with the Family Relief Act at this time and accept it, or let it stand over and accept this at some future meeting.

MR. LYSONS: I move that we accept it.

MR. DEPUTY CHAIRMAN: I am wondering whether we should accept this point by point or

step by step, or the whole Act.

MR. CLEGG: We should first deal with Mr. Lyson's motion as a motion that we deal with the matter now. When that is passed, we can deal with it one by one.

MR. DEPUTY CHAIRMAN: We have a motion to accept the Family Relief Act. All agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Contrary? Carried. We'll probably take this point by point. The first one is Claim Conferred by the Statute. No change proposed. Any question there?

MR. HURLBURT: There isn't really a question there, Mr. Chairman. That's really information.

MR. DEPUTY CHAIRMAN: Then: Who Can Claim?

MR. LYSONS: As long as there's clarification, and it is worded properly, that the divorced spouse can't re-enter. Mr. Clegg had a few words yesterday as to how that could be worded.

MR. CLEGG: Mr. Chairman, I think the motion Mr. Lysons might want to make would be that there would be an amendment that the divorced spouse with a support order would be able to claim only with respect to the security of her support under that order.

MR. DEPUTY CHAIRMAN: Are you making that motion, Mr. Lysons?

MR. LYSONS: Yes.

MR. DEPUTY CHAIRMAN: Any other questions? All agreed on Mr. Lyson's motion?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Those contrary? Carried.

The next point, Protection of Right to Claim. Are you agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Are you agreed on How Much Can be Claimed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Are you agreed on When is Need Determined?

HON. MEMBERS: Agreed.

MR. LYSONS: Oh, it's a little late now, but maybe Mr. Hurlburt could . . . When is need determined? "Not entirely clear, but generally as of date of death". Then you have "Date of application". I have missed that up to this point. Wouldn't it still be date of death?

MR. HURLBURT: Mr. Chairman, our proposal is that the court can look at the situation as it stands when you get to the court. I think this was the point that Mr. Moore was bothered about a little earlier, as to whether that's right or whether you should choose some other date. I don't know that I have too much to say, except that I think our proposal is that you deal with the situation as you find it rather than the situation as it was some time in the past, that that is the way to go at it. That's my whole pitch on the subject.

MR. R. MOORE: Mr. Chairman, there seemed to be some question on that, and I raised it earlier. Just to clarify it, so we can move on rather than having little discussions within discussions here, I move that we consider recommending that, if there is still some doubt in the members' minds on this point, the institute consider putting a six-month time limit on When is Need Determined, as the time that they'd have to apply, rather than leaving it open-ended.

MR. COOK: Mr. Chairman, if I could speak to that. There might be some difficulty if, for example, an illegitimate child registers his claim a year after the death. What would you do? If we've got this time limit, the person might miss the deadline.

MR. HURLBURT: I didn't understand Mr. Moore to be suggesting a deadline on the application. I think your point was as to what point in time you're determining the need. So even if you came in a year afterwards, you

could still look at the earlier time as to when the provision should be made.

This sort of goes back to just what it is you're doing here. If you are simply looking at me — I'm the deceased — and you say, what ought I to have done, then you will really go back and look at the date of death, because that's the time when I ought to have done something. So that's one way you can look at this — as if I had at least a moral responsibility to do something and that by dying without a will or with a will that didn't do what seems to be right by my dependants, I hadn't carried out that responsibility.

On the other hand, if the main consideration is really that there is some sort of public policy interfering with my ability to make a will in order to see that my dependants are supported -- not provided for in any capital sense but supported -- then you're more likely to look at a later time, such as the time when it comes before the court. I don't know that the point ... Well, it can be important, and it really depends on how you look at the whole process. Certainly, if the committee asks us to look at something, we'll look at it and report back.

MR. CLEGG: Mr. Chairman, it would be open to the committee to do as Mr. Moore has suggested and ask the institute to report back in more detail on this issue, if the committee feels it wants to see more argument and maybe more examples of how this particular point might be more equitably determined.

MR. LYSONS: Under normal circumstances I think six months is probably adequate, because it takes that much time to get an estate processed and so on. Six months would be the minimum time, although apparently some are done sooner than that. Let's take, for instance, a posthumous child. There may be a situation where it's six months before it's found that there is some major medical problem with the child. In other sections we have dealt with the question of up to age 23, which has no relevance that we can really put our finger on except that maybe it's about the time someone should be through school. So I would like to make a motion to delete When is Need Determined and have more research on it.

MR. DEPUTY CHAIRMAN: Was that your motion, Mr. Moore?

MR. R. MOORE: Just to clarify it again, my motion was that the institute review this area and report back on it, that we would like a little more information on it. Just for the clarification of those here, my intent was the need, not the date of application. Need up to six months after the time of death should be the area that they can claim a need for, not, say, at the date of application. The application can come two years down the road if it's still going through the process, but they shouldn't base it on the need three years down the road when actually it relates back to that period. I would make the motion that the institute review this and report back.

MR. DEPUTY CHAIRMAN: The motion is to hold the point, When is Need Determined, until additional information is brought back. Agreed on that?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Contracting Out: any question on that? Next page: Where Deceased Made Contract to Leave Property by Will. Agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Property Which May be Used for Maintenance of Dependants.

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Additional Powers of Court.

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Binding Effect on Crown.

HON. MEMBERS: Agreed.

MR. CLEGG: Mr. Chairman, for the record I suggest you ask for somebody who will be recorded as a mover of those motions, because as we went through, essentially they were being moved by the Chair, which isn't procedurally correct. Could you could ask for a member to volunteer to be the recorded mover of those?

MR. DEPUTY CHAIRMAN: Do we have a

mover? Mr. Moore.

Moving along on the agenda, Discussion of Minors' Contracts.

MR. HURLBURT: This is a new topic, Mr. Chairman, and quite a different one: Minors' Contracts. A minor, for this purpose, is somebody who isn't yet 18 years of age. By the way, I'm still trying to evolve the best form for these statements or charts, or what have you, and at the beginning, I've started to put in what we think we're trying to do. I hope that's of some help.

The law is based on protecting immature people against getting entangled in contracts because of their immaturity. Obviously, you can't have a babe in arms signing a contract. There may be some question as to whether a 16-year-old should or shouldn't, but that's the basis of the law. On the other hand, if you protect the minor, you may do some harm to the other side of the contract. The law has got itself into some rather strange convolutions in order to try to meet those two objectives of protecting the youngster without being too harsh on the adult. We aren't suggesting a change in the basic purpose of the law; we would like to make it less confused -- or we hope that can be done — more efficient, and do away with some unfairness.

In the chart on the left-hand column under item 2, there's a statement of five different classes of contracts that the courts have worked out and dealt with in five different ways. The first is what is called "necessaries". If you protect young people from entering into contracts, and do that in every case, and say they're not bound by them, you may protect them to the extent that they can't rent a house, buy a loaf of bread, or get medical attention — I shouldn't say that under medicare, I suppose; get a lawyer's advice, if you like -- simply because . . .

MR. COOK: Is that necessary?

MR. HURLBURT: It has been held so. The thing is that you can protect him so he starves to death. So the law has said that he has to be able to pledge his credit for "necessaries", whatever they are. It's a rather confused category.

Then you'll see two other kinds of contracts. One called "beneficial contract of service", which can be an apprenticeship, is the main example. The minor will be bound by that, because presumably the law wants him to be able to contract for that sort of thing. There's another batch, which is called "voidable". That means there's something there; they're good until they're set aside. In that class you have a case where, for the time being, everybody is bound by the contract, but the minor can repudiate it and then he isn't bound any longer. Those are contracts about land, contracts for shares, partnership agreements, and marriage settlements, which aren't very common in this part of the world.

Next is another batch, which he won't be bound by at all unless, after he becomes 18, he ratifies or says, "I now want the contract." That includes any kind of business contract, the settlement of a law suit, and in fact anything else that isn't in some class or other; it's a sort of residue. He isn't bound unless, after he's 18, he specifically says he wants to be bound.

Finally, there's a class in which the minor is never bound: contracts that are prejudicial to the minor. An example is that he has sold shares and indemnified the purchaser against loss. The courts have said, "That's prejudicial; that's void; it's nothing; it's no contract; he's not bound at all."

The problem with all that is that these categories are very artificial, very hard to tell one from the other, very confusing. People don't know what their rights are — at least it's very difficult for anybody who wants to find out about the law to know what it is he can do. That, we suggest, is bad. It's very confusing as to when the minor can get money or property back that he's paid. Also, in many cases the present law leaves the other side in a pretty bad situation. There may be nothing he can do to get his property back and he has no benefit, and that sort of thing.

So what we have suggested on this main question is what is in the right-hand column, and that's a little complex too. What we say is that all contracts a minor enters into should fall into one of two categories. The first one is a contract in which all the appearances are that this is a reasonable and good contract, in which everything appears to be on the up-and-up and which the other side reasonably believes to be a fair contract for the minor. Certainly this would cover your "necessaries" as long as the price is reasonable. It would cover anything

that it's reasonable to allow a minor of the age we're talking about to contract for, if it's a fair deal. We think this would leave the other side reasonably free to deal with the minor or would give them a reasonable test — I can make this deal with this young person if it's a good deal from that young person's point of view. If I'm selling him a motorbike or renting him a house, or what have you, as long as it looks like a reasonable deal to me, I can enter into it safely.

We did carve one exception out of that. If, despite the appearances, it in fact is a bad deal, the minor could ask to have it set aside, but there would then be an adjustment. If he could put me back into as good a position as if the contract hadn't been made, then he can get out of it. He doesn't have to give me my profit, but he should give me back anything I've put out under it.

So that's one class, a class of contracts where everything looks all right: it's an ordinary deal; it's something the minor might reasonably be expected to have need of. That's binding as if the minor were an adult, subject to this one qualification.

The second category would be any other contract. The basic rule there would be that the contract is not enforceable against the minor; it would be enforceable against the adult. We're talking again about a contract which can't be justified on the grounds that it looked good for the minor so you can afford to get somewhat harsher on the adult side. Here, if the minor does repudiate, the court would be able to adjust things. If the minor had received a substantial benefit under the contract and the contract is then declared unenforceable against the minor, the minor could be required to compensate the other side for the benefit. Or if the minor had received the motorbike, he'd have to give the motorbike back, under court order. Once the minor becomes a major, once he reaches 18, he would be able to affirm or repudiate the contract. If he brings an action for relief from the contract, or what have you, he has obviously repudiated it.

That's the main part of this report, Mr. Chairman. That's the general line of thought we suggest. It's intended to protect young people. It's intended not to be too hard on the other side.

I should say that a lot of the problem with this law disappeared when the age of majority came down to 18. A lot of 19- and 20-year-olds get into business, make contracts, do all sorts of things; 17-year-olds aren't as likely, but there are still some. I can still remember somebody coming up to Mr. Justice Kerans of Calgary to get a contract affirmed, or something like that. It turned out that this young chap had built up a real little business empire and wanted to sell it. The judge said, "And he's coming to me for confirmation?" We have this chap with this extraordinary business flair, and he has to come to a judge to get his thing rubber-stamped. So there can still be young people who make deals that the law should cope with in some reasonable manner. We say: protect the young person, but don't hammer the other side too hard. This is our way of getting at that.

MR. DEPUTY CHAIRMAN: Any comments or questions?

MR. CAMPBELL: Mr. Chairman, I move that we accept this report.

MR. DEPUTY CHAIRMAN: Any debate on the motion? All agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Contrary? Carried.

MR. HURLBURT: Then there are a number of details, Mr. Chairman. The next point is: so there is a contract that's unenforceable. Under it the minor has turned property over to the other side, and then you get difficult questions of title. The real problem arises if the other side transfers the property further. The real question is: what about the third party? I buy a motorbike from a youngster and don't pay him as much as I should. I then sell the motorbike to Mr. Clegg. All he knows is that I have a motorbike. When the youngster comes to set this thing aside, on the ground that I took advantage of him, what should happen to Mr. Clegg? If he has paid me and has acted in good faith, should he be able to keep the motorbike? Our answer is basically yes; treat the contract as good until it's set aside for this purpose so that I get legal title to the motorbike and can transfer legal title — or all kinds of title — to Mr. Clegg if he buys it from me. That's the essence of that point.

MR. COOK: Mr. Chairman, could we examine point 1?

MR. HURLBURT: Do you mean the statement of objectives?

MR. COOK: No. I was thinking of your (1) and (2). The objectives seem self-evident. Do we need to accept the objectives specifically?

MR. HURLBURT: They're there for information, unless somebody doesn't like them.

MR. DEPUTY CHAIRMAN: That's page 1, Mr. Hurlburt, Objectives and Contracts.

MR. COOK: I thought we had accepted that. I don't know how you want to do it. Under point 2, Contracts, Institute Proposals (1) and (2) . . .

MR. HURLBURT: I thought you were dealing with the whole heading — item 2, Contracts — when you moved previously. Were you not, Mr. Chairman?

MR. DEPUTY CHAIRMAN: Yes.

MR. HURLBURT: I'm now down at number 3.

MR. DEPUTY CHAIRMAN: Number 3 on page 2.

MR. HURLBURT: Sorry; I guess that's the problem.

MR. COOK: I'm slower.

MR. CLEGG: For clarification, Mr. Chairman, my understanding of the recommendation is that if there has been a purchase of something from a minor and a subsequent sale to somebody else, the minor would have a remedy against the person he sold it to but couldn't go after the second person if that second person acquired it in good faith. The minor would still have a remedy but only against the person he sold it to, not against the subsequent purchaser.

MR. HURLBURT: That is correct, Mr. Chairman.

MR. CLEGG: That seems to be consistent with the idea of protecting the validity of continuing trade.

MR. COOK: I move we accept number 3.

MR. DEPUTY CHAIRMAN: We have a motion to accept number 3. Agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Contrary? Carried.

MR. HURLBURT: Mr. Chairman, item 4 provides a mechanism whereby if there is a contract, it can be entered into and everybody can be safe. It would allow the court to approve a specific contract that a minor wanted to enter into, or the other side could bring it to the court and say: "I want to make this deal, and it's a reasonable deal for the minor. Please approve it." The court could do so. Alternatively, the minor could come to court and say: "I'm perfectly mature. I'm able to look after myself. I don't need the law to look after me, thank you very much." If so satisfied, the court could put a stamp on his forehead and he could go out and make any contracts he wanted to. I don't know whether anybody would ever do this. Probably the specific contract approval might be used occasionally; I don't know whether a granting of full capacity would ever be used. Your 17-year-old businessman could come to a judge and say: "I don't need your help, baby. Just set me free to manage my own affairs."

MR. DEPUTY CHAIRMAN: Do we have a mover for point 4? Mr. Moore. All agreed?

HON. MEMBERS: Agreed. Number 5.

MR. HURLBURT: Under the present law a minor can appoint an agent. That doesn't make a contract good if the minor couldn't have made it himself. We just say: leave it the same way.

HON. MEMBERS: Agreed.

MR. HURLBURT: The next one is a little more difficult. If our enterprising 17-year-old comes to me and says "I'm 19," and I deal with him on that basis, what should the situation be? Under the present law he's entitled to be protected even if he's a liar. We say: let the same continue, again bearing in mind that the adult is only going to be prejudiced if it isn't a deal that

looks reasonable. We say that if you're going to protect minors, you have to do it that way. If you didn't, for one thing people selling motorbikes would simply stick a statement in the contract saying "I am of the full age of 18 years," get it as a standard form signature, and the minor would not be protected. So we say that in this case it may be tough on the adult who doesn't have an all-seeing eye for people's ages and gets one put over on him, but that's the way it should be.

MR. DEPUTY CHAIRMAN: Back to number 5, Appointment of Agent. Mr. Batiuk, you had your hand up.

MR. BATIUK: Mine has been answered.

MR. DEPUTY CHAIRMAN: We need a mover for that.

MR. BATIUK: I'll move.

MR. DEPUTY CHAIRMAN: Agreed on that?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Carried.
Number 6. A mover?

MR. FISCHER: I'll move.

MR. DEPUTY CHAIRMAN: Agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Number 7.

MR. HURLBURT: Now we're talking about wrongful acts of kinds other than contracts. The general law is that a minor is liable for his wrongful acts, though if it's an act that requires intention and he isn't old enough to form an intention, he may get off on that ground. There's a second way the minor can get off. If his wrongful act is something done under the contract, he can get off on that ground. This is a very difficult and confusing sort of thing. The example I put here is that the minor rents a car under a contract that's unenforceable against him. He then takes an axe to the car, shall we say. Under the present law it seems that the courts have gone so far as to say that he shouldn't be held liable. The reason they've said that is that if there's a contract involved, we want to make the whole thing unenforceable.

We are suggesting a rather more restricted protection for the minor. We are saying that if the minor has done an act which would be wrongful under ordinary circumstances and if there is a contract that said he could do that thing, then he would be protected, but not if there were merely some sort of loose association between what he did and the contract. The general rule is that he's liable for his own wrongs. The only defence he would have on this basis would be if he could point to the contract and say, "That contract said I could do that." Then he would be protected. But he couldn't say, "In general I was acting in this area of contract, and therefore you can't get at me." He'd be left a little more on his own responsibility by our proposal than by the present law.

MR. LYSONS: Mr. Chairman, a question. You've confused me by saying that if he took an axe to a car, he wouldn't be responsible.

MR. HURLBURT: Maybe I should change my example to: he went through a red light and creamed it against a lamp post, or something like that.

MR. LYSONS: My question is: what the heck has that got to do with a contract? If he has done something clearly wrong, he should be liable for it, regardless. At five years old, a child quite often knows when he's doing something wrong. But because someone happens to be under 18 . . . What I'm saying is that I can't see why this section is in here.

MR. HURLBURT: I think we're on the same wavelength, Mr. Lysons. What I described is the existing law, and we would take away the protection in that case. I can't really imagine this, but if, under the car rental contract, the other side said, "I will not hold you responsible for damage to the car even if you're negligent," and the youngster took the car out and creamed it against a light standard, the youngster would then be able to point to that provision in the contract just as if he were an adult and be protected, but not otherwise. So we're saying that the contract shouldn't be a protection unless it says it's meant to be a protection.

MR. CLEGG: Mr. Chairman, I was just trying to think of some examples which might help the committee. The one I thought of relates again to car rental. I think the kind of claim that might arise from something that was contemplated by the contract is if, say, a minor rents a truck for hauling rail ties. He goes out and hauls rail ties, puts too many on, and damages the truck, but it is clear that he had rented it for that purpose. He tells the rental people he is going to haul rail ties, and that is something that is permitted by the contract: we will rent this truck to you for hauling rail ties. They couldn't sue him for negligence, because it was something that was contemplated by and specified in the contract, although another person, maybe a more experienced person, might have been liable for negligence. If he drove the vehicle negligently and caused an accident, causing an accident would obviously not be part of the contract and therefore he would not be given the protection of the minor's contract. Maybe those examples are helpful.

MR. R. MOORE: Mr. Chairman, it's an excellent change, and I move that we approve number 7.

MR. DEPUTY CHAIRMAN: Agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Carried.

MR. HURLBURT: Mr. Chairman, the last one has to do with guarantees, the case where an adult guarantees performance of a minor's contract. This can happen if the son buys the motorbike and the father goes on the paper for him. We assume that the contract isn't binding on the minor. I didn't specifically say that in the chart, but that should be understood. We only need to worry about the case in which the contract is unenforceable against the minor. If it's enforceable, the guarantee is valid and the minor is bound, and everything is all right — or all wrong.

But if we take the situation in which an adult has guaranteed payment of a debt by the minor, the present law isn't all that clear. If it's one of those void contracts, the guarantor is probably not liable. If it's one that the minor can either accept or reject, it isn't really clear at all. Finally, if it's put in a little different form, whereby I say that I as the primary debtor will pay, although it's really a guarantee, then I'm bound. So it's really not very satisfactory.

Our proposal does make the adult the goat. An adult who guarantees a minor's contract should be responsible, just like anybody else who guarantees anything else. That's fine, but the next question is this: a guarantor who is made to pay can normally go back against the principal debtor, the person whose debt he guaranteed, which is only fair. Should that be true in the case of this minor? That is, the minor signed the contract, the adult guaranteed it, and the adult has been called on his guarantee and has had to pay. Should he have recourse against the minor? Our answer is no; that would be making the minor indirectly liable on the contract. But this does load it onto the guarantor. He's had to pay, and he now has no recourse. Our answer is, well, people who sign guarantees should expect to pay. If they guarantee a minor, then they shouldn't expect to get reimbursement.

MR. DEPUTY CHAIRMAN: Comments? A mover? Mr. Batiuk. Agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: That brings us down to "Other Business". The next point is Scheduling of Future Meetings.

MR. R. MOORE: Mr. Chairman, we have to be back next week, later in the week. I suggest March 5 and March 6, Tuesday and Wednesday of next week. We have to be here on Thursday.

MR. HURLBURT: Mr. Chairman, I'm very sorry, but I'm on the road all next week. I'll be in Quebec City on Tuesday, and I'm afraid I'm now committed. I think I said earlier, when we were talking about meetings, that I could call it off, but I've now put myself beyond the point of no return, I'm afraid.

MR. BATIUK: Mr. Chairman, I was going to suggest that maybe the 11th and 12th would be ideal, because we have to be in for the 13th and session is opening on the 14th. It's usually customary that MLAs are in for the entire week. If we're going to come in, maybe Monday afternoon and Tuesday morning, the 11th and

12th, would be good.

MR. R. MOORE: I second that motion.

MR. DEPUTY CHAIRMAN: Is the 11th and 12th agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: That's contingent on the availability of members. A motion to adjourn? Mr. Clark. Seconded by Mr. Batiuk. Agreed?

HON. MEMBERS: Agreed.

MR. DEPUTY CHAIRMAN: Contrary? Carried.

[The committee adjourned at 11:34 p.m.]