APPENDIX B

[see page 53]

INTERPROVINCIAL SUBPOENA ACT

Neil Feguson
Nova Scotia

INTRODUCTION

[1] The Uniform Law Conference of Canada adopted its *Uniform Interprovincial Subpoena Act* in 1974. Since then, 11 jurisdictions have enacted interprovincial subpoena legislation, some with modifications to the *Uniform Act*. Those jurisdictions are:

Alberta	1981
British Columbia	1976
Manitoba	1975
New Brunswick	1979
Newfoundland	1979
Northwest Territories	1976
Ontario	1979
Prince Edward Island	1987
Saskatchewan	1977
Yukon Territory	1981
Nova Scotia	1996

[2] Following enactment of the *Interprovincial Subpoena Act* in Nova Scotia in 1996, the then Minister of Justice, William Gillis, wrote to a number of Attorneys General suggesting that the definition of "court" in their provinces' legislation be expanded to include other boards, commissions, and tribunals that might issue subpoenas, as was the case under the Nova Scotia version of the legislation. The Nova Scotia statute provides that the definition of "court" includes a board, commission, tribunal or other body of another province that is designated as a court by the Nova Scotia Governor in Council.

EXISTING LEGISLATION

[3] There are several provinces that do not require the "designation" of the board, commission, tribunal or other body in order that subpoenas of such bodies be recognized. So long as the body in the originating province has the power to issue a subpoena, it will be recognized by the courts of those provinces. This avoids the requirement that the issuing body be formerly designated in the receiving province for its subpoena to be enforceable there. It is apparent that there are three general approaches to recognition of subpoenas from other provinces in the legislation across the country:

1) The legislation of six provinces limits recognition of extra-provincial subpoenas to courts of other provinces. (British Columbia, Ontario, Prince Edward Island, Newfoundland, the Yukon and Manitoba)

2) The legislation of three provinces provides for recognition of a board, commission, tribunal or other body of another province that is designated by the receiving province's Lieutenant Governor in Council. (Alberta, New Brunswick and Nova Scotia)

3) The legislation of two provinces provides "as of right" recognition for subpoenas coming from a board, commission, tribunal or other body in another province having the power to issue a subpoena. Saskatchewan also

> recognizes a subpoena from a "person" having the power to issue a subpoena, and the Northwest Territories legislation also recognizes a subpoena from any "committee" having the power to issue a subpoena.

[4] The *Uniform Interprovincial Subpoena Act* contemplated the extension of "court". A note to the *Uniform Act* stated:

> Provinces may wish to extend definition of "court" to include a power to enable to the Lieutenant Governor in Council to extend to named boards, commissions, or other bodies having power to issue a subpoena, on a reciprocal basis with another province. In provinces where magistrates have power to issue subpoenas in civil matters in their official capacity and not out of a court, consideration should be given to a change in the definition of "court".

[5] The adoption of the "as of right" approach by the Province of Saskatchewan was effected by their *Interprovincial Subpoena Amendment Act, 1992*. This approach was apparently adopted for two reasons.

1) It was felt that if a board in another province was given the power to issue subpoenas, that should be a sufficient indication of its stature to warrant the application of the Act to such subpoenas.

2) A subpoena issued by a body in another province would still be required to be accompanied by a certificate of a judge of a superior, county or district court from that other province which certified that the attendance of the person to be subpoenaed is:

(i) necessary for the proceedings in which it was issued; and

(ii) reasonable and essential to the due administration of justice in that province.

It was apparently felt that those requirements would maintain some control on the use of the interprovincial subpoena regime by boards and commission from other jurisdictions.

PROPOSAL

[6] It is submitted that this approach makes a great deal of sense. In a number of uniform Acts, the Uniform Law conference has been adopting the "full faith and credit" concept, recognizing the validity of judgments from the courts in other provinces and territories. In Hunt v. T.N.P.L.C.L., [1993] 4 S.C.R. 289, the Supreme Court of Canada extended the principles set out in Morguard Investments Limited v. DeSavoye, [1990] 3 S.C.R. 1077, from interprovincial recognition of final judgments of a court in another province to other types of court orders (discovery in that case), thus requiring each province to respect the normal judicial processes such as discovery, of other provinces. The Supreme Court of Canada relied heavily on a notion that the parts of Canada are parts of a single nation with an "essentially unitary" court system.

[7] The issue of full faith and credit was argued in Ontario before Justice Sheard of the General Division in relation to the Westray Inquiry. Two former executives of Curragh Resources were subpoenaed by the Commission of Inquiry. It sought to have Clifford Frame and Marvin Pelley, residents of Ontario, called as witnesses in the Nova Scotia Inquiry.

[8] The issue of "full faith and credit" was raised in relation to the court's jurisdiction to give effect to judicial decisions of another jurisdiction. Justice Sheard specifically considered the decision in Morguard and stated:

> . . . when considering the principle of comity one should not lose sight of the fact that here we are dealing with a request from a court of a sister province in Canada. On that subject the statement of La Forest J. in Morguard Investments Ltd. v. De Savoye (1990), 76 D.L.R. (4th) 256, at p. 270 is relevant:
>
> > The consideration underlying the rules of comity apply with such greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice . . . .
>
> The requesting court here is the Supreme Court of Nova Scotia, a court of competent jurisdiction. It is not necessary to revisit the argument, discussed earlier, that the Inquiry is not a court. In the context of these proceedings it is a court. The request to this court comes from the Supreme Court of Nova Scotia.

The court endorsed the subpoenas and Frame and Pelley filed an appeal. It is my understanding that the appeal will not be continued with as it is considered moot, the Commission having already issued its final report.

[9] It is apparent that the differences in the legislation in various provinces are leading to inconsistent results in the courts. For example, there is the decision of Justice Noble in the Supreme Court of Saskatchewan in the matter of an inquiry into the shooting death of Leo

LeChance at Prince Albert, Saskatchewan. In that case the chair of the Commission of Inquiry applied to the court for a certificate to authorize the use of the Commission's subpoena to bring a prospective witness from Manitoba. Justice Noble concluded that the public inquiry was not a "court". On the other hand, the Alberta Court of Queens Bench had no difficulty in issuing a certificate under its legislation in Re Cochrane (1983), 26 Alta.L.R. (2d) 27, which dealt with a public inquiry under the Province's *Fatality Inquiries Act*. The problem has been noted in the Senate of Canada as a result of the Westray Inquiry, and Senator Wilfred P. Moore has tabled a motion urging those provinces and territories whose legislation does not include subpoenas from boards, commissions, tribunals or other bodies, to amend their Acts. He has also written to the Uniform Law Conference of Canada urging an amendment to the *Uniform Act*.

CONCLUSION

[10] It is clear from this that the effect of the slight differences in the legislation across the country is that the legislation is not as "uniform" as was originally intended to be. Accordingly, it seems appropriate to develop a suggestion for an amendment to remedy this. It is submitted that the "as of right" approach is in keeping with the full faith and credit approach taken by the Uniform Law Conference in a number of recent uniform Acts.

[11] It is recommended that clause 1(a) of the *Uniform Interprovincial Subpoena Act*, found in the 1974 Proceedings, be struck out and replaced with:

> (a) "court" means any court in a province and, where a board, commission, tribunal or other body or person in a province has the power to issue a subpoena, includes that board, commission, tribunal, body or person;