[Chairman: Mr. Schumacher] [8:35 a.m.]

MR. CHAIRMAN: Ladies and gentlemen, I see a quorum. As our notice indicated, we're here today to deal with Bill Pr. 10, the Brandon Paul Lumley Limitation Act. I'd like to welcome Mr. Major, Mr. and Mrs. Lumley, and the intervenors with respect to this Bill.

Our practice is to have Parliamentary Counsel give a report on the Bill. Then everybody who will be giving evidence will be sworn. Then Mr. Major will have the opportunity of explaining to the committee why we're here and the need for this legislation, followed by the evidence of, I assume, Mr. and Mrs. Lumley. Following that, I believe we will give the opportunity for any cross-examination that may be required by counsel for the intervenors. Then members of the committee will be given the opportunity to ask questions or make any comments they wish. Then there'll be an opportunity for closing statements by those opposed to the Bill, followed by a closing statement by Mr. Major.

Oh, yes. I should ask: do the intervenors have any evidence that they wish to present? Is there anybody here as witnesses on behalf of intervenors?

MR. LOWE: Mr. Chairman, Dr. Hunt and Dr. Bladek, who would be named as defendants if this Bill were permitted, are here with me today. I don't anticipate the need for any direct evidence from them, but that, of course, depends on what we hear from my learned friend and from his witnesses.

MR. CHAIRMAN: I think I should state that I believe the committee does not want to try this action. We are not interested, I guess, in liability. That will be for a different court than this. All we want to know is information relating to that narrower question of the possibility of pursuing an action. We don't want to, I believe, hear about liability. So if that is well understood by everybody, are there any other questions about our procedure? If there aren't, then I'll ask Parliamentary Counsel to give his report on this Bill.

MR. M. CLEGG: Mr. Chairman, this is my report on Bill Pr. 10, Brandon Paul Lumley Limitation Act.

The purpose of this Bill is to enable a judge to consider whether or not the time allowed by sections 55 and 56 of the Limitation of Actions Act should be extended to permit the commencement of an action by Brandon Paul Lumley by his next friend, Joni Marie Lumley, against the named putative defendants in the Bill. The Bill, if passed, would provide for an exception to the general law of limitations. The Bill does not contain any further provisions and is similar in its content and structure to previous Bills that have been brought before the committee in other circumstances on rare occasions in previous years.

Mr. Chairman, both the petitioner and the intervenors have been advised, as you mentioned, that the committee would not wish to hear evidence with respect to alleged negligence or the litigation that [inaudible] should restrict its evidence to the matters which justify an exception being made to the general public law and policy with respect to the law of limitations and as to what exceptional circumstances existed which might justify such an exception.

Thank you, Mr. Chairman.

MR. MAJOR: Excuse me, Mr. Chairman, I wonder if the Bill could read "for the continuance of an action."

MR. CHAIRMAN: I believe that an action has been commenced, but you're prevented from continuing.

MR. MAJOR: We may be, yes.

MR. M. CLEGG: Mr. Chairman, this is a matter which we can deal with if the Bill proceeds. It's just a matter of picking the correct word to describe the exact circumstances. Whether an action which has been sought to be commenced but which has been barred by limitations has in fact commenced or is in fact trying to commence is really half a semantic question. But there's no problem with that word. We can sort out the appropriate word at a later stage.

MR. CHAIRMAN: Then I'll ask Parliamentary Counsel to administer the oath to all those who will be or may be giving evidence or answering questions.

[Mrs. Lumley, Mr. Lumley, Dr. Hunt, and Dr. Bladek were sworn in]

MR. CHAIRMAN: Mr. Major.

MR. MAJOR: Thank you, Mr. Chairman. Mr. Chairman and members of the committee, this is the first time I've had occasion to address a parliamentary committee, or a Legislative Assembly committee, and I would ask your indulgence if I'm not familiar with your procedure. I may say that when a man gets to be my age, it's quite a thrill to be doing something for the first time. This doesn't happen very often to a young fella who's over 60.

The essence of this application is that we have a two-year old boy, Brandon, who is brain damaged. The injury was not noticeable until after the child was over a year old. The child cannot investigate the cause of the injury because of an unfair limitation period. The limitation is over, passed before the damages were observable. Now, we're not asking this body to extend the limitation period; we're merely asking this body to give a judge the discretion, if the circumstances, in the judge's discretion, permit it, to extend the period only if it's proper to do so. The judge will deal with the facts, with the legal questions under the Charter, and that type of thing.

First, I'll just outline the facts briefly. We filed a submission. I don't know if all of you have received a copy.

MR. CHAIRMAN: I believe it's been circulated.

MR. MAJOR: In the event any of you didn't receive one or haven't got yours with you, I have additional copies that I'd be pleased to . . .

MR. ADY: Could I have one? I did see one, but I just didn't bring it in with me. I thought it was in my file.

MR. MAJOR: Brandon Paul Lumley was born on September 4, 1985, with the use of forceps at 7:14 p.m. Dr. Hunt was amused at the cone-shaped head but assured Mr. and Mrs. Lumley they had a healthy baby and the head would go back to a normal shape. About eight hours later, at 3 a.m., Mrs. Lumley was told by three doctors, including Dr. Govender, that Brandon was being sent to the Foothills hospital because he had a trace of

pneumonia and a cyst on his head. No mention was made of any injury at birth.

At the Foothills hospital Mr. and Mrs. Lumley learned their baby had a number of problems, including a fractured skull, and they were told that "these things happen." They were not told the cause of the problems. Brandon recovered and was brought home on September 18 on phenobarb, a relaxant drug, to prevent seizures.

The child was a joy to the Lumleys and his progress was recorded in a baby book, a copy attached as exhibit 1. With respect to exhibit 1, I apologize. Some of the xeroxing is not legible, but it gives a fairly accurate summary, and I have the original baby book, which I'll pass around. You'll note that I have not reproduced all of the pages, but all of the significant pages have been produced. I wonder, Mr. Chairman, if this might be circulated.

On his six-week checkup, Dr. Hunt advised Mrs. Lumley that Brandon was fine and that "he looks great now." Mrs. Lumley brought Brandon to Dr. Govender, a child specialist first introduced to her at the Calgary General hospital. Dr. Govender examined the child on October 24 and stated that he looked nice and healthy. On December 16 Dr. Govender said the baby was doing well but was not holding his head up due to weak muscles. Therapy was prescribed for weak muscles when the baby was seven months old.

You'll note in this baby book that this was the Lumleys' first child, and each event of significance is recorded in the baby book as seen through the eyes of Mrs. Lumley. I'd point out to you that Mr. and Mrs. Lumley did not have the hospital records. Now, you all know that when you go in the hospital, you're not given the hospital records. You get those after you get a lawyer and you demand them. So I'd emphasize that the hospital records that my learned friend relates to give the knowledge of the doctors. The child baby book gives the knowledge of the Lumleys.

You'll note from both the records and the baby book that on May 6 Brandon had an EEG, which I understand to be an electronic measurement of brain waves, to see if he could come off medication. The EEG was normal, and the medication was discontinued. On August 6 Dr. Sarnat showed the Lumleys a CAT scan which showed a portion of the brain that was black, or dead. Dr. Sarnat held out hope that the right side of the brain might take over for the dead portion.

It was not until August 1987, when the child was almost two years old, that the Lumleys discovered that Brandon had cerebral palsy. The parents were not told -- and they will testify to this fact, that they were not told the child had cerebral palsy until the child was almost two years old. They sought legal advice and a statement of claim, exhibit 2, was issued before the child's second birthday. The usual limitation period for accidents, tort claims, is two years. This is an unusual limitation period that we're dealing with.

It's submitted that cerebral palsy is very rare with respect to hospital births in Alberta in the 1980's.

Now, the facts are that Brandon is an innocent two-year-old child who may never be able to walk or talk normally. Brandon is not likely to be able to play ball with the other kids. Brandon must carry this physical disability. He ought to have the opportunity to investigate to see whether or not there was negligence and if there was negligence, to get some assistance in carrying this disability through life. Brandon is not likely to be able to make speeches or to ever become a Member of the Legislative Assembly. It is cruel and unjust to prevent Brandon from investigating through an action concerning his injury and, if the disability was caused by negligence, to get compensation. Brandon will have more difficulties than the average child, and he will need help. Brandon's father works as a construction superintendent, and his mother devotes all her time to Brandon. The family has limited financial prospects. You might ask yourselves: why should the family, or indeed the government and the people, pay for this disaster if in fact it was due to doctors' negligence?

Now, there are two elements necessary before a reasonable person commences a lawsuit. First, there must be damages. Even though a wrong is committed, if the child completely recovers, there are no damages. You don't sue to punish someone; you sue to get recompense for damages. The entries in the baby book that are reproduced in exhibit 1 -- and the baby book covers the first year of the child's life -- indicate normal development from the eyes of first-time parents. This was the Lumleys' first child. They had no experience with other children. We all know that children develop at different speeds. Many children don't walk or talk until after they're 12 months old.

As well as damages, the second element is that there must be a negligent act that caused the damage. Now, we don't know if there was negligence, but it appears, in today's modern society, that Brandon, who is burdened with these disabilities . . . This little boy has these disabilities, and he should be entitled to investigate. If negligence is established, the court may award damages commensurate with the disability to ease his burden.

As I mentioned and as you know from your experience, the Lumleys, like other patients, were not given the hospital records. Their only source of advice and counsel were the doctors, who consistently stated that these things happen, while holding out hope of complete recovery. The truth, which is well-known to the doctors, is that a fractured skull during a hospital birth is extremely rare, it does cause cerebral palsy, and complete recovery, while possible, should not be expected.

Now, I'd like to talk briefly about the special and unusual treatment given to Alberta doctors generally. I pause here to the tell the committee that I hold no malice whatsoever; in fact, I'm a great admirer of doctors. Two of my six children are doctors within the meaning of this special doctors' limitation period. But this unusual Act, which originated at the time of the Stuarts back in England and was adopted when Alberta became a province, results in manifest injustice to an innocent victim. You ladies and gentlemen have the power and, with it, the obligation to relieve from manifest injustice. Since earliest times Parliament could relieve individuals from an unjust law.

The usual limitation period during which an injured party may commence an action in Alberta for damages -- and most of us are familiar with automobile accidents and, indeed, the section covers all accidents. Section 51 says that action may be commenced

> 2 years after the cause of action arose, and not afterwards.

The unusual procedural limitation period that applies to all doctors is found in section 55. With respect to medical doctors it reads:

> 55 Except as provided in sections 57 to 61, an action against
> (a) a physician registered under the Medical Profession Act,

and there are (b), (c), (d), and other sections that cover doctors in other fields.

> An action
> for negligence or malpractice by reason of professional services requested or rendered may be commenced within one year from the date when the professional services terminated in

respect of the matter that is the subject of the complaint, and not afterwards.

Now, with respect to the beginning of the limitation period there have been several court decisions. Suffice it to say that the Supreme Court of Canada has now fixed the date at the time of discovery. When the plaintiff discovers that he has suffered damages, the ordinary limitation period starts to run. In medical cases the courts are bound by the wording of the Act, and they follow it. The Act starts to run when the doctor's services terminated.

Now, in this unusual case -- and I say it is unusual because we don't have many brain-damaged children born in hospital -- the parents were not told in clear language, and they had no way of discovering that there'd be serious injury to the baby until the little boy demonstrated that he was unable to walk well after he was a year old.

The injustice caused by the special limitation period for doctors was the subject of an article by Professor John McLaren of the University of Calgary. And he wrote this when he was dean at an eastern university, and it was published 15 years ago in 1973 in the *Osgoode Hall Law Journal*. Little has happened over the years, and little has happened simply because it's not a pressing problem. Doctors' negligence is few and far between. And as you know, Legislatures have to deal with more pressing priorities.

Professor McLaren pointed out that there's a two-year limitation period in Newfoundland, Manitoba, and the Yukon. Manitoba dealt with the problem of belated discovery in 1966 by legislation which fixed the discovery of the damages as the limitation period, and it's interesting to note that the Manitoba Legislature dealt with this before the Supreme Court of Canada interpreted the cause of action as commencing with the discovery of the damages. New Brunswick has enacted legislation specifically dealing with the problem of late discovery by fixing the commencement of the period with the day of discovery.

After reviewing all of the legislation, Professor McLaren states at page 93, and extracts from his article appear under exhibit 3:

> By any contemporary standards of sound social policy, the equivocal situation of the patient in these malpractice cases is entirely unsatisfactory and calls out for remedy.

Now, Ontario changed its legislation prior to 1974. This article appeared in 1973. And the current Ontario legislation provides that an action against a doctor may be commenced within one year from the date when the person commencing the action knew or ought to have known the fact or facts upon which he alleges negligence or malpractice. And that again brings in the date of discovery.

Now, this problem was also dealt with by the Alberta Institute of Law Research and Reform in their September 1986 report. They deal with an analogous situation on page 72. A victim was knocked to the pavement in an intentional tortious assault, and that's quite different than inadvertent tortious assault. Such a victim might discover in a few minutes that his head was cut, but it's quite possible that he could not discover that the impact left permanent brain damage until more than two years from the time of the assault, let alone 12 months.

Now, the parents were aware that the skull was fractured shortly after the birth of Brandon, but they did not receive information and were not aware that there would be permanent damage to Brandon until almost two years after his birth. Thus, they could not be expected to commence an action for Brandon until such time as they were aware of damages accruing from the apparent negligence of Dr. Hunt. Furthermore, Dr. Hunt and his associate, Dr. Bladek, had the opportunity to advise the Lumleys of the facts and consequences shortly after the birth and during subsequent office visits, and they chose not to do so. As a consequence, the Lumleys were not aware that Dr. Hunt might be responsible for the baby's permanent injuries. They were not aware within the 12-month period.

And I might just digress here for a moment. I'd like to refer to the notes that my learned friend has placed before you. Now, I've pointed out [not recorded]. Certainly the doctors knew it, and Mr. and Mrs. Lumley will tell you under oath that they were not told until the baby was almost two years old that it had cerebral palsy.

Speaking of damages, if you refer to exhibit 5 of the hospital notes -- and you'll note that these are stamped all over them:

> PRIVATE AND CONFIDENTIAL
> This document may not be released, copied or Published in whole or Part.

And it certainly was not published to the Lumleys. In any event, Dr. Sarnat, in doing an evaluation when the child was six months old, reviews the child's development, and on page 2 he states:

> Development was as follows: the child was cooing at two months; also smiling appropriately at two months; was grabbing objects in his hands at five months of age, and began to play with both hands at 4 1/2 months of age. The baby has rolled over only twice from tummy to back, but not the other way around. Mrs. Lumley has noticed very poor head control until approximately five months of age. He is actually six months of age. She has also noticed a right internal strabismus.

I understand that's an eye turning inward.

> The baby seems to respond to light and touch appropriately, but occasionally he has a "startle" response to loud sounds.

On page 3, the doctor's notes read:

> Brandon appears to be six months old, happy, playful, alert, and he responds appropriately to the examiner and makes good eye contact.

The medical expert examined the child when he was six months old, and these are his notes. You can forgive the parents when they were not told specifically of the child's disability that their observations -- and perhaps all of us in viewing our own children look at them with a jaundiced eye with respect to their abilities. But certainly first-time parents did not know. Indeed, in summary on page 5, Dr. Sarnat and Dr. Alcala report:

> The neurological deficit that Brandon presents seems to be mainly related to damage to the cerebellum and possibly to the brainstem, or damage to the corticular bulbar pathways. It is difficult to know at this moment how much neurologic deficit the child will have, but he does not seem to be severely retarded.

In the next paragraph:

> After evaluation of the CT scan, EEG, auditory and visually evoked potentials, a more realistic diagnosis will be done, although the real answer, in relation to prognosis, will come in time from Brandon's own neurologic development.

The doctors are saying that they simply don't know whether Brandon will recover or not, that that's something only time will tell. And time doesn't tell it within the 12-month period.

Now, there is a parallel request to extend the period with respect to the hospitals, and with respect to the hospitals the limitation period is not as severe because it provides that an action may be commenced within one year after the cause of action arose. That's been interpreted to mean within one year after discovery. However, we would ask that a judge be given the power, which he hasn't got unless it's given to him under this special Bill, to extend the limitation periods concerning both

actions in order that the preliminary question of limitation may be dealt with by the judge with respect to both parties and the action may proceed on the merits as to whether or not there was indeed negligence. And the two of them are intricately wound up together.

Now, I'd like you to go through with me the baby's first year calendar of memories. Starting in September, there are little stickers, as you note, that are pasted on the calendar: when the baby arrived, when the baby received its first bottle. The baby arrived home on September 18. And I also note in the doctors' notes that my learned friend has attached and which the Lumleys never saw -- and most of us don't see hospital records. I know I haven't seen hospital records concerning any of my six children. They were all born in hospital, and some of them have been in on other occasions for broken legs and arms that they picked up while skiing and playing ball, or trying to play ball.

In his summary he states that according to Mrs. Lumley, the child was sent from the Calgary General to the Foothills hospital because he had a "touch of pneumonia" and was being treated with antibiotics, and also because he had a fracture in the left parietal occipital region -- now, those words are not Mrs. Lumley's; those were added by the doctor -- and some intracranial bleeding that needed to be drained. The second last paragraph on that page:

> Mrs. Lumley did not see the child for four days while he was at the Foothills hospital. For that reason her information regarding the immediate perinatal period is limited.

She knew only what the doctors told her.

I don't wish to in any way malign the doctors. Certainly the experts who are called in are not there to assess the cause of the injury. They're there to assist and cure the child, and they're not going to unreasonably upset the parents when there may be no cause for it. The child may recover. And they, in fact, did not tell the Lumleys, and the Lumleys had no way of knowing except by observing the child. And the one-year period went by.

In September a special visit of grandma and grandpa -- something remarkable. On October 1 that should read: "recognizes mummy." It doesn't come out too clearly. The baby smiles on October 21. On November 1 he gets his first shoes. On the 27th they have the first sitter, when Mrs. Lumley has to go to a funeral. In December he holds a toy, first sounds, "Baby's First Christmas," and he turns his head. In January he holds his head up, puts objects in his mouth. Five months old in February, he sits in a high chair -- and written in there, "with lots of support." Mrs. Lumley is the author of these notes. If you have any questions, she'll be happy to answer them.

When he's six months old, he finds his toes, and he discovers his head and ears, and he celebrates his first Easter. When he's seven months old, he laughs and giggles, and there's a special day on the 21st when he starts therapy. Now, he was sent to therapy for weak muscles, not because he had cerebral palsy. There's no reason why the parents weren't told, but they weren't. I shouldn't say there's no reason; in fairness, they don't want to alarm the parents unnecessarily. But the fact is that the parents were not told.

May 6 he took an EEG "to see if you can come off phenobarbital." Now, I've seen the EEG, and the EEG report is normal. At least that was the report, and the child was taken off phenobarbital on June 1. By the end of May, that entry on May 27 reads: "pulls off socks." Unfortunately, it doesn't come out too clearly.

June 2 he "creeps on belly." June 1 he's "off medication" because the EEG was normal. He's now nine months old. He splashes in the bath; he has his first upper tooth; he waves good-bye. On June 27, a special day, the therapist came to Brandon's house.

In July he goes to Dr. Hindle to check his eyes and vision. He's now 10 months old. He sits alone on the 23rd. From the 25th to the 29th he had a fever and kept his parents up all night. On the 28th he was better; no therapy today. He went to the doctor for an ear infection and throat infection at the end of July.

On August 6 he had a CAT scan. On August 12 he pulled himself up for the first time on the back screen door. On the 19th he experienced his first big fall. On the 20th he got up on his hands and knees. On the 22nd he pulled himself to a stand in the crib. On the 26th he's "pulling up on furniture & everything," and on September 1 he says "Na Na," which Mrs. Lumley interprets as "grandma." On September 4 he celebrates his first birthday, and under the current legislation on this date this innocent child is prevented from inquiring: "Why can't I run? Why can't I talk?" Who carries this burden? The physical burden the child carries. Should the people, through taxes, carry the financial burden or, like in other negligence actions, if negligence is established, should the burden fall on those who caused it if that is proven?

Now, there are a couple of notes. The next exhibit, 2, is a statement of claim. You'll note that that was issued on September 3, just prior to the second birth date. With respect to taking prompt action within the two-year period and where hospitals and doctors are concerned, they're required to keep notes, and there are detailed notes kept. The evidence is preserved, and there's simply no justice for not being able to pursue an action within the normal two-year limitation period. There simply isn't any reason. It's historical. It goes back to the early Stuarts. At that time, there may have been some reason for it, but the reason has long since evaporated.

Professor McLaren's article reads:

> Amidst the bewildering complex of limitation periods which govern the actionability of tort claims across Canada, an object of particular puzzlement is the disparity between the periods applicable to negligence actions at large on the one hand, and those prescribed for malpractice actions against various classes of medical professionals and medical institutions on the other.

Clearly, this is an anomaly. The author points out on page 86 at the top of the page:

> Strangely enough this disparity in limitation periods does not exist in the cases of assault and battery. In every jurisdiction, medical men or institutions are subject to the same periods for these torts as any other individual or institution.

If a doctor's in an automobile accident, the fact that he's a doctor gives him no more protection than you and I.

MR. CHAIRMAN: Mr. Major, I'm just wondering. I think Professor McLaren's article really is directed at convincing governments to change their general law and not really to this special . . .

MR. MAJOR: No, but when I come before this body and submit that this is a very marked, a very real injustice, I think it's helpful and beneficial to point out that the general legislation needs review. The thrust of the article is that there's no need for this continued procedural protection. However, whatever is done with the legislation will not help this little boy. The only way this little boy can be helped is if a special Bill is passed in which a judge is given the opportunity to extend the limitation

period. I would point out, with your indulgence, Mr. Chairman, that on page 98 the author states in the second paragraph:

> In all negligence actions the point of time selected should be the occurrence of damage.

Not when the services are rendered but when the damage occurs. You're not going to sue if the child recovers, no matter how badly he's been injured. If he recovers, that's the end of it. In the same paragraph, Professor McLaren states:

> it is now settled that it is the damage or injury which completes the cause of action.

On page 99, I direct your attention to the first paragraph.

> A primary consideration is the extent to which the plaintiff should be protected in belated discovery cases. From what has been said earlier in this article, it is clear that there are two major problems which confront the plaintiff. The first is that he may have no idea that he has suffered any harm.

Clearly an infant child has no idea. We're talking about the parents having had no idea that he'd suffered any permanent harm.

> The second is that even though he may be aware of an ailment he may be unable to associate it with any conduct on the part of the defendant.

There were several things wrong with the Lumley baby when he was taken to the Foothills. He did have a touch of pneumonia; he was reported to have a cyst on his head. These things, the child's health, were not related by the Lumleys to what happened at the delivery.

Professor McLaren concludes on page 102:

> If the suggestions contained in this article pertaining to the reform of limitation legislation were implemented there is little doubt that the palpable injustice which is done to plaintiffs in medical malpractice cases would be effectively removed. There are no cogent arguments which can be raised against the reforms advocated and they certainly are not revolutionary.... Legislative reforms allowing a belated discovery exception have been undertaken in common law jurisdictions both within and without Canada, based on the premise that the traditional limitation provisions have caused injustice in such cases.

In the next article from the Alberta Institute of Law Research and Reform, our own researchers have stated on page 71:

> (a) Fairness for claimants
>
> 2.54 It may be argued that there is a normal period of time which a claimant will require to discover the requisite information about a claim which will vary in length according to the type or category of claim. If this were so it would justify assigning a relatively short limitation period to those types of claims in which the usual discovery period is relatively short, and a longer... period to those types of claims in which the usual discovery period is longer.
>
> 2.55 Under the present Alberta Act, the limitation periods applicable to certain categories of claims are as follows:
>
> (1) claims against a member of one of the medical professions based on negligence or malpractice, one year from the date the professional services terminated...
>
> (2) most tort claims, two years from accrual...
>
> (3) most contract claims, six years...

et cetera.

> 2.56 It is probable that the odds that a patient will discover an injury caused by medical malpractice during the first year after the services were performed is at most only slightly higher than the odds that he will discover the injury later.

Now, is it fair when the Alberta research council states that in all medical malpractice cases you've got essentially a fifty-fifty chance of discovering it within the year or discovering it after the year? Clearly our researchers are telling the Legislature that this ought to be changed. The injustice to this little boy is manifest. The summary of our Alberta researchers is contained on page 77, and it reads:

> 2.63 Our conclusion is that there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claims. Our conclusion that this practice is unsound is bolstered by the fact that the limitation period which has been assigned to a particular category of claim has varied not inconsiderably in different jurisdictions with socio-economic environments similar to that of Alberta. If the present practice were sound, we doubt that the diversity of treatment... Not only do we think that the use of different limitation periods for different categories of claims serves no useful purpose; we think that the practice results in limitation periods which are too often unreasonable, either to claimants or to defendants.

Mr. Chairman, and members of the committee, I thank you for your indulgence in listening to this presentation.

MR. CHAIRMAN: I think at this stage, Mr. Major... Many members of the committee have to leave at 10 for another one. We are going to carry on with it because we will have enough for a quorum. But those members who have to leave would like to hear as much as possible, so I'd ask you now to read the evidence as quickly as can be done, and then the intervenors should be given...

MR. MAJOR: Perhaps, Mr. Chairman, it would be appropriate for me to ask Mrs. Lumley the simple question: why didn't you sue within a one-year period? Would you just tell the members?

MRS. LUMLEY: We didn't sue sooner because there wasn't any evidence to sue. We asked the doctors, "How come our little boy was born with a fractured skull?" They'd give us no answer. They would say, "These things just happen." Every specialist, and he's had tons of them, they'd all tell us the same thing. Now, when I took him to his eye doctor, and his eye doctor asked me if he had cerebral palsy, well, that took me for a loop. I'd never heard that before. So I called up his pediatrician and asked him, "Does Brandon Paul have cerebral palsy?" And he said, "You'd better come in to my office." So I went in, and he told me, "Yes." Then, shortly after that, during his therapy, they sent home a handicap walker and told me that he'd probably never walk. Well, that's when I called Mr. Major.

MR. MAJOR: Now, are you telling the committee that you didn't hear the words "cerebral palsy" until the eye doctor asked you? What date was it that the eye doctor asked you if the child had cerebral palsy?

MRS. LUMLEY: July 2, 1987. This is when he had his eye appointment, and the next day I went in to see his pediatrician and asked about it.

MR. MAJOR: What did the pediatrician say when you asked him?

MRS. LUMLEY: If he had cerebral palsy?

MR. MAJOR: Yes.

MRS. LUMLEY: He said, "Yes, he does." And he said, "I was wondering when you were going to ask me this." So then I said, "Well, what caused cerebral palsy?" And he said, "The damage that he'd gotten from his birth." And I said, "Well, do you mean the fractured skull?" And he just – he wouldn't answer.

MR. M. CLEGG: Excuse me, Mr. Major, could you identify these doctors by name, because this is the way they're identified in the exhibits.

MRS. LUMLEY: Dr. Govender.

MR. M. CLEGG: He's the pediatrician?

MRS. LUMLEY: Yes.

MR. MAJOR: And who is the eye doctor?

MRS. LUMLEY: Dr. Hindle.

MR. MAJOR: And was this the first occasion on which you'd seen Dr. Hindle?

MRS. LUMLEY: No, he'd been there one other time because of his eye turning in.

MR. MAJOR: But this was an appointment in July 1987, when Brandon was almost two?

MRS. LUMLEY: Yeah.

MR. MAJOR: Mr. Lumley, have you anything to add to what your wife has stated?

MR. LUMLEY: No, other than that's the first I ever heard of cerebral palsy, when she called me at work. And then I came home from Red Deer because she was quite upset about it.

MR. CHAIRMAN: The date of that . . .

MR. MAJOR: That's July 1987, and she contacted a lawyer in August of '87. The statement of claim was issued prior to the second birthday, which was September 4, '87.

MR. CHAIRMAN: I'd just ask Mr. and Mrs. Lumley if they felt any of the statements of fact made by Mr. Major in his presentation as being their evidence and being the truth as far as they know it.

MRS. LUMLEY: Yes.

MR. LUMLEY: Yes.

MR. MAJOR: You've read the submission, and it accurately states out your understanding. You kept the baby book. The stickers that are placed in here were placed by you, Mrs. Lumley?

MRS. LUMLEY: Yes.

MR. CHAIRMAN: Now, I'll give an opportunity to the intervenors to conduct any cross-examination they may deem necessary. Mr. Lowe.

MR. LOWE: Thank you, Mr. Chairman, I will. I'd like to ask, and perhaps -- do you mind if I sort of go back and forth between Mr. and Mrs. Lumley? I think the narrative will be clearer if we do it chronologically than if I do it person by person.

I understand, Mr. Lumley, that you were in the delivery room when your son was born?

MR. LUMLEY: Yes.

MR. LOWE: And you heard the conversation, then, between Dr. Hunt and the nurse about the use of forceps?

MR. LUMLEY: I couldn't say what was said. It was pretty busy where I was.

MR. LOWE: You saw the child delivered with forceps?

MR. LUMLEY: I never saw the forceps on the baby. I was looking at the bride.

MR. LOWE: Did you understand that forceps were being used?

MR. LUMLEY: Yes, yes.

MR. LOWE: You knew that, at the time.

MR. LUMLEY: Yes.

MR. LOWE: Now, in your statement of claim, Mrs. Lumley or Mr. Lumley, you say you knew that same day that your son had been born with a fractured skull.

MRS. LUMLEY: Well, a cerebral hemorrhage is what they called it . . .

MR. LOWE: Okay. Did you understand . . .

MRS. LUMLEY: . . . which later on I found out was a fractured skull.

MR. LOWE: When you say "later on," you mean within a day or so?

MR. LUMLEY: Within, yeah, a few days.

MR. LOWE: So within a day or two you understood that he had had bleeding within his head and that he'd had a fractured skull, and you knew that he'd been delivered with forceps.

MR. LUMLEY: Yes.

MR. LOWE: And in fact you signed the consent form permitting a drain to be put in the base of his skull.

MR. LUMLEY: Well, I gave the permission over the phone.

MR. LOWE: Over the phone.

MR. LUMLEY: Yes.

MR. LOWE: And did you see him with the drain in the base of his skull?

MRS. LUMLEY: Yes. It was in the top.

MR. LOWE: In the top of the skull. And you understood from that that they were draining blood out of his skull. And this was

all within a few days of his birth.

MRS LUMLEY: Yes.

MR. LOWE: Now, you also knew that he was having seizures, didn't you?

MRS.LUMLEY: Well, we never . . .

MR. LUMLEY: No. To this day we don't know he had the seizures.

MR. LOWE: Why did you think you were giving him phenobarbital for seven months?

MRS. LUMLEY: Because when they did the first EEG, that's for brain waves . . .

MR. LOWE: Yes.

MRS. LUMLEY: . . . it showed brain activity which could mean a seizure, but he never did take a seizure.

MR. LOWE: All right.

MRS. LUMLEY: Okay?

MR. LOWE: But you understood you were taking the phenobarbital to prevent possible seizures?

MRS. LUMLEY: Right.

MR. LOWE: Your doctor had told you that there was a risk of seizures?

MRS. LUMLEY: Yeah.

MR. LOWE: All right. Now, you didn't think that was normal, of course, for your baby to have a risk of seizures?

MRS. LUMLEY: No.

MR. LOWE: You didn't think it was normal for him to have to have blood drained out of his skill right after his birth either, did you?

MR. LUMLEY: It depends on what you call "normal."

MRS. LUMLEY: Well, no. Babies aren't born with fractured skulls. No, it's not normal.

MR. LOWE: Right. Okay. So you knew these facts early on.

MRS. LUMLEY: Right.

MR. LOWE: Now, your primary care physician for this baby was Dr. Govender, wasn't it?

MRS. LUMLEY: One of them. That's the pediatrician.

MR. LOWE: Okay. And who else were you seeing?

MRS. LUMLEY: Dr. Sarnat, Dr. Cochrane. Dr. McMillan was the one that worked on him in the Foothills.

MR. LOWE: Okay. Let's just get down who these people are. Dr. McMillan worked on him at the Foothills immediately after birth?

MRS. LUMLEY: Right. He helped Dr. Cochrane put the drain in.

MR. LOWE: Dr. Cochrane was the specialist who put the drain in his skull?

MRS. LUMLEY: Yes, he was.

MR. LOWE: He was a neurologist?

MRS. LUMLEY: Yes.

MR. LOWE: Did you see Drs. McMillan and Cochrane after the baby came home.

MRS. LUMLEY: No -- oh yeah, we did. Once.

MR. LOWE: Once.

MRS. LUMLEY: Yeah.

MR. LOWE: What was that for?

MRS. LUMLEY: Just a follow-up to see how he was doing. I think it was a couple of months after. Remember we went to his office?

MR. LUMLEY: Yeah.

MRS. LUMLEY: And he said that he was doing great.

MR. LOWE: Okay. Dr. Govender, though, was a pediatrician, and you saw him regularly after Brandon was born?

MRS. LUMLEY: Yes.

MR. LOWE: We don't have Dr. Govender's copy of his file here at all, do we, today?

MRS. LUMLEY: No.

MR. LOWE: So we don't know what he would say about what he told you, do we?

MRS. LUMLEY: No.

MR. LOWE: All right. We don't have Dr. Sarnat's file here either, do we, Mr. Major?

MRS. LUMLEY: Yes, we do.

MR. LOWE: Do we have Dr. Sarnat's file? Is that an exhibit in these proceedings?

MR. MAJOR: It's your exhibit . . .

MR. LOWE: We have one report that you've provided to us,

signed by Dr. Govender, under category number 5.

MR. MAJOR: Well, the neurological clinic provided the doctor's clinic notes, and all of the notes that we received from Dr. Sarnat were delivered to you, and you've inserted the one dated March 11, '86. All of the occupational therapy reassessment and all of these, in fact, were not seen by the Lumleys until after our office got involved.

MR. LOWE: Sure. We'll get to that.

Now, let's just stay with the fall of 1985, Mr. and Mrs. Lumley. Your counsel said you came to see Dr. Hunt. He's referred to tab 4 of our presentation, and there is an entry there on . . . Here's a bit of a problem. We have under tab 5 a photocopy of a chart kept for Mrs. Lumley. It also mentions a visit having to do with Brandon. We have also – and I apologize; I only discovered this yesterday -- a chart that was kept for Brandon by Dr. Bladek, and I have copies of that, which I'll pass out today. And then . . .

MR. MAJOR: Again, Mr. Lowe, we'll make it clear to the committee that Mr. and Mrs. Lumley had never seen these.

MR. LOWE: Granted. Right. Yeah. We will make it clear to the committee also what discussion was held on the topics that are listed here by the doctors with the patient. Perhaps you'd like to take some copies and pass those around.

MR. M. CLEGG: Excuse me, Mr. Lowe. For the benefit of the committee, could you identify the author of the chart under tab 4?

MR. LOWE: Yes. The chart has entries in it made by both Dr. Hunt and Dr. Bladek. The entry for October 18, 1985, is by Dr. Hunt. The entries for October 25, '85, and February 18, '86, are by Dr. Bladek. Now, if you put that under our tab 4, you'll have a complete set, and this should fit under tab 4.

Now, Mrs. Lumley, if you're looking under tab 4 . . . I'll wait till those copies get circulated before we continue. If you're looking under our tab 4, submission of Drs. Hunt and Bladek, at the October 25, 1985, entry, I am told by Dr. Bladek that you saw her that day, on October 25, and that these are her notes.

MRS. LUMLEY: Yes. Dr. Bladek is my doctor, or was my doctor.

MR. LOWE: All right. Dr. Bladek wasn't at the delivery?

MRS. LUMLEY: No.

MR. LOWE: And wasn't in the hospital?

MRS. LUMLEY: No.

MR. LOWE: And didn't see Brandon in the hospital?

MRS. LUMLEY: No.

MR. LOWE: She tells me that the notes that she's written here:

> Talk re son Brandon's delivery -- cord wrapped around neck forceps/intracranial hemorrhage.

are things that you told her, not that she told you.

MRS. LUMLEY: She didn't know anything about it until I told her.

MR. LOWE: Okay. So you're the one reciting this to her.

MRS. LUMLEY: Right.

MR. LOWE: And he's on phenobarb.

MRS. LUMLEY: Yes.

MR. LOWE: That was your advice to her as well. All right.

Now, the next entry February 18, 1986 – now, Mr. Major, I think earlier you thought that read October, because the way we punched and bound these the month is a little obscure; but I'm told that's February 18, 1986 – Dr. Bladek has written, "Worried about son."

MRS. LUMLEY: That's me.

MR. LOWE: That's right. You came to see her, because you were worried about your son.

MRS. LUMLEY: Yes.

MR. LOWE: What was it that had you worried about your son on February 18, 1986?

MRS. LUMLEY: It was probably constipation, because as soon as I quit nursing him he started having trouble with constipation, and I couldn't figure out why. We've found out now, since he's got the cerebral palsy, that that causes constipation. The muscles that control don't work.

MR. LOWE: All right. Let's be clear. She's also written here, "Dr. Govender thinks he's slow." Now, this is something you told Dr. Bladek, isn't it?

MRS. LUMLEY: Uh huh.

MR. LOWE: Dr. Govender wasn't sending Dr. Bladek copies of his office notes, as far as you're aware?

MRS. LUMLEY: No.

MR. LOWE: And you weren't telling Dr. Bladek everything you heard from Dr. Govender?

MRS. LUMLEY: Pretty well everything.

MR. LOWE: Well, we'll get that from Dr. Bladek, I guess.

In any event, you had been told by February 18, 1986, that Dr. Govender thought your son was developing slowly.

MRS. LUMLEY: Because of the phenobarbital he was on. That slows your metabolism down.

MR. LOWE: Is that what he said?

MRS. LUMLEY: That's what he told me, yeah. He said he'll be slower because of the medication.

MR. LOWE: Then why did he want your son referred to a

neurologist?

MRS. LUMLEY: Because of the fracture.

MR. LOWE: Because of the fracture and the intracranial bleeding?

MRS. LUMLEY: Yeah, right.

MR. LOWE: And Dr. Govender thought that that may be causing your child's slow development? Isn't that right?

MRS. LUMLEY: Well, maybe that's what he thought.

MR. LOWE: Isn't that what he said to you?

MRS. LUMLEY: No.

MR. LOWE: Well, now. I just asked you why did he want the child referred to a neurologist, and you told me because of the fracture.

MR. MAJOR: Well, Mr. Chairman, I must object to a line of questioning in which a solicitor . . .

MR. LOWE: Mr. Major . . .

MR. MAJOR: Mr. Chairman, I must object to a line of questioning in which a solicitor attempts to browbeat a witness into asking her what the doctor thought. This witness can only reasonably respond to what the doctor said, what she remembers the doctor said. She cannot and ought not to be asked what the doctor thought.

MR. LOWE: Mr. Major, I'll make sure that I ask what she was told.

MR. CHAIRMAN: I think that is correct. Carry on, Mr. Lowe. Sorry, Mr. Younie.

MR. YOUNIE: Yes. I thought our purpose here was not to hear the medical evidence and decide whether or not the doctors had been negligent but to hear the legal evidence and decide whether or not the case should go to court so that a court of law can decide whether or not the doctor was negligent. And what it seems to me I'm hearing now is someone trying to establish that the medical evidence indicates the doctor wasn't negligent and therefore we shouldn't give the extension. We're sort of hearing a rehearsal of the court case that should come later, if this committee decides on the extension.

MR. LOWE: Mr. Chairman, may I explain. Members of the committee, I apologize for not having laid the groundwork. I guess I assumed that because the chairman is a lawyer and I'm speaking on legal matters, you're following. Let me explain what this turns on.

Mr. Major began by saying that he said there were three factors to keep in mind. First, the injury was not noticeable until a year had passed. He said, second, that the limitation period was over before the damages were observable. And he said, third, that all he's asking is that a judge have discretion about whether or not to extend the limitation.

I'd like to contradict all three of those things, because you heard him and recite the Ontario legislation. Now, keep in mind that your legislation is the same as the legislation in seven out of 10 provinces. It's not abnormal or unusual. There are seven other provinces who see the same thing in the same way Alberta does. Ontario has made a change, and you heard him recite that Ontario says that a plaintiff must bring the action within one year from the date when the facts upon which the action is based are discoverable, not one year from the date when you have the opinion of an expert or the opinion of a lawyer that you've got a good case, not one year from the date when you have the opinion of a doctor that the damages are irreversible. Because damages are damages. Whether they're reversible or irreversible, the damages occur. It's nonsense to say that someone who has a broken leg in a car accident but is not going to have any lifetime defect wouldn't sue for the broken leg. Of course he would. The Ontario statute says: one year from the time when the facts are observable.

Now, what I'd like to demonstrate to you is that the facts were known by the parents well before the year had expired, certainly not later than August of 1986 when Mrs. Lumley was apparently told that a portion of her child's brain was dead. Now, actually what she was told was that there was a cyst there, that there was a portion that would not develop. And that is permanent damage. It was discovered in August of '86, and even if you use the Ontario rule and gave a year from that date, these plaintiffs would be out of time.

Now, the relevant question was to establish what facts Mrs. Lumley knew, not what opinions she had from a lawyer about whether this was a good case, not what opinions she had from a specialist about whether the damage would reverse itself, because whether it reverses itself or not is irrelevant.

Mr. Major has said, "You won't sue if you think you're not going to have a lifetime deficit," or words to that effect. Nonsense; of course you sue if you think you're not going to have a lifetime deficit. You sue even if you think you're going to be disadvantaged for a year or two years. The point when the damages occur is absolutely unrelated to how long the effect of those damages will continue. All that has to do with is the amount of the compensation to the plaintiff, not whether you've got cause of action. It isn't only people with lifetime deficits who have a cause of action.

Now, this line of questioning and the evidence that we'll hear from Drs. Hunt and Bladek will demonstrate that Mr. and Mrs. Lumley knew these facts before a year had expired. And these are the only facts on which the entire lawsuit is based. Fact number one: the child was a forceps delivery. Fact number two: there was a fractured skull. Fact number three: there was intracranial bleeding that had to be drained; the pressure had to be relieved with a shunt. Fact number four: the neurologist who installed the shunt counseled the use of phenobarbital to prevent possible seizures for seven months. All of this does not speak to a normal child or a normal delivery.

MR. LUMLEY: It doesn't speak that there's anybody to be sued either.

MRS. LUMLEY: We didn't . . .

MR. LOWE: In fact, whether they knew there was somebody to be sued or not . . . Yes, ma'am.

MR. CHAIRMAN: Mrs. McClellan.

MRS. McCLELLAN: I'm one of the people that has to leave for another meeting, and I think that's unfortunate, Mr. Chairman, because I think this is very serious.

I have to put this question because I have a couple of children myself. I hope that what we're hearing isn't that if there's anything irregular in a delivery, you should make a statement of claim against the doctor just in case something develops down the road. Now, maybe I'm out of order with my comment, but I have a concern with the direction we're going with this.

I guess my other concern is that I don't want to hear the court case today. I want to hear the reasons that this should be allowed to be decided by a judge. I don't think that our decision should be in any way compromised by a discussion of the court case on either side of the question. Now . . .

MR. LOWE: May I assure you on that point. The court case stops the day the child was born. Other than the question of ongoing damages, the question of liability is decided on September 4. The question of liability isn't decided in October or November or December after the child was born. So what I'm talking to you about has nothing to do with the court case. Let's be clear on that, please. I'm not arguing the court case.

MRS. McCLELLAN: Why are you questioning then?

MR. LOWE: I'm hoping to establish when those facts were known.

MRS. McCLELLAN: The questioning is what worries me.

MR. MAJOR: If I might respond and say simply: you don't commence an action until you have something to sue about. You simply don't sue unless there are damages. If you do sue, you'll get nothing unless there are damages. People don't come to see me -- and I act for plaintiffs -- unless there are damages. When you're in an automobile case, you know that there are damages, but when you go to the hospital, you don't anticipate any negligence. When you go with the first child, things happen.

[The House bell rang]

MR. CHAIRMAN: That doesn't mean there's a fire. It means that Public Accounts Committee members are being called.

Mr. Day, followed by Mr. Ady.

MR. DAY: Thank you, Mr. Chairman. I appreciate what my colleague said in terms of irregular deliveries; my wife had three.

However, Mr. Major was given about an hour virtually uninterrupted, and however we feel -- and this is a very emotional case, and I'm sure as we listen to these facts, all of us are being tugged in different directions. The gentleman representing Drs. Hunt and Bladek, however, has not been able to have anywhere near the same amount of time and has received a number of interruptions. I wondered if we might just, though we're all in a hurry -- this is a very, very serious matter -- if we could at least allow him the same uninterrupted period of time as we did with Mr. Major.

MRS. MIROSH: Agreed.

MR. CHAIRMAN: Mr. Clegg.

MRS. McCLELLAN: We have to go.

MR. CHAIRMAN: Some members have to go.

MRS. MIROSH: But we want to hear it. We want to hear both sides.

MRS. McCLELLAN: Mr. Chairman, I think that maybe we should consider that we all have the same opportunity to hear the facts.

Mr. Chairman, if it's in order, I would move that although I know it's inconvenient for all of these people involved, including ourselves, to make a fair decision we should have the opportunity to hear this, if it means another meeting.

MR. CHAIRMAN: Your motion is that this hearing be adjourned until another time?

MRS. McCLELLAN: I'm afraid it is. You can vote down my motion. I'm just saying that that's the way I feel.

MR. MAJOR: Could we set any time today or this evening, while we're all here?

MR. CHAIRMAN: Mr. Major, that sometimes proves difficult, because the members do make a lot of arrangements.

MR. MUSGREAVE: Could we determine if the other committee has a quorum without these members?

MR. ADY: That was my question: whether there could be arrangements made by . . .

MR. CHAIRMAN: Well, as I counted our committee, we would have a quorum without these members.

AN HON. MEMBER: You would have.

MR. CHAIRMAN: Public Accounts would have a quorum without . . .

AN HON. MEMBER: Downstairs.

MR. CHAIRMAN: All I mean, without – I guess that's another thing. If someone wanted to go downstairs and see what the situation was?

MR. DOWNEY: I can do that, Mr. Chairman.

MR. CHAIRMAN: All right. Mr. Downey will go downstairs and see what their quorum requirements are.

Mr. Younie.

MR. YOUNIE: Just one point. Although it may not be quite as convenient, as long as the presenters are going to be here next week as well, or at our next meeting to answer questions, that the rest of this morning's proceedings -- they won't be? Or will they? I mean, could that be arranged, that we could continue this morning if we . . .

MR. CHAIRMAN: Mr. Younie, as a matter of fact, we had scheduled other business for next week. It's completely taken up. In fact, it's a longer meeting than we anticipated this to be.

MR. YOUNIE: So likely adjourning this one at this point would mean that it would not be dealt with at this session and would have to redone and brought back. That's a consideration.

MR. CHAIRMAN: I don't know about that. It's a possibility. But then, of course, there's always the possibility of a fall session too.

MR. M. CLEGG: Mr. Chairman, we still have the motion that the committee adjourn. I would only like to note that of course the transcripts will be available to members who are not able to be present. And it's possible, of course, that they may be able to come back while we're still sitting.

MRS. McCLELLAN: Well, we can't question them. I will sum up by saying: but we can't question the transcripts.

MR. CHAIRMAN: Mr. Day.

MR. DAY: Well, just speaking to the motion, Mr. Chairman. If we could just wait till Mr. Downey comes back, it may well be that the other committee has a quorum, and we could just continue right on here.

MR. CHAIRMAN: Mr. Ady.

MR. ADY: I just wonder if there's a possibility we could adjourn till 11:30, and then go for one hour: 11:30 a.m. till 12:30 p.m. There isn't?

MR. CHAIRMAN: That is a possibility. We could adjourn this matter until we hear the immigration evidence that is waiting outside. Then perhaps as soon as people get back from Public Accounts, we could resume.

MRS. MIROSH: We could adjourn Public Accounts if we get down there.

MRS. McCLELLAN: Could we vote on the motion? Then I can leave.

MRS. MIROSH: No, don't do anything like that.

MR. ADY: We should only vote on her motion to adjourn until a specific time. Let's not just adjourn on it.

MR. CHAIRMAN: But she'd have to change her motion for that.

Would you like to amend your motion that this matter be adjourned to a specific time this morning? In the meantime, the committee could carry on with other business that . . .

MRS. McCLELLAN: No. I'd be happy if you want to vote down my motion and make another one, because I have a commitment on behalf of the government in Olds. One person isn't so bad, but four or five . . .

MR. CHAIRMAN: Is there a willingness for the committee to either amend Mrs. McClellan's motion and vote on that or to vote on Mrs. McClellan's motion as it stands?

MRS. McCLELLAN: Whichever way you want to do it.

MR. CHAIRMAN: Well, I can't -- I'm the committee's chairman.

MRS. HEWES: Mr. Chairman, can I make an amendment, to adjourn until 11:30?

MR. CHAIRMAN: That this matter of the committee be adjourned till 11:30 a.m.?

MRS. HEWES: That's correct.

MR. CHAIRMAN: Any discussion on that?

MRS. McCLELLAN: Only the convenience . . .

MR. CHAIRMAN: Just wait a minute now. I'll just wait a minute. Mr. Downey is here. He may have something to report.

Mr. Downey.

MRS. MIROSH: The answer is they need us. So we'll come back at 11:30.

MR. CHAIRMAN: Then could we have the vote on those in favour of the amendment that we adjoun until 11:30 a.m.?

MR. MUSGREAVE: We adjourn this particular . . .

MR. CHAIRMAN: This particular matter -- not the committee. This particular matter. Opposed? Carried.

So therefore, those who have to go to Public Accounts will go, and come back at 11:30 a.m. The remainder will stay so that we can deal with the immigration matter that we have scheduled.

[The committee recessed from 10:01 a.m. to 10:07 a.m.]

MR. CHAIRMAN: Members of the committee, I would like to welcome Mr. Dave Kornichuk and Mr. Doug Haaland from Canada Immigration, who have responded to our invitation to attend at our committee this morning in order to discuss the implications of adult adoption as it relates to immigration into our country. That's in the context of a petition for a private Bill we heard on behalf of a family to adopt nieces and nephew who reside in Chile, the petitioners being Canadian citizens who reside in the city of Edmonton. I guess on behalf of the committee I certainly had the impression -- it may not have been spoken in words -- that the petitioners believed that if they became the lawful parents by adoption of these nieces and nephew, who are aged 20 and 22, they would have a very good chance of obtaining their admission to Canada as a result of that action. I'd like, and I think all members of the committee would like, to hear the view of Canada Immigration.

MR. KORNICHUK: It's probably best if I speak in generalities rather than case-specific, but there is a provision in the Immigration Act for sponsoring the admission to Canada of what we call family class immigrants. The family class is our highest priority and, if you will, the easiest method of gaining entry to Canada as an immigrant. Basically, you have to prove the relationship between the sponsor and yourself. You have to be of acceptable medical condition and meet our background inquiries, and if you meet those, you would likely be granted admission under the family class of immigrants. Now, why I'm discussing the fam-

ily class is because, as we talk about adoptions -- and I believe, based on your preamble, the people concerned with this particular adoption believe that if in fact the adoption is granted, these individuals, the children, would become members of the family class, and therefore that would make it quite easy for them to immigrate.

Based on the ages that you have indicated to us, that is not, in fact, correct. These children, whether legally adopted or not, would not be members of the family class. Rather than going through all of the regulations and the rules, what I will say is that members of the family class include sons and daughters. Now, a person who is legally adopted becomes a son or daughter. However, for purposes of the Immigration Act you can sponsor a son and daughter as a member of the family class if they're either your natural offspring or if they were adopted prior to their attaining 13 years of age. In this particular case at hand, obviously the children would not have been adopted before the age of 13 and therefore would not qualify in the family class. Now having said that, whether an adoption is granted or not certainly is a provincial responsibility and rests with yourselves in committee obviously.

I guess what we can extrapolate on is the two scenarios, one of if the adoption was granted and in fact these children would become the legal children through adoption of the parents here in Canada and what effect that would have on Immigration's view of the case. I would say that generally speaking, certainly it would play a role in it, but what we would be trying to examine in any case of this nature is the relationship that was established as a result of the adoption. That is, was there a relationship of parent and child established? Quite frankly, I would say that it will be difficult for the persons concerned in this particular case to establish to, say, an impartial third party that in fact a relationship of parent and child was established. At the ages of 20 and 22 we're normally expecting that these people are adults in their own right. And there may in fact be some legal requirements, say, as an heir or as a guardian, you know, that would present a rationale for going through with an adoption, but I don't believe that Immigration is one of those rationales that would likely support an adoption. I guess the point that I'm making is that these people do not fit within the family class of regulations, whether or not they're adopted.

The next scenario would be whether or not they would qualify for immigration to Canada under any other category. Certainly they would be eligible to apply as independent immigrants, subject to our criteria that we apply in those cases, and possibly as assisted relatives. But again, they would have to meet the criteria that are applicable in each of those cases, which is much more stringent than the criteria in the family class.

We would also look at... There is a procedure, for instance, to consider humanitarian and compassionate considerations. The humanitarian and compassionate considerations that we would look at are, again, whether a parent/child relationship has been established, and we would look at the history of the relationship. Have in fact the parents here in Canada supported these children for the last several years and, in fact, is the adoption just the culmination of that support? Or is it simply that they wish to assist these individuals in coming to Canada, and they view the adoption and immigration as a natural process? Again, if they make a case that a reasonable person would see as there being humanitarian and compassionate considerations, there is provision to process any immigrant within the independent category, but the adoption itself will not really have an impact upon reaching that decision.

Now, I guess rather than me rambling on at length, maybe I could address any specific questions.

MR. CHAIRMAN: Sure. Mr. Younie.

MR. YOUNIE: A question and a comment from what I recollect from earlier testimony from the petitioners. First of all, does Immigration Canada recognize forms of family ties or customs that exist in the culture of the immigrant that do not exist in the culture of Canada? Now, in this case it was what was explained by the petitioners as a very strong godparent tie, which in their culture does confer very strong responsibilities upon them of a family nature.

MR. HAALAND: The relationships acceptable for immigration to Canada are defined clearly under the Immigration Act and regulations. Within the family class there are what we would perceive as traditional blood relatives. In a case of another culture's relationship that would not be recognized under the regulations, we would not be able to process an application for permanent residence based on that relationship, because it was not blood related or not defined under the regulations. However, as Mr. Kornichuk explained, individuals can present information at any time that they believe warrants special consideration because of the humanitarian and compassionate aspects. Certainly if there was a long-term de facto relationship that existed, regardless of the fact they weren't, in a sense, blood relatives, then certainly the officers reviewing the case would take that information into consideration. And where the grounds were sufficient, an exception to the law could be made by order in council.

MR. YOUNIE: Okay. The comment I had then was that as I recall the comments of the petitioners when they appeared before us, they explained that the rationale for adoption was their already existing responsibility as godparents and that they did not believe, according to the petitioners, that the adoption would necessarily make easier or facilitate helping the children come to Canada and that they were willing to accept having their adopted children stay in Chile if that's what ended up being the decision of Immigration Canada. Although they obviously would like them to immigrate here, they understood that the adoption wouldn't affect it. Although some members of the committee were concerned that it was being used to short-circuit immigration procedures, they wanted to make it clear that wasn't the case.

Also, as I recall, they indicated that they had been providing financial assistance to the family in Chile because of the godparent responsibility. So it would seem to me that what you've done is clarify that their presumption that the adoption wouldn't help them in their immigration case at some future point was accurate. Therefore, what the committee is now deciding is whether or not in their culture the godparent responsibility justifies our allowing for an adult adoption, and we should have no concern about whether or not they're short-circuiting immigration procedures.

MR. KORNICHUK: I think if I can comment, clearly there are two areas of jurisdiction in a situation such as this. There is obviously the adoption issue, and then there is the immigration issue. In this particular case, and generally speaking, adoption is a provincial matter, and the federal government and our de-

partment have no particular role in determining whether or not the province will grant an adoption. Our role in cases such as this, where adoption and immigration become sort of intertwined, is simply to determine whether or not the children in the adoption case meet, in fact, the regulations of the Immigration Act and the regulations to allow them to come into Canada.

I guess what I would comment is that I think your summation is very on target as far as it goes. Certainly if somebody presented us with a situation where they had one or more adopted children, it would have to be a factor in our consideration of the overall processing; to say we would completely disregard it is obviously not the case. However, to decide whether or not the adoption should be granted, it may be worth while considering, as you say, the ethnic relationships and ideas of extended family and that sort of thing, as well as the guidance of provincial social service agencies which, again, deal with the issue of adoption per se.

The other area that comes to my mind when you mention the godparent relationship is that it's true that in various cultures of the world there is a differing understanding of family and extended family and relationships. However, I think it remains paramount that the bond between a child and its natural parents is quite critical. In this particular case I'm not aware of whether the natural parents are, in fact -- whether the children are still living with the parents or not.

MR. CHAIRMAN: The mother is alive. The father is dead.

MR. KORNICHUK: The other thing that one has to consider is that Canada right now is facing a major influx of persons who are very interested in immigrating to Canada, and I'm sure that people are trying a variety of methods. If in fact the adoption is for immigration purposes, I don't really think it would facilitate it in this case. But that's not to say that the adoption shouldn't be considered on its own merits.

MR. CHAIRMAN: Mr. Day.

MR. DAY: Thanks, Mr. Chairman. Do the immigration forms that are filled out by people -- you'll have to help me with this because I'm not familiar with it. Somewhere on the form would it be asked: what relation are you to the person you're coming in to see or sponsor or whatever? If they were adopted -- I understand they haven't applied yet -- then they could just put "son" or "daughter." Is there something on the form that alerts a very busy immigration official to ask, "Have you recently been adopted?" Or does it simply say "son," "daughter," and that's an end to it?

MR. KORNICHUK: Well, the form that would be completed in this case is what we call an application for permanent residence. Of course, one of the questions on that form is the relationship: parents' name and that sort of thing. They ask for supporting documentation to establish those relationships. They don't accept just verbatim that I'm so and so and that these are my parents. So in fact they would have to produce some sort of documentation showing that they are in fact related to the persons they are claiming to be related to.

Again, I go back to the family class sponsorship, and I say that there are two parts to that type of an application. That is, the sponsorship in Canada is completed by the sponsors, or the residents in Canada in this particular case, which is then accepted, processed here in Canada, and sent to the visa office responsible for processing the immigrant application. Then the immigrants themselves, or the prospective immigrants, are invited to complete the other half of the application. There that relationship is tested and established. In this particular case what I would say is that we would not be in the position of taking a sponsorship, because in fact whether adopted or not, these individuals will not fall within the family class of immigrants and therefore cannot be sponsored. So the application process will have to be initiated by the prospective immigrants themselves through the appropriate visa office. At that point in time, while they have relatives in Canada -- i.e., their adoptive parents, if that were to be the case -- that will only affect their assessment as independent applicants. Therefore, unless they present specific information showing how the relationship should be termed in their favour, basically there wouldn't be a family class application. So I think it would clearly come into question, the relationship.

MR. DAY: I haven't been following this that closely in terms of immigration policy, but has not the family class just been extended? Is that in effect now?

MR. HAALAND: I could address that. The immigration regulations will be amended and be implemented on July 8. The changes will amount to: where it now exists that a person can sponsor an application made by their never married sons or daughters under the age of 21 at the time of application, that age restriction will be lifted. So after July 8 the regulations will allow for the sponsorship of never married sons and daughters of any age.

The second part of the changes to the regulations will allow for an additional five points in the selection criteria under the kinship factor, which will relate primarily to assisted relatives, and that will be married sons and daughters and brothers and sisters.

Now, those changes will not affect the requirements under the Act or regulations respecting adoption. The requirement that a child be adopted before the age of 13 will still be a factor. If, to give you a scenario, a child was in fact adopted before the age of 13 and was not sponsored until later on, say when they completed school or something, the present regulations would require that that sponsorship be completed and the application be made before the child's 21st birthday. With the changes in regulations that will no longer be a problem.

MR. DAY: Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Sigurdson.

MR. SIGURDSON: Mr. Day asked the question I wanted to ask.

MR. CHAIRMAN: Mr. Clegg.

MR. M. CLEGG: Yes, Mr. Chairman. My understanding, therefore, is that the fact of a private Act adoption here would not bring these children into the family class of sponsorship because they weren't adopted before the age of 13 and that that will not be affected by the new extension of regulations because that only widens the acceptability of people who were adopted before the age of 13.

But they might make an application under any of three

classes: independent immigrant, assisted relatives, or on humanitarian and compassionate grounds. Now, with respect to these three classes my understanding from what you have said is that the immigration authorities can take various facts into consideration, one of which might be the existence of adoptive parents in Canada . It might well apply in the case of assisted relatives or humanitarian and compassionate grounds. Would it also apply in the case of an independent immigrant? In other words, could it contribute to any of the point block system? Would it, for example, apply in a discretionary area to bring up the number of points, that that person has adoptive parents in the country?

MR. KORNICHUK: Okay. Just as a point of clarification, the first thing I would say is that we're not talking about three classes. We're really talking about one class, and that's the independent category. The assisted relative provisions are a subsection, if you will, of the independent category, and the humanitarian and compassionate considerations are not a category or class in itself. In any immigration application, once we come to the point of making a decision, we generally examine it and we try and take a wider look at it to see if, for a person who strictly does not meet the criteria of the category that they're applying under, there are any more global aspects, if you will, to consider, which would come under the guise of humanitarian and compassionate considerations. And then that would allow a visa officer to use discretion, if merited, or to seek an exemption from certain requirements through an order in council basically.

So basically, then, we're dealing with one category, and that's an independent immigrant. As a straight independent application, the fact of whether a person has or does not have parents, whether adoptive or not, will play a role only in the kinship aspect of it. And as Mr. Haaland pointed out, the current change in regulations will give an additional five points for a kinship bonus.

MR. HAALAND: I should clarify that: if it's a legitimate relationship under the definitions of the immigration regulations as well.

MR. M. CLEGG: That means adopted before 13?

MR. HAALAND: If it's a son or daughter adopted before 13.

MR. M. CLEGG: So if this Bill were granted, it would not be recognized as a kinship.

MR. HAALAND: No. I think that if this Bill were granted, the effect that it would have on any immigrant application -- we would have to determine whether the relationship and, in fact, the adoption created any humanitarian and compassionate grounds which should be considered in addition to the independent application.

MR. M. CLEGG: Would it be true to say that the history and facts upon which this application has been brought to us consists of the family relationship: the fact that they are nieces and nephews, the fact that they had been a close family before the parents came to Canada, the fact that they are godparents, the fact that their father is no longer alive? They have in the past had close family ties. Those factors might perhaps be presented to you, even without the adoption, as being compassionate grounds.

MR. HAALAND: Exactly.

MR. M. CLEGG: We're just wondering whether the addition of a piece of paper that says, "By the way, also you can call yourselves our children in Alberta" -- that doesn't in fact alter the emotional relationship between them. It just puts a legal tag on it; it might not affect it. It seems to me from what you're saying that the weight you would give to that would be the same whether or not they're granted the adoption, because it is the history of the support that's existed and the emotional relationship.

MR. KORNICHUK: Exactly.

MR. M. CLEGG: It might even be also that the attempt to adopt would be a credit in their favour. It shows the seriousness of the relationship.

MR. HAALAND: By all means. And if anything, it would add an element of credibility to the application, although we couldn't consider the adoption under the provisions of the immigration legislation.

MR. M. CLEGG: That credibility would be there on the basis of their attempt as well as if their petition is a success.

MR. HAALAND: Certainly. Certainly.

MR. CHAIRMAN: Mr. Brassard.

MR. BRASSARD: Mr. Chairman, just that it would add credibility and so it would add impact to your considerations.

MR. HAALAND: It is not an element that would definitely decide one way or the other an acceptance or a rejection of an application in and of itself.

MR. BRASSARD: I guess we would always question the reasons behind an adult adoption, and you can't help but assume that we're building a case here for an adoption procedure without getting . . .

MR. HAALAND: That's where we rely upon other agencies, such as provincial authorities who grant adoptions and who assess relationships in terms of home studies and that sort of thing. That's where we rely upon that information as assisting in forming our judgment on the merits of the case under immigration legislation.

MR. KORNICHUK: I think, you know, just to add to that, the mere fact that the adoption process is quite -- how should I say it? -- a serious process to go through. And obviously a person who, having gone through that process and satisfied the relevant governing bodies, if you will, that in fact an adoption is not only a legally feasible action but, in fact, that one has been granted -- that certainly has to put an onus on anybody who is viewing that process. To say that the people who have the power to grant the adoption did it without due consideration, if you will, I think would be inappropriate. Therefore, we have to assume that this group or any other group in probably any province in Canada and maybe throughout the world do not consider these issues lightly. Therefore, if there were an adoption, it's certainly going to create a factor that we have to examine. Because again, it is a

very serious step, and it's one that I'm sure the group here is giving very serious consideration to.

MR. MUSGREAVE: While it may be a serious step, it's no guarantee to the people here in Canada that they're going to automatically reinforce the chances of their adopted children getting the right to come into Canada. Is that correct?

MR. HAALAND: That's correct.

MR. MUSGREAVE: I think that should be conveyed to them by us if we go that route, because I assume that it's going to cost them money to go through this process.

MR. HAALAND: Our presumption also would be that they would have gone into one of our offices for some counseling by an immigration officer on what steps they could take to bring these people to Canada. And had they presented this information to the officer, that they intended on adopting or filing for an adoption, the officer would have counseled that that does not in and of itself guarantee admission of their children.

MR. CHAIRMAN: Mr. Younie.

MR. YOUNIE: Okay. Again I repeat that it was, in fact, the petitioners who told the committee: we already understand that this is not a deciding factor with Immigration and is not the purpose for the adoption. They indicated that they already did know that. And what it indicates to me, from what we've heard here this morning, is that we have to understand that although the adoption procedure would be a very small factor in a lot of factors that would be weighed in an immigration case, it's not a deciding factor, and therefore we can consider the case on the merits of the petition for adult adoption without being concerned that it's an attempt to circumvent immigration laws. That would be the point I've gotten out of this this morning.

MR. CHAIRMAN: If I could ask a question. What about the situation where there was such an adult adoption granted and these children then come to visit their parents and decide to stay? Does that make it more difficult for the department to deal with it?

MR. KORNICHUK: Well, let me put it to you this way: again, people are coming to Canada every day as visitors. Once having entered Canada as visitors or even at the ports of entry, they're declaring a very different story, and that is that they want to stay. Practically speaking, the Immigration Act has provisions within it to remove people from Canada, to consider applications from within Canada, and to allow people to make refugee claims: to allow a wide variety of things. But the truth of the matter is today that if a person were to enter Canada as a visitor and then seek to remain in Canada, some consideration would be given to processing that application, again taking into account all of the things we've discussed here. But there are provisions to remove people from Canada should it come down to that.

MR. MUSGREAVE: But you don't have a horde of inspectors running around the country checking on those that said they were visitors and making sure they go back home when their visit's over?

MR. HAALAND: That's correct. We don't have an exit control policy.

MR. BRASSARD: Can I just ask either gentleman: is it my interpretation or is it fact that there is a growing leniency towards this practice, that once here we will take a look at you certainly in a different light than if you were somewhere else?

MR. HAALAND: I wouldn't want to use the term "growing leniency," but certainly in the global context people are becoming more and more aware of provisions of Canadian immigration law. Some elements of the current legislation, for example, allow for refugee claims to be made when a person seeks entry.

The aspect of a person being in Canada and being allowed to stay in itself is not an entirely correct statement. The mere presence of a person in Canada, the physical presence, doesn't mean that we abdicate all responsibility under our immigration policy. The case is still examined on the merits of the case, whether it be based on a relationship, whether it be based on a person's skills or talents that are deemed to be in demand in Canada, or for whatever reason. So a person's mere physical presence here doesn't mean that we're going to allow them to remain.

Generally speaking, I think we're taking a closer look at other elements of cases that a number of years ago we might not have. Certainly economic factors and cultural factors and all sorts of things that may not have been given appropriate consideration in the past are being given more consideration at present. That, coupled with just the general trend of global migration, means that we are encountering more people than we have in the past. I don't think that is in itself indicative of the fact that we're becoming more lenient or anything of that nature. It's a combination of a lot of things.

MR. BRASSARD: Perhaps the term "lenient" was a bad one, but I just see that there are more. We've had examples of groups of individuals landing on our shore, and all of a sudden it becomes a very emotional issue. It divides up the country, whether we should kick these people back out again or whether we should accept them. It would seem to me that probably on an individual basis their circumstances are judged differently if they are indeed here. That was my question.

MR. HAALAND: I would say that the circumstances of those cases are all judged on their own merits -- not in comparison but equally, on their own merits. A group of 174 people arriving in a boat off our shores is certainly a cause célàbre, but we don't treat those individuals any differently than the one or two that are coming off of each plane every day. The fact that they arrived in a boat in one group off the shore created headlines, but . . .

MR. MUSGREAVE: You have lots more, is what you're saying.

MR. HAALAND: They're only a small percentage.

MR. BRASSARD: Do you agree that you wouldn't, though, go through that boat load of X number of people and say, "You can stay and you cannot"?

MR. KORNICHUK: I think maybe what I could do is sort of take your question, which I think is the fact that there seems to be a perception in Canada that we're being forced to take a

number of people that we wouldn't otherwise be forced to take. What I would say is that the immigration law as it was established in 1978 had a number of provisions in it which allowed for the taking of refugee claims, which allowed for a large variety of discretion, if you will, in certain areas. What has happened is that the policy and procedure set in place by our department was designed to give meaning to the law that was established by Parliament and to process immigration applications in a fair and equitable manner.

However, through challenges to the legislation, through court rulings that have come about on various provisions within our legislation, certain rights have been given to individuals that were not taken for granted earlier in the application of our legislation. What it has amounted to is that we have a growing backlog of people who are coming to Canada and making refugee claims. Whether those people come, as Mr. Haaland has said, in a boat load of 174 or whether they get off the plane at Edmonton International Airport from Chile, for instance, the fact is that they can in fact make a refugee claim. And the current system, because of a number of steps built into it, takes very long to resolve that claim for refugee status. That is resulting in our significant backlogs and, in fact, our growing backlogs.

The Parliament of Canada right now has two pieces of legislation before it which they hope will address those problems in a fair and equitable manner, and they're preparing to put those through the process and make them law. However, the situation does exist right now that there are problems in administering this particular piece of legislation. People who do arrive on our shores . . . I would say that it is more difficult to apply the removal provisions of our legislation at this point in time. We expect that when new legislation is introduced, then we will have a process, and the policy of the government of Canada will in fact be put into place.

So your perception is that there are increasing numbers who are coming to Canada and seeking to stay, but as Mr. Haaland pointed out, I wouldn't say that there's an increasing leniency. I would say that the legislative challenges that have been made and the court rulings that have come from those challenges have put us in a position where we're not able to address those people's claims in as speedy a manner as we would like to. That may change with new legislation. But I think the Immigration Act and regulations and the policy of our country is not what I would say becoming more lenient. I think that if anything the government is trying to make it more fair, and fairness has a lot of connotations to a lot of people. But I believe we are seeking more fair legislation and application of it.

MR. CHAIRMAN: Thank you, Mr. Kornichuk.

Any further questions or comments?

MR. MUSGREAVE: Can I ask a general question? What happens in the case of refugees, of people who land here and claim refugee status? What is the position if they then want to bring a wife over? Is that part of the process?

MR. CHAIRMAN: Not until they're landed.

MR. HAALAND: Precisely. Only Canadian citizens and permanent residents can sponsor the admission to Canada of members of their family. So if a person comes to Canada, claims refugee status, has gone through the determination process, and is found in fact to be a convention refugee, then steps are taken, provided the person isn't otherwise inadmissible to Canada, to process his or her application towards landing from within Canada. Once granted permanent residence, then they can go about submitting and undertaking on behalf of family members and be subject to the sponsorship requirements.

MR. MUSGREAVE: I see.

MR. CHAIRMAN: If there's nothing further, on behalf of the committee I'd like to thank Mr. Kornichuk and Mr. Haaland for their very useful, interesting, and educational presentation to us this morning.

MR. KORNICHUK: Thank you very much for inviting us. It was very interesting for us.

[The committee recessed from 10:46 a.m. to 11:33 a.m.]

MR. CHAIRMAN: Before we commence, I would like to poll the committee. I was speaking with Mr. Lowe during the break, and I mentioned there was a possibility that we may not be able to continue past 12 o'clock. He suggested to me that he could not finish his cross-examination in that period, and of course Mr. Fradsham has a contribution to make. I would like to ask committee members: who has to leave at 12 o'clock or soon thereafter?

AN HON. MEMBER: 12:30.

MR. CHAIRMAN: We have until 12:30.

MR. BRASSARD: I have a meeting at 12:30.

MR. YOUNIE: Just a suggestion. I can see where the cross-examination is going, but it seems to me it would be more efficient if instead of doing it through question and answer, you just presented the facts that you're trying to obtain through your questions and answers, that she did know this on such and such a date by what the doctors have said, and so on and so forth. The courtroom cross-examination procedure might be less efficient than just a straight presentation.

MR. BRASSARD: I'm sorry, Mr. Chairman, but in all fairness I think these people are entitled to give the kind of presentation that they feel suits their case best. I don't think we can circumvent the procedure just to facilitate time. I think that would be unfair to these people.

MR. LOWE: Mr. Chairman, let me just say that I've probably been warped by 20 years of legal practice, but my understanding is that when lawyers speak, they're not giving evidence, and you can't believe what they say. Now, maybe that's overstating it a bit. But if you're prepared to hear me tell you what my clients tell me and take that as evidence, I could do that. I think it would shorten it. In many cases that's what Mr. Major did. He said what his clients told him, and he made it as a presentation. But I've always understood that that was a kind of dubious way of getting at the facts. I'm at your disposal.

MR. MAJOR: Well, I take umbrage that anyone is suggesting that I'm devious, because . . .

MR. LOWE: I'm not saying that.

MR. CHAIRMAN: Mr. Major, I don't think there's any suggestion of that. Because as you recall, at the end of your presentation I asked Mr. and Mrs. Lumley if they would adopt everything you said as their evidence, and they did. I just think, Mr. Lowe, that the committee is prepared to proceed on that basis. If you want to supplement, if it's supplemented by your clients directly, well, that's fine too. All we're interested in is getting the facts, and your position in relation to those facts, out.

MR. LOWE: All right; I'd be happy to proceed on that basis.

May I begin, then, by backtracking a bit and laying a bit of groundwork? We're here today responding principally to a letter from your chairman, hon. members, dated April 27, 1988. Now, I don't know if you've seen that. May I take a minute to read it to you?

MR. CHAIRMAN: They haven't, so you should.

MR. LOWE: Okay; I will. Thank you. The letter is addressed to our firm and says:

> The Committee only wish to hear evidence on the question of whether or not circumstances exist whereby the present public policy as it relates to limitations of action should be waived in this particular instance. The matter is an extremely sensitive one . . .

And I concur with that.

> . . . and the writer requests that no party lead evidence as to negligence, but only as to the circumstances of . . .

And here, I think are the key words; at least we've taken them as the key words.

> . . . why or why not it was impossible to commence an action prior to the expiration of the limitation period.

Now, we've understood that we're to address our attention to whether or not it was impossible to have begun this action within one year. Mr. Major has said, and I'll paraphrase him a bit, that the Lumleys did not know the seriousness of Brandon's symptoms until Dr. Hindle and Dr. Govender put a name to them in August of 1987 and called them "cerebral palsy." Those are frightening words. But nobody has said that the symptoms changed in August of 1987 or that something new happened in August of 1987. All we've heard is that someone put the name to the symptoms. The symptoms were known.

Now, it's our submission that it was possible for the plaintiffs to begin their action for the observable injuries to Brandon even before someone gave them the opinion that the symptoms could be called cerebral palsy. I want you to keep in mind the distinction between facts and opinions as we go through this chronologically.

When it was possible to begin an action, to use the words in the letter -- our letter of instructions -- depends on when the the fact of an injury and the fact of some consequence flowing from that injury are known. Those are the only two things that create a cause of action. You don't have to know how much the consequences are going to cost to remedy. You don't have to know how long the consequences are going to last. You don't have to know what some court might award as damages if you took that case to trial. You don't have to know those things to have a cause of action. You have a cause of action when there's been an act of negligence followed by an injury.

Now, we have to inquire, then, into what facts were known by Brandon's parents and when they were known. What did they know and when did they know it? To inquire into that is not to try the question of negligence. If I ask Mrs. Lumley questions or examine the doctor's records after September 4, I am not trying the issue which is in Mr. Major's lawsuit. Mr. Major's lawsuit begins and ends on September 4, 1985. That's where liability, that's where negligence, if there is any, is going to be determined. So please understand that if I am inquiring into what Mrs. Lumley knew and when she knew it, that is not a trial of the issue in this lawsuit.

Now, that inquiry into what Brandon's parents knew and when they knew it cannot be avoided. You cannot simply take the representations of one side or the other at face value. It is not enough for Mr. Major to sit here before you and say, "My clients didn't know enough to start an action until after a year had gone by." That's not enough. That's not evidence. That's his opinion. He's representing someone. He's paid to represent them just the same way I'm paid to represent Dr. Hunt and Dr. Bladek. That's an opinion; that isn't a fact. We have to make the inquiry, and you have to draw your own conclusion on the facts: whether it was impossible for Mr. and Mrs. Lumley to have begun this action within the year.

I need to know some legal background. I'm sorry that I started in this morning the way I do in court with cross-examination, assuming everybody was thoroughly familiar with the facts and the law. I apologize for that. I want you to know a few things. First, there is a lawsuit. Mr. Major is not here asking for a Bill which would permit him to sue the doctors. He has sued the doctors and the hospital; there is a lawsuit. And if nothing more is done, there will be pretrial examinations for discovery, there will be production of records and documents, and there will be a trial of the issue of whether Dr. Hunt or Dr. Bladek or the hospital were negligent on September 4, 1985. All those things will happen without you taking a single step today. Now, Mr. Major will be faced at that trial, and he'll have his day in court. He'll get to lead his evidence.

But he will be faced at that trial with our defence, and our defence will be that the plaintiffs acted too late. We're entitled to the protection of the Limitation of Actions Act, protection granted by the Legislature of this province and six other provinces. Keep in mind that there are seven provinces that have the same policy that Alberta has. They're entitled to that protection, and that's part of our defence. That won't be our only defence. We'll meet the lawsuit on its merits. We'll try to satisfy the court that there was no negligence. But one of our defences will be: you're out of time.

Now, what this presentation is for, what this Bill is about -- although it's not clear by reading the Bill -- is this: Mr. Major is asking you to pull that defence out from underneath Dr. Hunt and Dr. Bladek. Very simple, pure and simple: take the defence away from them, take away the defence of the Limitation of Actions Act, the defence given by the laws of this province, recognized, incidentally, in case law as being a perfectly legitimate piece of legislation. It's been challenged constitutionally no less than six times that I'm aware of, and it's withstood the challenge in other provinces. If someone loses a right of action by being too slow to bring the lawsuit, that is not an injury to the plaintiff's constitutional rights under the Canadian Bill of Rights. I want you to understand that.

The Supreme Court of Canada has also said that the limitation defence, the right to be free from suit which has accrued, we say, to Drs. Hunt and Bladek at this point, is not just a procedural matter. We're not just talking about some sort of rule, some sort of loophole, some sort of bylaw or procedure. The Supreme Court of Canada has called that right to freedom from suit an accrued, substantive legal right. We're not talking about procedure.

Now, Mr. Major is asking you retroactively to take away from Drs. Hunt and Bladek an accrued, substantive legal right. In essence, we say, he's asking you to treat them differently from all other doctors in this province. We say he's asking you to do a thing which section 15 of the Bill of Rights would make unconstitutional.

Leaving that aside, Mr. Major's Bill -- a bit more of the legal background -- may also be premature. In our submission, there is no reason for us to be here today. You are wasting your time, and we're wasting our time, because Mr. Major has pleaded in his statement of claim that the doctors fraudulently concealed the facts. Now, if that's true, then no limitation period has expired. The wording of the Act says that if there's been a fraudulent concealment of the facts, time doesn't run. So if Mr. Major can make that case, that there's been a fraudulent concealment, he doesn't need this Bill; the time has not expired. His clients are not out of time, and they'll go to trial, just as they will no matter what you do here today. Only when they get to trial and we say, "You're out of time," they'll say, "No, we're not," and if he's right, he wins. So I say that it's premature.

Now, there's an even better argument that it's premature as against the hospital. Let me refer you to the wording of the Bill itself. I want to clear up one misconception that seems to be current before I go any further. Will you look not at the preamble but at the wording on the second page. It says, "notwithstanding the *Limitation of Actions Act*, Joni Marie Lumley may make an application" and the court shall decide. I want you to understand how subtle those words are. The words "notwithstanding the *Limitation of Actions Act*" mean setting aside all defence available to the doctors pursuant to the Limitation of Actions Act. May the plaintiff sue? Well, of course they may sue. It speaks of some judge exercising his discretion. No judge will exercise his discretion; there's no discretion that needs to be exercised. Once you set aside the limitation of actions defence, there isn't anything on this green earth that could prevent these people from continuing their lawsuit. They're within the two-year limit like anybody else. They have a cause of action which sounds plausible on its face. There is no discretion to be exercised by a court if this Bill is passed.

You are not asking somebody else to make the decision; you are making the decision with this Bill. I want you to understand that plainly. In fact, it's a waste of time and money to make us go through the exercise of applying to a court and asking some court to consider: if there is no limitation defence anymore -- we've set it aside -- now, Court of Queen's Bench, should they be allowed to sue? That's a waste of time and money. Of course they should be allowed to sue. There's nothing that can prevent them from suing under those circumstances. So the wording "notwithstanding the *Limitation of Actions Act*" is subtle, and I want you to know what it means. You are being asked to take away the defence, the substantive accrued legal right which we say Dr. Hunt and Dr. Bladek now have. It's that simple. You won't prevent or permit this case from going to trial by anything you do today. Any decision you have will not prevent or permit this case. It will go to trial whether you decide or don't decide.

Now, I was asked before we adjourned if I was suggesting that a patient should sue a doctor before the limitation expired, and I think the words were "just in case there had been negligence." If I've given you that impression, I apologize. That is not what I'm suggesting. The present limitation Act says that you must sue within one year of the service complained of if you're suing a doctor. The indications for suit are that someone has done something, has intervened in your body, and there's been a consequent injury. Now, there is not a third element that is that you don't have to think the injury is permanent or long lasting. Once the injury is done, whether it's permanent or long lasting doesn't make any difference. That only goes to the question of how much you might get from a court if you win. But the intervention and the subsequent injury are the elements that send you to court. You then say that that intervention was negligent; the other side says that it wasn't. You then say that the injury was caused by the intervention; the other side says that it wasn't. That's a lawsuit. That's a car crash case, that's a medical case, that's any tort case you want to name. Those are the elements: an intervention and an injury. And once you've got the intervention and the injury, you've got everything you need to bring a lawsuit. You don't need someone to put a label on it. You don't need someone to tell you that this is going to last for a very long time instead of for a short time. You don't need someone to tell you that this is worth a lot of money instead of a little bit of money. You've got the elements of a lawsuit as soon as you have the intervention and the injury.

In our material, the written submission we've handed you, we addressed the question which was put to us by your chairman, which is whether or not it was impossible to commence an action prior to the expiration of limitation. We recite what was known within one year by the parents and by the physicians. Now, Mr. Major has said that the physicians did not tell the parents the seriousness of Brandon's injuries. That doesn't answer the question. The question isn't: how serious did the parents think their son's injuries were? The question is: did they understand their son to have been injured? Did the physicians hide from them that there was something abnormal about Brandon, that there'd been something abnormal about his delivery, and that there was something abnormal about his development? Was that hidden from them? Did they understand, as these reports say, that he was suffering from neurological deficit, that he had psychomotor impairment? Did he go through all of those assessments, and at the end of the assessments did the doctors sit down with Mr. and Mrs. Lumley, look them square in the eye and say, "Everything's fine, but we're sending your child to therapy at the age of seven months anyway"? Did the doctors sit down and say: "Your child has a piece of his brain which shows up on the CAT scan as being a cerebral cyst. That is, where a brain should be there's nothing; instead, it's filled with liquid. We think that the rest of the brain may some day counteract for that. But don't worry about it. That's not an injury; that's perfectly normal"?

It strains belief that anyone, whether first-time parents or otherwise, could put together the facts we know and think that Brandon's development was normal. Now, we don't have Dr. Govender here, and we don't have his file. Dr. Govender was the primary care giver; he was the pediatrician. We're being asked to believe -- Mr. Major is asking you to believe -- that Dr. Govender told these parents all along that there was nothing wrong with their child. Now, I'm going to read you some of the material we have and some of the facts we know that suggest that that's just not believable.

I had thought I would have only one choice in helping you to understand what was known and when it was known and that was to cross-examine. I want to say something, a bit about cross-examination, in case that becomes necessary as we go along. You know without my saying it that cross-examination is the foundation of a search for truth in a courtroom. It's right there alongside the oath that's administered and that we believe

binds the conscience of the witness. Witnesses are not perfect in their recall. Anyone with any experience in a courtroom or out knows that time changes recollections, not because the witness is untruthful or intentionally misremembering but because the witness is human. So cross-examination is the foundation of our search for truth. A witness, faced with the evidence of others, faced with notes kept by others at the same time, can have his memory jogged, his recollection refreshed; his recollection will be different. And cross-examination to a layman always appears confrontational. It looks like the lawyer is badgering somebody.

I obviously gave some of you that feeling as I was cross-examining Mrs. Lumley this morning. For that I apologize. It not only indicates that Mrs. Lumley felt I was treating her badly, it indicates that I was doing my job badly. Because if I'm doing it properly, the witness never should feel she's being badgered. I apologize if I left you with that impression. But I don't apologize for cross-examining Mrs. Lumley, because I don't expect you to take anyone's evidence at face value without having it tested. I've been invited to do that today, and I will. Normally I wouldn't do that. I don't think Mr. Major objects to cross-examination. It's his daily tool. He only objects if he feels I'm being abusive. I'll try not to be.

Can I now help us to examine the questions: was it impossible to have begun this action within a year, what did Mr. and Mrs. Lumley know, and when did they know about Brandon's condition? You heard this morning that Mr. Lumley was in the delivery room. We know that it was a forceps delivery. You've heard from Mrs. Lumley that she knew within a day or so that her son had suffered a fracture of his skull. You heard from Mr. Lumley that he gave permission over the telephone to Dr. Cochrane, I believe it was, to insert a drain in their son's skull to drain blood. You've heard that the child for seven months was on phenobarbital as a precaution to prevent seizures. The hospital records show that there were some minor seizures immediately after birth. This was a precaution.

Under our tab 4 we have a note, the one that's bound in there, from October 25, 1985, written by Dr. Bladek, who was not in the hospital and didn't know the circumstances of the birth. Mr. Major has said time and time again that the doctors never told the Lumleys anything about what had happened to their child. Well, Dr. Bladek wasn't there and didn't know the circumstances of the birth. But Mrs. Lumley told her on October 25, and Dr. Bladek wrote down: "Talk re son Brandon's delivery." And Mrs. Lumley acknowledged this. She was telling Dr. Bladek these things. The cord was wrapped around the child's neck. It was a forceps delivery. There's the word "forceps." Mrs. Lumley knew that. Dr. Bladek didn't know that. She wasn't there. Mrs. Lumley knew that it was a forceps delivery. Dr. Bladek has used the word "intracranial hemorrhage." I don't know if Mrs. Lumley used that or not. Bleeding in the head means the same thing. "On Phenobarb." We know that Mrs. Lumley knew all these things by October 25.

On February 18, 1986, still well within a year, Mrs. Lumley appears again in Dr. Bladek's office, and Dr. Bladek writes the words "Worried about son," followed by these words, "Dr. Govender thinks he's slow, has low tone and wants referral to neurologist." Dr. Bladek tells me that this is what Mrs. Lumley said to her, that Dr. Govender wanted the child referred to a neurologist. Now, what would a normal parent think when a pediatrician tells her that the child is slow, has low muscle tone, and should be seen by a neurologist? I won't answer that question; you answer it yourself.

A note was also made that same day, February 18, 1986, on Brandon's chart, and that's the one I've handed you which, had I known it wasn't inserted, I would have inserted under tab 4. You'll notice the one that is bound in there follows these comments with the word "Talk." That means that Dr. Bladek discussed with Mrs. Lumley that day, February 18, 1986, Mrs. Lumley's worries about her child's development and encouraged her to go a neurologist, and that shows up. And when you look at this sheet for February 18, 1986, here is a more complete recital. This is Brandon's sheet:

> 5 month weight -- 16 pounds
> on phenobarb -- 3.5 BID

That means twice a day?

DR. BLADEK: Yes.

MR. LOWE:

> formula and food -- gets excited
> smiles
> sits with support
> rolled back to front x two
> minimal head lag
> eyes don't focus too well
> can see light -- reaches for it
> imp -- birth injury.

"Imp" means "impression." Here on Dr. Bladek's chart, she's written, "imp -- birth injury."

> ? -- developmental delay
> talk -- reassured parents are doing a good job; proceed with referral to neurologist.

Now, Dr. Bladek tells me that she did discuss with Mrs. Lumley on that day the possibility that these symptoms related to a birth injury and encouraged her, for goodness' sake, to do what Dr. Govender said and go see a neurologist. And indeed Mrs. Lumley went to see a neurologist, and we have that under tab 5.

We have a neurological assessment the very first thing under tab 5. It's a thorough neurological assessment. Now, you have to wonder what goes through a parent's mind, what anxiety and what concern, when the child is to be assessed by the neurology clinic. It must have been a terrible burden and of great concern to both parents. But I can't believe they thought that Brandon was being assessed by the neurology clinic because he was normal.

Mr. Major has made much of the fact that Mr. and Mrs. Lumley did not have the neurology clinic assessment that you have now before you as the first item under our tab 5. That's true. Mr. Major would have you believe that Dr. Sarnat, having written this assessment, did not spend any time with the parents and discuss what's in it. Dr. Sarnat isn't here to defend himself. We don't know what he would say about that. I say it strains belief when in the second-last paragraph you read this: "The neurological deficit that Brandon presents." In other words, Brandon has a neurological deficit.

> The neurological deficit that Brandon presents seems to be mainly related to damage to the cerebellum . . .

He has had damage to his brain.

> . . . and possibly to the brainstem, or damage to the cortical bulbar pathways.

I don't know what that means. Maybe, Dr. Bladek, you can tell me what that means. What does "cortical bulbar pathways" mean?

DR. BLADEK: Those are the neurological pathways in the brain.

MR. LOWE: Oh. So here on March 11, 1986, well within a year, certainly the specialist has concluded that Brandon has a neurological deficit, that there's a likelihood he's had damage to his brain, possibly to the brain stem, possibly to the pathways in the brain. It's difficult to know at this moment how much neurological deficit the child will have; that is, the extent of it we're not sure. We know there is some; we don't know how serious it's going to be. That is, we know the fact of injury; we don't know how long it's going to last or how much it would be worth to try to remedy in dollars. We don't know those facts, but we know he does not seem to be severely retarded. Fine. He's retarded; he's not severely retarded.

On the preceding page, the summary and impression, page 4, you look at the plan for Brandon, point 3:

> Auditory brainstem evoked potentials:

This is something they plan to do.

> To rule out possible brainstem damage due to posterior hemorrhage in the perinatal period.

Let's find out whether there has been brainstem damage due to the hemorrhage and perinatal means of birth, due to the hemorrhage at birth. Certainly Dr. Sarnat was putting together the mental retardation, the neurological deficit, and the hemorrhage at birth on March 11, 1986. Mr. Major would have you believe that nobody ever said that to the parents. Dr. Sarnat isn't here and can't speak. We do know, however, that just before this Mrs. Lumley had seen Dr. Bladek and, as we noted, on February 16 had expressed her concern at her child's condition. Is it believable to you that having expressed that concern, having been referred to a neurologist, she didn't then inquire of the neurologist following what he'd found and what was going to be done? In fact, what was done was that he was referred again -- and this is the third item under our tab 5. It's a program record from the infant therapy program, dated April 1986. Referral by Dr. Govender. "Reason for Referral" -- top of the first page -- "Delayed development."

Mr. Majors walked you through the baby calendar. Probably everybody in this room who has children has kept one of those or, more accurately, has a wife who has kept one of those. I can understand that first-time parents might not understand what levels of development are appropriate for what chronological age. But is it to be believed that the parents of Brandon did not know he was being referred for assessment because of delayed development?

MR. MAJOR: At 29 months?

MR. LOWE: The one I'm looking at is dated April 1986. It's the last one, not the second one. Turn behind where you are, Mr. Major. It's entitled "Multidisciplinary Initial Assessment -- Infant Therapy Program," dated April 1986. There are three items behind our tab 5. This is the third. He was not 29 months; he was seven months.

If you'll turn to about page 4, I won't go into the observations one by one, but if you'll take the time to look at them, almost every test done shows that his skills were solid to four months. That is, he was performing at a four-month level at the age of seven months. You can look at them one by one, but in summary that's accurate. On page 7 is the summary. It goes on to page 8. At the top of page 8, the first paragraph:

> Brandon's gross motor skills are at a 4-5 month level.

And finally, on page 9, he's in the infant therapy program.

I wanted to point out something else as well, the very first one under tab 5. Let's take a look at the wording in that one on page 4.

> Summary and Impression:
>
> Six-month-old child with prolonged labour (20 hours).

Mrs. Lumley was in labour for 20 hours.

> Application of midforceps, with fracture in the left parietal occipital region, and posterior fossa hemorrhage requiring surgical drainage. Mild psychomotor delay, [et cetera]. Mild neurologic deficit . . .

The connection is made there. At least it's made there for the purpose of trying to rule it out.

Then we're told in Mr. Major's submission on page 2 that in August 1986 a CT scan was performed and at that time -- a year hasn't expired yet -- Dr. Sarnat tells Mrs. Lumley that the CT scan shows, in the words of Mr. Major's submission, page 2 I think it is, that a portion of his brain is "dead." Now, from what I understand, it's called a cerebral cyst. Is that correct?

DR. BLADEK: That's right.

MR. LOWE: Could you explain that that is not dead tissue sitting there but simply that there isn't tissue where there should be tissue? Is that right?

DR. BLADEK: That's right. You can see it as a hole, that there is not brain tissue. It's usually filled with fluid.

MR. LOWE: This is a permanent condition. Now, Mr. Major, I think on page 2, said:

> Dr. Sarnat held out hope that the right side of the brain may take over for the dead portion.

In any event, they knew there was a portion of the brain which had not developed. There was some possibility that the rest of the brain might compensate, but if it didn't, there was a portion of the brain not there, not functioning.

So let's add up what Mr. and Mrs. Lumley knew, and we know they knew, by August 1986, before the one-year period had expired. They knew of the forceps delivery, they knew of the fracture, they knew of intracranial bleeding, they knew that a drain had been inserted, and they knew that the child took phenobarbital for seizures. Unless the people doing the assessments hid all of this from them, I suggest to you they must have known, too, that their child had neurological deficit, psychomotor problems, and delayed maturity. That's why he was in, number 7, therapy starting at seven months.

Finally, in August of '86 they knew that a portion of his brain simply wasn't there. Now, are those sufficient facts on which a plaintiff could reasonably be expected to rely at that point? There may be a name that can be attached to these symptoms. The name is the name that Dr. Hindle used and Dr. Govender then accepted. The name is cerebral palsy. But the symptoms were there, all of them, by August of 1986. Whatever they were called, the symptoms were there. Mrs. Lumley and Mr. Lumley were [inaudible]. They knew what they were.

Now, in our submission the facts were known. In fact, if this goes to trial, when it goes to trial, those are the facts on which the plaintiffs will rely to try to satisfy a court that there's been some injury and permanent loss to the child -- nothing more. That's it. That's the sum total. All of that was known within a year.

Was it impossible to have brought this lawsuit by September 4, 1986, given those facts? All that happened after August of 1986 was that someone put a name to it. The name was frightening, and the name sent Brandon's parents to a law office. The lawyer suggested that this was worth testing in a law-

suit. We don't know even now whether the test will turn out to give Brandon any damages or any remedy, but we do know that the test will occur, that it will go to trial whatever you do here today. The only question is: will you pull the defence of the Limitation of Actions Act out from under Drs. Hunt and Bladek before they go to trial. Don't be misled by the wording of the Bill; that's what you're being asked to do.

Now, can I speak to you a bit about the general policy of limitations Acts? First, let me read to you from the report of the committee, a portion of which is appended to Mr. Major's material. He read you pieces from this Institute of Law Research and Reform report on the Limitation of Actions Act. It goes back to September 1986. The preamble says this. It's called, incidentally, preface and invitation to comment. It says this:

> In the result this is not a final report; it is a tentative set of conclusions accompanied by draft legislation. The institute's purpose in issuing a report for discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and make their views known to the institute. Any comments sent to the institute will be considered when the institute determines what recommendation, if any, it will make to the Alberta Attorney General.

Presumably, if there is a recommendation made to the Alberta Attorney General, then the pros and cons will be debated by yourselves before any general change is made.

I trust we're not under a misapprehension that the Limitation of Actions Act was somehow invented by your predecessors to give some unfair advantage to doctors. I trust it's not necessary for me to disabuse you of that suggestion; you haven't so low an opinion of those who preceded you as to think that's why it was invented. There are policy reasons for it. Those policy reasons have been found credible in seven out of 10 jurisdictions in Canada. Let us not begin with any sort of impression that the one-year limitation on actions against doctors is somehow an inherent unfairness put there by misguided legislators under the evil influence of the doctors' lobby. Let's lay that one to rest before we go any further.

MR. YOUNIE: I'm just wondering: if the presentation goes till 12:30 and we adjourn, will the people be coming back to answer questions? I have close to two pages of questions I want to ask.

MR. CHAIRMAN: I think we'll have to face that close to 12:30.

MR. YOUNIE: I think we are close to 12:30. That's why I asked.

MR. LOWE: Mr. Chairman, if I can just have a minute, I'll see how much of this I need to bring to your attention. Most of what I was going to draw to your attention from this you have in our written submission. I sometimes like to emphasize some of that, but we may have already covered most of it. Let me simply draw to your attention the very last paragraph on page 5, in which we say:

> This area of the law has been under active consideration by the Institute of Law Research and Reform since it was established in 1968,

and we suggest that

> this Committee ought not to respond to ad hoc applications.

There's a quote from a case by Chief Justice Laycraft, which I can give to you if you want, in which he comments on the need for "legislation of general import" and not ad hoc remedies, piece by piece, which may or may not be even be constitutional. That, I suppose, is our final suggestion.

You will have a chance to debate someday the merits of limitations. You will discover during that thorough debate, at which I expect you will hear from representatives of the professions who enjoy this protection, what the advantages and disadvantages are, what the policy reasons are for supporting what we now have and what the policy reasons might be for changing it.

Professor McLaren, whose article Mr. Major quoted to you, has his own personal views. I would have my own personal views. Mine are probably not entitled to any more weight than Professor McLaren's. I won't bore you. But there are policy reasons on both sides. You're being asked to ignore the policy reasons, set them aside, and treat this case differently, to treat these two physicians differently than all other physicians in this province. The reason you're being asked to do that is because you're being urged to believe that the parents had not the facts before them within the limitation period. I suggest to you that the evidence indicates they had the facts.

Our sympathies begin, naturally, with Mr. and Mrs. Lumley and with Brandon. I understand that. I have five children. But this province is second to none in the care it provides for families like the Lumleys. The Lumleys are not going to be left homeless and without support if you don't act today. That's not the case. There are programs, most of which you know better than I, which support the Lumleys in their burden, as Mr. Major has called it quite accurately. And no province, in fact I would venture to say no jurisdiction in North America, does it better.

Thank you for your attention.

MR. CHAIRMAN: Mr. Younie.

MR. YOUNIE: Thank you. I have a number of points and questions. One point you made several times was that all the Lumleys learned in 1987 was that the name cerebral palsy was what applied to the symptoms they'd been witnessing all along. From what I've seen, there may well have been one other thing they learned first at that time, and that is that the condition may have been directly caused by the birth injury. Up until that time, in all the documents you cited, even though it said that there had been a birth injury which did certain things and that there were now these certain symptoms, nowhere in it does any doctor acknowledge that the symptoms are a direct result of the injury. Now, I've gone to so many WCB hearings where in fact they say, "Well, we're not allowing this claim because the doctor doesn't say this symptom was caused by this injury," even though it does say there was an injury and there is a symptom. So I'm just wondering if at any time anybody said, "These symptoms are demonstrably a direct result of the birth injury," not just that they both existed.

MR. MAJOR: Mr. Younie, may Mr. and Mrs. Lumley respond to that question?

MR. YOUNIE: It's addressed to both. I would like to hear both answers.

MR. LOWE: May I comment on that first? There is nothing in Mr. Major's evidence to suggest that anybody has given that opinion even now. Certainly whether there is a cause and effect relationship between the application of forceps and this child's condition is a question to be decided on expert evidence at a trial.

MR. YOUNIE: Okay. My point is just that, that it is when they found out it was cerebral palsy. From what Mrs. Lumley said, it was at that point that somebody said it was a result of the birth injury. That was the first point they knew that the relationship that legitimizes a court case or a lawsuit – because the fact that there are symptoms and there was an injury means nothing until someone says they are related by cause and effect, and that is when a lawsuit becomes a legitimate possibility.

Unless it can be demonstrated to me that at some point prior to that somebody told them there is a direct cause and effect relationship, they had no way of knowing, although they would have suspicions. In fact, it seems to me that all the medical evidence never said that to them, and they were never led to believe at any time there was a direct cause and effect relationship. I understand that it's common, from what I've seen with WCB cases I've handled, that doctors never, if they can avoid it, say there is a direct cause and effect relationship.

MR. LOWE: Mr. Younie, I direct you to page 4 of the assessment done by Dr. Sarnat. Dr. Sarnat recites:

> 1) Six-month-old child with prolonged labour (20 hours). Application of midforceps, with fracture in the left parietal occipital region, and posterior fossa hemorrhage requiring surgical drainage. Mild psychomotor delay . . .

He does not say, "I think this caused the injury." It's not his position to do that, but the facts are recited. Now, it is a matter of opinion whether those events caused the cerebral palsy, but in very nearly every lawsuit it is a matter of opinion and a matter to be determined by the court whether the acts the plaintiff relies on caused the injury to be suffered. That is, the plaintiff says, "The defendant did such and such and, because of that, I'm injured." There are two tests. First, was what the defendant did negligent, and two, even if it was negligent, did it cause what you're complaining of? Now, you're saying to me that there isn't a lawsuit until you have an expert tell you not only (a) there was a negligent act but, yes, it caused your injury. I'm say to you that that isn't known until the judgment comes down and that very nearly every negligence lawsuit goes to trial.

MR. YOUNIE: My question was: did anyone give them reasonable cause to believe there was a relationship? From what I've seen, the first time that happened was when they were told the child had cerebral palsy. Up until that time, they would have been jumping to a conclusion that no doctor had given them a reason to believe. It wasn't until the doctor said, "Your son has cerebral palsy, and it may be connected to the birth injury," that they had legitimate cause to consider a lawsuit. That is my interpretation of what I've seen to this point.

MR. LOWE: Well, Mr. Younie, I guess what we need in order to answer that question is to bring Dr. Govender and Dr. Sarnat here and ask them what they said.

MR. MAJOR: Perhaps the parents can answer the question, Mr. Lowe.

MR. YOUNIE: Well, yes, I would like to hear their opinion. Did any doctor at any time indicate that there was a cause and effect relationship between the symptoms and the birth injury?

MRS. LUMLEY: No, not until they said cerebral palsy. That's when . . .

MR. CHAIRMAN: Mr. Younie, Mr. Clegg had a supplemental to that first one.

MR. M. CLEGG: Mr. Chairman, thank you. It was essentially on this point. One thing that hasn't been made clear is whether the Sarnat report was provided to Dr. Bladek, when I believe that in the report that is the case.

DR. BLADEK: Which report, please?

MR. M. CLEGG: Dr. Sarnat.

MR. LOWE: The Sarnat report, whether that came back to Dr. Bladek? No, it did not.

MR. M. CLEGG: It did not?

DR. BLADEK: No.

MR. MAJOR: Did Dr. Bladek see the CAT scan that she was commenting on earlier?

DR. BLADEK: No. I was just speaking generally about what a cyst is.

MR. CHAIRMAN: So who received the Sarnat report?

MR. LOWE: Mr. Major provided that to us.

MR. MAJOR: Only the doctors.

MR. CHAIRMAN: Yes, but could I just ask Mr. Lowe: to his information, who received that report?

MR. LOWE: Certainly neither Dr. Hunt nor Dr. Bladek received it. Who else received it, we do not know. We know that it was prepared. We're asking you, without Dr. Sarnat here to give evidence, to draw the conclusion that whether the report was handed to the parents or not, its contents were discussed with them before the child was enrolled in the therapy program.

MRS. HEWES: Can I ask a question on that point?

MR. YOUNIE: Can I finish the points I was trying to make? I think that one answer there has summed up a lot of my questions, but I do have one other. Because the other big point that was made was the purpose behind the limitation itself as a defence. Again, my interpretation of what we're doing here – and I don't consider it a waste of time – is to decide whether or not this case could or could not have been launched beforehand and whether or not, therefore, it would be legitimate for us to say that this should go to trial with the consideration being whether or not there was negligence and the negligence caused the continuing injury to their son, without it being removed from the court on the grounds that it's technically past the limitation time as a defence.

So what we're being asked to look at is whether you should be allowed to use a defence that has nothing to do with the actual question of negligence and injury but whether or not they knew the facts in time. We're being asked to say, well, they didn't know well enough, and we'd like to see it go to court on its merits as a medical case and medical lawsuit, not on a technical lawsuit over the limitation Act.

MR. LOWE: I'm glad you used that word. I'm glad you used the word "technical," because I'm going to jump on it. I want you to understand, and I will repeat this again: the case is Perrie and Martin in the Supreme Court of Canada, and the Supreme Court of Canada has said this is not a technical defence. I want you to understand that the privilege of being free of lawsuit is one which extends to you after two years and to me after two years and to physicians after one year. It isn't a technical defence. It is a substantive, accrued right. It is recognized in the law, and it isn't a loophole. I'm glad you used the word "technical" because I don't want to hear that term "technical" adopted by this panel as a description of the Limitation of Actions Act. It isn't. It's a substantive right to freedom from suit, and you have it, and you have it, and you have it, and I have it. We have it after two years. Physicians have it after one year. Now, let's be clear on that.

MR. YOUNIE: Okay, but it is not a medical argument. So if based on the evidence we assume that the limitation should not apply because they did not have enough facts to have reasonably, as laypeople, as parents, as those who had only what their doctors told them -- because I've never had a doctor give me one of those written reports unless I was threatening to take him to court. So the parents don't get to see those. Parents get what doctors tell them, and if we are convinced that they had no way to know they had sufficient evidence to warrant the lawsuit or that they were never led to believe -- in fact, were led to believe otherwise -- that there was a cause and effect relationship between the symptoms and the birth injury, then the limitations in this case would not apply if we're convinced of that.

MR. CHAIRMAN: Mr. Younie, we're getting involved in a debate here. You're not trying to elicit information or facts, and I'm going to move to Mr. Day, who indicates he has a question.

MRS. MIROSH: I indicated it.

MR. CHAIRMAN: Well, you had your hand up after Mr. Day, Mrs. Mirosh.

MRS. MIROSH: No, I didn't. I had it up before, but . . .

MR. DAY: Thank you, Mr. Chairman. I had my hand up quite a while ago.

MR. CHAIRMAN: And Mrs. Hewes follows Mrs. Mirosh.

MR. DAY: I also sense your discomfort, Mr. Chairman. I think Mr. Younie's comments and others' may be reserved for our own discussion, but I think here we're to ask some questions to clear up some thinking in our own mind and reserve our broader comments for later. I'll try to. Though this is difficult for us, I'm sure both lawyers can understand, and you keep us on track on the issue itself if we stray.

A fracture caused during birth: how rare is that? Can we just get -- I'm leading to something here. How rare is that?

DR. HUNT: It's very uncommon.

MR. DAY: Very uncommon. And when these cases occur, can you give just a rough -- it doesn't have to be exact -- ballpark figure. With a fracture of this nature, how often do motor/neural development or other problems occur?

DR. HUNT: It's a very tough question. This is the only case I've been involved in personally, and I couldn't answer that.

MR. DAY: Okay.

To Mr. Lowe. On your presentation to us that we could be removing one of Dr. Hunt's means of defence and that this is going to court anyway, regardless of what we decide here -- I understand that. However, from your estimation, if the judge indeed says that these folks are out of time, can it be dismissed right there with no further discussion, and the thing is dealt with?

MR. MAJOR: There may be a difference of opinion between Mr. Lowe and myself on that.

MR. DAY: Good. I appreciate that.

MR. MAJOR: Mr. Lowe said this matter was going to court in any event, and I would anticipate that Mr. Lowe's firm would bring a motion in which he said: "Assuming that there was negligence, assuming that the negligence caused the injury making -- all those assumptions -- the injury complained of is the birth. You're out of time." And they would ask for a dismissal of the lawsuit.

MR. DAY: And on that ground the thing would be dismissed right there?

MR. MAJOR: It might be. Now, as Mr. Lowe ably pointed out -- and it's quite correct -- if we can prove fraud, we might circumvent the lawsuit. But where a doctor withholds information for perhaps two reasons -- one is not to unnecessarily burden the parents with knowledge that may not happen and the other might be to save his own skin -- it's difficult for a court to attribute bad faith, and it's very difficult and very rare to prove fraud. For all practical purposes, we're asking for an extension of the limitation period because we feel that without the limitation period being dealt with fairly, the matter will not be heard on the merits.

MR. DAY: To Dr. Bladek. The cyst, called a permanent condition: can that type of cyst be trauma-caused as well as congenital?

DR. BLADEK: I'm not an expert on brain cysts, but I would answer that by saying I believe that would be a possibility.

MR. DAY: To Mrs. Lumley. When was the thought or the suggestion -- maybe it was a suggestion to you -- to take litigation presented to you, either in your own mind or by somebody else?

MRS. LUMLEY: Okay. The day that I took him to the eye doctor, Dr. Hindle, he asked me if he had cerebral palsy. Well, that's when I got really upset. So I called my husband and he came home, and I called his pediatrician, Dr. Govender, and asked if I could see him. So I went in and asked him, and he said yes, he did.

MR. DAY: Was it at that time that you started thinking of litigation?

MRS. LUMLEY: Yes.

MR. DAY: A final question, maybe to either of the doctors. Is it normal that a doctor -- and I recognize Dr. Govender isn't here -- would have that information, yet not pass it on to the parents until they specifically asked for that information?

DR. HUNT: If I may answer that. I think the term cerebral palsy has all sorts of connotations on it. I think most physicians would not label a child as having cerebral palsy at age two months or three months. The normal course of events would be to see how the child is developing without alarming the parents, I think, by putting a label on it at that time. In fact, I think that to diagnose cerebral palsy at two or three months of age would be difficult to do.

MR. MAJOR: That's exactly what he told us.

MR. DAY: And also at a year of age, would it be difficult to do?

DR. HUNT: It's a label, you know.

MR. MAJOR: It has a meaning to it, though.

DR. HUNT: It's a label that the physician might attach at any time, but I think they'd be very careful to use that term. They would use other terms and talk about the baby's development or lack thereof.

MR. DAY: Thank you, Mr. Chairman.

MRS. MIROSH: To either physician. With the diagnosis of cerebral palsy -- I gather that cerebral palsy flagged this whole thing. In your experience with other children with cerebral palsy, do you know if that condition has been diagnosed as a result of any kind of injury, necessarily? Cerebral palsy can be diagnosed without injury, can it not?

DR. BLADEK: I think that's a topic of debate amongst experts.

MRS. MIROSH: Right.

DR. BLADEK: It is a difficult diagnosis to make as to why it occurred, as well.

MRS. MIROSH: To me, I feel that if the symptoms were there, it's true that there was time to make this lawsuit in the first year. The idea of the cerebral palsy and us looking at extending the time limit just because the diagnosis of cerebral palsy has been made doesn't, to me, warrant an extension because the unknown diagnosis of cerebral palsy was the cause of it.

MR. LUMLEY: If I may, ma'am. We understand cerebral palsy to be the result of a blow to the head or violence.

MRS. LUMLEY: We looked up cerebral palsy, and that's what it says.

MR. LUMLEY: Nobody else ever told us that a fracture of the skull or the condition that he was or was not going to be in was caused by a blow to the head.

MRS. MIROSH: So you think in your mind that any child diagnosed with cerebral palsy would be a direct result of an injury regardless of any case, to your knowledge?

MR. LUMLEY: I don't know about any case. All I know is that it's the only thing we've found out that gave us any legitimate reason to question the good doctor on his condition.

MRS. MIROSH: But you didn't have any questions about your child's growth patterns until you were told this child had cerebral palsy?

MR. LUMLEY: The questions and the answers we got for the questions . . .

MRS. LUMLEY: We never got any answers. We had lots of questions.

MRS. MIROSH: But it was the diagnosis of cerebral palsy that flagged this whole thing for you, right?

MRS. LUMLEY: Yes, and the handicap walker.

MRS. MIROSH: And the fact that you think cerebral palsy is a direct result of this injury, in your own mind. You think that that diagnosis is a result of this injury; therefore, every cerebral palsy diagnosis is a result of a brain injury?

MR. LUMLEY: Well, a blow to the head doesn't just happen. We were told that the fracture, the cerebral whatever, is just something that can happen.

MRS. MIROSH: But, you know, I have three children and one who has had a severe head injury who doesn't have cerebral palsy, and there are a lot of mothers out there with the same. You know, I'm just trying to collect in my own mind. You did know that there were problems that first year. The fact that he was diagnosed with cerebral palsy by a physician later on doesn't mean it's a direct result of that injury is basically what I'm saying.

MR. LUMLEY: That's what we want to find out, ma'am.

MRS. LUMLEY: We knew he had problems, ma'am, but we didn't know what caused it. We don't know if it was the forceps. We don't know how it happened.

MRS. MIROSH: But most children with cerebral palsy . . . You don't know what causes cerebral palsy. I don't think there's a medical book that can tell you that. That's difficult for us to determine. The fact is, we have to determine the extension of the date, and in my mind . . .

MR. CHAIRMAN: No, Mrs. Mirosh. I'd just as soon not hear what's in your mind.

MRS. MIROSH: Why not?

MR. CHAIRMAN: We're here to listen.

MRS. MIROSH: I hear what's in yours.

But I'm trying to determine in my mind and in everybody else's whether or not this extension should be warranted.

MR. CHAIRMAN: I think we're here to try to get the facts so

that we can then assess whether . . .

MRS. MIROSH: Well, that's exactly what I'm getting at, Mr. Chairman.

MR. LOWE: Mr. Chairman, there's an unasked question here, and the risk, of course, of a lawyer asking an unasked question is that he gets an answer he is not interested in. But it needs to be asked, and I'd like to put it to Mrs. Lumley.

Dr. Govender did not say to you, "and I think that the cerebral palsy was caused by the fracture or by the forceps delivery," did he?

MRS. LUMLEY: No. He said, "The way he was delivered." So we just put two and two together.

MR. MAJOR: When did Dr. Govender tell you that?

MR. CHAIRMAN: Did I hear a question?

MR. M. CLEGG: Would that have been in August 1987?

MRS. LUMLEY: It would be July '87. It would be right after his eye appointment, and his eye appointment was July 2. So it would be the third or the fourth. Now, I'm not sure of that date.

MR. MAJOR: What did Dr. Govender tell you? What did you ask him? Tell the people in your own words. The child's almost two at this time.

MRS. LUMLEY: Okay. I asked what cerebral palsy was. He said that it's muscles: low muscle tone and everything. I said, "Well, what caused it?" He said, "Well, we're not sure, but it could be anything." He said, "It could have been the way he was delivered." I think that's all he said. So I took it as -- the only way he was delivered was with forceps. So then I started thinking: forceps and . . .

MR. LOWE: Can I ask you another question, Mrs. Lumley? Had you not asked Dr. Govender before that what might have caused your child's problems?

MRS. LUMLEY: Oh, yeah. Lots of times. He wouldn't tell me.

MR. LOWE: He didn't ever suggest any cause?

MRS. LUMLEY: No. "These things happen." Same with Dr. Sarnat, all the specialists. That's all they'd tell us, that these things happen. I don't want to sound ignorant or anything, but after he turned a year, that's when we started getting the answers. We started asking the same questions, and we were getting the answers then.

MR. LOWE: After he turned a year?

MRS. LUMLEY: Now, Dr. Hunt saw Brandon, Dr. Bladek saw him, and if they knew he had cerebral palsy, why didn't they tell us?

MR. LOWE: Well, let's be clear. Dr. Hunt saw him once for a rash and once for . . .

MRS. LUMLEY: Twice.

MR. LOWE: Twice for a rash, then.

MRS. LUMLEY: Ear infection.

MR. LOWE: Once for a rash and once for an ear infection. You didn't ever come in to talk to Dr. Hunt about your child's development, and Dr. Hunt didn't ever test your child's development?

MRS. LUMLEY: No. But he checked him all over, and he said he was fine. That was his six-week checkup.

MR. LOWE: Yes, but he didn't do psychomotor testing the way it was done in the institute in March 1986?

MRS. LUMLEY: No.

MR. CHAIRMAN: Mrs. Hewes.

MRS. HEWES: Yes, Mr. Chairman. Two or three questions. Mrs. Lumley, would I be correct in assuming from your description here that you knew that there had been some problems with the birth? There's no question about that? There were results over the next few months, and in each case when you saw a specialist or saw somebody about them, they had positive suggestions for you about what could be done. So you were then dealing with symptoms, not with the cause. Nobody ever talked about the cause?

MRS. LUMLEY: No.

MRS. HEWES: Mr. Chairman, I have a question of Dr. Bladek. In these documents that Mr. Lowe has provided us with, on the entry on February 18 -- this is the second album that came to us -- there is a series of . . . This is a five-month check: 16 pounds, smiles, sits, and so on. Then down at the bottom of that it says "birth injury." Now, that's on your report, right? This is 1986. He's then five months old. Did you talk then with Mrs. Lumley about the possibility that these symptoms that she was observing one by one or that she was attesting to, these little signs, could have been caused by a birth injury? Did you talk with her then?

DR. BLADEK: Now, I see the chart that you have, and that's a copy of Brandon's chart. Also, on that same date the mom's chart there says . . . I know you have this side by side. This happened in '86, and from what I recall from looking at these charts is that the mom brought the boy in for a five-month check, and she told me that she was concerned about her son. Then again, referring back to October '85, she had told me what had happened at birth. Later on in February of '86 she tells me she's worried; Dr. Govender feels that he's slow and wants a referral to the neurologist. Then with Brandon I did a physical examination and summarized there that he did have a birth injury and that he's had the developmental delay. Now, when I say birth injury there, that is referring to what the patient had told me with regards to the delivery: cord wrapped around the neck, forceps, intracranial hemorrhage.

MRS. HEWES: Dr. Bladek, you're in practice with Dr. Hunt?

DR. BLADEK: We share an office.

MRS. HEWES: In a clinic together? But there had been no sharing of the documentation or the report of the birth to you?

DR. BLADEK: Now that we are sitting here, I have all the information, but at that time I did not have a copy of any of Dr. Govender's or Dr. Sarnat's charts. I did not have any of that information.

MRS. HEWES: Well, in fact, then following that one. On February 18 on the mother's chart, it says: "Worried about son. Dr. Govender thinks he's slow, has low tone and wants referral to neurologist." That, I assume, is that mother says, "Look, I'm concerned, and Dr. Govender says this and this, and I want a referral." Is that correct?

DR. BLADEK: She told me, yes, that Dr. Govender feels he's slow and that he wants a referral to a neurologist. That's what that means. You know, at the time, what I recall about that is that she wasn't sure whether she should do that or not.

MRS. HEWES: Right.

DR. BLADEK: You know, "Should I go? Why should I go?" We reviewed what had happened, and I indicated to her: do go see the neurologist.

MRS. HEWES: Then, on page 4 in the first part of the document, in section (e) it says:

> the mother discussed the head and brain injury with Dr. Mary Bladek who recommended further neurological investigations.

Now, I take it that this isn't suggesting that this was your initiation. This was her initiation, and you simply went along with it?

DR. BLADEK: That's right. I had agreed with Dr. Govender's recommendation to go ahead. The referral was initiated by Dr. Govender. I had talked it over with the mother and I said . . .

MRS. HEWES: But you made it.

DR. BLADEK: No, I did not make the appointment. Dr. Govender had made the appointment, and I had indicated to the mom: do go.

MRS. HEWES: Okay. I've just got a couple more questions, Mr. Chairman, just very briefly.

So Dr. Govender made the referral to Dr. Sarnat. We don't know, sitting here, if Dr. Govender got Dr. Sarnat's report. We do know that Mrs. Lumley didn't get it. Correct?

MR. CHAIRMAN: As I understood it.

MRS. HEWES: Right. Mrs. Lumley didn't get it. We don't know if Dr. Govender got it. Dr. Bladek, did you get it?

DR. BLADEK: No.

MRS. HEWES: And did you ask for it?

DR. BLADEK: No.

MRS. HEWES: Did Dr. Hunt ask for it?

DR. HUNT: No; I received no reports from anybody.

MRS. HEWES: But we've got it now because it's a lawsuit.

DR. BLADEK: Could I just add to that that ordinarily when a child has a lot of trouble, the primary care physician becomes the specialist, the pediatrician rather than the family doctor, and in most instances, there are copies sent to family doctors. We never received any, and I always felt, looking back, that I probably would have received something. I never did.

MRS. HEWES: This is my last question, Mr. Chairman. Would it not be a standard procedure? The mother is your patient. You are also seeing the son and discussing the son in the context of both persons' health. Would it not have been straightforward policy that you would then get the report or request the report from Dr. Sarnat and discuss it immediately with Mrs. Lumley?

DR. BLADEK: In hindsight, yes, we should have received it. The normal course of events is that the report automatically gets sent to the family doctor. In this instance, I believe that Dr. Sarnat and Dr. Govender did not know that I was the family doctor, and that's why . . .

MRS. HEWES: And that is puzzling.

DR. HUNT: Basically, there's a breakdown in communication. You have to remember the scenario, that after the birth I referred the patient to the care of a pediatrician. The pediatrician looked after this child for a period of less than two days, and he's then transferred to the Foothills hospital, where he is seen by a barrage of other specialists. Now, those specialists at that hospital probably sent the information to Dr. Govender because he is now the attending physician. I think that one of the reasons that maybe we didn't write for any information is because with this particular problem Dr. Govender then becomes the primary care physician rather than Dr. Bladek or myself. So there's obviously a breakdown in communication.

Had the mother directed questions to me about this at the first visit – I mean, she knew more about the information at the Foothills because I knew absolutely nothing of what had transpired at the Foothills. But we never discussed the problems at the Foothills. Certainly maybe we're derelict in not having written for records at that particular time, but I think we were under the false assumption that the pediatrician who's been involved in the case, because of the magnitude of the problems, is going to continue with the ongoing care. I think that's the assumption that we both made.

MRS. HEWES: My only worry, Mr. Chairman, is that Dr. Bladek, who was the mother's doctor – because it had been raised between you, it wasn't pursued from your office.

DR. BLADEK: Now, may I answer to that? Now, problems occur in our practice from day to day, and ordinarily what happens, for example, if a patient had seen a specialist and wanted to know the results, it's customary for patients to phone and say, "Did you get the result?" If we have it, we discuss the results with them. However, if it's not initiated, if it isn't asked: "Do you have the reports? Can we discuss what the specialist said?" it's difficult for our practice to sort of go out and call out all reports on all people. So here on that visit -- you know, "Go

ahead and see the neurologist" -- I expected I'd get the report. I never did. Time goes by, and here we are now. Yes, we should have.

MRS. HEWES: I would just think, Mr. Chairman, that it would have been easy for the Lumleys, not hearing from Dr. Govender, not getting the report from Dr. Sarnat, not hearing from Dr. Bladek, to assume that things were status quo. Sorry; comment.

MR. CHAIRMAN: Mr. Sigurdson.

MR. SIGURDSON: It's fine, thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Brassard, followed by Mr. Younie.

MR. BRASSARD: I just have one observation. In Mr. Lowe's presentation he mentioned that nothing had really changed all through the pattern of the first year and the second, and no one got excited until it was identified as cerebral palsy. I submit that that's a very significant recognition. I could go along with the situation, for instance, of having an infection, but the minute someone identifies it as gangrene, it takes on a totally different connotation. So I guess I would like to satisfy myself: is this the first time you actually knew that you were dealing with cerebral palsy as opposed to . . .

MRS. LUMLEY: A handicapped child.

MR. BRASSARD: . . . and a handicapped child as opposed to just a slow development for whatever reason. We all have children that developed at various stages. Is that my understanding of what we're saying here?

MRS. LUMLEY: When he was slower at the beginning, he was on that muscle relaxant, phenobarbital, so we thought maybe this was making him a little bit slower. So we never really thought too much of it.

MR. BRASSARD: But is it safe to say that your first realization that you had a major problem on your hands was the first time it was identified as cerebral palsy?

MRS. LUMLEY: You bet.

MR. BRASSARD: Thank you.

MR. CHAIRMAN: Could I just ask: after the Sarnat assessment in March of '86 did you ever query anybody as to the results of that?

MRS. LUMLEY: Yeah. I think we asked him then, too, didn't we?

MR. LUMLEY: We had a meeting.

MRS. LUMLEY: The only answer we ever got from Dr. Sarnat, Dr. Cochrane, all the big specialists: "These things happen."

MR. CHAIRMAN: That was the extent of your discussion . . .

MRS. LUMLEY: That's all they'd say.

MR. CHAIRMAN: . . . with regard to that assessment of March of '86 and following that?

MRS. LUMLEY: Yeah. Oh; pardon me. He did say that he was getting better from our last visit.

MR. M. CLEGG: A supplementary. When he said, "These things happen," did you understand that to refer to an injury at birth or a developmental problem?

MRS. LUMLEY: To the birth injury.

MR. M. CLEGG: So he was saying to you essentially that there was injury at birth, but these things happen.

MRS. LUMLEY: Yes.

MR. M. CLEGG: And that was after the assessment which we received with this report.

MRS. LUMLEY: Right.

MR. CHAIRMAN: Mr. Lowe, followed by Mrs. Mirosh.

MR. LOWE: Mr. Chairman, I think that last question answered what I was going to get at. When you say these things happen, you're not just talking about brushing off with no information; we're talking about -- this is a patient's summary of a doctor saying there's been a birth injury and these are the consequences, but these things happen. It's quite a different story.

MR. CHAIRMAN: I'm sorry, Mrs. Mirosh, but Mr. Younie did put up his hand earlier. It was so long ago that I'd forgotten.

MR. YOUNIE: Two questions, one that was just brought up. Did Dr. Sarnat indicate that there was a connection between the birth injury and the symptoms your son was suffering?

MRS. LUMLEY: No.

MR. YOUNIE: He did not. So when he said these things happen, he was referring generally to the situation, not to a cause and effect relationship between the birth injury and the condition.

MRS. LUMLEY: Yeah. If he would have given us any indication that the forceps did it or any indication, then we would have sued a lot sooner.

MR. YOUNIE: Okay. My second question is something you said earlier this morning concerning when you went to Dr. Govender, I believe it was, after the eye examination, and you said, "Does my son have cerebral palsy?" At that point, you not only said that he said yes, but -- I believe this is an exact quote -- you said the doctor also said, "I wondered when you would ask that."

MRS. LUMLEY: Yes.

MR. YOUNIE: Now that indicates to me that he had diagnosed cerebral palsy prior to that point and had just not told you, for whatever reason, that he had cerebral palsy.

MRS. LUMLEY: He told me after why he didn't tell me. He said cerebral palsy is such a widely used word. Like, there's bad cerebral palsy, and there's not so bad. He said, "I didn't want to alarm you when I said he had cerebral palsy."

MR. LUMLEY: He said it was a word that doctors didn't like to use because . . .

MR. YOUNIE: Okay. But the important fact to me is that there was information that doctor had, perhaps even during the time during which you could have sued under the limitation Act, and that you were not given that information, for whatever reason. I won't impute motives, but you were not given that information by the doctor until after the limitation time had run out by almost a year.

MRS. LUMLEY: Yes. Cerebral palsy can be detected at six months. That's normally when kids sit up and . . .

MR. YOUNIE: Did the doctor indicate to you at any time, at what age he had come to the conclusion your son had cerebral palsy?

MRS. LUMLEY: No.

MR. YOUNIE: So, that would have to come out in the court case as well, seeing as he's not here. Okay, I'll have to read the rest in *Hansard*. I'm already late for a constituency matter.

MRS. MIROSH: Mrs. Lumley, I just wondered what stimulated you, or created this Alberta children's hospital assessment program. Why did you take your child there at seven months?

MRS. LUMLEY: Because Dr. Govender told us he had low muscle tone. I asked what caused that, and he said: "Well, it could be the phenobarbital because that's a muscle relaxant. Some kids are born with low muscle tone with not having any injury." And then he said, "Or it could have been the damage he received at birth."

MRS. MIROSH: What other symptoms were there? You mentioned your mom reports that Brandon did not begin to prop and prone until five months and just began to roll onto his side after.

MRS. LUMLEY: I don't know what age you're supposed to do it at.

MRS. MIROSH: But obviously you felt that the child was being slow or you wouldn't have taken him to the clinic. You also noticed other symptoms, though, right? Like the eyes and . . .

MR. LUMLEY: We didn't take him to the clinic. We were sent.

MRS. MIROSH: You were sent there as a result of the neurological write-up.

MRS. LUMLEY: Yes. Same with the eyes. We were sent to Dr. Hindle.

MRS. MIROSH: But when you did this, though, it was as a result of your knowledge that there was something wrong with your child at that time, as a result of the damage or the neurological result.

MRS. LUMLEY: The follow-up. Right.

MRS. MIROSH: The follow-up. So you knew then, though, and as a result of this program -- and the final observations of this program and what is all spelled out here, indicated that there was something definitely wrong in the progress and the development of your child, more than just phenobarb causing it. You knew by seven months it wasn't the phenobarb.

MR. LUMLEY: Not really, no.

MRS. MIROSH: You mean after the results of this program came, after the results of the neurological surgeons, you still thought it was phenobarb?

MR. MAJOR: Let's be clear . . .

MRS. MIROSH: I'm not a lawyer. I'm just asking this question about phenobarb and the relationship to the development.

MR. MAJOR: Yes, but let's be clear that the Lumleys did not have these reports that you're referring to. They were not told the results of these reports. Perhaps you might wish to rephrase your question by asking them what they knew.

MRS. MIROSH: I'll ask my question the way I want to ask my question, because this isn't a court of law.

MR. MAJOR: No, but I want you to be fair to the witness.

MRS. MIROSH: I am. I'm asking them that question: did you still think, though, as a result of this test and the neurological study that the doctor did, that the development of your child was still as a result of the phenobarb?

MRS. LUMLEY: And low muscle tone.

MRS. MIROSH: Then you didn't think the phenobarb was causing the low muscle tone.

MRS. LUMLEY: I don't know. I don't know how to answer that. It's the two of them. Because we had no other reason, no other . . .

MRS. MIROSH: But you had indicated earlier -- I heard you say that you thought the development was because of all the phenobarb he was on, and you didn't really want to question anything.

MRS. LUMLEY: Even my doctor told me that. He said, "Well, he's going to be kind of sluggish; he's going to sleep a lot." No kid is going to get up and crawl when he's sluggish.

MRS. MIROSH: Then what did the doctor tell you after seven months of this workup? Didn't somebody tell you after you went to the neurologist and the children's hospital in Calgary? After all that was done, you still did not know that there was something wrong with your child? I mean, did somebody describe to you in detail . . .

MRS. LUMLEY: All we were told was that he had low muscle

tone. That's all we were told. That's why he was being referred by Dr. Govender to the children's hospital.

MRS. MIROSH: What did Dr. Govender or whoever tell you after this was done? Did they give you the detailed results of this study at all and tell you that there might be some brain damage?

MRS. LUMLEY: The therapists?

MRS. MIROSH: Did whoever sent you to get this work done -- this work was done as a result of the neurological studies, right?

MRS. LUMLEY: Uh huh.

MRS. MIROSH: Following these studies did anybody tell you the results of these studies?

MR. LUMLEY: Is that the children's hospital you're talking about?

MRS. MIROSH: Anybody.

MR. CHAIRMAN: Yes, in March of 1986. The big study that was done in March of '86 by Dr. Sarnat. That was the question I asked: what did you learn as a result of that? Did you ask anybody anything or talk to any physician who told you what happened in March of '86?

MRS. LUMLEY: I don't know which time you're talking about.

MR. CHAIRMAN: We're talking about March of '86.

MRS. MIROSH: We want to know what they told you after all these tests were done, that's all. What were you told?

MR. MAJOR: Or March of '87?

MR. CHAIRMAN: No, there was a test in March of '86, I believe.

MRS. LUMLEY: The CAT scan?

MR. CHAIRMAN: No. The Sarnat one at the children's hospital. Dr. Sarnat's assessment of March '86, the four- or five-page document, that Dr. Govender suggested that you have done by a neurologist.

MRS. LUMLEY: March 11, 1986?

MR. CHAIRMAN: Yes. And you saw Dr. Bladek in February, saying that Dr. Govender thinks that we should have a neurologist involved. As a result of that, you went to Dr. Sarnat in March of '86, and there's a big long report there. Did Dr. Govender not . . .

MRS. LUMLEY: We just talked about his CAT scan.

MR. CHAIRMAN: No, the CAT scan was in '87.

MRS. LUMLEY: Well, he's had three or four CAT scans.

MRS. MIROSH: You mean that after you went to the children's hospital twice, they didn't tell you anything about the results of the tests that they did? I guess that's what we're trying to determine. Didn't anybody give you the results of the tests? Didn't anybody discuss . . .

MRS. LUMLEY: What tests?

MR. MAJOR: Have you seen this report?

MRS. MIROSH: I'm asking the question. They may not have seen the report. Very seldom do patients see the report. It says here: "Private and Confidential."

MR. CHAIRMAN: Not on that one.

MRS. MIROSH: What I'm asking is: did anybody discuss the results of these tests at the children's hospital with you?

MR. LUMLEY: Is Dr. Sarnat the one who does . . .

MRS. LUMLEY: The CAT scans.

MR. LUMLEY: He told us -- we talked to him, yes.

MRS. MIROSH: No, I'm talking about the multidisciplinary initial assessment infant therapy program, not the EEG or anything else. I'm talking about those tests.

MR. LUMLEY: Okay. Yes, after the infant therapy was over, we went to a meeting with them.

MRS. LUMLEY: Right.

MR. LUMLEY: And they told us this, that, and the other thing, that his muscles were doing this and his muscles were doing that, and they wanted to take him and either do another six months or go into multihandicapped.

MRS. LUMLEY: But we had already started the lawsuit then, before he even . . .

MRS. MIROSH: That's not what I'm trying to determine. We're only trying to determine the length of time here. Now, my next question, then, is: you knew then that it wasn't the phenobarb causing the problems of the growth, the poor development, delayed development of your child, by this time, at seven months of age. You knew it wasn't just the phenobarb.

MR. LUMLEY: He was still on phenobarbital.

MRS. LUMLEY: He was still on phenobarbital.

MRS. MIROSH: But that's not my question. After you had this team discussion with them, you knew that there was something wrong with your child.

MR. LUMLEY: We didn't have that team discussion until . . .

MRS. LUMLEY: . . . after he was taken off phenobarbital.

MR. LUMLEY: Yeah. After a year.

MRS. MIROSH: When he was seven months old, he went through these tests, right?, at the children's hospital.

MRS. LUMLEY: I don't know what type you're talking about, because . . .

MR. CHAIRMAN: No, no. Let's just get back to the discussion.

MRS. MIROSH: You did take your child to the children's hospital?

MR. CHAIRMAN: Mrs. Mirosh, could I just review the evidence with the witness first for a minute, and maybe we can help?

In February of '86, when Brandon was five months old, you went to Dr. Bladek.

MRS. LUMLEY: Right.

MR. CHAIRMAN: And you told her, "Dr. Govender thinks there's something wrong here and we should see a neurologist, and he's going to refer us to a neurologist." And a month later, in March of '86, when Brandon was six months old, he went to this children's hospital, and Dr. Sarnat conducted a very extensive thing, which is reproduced here but which you never saw but which we assume went back to Dr. Govender. Dr. Bladek said she never got it because she wasn't on the record as the physician, because Dr. Govender referred you to Dr. Sarnat. And that's what Mrs. Mirosh is asking about. Did Dr. Govender then not talk to you about the results of all those tests that Dr. Sarnat did in March of '86, when Brandon was six months old?

MR. LUMLEY: Dr. Sarnat didn't.

MR. CHAIRMAN: No. That wasn't my question. Did Dr. Govender say anything about receiving results from all the tests that Dr. Sarnat had done?

MRS. LUMLEY: I don't know.

MR. CHAIRMAN: You don't know.

MRS. MIROSH: You mean, you took your child to have his tests done at children's hospital, you went through a series of tests, and you didn't ask the results of these tests?

MR. LUMLEY: Yes. We talked to Dr. Sarnat, the guy that gave the tests.

MRS. MIROSH: And he told you the results of what had been done by the occupational therapist at the children's hospital?

MR. LUMLEY: No, ma'am. He has nothing to do with the occupational therapy.

MRS. MIROSH: Okay. But you knew after these tests were done, though, that there was something wrong with your son.

MR. LUMLEY: Well, we knew before that -- I don't know what you mean by "something wrong."

MRS. LUMLEY: We knew he had a fractured skull.

MRS. MIROSH: No, I'm talking about his development specifically.

MR. LUMLEY: Right.

MRS. MIROSH: And I'm talking about the results of these tests specifically and the discussion. How much detail did you get specifically from whoever it was that ordered these tests?

MR. LUMLEY: It was Dr. Sarnat, the one that did the -- was that an X-ray or was that the one with all the wires? He told us that there was another test to be done every year and in another six months and that as the child grew we'd be able to see what he would be like. He never told us what he wouldn't be like.

MRS. MIROSH: Well, nobody can . . .

MR. LUMLEY: Right.

MRS. MIROSH: . . . determine that, even with any child, but you did know that there was something other than what the phenobarb was doing?

MR. LUMLEY: Well, we were taking him to therapy even at that time for his low muscle tone.

MRS. MIROSH: Okay. That's all.

MR. CHAIRMAN: Well, if members of the committee -- we're losing members, and we have not finished. Mr. Fradsham hasn't had a chance, so it looks like we're going to have to give consideration to continuing this process at a later date. And I don't think we're in a position right now to decide when that's going to be. [interjection] Well, next week we have a very full schedule, exceptionally full.

MR. MAJOR: Is it at all possible anytime today? Tonight?

AN HON. MEMBER: No.

MRS. MIROSH: No.

MR. CHAIRMAN: I'm sorry; not tonight.

MRS. MIROSH: You feel, Mr. Chairman, that we haven't heard enough evidence?

MR. CHAIRMAN: Well, we have other interested people who all have the right to be heard before us. You may have heard enough evidence, but the fact is the process calls for people who have a legitimate interest to be heard.

MRS. HEWES: Mr. Chairman, we may have to have an extraordinary meeting.

MR. CHAIRMAN: Yes, but I think we'll have to try to work that . . . And I'm sorry to tell the participants this, but we're going to have to work this out amongst ourselves as to when we can do this as soon as possible.

MR. MAJOR: Could you possibly give us a date?

MR. CHAIRMAN: Not at this point. No.

MR. M. CLEGG: We have so few of the members of the committee here now, we can't possibly tell when we can raise a quorum.

MR. CHAIRMAN: We don't have a quorum now, Mr. Major.

MR. MAJOR: I appreciate that.

MR. CHAIRMAN: That's the difficulty. And of course, we will then decide what . . . Now, I think Mr. Fradsham will require Mr. and Mrs. Lumley to return for his -- or will he?

MR. FRADSHAM: Mr. Chairman, if I might give some assistance to the hon. members who have gathered here in respect of that, I will not have to cross-examine either of the Lumleys. However, let me make it very clear that I very much want to have a chance to make submissions on behalf of my client, because it will not be a carbon copy of what my learned friend Mr. Lowe has said, because the section which governs my client in the present Act is very different.

MRS. MIROSH: Who is your client?

MR. FRADSHAM: The Calgary General hospital.

It is, I think, imperative for the committee to understand the differences between the position that my client finds itself in in respect to the proposed legislation and the position that the two doctors find themselves in. I would not require the members to return if I didn't think I had something different to say. I love coming back to Edmonton, but . . .

MR. CHAIRMAN: Just for our information, Mr. Fradsham, how long do you think you reasonably would need with the committee, bearing in mind what you've seen already?

MR. FRADSHAM: Did you want the nearest day, or . . . I don't think that I will take any longer than about 20 minutes, subject to what fun the committee may have in store for me.

MR. CHAIRMAN: And then I'd like to ask Mr. Major and Mr. Lowe how much time they feel they would require to sum up and make their final presentations to the committee.

MR. MAJOR: I think the committee is apprised of the facts, and I would . . .

MR. CHAIRMAN: So you wouldn't require more than 15 minutes anyway to respond to whatever Mr. Lowe and Mr. Fradhsham . . .

MR. MAJOR: Right.

MR. CHAIRMAN: And you would like 15 minutes?

MR. LOWE: Ten or 15 minutes.

MR. CHAIRMAN: So we have an hour that we have to have.

MR. M. CLEGG: One question, Mr. Chairman. I don't think anybody has more questions [inaudible].

MR. CHAIRMAN: Or, Mr. Fradsham, you don't think you'd have any questions to the Lumleys now that you'd like to . . .

MR. FRADSHAM: Oh, I know I don't.

MR. CHAIRMAN: Mr. Lowe, you're satisfied?

MR. LOWE: Well, sir, I think if I can get a copy of the transcript, there are a couple of answers there that will be just as good on the transcript as if I'd put them to the witness again, so . . .

MR. CHAIRMAN: So you're satisfied that they will not be required?

MR. LOWE: Yes.

MR. CHAIRMAN: Mr. Major, you don't think you have any more evidence to leave?

MR. MAJOR: I have a few questions of Dr. Bladek and Dr. Hunt.

MR. CHAIRMAN: Maybe we should . . .

MR. BRASSARD: I would hope that we're not implying that they wouldn't be welcome.

MR. CHAIRMAN: Oh, no. You're welcome, but we recognize there are transportation and time problems and expense involved. That's all.

MR. MAJOR: I think this is so important that the Lumleys will be here in any event.

MR. CHAIRMAN: But what about Drs. Hunt and Bladek? Would you like to respond to Mr. Major's questions now in case you would be required?

MR. BRASSARD: I'm sorry, Mr. Chairman, but I [inaudible].

MR. CHAIRMAN: You may have to come back.

DR. HUNT: If we have sufficient notice and we can make arrangements, we'll be glad to come back.

MR. CHAIRMAN: Motion to adjourn, please. All those in favour? Opposed? Carried.

[The committee adjourned at 1:10 p.m.]