1970

PROCEEDINGS

OF THE

FIFTY-SECOND ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

CHARLOTTETOWN, P.E.I.

AUGUST 24TH TO AUGUST 28TH, 1970

MIMEOGRAPHING AND DISTRIBUTING OF REPORTS

By resolution of the Conference, the Commissioners who are responsible for the preparation of a report are also responsible for having the report mimeographed and distributed. Distribution is to be made at least three months before the meeting at which the report is to be considered.

Experience has indicated that from 60 to 75 copies are required, depending on whether the report is to be distributed to persons other than members of the Conference.

The local secretary of the jurisdiction charged with preparation and distribution of the report should send enough copies to each other local secretary so that the latter can give one copy to each member of the Conference from his jurisdiction. Three copies should be sent to the Secretary of the Conference and the remaining copies should be brought to the meeting at which the report is to be considered.

To avoid confusion or uncertainty that may arise from the existence of more than one report on the same subject, all reports should be dated.

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CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

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COMMISSIONERS AND REPRESENTATIVES OF THE PROVINCES AND OF CANADA

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(Commissioners appointed under the authority of the Revised Statutes of Alberta, 1955, c. 350.)

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D. S. THORSON, Q.C., Associate Deputy Minister of Justice, Ottawa.

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G. S. RUTHERFORD, Q.C., Revising Officer, Winnipeg.

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R. H. TALLIN, Legislative Counsel, Winnipeg.

(Commissioners appointed under the authority of the Revised Statutes of Manitoba, 1954, c. 275)

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M. M. HOYT, Q.C., Legislative Counsel, Parliament Bldgs., Fredericton.
D. G. ROUSE, Deputy Minister of Justice, Fredericton.
J. E. WARNER, Director of Public Prosecutions, Fredericton.

(Commissioners appointed under the authority of the Statutes of New Brunswick, 1918, c. 5.)

Newfoundland:

C. J. GREENE, Q.C., Deputy Minister of Justice, St. John's.
VINCENT MCCARTHY, Q.C., Department of Justice, St. John's.
GEORGE B. MACAULAY, B.L. (Glas.), Dept. of Justice, St. John's.
R. AUSTIN PARSONS, Q.C., Queen's Road, St. John's.

Northwest Territories and Yukon Territory:

DR. HUGO FISCHER, Dept. of Indian Affairs and Northern Development, Ottawa.
F. G. SMITH, Legal Adviser, Government of the Northwest Territories, Yellowknife, N.W.T.
P. O'DONOGHUE, Box 2703, Whitehorse, Y.T.

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B. M. NICKERSON, Q.C., Centennial Bldg., Halifax.

(Commissioners appointed under the authority of the Statutes of Nova Scotia, 1919, c. 25.)

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H. ALLAN B. LEAL, Q.C., Chairman, Ontario Law Reform Commission, Toronto.
A. N. STONE, Q.C., Legislative Counsel, Toronto.

(Commissioners appointed under the authority of the Statutes of Ontario, 1918, c. 20, s. 65.)

Prince Edward Island:

J. MELVILLE CAMPBELL, LL.B., Summerside.
KENNETH R. MACDONALD, LL.B., Charlottetown.
IAN M. MACLEOD, LL.B., Charlottetown.

J. ARTHUR MCGUIGAN, Q.C., Deputy Attorney-General, Charlottetown.
(Commissioners appointed under the authority of the Revised Statutes of Prince Edward Island, 1951, c. 168.)

Quebec:

GERALD BOISVERT, Associate Deputy Minister of Justice, Parliament Buildings, Quebec.
LUCIEN DARVEAU, Deputy Minister of Justice, Parliament Buildings, Quebec.
EMILE COLAS, C.R., Suite 2501, Stock Exchange Tower, Victoria Square, Montreal 126.
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ROBERT NORMAND, Deputy Law Clerk of the Legislature, P.O. Box 142, Parliament Buildings, Quebec.
LOUIS PARADIS, Chief Crown Attorney, 100 Notre Dame East, Montreal 127.
CLAUDE RIOUX, Associate Deputy Minister of Justice, Parliament Buildings, Quebec.

Saskatchewan:

W. G. DOHERTY, Q.C., Attorney-General Dept., Regina.
G. C. HOLTZMAN, Solicitor, Attorney-General Dept., Regina.
J. G. MCINTYRE, Q.C., 2236 Albert St., Regina.
R. S. MELDRUM, Q.C., Deputy Attorney-General, Regina.
R. L. PIERCE, Q.C., 201 Gordon Bldg., Regina.

MEMBERS EX OFFICIO OF THE CONFERENCE

Attorney-General of Alberta: Hon. E. H. Gerhart.
Attorney-General of British Columbia: Hon. L. R. Peterson, Q.C.
Minister of Justice of Canada: Hon. J. N. Turner.
Attorney-General of Manitoba: Hon. A. Mackling, Q.C.
Attorney-General of New Brunswick: Hon. John B. M. Baxter, Q.C.
Minister of Justice of Newfoundland: Hon. L. Curtis, Q.C.
Attorney-General of Nova Scotia: Hon. Leonard L. Pace.
Minister of Justice and Attorney-General of Ontario:
Hon. A. A. Wishart, Q.C.
Attorney and Advocate General of Prince Edward Island:
Hon. Gordon L. Bennett.
Minister of Justice of Quebec: Hon. Jerome Choquette, Q.C.
Attorney-General of Saskatchewan: Hon. D. V. Heald, Q.C.

PRESIDENTS OF THE CONFERENCE

Sir James Aikins, K.C., Winnipeg	1918 - 1923
Mariner G. Teed, K.C., Saint John	1923 - 1924
Isaac Pitblado, K.C., Winnipeg	1925 - 1930
John D. Falconbridge, K.C., Toronto	1930 - 1934
Douglas J. Thom, K.C., Regina	1935 - 1937
I. A. Humphries, K.C., Toronto	1937 - 1938
R. Murray Fisher, K.C., Winnipeg	1938 - 1941
F. H. Barlow, K.C., Toronto	1941 - 1943
Peter J. Hughes, K.C., Fredericton	1943 - 1944
W. P. Fillmore, K.C., Winnipeg	1944 - 1946
W. P. J. O'Meara, K.C., Ottawa	1946 - 1948
J. Pitcairn Hogg, K.C., Victoria	1948 - 1949
Hon. Antoine Rivard, K.C., Quebec	1949 - 1950
Horace A. Porter, K.C., Saint John	1950 - 1951
C. R. Magone, Q.C., Toronto	1951 - 1952
G. S. Rutherford, Q.C., Winnipeg	1952 - 1953
L. R. MacTavish, Q.C., Toronto	1953 - 1955
H. J. Wilson, Q.C., Edmonton	1955 - 1957
Horace E. Read, Q.C., Halifax	1957 - 1958
E. C. Leslie, Q.C., Regina	1958 - 1959
G. R. Fournier, Q.C., Quebec	1959 - 1960
J. A. Y. MacDonald, Q.C., Halifax	1960 - 1961
J. F. H. Teed, Q.C., Saint John	1961 - 1962
E. A. Driedger, Q.C., Ottawa	1962 - 1963
O. M. M. Kay, Q.C., Winnipeg	1963 - 1964
W. F. Bowker, Q.C., Edmonton	1964 - 1965
H. P. Carter, Q.C., St. John's	1965 - 1966
Gilbert D. Kennedy, Q.C., Victoria	1966 - 1967
M. M. Hoyt, Q.C., Fredericton	1967 - 1968
R. S. Meldrum, Q.C., Regina	1968 - 1969
Emile Colas, C.R., Montreal	1969 - 1970
P. R. Brissenden, Q.C., Vancouver	1970 -

HISTORICAL NOTE

More than fifty years have passed since the Canadian Bar Association recommended that each provincial government provide for the appointment of commissioners to attend conferences organized for the purpose of promoting uniformity of legislation in the provinces.

This recommendation was based upon observation of the National Conference of Commissioners on Uniform State Laws, which has met annually in the United States since 1892 to prepare model and uniform statutes. The subsequent adoption by many of the state legislatures of these statutes has resulted in a substantial degree of uniformity of legislation throughout the United States, particularly in the field of commercial law.

The seed of the Canadian Bar Association fell on fertile ground and the idea was soon implemented by most provincial governments and later by the remainder. The first meeting of commissioners appointed under the authority of provincial statutes or by executive action in those provinces where no provision had been made by statute took place in Montreal on September 2nd, 1918, and there the Conference of Commissioners on Uniformity of Laws throughout Canada was organized. In the following year the Conference adopted its present name.

Since the organization meeting in 1918 the Conference has met during the week preceding the annual meeting of the Canadian Bar Association, and at or near the same place. The following is a list of the dates and places of the meetings of the Conference:

1918. Sept. 2, 4, Montreal.
1919. Aug. 26-29, Winnipeg.
1920. Aug. 30, 31, Sept. 1-3, Ottawa.
1921. Sept. 2, 3, 5-8, Ottawa.
1922 August 11, 12, 14-16, Vancouver.
1923. Aug. 30, 31, Sept. 1, 3-5, Montreal.
1924. July 2-5, Quebec.
1925 Aug. 21, 22, 24, 25, Winnipeg.
1926. Aug. 27, 28, 30, 31, Saint John.
1927. Aug. 19, 20, 22, 23, Toronto.
1928 Aug. 23-25, 27, 28, Regina.
1929. Aug. 30, 31, Sept. 2-4, Quebec.
1930 Aug. 11-14, Toronto.
1931. Aug. 27-29, 31, Sept. 1, Murray Bay.
1932 Aug. 25-27, 29, Calgary.
1933. Aug 24-26, 28, 29, Ottawa.

1934. Aug. 30, 31, Sept. 1-4, Montreal.
1935. Aug. 22-24, 26, 27, Winnipeg.
1936. Aug. 13-15, 17, 18, Halifax.
1937. Aug. 12-14, 16, 17, Toronto.
1938. Aug. 11-13, 15, 16, Vancouver.
1939. Aug. 10-12, 14, 15, Quebec.
1941. Sept. 5, 6, 8-10, Toronto.
1942. Aug. 18-22, Windsor.
1943. Aug. 19-21, 23, 24, Winnipeg.
1944. Aug. 24-26, 28, 29, Niagara Falls.
1945. Aug. 23-25, 27, 28, Montreal.
1946. Aug. 22-24, 26, 27, Winnipeg.
1947. Aug. 28-30, Sept. 1, 2, Ottawa.
1948 Aug. 24-28, Montreal
1949. Aug. 23-27, Calgary.
1950. Sept. 12-16, Washington, D.C.
1951. Sept. 4-8, Toronto.
1952. Aug. 26-30, Victoria.
1953. Sept. 1-5, Quebec
1954. Aug. 24-28, Winnipeg.
1955. Aug. 23-27, Ottawa.
1956. Aug. 28-Sept. 1, Montreal.
1957. Aug. 27-31, Calgary.
1958. Sept. 2-6, Niagara Falls.
1959. Aug. 25-29, Victoria.
1960. Aug. 30-Sept. 3, Quebec.
1961. Aug. 21-25, Regina.
1962. Aug. 20-24, Saint John.
1963. Aug. 26-29, Edmonton.
1964. Aug. 24-28, Montreal.
1965. Aug. 23-27, Niagara Falls.
1966. Aug. 22-26, Minaki.
1967. Aug. 28-Sept. 1, St. John's
1968 Aug 26-30, Vancouver
1969. Aug. 25-29, Ottawa.
1970. Aug. 24-28, Charlottetown

Because of travel and hotel restrictions, due to war conditions, the annual meeting of the Canadian Bar Association scheduled to be held in Ottawa in 1940 was cancelled and for the same reasons no meeting of the Conference was held in that year. In 1941 both the Canadian Bar Association and the Conference held meetings, but in 1942 the Canadian Bar Association cancelled its meeting which was scheduled to be held in Windsor. The Conference, however, proceeded with its meeting. This meeting was significant in that the National Conference of Commissioners on Uniform State Laws in the United States was holding its annual meeting at the same time in Detroit which enabled several joint sessions to be held of the members of both Conferences.

Since 1935 the Government of Canada has sent representatives annually to the meetings of the Conference and although the Province of Quebec was represented at the organization meeting in 1918, representation from that province was spasmodic until 1942. Since then representatives from the Bar of Quebec have attended each year, with the addition since 1946 of one or more representatives of the Government of Quebec.

In 1950 the newly-formed Province of Newfoundland joined the Conference and named representatives to take part in the work of the Conference. At the 1963 meeting representation was further enlarged by the presence and attendance of representatives of the Northwest Territories and the Yukon Territory.

In most provinces statutes have been passed providing for grants towards the general expenses of the Conference and for payment of the travelling and other expenses of the commissioners. In the case of provinces where no legislative action has been taken and in the case of Canada, representatives are appointed and expenses provided for by order of the executive. The members of the Conference do not receive remuneration for their services. Generally speaking, the appointees to the Conference from each jurisdiction are representative of the various branches of the legal profession, that is, the Bench, governmental law departments, faculties of law schools and the practising profession.

The appointment of commissioners or representatives by a government does not of course have any binding effect upon the government which may or may not, as it wishes, act upon any of the recommendations of the Conference.

The primary object of the Conference is to promote uniformity of legislation throughout Canada or the provinces in which uniformity may be found to be practicable by whatever means are suitable to that end. At the annual meetings of the Conference, consideration is given to those branches of the law in respect of which it is desirable and practicable to secure uniformity. Between meetings the work of the Conference is carried on by correspondence among the members of the executive and the local secretaries. Matters for the consideration of the Conference may be brought forward by a member, the Minister of Justice, the Attorney-General of any province, or the Canadian Bar Association.

While the primary work of the Conference has been and is to achieve uniformity in respect of subject matters covered by existing legislation, the Conference has nevertheless gone beyond this field in recent years and has dealt with subjects not yet covered by legislation in Canada which after preparation are recommended for enactment. Examples of this practice are the Survivorship Act, section 39 of the Uniform Evidence Act dealing

with photographic records and section 5 of the same Act, the effect of which is to abrogate the rule in *Russell v. Russell,* the Uniform Regulations Act, the Uniform Frustrated Contracts Act, and the Uniform Proceedings Against the Crown Act. In these instances the Conference felt it better to establish and recommend a uniform statute before any legislature dealt with the subject rather than wait until the subject had been legislated upon in several jurisdictions and then attempt the more difficult task of recommending changes to effect uniformity.

Another innovation in the work of the Conference was the establishment in 1944 of a section on criminal law and procedure. This proposal was first put forward by the Criminal Law Section of the Canadian Bar Association under the chairmanship of J. C. McRuer, K.C., at the Winnipeg meeting in 1943. It was there pointed out that no body existed in Canada with the proper personnel to study and prepare recommendations for amendments to the Criminal Code and relevant statutes in finished form for submission to the Minister of Justice. This resulted in a resolution of the Canadian Bar Association that the Conference should enlarge the scope of its work to encompass this field. At the 1944 meeting of the Conference in Niagara Falls this recommendation was acted upon and a section constituted for this purpose, to which all provinces and Canada appointed representatives.

In 1950, as the Canadian Bar Association was holding a joint annual meeting with the American Bar Association in Washington, D.C., the Conference also met in Washington. This gave the members an opportunity of watching the proceedings of the National Conference of Commissioners on Uniform State Laws which was meeting in Washington at the same time. A most interesting and informative week was had.

An event of singular importance in the life of this Conference occurred in 1968. In that year Canada became a member of the Hague Conference on Private International Law whose purpose, as stated by J.-G. Castel, S.J.D. in a comprehensive article in the March, 1967 number of the Canadian Bar Review, "is to work for the progressive unification of private international law rules", particularly in the fields of commercial law and family law where conflicts of laws now prevail.

In short, the Hague Conference works for the same general objectives at the international level as the Uniformity Conference does within Canada.

The Government of Canada in appointing six delegates to attend the 1968 meeting of the Hague Conference greatly honoured the Uniformity Conference by requesting the latter to nominate one of its members as a member of the Canadian delegation.

For a more comprehensive review of the history of the Conference and of uniformity of legislation, the reader is directed to an article by L. R. MacTavish, K.C., entitled "Uniformity of Legislation in Canada—An Outline", that appeared in the January, 1947, issue of the *Canadian Bar Review*, at pages 36 to 52. This article, together with the Rules of Drafting adopted by the Conference in 1948, was re-published in pamphlet form in 1949.

TABLE OF MODEL STATUTES

The table on pages 16 and 17 shows the model statutes prepared and adopted by the Conference and to what extent these have been adopted in the various jurisdictions.

Line	Title of Act	Conference	Adopted Alta	B.C	Man	N B	Nfld
1	Accumulations	1968		1967			
2	Assignments of Book Debts	1928	'29, '58*		'29, '51*, '57*	1952‡	1950‡
3							
4	Bills of Sale	1928	1929		'29, '57*	——$	1955‡
5							
6	Bulk Sales	1920	1922	1921	'21, '51*	1927	1955‡
7	Compensation for Victims of Crime	1970					
8	Conditional Sales	1922		1922¶		1927	1955‡
9	Conflict of Laws (Traffic Accidents) Act	1970					
10	Contributory Negligence	1924	1937*	1925		'25, '62*	1951*
11	Cornea Transplant	1959	1960‡	——¶	——¶	——$	1960
12	Corporation Securities Registration	1931					
13	Defamation	1944	1947	——$	1946	1952‡	
14	Devolution of Real Property	1927	1928			1934†	
15	Domicile	1961					
16	Evidence	1941			1960†		
17							
18	Foreign Affidavits	1938	'52, '58*	1953†	1952	1958‡	1954*
19	Judicial Notice of Statutes and						
20	Proof of State Documents	1930		1932	1933	1931	
21	Officers, Affidavits before	1953	1958	——$	1957		1954
22	Photographic Records	1944	1947	1945	1945	1946	1949
23	*Russell v. Russell*	1945	1947	1947	1946		
24	Fatal Accidents	1964				1968	
25 ●	Fire Insurance Policy	1924	1926	1925$	1925	1931	1954‡
26	Foreign Judgments	1933				1950‡	
27	Frustrated Contracts	1948	1949		1949	1949	1956
28	Highway Traffic and Vehicles—						
29	Rules of the Road	1955	1958†	1957†	1960‡		
30	Hotelkeepers	1962			....	....	....
31	Human Tissue	1965	1967	1968	1968		
32	Interpretation	1938	1958*	——$	'39‡, '57*		1951‡
33							
34	Intestate Succession	1925	1928	1925	1927‡	1926	1951
35							
36	Landlord and Tenant	1937				1938	
37	Legitimation (Legitimacy)	1920	'28, '60*	'22, '60*	'20, '62*	'20, '62*	——$
38 ●	Life Insurance	1923	1924	1923$¶	1924	1924	1931
39	Limitation of Actions	1931	1935		'32, '46‡		
40	Married Women's Property	1943			1945	1951$	
41	Partnership		1899°	1894°	1897°	1921°	1892°
42	Partnerships Registration	1938				——$	
43	Pension Trusts and Plans						
44	Perpetuities	1954		1957‡	1959	1955	1955
45	Appointment of Beneficiaries	1957	1958	1957‡	1959		1958
46	Presumption of Death	1960		1958$	1968‡		
47	Proceedings Against the Crown	1950	1959‡		1951	1952†	
48	Reciprocal Enforcement of Judgment	1924	'25, '58*	'25, '59*	'50, '61*	1925	
49							
50	Reciprocal Enforcement of Tax						
51	Judgments	1965					
52	Reciprocal Enforcement of Mainte-						
53	nance Orders	1946	'47, '58*	'46, '59*	'46, '61*	1951‡	'51‡, '61*†
54	Regulations	1943	1957‡	1958‡	1945‡	1962	
55	Sale of Goods		1898°	1897°	1896°	1919°	1899°
56	Service of Process by Mail	1945	——$	1945	——$		
57	Survival of Actions	1963				1968	
58	Survivorship	1939	'48, '64*	'39, '58*‡	'42, '62*	1940	1951
59	Testamentary Additions to Trusts	1968					
60	Testators Family Maintenance	1945	1947‡	——$	1946	1959	
61	Trustee Investments	1957		1959†	1965‡		
62	Variation of Trusts	1961	1964	1968	1964		
63	Vital Statistics	1949	1959‡	1962‡	1951‡		
64	Warehousemen's Lien	1921	1922	1922	1923	1923	
65	Warehouse Receipts	1945	1949	1945‡	1946‡	1947	
66	Wills	1929	1960‡	1960‡	1964‡	1959‡	
67							
68	Conflict of Laws	1953		1960	1955		1955

* Adopted as revised.
° Substantially the same form as Imperial Act (*See* 1942 Proceedings, p 18)
$ Provisions similar in effect are in force
● More recent Act on this subject has been recommended by the Association of Superintendents of Insurance

	P E I.	Adopted Que	Sask	Can	N W T	Yukon	Remarks
	1931		1929		1948	1954‡	Am. '31; Rev. '50 & '55; Am. '57
	1947		1957$		1948‡	1954‡	Am. '31 & '32; Rev. '55; Am '59
	1933				1948¶	1956	Am. '21, '25, '39 & '49; Rev. '50 & 61.
	1934		1957$		1948‡	1954‡	New Am '27, '29, '30, '33, '34 & '42; Rev. '47 & '55; Am. '59
	1938*		1944*		1950*‡	1955‡	New Rev. '35 & '53
—¶	1960		——¶		——¶	1962	Sup. '65, Human Tissue Act
	1949		1932			1963	
132	1948				1949*‡	1954	Rev. '48; Am. '49
			1928		1954	1954	Am '62
160†					1948*‡	1955‡	Am. '42, '44 & '45; Rev. '45; Am. '51, '53 & '57
', '54*			1947	1943	1948	1955	Am. '51; Rev. '53
	1939				1948	1955	Rev. '31
154						1955	
45	1947		1945	1942$	1948	1955	
46	1946		1946		1948	1955	
124	1933		1925				Stat Cond 17 not adopted
			1934				Rev. '64
149	1949				1956	1956	
							Rev. '58; Am. '67
—$			1968‡		1966		Rev '70
	1939		1943		1948*‡	1954*	Am. '39; Rev. '41; Am. '48; Rev. '53
	1944‡		1928		1949‡	1954‡	Am. '26, '50, '55; Rev. '58; Am. '63
	1939				1949‡	1954‡	Recomm. withdrawn '54
, '62*	1920	——$	'20, '61‡		'49‡, '64*	1954†	Rev. '59
124	1933		1924				
	1939‡		1932		1948†	1954*	Am. '32, '43 & '44
					1952†	1954†	
120°	1920°		1898°		1948°	1954°	
			1941†				Am. '46
154			1957			1968	Am '55
154$	1963		1957$				
					1962	1962	
163‡			1952‡				
129			1924		1955	1956	Am. '25; Rev. '56; Am. '57; Rev. '58; Am. '62 & '67
							Rev '66
‡ '59*‡	1951‡	1952$	1968		1951‡	1955‡	Rev. '56 & '58; Am. '63 & '67
144‡			1963	1950$		1968‡	
120°	1919°		1896°				
			——$				
140	1940		'42, '62*		1962	1962	Am. '49, '56 & '57; Rev. '60
			1940				Am. '57
			1965		1964	1962	Am '70
59	1963		1969				
48$	1950‡		1950$		1952	1954‡	Am '50 & '60
24	1938		1921		1948	1954	
46‡							
			1931		1952	1954‡	Am '53; Rev. '57; Am. '66 & '68
54							Rev '66

part of Commissioners for taking Affidavits Act
part.
ith slight modification.
opted and later repealed

PROCEEDINGS OF THE DRAFTING WORKSHOP

(SUNDAY, AUGUST 23, 1970)

10·15 a.m. - 5:45 p.m.

The workshop convened at 10:00 a.m. The following Commissioners and representatives were present:

Leslie R. Meiklejohn
Alberta

G. Allan Higenbottam
British Columbia

J. W. Ryan, Q.C.
Canada

Andrew C. Balkaran
Manitoba

R. H. Tallin
Manitoba

M. M. Hoyt, Q.C.,
New Brunswick

Hugo Fischer
Northwest Territories
and Yukon Territory

Frank G. Smith
Northwest Territories

Arthur N. Stone, Q.C.,
Ontario

J. Arthur McGuigan, Q.C.,
Prince Edward Island

Robert Normand
Quebec

W. Gordon Doherty, Q.C.
Saskatchewan

Padraig O'Donoghue
Yukon Territory

Mr. Emile Colas, Q.C., the President of the Conference, welcomed those present. Mr. Ryan, the Chairman of the Drafting Workshop, opened the meeting at 10:15 a.m.

Conforming to the proposal adopted at the last meeting, as reported on page 19 of the 1969 Proceedings, the following jurisdictions reported on the following sections:

Quebec (Mr Normand)	1 (short title section), 2 and 3 (interpretations) and 4 (arrangement of Acts)
British Columbia: (Mr. Higenbottam)	5 (sections)
Manitoba: (Mr. Balkaran)	6 and 16 (marginal notes)
Canada: (Mr. Ryan)	7 (voices), 8 (terms) and 9 (moods)
New Brunswick (Mr. Hoyt)	10 and 11 (words and expressions)

Northwest Territories: (Mr. Smith)	12 and 13 (spelling and pronunciation)
Saskatchewan: (Mr. Doherty)	14 (reference to other provisions)
Ontario: (Mr. Stone)	15 (provisos)
Alberta: (Mr. Acorn)	17 (reference to legislation)

The Drafting Workshop prepared the following Discussion Draft of the Rules of Drafting:

Title

1. (1) Every draft uniform Act shall have only one title which should be as short as possible.

(2) Where possible, the name of the province or the word "Government" shall be avoided as the first word of the title of an Act.

Definition Section

2. (1) Where expressions or words are defined in an Act, they shall be grouped in a separate section which shall be the first section of the Act.

(2) The expression "means and includes" shall not be used.

Objects or purposes

3. The objects or purposes of an Act should be deduced from the Act itself and shall not be enunciated in an individual section.

Arrangement of Acts

4. (1) Provisions respecting the interpretation or application of an Act shall follow the definition section.

(2) A complex Act may be divided into "Parts" but shall not be so divided unless the subjects are so different that they may be appropriately embodied in separate Acts.

(3) General provisions shall follow the definition section or the interpretation or application section, if any.

(4) Special and exceptional provisions shall follow the general provisions.

(5) Transitional and temporary provisions shall be placed at the end of the Act.

Sections

5. (1) Sections shall be numbered consecutively by Arabic figures throughout the Act whether or not the Act is divided into Parts.

(2) Sections shall be divided into subsections where division is necessary in order to avoid undue length and complexity.

(3) Subsections shall be numbered consecutively by Arabic figures in brackets.

(4) A subsection, or a section that does not contain subsections, may contain two or more clauses indented and lettered with italicized letters in brackets commencing with (*a*), if the clauses are preceded or followed by general words applicable to both or all of them.

(5) A clause may contain two or more subclauses, further indented and numbered with small Roman numerals in brackets commencing with (i), if the subclauses are preceded or followed by general words, within the clause, applicable to both or all the subclauses.

(6) Where it is necessary to insert a new section, subsection, clause, subclause or paragraph to an Act, the decimal system of numbering adopted by the Conference shall be used to designate the insertion.

(7) A subsection, or a section that does not contain subsections, should contain only one sentence.

(8) Long sections and long subsections should be avoided.

(9) The cases or conditions should be stated first followed by the rule, unless the rule is to apply to several cases or conditions in which event it may be found advisable to state the rule and follow with the cases or conditions. Where both cases and conditions are expressed, cases should precede conditions.

Headings

6. (1) Where an Act is lengthy, headings may be used to aid visualization of its provisions.

(2) Headings should be used sparingly.

Voices

7. In general the active voice shall be preferred to the passive voice but when the passive voice is used every care shall be taken to ensure that the legal subject is expressly mentioned or clearly understood from the context.

Tenses

8. (1) The present tense of the indicative mood shall be used to describe the case or condition in which a law is to operate unless the case or condition contemplates a time relationship between events when the past tense, indicative mood, may be used with the present tense, indicative mood, to express the time relationship between these events.

(2) The present tense of the indicative mood shall be used to express a rule of law.

Moods

9. (1) The indicative mood shall be used in stating a case or condition whether preceded by "where", "when" or "if" or any variation on those introductory words.

(2) The indicative mood shall be used in stating a rule of law, and the imperative in stating a rule of conduct.

(3) The subjunctive mood shall not be used except to state a contrary-to-fact situation or fiction of law when the use of that mood will make the intended meaning of the legislative sentence clearer.

Words and Expressions

10. The word "may" shall be used as permissive or empowering and the word "shall" to express the imperative.

11. (1) Different words or expressions shall not be used to denote the same thing.

(2) The same word or expression shall not be used to denote different things.

(3) Pairs of words having the same effect shall be avoided.

(4) The expressions "it shall be lawful", "it is the duty", "it is declared" and similar expressions shall be avoided.

(5) The words "said", "aforesaid", "same", "before-mentioned", "whatever", "whatsoever", "wheresoever" and the device "and/or" shall be avoided.

(6) Where the definite article may be used, the word "such" shall be avoided.

(7) Where the indefinite article may be used, the words "any", "each" and "every" shall be avoided.

Spelling and Punctuation

12. (1) Spelling shall be in accordance with the Shorter Oxford English Dictionary, unless another spelling is in common usage.

(2) Capital letters shall be used only where necessary.

13. The sentence shall be so constructed that its meaning does not depend on its punctuation.

Reference to Other Provisions

14. (1) A reference to another section, subsection, clause or subclause shall identify the section, subsection, clause or subclause by its number or letter and not by such terms as "preceding", "following" or "herein provided".

(2) The words "of this Act" shall not be used unless necessary to avoid confusion where reference is made also to another Act.

Provisos

15. The use of the expression "provided that" in its various forms to denote a proviso should be avoided

Marginal Notes

16. (1) Marginal notes shall be short and shall describe but not summarize the provisions to which they relate.

(2) When read together, marginal notes shall have such a consecutive meaning as will give a reasonably accurate idea of the contents of the provisions to which they apply.

(3) Marginal notes shall be in substantive form.

(4) Marginal notes shall be included in all drafts of uniform Acts for sections and subsections.

The members of the Workshop agreed on the deletion of sections 17 and 18.

The following jurisdictions will report at the next meeting on the observations and suggestions of the drafting of legislation contained in the booklet entitled *Rules of Drafting,* starting on page 31:

Yukon Territory (Mr. O'Donoghue)	8 (Formation of Sentences)
Quebec	9 (Definitions) 17 (Titles) 18 (Preambles)
Manitoba	10 (Headings) 11 (Marginal Notes)
New Brunswick	12 ("Shall" and "May")
Saskatchewan	13 ("Where"; "When") 14 (Relative Words, etc.)
Canada	15 (Powers, Duties and Privileges)
Ontario . .	16 (Ejusdem Generis Rule)
Alberta . .	19 (Declaratory Provisions)
British Columbia	20 (Unnecessary Particulars)
Northwest Territories (Mr. Smith)	21 (Application of Qualifying Words)

The members of the Workshop will reconvene at the notice of the Chairman.

The meeting then briefly considered the effect of their discussions on drafting rules and the legislative drafting courses and seminars being given by Dr. E. A. Driedger at Ottawa University. Some concern was expressed that the Drafting Workshop was not sufficiently informed of this course. The meeting then unanimously approved a suggestion that Dr. E. A. Driedger be invited to the next meeting of the Workshop so that the Workshop would have the advantage of his suggestions and views in its revision of the drafting rules.

Mr. Ryan was again elected Chairman for 1971 and Dr. Fischer Secretary.

The meeting adjourned at 5:45 p.m.

MINUTES OF THE OPENING PLENARY SESSION

(MONDAY, AUGUST 24TH, 1970)

10:00 a.m.-10:45 a.m.

Opening

The fifty-second annual meeting of the Conference opened at the Confederation Building, Charlottetown, P.E.I. with the President, Mr. E. R. Colas, C.R., in the Chair.

The President welcomed the members of the Conference and, in particular, the new members. The representatives from each of the jurisdictions then introduced themselves.

Minutes of Last Meeting

The following resolution was adopted:

> RESOLVED that the Minutes of the 1969 Annual Meeting, as printed in the 1969 Proceedings, which were circulated, be taken as read and adopted.

President's Address

"Before attacking the very heavy agenda which has been prepared for this fifty-second annual meeting, let me for a moment express some of the thoughts which I have already expounded before you in the past.

As you are aware humanity has passed through four fundamental revolutions. The first one made prehistoric man a vertical animal. The second one brought him to the great civilizations which have now disappeared. The third one which has been called the industrial revolution, took place yesterday and the fourth one, which is the scientific revolution, has been sparked by the discovery of new sources of energy, the great expansion of machines and credit, which resulted in economic, political and social confusion but also in the unbearable inequalities between men and nations. This fourth revolution offers barbarian names and frightening characters. First of all the Computer System, its vertiginous progress, its unlimited possibilities lead to a devastating revision of the notion of work and its traditional morality. The labourer using his hands has lived. Human activity will from now on be cerebral, collective, without any idea of hierarchy.

We have seen how the computers have completely modified information, education, urbanism, medicine, economic structures and the relationship between the individuals and the state. Tomorrow, although it is already late, the whole legal system will be completely transformed by it.

The computer has brought to the industrial society its first death blow. The second is brought to it by cybernetics. The era of automation and robot will only leave to men the field of creative thinking. Just a word of the possibilities opened by the biological mutations. Its perspectives make science-fiction stories like fairy tales. The transplant of human organs is a thing of the past. The baby factories are for tomorrow and the day after tomorrow the death of death.

Should we now talk about the secondary revolutions which touched less the nature of phenomenon than their dimension: astronautics, giant cities without heart or soul, environments, leisures. In a new society will develop a new morality. The gamble on life can be won only at the price of collective organization of society and a planetarian organization of the states, a massive cultural effort, equality of chances, subordination of science and technique to political control. The salvation of men of the year 2000 is at that price, otherwise there would not even be the choice of despair.

These are some of the thoughts which have prompted me to rethink with you the future role of the Conference. You are aware of the suggestions which I have made both in my letter to the former President and in my resolution moved at the last annual meeting.

I must say with pleasure that I have received the greatest cooperation from all the Commissioners over the past year. You must have noticed that the provincial reports have been forwarded on time and meetings of the ad hoc committee on the compensation of victims of violent crimes have been held very successfully.

This shows that we can certainly with the quality of people who sit at the Conference achieve much more valuable work. The potential is there but it is not used to the fullest and, furthermore, not with the efficiency which we should expect. I am quite aware that the situation is not peculiar to the Conference but is

common in all fields related to law and the administration of justice in our society.

It even exists in countries which are more advanced and wealthy than ours. Chief Justice Warren E. Burger of the United States Supreme Court proposed on Monday, August 10, 1970, the creation of a council representing all branches of the Federal Government to bring the U S. Court system up to date.

'In a super market age,' he said, 'we are like a merchant trying to operate a cracker barrel corner grocery store with the method and equipment of 1900.'

In his state-of-the-judiciary message to the American Bar Association, this distinguished jurist said 'the Court needs more money, Judges and trained administrators and a stream-lining of their trial and appellate processes to retain public confidence.'

He questioned the priorities of a nation that spends 200 million to develop the C-5A airplane and 128 million on its federal judicial system.

'Military aircraft are obviously essential in this uncertain world' Chief Justice Burger said, 'but surely adequate support for its judicial branch is also important.'

This situation exists even in a more acute way in our own country. I personally believe strongly that the time has come for more profound thinking and the immediate implementation of some of the reforms which are so needed. There is no doubt in my mind that we should strive towards more permanency, continuity, efficiency. We should give ourselves the tools which would allow a better service to Canadians from coast to coast in order to live the principle of equality of chances to which I have referred earlier. We should also investigate and possibly coordinate the efforts made by various groups in the use of computers in the legal field.

It seems in fact foolish to waste such a valuable human resource as a lawyer's time and energies by expending them upon tasks that machines can do better. And I feel that I should digress to elaborate for a few minutes upon the tasks we do with our hands and which should be turned over to computers and thus raise timidly the veil which may give you a glance of all the possibilities thus offered already to us and which will have such impact on our future as lawyers, legislative draftsmen, law

enforcement, uniformity of legislation, judicial process and many other fields. You can immediately grasp the consequences which will flow from such application on the cultural, social, economic and legal fields.

Various applications

Almost all areas of legal activity may benefit in some way from the introduction of a computer. Many practitioners amongst the audience will be familiar with its use for office management and bookkeeping functions. Less known are the applications in estate planning, in preparing tax returns, organizing and retrieving the items of a complex case file and printing contracts, wills and other documents that are standardized to a certain extent and require but a few modifications and insertions to suit new parties.

Court procedure has been sped up by relegating the scheduling of the hearings to a computer. Another application, widely publicized, was computer use in the administration of 'parking tickets' in Paris. As you know, the Parisian police hand out every year millions of parking tickets. This practice, necessary as it may be, led to fantastic administrative congestions when it came to follow up the payment of the tickets. In sheer despair, the authorities used to throw out, at the end of each year, about a million and a half of these tickets, to avoid an ever-accumulating back-log. And knowing that, no self-respecting Parisian would pay his tickets voluntarily. The situation has radically changed since the introduction of a computer system. Not only does the system pay for its own costs, but it also permits the police to put stiffer penalties on second and further offenders and to implement them

I should also mention computerization of large data banks. Everybody knows how time-consuming and sometimes difficult it is to obtain information about people's civil status, about things people have bought on credit or instalment plans, or about rights on real estate. By putting this information in one centralized bank, accessible from various stations throughout a province, everybody who needs it may obtain it at very short notice. In Quebec, for instance, the registers of civil status and of real estate will thus be automated. Ontario is working on a personal property security registration system. I should mention the danger that this concentration of information represents to

people's privacy. To whom are we prepared to make such files accessible? Should a citizen be informed about files existing on him and given the opportunity to correct them where necessary? These are new legal problems arising out of computer use, which I will not go into here, but which will be discussed later on in the uniform law section.

The legislator, too, uses computers. In Manitoba, publishing and updating of statutes is automated. Similar systems are designed for the Federal Legislature and for the Government of Quebec. Concurrently, this process can provide the draftsmen with indices listing, in alphabetical order, all the terms found in the statutes, each with adjacent words in the text of those statutes.

The last type of service I want to mention is useful to the legal profession as a whole. I am referring to the retrieval of legal texts, be they statutes, cases or legal commentary. Practitioners may use such a system to find cases supporting their points; the legislator can trace all articles in different statutes affected by proposed legislation, or compare the law in force in different provinces; and finally, it helps scholars to compose articles and doctrinary works.

Not an American Affair

Various people to whom I spoke about these possibilities felt that they did not exist in Canada and that, to use them, we would have to sell out to the Americans. I cannot stress it strongly enough that these opinions are wrong.

True, most of this work has started in the United States. Law retrieval is still strongly associated with the name of John Horty, in Pittsburgh, as is automated text editing with John Lyons in Washington.

But I feel that in a few years, bilingual or multilingual retrieval will be associated with one of our Canadian research teams working on the subject. And some of the solutions that the Americans have come up with, I think we can and *should* avoid in Canada. In particular, we should avoid a situation that exists in the United States, where some commercial outfits have tried to make a fast buck running a service which only a few of the wealthier law firms could afford.

Research in Canada

Let me for a moment go over one of the works done in Canada. I mentioned already that the Government of Manitoba now has a computer system to edit, update and publish its statutes. New legislation can be passed very quickly through the three required readings, because no longer does one have to wait for the modified proposal to be manually set and printed between different readings. The system can generate automatically various indices to the legislation, such as the already mentioned key-word-in-context system, that make useful tools in the uniformization of terminology. Another by-product is a copy of the text of those bills that serves as input to retrieval systems, thus permitting you to keep informed of the most recent version of the statutes.

It will not surprise you that the Federal Government has hired the designer of this system, Mr. Stephen Skelly, to do an even larger job in Ottawa. At the University of Ottawa, the Law Faculty is working on a vocabulary in English and French, of both civil and common law systems. Laval University in Quebec City is completing a text publishing and updating system for the Provincial Government, along with a retrieval system for the Provincial Statutes.

Another major development is the design of case law retrieval systems at the University of Montreal and Queen's University, Kingston, Ontario. Both systems are intended to operate on very large data banks, including major federal reports (Supreme Court and Exchequer Court) and the reports of interest in their respective provinces.

I will not bore you by enumerating all the major *Canadian* initiatives. The examples that I mentioned should convince everyone of the growing interest in Canada for studies on computers and law, and the necessity of coordinating their work in order to achieve more efficiency and avoid unnecessary duplication which is so costly and frustrating.

DATUM

One of the Canadian projects, with which I am personally more familiar, is the DATUM project at the University of Montreal. DATUM stands for the French 'documentation automatique de textes de l'Universite de Montreal', or automatic text retrieval system of the University of Montreal. As I mentioned before,

this system contains the bulk of Quebec cases, as listed in four reports, namely BR, CS, RP and RL, over the last 25 years. It will also include the Supreme Court Reports over that period, and plans exist to further enrich the bank with the Exchequer Court Reports and some other series of national interest. Cases further back than 1945 may be included, if the lawyers who will use the systems think it worthwhile.

As you know, Quebec has a civil law system and judges write either in French or English while the Statutes are published in both languages. The designers of DATUM took the view that in their system questions in either language should be given equivalent treatment and cover the entire bank. Thus, when the system is operational, you can ask your question in English, and receive both French and English cases in reply. This idea is eminently sensible, since a lawyer, even though he may read and speak both languages, may have difficulty finding the precise terminology he needs in the language which is not his mother tongue.

To realize this option, DATUM had to create a special bilingual thesaurus, containing French and English terms, derived from both civil law and common law systems. Each word is accompanied not only by its translation, but also by equivalent and less related terms in both languages. This dictionary will automatically look for all words or expressions that have roughly the same meaning as the term you originally had in mind, either in French or in English.

I do not have to tell you that if that thesaurus proves useful, we will possess an authentically Canadian research tool that will be useful to practitioners, legislative draftsmen and law schools alike

DATUM has opted for the so-called full-text system of retrieval. This means that every word in each case of the bank is maintained as a key-word, and not just the terms of an abstract or scope-note. Thus you can use any word occurring in a law case to retrieve that case, and you are not restricted to some selected vocabulary with which you are not entirely familiar Furthermore, you can use terms referring to the facts of a case, just as well as legal terms, to retrieve precedents.

For more complex questions, say a car accident involving children at play, you can specify that the text should contain

each of those four terms, that is CAR and ACCIDENT and PLAYING and CHILDREN. Since each of those terms is very specific and the judge may happen to talk about a 'collision of trucks, hitting an infant who was playing on the road', the system will also look for equivalent terms, via the thesaurus I already mentioned. If you do not like the synonyms the thesaurus gives you, you may supply your own in the query. Finally, you may indicate to the computer that it should only accept documents where those four terms occur in the same context, say in the same sentence or two. This is to avoid where there was a car accident, discovered by some passer-by, who found children peacefully playing in the neighbourhood.

Once these systems function, you will have a computer console in your office, a sort of typewriter which permits you to submit your questions directly to the computer. The answer comes back very soon, on the same instrument, or on a sort of television screen.

How much time and effort goes into the development of this system? Much. Much if you look in the abstract at the large sum of money invested in DATUM. But little, if you consider this as an initial investment to be written off over a decade or so, and if you compare it to what we spend on digests and research tools. This summer, DATUM employed three lawyers, four experts in analysis, six law school graduates, a professional translator, thirty typists and proof-readers, and two secretaries. Besides that, a number of linguists have worked part time for it, and other linguists, statisticians and professional translators have been consulted on separate occasions. The project started only two years ago and is now in its final stage.

Conclusions

I have mentioned DATUM as an example of Canadian research effort, from which the legal profession as a whole is likely to benefit.

The important thing, as I see it, is not only that we save time and probably money by mechanizing some rather clerical work; these systems may also have a social impact in that they put all lawyers at the same level as far as research goes, irrespective of the size of their firm or the city in which they work. They should be used by the *profession as a whole,* and not just by law professors. The sums invested are too large for such parochial-

ism. The retrieval of law is as essential a communication function to lawyers as the telephone, the mail, or public transport to the community as a whole. We should start to think *now,* in terms of a unified system, in which the interest of lawyers, the adequacy of the service is given prime consideration. We should not allow a splintering of market as has occurred in the United States. We should work toward a truly national system, with a national bank, to which all Canadian lawyers have access in the language of their choice

I am confident that such a system, by making the law and legal vocabulary of the different provinces easily accessible from either language, will provide a major impetus in our efforts to standardize Canadian law.

Is this not another task that could be performed by the Conference, or at least if the Conference could have served as the forum for inducing all those interested in this work to become aware of the problem and thus devise the proper solutions we would have played a valuable role.

I would like to have mentioned the work done on drafting of the Uniform Model Act on the compensation of victims of violent crimes on my attendance at the International Conference held in May at Baltimore on the same topic, but I will have the opportunity to do so more fully when we discuss this question as it appears on the agenda.

In concluding, I must apologize for these lengthy remarks but you must agree with me that this is the only chance for your President to express his views and give to this Conference the schema of its future activities. Let us hope that this fifty-second Conference will be fruitful and will give every Commissioner a sense of responsibility and usefulness which is so important to achieve great things"

Treasurer's Report

The Treasurer, Mr. Howard E. Crosby presented the Treasurer's Report (Appendix B, page 89)

The Report was, on motion, received.

Messrs. Brissenden and Higenbottam were named as auditors to report at the closing plenary session.

Secretary's Report

The Secretary, Mr. J. W. Ryan, presented the Secretary's Report (Appendix C, page 91) which, on motion, was received.

Resolutions Committee

The following persons were named to the Resolutions Committee: Messrs. Normand (Chairman), Alcombrack and Dick.

Nominating Committee

The following Past Presidents were named to constitute the Nominating Committee:

Messrs. Bowker (Chairman), Meldrum, Hoyt, Kennedy and Rutherford.

Publication of Proceedings

The following Resolution was adopted:

> RESOLVED that the Secretary prepare a report of the Meeting in the usual style, have the report printed and send copies thereof to the members of the Conference and those others whose names appear on the mailing list of the Conference and that he make arrangements for the supply to the Canadian Bar Association at its expense, of such number of copies as the Secretary of the Association requests

Next Meeting

The President indicated that the Annual Meeting of the Canadian Bar Association in 1971 would be held in Banff, Alberta. The question of the location of the next meeting of the Conference was deferred until the closing plenary session.

Adjournment

At 10:45 a.m. the opening plenary session adjourned to meet at the call of the President at a time to be fixed later.

MINUTES OF THE UNIFORM LAW SECTION

The following Commissioners and representatives participated in the sessions of this Section:

Alberta:

Messrs. W. E. WILSON, W. BOWKER and L. R. MEIKLEJOHN.

British Columbia:

Messrs. G. A. HIGENBOTTAM and P. R. BRISSENDEN.

Canada:

Messrs. J. W. RYAN and D. S. THORSON.

Manitoba:

Messrs. R. TALLIN, A. C. BALKARAN, G S. RUTHERFORD and R. G. SMETHURST.

New Brunswick:

Messrs. M. M. HOYT and B. D. STAPLETON.

Northwest Territories and Yukon Territory:

Messrs. H. FISCHER, F. G. SMITH and P. O'DONOGHUE.

Nova Scotia:

Mr. H. E. CROSBY

Ontario:

Messrs. W. C. ALCOMBRACK, H. A. B. LEAL and A. N. STONE.

Prince Edward Island:

Mr. J. M. CAMPBELL.

Quebec:

Messrs. E. COLAS, J. K. HUGESSEN, R. NORMAND and YVES CARON.

Saskatchewan:

Mr. G. C HOLTZMAN.

FIRST DAY

(MONDAY, AUGUST 24TH, 1970)

First Session

10:50 a.m. - 12:30 p.m.

The first meeting of the Uniform Law Section opened at 10:50 a.m. The President, Mr. Emile Colas presided.

Hours of Sittings

It was agreed that the Uniform Law Section sit from 9:30 a.m. to 12:30 p.m. and from 2 p.m. to 4:30 p.m. each day during the meeting.

Contributory Negligence (Tortfeasors)
Limitation of Actions
Interpretation Act

Mr. Bowker, on behalf of the Alberta Commissioners, requested that these matters be put over for another year. After an explanation by Mr. Bowker the following resolution was adopted:

> RESOLVED that the matters be referred back to the Alberta Commissioners for a report at the next meeting of the Conference.

Amendments to Uniform Acts

Mr. Tallin requested that the report on amendments to Uniform Acts be put over until another year.

> RESOLVED that the amendments to Uniform Acts be put over for report by Mr. Tallin at the next meeting of the Conference

Trustee Investment

Mr. Hugesson presented the report of the Quebec Commissioners on Trustee Investment (Appendix D, page 115). After discussion, the following resolution was adopted:

> RESOLVED that the amendment to the Uniform Trustee Investment Act as set out in Appendix E, page 117, be recommended for enactment in that form.

Family Relief Act

Mr. Holtzman presented the report of the Saskatchewan Commissioners on the Uniform Family Relief Act. (Appendix F, page 118) A discussion on the report followed.

Second Session

3:15 p.m. - 5:00 p.m.

Family Relief Act (continued)

The meeting continued its consideration of the report of the Saskatchewan Commissioners on the Family Relief Act, with particular reference to the class of dependant to be brought within the purview of the Act. The discussion of this matter occupied the whole of the Second Session.

SECOND DAY

(TUESDAY, AUGUST 25TH, 1970)

Third Session

9.30 a.m. - 12.30 p.m.

Family Relief Act (Concluded)

After further discussion the following resolution was adopted:

RESOLVED that the Family Relief Act be referred back to the Saskatchewan Commissioners for a further report at the next meeting of the Conference with a draft giving effect to the decisions made at this meeting

Human Tissue Act

Mr. Leal presented the report of the Ontario Commissioners on the Uniform Human Tissue Act (Appendix G, page 138.) General discussion of the report of the Ontario Commissioners occupied the balance of the Third Session.

Fourth Session

2:00 p.m. - 4:30 p.m.

Human Tissue Act (Concluded)

After further discussion the following resolution was adopted:

RESOLVED that the Conference approve the Human Tissue Act presented by the Ontario Commissioners with the changes in the text agreed upon by this meeting, (Appendix H, page 151) and recommend it for enactment in that form

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THIRD DAY

Fifth Session

9:30 a.m. - 12:30 p.m.

Protection of Privacy

The Conference turned its attention to those items which had been brought to its attention in the Secretary's Report (see Appendix C, page 91).

Mr. Ryan drew the attention of Conference to the Conference held in June at Queen's University on "Computers: Privacy and Freedom of Information" and summarized the manner in which that Conference had been run and the kinds of suggestions that emanated from the workshops in that Conference.

Mr. Leal then reviewed the privacy situation with respect to electronic eavesdropping, lie detectors, information gathering, etc., the use of information in employment and personnel recruitment, in the educational areas of provinces and for credit bureau and insurance company purposes.

Mr. Bowker spoke of the privacy in American "search and seizure" laws as well as the United States tort "breach of privacy", and referred particularly to the work of Gibbs and Sharp of the University of Manitoba as being an excellent report of the type of problems involved in this matter.

Mr. Thorson spoke of the size of the undertaking and suggested making use of law reform bodies, both federal and provincial, to assist in the development of uniform laws for the protection of privacy.

Mr. Hugesson spoke of the invasion of privacy tort law recently enacted in British Columbia and Mr. Caron mentioned the activities taking place in Quebec.

After further discussion the following resolution was adopted:

> RESOLVED that this Conference request the Minister of Justice to seek the cooperation of the Federal Law Reform Commission acting in conjunction with such other law reform bodies in Canada, as it may see fit to associate with it, and after study of existing legislation and all other available material
>
> (a) to make a report to the proper authorities on all aspects of the protection of privacy and to delineate the areas in which laws, including uniform laws, are required;
>
> (b) to carry on studies in these various areas and recommend for the purpose of this Conference the matters of policy that should be

included in any uniform legislation; and to suggest the remedies that should be adopted;

and finally to make reports available to this Conference from time to time and as expeditiously as possible, with the intention that this Conference will proceed forthwith thereafter to draft model legislation on the subject of protection and privacy.

A further discussion took place with respect to the matter of privacy. It was suggested that Messrs. Richard Goss, Q.C. (British Columbia), W. F. Bowker (Alberta), Sharp or Gibbs (Law Reform Commission of Manitoba), A. Leal (Ontario), D. S. Thorson (Canada) (Chairman), Y. Caron (Quebec), and H. Crosby (Nova Scotia) should be invited to form a special committee of the Conference for the purposes of the Conference's review of the protection of privacy.

After further discussion the following resolution was adopted·

RESOLVED that the President establish a committee of this Conference to gather legislation and related materials on privacy, including the tort of invasion of privacy and that dealing with control of procedures of credit bureaus and to report to this Conference at its meeting next year.

The Hague Conference

The first report of the Quebec Commissioners on this matter was made by Mr. R. Normand (Appendix I, page 157).

The Hague Conference (continued)

The second report of the Quebec Commissioners was presented to the Conference by the President, Mr. E. Colas (Appendix J, page 177). After discussion it was agreed to defer the matter to a later Session to give the Quebec Commissioners an opportunity to draft a motion incorporating the views expressed by the meeting.

Sixth Session

2:30 p.m. - 4·30 p.m.

Foreign Torts

Mr. Fischer presented his report on the Hague Convention on the law applicable to traffic accidents (Appendix K, page 215)

After the presentation of the report, the meeting moved a vote of thanks to Dr. Fischer for a report that obviously involved a considerable amount of work. The discussion of the report occupied the balance of the Sixth Session.

FOURTH DAY

(THURSDAY, AUGUST 27th, 1970)

Seventh Session

9:30 a.m. - 12:30 p.m.

Compensation for Victims of Crime

The President, Mr. Emile Colas, spoke briefly on this matter and informed the meeting that Mr. T. D. MacDonald, Q.C., was present at the meeting to give the report of the Special Committee of the Conference on Compensation for Victims of Crime on behalf of that Committee (see 1969 Proceedings at page 26).

In his comments to the meeting Mr. MacDonald made the following points: (see Appendix M, page 271).

Following the report of Mr. MacDonald, Mr. Stone presented the Uniform Compensation for Victims of Crimes Act on behalf of the special committee (Appendix M, page 287). Discussion of the draft followed and occupied the remainder of the Seventh Session.

Eighth Session

2:30 p.m. - 6:05 p.m.

Compensation for Victims of Crime (concluded)

Following a discussion of the draft Bill, the meeting conveyed its appreciation and thanks to Messrs. MacDonald and Stone for the presentation of their reports. The following resolution was then adopted:

> RESOLVED that the Act be referred back to the Ontario Commissioners with a request that they prepare a redraft of the Act in accordance with the changes agreed upon at this meeting, that the draft Act as so revised be sent to each of the local secretaries for distribution by them to the Commissioners in their respective jurisdictions and, if the draft as so revised is not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1970, it be recommended for enactment in that form.

The draft Act is set out in Appendix N, (page 298). The draft as therein set out is therefore recommended for enactment in that form.

Note:—Copies of the revised draft were distributed in accordance with the above resolution Disapprovals by two or more jurisdictions were not received by the Secretary by November 30th, 1970.

FIFTH DAY

(FRIDAY, AUGUST 28th, 1970)

Ninth Session

9.30 a.m - 1:00 p.m

Foreign Torts (concluded)

Consideration of this report was continued and the following resolution was adopted:

> RESOLVED that the draft Act applicable to traffic accidents (conflict of laws) be referred back to the Commissioners of the Northwest Territories for revision in accordance with the changes agreed upon at this meeting; that the draft as so revised be sent to each of the local secretaries for distribution by them to the Commissioners in their respective jurisdictions; and that if the draft as so revised is not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1970, it be recommended for enactment in that form.

Note:—Copies of the revised draft were distributed in accordance with the above resolution. Disapprovals by two or more jurisdictions were not received by the Secretary by November 30th, 1970.

The revised draft Act is set out in Appendix L, (page 263) The draft as therein set out is therefore recommended for enactment in that form.

Judicial Decisions affecting Uniform Acts

Mr. Crosby presented the report of the Nova Scotia Commissioners (Appendix O, page 313).

The case *Re McLean* (1969) 1 N.B.R. (2d) 500, (Wills Act) was discussed by Mr. Bowker. After discussion the matter raised in this case was referred to the Saskatchewan Commissioners for report at the next meeting of the Conference.

The following resolution was adopted:

> RESOLVED that the Nova Scotia Commissioners continue to prepare a report on Judicial Decisions Affecting Uniform Acts.

Minimum Age for Marriage

Mr. Ryan presented the report of the Canada Commissioners (Appendix P, page 319). Following a discussion of the report the following resolution was adopted:

> RESOLVED that the subject matter of a minimum age for capacity to marry be referred back to the Commissioners for Canada for

study in consultation with law reform bodies and other organizations in Canada for a report and recommendations at the next meeting of the Conference.

Personal Property Security

The report of a Special Committee on this matter (see 1969 Proceedings, page 29) was presented by Mr. Tallin on behalf of the Committee. (Appendix Q, page 325).

After discussion the following resolution was adopted:

RESOLVED that the Special Committee consisting of Messrs. Bowker, Leal, McTavish and Tallin, be continued, that the decisions taken at this Conference on the report of that committee be referred to the Commercial Law Section of the Canadian Bar Association and discussed with that Section or an appropriate sub-section thereto and that the Special Committee report at the next Conference with a revised draft of the Uniform Personal Property Security Act.

Hague Conference (concluded)

The meeting returned to this matter and after discussion the following resolution was adopted:

RESOLVED that

Whereas the Conference of Commissioners on Uniformity of Legislation in Canada noted that the international conventions dealing with subjects falling either wholly under the jurisdiction of the provincial legislatures or under the jurisdiction of the legislatures and the Parliament of Canada at the same time, have practically not been applied in Canada up to now and thus, that Canadians do not benefit from the current trend towards unification of law at the international level;

Whereas this Conference favours that all such conventions as are acceptable to the respective legislatures and the Parliament of Canada should be capable of implementation in Canada expeditiously and is of the opinion that it is possible to achieve this objective while safeguarding the provisions of the constitution of Canada as well as the rights and obligations of its component parts;

Whereas this Conference noted with great satisfaction that consultations have increased on these matters recently between the federal and provincial governments and would be pleased to collaborate fully thereon with them if so requested; Therefore, the Conference of Commissioners on Uniformity of Legislation in Canada

Expresses the hope that Canadians may benefit as soon as possible from the international conventions dealing with subjects falling either wholly under the jurisdiction of the provincial legislatures or under the jurisdiction of the legislatures and the Parliament of Canada at the same time, and that Canada take part fully in their preparation;

Expresses the hope that the composition of Canadian delegations taking part in the elaboration of such conventions to be decided upon after consultations between the federal and provincial governments;

Recommends that Canadian delegations cause to be inserted in such conventions a provision known as a "federal state clause" the text of which shall be established after such consultations and shall allow full implementation of such conventions within any province wishing it; and

Suggests that the required machinery be set up as soon as possible by the federal and provincial governments to assess the merits of implementing any conventions so elaborated;

Assures the federal and provincial governments that it would be pleased to collaborate fully with them within the framework of such machinery, if so requested, in particular by studying these conventions and offering its opinion thereon; and

Directs its Secretary to send the text of this resolution to the Ministers of Justice and Attorneys General of Canada and the provinces of Canada.

Occupiers' Liability

The report of the British Columbia Commissioners on this matter was presented by Mr. Higenbottam. (Appendix R, page 328).

After discussion the following resolution was adopted:

RESOLVED that the matter be referred back to the British Columbia Commissioners for report on the next meeting of the Conference with a draft giving effect to the decisions made at this meeting.

Reciprocal Enforcement of Maintenance Orders

Mr. Rutherford presented the report on Reciprocal Enforcement of Maintenance Orders Act for the Manitoba Commissioners. (Appendix S, page 338).

After discussion the following resolution was adopted:

RESOLVED that the Reciprocal Enforcement of Maintenance Orders Act be amended by adding thereto the provisions recommended in the Manitoba report as set out in Appendix T, page 340)

Consumer Protection

The meeting directed its attention to the matter of a Uniform Consumer Protection Act referred to in the Secretary's report to the Conference. (Appendix C, page 92).

After discussion the following resolution was adopted·

RESOLVED that the matter of a Uniform Consumer Protection Act be referred to the Manitoba Commissioners for a report and recommendations at the next meeting of the Conference.

Condominium Insurance Legislation

The meeting directed its attention to the matter of Condominium Insurance Legislation referred to in the Secretary's report to the Conference. (Appendix C, page 92).

After discussion the following resolution was adopted:

RESOLVED that the matter of Condominium Insurance Legislation be referred to Messrs. Tallin and Higenbottam for a report and recommendations at the next meeting of the Conference.

Perpetuities Act

The report of the Alberta Commissioners on this matter was presented by Mr. Bowker. (Appendix U, page 341).

After discussion the following resolution was adopted:

RESOLVED that the matter be referred back to the Alberta Commissioners for a report at the next meeting of the Conference.

Agenda

In the matter of Presumption of Death Act (see Proceedings 1969, page 25) and the Survivorship Act (see Proceedings 1969, page 28) the following resolution was adopted:

RESOLVED that these matters be continued on the Agenda for discussion at the next meeting of the Conference.

MINUTES OF THE 1970 MEETING OF THE CRIMINAL LAW SECTION OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

The following members attended:

N R. ANDERSON, Department of the Attorney General, N.S.

G. BOISVERT, Associate Deputy Attorney General, Quebec.

W C BOWMAN, Q.C., Director of Public Prosecutions, Ontario.

D. H. CHRISTIE, Q C., Assistant Deputy Attorney General, Canada.

W. B. COMMON, Q.C., Commissioner, Toronto, Ontario

A R. DICK, Q C., Deputy Attorney General, Ontario

ANTONIO DUBÉ, Q.C., Deputy Attorney General, Quebec.

S. A. FRIEDMAN, Q.C , Department of the Attorney General, Alberta.

J E. HART, Q.C., Deputy Attorney General, Alberta.

G. D. KENNEDY, Q C , Deputy Attorney General, British Columbia.

J. ARTHUR LEPINE, Chief Crown Prosecutor, Montreal.

D. S. MAXWELL, Q.C , Deputy Minister of Justice, Canada.

J. A. MCGUIGAN, Q C., Deputy Attorney General, P.E.I.

J G. MCINTYRE, Q.C., Commissioner, Regina, Saskatchewan.

R. S. MELDRUM, Q.C , Deputy Attorney General, Saskatchewan.

B. M. NICKERSON, Q.C., Commissioner, Halifax, N.S

G. E. PILKEY, Q.C., Deputy Attorney General, Manitoba.

J E WARNER, Q C , Director of Public Prosecutions, N.B.

Chairman· Mr. Antonio Dubé

Secretary: Mr. D. H. Christie

The following matters were considered by the Criminal Law Section:

1. *Mentally Disordered Persons Under the Criminal Law*

The Commissioners considered the 13 recommendations contained in Chapter 12 of the Report of the Canadian Committee on Corrections under the chairmanship of Mr. Justice Roger Ouimet. The Commissioners expressed the following views with respect to these recommendations:

Recommendation (i)

Where psychiatric evidence is to be presented by the prosecution and the defence, the judge or magistrate should be empowered—through amendments to the Code —to require the respective sides to exchange psychiatric reports, for the purpose of minimizing the risk of disagreement.

No action is required on this recommendation because that is the general practice currently followed and if it should be a problem in some parts of Canada it is one that can be taken care of administratively.

Recommendation (ii)

Provisions respecting remands for psychiatric observation under the Code should be amended to

(1) allow a remand up to 60 days;

(2) substitute the term "mentally disordered" for the term "mentally ill";

(3) enable a court to order a remand in the absence of the evidence of a physician, in compelling circumstances

None of these recommendations were approved. Concern was expressed that if the period of remand could be extended to 60 days that might well become the rule with the result that there would be unnecessary periods of incarceration while undergoing medical examination.

With respect to substituting "mentally disordered" for "mentally ill" the Commissioners were of the view that this would not produce a particularly useful result.

With respect to enabling a court to order a remand in the absence of the evidence of a physician the Commissioners did not believe circumstances were such as to require such an amendment.

Recommendation (iii)

That the Code be amended to restrict the use of transfers contemplated to *sentenced* prisoners (section 527). This means that the warrant of the Lieutenant-Governor would not be available to transfer prisoners not yet sentenced.

It was indicated that there were no existing difficulties in relation to the transfer of prisoners pursuant to section 527 of the Criminal Code. The constitutionality of leaving the transfer of prisoners other than sentenced prisoners to provincial law has been questioned although no definite opinion has been expressed in this regard. In any event, the Commissioners did not approve the recommendation

Recommendation (iv)

That the Code be amended to authorize the postponement of the trial of the fitness issue beyond the stage provided for by paragraph 524(2)(a).

It was agreed that this recommendation should not be acted upon until there had been more experience with respect to the 1969 amendment to paragraph 524(2)(a) of the Criminal Code.

Recommendation (v)

That assignment of counsel be guaranteed by law where fitness to stand trial is an issue.

This recommendation is presently the law. See paragraph 524(1)(b) as enacted by the 1969 amendments to the Criminal Code.

Recommendation (vi)

That a finding of fitness to stand trial or unfitness to stand trial be subject to statutory appeal.

By paragraph 583(2)(a) of the Criminal Code as enacted by the 1969 amendments a person who is found unfit to stand trial on account of insanity may appeal to the Court of Appeal against that verdict. If an accused is found fit to stand trial and is convicted he has a right of appeal. Under the circumstances it was agreed that no further action is required with respect to this recommendation.

Recommendation (vii)

That the Criminal Code be amended to allow the fitness issue to be considered upon preliminary inquiry.

It was agreed that no action should be taken with respect to this recommendation. It was considered that there was no practical problem in existence to which this recommendation was directed.

Recommendation (viii)

That an amendment be made to section 557 to authorize, in appropriate cases, the trial of the fitness issue in the absence of the accused person.

This recommendation was approved where "compelling circumstances" exist. There was agreement with the reasons given in the Ouimet Report in support of this recommendation.

Recommendation (ix)

Section 526 of the Code should be amended to remove any doubt that an order of the Lieutenant-Governor may encompass a broad scope of disposition, including discharge from custody in the initial instance.

This recommendation was approved.

Recommendation (x)

That there be adequate review, provision for which is made by statute, of every person in Canada who is detained under the authority of an order made by the Lieutenant-Governor.

This recommendation is dealt with by paragraph 527(a) of the Criminal Code as amended by the 1969 amendments. Under the circumstances it was agreed that no further action was required.

Recommendation (xi)

That a federal review body be created to handle those cases for any province having no such body of its own.

This recommendation was not approved. It was pointed out that almost every province has such a review committee or something analogous thereto.

Recommendation (xii)
That the Code be amended to authorize a court to issue a "hospital permit" to allow an offender to benefit at once from treatment in a psychiatric facility.

This recommendation was not approved. The opinion was expressed that a matter of this kind could best be handled administratively and that such a provision in the Criminal Code would be meaningless if a hospital would not receive the offender.

Recommendation (xiii)
Statutes providing the authority for transfers from correctional institutions to psychiatric facilities should be amended to allow transfers to take place immediately, upon the basis of local negotiation.

This recommendation was approved.

2. *The Dangerous Offender*

The Commissioners considered the recommendations contained in chapter 13 of the Ouimet Report with respect to dangerous offenders.

Recommendation 1
That the present habitual offender legislation and dangerous sexual offender legislation be repealed and replaced by dangerous offender legislation.

This recommendation was approved.

At p. 259 of the Ouimet Report there are six principles which the Ouimet Committee considered should be given effect to by the proposed legislation, namely:

(a) That legislation be enacted to empower the court where an offender has been convicted of any one of certain specified offences, and where from the circumstances under which the offence was committed, the evidence, if any, as to character disorder, emotional disorder, mental disorder or defect, and the criminal record of the offender the court is of the opinion that the offender may be a dangerous offender, to remand the offender in custody to a diagnostic institution for a period not exceeding six months for diagnosis and assessment before imposing sentence.

The majority of the Commissioners agreed with this principle subject to the following caveats. It was suggested that it would not be desirable for the existence of a criminal record to be a necessary condition precedent—particularly with respect to sex offences. The thought was expressed that the dangerous offender provisions should be more stringent and enforceable in relation to organized crime. It was also suggested that perhaps there should be some difference in the manner of dealing with dangerous offenders in contradistinction to "persistent non-dangerous property offenders". It was also suggested that "persistent" should apply only to property offenders and not to persons who are a menace.

(b) If the offender is diagnosed as a dangerous offender, the offender shall be given suitable notice that it is alleged that he is a dangerous offender, whereupon the issue as to whether the offender is a dangerous offender shall be determined by the court.

This principle was approved.

(c) A person who is alleged to be a dangerous offender shall have the right to make full answer and defence to the allegation that he is a dangerous offender, and shall be provided with counsel if he lacks the means to employ counsel himself.

This principle was approved, but a question was raised whether the right to counsel should be spelled out. It was pointed out that in other serious cases this statutory right does not exist.

(d) Where the diagnostic facility does not diagnose or assess the offender as a dangerous offender, or where there is a diagnosis of dangerousness but the court does not find the offender to be a dangerous offender, the court shall deal with the accused as an ordinary offender having due regard to all the relevant circumstances.

This principle was approved.

(e) If the court finds that the offender is a dangerous offender, the court shall sentence the accused in accordance with the provisions of the Act relating to dangerous offenders.

This principle was approved.

(f) The legislation should provide for a right of appeal on any ground of law or fact, or mixed law and fact, by a person found to be a dangerous offender.

This principle was approved. It was suggested, however, that the Crown should have a right of appeal in questions of law alone against a finding that an accused was not an habitual offender.

Recommendation 2

The Committee, therefore, recommends the passing of an indeterminate sentence upon persons found to be dangerous offenders, subject to the safeguards hereinafter discussed.

This recommendation was approved.

Recommendation 3

The Committee recommends that the proposed dangerous offender legislation, if enacted, provide in addition to an automatic yearly assessment and review by the Parole Board, that a person sentenced to preventive detention as a dangerous offender be entitled to have a hearing every three years before a superior, county or district court judge or judge of the court of sessions of the peace, for the purpose of determining whether he should be further detained or his sentence should be terminated if he has been released on parole.

This recommendation was approved.

Recommendation 4

The Committee recommends that Government grants be made for research devoted to the development of new and improved methods for identifying and treating the dangerous offender.

This recommendation was approved.

Recommendation 5

The Committee recommends that further research be undertaken to determine the most appropriate way in which to deal with the persistent petty offender.

This recommendation was approved.

3. *Arrest and Bail—The Bail Reform Bill, C-220*

Clause by clause consideration was given to Bill C-220 entitled "The Bail Reform Act" which received first reading on June 8, 1970. A number of recommendations were made by the Commissioners particulars of which were placed before the Minister of Justice in the course of revising Bill C-220. If any of the Commissioners require the details of these recommendations they can be obtained from the Secretary.

4. *Off-track Betting*

No specific recommendation was made by the Commissioners on the question whether off-track betting should be made permissible. It was pointed out that in the horse racing industry there were differences of opinion. Some of the smaller tracks were opposed while the larger tracks were in favour. Some Commissioners indicated that it was not an issue in their provinces while others indicated pressure was being brought to bear to authorize this form of gaming.

5. *Glue Sniffing*

No further legislation was recommended pending the acquiring of some experience in solving this problem within the application of the Hazardous Products Act, Statutes of Canada 1968-69, c. 42, and the Regulations made thereunder. One of the Commissioners observed that the peak of the problem appears to have passed.

6. *Proving Proclamations*

A majority of the Commissioners were of the opinion that further federal legislation was not required to facilitate proving proclamations.

7. *Section 556 Criminal Code—Separation of Jurors*

The Commissioners approved a recommendation which would allow a trial judge in his discretion to permit members of the jury to separate in a capital case.

8. *Section 556 Criminal Code—Juries—Prohibition of Publication*

The Commissioners agreed with the recommendation that where a trial judge permits the members of a jury to separate he shall make an order directing that anything that happens

during the trial, not in the presence of the jury, shall not be published in any newspaper or broadcast, before the verdict is rendered

9. *Juries—Secrecy in Relation to Deliberations*

The Commissioners approved a recommendation that jurors should be prohibited from discussing what went on in the jury room during the course of a trial. It was suggested that to do so be made an offence punishable on summary conviction. It was indicated, further, that any such legislation should avoid interfering in any manner with investigations into jury tampering.

10 *Juries—Questionnaire*

A majority of the Commissioners did not favour requiring prospective jurors to complete a questionnaire under oath along the lines indicated in Schedule I to these Minutes.

Concern was expressed that this might lead to the cumbersome and time-consuming process involved in selecting jurors which now exist in the United States. It was also pointed out that such an approach might be a useful device to persons seeking to avoid jury duty by selecting answers to some questions which would make it appear that they were unsuitable to try the case.

11. *Subsection 421(3) Criminal Code—Offences Tried Outside Jurisdiction Where Committed*

The Commissioners agreed to continue to endeavour to secure appropriate sentences in relation to cases disposed of pursuant to subsection 421(3) of the Criminal Code. It was pointed out that one area of abuse in this regard relates to NSF cheques. With respect to this matter reference is made to Item 49 of the 1969 Minutes.

12. *Section 224 Criminal Code—Breathalyzer Legislation—Extension to Cover Vessels*

The Commissioners agreed that the Breathalyzer legislation should be extended to cover vessels. The Commissioners were canvassed on the effectiveness of the Breathalyzer legislation and the general response was to the effect that it was helpful and effective.

13. *The Lord's Day Act*
The Commissioners were asked whether the Lord's Day Act might be usefully revised and, if so, in what manner. It was agreed that there should be no amendments to the legislation at this time.

14. *Sections 129 and 634 Criminal Code*
The views of the Commissioners were sought on the question of further legislation arising out of apparent conflict of section 129 and section 634 of the Criminal Code. It was agreed that British Columbia and Ontario would consider this matter and report back.

15 *Section 446 Criminal Code*
The views of the Commissioners were sought concerning the application of section 446 whereby a person may be taken from one province to another pursuant to an order of a judge of a superior court even if that person at the time the order is made is in custody in the province from which he is to be taken on charges pending there.

The Commissioners expressed the view that section 446 as presently worded presents no problems.

16. *Receiving Evidence on Voir Dire*
The views of the Commissioners were sought with respect to a suggestion that a judge other than the trial judge presiding over a case be appointed to hear evidence on voir dire. This recommendation was not approved.

17 *Paragraph 451(g) Criminal Code*
The views of the Commissioners were sought on a resolution adopted in 1969 by the Canadian Bar Association reading as follows:

> "That section 451(g) of the Criminal Code be amended to provide for the issuance of a warrant with discretion, returnable on a fixed date and that Forms 8 and 9 be amended accordingly".

This recommendation was not approved.

18. *Awarding Costs to an Accused*
The views of the Commissioners were sought on a resolution adopted in 1969 by the Canadian Bar Association reading as follows:

"To provide for the awarding of costs, in the discretion of the court, to an accused who was discharged after preliminary inquiry, or who is not proceeded against after acquittal on a preliminary inquiry or who is acquitted after trial or on appeal."

A majority of the Commissioners did not approve of this recommendation. During the course of the discussion, however, it was suggested that in a proper case there might be compensation rather than costs to a person described in the resolution who had been subjected to considerable financial burden. Others who opposed the resolution did so on the ground that there were other matters deserving of greater priority at this time, e.g., compensation for victims of crime. It was also observed that an adequate legal aid system would go a long distance towards alleviating hardship against persons described in the resolution.

19. *Section 162 Criminal Code—Trespassing at Night*

The views of the Commissioners were sought on whether the words "at night" should be deleted from section 162 which provides as follows:

"Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction."

This proposal was on last year's agenda and is referred to in Item 19 of the Minutes, but was deferred for further consideration at this year's meeting. A majority of the Commissioners were not in favour of the recommendation.

It was agreed that for next year's meeting the Commissioners from Ontario, Quebec and British Columbia would prepare a working paper on the general question of trespass and interference with the use of property by such means as "sit-ins".

20. *Subsection 295(2) Criminal Code—Female Impersonators*

This was on last year's agenda and is referred to in Item 24 of the Minutes of that meeting. It was put over to this year's meeting at which time a report was received from

Mr. McDiarmid concerning the adequacy of subsection 295(2) for the purpose of dealing with acts of gross indecency and robbery involving female impersonators. His report reads as follows:

> "In connection with item 24 (female impersonators) there has been a continuing discussion with Mr. A. S. McMorran, Q.C., Prosecutor for the City of Vancouver, but we have not as yet resolved the problem in any useful way. I think the matter might be removed from the agenda for the time being on the undertaking of the writer that he will be in touch with the secretary following any useful discussions which might come out of his conversations with Mr. McMorran. It may well be that subsection 295(2) is adequate for all except the most exceptional cases."

The Commissioners agreed that no further action was required at this time.

21. *Sections 374-377 Criminal Code—Arson*

This matter was on the agenda of last year's meeting and is referred to in Item 39 of the Minutes. It was put over until this year at which time a report was received from Mr. Bowman concerning what amendments, if any, might usefully be made to sections 374 to 377 of the Criminal Code.

In his report Mr. Bowman pointed out that the arson provisions in the Criminal Code deal with essentially the same matters as the mischief provisions and concluded, "—that there should be considerable revision of the arson sections either by way of merging them with the mischief provisions or by specific alteration of the sections themselves". He went on to say that, in his opinion, the matter was not one of immediate urgency and might be considered in any general revision of the Criminal Code.

After considerable discussion the Commissioners were of the view that it would not be advisable to do away with the arson provisions by way of merging them with the mischief provisions. It was agreed that arson is a crime of such seriousness that it should continue to be dealt with as a separate matter in Criminal Code thereby receiving special emphasis notwithstanding that there may be some overlapping with the mischief provisions.

22. *Section 699 Criminal Code—Common Assault—Proceedings as for an Indictable Offence*

This item was on the agenda of last year's meeting and is referred to in Item 27 of the Minutes. It was put over until this year at which time a report was received from Mr. McDiarmid in which he reviewed the history of section 699 and went on to recommend that it be deleted from the Criminal Code. A majority of the Commissioners were not in favour of repealing the section.

23. *Subsections 224A(5) and 574(3) Criminal Code; Section 9 Narcotic Control Act; Section 28A Food and Drugs Act—Notice of Intention to Use Certificate*

The views of the Commissioners were sought on the problems posed by the requirements of reasonable notice before trial of intention to produce certificates referred to above. The Commissioners were of the view that there was no need to amend section 224A; section 404 of the Criminal Code; the Narcotic Control Act or the Food and Drugs Act. On the other hand it was recommended that subsection 574(3) be amended to delete reference to giving notice before trial.

24. *Section 179A Criminal Code—Municipal Lotteries*

The views of the Commissioners were sought on the advisability of amending the Criminal Code to allow municipalities to conduct sweepstakes and lotteries for municipal purposes

This recommendation was not agreed to.

25. *Verdict of Not Guilty on Account of Insanity in Summary Conviction Proceedings*

The views of the Commissioners were sought on whether there should be a provision similar to section 523 making it possible to have a verdict of not guilty on account of insanity in summary conviction proceedings. It was pointed out that the problem appears to arise in particular with respect to prosecutions for turning in false fire alarms, contrary to section 378 of the Criminal Code. It was suggested that as an alternative solution section 378 be made punishable on indictment.

The Commissioners agreed that section 378 should be made punishable on indictment or summary conviction at the option of the Crown.

Mr. Common and Mr. McIntyre were designated to inquire into and report at next year's meeting on what other offences, if any, should be dealt with in this manner for the reasons mentioned above.

26. *Section 638 Criminal Code—Probation*

It was brought to the Commissioners' attention that apparently some sentences are being suspended and probation granted, the only condition being that the individual leave the province in which the order is made.

The Commissioners agreed that this type of order is not authorized and that those Commissioners concerned with the enforcement of the Criminal Code would endeavour to deal with this problem in their respective jurisdictions.

27. *Section 479 Criminal Code—Discretion of Judge or Magistrate Where More Than One Accused*

The views of the Commissioners were sought on a recommendation that section 479 of the Criminal Code be amended to allow those who wish to be tried by a magistrate to be given that opportunity, if they would otherwise have to remain in custody for an extended period awaiting trial.

The Commissioners did not agree with this recommendation. It was pointed out that the Crown can agree to separate trials in proper cases.

28. *Subsections 639(3), (4) and Section 640A Criminal Code — Probation*

The views of the Commissioners were sought with respect to anticipated difficulties where a juvenile has been transferred to adult court and subsequently breaches his probation order. It was anticipated that under these circumstances the accused juvenile might, if charged pursuant to section 640A, have to be dealt with before the juvenile court.

It was pointed out to the Commissioners that on July 28, 1970 Mr. Justice Aikins of the Supreme Court of British Columbia held in *McGowan* that once a child is transferred

to adult court and there put on probation any proceedings arising out of that order must be dealt with in adult court.

The Commissioners agreed that this judicial decision disposed of the anticipated difficulty. If it should be over-ruled by higher authority the matter could be reconsidered.

29. *Subparagraph 722(1)(b)(ii) and paragraph 722(1)(c) Criminal Code—Service in Summary Conviction Appeals*

The views of the Commissioners were sought on the suggestion that the clerk should only receive documents for filing, and that if service on the Crown is to be effected by the clerk there should be a statutory duty on him to provide copies to the Attorney General.

The Commissioners agreed that subparagraph 722(1)(b)(ii) should be amended to provide that the notice of appeal shall be "filed with" the clerk of the appeal court rather than "served" upon him. It was not felt necessary that there be a statutory requirement imposed on the clerk to provide copies to the Attorneys General. This could be dealt with by way of administrative direction.

30. *Section 743—Appeals to Provincial Courts of Appeal in Summary Conviction Matters*

The views of the Commissioners were sought on the advisability of enlarging the grounds of these appeals to include questions of mixed law and fact.

This recommendation was not approved.

31. *Procedure for Determining Preliminary Questions*

The views of the Commissioners were sought concerning a suggestion that the Massachusetts procedure in this regard whereby "any defence or objection which is capable of determination without the trial of the general issue may be raised before trial by motion" might be incorporated into the Criminal Code.

The Commissioners were of the view that this rather complex matter should be the subject of study by the Law Reform Commission of Canada and the result of that Commission's deliberations be considered by the Uniformity Commissioners.

32. *Legislation Banning Firecrackers*

The views of the Commissioners were sought on the question whether it should be made an offence under the Criminal Code to sell firecrackers.

This suggestion was not approved.

33. *Authorize Court of Appeal to Remand Prisoner to Mental Institution for Observation*

The views of the Commissioners were sought whether the Criminal Code should be amended to authorize a court of appeal to remand a prisoner to a mental hospital for observation.

This proposal was approved.

34. *Automobile Thefts—Penalties*

The views of the Commissioners were sought on a recommendation that the penalties provided for auto theft be as follows:

(a) first offence: no minimum sentence;

(b) second offence: minimum sentence one year's imprisonment; and

(c) third and subsequent offences: minimum sentence two year's imprisonment.

This recommendation was not approved.

35. *Evidence Act—Auto Theft*

The views of the Commissioners were sought on a recommendation that "—the Canada Evidence Act be amended to provide that expert Crown witnesses testifying as to the confidential serial numbers of motor vehicles, not be obliged to divulge the location of such numbers."

This recommendation was not approved.

36. *Detention of Acquitted Person Pending Crown Appeal*

The views of the Commissioners were sought on the suggestion that the Criminal Code should be amended to provide for the custody of an acquitted respondent pending disposition of an appeal by the Crown.

This recommendation was not approved.

37. *Penitentiary Inmates Required for Questioning*

The views of the Commissioners were sought with respect to the sharing of costs by the provinces, where penitentiary inmates are needed for police questioning and where such inmates are required to be away from the penitentiary in the custody of a penitentiary officer.

The Commissioners recommended that the Penitentiary Act be amended to make it clear that inmates of penitentiaries required for that purpose may be turned over to the custody of provincial police officers designated by provincial Attorneys General.

38. *Subsection 295(1) Criminal Code—Possession of Vault Breaking Instruments*

The views of the Commissioners were sought with respect to the possibility of amending subsection 295(1) of the Criminal Code in order that it does not place an unwarranted burden on the accused and does not result in the possible injustice referred to in *Tupper v The Queen*, 67 S.C.R. 589.

A majority of the Commissioners favoured such an amendment

39. *Paragraph 467(a) Criminal Code—Absolute Jurisdiction of a Magistrate—Theft Not Exceeding $50*

The views of the Commissioners were sought on a recommendation that theft not exceeding $200 should be a summary conviction offence.

The Commissioners agreed to this proposal

40. *Paragraph 467(a) Criminal Code—Absolute Jurisdiction of Magistrates—Theft Not Exceeding $50*

The views of the Commissioners were sought concerning a resolution passed at the Annual Conference of the Justices of the Peace held in April 1970 at Yellowknife which reads as follows:

> "Resolution to amend section 280 of the Criminal Code to allow justices of the peace to deal with questions of theft under $50 that be punishable either by summary conviction or by indictment."

It was brought to the Commissioners' attention that the Canadian Bar Association at its 1969 Annual Meeting resolved as follows:

"That the Criminal Code be amended to provide that theft, false pretences, possession of goods obtained by crime and wilful damage, involving a sum under $200 be triable at the option of the prosecution by way of indictment or by way of summary conviction."

Item 35 of last year's Minutes is as follows:

"A majority of the Commissioners adopted a resolution that paragraph 467(a) of the Criminal Code be amended by substituting two hundred dollars for fifty dollars."

The resolutions adopted by the Justices of the Peace of the Northwest Territories and the Canadian Bar Association were not approved.

41. *Section 10 of the Canada Evidence Act—Cross-Examination in Relation to Previous Statements in Writing*

The views of the Commissioners were sought on a suggestion that a magistrate presiding at a preliminary inquiry should have the authority to order that a statement made by a witness to the police be made available to defence counsel for the purposes of cross-examination.

This proposal was approved.

42. *Section 574—Proof of Previous Conviction and Subsection 2(6)—Definition of Clerk of the Court*

The Commissioners considered two proposals emanating from the same source, but unrelated:

(a) that section 574 of the Criminal Code be amended to apply to provincial as well as federal summary conviction matters as well as to indictable offences and to provide for the certificate being signed by "the officer having charge of the records"; and

(b) that subsection 2(6) of the Criminal Code be amended to include a judge who may from time to time perform the duties of the clerk of the court.

These recommendations were not approved.

43. *Subsection 231(2) Criminal Code—Assault Causing Bodily Harm*

The views of the Commissioners were sought on the following resolution adopted by the Canadian Bar Association at its 1969 meeting:

"That subsection (2) of section 231 of the Criminal Code be amended by providing that the maximum penalty for aggravated assault be 5 years instead of 2 years."

This recommendation was approved:

44. *Subsection 232(2) Criminal Code—Assault of Peace Officer Etc.*
The views of the Commissioners were sought on the question whether subsection 232(2) should be amended to provide that the maximum penalty be increased from two years to five years.

A majority of the Commissioners agreed that this should be done. It was recommended, however, that proceedings for a violation of this offence should be made punishable on summary conviction or indictment at the option of the Crown and if the Crown chose to proceed by way of indictment the accused would have an election with respect to his mode of trial.

45. *Paragraph 638(1)(b)—Probation Following Imprisonment*
The views of the Commissioners were sought on a recommendation that section 638 of the Criminal Code be amended to eliminate "—provision for the imposition of probation in addition to a period of imprisonment—".

A majority of the Commissioners did not approve this recommendation.

46. *Interim Report of the Commission of Inquiry into the Non-Medical Use of Drugs (LeDain Report)*
After a lengthy discussion of the Report no specific recommendations were made arising out of this Interim Report with respect to existing laws relating to illegal use, sale, importation, etc. of drugs. There was general agreement, however, that there should be intensive research on the non-medical use of drugs and the development of additional programs in this regard.

47. *Paragraph 316(1)(a) Criminal Code*
The views of the Commissioners were sought with respect to the inapplicability of paragraph 316(1)(a) of the Criminal Code to threats made orally and directly in contrast to those

made by a letter, telegram, telephone, cable or radio. Reference was made to the decision of the British Columbia Court of Appeal on May 29, 1970 in the case of *R. v. Wallace*

It was agreed that Mr. Common would check into the legislative history of this provision and comparable similar law, if any, in the United States and the United Kingdom and recommend to next year's meeting what course of action might be adopted.

48. *Subsection 232(2) and section 202A of the Criminal Code*

The views of the Commissioners were sought concerning recommendations that subsection 232(2)—assaulting a peace officer—and section 202A—capital murder as a result of causing the death of a police officer—be amended to specify that they apply where a police officer is in uniform or identifies himself to be such, or it is known to the assailant that the person assaulted or murdered is a police officer and the assault or murder occurred as a consequence of his position as a police officer.

It was agreed that no useful purpose would be served by changing the existing laws with respect to subsection 232(2) and section 202A along the lines recommended.

49. *Concurrent Sentence Imposed in One Province*

The views of the Commissioners were sought on a suggestion that a judge of one province be authorized to transmit in writing the pronouncement of his sentence to a judge or magistrate having the same jurisdiction in another province, who would read the pronouncement of sentence to the accused, in cases where the accused is already serving a sentence in the other province and where the first named judge intends to impose a concurrent sentence.

It was agreed that this proposal did not relate to a sufficiently practical problem to require legislation.

50. *Sentencing for Soliciting for the Purpose of Prostitution and Male Prostitution*

Items 52 and 53 of the 1969 Minutes read as follows:

"52. The Commissioners approved a motion that the Centre of Criminology at the University of Toronto be

advised that the Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada is undertaking a study of problems relating to the imposition of sentences for soliciting for the purpose of prostitution and requesting the Centre to let the Conference have a report expressing its views.

53 The Commissioners adopted a motion that a recommendation that all offences in the Criminal Code relating to prostitution should relate to both male and female prostitutes be referred to the Centre of Criminology at the University of Toronto for an expression of its views."

Mr. Common informed the Commissioners that the Centre of Criminology at the University of Toronto had agreed to undertake to prepare a report on these matters and that he expected to be able to present the report at next year's meeting. The Commissioners expressed special thanks to Professor Edwards for agreeing to undertake this work.

51. *Sexual Offences Generally*

Item 56 of the 1969 Minutes reads as follows:

"56. Mr. Paradis was designated to communicate with the Centre of Criminology at the University of Montreal to discuss the possibility of an examination in depth in relation to all sexual offences in the Criminal Code, the results of any such study to be referred to the Criminal Law Section of the Canadian Bar."

Mr. Dubé presented a report with respect to this item which included a draft outline for research prepared by Mr. Denis Szabo, Director of the International Centre for Comparative Criminology, University of Montreal, together with the proposed budget for a 24-month period. The financial commitment being beyond the resources of the Uniformity Conference it was decided not to pursue the matter further at this time

52. *Costs in Criminal Proceedings*

At last year's meeting the Commissioners recommended (Item No. 21 of the Minutes) that costs be done away with in all public prosecutions and that a study be made regarding costs in relation to private prosecutions to be considered at this year's meeting.

It was agreed that the payment of costs continue in relation to private prosecutions.

With respect to public prosecutions a majority of the Commissioners reversed the decision, taken in 1969 and recorded in Item 21(*a*) of last year's Minutes, and agreed that the present provisions of subsection 744(2) of the Criminal Code continue in force.

53. *Forfeiture of Weapons*

As an item of additional business the Commissioners agreed that the Criminal Code be amended to allow the forfeiture of a weapon used in the commission of an offence whether the possession of that weapon was lawful or not.

54. *Election of Officers*

Mr. Warner was elected Chairman and Mr. Christie was elected Secretary for the ensuing year.

SCHEDULE I

(See page 52)

DECLARATION BY JUROR

Regina vs Smith

The accused is charged with the attempted murder of JOHN DOE.

1. The name of the accused is JOHN WILLIAM SMITH, who resides at 123 Front Street, Ottawa, Ontario.

   (a) To your knowledge, are you related to the accused by blood, marriage or adoption?

   If yes, what is the relationship?

   (b) Have you had any business or professional dealings with the accused?

   If yes, what was the nature of such dealings?

   (c) Are you a friend of the accused, or have you met him socially?

2. The name of counsel for the accused is GEORGE WILLIAM BROWN, whose business address is 456 King Street, Ottawa, Ontario, and who resides at 2043 Lundy Lane, Ottawa, Ontario.

   (a) To your knowledge, are you related to counsel for the accused by blood, marriage, or adoption?

   If yes, what is the relationship?

   (b) Have you had any business or professional dealings with counsel for the accused?

   If yes, what was the nature of such dealings?

(c) Are you a friend of counsel for the accused, or have you met him socially?

3 The name of the victim is JOHN DOE, who resides at 91 Flower Street, Ottawa, Ontario.

(a) To your knowledge, are you related to the victim by blood, marriage or adoption?

If yes, what is the relationship?

(b) Have you had any business or professional dealings with the victim?

If yes, what was the nature of such dealings?

(c) Are you, or were you, a friend of the victim, or have you met him socially?

4. Do you have a personal belief as to the guilt or innocence of the said JOHN WILLIAM SMITH?

If yes, what is your personal belief?

5. Do you have any opinion with respect to the offence with which the accused is charged

If yes, what is your opinion?

6. Do you have any opinion with respect to law enforcement officers as a class of persons?

If yes, what is that opinion?

7. Are you a Canadian citizen or a British subject?

8. Have you been convicted of an offence for which you were sentenced to death or to a term of imprisonment exceeding twelve months?

9. Do you have any physical disability that would prevent you from properly performing the duties of a juror?

MINUTES OF THE CLOSING PLENARY SESSION

(FRIDAY, AUGUST 28TH, 1970)

1:00 p.m. - 1:25 p.m.

The Plenary Session resumed with the President, Mr. Emile Colas, Q C., in the chair.

Report of Criminal Law Session

M. Antonio Dubé, C.R., the Chairman of the Criminal Law Section reported that 18 members of the Conference attended the meetings of the Section and this Section has completed its agenda. (Appendix A, page 87).

Appreciations

Mr. Normand, on behalf of the Resolutions Committee, moved the following resolution, which was adopted:

RESOLVED that the Conference express its sincere appreciation

(a) to the P.E I. Commissioners for the excellent accommodation and services provided for the meetings of the Conference and in particular for the arrangements for the meeting of the Drafting Workshop on Sunday;

(b) to the Law Society of P E I for the reception on Monday at Memorial Hall Confederation Centre;

(c) to the Government of P E.I. for the reception and dinner on Wednesday at Confederation Centre;

(d) to Mr. Fred Large for the cruise on his yacht on Tuesday evening;

(e) to the P.E I. Commissioners for the theatrical performance on Thursday evening at Confederation Centre;

(f) to the Lieutenant Governor, the Honourable G W. MacKay, and Mrs. MacKay for receiving the ladies of the Conference for tea at Government House on Tuesday afternoon;

(g) to the wives of the P E I. Commissioners for the gracious and thoughtful hospitality extended to the wives and children of the visiting members of the Conference, for their arrangements for sightseeing and swimming and in particular for the most enjoyable ladies program including the tours of the Island, luncheon on Monday at the Clinton Heights Motel and at the Lobster Shanty, Montague, on Thursday, the afternoon tea at Government House and the theatrical performance "Anne of Green Gables" at Confederation Centre on Wednesday;

AND, FURTHER, be it resolved that the Secretary be directed to convey the thanks of the Commissioners to those referred to above

and to all others who contributed to the success of the 52nd annual meeting of the Conference

Report of Auditors

Mr. Brissenden reported that he and Mr. Higenbottam had examined the Statement of the Treasurer and certified that they had found it to be correct.

Hague Conference

The President, Mr. Emile Colas, reported on the activities of the Uniform Law Section and brought to the attention of the Plenary Session the resolution adopted by the Uniform Law Section with respect to the Hague Conference on private international law and other international private law organizations.

Report of Nominating Committee

Mr. Bowker, on behalf of the Nominating Committee submitted the following nominations of officers of the Conference for the year 1970-71:

Honorary President	Emile Colas, Q.C., Montreal
President	P. R Brissenden, Q.C., Vancouver
1st Vice President	W. C. Alcombrack, Q.C., Toronto
2nd Vice President	J Arthur McGuigan, Q.C., Charlottetown
Treasurer	H. E. Crosby, Halifax
Secretary	J. W. Ryan, Q.C., Ottawa

The report of the Committee was adopted and those nominated were declared elected. The President, Mr. Colas, thanked the members for their cooperation during the year and turned the chair over, at this point, to the President elect, Mr. P. R. Brissenden, Q.C. The President elect then thanked the members for the honour bestowed upon him, and hoped that he would be able to advance the aims and objects of the Conference during his tenure of office.

The Next Annual Meeting

Mr. John Hart, Q.C., on behalf of the Alberta Commissioners, invited the members to hold the next annual meeting of the Conference in Jasper, Alberta. The members expressed their appreciation and agreed to meet in Jasper in 1971.

Close of Meeting

The absence of Mr. L. R. MacTavish from this meeting was regretted by the President and Dr. Kennedy noted the great personal contribution made by Mr. Arthur J. McGuigan to the Conference in Charlotteown.

At 1·25 the Meeting adjourned.

STATEMENT OF PROCEEDINGS

Address of Mr. Emile Colas at Opening Session of Annual Meeting of the Canadian Bar Association Halifax—September 1970

Mr. President, Distinguished Guests, Dear Confrères, Ladies and Gentlemen:

As you are aware, the Conference of Commissioners on Uniformity of Legislation in Canada held last week its 52nd annual meeting at Charlottetown, P.E.I. Many in this audience may not know that the Conference was created in 1918 in Montreal following the Canadian Bar Association recommendation that each provincial government provide for the appointment of Commissioners to attend Conferences organized for the purpose of promoting uniformity of legislation in the provinces.

This recommendation was based upon observation of the National Conference of Commissioners on Uniform State Laws, which has met annually in the United States since 1892 to prepare model and uniform statutes. The subsequent adoption by many of the State legislatures of these statutes has resulted in a substantial degree of uniformity of legislation throughout the United States, particularly in the field of commercial law

The seed of the Canadian Bar Association fell on fertile ground and the idea was soon implemented by most provincial governments and later by the remainder. The first meeting of commissioners appointed under the authority of provincial statutes or by executive action in those provinces where no provision had been made by statute took place in Montreal on September 2, 1918.

Since the organization meeting, the Conference has met during the week preceding the annual meeting of the Canadian Bar Association, and at or near the same place.

Since 1935, the Government of Canada has sent representatives annually to the meetings of the Conference.

The primary object of the Conference is to promote uniformity of legislation throughout Canada or provinces in which uniformity may be found to be practicable by whatever means are suitable to that end.

At the annual meeting of the Conference, consideration is given to those branches of the law in respect of which it is desirable and practicable to secure uniformity. Between meetings the work of the Conference is carried on by correspondence among the members of the executive and the local secretaries Matters for the consideration of the Conference may be brought forward by a member, the Minister of Justice, the Attorney General of any province, the Canadian Bar Association or any national group.

While the primary work of the Conference has been and is to achieve uniformity in respect of subject matters covered by existing legislation, the Conference has nevertheless gone beyond this field in recent years and has dealt with subjects not yet covered by legislation in Canada which after preparation are recommended for enactment. Examples of this practice are the Survivorship Act, Section 39 of the Uniform Evidence Act dealing with photographic records and Section 5 of the same Act, the effect of which is to abrogate the rule in *Russell v Russell*, the Uniform Regulations Act, the Uniform Frustrated Contracts Act, the Uniform Proceedings Against the Crown Act. Last week the Conference adopted a Uniform Human Tissue Act and a uniform draft bill on Compensation for Victims of Violent Crime

In these instances the Conference felt it better to establish and recommend a uniform statute before any legislature dealt with the subject rather than wait until the subject had been legislated upon in several jurisdictions and thus attempt the more difficult task of recommending changes to effect uniformity.

Another innovation in the work of the Conference was the establishment in 1944 of a section on criminal law and procedure. This proposal was first put forward by the Criminal Law Section of the Canadian Bar Association under the chairmanship of the then J. C. McRuer, K.C., at the Winnipeg meeting in 1943. It was then pointed out that no body existed in Canada with the proper personnel to study and prepare recommendations for

amendments to the Criminal Code and relevant statutes in finished form for submission to the Minister of Justice. This resulted in a resolution of the Canadian Bar Association that the Conference should enlarge the scope of its work to encompass this field. At the 1944 meeting of the Conference in Niagara Falls this recommendation was acted upon and a section constituted for this purpose, to which all provinces and Canada appointed representatives.

As the Minister of Justice, The Honourable John N. Turner, P.C. said in his address to the Conference last year in Ottawa mentioning that it was the 25th Anniversary of the founding of the Criminal Law Section:

> "That development has proved to have been a most important one in the evolution of the Conference because until that time, no organized body had existed in Canada with the proper personnel to study and propose recommendations to the Minister of Justice for amendments to the Criminal Code. The creation of the Criminal Law Section filled a very definite void in Canada at the time and the federal government is deeply indebted to those who participate so ably in its undertakings."

A further development has taken place in the life of the Conference when Canada decided to become a member of the Hague Conference on Private International Law and Unidroit —International Institute for the Unification of Private Law, in 1968. These two international bodies work for the same general objectives at the international level as the Uniformity Conference does in Canada. The government of Canada in appointing six delegates to attend the 1968 meeting of the Hague Conference requested the Uniformity Conference to nominate one of its members as a member of the Canadian delegation.

It is not at all surprising therefore, Mr. President, that in these rapidly changing times the Commissioners find themselves asking some very fundamental questions about the future role and function of the Conference. The answers to such questions must, I think, be found in determining what are the current and future needs of governments and the Canadian population and how best these can be met. We must respond to the pressing necessities of the present or find that we have become substantially irrelevant.

To be able to achieve these new aims and meet this new challenge, I believe that the Conference should serve as a

coordinating body for the purpose of avoiding the unnecessary and costly duplication of work, research and information which is so common in our country and in particular in the legal field.

With the creation of the provincial Law Reform Commissions and the adoption of Chapter 64 of the Statutes of Canada, 1969-70, which authorizes the establishment of a federal Law Reform Commission, with the rapid development of data banks and the use of computers by various governmental bodies and law faculties, it is more important to find a rapid solution to this important problem of co-ordination

During the past year I have had informal discussions, Mr. President, with your Honorary Secretary, M. le batonnier Louis-Philippe de Grandpré, to find ways and means to establish in Ottawa a permanent secretariat for the Conference which could become a centre of information, co-ordination and research in all fields of law, legislation and administration of justice.

It is hoped that these discussions will become more official in the near future and that they will result in concrete solutions. The executive of the Conference is certainly anxious to meet with the executive of the Canadian Bar Association, as it is felt that the quality of the government representatives which sit at the Conferences is of the highest and the potential to achieve greater and better results is there but is not used to the fullest and furthermore, not with the efficiency which should be expected I am quite aware that, unfortunately, this is not peculiar to the Conference but is common to all fields related to law and the administration of justice in our society.

It even exists in countries which are more advanced and wealthy than ours Chief Justice Warren E. Burger of the United States Supreme Court proposed on Monday, August 10, 1970 the creation of a council representing all branches of the Federal Government to bring the U.S. Court system up to date.

"In a super market age," he said, "we are like a merchant trying to operate a cracker barrel corner grocery store with the method and equipment of 1900."

In his state-of-the-judiciary message to the American Bar Association, this distinguished jurist said "the court needs more money, Judges and trained administrators and a streamlining of their trial and appellate processes to retain public confidence.

He questioned the priorities of a nation that spends 200 million to develop the C-5A airplane and 128 million on its federal judicial system.

"Military aircraft are obviously essential in this uncertain world" Chief Justice Burger said, "but surely adequate support for its judicial branch is also important."

This situation exists even in a more acute way in our own country. I personally believe strongly that the time has come for more profound thinking and the immediate implementation of some of the reforms which are so needed. There is no doubt in my mind that we should strive towards more permanency, continuity, efficiency. We should give ourselves the tools which would allow a better service to Canadians from coast to coast in order to live the principle of equality of chances and equality of all before the law. The time has also come to investigate and possibly coordinate the efforts made by various groups in the use of computers in the legal field.

It seems in fact foolish to waste such a valuable human resource as a lawyer's time and energies by expending them upon tasks that machines can do better. And I feel that I should digress to elaborate for a few minutes upon the tasks we do with our hands and which should be turned over to computers and thus raise timidly the veil which may give you a glance at all the possibilities thus offered already to us and which will have such impact on our future as lawyers, legislative draftsmen, law enforcement, uniformity of legislation, judicial process and many other fields. You can immediately grasp the consequences which will flow from such application on the cultural, social, economic and legal fields.

Various Applications

Almost all areas of legal activity may benefit in some way from the introduction of a computer. Many practitioners amongst the audience will be familiar with its use for office management and bookkeeping functions. Less known are the applications in estate planning, in preparing tax returns, organizing and retrieving the items of a complex case file and printing contracts, wills and other documents that are standardized to a certain extent and require but a few modifications and insertions to suit new parties.

Court procedure has been sped up by relegating the scheduling of the hearings to a computer Another application, widely publicized, was computer use in the administration of "parking tickets" in Paris. The representative of the Paris Bar, Maitre Bernard de Bigault du Granrut knows as all of us that the Parisian Police hand out every year millions of parking tickets. This practice, necessary as it may be, led to fantastic administrative congestions when it came to follow up the payment of tickets. In sheer despair, the authorities used to throw out, at the end of each year, about a million and a half of these tickets, to avoid an ever-accumulating back-log. And knowing that no self-respecting Parisian would pay his tickets voluntarily The situation has radically changed since the introduction of a computer system. Not only does the system pay for its own costs but it also permits the police to put stiffer penalties on second and further offenders and to implement them.

I should also mention computerization of large data banks. Everybody knows how time-consuming and sometimes difficult it is, to obtain information about people's civil status about things people have bought on credit or instalment plans or about rights on real estate. By putting this information in one centralized bank, accessible from various stations throughout a province, everybody who needs it may obtain it at very short notice In Quebec, for instance, the registers of civil status and of real estate will thus be automated. Ontario is working on a personal property security registration system. I should mention the danger that this concentration of information represents to people's privacy To whom are we prepared to make such files accessible? Should a citizen be informed about files existing on him and given the opportunity to correct them where necessary? These are new legal probelms arising out of computer use, which I will not go into here.

The legislator, too, uses computers In Manitoba, publishing and updating of statutes is automated. Similar systems are designed for the Federal Legislature and for the Government of Quebec. Concurrently, this process can provide the draftsmen with indices listing, in alphabetical order, all the terms found in the statutes, each with adjacent words in the text of those statutes.

The last type of service I want to mention, is useful to the legal profession as a whole. I am referring to the retrieval of

legal texts, be they statutes, cases or legal commentary. Practitioners may use such a system to find cases supporting their points; the legislator can trace all articles in different statutes affected by proposed legislation, or compare the law in force in different provinces; and finally, it helps scholars to compose articles and doctrinary works.

Not an American affair

Various people to whom I spoke about these possibilities felt that they did not exist in Canada and that, to use them, we would have to sell out to the Americans. I cannot stress it strongly enough that these opinions are wrong.

True, most of this work has started in the United States. Law retrieval is still strongly associated with the name of John Horty, in Pittsburg, as is automated text editing with John Lyons in Washington.

But I feel that in a few years, bilingual or multilingual retrieval will be associated with one of our Canadian research teams, working on the subject. And some of the solutions that the Americans have come up with, I think we can and *should* avoid in Canada. In particular, we should avoid a situation that exists in the United States, where some commercial outfits have tried to make a fast buck running a service which only a few of the wealthier law firms could afford.

Research in Canada

Let me for a moment go over one of the works done in Canada. I mentioned already that the Government of Manitoba now has a computer system to edit, update and publish its statutes. New legislation can be passed very quickly through the three required readings, because no longer does one have to wait for the modified proposal to be manually set and printed between different readings. The system can generate automatically various indexes to the legislation, such as the already mentioned key-word-in-context system, that make useful tools in the uniformization of terminology. Another by-product is a copy of the text of those bills that serves as input to retrieval systems, thus permitting you to keep informed of the most recent version of the statutes.

It will not surprise you that the Federal Government has hired the designer of this system, Mr. Stephen Skelly, to do an even larger job in Ottawa. At the University of Ottawa, the Law Faculty is working on a normative vocabulary in English and French, of both civil and common law systems. Laval University in Quebec City is completing a text publishing and updating system for the Provincial Government, along with a retrieval system for the Provincial Statutes.

Another major development is the design of case law retrieval systems at the University of Montreal and Queen's University, Kingston, Ontario. Both systems are intended to operate on very large data banks, including major federal reports (Supreme Court and Exchequer Court) and the reports of interest in their respective provinces.

I will not bore you by enumerating all the major *Canadian* initiatives. The examples that I mentioned should convince everyone of the growing interest in Canada for studies on computers and law, and the necessity of coordinating their work in order to achieve more efficiency and avoid unnecessary duplication which is so costly and frustrating.

Datum

One of the Canadian projects, with which I am personally more familiar, is the DATUM project at the University of Montreal. DATUM stands for the French "documentation automatique de textes de l'Université de Montréal", or automatic text retrieval system of the University of Montreal. As I mentioned before, this system contains the bulk of Quebec cases, as listed in four reports, namely BR, CS, RP and RL, over the last 25 years. It will also include the Supreme Court Reports over that period, and plans exist to further enrich the bank with the Exchequer Court Reports and some other series of national interest. Cases further back than 1945 may be included, if the lawyers who will use the systems think it worthwhile.

As you know, Quebec has a civil law system, and judges write either in French or English, while the Statutes are published in both languages. The designers of DATUM took the view that in their system questions in either language should be given equivalent treatment and cover the entire bank. Thus, when the system is operational, you can ask your question in

English, and receive both French and English cases in reply. This idea is eminently sensible since a lawyer, even though he may read and speak both languages may have difficulty finding the precise terminology he needs, in the language which is not his mother tongue.

To realize this option, DATUM had to create a special bilingual thesaurus, containing French and English terms, derived from both civil law and common law systems. Each word is accompanied not only by its translation, but also by equivalent and less related terms in both languages. This dictionary will automatically look for all words or expressions that have roughly the same meaning as the term you originally had in mind, either in French or in English.

I do not have to tell you that if that thesaurus proves useful, we will possess an authentically Canadian research tool that will be useful to practitioners, legislative draftsmen and law schools alike.

DATUM has opted for the so-called fulltext system of retrieval. For those who are interested to know more about Datum they may do so by visiting the stand they have near the registration office.

I personally believe that the computer system has brought to the industrial society its first death blow. The era of automation and robot will only leave to men the field of active thinking. We are now entering the fourth revolution known by mankind. The vertiginous progress achieved by the computer system, its unlimited possibilities lead to a devastating revision of the notion of work and its traditional morality. The labourer using his hands will become a thing of the past Human activity will then become cerebral, collective without any idea of hierarchy.

We thus can no longer, Mr. President, remain adamant to the problems confronting our society today. The time has come to abandon the parochial, divisive, meaningless discussions, to become aware that we are already confronted with the consequences created by the scientific revolution. The gamble on survival can only be won at the price of collective organization of society and a planetarian organization of the states, a massive cultural effort, equality of chances, subordination of science and technique to political control. The salvation of men of the year 2,000 is at that price, otherwise, there will not even be the choice of despair!

These are some of the thoughts which have prompted me to rethink with you, Mr. President, the future role of the Conference of Commissioners. I am aware that the Canadian Bar Association cannot refuse to be present to fulfil its role and to meet these new objectives. You have given in your enlightening presidential talk the assurance of your cooperation.

Referring now to the actual work done at the 52nd annual meeting held last week in Charlottetown, may I go briefly over the agenda.

The Committee on Human Organ Transplants

As far back as 1958, the Uniformity Conference was made aware of the necessity to establish eye banks and facilities for the preservation and use of other types of human tissue. In 1959, the Draft Act prepared by the Ontario Commissioners on cornea transplant was adopted.

As a result of the enactment of a Human Tissue Act in Ontario, the Conference adopted in 1965 the draft Act submitted by the Alberta Commissioners on the same subject, which broadened the scope and content of the earlier Act.

In the light of the studies made in this field, the Committee on Human Organ Transplants of the Medico Legal Society of Toronto transmitted on May 4, 1970 the final draft of a new Act to the Minister of Health for Ontario at the latter's request This draft Act was studied last week by the Commissioners. The first purpose of this Bill is to facilitate transplant of organs from a living body to another living body or from a dead body to a living body for therapeutic benefit of the recipient. The second purpose is to facilitate the disposition of dead human bodies or parts for medical education or scientific research.

This draft Act is designed to achieve these objects by broadening the scope of the Uniform Human Tissue Act of 1965, and updating its provisions, thus bringing the law into line with recent medical and scientific developments and the consequent acceleration of public interest in this field. This new draft was adopted unanimously and is in our opinion the most advanced piece of legislation on the subject in the world.

Compensation for Victims of Violent Crime

In 1969, the matter of compensation for victims of violent crime was referred by the criminal section to the civil section

of the Conference with a request that consideration be given to the preparation of a draft uniform Act which might be enacted by the provinces and which would contemplate Federal participation. A committee comprising the Quebec, Ontario and Canada Commissioners together with Mr. T. D. MacDonald, Q.C., met in Ottawa in January 1970 and prepared a draft Act on the subject, which has been adopted at the last meeting of the Conference. The purpose of the Act is to create a Criminal Injuries Compensation Board for the purpose of indemnifying any person who is injured or killed in a province by any other person occurring in or resulting from

(a) the commission of an offence within the description of any criminal offence mentioned in the schedule,

(b) lawfully arresting or attempting to arrest an offender, or assisting a peace officer,

(c) preventing or attempting to prevent the commission of an offence.

The Board may make an order for the payment of compensations to the victim, to a person who is responsible for the maintenance of the victim or where the death of the victim resulted, the victim's dependants.

Mr. President, uniformity in this field is desirable and could only be achieved through the financial support of the federal authorities.

Personal Property Security

At the 1969 meeting of the Conference, a committee composed of Messrs. Bowker, Leal, MacTavish and Tallin was appointed to report on policy and drafting of the proposed Uniform Personal Property Security Act, proposed by the Commercial Law Sections of the Canadian Bar Association. The Committee met in Toronto and was in contact with Mr. Jacob Ziegel, Chairman of the Bar's Committee, concerning a number of matters arising from the draft.

However, a sub-committee of the Bar's Committee is still considering the drafting of the proposed Act and has recommended a number of further changes which the Commissioners did not have the opportunity to consider, nor has the Bar's Committee had an opportunity to discuss the changes in drafting

recommended by the Commissioners. It was thus decided that the Conference is not prepared to make any further comments on the draft Act without further study and discussion with the Bar Committee and the Conference Committee has been reappointed to report on policy and drafting at the next meeting of the Conference to be held in Jasper the last week of August 1971

Privacy

The attention of the Conference was directed to the fourth report of the Standing Committee on Justice and Legal Affairs of the House of Commons (Votes and Proceedings of the House of Commons no. 84, March 11, 1970) which contained a recommendation: that the Commissioners should study uniform acts which could complement the federal legislation on this important contemporary problem. This recommendation was studied and a committee has been appointed with instructions to report at the next meeting on all aspects of privacy and in particular with respect to problems arising from information of credit bureaus, data banks, etc.

Minimum Age for Marriage

All the provinces of Canada, except the provinces of Newfoundland and New Brunswick have now established a statutory minimum age for marriage which varies between twelve, fourteen, fifteen and sixteen. In one province, Quebec, the minimum age for marriage is different for a woman than for a man. In some provinces, the minimum age is absolute; in other provinces, a marriage may be celebrated, even if a party is under age, in order to prevent illegitimacy of offspring. One more difficulty springs from the fact that *capacity* is under federal jurisdiction and *solemnization* of marriage is under provincial jurisdiction.

A committee has been formed to study this very important problem which should have been uniform all through Canada long ago and will report at the next annual meeting Nevertheless it was felt that 16 years for a woman and 18 years for a man, as suggested by the Ontario Law Reform Commission, could be a solution acceptable to many. A final solution will most certainly be reached next year

Perpetuities

This year, the Alberta Commissioners produced very extensive study on Perpetuities. They agree that the policy behind

the rule, namely, to control the time within which interests in real and personal property must vest is a second one. Although they do not necessarily favour the abolition of the rule, they consider that the abolition would probably not bring about any substantial number of eccentric dispositions which could do great damage to the economy or society. On the other hand, the rule in its present form often works harshly and capriciously and renders void dispositions which do not violate the spirit of the rule and which should not be void.

It has been decided to further study the problems to decide if this rule should be modified along the lines of modern statutes.

1 To create a wait and see rule

2. To permit cy près dispositions

3. To abolish or change various particular rules which are not defensible and which work hardship or simply to favour the abolition of the rule

Foreign Torts

Dr. Hugo Fischer, on behalf of the Yukon and Northwest Territories Commissioners, submitted an exhaustive report on the convention on the law applicable to Traffic Accidents adopted by the eleventh session of The Hague Conference on Private International Law and prepared a model Act on the convention. The purpose of this Draft Act is to guide the Court in the finding of the applicable law. It provides firm rules determining the law to be applied to tortious liability arising from traffic accidents. If implemented, this law would not only bring certainty and uniformity, but also justice, and it would prevent what has been described as "forum shopping".

Implementation of International Treaties and Conventions

The Quebec Commissioners submitted two exhaustive reports on the implementation of the Hague Conventions and in general, international treaties and conventions. This led to a lengthy discussion which resulted in a far reaching resolution which was prepared by the Associate Deputy Minister of Justice for Quebec, Mr. Robert Normand, and seconded by the Associate Deputy Minister of Justice for Canada, Mr. D. S. Thorson, Q.C. It reads as follows:

"Whereas the Conference of Commissioners on Uniformity of Legislation in Canada noted that the international conventions dealing with subjects falling either wholly under the jurisdiction of the provincial legislatures or under the jurisdiction of the legislatures and the Parliament of Canada at the same time, have practically not been applied in Canada up to now and thus, that Canadians do not benefit from the current trend towards unification of law at the international level;

Whereas this Conference favours that all such Conventions as are acceptable to the respective legislatures and the Parliament of Canada should be capable of implementation in Canada expeditiously and is of the opinion that it is possible to achieve this objective while safeguarding the provisions of the Constitution of Canada as well as the rights and obligations of its component parts;

Whereas this Conference noted with great satisfaction that consultations have increased on these matters recently between the federal and provincial governments and would be pleased to collaborate fully thereon with them if so requested;

Therefore, the Conference of Commissioners on Uniformity of Legislation in Canada

Expresses the hope that Canadians may benefit as soon as possible from the international conventions dealing with subjects falling either wholly under the jurisdiction of the Provincial Legislatures or under the jurisdiction of the Legislatures and the Parliament of Canada at the same time, and that Canada take part fully in their preparation;

Expresses the hope that the composition of Canadian delegations taking part in the elaboration of such Conventions be decided upon after consultations between the federal and provincial governments,

Recommends that Canadian delegations cause to be inserted in such Conventions a provision known as a "federal state clause" the text of which shall be established after such consultations and shall allow full implementation of such Conventions within any province wishing it;

Suggests that the required machinery be set up as soon as possible by the federal and provincial governments to appreciate the merits of implementing any Conventions so elaborated;

Assures the federal and provincial governments that it would be pleased to collaborate fully with them within the framework of such machinery, if so requested, in particular by studying these conventions and offering its opinion thereon; and

Directs its Secretary to send the text of this resolution to the Ministers of Justice and Attorneys General of Canada and the provinces of Canada."

You must appreciate Mr. President that although it may appear from a casual and uninformed appreciation of the work of the Conference, that its role can be limited, when in fact you realize that it is the only permanent body in Canada which allows the frank discussions of legislative problems vital to Canada, in an atmosphere of friendship and cooperation. It gives a chance to the Deputy Attorneys General of all the provinces of Canada and the federal Deputy Attorneys General to discuss amendments to the criminal code and to air their views as they did this year, on such reports as the Ouimet and LeDain reports, as well as on other items referring mostly to proposed amendments to the criminal code.

In concluding, it is my pleasure to inform you Mr. President that the officers of the Conference for the coming year are·

Honorary President	Mr. Emile Colas, Q.C., Montreal
President	Mr. P. R. Brissenden, Q.C., Vancouver
Vice-President	Mr. Warner Alcombrack, Q.C., Toronto
Secretary	Mr. J. W. Ryan, Q.C., Ottawa
Treasurer	Mr. H. E Crosby, Q.C., Halifax

APPENDIX A

AGENDA

OPENING PLENARY SESSION

1. Opening of Meeting.
2. Minutes of Last Meeting.
3. President's Address.
4. Treasurer's Report.
5. Secretary's Report.
6. Appointment of Resolutions Committee.
7. Appointment of Nominating Committee.
8. Publication of Proceedings.
9. Next Meeting.

UNIFORM LAW SECTION

1. Amendments to Uniform Acts—(see 1969 Proceedings, page 25).
2. Contributory Negligence (Tortfeasors), Limitations of Actions, Interpretation Act—Report of Alberta Commissioners (see 1969 Proceedings, page 24).
3. Compensation for Victims of Crime—Draft Bill and Report of Committee of representatives from Canada, Quebec and Ontario (see 1969 Proceedings, page 33).
4. Conventions (The Hague Conference)—Report of Quebec Commissioners (see 1969 Proceedings, page 33).
5. Family Relief Act—Report of Saskatchewan Commissioners (see 1969 Proceedings, page 26).
6. Foreign Torts—Report of Dr. Fischer (see 1969 Proceedings, page 30).
7. Human Organ Transplant—Report of Ontario Commissioners on progress of Medico-Legal Committee (see 1969 Proceedings, page 29).

8. Judicial Decisions Affecting Uniform Acts—Report of Nova Scotia Commissioners (see 1969 Proceedings, page 27).

9. Minimum Age for Marriage (see Report of Canada Commissioners circulated by Secretary on March 18, 1970).

10. Occupiers Liability—Report of British Columbia Commissioners (see 1969 Proceedings, page 26).

11. Perpetuities—Report of Alberta Commissioners (see 1969 Proceedings, page 27).

12. Personal Property Security—Report of committee consisting of Messrs. Bowker, Leal, Tallin and MacTavish (see 1969 Proceedings, page 29)

13. Presumption of Death Act—Report of Commissioners of N.W.T. (see Proceedings 1969, page 25).

14. Reciprocal Enforcement of Maintenance Orders—Report of Manitoba Commissioners (see 1969 Proceedings, page 27).

15. Survivorship Act—Report of British Columbia Commissioners (see 1969 Proceedings, page 28).

16. Trustee Investments—Report of Quebec Commissioners (see 1969 Proceedings, page 30)

17. New Business.

CRIMINAL LAW SECTION

The views of the Commissioners will be sought on the following matters, among others, for which a Memorandum will be circulated to the members of the Criminal Law Section:

1. Mentally disordered persons under the Criminal Law.

2. The Dangerous Offender.

3 Glue Sniffing.

4. Separation of Jurors—Section 556.

5. Offences Tried Outside Provincial Jurisdiction — Subsection 421(3).

6. Breathalizer Legislation—Extension to Cover Vessels.

7. The Lord's Day Act.

8. Sections 129 and 634.
9. Section 446.
10. Juries—Oath.
11. Juries—Questionnaire.
12. Voire Dire.
13. Off-Track Betting.
14. Paragraph 451(g).
15. Awarding of Costs to Accused who has been discharged.
16. Section 162—Trespassing at Night.
17. Female Impersonators—Subsection 295(2).
18. Sections 374 to 377—Arson.
19. Section 699—Common Assault—Proceedings as for an Indictable Offence.
20. Subsections 224A(5) and 574(3)—Notice of Intention to use Certificate.

CLOSING PLENARY SESSION

1. Report of Criminal Law Section.
2. Appreciations, etc.
3. Report of Auditors.
4. Report of Nominating Committee.
5. Close of Meeting.

APPENDIX B

(See page 32)

TREASURER'S REPORT

FOR THE YEAR 1969-70

Balance on hand—October 30, 1969		$4,106.46
RECEIPTS		
Province of New Brunswick		
January 9, 1970	$ 200.00	
April 24, 1970	200.00	
Government of Canada		
April 9, 1970	400.00	
Province of Nova Scotia		
April 22, 1970	400.00	
Province of Alberta		
April 27, 1970	400.00	
Province of Quebec		
May 4, 1970	400.00	
Province of Prince Edward Island		
May 19, 1970—1969 contribution	100.00	
1970 contribution	200.00	
Province of British Columbia		
May 19, 1970	400.00	
Province of Newfoundland		
June 2, 1970	400.00	
Province of Ontario		
June 2, 1970	400.00	
Bar of the Province of Quebec		
June 22, 1970	100.00	
Province of Manitoba		
July 17, 1970	400.00	
Province of Saskatchewan		
August 4, 1970	400.00	
		$4,400.00
Rebate of Sales Tax—Ontario		101.56
Bank Interest—December 1, 1969		54.28
Bank Interest—April 30, 1970		45.71
Total Receipts		$8,708 01
Total Receipts carried forward		$8,708.01

DISBURSEMENTS

Canadian National Railways January 30/70		
Transfer of Secretary's files		$7.65
Transfer remaining Secretary's files March 26/70		5.00
Clerical Assistance Honoraria December 15/69		300.00
Clerical Assistance Honorarium January 8/70		25.00
CCH Canadian Limited—Printing 1969 Proceedings April 6/70		2,187 87
Lowe-Martin Company Limited—Printing Agenda—August 5/70		79 97
Total Disbursements		$2,605.49
Cash in bank—August 4, 1970 ($6,182.49—$79.97)		6,102 52
	$8,708.01	$8,708 01

Howard E. Crosby
Treasurer
August 6, 1970.

APPENDIX C

(*See page 43*)

SECRETARY'S REPORT

Proceedings

In accordance with the resolution passed at the 1969 meeting of the Conference (1969 Proceedings, page 21), a report of the proceedings of that meeting was prepared, printed and distributed to the members of the Conference and to the persons whose names appear on the Conference mailing list. Arrangements were made with the Secretary of the Canadian Bar Association for supplying to him, at the expense of the Association, a sufficient number of copies to enable distribution of them to be made to the members of the Council of the Association.

Mr. Warner Alcombrack, the 2nd Vice-President and former Secretary of the Conference, was kind enough to arrange for the printing and distribution of the proceedings before handing over to me the files and paraphernalia of the Secretary's office, a kindness for which I am grateful.

The gratitude of the Conference is again extended to Mr. John Cannon, the Legislative Editor in the Office of the Legislative Counsel of Ontario, who rendered his usual valuable assistance by making arrangements for and supervising the printing, proofreading and distribution of the Proceedings

Appreciations

In accordance with the resolution adopted at the closing plenary session of the 1969 Conference (1969 Proceedings, page 54), letters of appreciation were sent to all concerned.

Sales Tax

Applications for remission of Sales Tax amounting to $319.18 paid in respect of the printing of the 1969 Proceedings, were made to the Federal Government and the Ontario Government. A refund totalling $101 56 has been received from the Government of Ontario

Uniform Anatomical Gift Act

Letters have been received from Alfred L. Sadler, M.D., and Blais L. Sadler, J.D., of the National Institutes of Health, Bethesda, Maryland, and Dr. Richard B. Middleton, Department of Genetics, McGill University, concerning the Uniform Anatomical Gift Act. (see 1969 Proceedings, page 67) The subject matter of the correspondence relates to the Human Tissue Act which is a matter on the Agenda of the Uniform Law Section for this Conference.

Condominium—Uniform Insurance Provisions

Letters have been received from Mr. G. E. Grundy, F.C.A., Superintendent of Insurance, Ontario, and Mr. Wilson E. McLean, Q.C., concerning a Resolution passed by the Association of Superintendents of Insurance of Canada at the meeting of that body in 1969. The Resolution read as follows:

> "That the Committee be instructed to direct to the attention of the Conference of Commissioners on Uniformity of Legislation the desirability of the enactment of uniform legislation relating to condominium."

Copies of the correspondence and the replies thereto are attached.

Uniform Child Custody Legislation

A letter has been received from Mr. R. T. DuMoulin, Q.C., Chairman, Civil Justice Section of the Canadian Bar Association containing a copy of his letter to Mr. Albert J. McComiskey, Q.C., concerning legislation with respect to Uniform Child Custody legislation. A copy of that letter and my reply thereto is attached.

Consumer Protection

A letter has been received from Mr. S. D. Turner, Director, Consumer Protection Division, Department of Financial and Commercial Affairs, Ontario, in respect of a Standard Form of Contract prepared by an inter-provincial committee of representatives of government officials concerned with consumer protection. Consumer legislation was considered by this Conference at past meetings. (1966 Proceedings, p. 25; 1967 Proceedings, p. 20).

Attached is a copy of the letter with enclosure and a copy of my reply.

Unidroit—International Institute for the Unification of Private Law

During the year I was in communication with Signor Mario Matteucci, Secretary General of Unidroit and M. Andre M. Hennebicq, Deputy Secretary General. The Institute is seeking to be kept up to date on the activities of our Conference. We have had previous correspondence from Unidroit (1959 Proceedings, p. 51; 1956 Proceedings, p. 39). In 1955, the then Secretary of the Conference, Mr. Henry Muggah, prepared a report on the history and activities of the Conference which was published in the 1956 yearbook of the Institute. Canada adhered to the Institute in 1968. Last September, I visited the Aldobrandini Palace in Rome, where the Unidroit secretariat and library are situated. M. Hennebicq and the members of the Secretariat were extremely courteous to me. The Secretary General was out of Rome at the time.

The similarity between the objectives and difficulties of the Institute and our Conference is noteworthy. The Institute is very anxious to have a report of the activities of the Conference since 1956 for publication in the yearbook of the Institute. Because it may be of interest to the Commissioners, I have prepared a report on Unidroit for the Conference. (Copies of this report are available.)

Law Reform Bodies

Because of the recommendation adopted last year with respect to the representation on this Conference of the Chairmen of law reform bodies (1969 Proceedings, page 57), the attention of the Conference is directed to Chapter 64 of the Statutes of Canada, 1969-70, which authorizes the establishment of a federal Law Reform Commission.

Protection of Privacy

The attention of the Conference is also directed to the fourth Report of the Standing Committee on Justice and Legal Affairs of the House of Commons (Votes and Proceedings of the House of Commons of Canada, No. 84, March 11th, 1970) which contained the following recommendation:

"The Committee recommends that federal initiatives be taken to assist and encourage the enactment of privacy laws in each province and that a federal approach be made to the Uniformity Commissioners with a view towards the production of a uniform Act for the Protection of Privacy which will complement the proposed federal legislation, as well as providing the necessary protection of personal and institutional privacy which lies beyond the constitutional reach of Parliament."

Copies of the Committee's report are available to the Conference.

J. W. Ryan,
Secretary.

August 18, 1970.

Dear Mr. Ryan:

Re: Uniform Legislation
re Condominiums

At the last meeting of the Association of Superintendents of Insurance held in September 1969 the Committee on General Insurance Legislation passed a Resolution which reads as follows:

"That the Committee be instructed to direct to the attention of the Conference of Commissioners on Uniformity of Legislation the desirability of the enactment of uniform legislation relating to condominium"

It would be appreciated if this Resolution could be brought to the attention of the Commissioners at their next annual meeting.

Yours very truly,

(signed) G. E Grundy

Superintendent of Insurance.

Mr. G. E. Grundy, F.C.A.,
Superintendent of Insurance,
Department of Financial and Commercial Affairs,
6th Floor, 555 Yonge Street,
Toronto 284, Ontario

Dear Mr Grundy:

Re: Uniform Legislation
re Condominiums

I have received your letter of March 25th, 1970, relating to the Resolution on Condominium legislation.

Could I be given copies of any reports or material placed before the Committee on General Insurance Legislation that led to the resolution? I presume the concern was related to uniform property provisions. As you know, there is no uniformity (or very little) among the provinces with respect to land titles or registry systems.

The resolution will be brought to the attention of the executive of the Conference, but the scope of the resolution should be known.

Yours truly,
J W. Ryan,
(Secretary)

Dear Jim:

re: Condominium Legislation—
Insurance Aspects

I understand that the Association of Superintendents of Insurance have referred to the Uniformity Commissioners a resolution on the above subject. I believe this was sent to you.

This is a matter of very considerable concern not only to insurers but to condominium corporations and condominium owners. The matter is, at the moment, quite complex and if this type of legislation is considered by the Uniformity Commissioners I am sure that the industry could be of considerable help in discussing the practical problems involved in the multiplicity of interests.

With kind regards, I am,

Yours sincerely,
(Signed) Wilson

WEM:m

Re: Condominium Legislation
Insurance Aspects

Dear Wilson:

The matter of the resolution of the Association of Superintendents on condominium legislation was referred to the Uniformity Conference by way of a letter to me as Secretary of that body from Mr. Gordon Grundy.

There is very little background given to me in the submission and I wrote Mr. Grundy to find out if the resolution related to the insurance aspects alone. I was informed by letter from Mr. S. J Sexton on April 7th that the resolution was intended to relate to the uniform insurance provisions

I shall attempt to have this matter placed before the next Conference of the Uniformity Commissioners but it would be helpful if I could obtain from somebody on the Association of Superintendents the background material and reports so that the Commissioners could have before them more information than I am now able to give them Perhaps you could draw this to the attention of Mr. Grundy.

Sincerest personal regards

Yours truly,
J. W. Ryan,
Director, Legislation Section

Wilson E. McLean, Esq,
McLean, Lyons & Kerr,
372 Bay Street,
Toronto 105, Ontario

Dear Jim:

re: Condominium Legislation
Insurance Aspects

Your letter of May 14, for which I thank you, was referred to me upon my return to the office this week.

I have had a word with Superintendent Grundy and at his suggestion I am sending herewith photocopies of the following excerpts from the Proceedings of the Superintendents' Conference:

1968—page 106—reference in Report submitted
pp 113-115—discussion at 1968 Conference
page 119—Resolution (9)

1969—page 96—reference in Report submitted to 1969 Conference

pp 103-104—discussion at 1969 Conference

page 105—Resolution (7) (I believe you already have a copy of this.)

I am a little afraid that the material is not too instructive as to the actual problem. Essentially the question is as to the different interests which are involved and whether these should be insured on a liability basis, in part, or on a property insurance basis

The provincial legislation is not uniform

There is an interesting chapter in Rosenberg "Condominium in Canada", a looseleaf book published by Canada Law Book Limited. The chapter in question is No. 10.

If, after perusing the foregoing material, you have any questions I can get more information as to the practical aspects of writing this type of insurance

Yours very truly,

WILSON

Excerpts from Proceedings of Superintendents' Conference:

1968, p. 106

In addition to the Resolutions passed in 1967, there are the following matters to be considered.

1. Insurance on Condominium Apartments

A number of provinces have recently adopted condominium legislation to provide for the use and management of what are commonly termed Condominium Apartments This legislation usually requires that such properties be insured and it is important that uniform requirements be enacted by the different provinces. It is recommended that a study be made of the relevant legislation to ensure this

1968, pp. 113-115

Mr. Richards: "Well perhaps at executive sessions, recommendations can be brought up making these 2 statutory conditions uniform.

"That completes all the resolutions from last year, but in addition to them there are some other matters to be considered.

"First; insurance on condominium legislation to provide for the use and management of what are commonly termed condominium apartments. This legislation usually requires that such properties be insured and it is important that uniform requirements be enacted by the different provinces. It is recommended that a study be made of the relevant legislation to ensure this. Your committee has made some study of the relevant legislation concerning condominium apartments, and the points that concern insurance seem to be mainly as follows:

"1. Question of ownership and insurable interest . . since condominium apartments or units are owned individually and a great deal of common property is owned collectively by these unit holders, the question

of who may insure what needs to be settled. The different Acts provide that the individual owners become a corporation In Nova Scotia they become a society with an insurable interest in the property as a whole In Quebec it is slightly different since administrators are appointed to act for the co-owners Now whether there is any difficulty in ensuring that there is an insurable interest under the present legislation is something that may require further study. Some of the Acts also provide that in addition to the collective owner of the condominium apartment, whether it is a corporation or a society, that the individual unit holders may, under certain conditions, insure their interest in their own unit. Alberta, British Columbia, Manitoba specifically authorize an owner of a unit to insure for the amount of the mortgage against this unit

"If a loss is paid, the insurer assumes the rights of the mortgagee up to the amount of the payment, and where the corporation has not insured to the full replacement value of the apartment as a whole, Alberta and British Columbia have authorized the unit holder to insure for the difference between his replacement value and the insurance carried This seems to leave a gap in some of the legislation in other provinces which doesn't provide for specific coverage by the owners of units Any suggestions from the industry . . amendments which might be required in this legislation to prevent any difficulty in insuring ."

Mr McKenzie. "The industry, of course, is interested in the development of uniform forms and a simple method whereby the public can be assured that they have positive coverage The condominium concept is quite new; however, the terms of the various Acts dealing with such property as you've mentioned, vary somewhat

"Different legislatures have dealt with the problem in different ways, e g., the Act in Ontario, by Section 15, requires the corporation holding the title to insure its liability to repair the property after damage resulting from fire or other casualty. In the Manitoba Act, Section 17 deals with the matter of insurance in considerably more detail. Certain of the provisions as to mortgagees' rights and contribution require examination Again, however, the basic requirement is that of the Ontario Act

"In the Saskatchewan Act the main insurance provisions are in Sections 21 to 24 inclusive. This Act says the obligation is to insure and keep insured the building to replacement value

"In the Alberta Act, the insurance provisions are Sections 20, 21, etc They follow the Saskatchewan pattern.

"It will be noted from the foregoing that one concept of the insurance is on the basis of insuring liability to repair, and the other insuring the property as such to replacement value. In the case of condominium property there are two types of interests First: all the apartment owners collectively in the walls, corridors, heating equipment, service rooms, etc that are common to all apartment owners. Second: the individual apartment that the owner owns. Undoubtedly there are group facets here, and some appropriate and hopefully uniform forms will have to be devised. It would be extremely valuable if common insurance provisions could be

included in the various Acts, and we would urge, if it is possible, for the Superintendents to bring this matter to the attention of the people that develop such legislation."

Mr. Richards: "I would suggest that the Superintendents would welcome some written suggestion from the industry as to the uniform provisions in these Acts that would simplify the question of insurance so that they could recommend amendments to the existing legislation on condominium apartments "

Mr McKenzie: "We'll be delighted to submit as soon as possible recommendations on this."

Supt Richards: "Thank you I'm sure the Superintendents would welcome some definite suggestions that they could take up with the authorities because, I don't know, but believe that the insurance Superintendents have actually no direct responsibility for this legislation concerning condominiums I'm sure recommendations would receive sympathetic hearing by those people who are responsible . . anyone else with comments on condominiums?"

Mr. Kelly: "We're like the bumblebee who doesn't know it's impossible to fly . . . we've been insuring them with substantial volume and for the last two years in the States. I don't know whether we've insured any of these in Canada—these are very large units and we normally write a single blanket contract in which we insure the entire unit, including the apartments and the spaces owned in common, and then provide a certificate for each individual owner dealing with his interests. In those cases, part of the premium is allocated or charged against his proper costs for maintenance of the whole unit, and we haven't run into the problems which are of concern to you in Canada

"Now from what I gather there has been legislation passed in some of the provinces, probably some of these condominiums are already built, and I'ni certain they're being insured—whether they're being insured legally or not . I wonder, sometimes we think that legislation is necessary when we can really get along without it."

A Delegate: "Mr. Chairman, if I may be permitted a little comment . . . I doubt if my learned friend from Rhode Island has ever attempted to assess a loss where a condominium is involved, and believe me there are two interests . the interests of the people who own the common facilities as the shareholders of the corporation, the halls and so on, then there are the interests of myself, who has an apartment on the 14th floor that has been burned out. Now in Canada our legislatures have attempted to deal with the various facets of the interests . . . and all I'm saying is that I don't think . . and I've read the American approach to it . . I don't think it answers it."

1968, p 119

(9) THAT the Committee be instructed to discuss with the industry recommendations for changes in the present provincial legislation dealing with the insurance of condominium apartments

1969, p. 96

Resolution 9—Condominium Apartments

The industry are of the view that the provisions of the Alberta and Saskatchewan Acts, as they provide for the insuring of these apartments, are to be preferred to the Ontario legislation and that of some of the other provinces. It is anticipated that the industry will have concrete proposals to make to the September Conference.

1969, pp 103-104

Resolution (9)

The *Chairman* read Resolution (9) and the relevant Report item on the subject of condominium, and invited comments.

Mr MacKenzie replied: "Last year we reviewed the two main insuring methods employed by the provincial Acts—briefly, some providing for insuring on a property damage basis and others on a liability basis. I think there is no point in rehashing what was said before on this. We believe there is greater value in the development of a common approach, as it permits more effective industry action in the developing of forms and different types of package coverages.

"Our review this year has not been as complete as we would like, but we have come to the conclusion that the problem results from the different philosophies involved. The philosophies are quite different and somewhere in here there should be a right way and a wrong way, and we suggest that the matter of resolving the problem might be referred to the Conference of Commissioners on Uniformity of Legislation."

Mr. McLean: "There is a great deal of literature on the insurance of condominiums and that kind of insurance is in a bit of a state of flux. In the United States, the practice is to insure the building as such for all interests—the interest of the corporation *per se* and the interest of each policyholder.

"There is a book on condominium just issued in Canada. It's a loose-leaf book and they have a whole chapter on condominiums.

"You have a problem because in respect of the halls and ceiling and outside walls, etc., there is a common interest, but I am also interested in my own four walls that contain my apartment. In Alberta and Saskatchewan they have approached this from the viewpoint of insuring the property as such. I have some doubt under various condominium laws—for instance, if there is damage under twenty-five per cent there is no responsibility to repair. At least I'd like to get back my portion of my interest in the walls and basement and so on. That is how they approached it in the United States.

"In Alberta and Saskatchewan they have dealt with it as a piece of property and I as an individual insuring what I have bought. That is our approach, but until the whole concept of condominiums is reduced to a common denominator in the provinces it is going to be a problem.

"In one case the condominium corporation insured the whole building. I would still want in that case to buy a contingent policy, so that if for any reason the building's insurance was not adequate or it could not be replaced, if I had put up $25,000 to buy an apartment I could be made whole. However, I don't think we can approach this until we have a common type of approach, and that is why we suggest that this be referred to the Uniformity Conference."

Chairman: "Thank you. We will, as you have suggested, give consideration to referring this to the Uniformity Commissioners"

1969, p. 105

(7) THAT the Committee be instructed to direct to the attention of the Conference of Commissioners on Uniformity of Legislation the desirability of the enactment of uniform legislation relating to condominium

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May 25, 1970.

Dear Sir:

I am writing to you in your capacity as Secretary of the Conference of Commissioners on Uniformity of Legislation in Canada to inquire whether the Conference has under consideration Legislation with respect to uniform child custody jurisdiction along the lines of the preliminary draft of a revision of the first tentative draft of the Uniform Child Custody Jurisdiction Act prepared for the U S. National Conference of Commissioners on Uniform State Laws.

Some consideration has been given to these matters by the Manitoba sub-section of the Civil Justice Section of the Canadian Bar Association of which I am this year the Chairman I have also written to the Chairman of the Family Law Section of the Canadian Bar Association concerning this matter

I am enclosing a copy of my letter to Mi. McComiskey, Q.C. the national Chairman of the Family Law Section and enclosures except the U.S. draft of which, no doubt, you already have a copy.

As I mentioned to Mr. McComiskey, if your Conference is dealing with these matters the Canadian Bar Association might either step out of the picture or alternatively some means of co-ordinating efforts should be considered.

I am also sending a copy of my correspondence with Mr. McComiskey, Q.C. to N. Roger Gauthier, the Section co-ordinator of the Canadian Bar Association, and you might like to discuss this matter with him.

Yours very truly,

R T DuMoulin

RDD/mz
Encs.

May 25, 1970.

Albert J. McComiskey, Esq. Q.C.,
Chairman, Family Law Section,
Suite 2107,
401 Bay Street,
Toronto 113, Ontario.

Dear Mr. McComiskey:

The Manitoba sub-section of this Section has been considering some interesting items which might also be under consideration by your Section or some part thereof, and I thought I would bring these to your attention with a view to having your comments on the proposals relating to the following subjects as outlined in the minutes of the Manitoba sub-section, copies of which I enclose.

It occurs to me that it might be possible for our two Sections to collaborate in one or two Resolutions at the Annual Meeting in Halifax if your Section is at all interested in these proposals:

Civil Kidnapping and Child Custody;

Draft Uniform Child Custody Jurisdiction Act
of the U.S. National Conference of Commissioners
on Uniform State Laws;

Draft Manitoba Bill "The Reciprocal Enforcement of
Custody Orders Act".

As yet, I understand, comments have not been received from the various other sub-sections to which Manitoba sent copies of the above documents

I am also writing to the Secretary of the Conference of Commissioners on Uniformity of Legislation in Canada, J. W. Ryan, Q.C., asking him if that Conference proposes to deal with these subjects It seems to me that if that Conference is dealing with these matters we might either avoid duplication on the part of the CBA or endeavour to co-ordinate the work of both bodies.

I would appreciate your comments in due course.

Yours very truly,

R T DuMoulin

CIVIL KIDNAPPING AND CHILD CUSTODY ORDERS

The Chairman made reference to the Wisconsin Draft Uniform Child Custody Jurisdiction Act considered at length at the December 12th, 1969 meeting, together with a rought draft "Act to Facilitate the Enforcement of Custody Orders". The latter was prepared by reference to and is based on the Wisconsin Draft Act.

No reciprocal provincial legislation exists for the enforcement of Child Custody Orders. No co-operation exists between the various provincial jurisdictions. When the child custody question comes before a particular Court it can only deal with the question on an ad hoc basis. Conflicts of law and *forum conveniens* problems are inherent in the child custody question in that each province guards its jurisdiction over family.

It was agreed provincial reciprocally enforceable legislation is required. The "real and substantial connection principle" established in the House of Lords decision of *Indyka vs Indyka* (1967) 2 AER 689, it was felt, should form the base for any proposed legislation and should serve as the jurisdictional criteria in custody matters

It was agreed by members present that the Wisconsin Draft Uniform Child Custody Jurisdiction Act be circulated to all members for consideration together with the draft "Act to Facilitate the Enforcement of Custody Orders". Both draft Acts could then be fully discussed at the next meeting, to be held May 29th, 1970. Following discussion of the draft Acts at the May 29th meeting a draft Act could then be finalized and submitted for consideration at the annual meeting of the Canadian Bar Association in Halifax. Both the Wisconsin Draft and the draft Act to Facilitate the Enforcement of Custody Orders are being circulated to all Provincial Civil Justice Subsection Chairmen with a request for the observations and comments of each Subsection Chairman.

MEMBERS OF CIVIL JUSTICE SUBSECTION OF MANITOBA

Record of Proceedings and Minutes of luncheon meeting held at the Marlborough Hotel, December 12, 1969.
Present:

Keith Turner

A. B. Bass

Perry Schulman

Charles Phelan

Bill Kushneryk

CHILD CUSTODY ORDERS

Burton Bass chaired the meeting and led discussion on the child custody question using the Wisconsin Draft Uniform Child Custody Jurisdiction Act as a guideline for the discussion. The Wisconsin Draft Act deals primarily with the interstate aspects of child custody determinations

CONSTITUTIONAL PROBLEMS

Members present raised the question whether the provinces were precluded from enacting custody legislation by reason of S.91(26) of the B N.A. Act which gives the Federal Government exclusive marriage and divorce jurisdiction Arguments advanced in favour of provincial legislation were as follows:

(i) custody a matter of property and civil rights within the province over which provincial legislators have exclusive jurisdiction by virtue of 92(13) of the B.N.A Act

(ii) no substantive law exists at the Federal level dealing with custody, although S.11(1)(c) of the Divorce Act gives the Court the right, *upon the granting of a Decree Nisi*, to make an order providing for the custody, care and upbringing of the children of the marriage;

(iii) *Whyte vs Whyte* (1969) 69 WWR 536. This is a Manitoba Court of Appeal decision which quotes and agrees with the B C. case of *Niccolls vs. Niccolls and Buckley* (1969) 68 WWR 307:

> "provincial and federal jurisdiction is co-extensive as the respective jurisdictions relate to custody".

These cases seemingly say that the federal government may *not* legislate where the question of custody arises independently of divorce, i.e. the federal government may not legislate as to custody simply as a civil right but only when an issue of custody arises as a necessary adjunct to the dissolution of marriage.

Members present agreed provincial legislatures hold the stronger hand and should take the initiative by enacting legislation with properly worded terms of reference.

PROPER JURISDICTIONAL BASIS

It was felt a criteria was necessary to establish jurisdiction in custody matters, i.e. which province to have jurisdiction

Wisconsin Draft Act:

(i) Litigation concerning custody of child to take place in Courts of the State where the child has lived for a considerable length of time;

(ii) Courts of Wisconsin to have jurisdiction if the child in question is left in Wisconsin with his parents or a parent or with a person acting as a parent for at least 6 months prior to the commencement of the proceedings.

The Wisconsin Draft Act contains a savings clause for neglect in emergency situations giving Wisconsin's Courts jurisdiction to make child custody determinations with respect to *any* child present in Wisconsin who is neglected or who has been subjected to or threatened with mistreatment and abuse The Draft Act contains a further provision whereby a Wisconsin Court shall not exercise its jurisdiction if it has knowledge that proceedings concerning the custody of the same child are pending in a Court of another state unless the proceedings in the other state are stayed on the ground Wisconsin is a more convenient forum. This ties in with our *forum non conveniens* topic and the proposed amendment to the Queen's Bench Act.

THE INDYKA PRINCIPLE

The Chairman made reference to the recent House of Lords decision of *Indyka vs. Indyka* (1967) 2 AER 689. This case dealt with recognition of foreign divorce decrees. The effect of the House of Lords decision is that decrees granted by Courts having a real and substantial connection to the parties based on the parties place of residence, etc. will be recognized. The Chairman felt the Indyka "real and substantial connection principle" could be extended to child custody problems and should form the base for any proposed legislation, i.e. it could serve as the jurisdictional criteria in custody matters.

ADDITIONAL PROBLEMS

1. Heirarchy of Courts in a province: It was felt proceedings should be removed automatically to the Court of Queen's Bench in Manitoba or the equivalent high court in other provinces.
2. Orders to appear: The Wisconsin Draft gives the Court the power to order any party within or without Wisconsin to appear personally before the Court. Non compliance with the Court's Order would be subject to the Courts power to proceed for contempt of Court. This ties in with the inter-provincial subpoena topic being dealt with by our section.
3. Binding force of custody decree and recognition of out of state decrees: Legislation would have to be reciprocally enforceable. The suggestion was made that registration of custody decrees be tied in with the Central Divorce Registry in Ottawa, where decrees could be registered together with amendments. This would present practical problems of volume and to overcome these problems it was suggested that only high Court Orders be registered at the Central Registry office.
4. Repeal of existing legislation: legislation giving jurisdiction to the Court in the place where a child is found would have to be repealed

The Chairman undertook to submit a Draft Act based on the Wisconsin Draft to be circulated for comments by members of the section.

AN ACT TO FACILITATE THE ENFORCEMENT OF CUSTODY ORDERS

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

1. This Act may be cited as: "The Reciprocal Enforcement of Custody Orders Act".
2. (1) In this Act,
   (a) "Certified Copy" in relation to an order of a court means a copy of the order certified [by the] proper officer of the court to be a true copy;
   (b) "Court" means an authority having statutory jurisdiction to make custody orders;
   (c) "Custody Orders" includes rights of access and visitation rights and other matters commonly contained in a custody order or decree;

(d) "Custody Proceeding" includes divorce and other proceedings in which a child custody determination is incidental to the main issue, and includes child welfare and child neglect and dependency and guardianship proceedings;

(e) "Physical Custody" means actual possession and control of a child;

(f) "Person acting as a Parent" means a person other than a parent who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(g) "Child" means a person who is not *sui juris* according to the law of that jurisdiction which has the real and substantial connection to the child, and includes a child, who is unable, by reason of illness, disability, or other cause, to withdraw himself from the custody, charge, control or guardianship of another person, or unable to provide himself with the necessaries of life.

3 There shall be established, pursuant to regulations made hereunder, a central "custody order registry" which said registry shall be an adjunct to the divorce registry established and implemented pursuant to the Divorce Act 1967-68, c 24 This registry shall have on file all custody orders and decrees and variations thereof made pursuant to the order of any court of competent jurisdiction as set forth in section 2 hereof, and such orders and decrees shall have appended thereto such additional information as this Act and the regulations passed thereunder may from time to time prescribe.

NOTE: [We have a constitutional problem here Under section 91 of the B.N.A. Act, the Federal government at Ottawa has exclusive jurisdiction over "marriage and divorce" Child custody proceedings are probably "property and civil rights" pursuant to Section 92 of the B.N.A. Act, and thus would be within the exclusive legislative competence of the provinces.]

4 Where, either before or after the coming into force of this Act, a custody order has been made by a court in a reciprocating state, and a copy of the order has been transmitted by the proper officer of the reciprocating state to the central registry, then, subject to this Act, all proceedings may be taken thereon as if it had been an order originally obtained in the courts of this province, and that the courts of this province has power to enforce the order accordingly.

5. The courts of the various reciprocating states, and the judges of the said courts respectively, are auxiliary to one another for the purposes of this Act; and for the enforcement of any custody order, and any proceedings relating thereto may be transferred from one court to another with the concurrence, or by the order or orders of the two courts, or by an order of the Exchequer Court of Canada

NOTE: This is essentially a recapitulation of section 127 of the Dominion Winding Up Act However, note that the Exchequer Court of Canada is given jurisdiction rather than the Supreme Court of Canada, in order to tie up with the provisions of the Canada Divorce

Act, which gives, pursuant to registrations in the Central Registry, the Exchequer Court of Canada jurisdiction to act where there is concurrent jurisdiction. Query? whether this procedure is too time-consuming and complicated.

6. *Primary Jurisdiction*

For the purposes of this Act, it is deemed that the court of that reciprocating state shall have primary jurisdiction to make child custody determinations by way of initial decree or modification decree if the child in question has the closest and most substantial connection with the jurisdiction of such reciprocating state

7 *Subsidiary Jurisdiction*

The courts of this province shall have subsidiary jurisdiction to make child custody determinations by way of initial decree or modification decree if:

(1) the court has taken jurisdiction in an action for divorce, separation or annulment, or on any other proceeding incidentally involving the custody of a child, or

(2) if this province has a sufficiently close connection with the particular child and his family as to give it a substantial interest in and responsibility for the welfare of the child.

Without restricting the generality of the foregoing, among the circumstances which establish a sufficiently close connection with the child and his family, the following may be considered:

(a) the child has recently lived in this province with a parent or a person acting as a parent

(b) two persons claiming custody of the child are residents of this province

(c) the child is staying in this province with a parent or person acting as a parent and not merely as a visitor or for other temporary purposes.

The circumstance that the child is present in this province shall not by itself, without other pertinent circumstances establishing a connection with the child and family, be sufficient to give the court jurisdiction under subparagraph (2) of this section.

8. *Savings Clause for Neglect, Dependency and Delinquency*

Nothing contained in sections 6 and 7 or in any other provisions of this Act shall in any way limit or affect the jurisdiction of courts of this province to make child custody determinations with respect to a child present in this province who is dependent, neglected or delinquent, or who has been subjected to or threatened with mistreatment or abuse

9 *Simultaneous Proceedings in Other Reciprocating States*

A court of this province shall not exercise its subsidiary jurisdiction under this Act, if it has knowledge of the proceedings concerning the custody of the same child are pending in a court of another reciprocating state, unless the proceedings in the other states are stated on the ground that this state is a more convenient form or for other reasons.

10. *Forum Non Conveniens*

For the purpose of finding whether it is inconvenient forum, the court shall be guided, inter alia, by the following considerations:

(a) a court of another reciprocating state would have primary jurisdiction under section 6

(b) another state has a closer factual connection with the child and his family (note: *Indyka* v. *Indyka*)

((c) a court of another reciprocating state has superior access to pertinent information about the child, his care, education and personal relationships

(d) the parties had agreed on another form which in the opinion of the court is no less appropriate than the present one

(e) a custody proceeding concerning the same child is pending in another reciprocating state and dismissal of the case in this province while not required by section 9 hereof and may be desirable under the circumstances.

(1) If the court finds that it is an inconvenient form and that the court of another state is likely to be a more appropriate form, it may dismiss the proceedings with or without prejudice, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named reciprocating state, or upon such other conditions as may be just or proper.

(2) The court may decline to exercise its jurisdiction under this Act when a custody determination is incidental to a divorce or other proceeding, while retaining jurisdiction over the divorce or other proceeding.

(3) When the court finds that it is a highly inappropriate form it may require the party who commenced the proceedings to pay, in addition to the cost of the proceedings in this province, necessary travel and other expenses, including attorney's fees, incurred by other parties

(4) When the court retains jurisdiction under this section, but the location of the forum is inconvenient from the standpoint of any of the parties, the court may require another party to pay necessary travel and other expenses of the party inconvenienced if this is fair and proper under the circumstances

(5) Upon dismissal or stay of proceedings under this section, the Clerk of the Court shall send a communication advising the state which the court found to be the more convenient forum for transmittal to the Clerk of the appropriate court of the reciprocating state.

11. Every party in a proceeding under this Act shall submit to the court a statutory declaration setting forth the following:

(a) whether or not he has participated as the party, witness, or in any other capacity in any previous litigation concerning the custody of the same child in this or in any other reciprocating state

(b) whether or not he has information of any custody proceedings pending in a court of this or any other reciprocating state

(c) whether or not he knows of any person not a party to the present proceeding who has or claims to have custody or visitation rights under a decree or without decree, or who has physical custody of the child.

12 *Additional Parties*

Whenever the court is in forum from data furnished by the parties pursuant to the foregoing section, or from other sources, then any person not a party to the proceedings has or claims to have custody or visitation or access rights with respect to the child or has physical custody of the child, it shall order such person to be joined as a party and to be duly notified of the pendency of the proceedings and of his joinder by the court as a party. If the person added as a party is outside this province, he must be served with process or otherwise notified in accordance with this Act

13 *Extraterritorial Service*

By registered mail, personal process, or how. I think that this Act should contain a provision that where the court deems it expedient, other parties may not need be served

14. *Orders to Appear*

NOTE: (Should have subpoenas and habeas corpus enforceable in all jurisdictions.)

15 *Extraterritorial Depositions, Interrogatories, Examinations for Discovery, etc.*

(Have a method whereby the courts may direct that depositions or interrogatories be obtained from persons residing out of the jurisdiction.)

16. *Out of Province Court Records, etc*

A court of this province may request the appropriate court of another reciprocating state to hold a hearing to receive testimony or to have investigations or studies made with respect to the custody of a child involved in the proceedings before the court of this province, and to forward certified copies of the transcript of the record of a hearing conducted or of investigation or study report prepared in compliance with such requests of the court of this province.

17. *Assistance to Courts of Reciprocating States*

Upon request of the court of a reciprocating state, the court of this province may order a person who is resident in Manitoba to appear at a hearing to give his testimony or statements, as may be required, or may order investigations or study to be made for use in custody proceedings in the reciprocating state that has requested same A certified copy of the transcript of the record of the hearing, and of any investigation or study or any deposition or statutory declaration shall be forwarded by the Clerk of the Court to the requesting court.

18. *Recognition of Out of Province Custody Decrees*

The Courts of this province shall accord recognition to and enforce a custody decree of a reciprocating state until such decree is nullified by the court which rendered it or until it is modified in accordance with this Act.

19. *Modification of Custody Decrees of Reciprocating States*

(a) When a court of a reciprocating state has rendered an initial modification decree, a court of this province shall not modify this decree unless:

(1) the court which rendered the prior decree no longer has primary subsidiary jurisdiction under the provisions of this Act, or has declined to exercise its jurisdiction to modify the decree

(2) the courts of this province have primary or subsidiary jurisdiction.

(b) when a court of this province is authorized to modify a custody decree of a reciprocating state in accordance with subsection (a) of this section it may modify the decree under conditions and standards which would be applicable if the court were called upon to make a modification of the custody decree of its own

(c) no court of this province shall modify a custody decree of a reciprocating state if the party petitioning for the modification has removed the child from the possession of the person to whom custody was awarded under a prior decree without his consent, unless the petitioner proves that he removed the child in an emergency threatening immediate serious harm to the child in which he was unable to obtain swift assistance from local or governmental authorities in the reciprocating state

(d) Nothing contained in this section shall limit the powers of the courts of this province to modify a custody decree with respect to a child who was neglected or dependent, or who has been subjected to or threatened with mistreatment or abuse

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April 30, 1970

Dear Mr. Ryan:

I write to you in your capacity of Secretary of the Conference of Commissioners on Uniformity of Legislation in Canada.

Approximately two years ago Mr. W Alcombrack, Q.C, wrote to me and extended an offer to have your Conference of Commissioners consider any proposed legislation which might well be acceptable for adoption in the provinces of Canada.

Approximately every 7 to 8 months representatives from all of the provinces in Canada meet to consider consumer problems. Federal Government representatives from the Department of Consumer and Corporate Affairs are invited to attend these meetings and they have done so at each one of the four meetings held during the past two years.

One of the subjects which has received a great deal of attention is that relating to Standard Form of Contract. A great deal of work has been done by an inter-provincial sub-committee and the resulting draft (12 copies) is attached. In the hope that your Conference of Commissioners will take this matter on for consideration, I submit this project to you. Any questions which you wish to ask will be dealt with promptly for you. You can count on our utmost co-operation.

Thank you,

Yours sincerely,

S. D. Turner,
Director

Encl.
SDT:nv

CONSUMER CREDIT CONTRACT

Made Pursuant to and Governed by *"The Consumer Protection Act"* of

CONTRACT DATE:

NOTE: In all matters of interpretation and application of the within Contract the comparable provisions of The Consumer Protection Act shall apply and govern

BUYER(S):	Full Name	SELLER:	Seller's Trade Name in Full
ADDRESS:	Full Name	ADDRESS:	
	Street Address		Street Address
	City and Province		City and Province

Buyer, jointly and severally (if more than one), hereby purchases from Seller on the terms and conditions set forth below (and on the reverse side hereof) the following described goods:

Quantity	New or Used	Year Model	Description of Goods	Manufacturer	Model No.	Serial No.	Cash Price	Amount
							$	$

TOTAL $—

—% Provincial Sales Tax, if any $—

TRADE-IN

Description:

Gross Allowance: $———

Less Amount Owing: $——— Net: $———

PAYMENT TERMS

Balance Payable: (Item 10) $———

Type of instalments: (monthly, weekly, etc.) ———

Number of instalments: ———

Amount of each instalment $———

Amount of final instalment, if different: $———

Instalments payable on: ———

Beginning with: ———

Due date of final instalment ———

Buyer agrees and promises to pay Seller the balance payable under this contract (Item 10) in the manner set out above or in accordance with the annexed payment schedule signed by Buyer and Seller.

DEFAULT AND ARREARS

- Each instalment not paid on the date it is due bears interest at ———% per year
- *If any instalment is not paid when due, the entire balance then owing, at the option of the Seller, will become due and payable and bear interest thereafter at ——— % per annum*

COST OF BORROWING DISCLOSURE

1	(a) Total Cash Selling Price (b) Installation or other charges	$— $—
2	Total Delivered Cash Selling Price (Items (a) plus (b))	$—
3	Down Payment: Cash $——— Trade-in $———	$—
4	Balance of Cash Price (Item 2 less Item 3)	$—
5	Insurance Premium for —— months (based on Cash Selling Price) Describe Coverage:	$—
6	Amount to be financed (Item 4 plus Item 5)	$—
7	Financing Charges—Cost of Borrowing (based on Item 6 above)	$—
8	Annual Rate of Cost of Borrowing (a) ——— % per year (b) $——— per $100 00 per annum	
9	Registration fees for filing Consumer Credit Contract	$—
10	Balance Payable by Buyer by instalments over Time Period (Item 6 plus Items 7 and 8)	$—
11	Aggregate of Price on Time Sale and all costs added thereto (sum of Items 2, 5 and 7)	$—

EXECUTED AT ... this ... day of ... 19

City -Province

SELLER ... BUYER(S) ...

Seller's Trade Name — Buyer's Signature

BY ...

Signature and Title of authorized Official — Buyer's Signature

TERMS AND CONDITIONS

A. Sellers Rights

1. TIME OF ESSENCE: — Buyer agrees that time shall be of the essence and until he has paid the balance payable in full;

(a) *Ownership in Seller Until Paid:* Title in the goods purchased by him shall remain in the Seller;

(b) *Buyer Won't Misuse; Seller May Inspect:* He will not misuse, secrete, sell, encumber, remove or otherwise dispose of the goods, and will permit the Seller to inspect it or them upon demand at reasonable times;

(c) *Property Not to Become Fixture:* The goods will remain a chattel or chattels and will not be attached to realty as a fixture or otherwise;

(d) *On Default Entire Balance Becomes Payable:* Any default under this Contract, including failure to make any payment when due, may, at Seller's option, accelerate all remaining payments, that is the amount of the balance then owing will become fully due and payable by the Buyer

2. ACTION ON DEFAULT: — In the event of the Seller declaring the entire balance due on default by the Buyer, the Seller may:

(a) *Repossess Goods:* Repossess the goods being purchased under the Contract; and

(b) *Sue for Balance:* Concurrently therewith bring suit against the buyer for the balance unpaid.

3. RE SALE BY SELLER ON REPOSSESSION: — After repossession of the goods and concurrently with any suit for the balance unpaid;

(a) *Seller to Hold Goods for 20 days:* The Seller shall hold the goods for 20 days after repossession, and advise the Buyer in writing of his right to redeem the goods on payment of the balance owing and interest due on account of default and proper costs of repossession; and

(b) *Buyer to be Given Notice of Intention to Re-Sell:* The Seller shall give the Buyer at least 5 days written notice, if delivered personally, or 7 days notice if sent by mail, of his intention to re-sell the goods;

after which, and failing the redemption of the goods by the Buyer, the Seller may sell the property by public or private sale The net proceeds of any such sale, when actually received in cash after deducting all costs of repairs and all proper charges and expenses, shall be applied in reduction of the balance unpaid and;

(c) *Buyer Liable for Shortage:* The Buyer shall be liable to the Seller for any deficiency; OR

(d) *Overage Remitted to Buyer:* The Seller shall forthwith remit in cash any excess of the net proceeds to the Buyer

4. BUYER'S OBLIGATIONS CONTINUE: — No transfer, renewal, extension or assignment of this Contract nor any loss, damage to or destruction of the property being purchased shall release Buyer from his obligations hereunder

5. BUYER TO INSURE PROPERTY: — Buyer will keep the goods insured at all times against risk of destruction or damage by fire and by perils commonly included within the definition of extended coverage or will indemnify Seller against loss from any such cause

B. Buyer's Rights

6. BUYER ABSOLUTE OWNER ON PAYMENT OF BALANCE PAYABLE: — Upon payment in full of the balance payable under this Contract (and all other amounts which may be required to be paid to the Seller hereunder) title in the goods being purchased shall vest absolutely and irrevocably in the Buyer.

7. PREPAYMENT PRIVILEGE: REBATING COST OF BORROWING: — The Buyer may at any time prepay the whole of the balance then owing, in which event the Seller shall rebate to him as a credit in reduction of the balance owing:

a. *Rule of 78ths:* That proportion of the cost of borrowing resulting from application to this Contract of the mathematical computation commonly known as "the sum of the digits" or "the rule of 78ths" method; PROVIDED

b. *Additional Retention by Seller:* In addition to any other amount to which the Seller is entitled as a result of computing the rebate amount, the Seller shall be entitled to retain $20.00 or one-half of the rebate, whichever is the lesser amount; AND PROVIDED FURTHER

c. *No Rebate Under $2.00:* Where the rebate required to be given is less than $2.00, the Buyer shall not be entitled to the rebate.

8. NO REPOSSESSION AFTER 2/3 PAID EXCEPT BY JUDGE'S ORDER: — After the Buyer has paid two-thirds (2/3) or more of the Total Delivered Cash Selling Price of the goods set out in Item 2 under COST OF BORROWING DISCLOSURE of this Contract, the Seller may not repossess or re-sell the goods unless the Seller has first obtained a Court Order from a County or District Court Judge authorizing the repossession and/or re-sale.

9. MIS-STATEMENT OF COST OF BORROWING: — If the Seller has misstated the COST OF BORROWING (Financing Charges) in this Contract, either as to amount and/or in the annual percentage rate Items 7 and 8 under COST OF BORROWING DISCLOSURE), the Buyer is not obliged to pay the Seller more than the actual amount calculable as the Cost of Borrowing

FOR B.C., SASKATCHEWAN this Clause would read:

"IF the Seller has misstated the COST OF BORROWING (Financing Charges) in this Contract, either as to amount and/or in the annual percentage rate (Items 7 and 8 under COST OF BORROWING DISCLOSURE), the Buyer is not obliged to pay the Seller more than the BALANCE OF CASH PRICE (Item 1), any amounts paid by the Buyer in excess of which are to be refunded by the Buyer or credited to him forthwith on demand to the Seller;

UNLESS the Seller can establish that such misstatement was due to a *bona fide* error (the onus being on the Seller) in which case:

(a) If the error was not such as to mislead the Buyer as to the essential credit terms of this Contract, the Buyer shall pay the COST OF BORROWING (Financing Charges) agreed to; or

(b) If the error was in stating the amount or annual percentage rate, the Buyer shall pay and the Seller may only recover the lesser of them"

C. General

10 ASSIGNMENT BY SELLER: — This Contract may be assigned by the Seller and if so assigned, the Assignee shall be entitled to all the rights and privileges of the Seller hereunder, and subject to all limitations and obligations of the Seller, including, without limiting the generality hereof, those set out under "BUYER'S RIGHTS"

11. PROMISSORY NOTE IN ADDITION: INDEMNITY TO BUYER: — If Buyer signs a Promissory Note or other negotiable instrument in addition to this Contract, a copy of this Contract shall be delivered to the Assignee along with the assignment of the Promissory Note or other negotiable instrument If, as a result of failure to comply with this provision by the Seller, the assignee of the Promissory Note or other negotiable instrument can recover from the Buyer any amount to which he would not be entitled under this Contract itself (e.g Prepayment Rebate, Mis-statement of Borrowing Costs, etc), the Seller shall and does hereby indemnify the Buyer for all such amounts

12 WARRANTY OR GUARANTEE: — The Warranty or Guarantee given by the Seller to the Buyer and enforceable by the Buyer against the Seller in respect of the goods (and services) is as follows:

13. NON-WAIVER OF BUYER'S RIGHTS UNDER "THE CONSUMER PROTECTION ACT": — This Contract is made and entered into under the provisions of "The Consumer Protection Act" of _____ and is subject to all of its relevant provisions and no waiver or agreement may be made to the contrary The provisions of the said Act shall govern and determine the interpretation and application of this Contract.

14 BUYER AND SELLER TO SIGN: BUYER TO BE GIVEN COPY: — This Contract is not binding on the Buyer unless it is signed by both the Buyer and the Seller AFTER IT HAS BEEN COMPLETELY FILLED-IN, and a duplicate original copy is in the possession of both the Buyer and the Seller;

(15 PROVISION NOT IN EFFECT IN CERTAIN PROVINCES: — Any provision of this Contract prohibited by the law of any Province shall as to that Province be ineffective to the extent of such provision without invalidating the remaining provisions hereof)

ANY QUESTIONS OR MATTER PERTAINING TO THIS CONTRACT OR TRANSACTION SHOULD (MAY) BE REFERRED TO: THE CONSUMER PROTECTION BUREAU, STREET ADDRESS, CITY, TELEPHONE NUMBER

Ottawa 4, Ontario,
May 8th, 1970.

S. D. Turner, Esq,
Director,
Consumer Protection Division,
Department of Financial and Commerical Affairs,
555 Yonge Street,
Toronto 284, Ontario

Dear Mr. Turner:

Thank you for your letter of April 30th and copies of the Standard Form of Contract developed by the Consumer Protection Conference.

I am now exploring with the Commissioners for Ontario the manner in which this request of the Consumer Protection Conference may be brought before the Conference of Commissioners on Uniformity of Legislation in Canada and I shall advise you of any decisions taken in that regard

Yours very truly,

J. W. Ryan,
Secretary.

Encl.

APPENDIX D

(*See page 35*)

TRUSTEE INVESTMENTS

REPORT OF THE QUEBEC COMMISSIONERS

The question of the adoption of the "prudent man" rule has been discussed at every meeting of the Commissioners since 1965. The first draft Act was submitted to the 1967 meeting (1967 Proceedings, p. 27), and was referred back to the Quebec Commissioners with the request that a new draft be prepared; this new draft (1967 Proceedings, p. 239) was duly distributed, but disapprovals were received by the Secretary from more than two jurisdictions prior to November 30, 1967. At the 1968 meeting the draft was again referred back to the Quebec Commissioners (1968 Proceedings, p. 31). A revised draft was submitted to the 1969 meeting (1969 Proceedings, p. 184), and after discussion, was again referred to the Quebec Commissioners with the request that a redraft be prepared in accordance with the changes agreed upon at the meeting. Such redraft was duly circulated, and again disapprovals were registered by two jurisdictions prior to November 30, 1969.

Apart from two relatively minor drafting changes, the draft which is appended follows the draft which was circulated following the 1969 meeting, and is now resubmitted so that the disapproving jurisdictions may comment thereon.

J. K. Hugessen,
for the Quebec Commissioners

August, 1970.

AN ACT TO AMEND THE TRUSTEE ACT

Sections of the Trustee Act are repealed and the following substituted therefor:

1. Unless otherwise authorised or directed by an express provision of the law or of the will or other instrument creating the trust or defining the duties and powers of the trustee,

   (a) in investing money for the benefit of another, a trustee shall exercise the judgment and care which a man of prudence, discretion and intelligence would exercise as a trustee of the property of others; and

   (b) subject to paragraph (a), a trustee is authorised to invest in every kind of property, real, personal or mixed.

2. A trustee may, pending the investment of any trust money, deposit it during such time as is reasonable in the circumstances in any bank or in any trust company, loan corporation or other corporation empowered to accept moneys for deposit which has been approved for such purpose by the Lieutenant Governor in Council.

3. Sections 1 and 2 apply to trustees acting under trusts arising before or after the coming into force of this Act.

APPENDIX E

(*See page 35*)

AN ACT TO AMEND THE TRUSTEE ACT

RECOMMENDED FOR ENACTMENT BY THE
CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF
LEGISLATION IN CANADA

Sections of the Trustee Act are repealed and the following substituted therefor:

1. Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining his powers and duties, he may invest trust money in any kind of property, real, personal or mixed, but in so doing, he shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise as a trustee of the property of others.

2. A trustee may, pending the investment of any trust money, deposit it during such time as is reasonable in the circumstances in any bank or trust company or in any other corporation empowered to accept moneys for deposit which has been approved for such purpose by the Lieutenant Governor in Council.

3. Sections 1 and 2 apply to trustees acting under trusts arising before or after the coming into force of this Act.

APPENDIX F

(*See page 35*)

FAMILY RELIEF ACT

REPORT OF THE SASKATCHEWAN COMMISSIONERS

At the 1969 Conference, the following resolution was adopted:

Resolved that the matter (proposed new draft Family Relief Act) be referred back to the Saskatchewan Commissioners for a further report at the next meeting of the Conference with a draft giving effect to the decisions made at this meeting (see page 26 of the 1969 Proceedings).

In accordance with this resolution the Saskatchewan Commissioners have prepared a second draft which is attached hereto and marked "Schedule A".

Except for a few drafting changes, some of which were suggested at the 1969 Conference, and the incorporation of the policy changes decided upon at that Conference, the draft is essentially the same as that presented at the 1969 Conference.

As you will recall, the last section of the draft, which is designed to prevent a person from evading the policy of the Act, deals with recapture and was not discussed in detail at the 1969 Conference. The matter was left with the Saskatchewan Commissioners in order that the work of the Alberta Institute of Law Research and Reform in this regard, be made known to the Saskatchewan Commissioners.

With the sanction of Mr W. F. Bowker, Director of the Alberta Institute, we are attaching hereto as "Schedule B" a memorandum which relates to a different approach in preventing a person from circumventing the policy of family relief legislation.

We expect that the Conference will be interested in considering the two approaches and accordingly have done nothing further in this matter until such time as the Conference has discussed it.

Respectfully submitted,
W. G. Doherty
G. C. Holtzman
J G. McIntyre
R. S. Meldrum
R. L. Pierce

The Saskatchewan Commissioners.

SCHEDULE A

DRAFT

FAMILY RELIEF ACT

1. This Act may be cited as *The Family Relief Act.* — Short title

2. In this Act: — Interpretation

(a) "child" includes: — "child"

*(i) a child adopted by the deceased; and

(ii) a child of the deceased *en ventre sa mere* at the date of the deceased's death;

(b) "deceased" means a testator or a person dying intestate; — "deceased"

(c) "dependant" means: — "dependant"

(i) the widow or widower of the deceased;

(ii) a child of the deceased who is under the age of years at the time of the deceased's death; or

(iii) a child of the deceased who is years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood;

(d) "judge" means a judge of ; — "judge"

(e) "order" includes a suspensory order; — "order"

*(f) "will" includes a codicil. — "will"

*(*Note*)—(a)(i) is not required in those jurisdictions in which legislation is in force providing that an adopted child has all the rights of a natural child. (See page 135 of 1969 proceedings).

—(f) is not required where the term is defined in the jurisdiction's *Interpretation Act.*

3. (1) Where a person: — Order for maintenance and support

(a) dies testate without making in his will adequate provision for the proper maintenance and support of his dependants or any of them; or

(b) dies intestate as to the whole or any part of his estate and the share under *The Intestate Succession Act* of the deceased's dependants or of any of them in the estate is inadequate for their proper maintenance and support;

a judge, on application by or on behalf of the dependants or any of them, may, notwithstanding the provisions of the will or *The Intestate Succession Act,* order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

(2) A judge, on application by or on behalf of the dependants or any of them, may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the deceased's estate, in order that application may be made at any subsequent date for an order making specific provision for maintenance and support.

Application

4. An application under this Act may be made by originating notice of motion (*or* summons) in the matter of the estate of the deceased.

Certain powers of judge

5. (1) The judge, upon the hearing of an application under this Act:

(a) may inquire into and consider all matters that he deems should be fairly taken into account in deciding upon the application;

(b) may in addition to the evidence adduced by the parties appearing direct such other evidence to be given as he deems necessary or proper;

(c) may accept such evidence as he deems proper of the deceased's reasons, so far as ascertainable:

(i) for making the dispositions made by his will,

or

(ii) for not making adequate provision for a dependant, including any statement in writing signed by the deceased; and

(d) may refuse to make an order in favour of any dependant whose character or conduct is such as, in the opinion of the judge, disentitles the dependant to the benefit of an order under this Act.

(2) In estimating the weight to be given to a statement referred to in clause (c) of subsection (1), the judge shall have regard to all the circumstances from which any inference can

reasonably be drawn as to the accuracy or otherwise of the statement.

Conditions and restrictions

6. (1) The judge, in any order making provision for maintenance and support of a dependant, may impose such conditions and restrictions as he deems fit.

(2) The judge may order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper.

(3) Provision may be made out of income or corpus or both and may be made in one or more of the following ways, as the judge deems fit:

(a) an amount payable annually or otherwise;

(b) a lump sum to be paid or held in trust;

(c) any specified property to be transferred or assigned, absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant.

(4) Where a transfer or assignment of property is ordered, the judge

(a) may give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the judge may direct; or

(b) may grant a vesting order.

Inquiries and further orders

7. Where an order has been made under this Act, a judge at any subsequent date may,

(a) inquire whether the dependant benefited by the order has become possessed of, or entitled to, any other provision for his proper maintenance or support,

(b) inquire into the adequacy of the provision ordered; and

(c) discharge, vary or suspend the order, or make such other order as he deems fit in the circumstances.

Further powers of judge

8. A judge at any time

(a) may fix a periodic payment or lump sum to be paid by a legatee, devisee or beneficiary under an intestacy to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested;

(b) may relieve such portion of the estate from further liability; and

(c) may direct:

(i) the manner in which such periodic payment is to be secured; or

(ii) to whom such lump sum is to be paid and the manner in which it is to be dealt with for the benefit of the person to whom the commuted payment is payable.

Distribution stayed

9. (1) Where an application is made and notice thereof is served on the executor, administrator or trustee of the estate of the deceased, he shall not, after service of the notice upon him, proceed with the distribution of the estate until the judge has disposed of the application.

(2) Nothing in this Act prevents an executor, administrator or trustee from making reasonable advances for maintenance and support to dependants who are beneficiaries.

(3) An executor, administrator or trustee who disposes of or distributes any portion of an estate in violation of subsection (1) is, if any provision for maintenance and support is ordered by a judge to be made out of the estate, personally liable to pay the amount of the provision to the extent that the provision or any part thereof, pursuant to the order or this Act, ought to be made out of the portion of the estate disposed of or distributed.

Incidence of provision ordered

10 The incidence of any provision for maintenance and support ordered shall fall rateably

(a) unless the judge otherwise determines, upon the whole estate of the deceased; or

(b) where the jurisdiction of the judge does not extend to the whole estate, upon that part of the estate to which the jurisdiction of the judge extends;

and the judge may relieve any part of the deceased's estate from the incidence of the order.

Effect of order

11. (1) An order made under this Act has, for all purposes, including the purpose of any enactment relating to succession duties, effect on and from the date of the deceased's death, and the will, if any, has effect from that date as if it had been executed with such variations as are necessary to give effect to the provisions of the order.

(2) Her Majesty is bound by the provisions of this section.

Further directions

12. A judge may give such further directions as he deems fit for the purpose of giving effect to an order.

Certified copy of order filed with the clerk of the court

13. (1) A certified copy of every order made under this Act shall be filed with the clerk of the court out of which the letters probate or letters of administration issued.

(2) A memorandum of the order shall be endorsed on or annexed to the copy, in the custody of the clerk, of the original letters probate or letters of administration, as the case may be.

Limitation period

14. (1) Subject to subsection (2), no application for an order under section 3 may be made except within six months from the grant of probate of the will or of administration.

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

Application on behalf of dependants

15. Where an application for an order under section 3 is made by or on behalf of any dependant.

(a) it may be dealt with by the judge as; and

(b) in so far as the question of limitation is concerned, it shall be deemed to be;

an application on behalf of all dependants who might apply.

Property devised or bequeathed under contract

16. Where a deceased

(a) has, in his lifetime, *bona fide* and for valuable consideration, entered into a contract to devise and bequeath any property real or personal; and

(b) has by his will devised and bequeathed that property in accordance with the provisions of the contract;

the property is not liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the deceased therefor.

Validity of mortgage, etc.

17. Where provision for the maintenance and support of a dependant is ordered pursuant to this Act, a mortgage, charge or assignment of or with respect to such provision, made before the order of the judge making such provision is entered, is invalid

Agreements to waive Act null and void

18. An agreement by or on behalf of a dependant that this Act does not apply or that any benefit or remedy provided by it is not to be available, is null and void.

Appeal

19. An appeal lies to the (court) from any order made under this Act.

Enforcement

20. (1) An order or direction made under this Act may be enforced against the estate of the deceased in the same way and by the same means as any other judment or order of the court against the estate may be enforced.

(2) A judge may make such order or direction or interim order or direction as may be necessary to secure to the dependant out of the estate the benefit to which he is found entitled.

Value of certain transactions deemed part of estate

21. (1) Subject to section 16, for the purposes of this Act, the capital value of the following transactions effected by a deceased before his death, whether benefiting his dependants or any other person, shall be treated as testamentary dispositions as of the date of the death of the deceased and be included in his net estate:

(a) gifts *mortis causa*,

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants with right of survivorship or as tenants by the entireties;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in con-

junction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof; but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V of *The Insurance Act*.

(2) The capital value of the transactions referred to in clauses (b), (c) and (d) of subsection (1) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entireties was furnished by the deceased; and the dependants claiming under this Act shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased; and where the other party to a transaction described in clause (c) or (d) is a dependant, such dependant shall have the burden of establishing the amount of his contribution, if any.

(3) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on such corporation or person a certified copy of a suspensory order under subsection (2) of section 3 enjoining such payment or transfer; and personal service upon the corporation or person holding any such fund or property of a certified copy of such suspensory order shall be a defense to any action or proceeding brought against the corporation or person with respect to the fund or property during the period such order is in force and effect.

(4) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

SCHEDULE B

THE INSTITUTE OF LAW RESEARCH AND REFORM

THE UNIVERSITY OF ALBERTA
EDMONTON, ALBERTA, CANADA

February 19, 1969.

Re FAMILY RELIEF ACT

The Board of the Institute of Law Research and Reform, on 13th February, 1969, agreed to undertake a study of two matters referred to it in connection with the Family Relief Act.

(1) *Whether the Act should be extended to illegitimate children and other children to whom the deceased was in loco parentis (provided, of course, that they are dependants) and also to a divorced wife,* at least where she had the benefit of a maintenance order at the time of her deceased husband's death. Incidentally, the effect of death of either party to a maintenance order is discussed in *Reg. v. Murphy* 1 D.L.R. (3d) 455 (1969 B.C.C.A.). That case had to do with a maintenance order in favour of a child but may have some relevance. An amendment to the Family Relief Act presumably would not be necessary in favour of a divorced wife if under present law the original order remains effective on the ex-husband's death. I am assuming that it is not so effective now, though I have not run down the point.

(2) *Whether the Act can be amended to prevent evasions.* The specific case referred to us is *Collier v Yonkers* 61 W.W.R. 761, a judgment of our Appellate Division. A related case is the judgment of Riley J. in *Re Dower*, discussed below. Both these cases dealt with absolute dispositions, one by way of outright gift and the other by way of irrevocable *inter vivos* trust. The discussion below shows that there is another large class of disposition which under present law is effective to remove the property from the estate and hence from the jurisdiction of the court under the Family Relief Act. This is the *incomplete disposition*; that is to say, a disposition which leaves the husband with a substantial degree of control over or interest in the property.

As appears from the discussion below, it is easier to deal with the second category than the first, *but it seems desirable to try to include both if practicable, and I set out below a means by which this might be done*

The purpose of this memorandum is to invite study and criticism of the suggestions made below.

An examination of (1) would be manageable. The *illegitimate is now being up-graded generally*, and two provinces already include him in their Family Relief legislation: British Columbia and Nova Scotia (See Bale, Limitation on Testamentary Disposition in Canada, 42 Can. Bar Rev. 367 at 375). In the Antipodes there is legislation including illegitimates and also a divorced wife, where a maintenance order existed in her favour (see Wright, Testator's Family Maintenance in Australia and New Zealand, 2 Ed 1966 at 9-10, 19 and preface vii, viii)

Turning now to the second problem, I propose to go into it in detail because of the work that the Uniformity Conference has done on the subject. I shall have occasion to refer to an excellent American study, Macdonald, Fraud on the Widow's Share (1960), hereinafter called "Macdonald" and perhaps to Wright, cited above.

It is possible for a husband to circumvent the policy of the Act by getting rid of his assets in his lifetime. (I shall speak of the husband though our Act works both ways except on intestacy.) This can be done either by *outright disposition* (including irrevocable trust) *or by various devices short of outright disposition* whereby the husband retains control of the assets *but yet has dealt with them in such a way that they are not part of his estate at death.*

The Judgment of Riley J. in *Re Dower*, 35 D.L.R. (2d) 29 (1962) illustrates the outright gift. *Collier v. Yonkers* is analogous in that it illustrates the irrevocable trust. In that case, the wife set up a trust of $100,000, the income payable to herself for life and the capital to go on her death to her children. She died over four years later with an estate of about $4,000. The husband argued that the trust was part of the estate but the Appellate Division held it was not.

I might note here that Alberta's Act, like Ontario, has a provision not found in the Uniform Act or in most Acts. This provision defines "will" to include "any will, codicil or other instrument or act by which a testator so disposes of real or personal property or any interest therein that the property or interest will pass on his death to some other person". *This seems to be an effort to catch various devices such as the revocable*

trust, the joint bank account and the declaration in favour of an ordinary beneficiary under an insurance policy However, the cases say that although such acts or instruments may be a will, the property which they pass is not a part of the estate Thus the extended definition of "will" is a dead letter

Re Naylor [1940] 1 D.L.R. 716 (Ont.)

Re Young [1955] O.W.N. 789

Dumoulin v. *Dumoulin*, unreported (17 Can. Bar Rev. 233 at 237-8).

Kerslake v. *Gray* [1957] S.C.R. 516

Collier v. *Yonkers, supra*

It is relevant to note the different devices that testators have used to circumvent the wife's claim. They can be divided into two categories. I have already mentioned the first, in which the husband divests himself of all interest in the property, such as the outright gift and the irrevocable trust. In the second category he retains "substantial control" over the property

The number of reported Canadian, Australian and New Zealand cases on evasions is not large. I have found none from England under its 1938 Act In the Antipodes the problem is recognized as a genuine one. In 1953, the Minister of Justice of New Zealand wrote Macdonald (p. 297) that New Zealand has not "been indifferent to the problem. The only reason why nothing has been done to amend the legislation is that *we have not succeeded in devising a practical method of avoiding disposition made to defeat claims without causing as many anomalies and injustices as are cured.* The question was last considered a year or so ago by our Law Revision Committee which decided that no practical remedy was possible." In 1955 New Zealand revised its Act but only to the extent of including a *donatio mortis causa* (sec 2(5), Wright at 236).

The reported cases consider the following types of disposition and, in every case, the property has been held not to be part of the estate·

A policy of insurance where the beneficiary is a preferred beneficiary.

Re Dalton & Macdonald [1938] 2 D.L.R. 798 (B.C.C.A.)

A policy of insurance even where the beneficiary is an ordinary beneficiary.

Kerslake v. *Gray, supra.*

Nomination of niece as beneficiary of two pension funds.

Re Young, supra.

An assignment of a policy of insurance by the insured to his secretary.

Re Naylor [1940] 1 D.L.R. 716 (Ont.)

A transfer of land by a testator to himself and his housekeeper in joint tenancy. Gillanders J.A. treated the husband as owning an undivided half interest in the land at his death. I doubt that this is correct.

Olin v. *Perrin* [1946] 2 D.L.R. 461 (Ont. C.A.)

A transfer of land and of a bank account by testator to himself and his wife jointly. She did not have to bring them into account when she applied for relief.

Re Maxwell 38 W.W.R. 23 (Sask.)

A gift of money by the testator, evidenced by an instrument in writing. Although the instrument may have been a will within the extended definition, the property was not property passing at death.

Dumoulin v. *Dumoulin, supra*

A deposit of money in the name of the testator in trust for his daughter and a like deposit for his son. Held, the bank accounts may be taxable on death but are not part of the estate for present purposes because they are property settled by the testator in his lifetime.

Re Paulin [1950] Victoria Law Reports 462.

Outright gift of farm and livestock to one of four children, made three months before death. This is the case which holds that a dependant cannot invoke the Statute of 13 Elizabeth and which Riley J. followed in *Re Dower.*

Re Thomson [1933] N.A. Law Reports Supplement 59.

In the United States, almost every conceivable device has been used to cut down the widow's statutory share: bank accounts in trust, joint bank accounts, joint property, revocable

trusts, designation of beneficiaries of insurance and pensions, *inter vivos* gifts (perhaps incomplete or colourable), promises to pay without consideration etc. Macdonald's discussion is exhaustive.

I shall now describe the efforts of the Uniformity Conference to deal with the problem of evasion.

(1) When *Re Dower* came before the Conference (1964 Proc 86) it was referred to the Alberta Commissioners for report

(2) The Alberta Commissioners reported as follows (1965 Proc. 113).

> While we are satisfied that the decision is legally correct, we do have sympathy for a dependant in the position of Mrs Dower. The question is, can any fair and workable legislative solution be found? It would be unacceptable to provide that a person cannot dispose of all or any of his property without the consent of his "dependants" Such a provision would require legislation embodying the principles of *The Bulk Sales Act* Any such legislation would cause much inconvenience if obeyed and could easily be evaded We also doubt if there would be very many cases of this nature It is, therefore, our opinion that no consideration be given to altering The Testators Family Maintenance Act because of this decision

I think the Alberta Commissioners (including myself) gave up too easily. We were thinking in terms of a provision to set aside absolute gifts; in other words, to "recapture" the assets, with all the difficulties of tracing and hardship to the donee.

The Conference disposed of the Alberta Report as follows. "The subject was referred to Dean Leal (of the Ontario Commissioners) with a request that he draft an amendment to the Act for discussion at the next meeting of the Conference." (1965 Proc. 34.)

(3) In 1966 Dean Leal reported as follows· (1966 Proc. 103),

> The solution to this problem would appear to lie in recapturing part or all of the testator's estate in a proper case by inserting in the Act a definition of "estate" which would extend its usual meaning to include property disposed of by the testator by way of absolute gift within a given period prior to his death; to bring into his estate property over which he had the power of disposition at his death; and specifically to bring back into the estate the assets of revocable *inter vivas* trusts and the proceeds of life insurance policies subject, at his death, to a revocable beneficiary designation; and property disposed of by the deceased within a given period prior to his death for partial consideration to the extent that the value of the property at the date of the disposition exceeds the consideration paid or to be paid.

All of these interests are deemed to be property passing on the death of the testator for the purpose of estate taxation and succession duties and, adopting the wording of the *Estate Tax Act,* the relevant provisions would read as follows:

"2(ba) 'estate' means the property owned by the deceased at the date of his death and includes, without restricting the generality of the foregoing,

(i) all property of which the deceased was, immediately prior to his death, competent to dispose;

(ii) property disposed of by the deceased under a disposition operating or purporting to operate as an immediate gift *inter vivos,* whether by transfer delivery, declaration of trust or otherwise made within *three years* prior to his death;

(iii) property comprised in a settlement whenever made, whether by deed or any other instrument not taking effect as a will, whereby the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to redeem the absolute interest in the property;

(iv) property disposed of by the deceased under any disposition made within *three years* prior to his death for partial consideration in money or money's worth paid or agreed to be paid to him to the extent that the value of such property as of the date of such disposition exceeds the amount of the consideration so paid or agreed to be paid;

(v) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V of *The Insurance Act,* Revised Statutes of Ontario, 1960, c. 190, as amended by 1961-62, c 63."

The foregoing five heads correspond closely to the Estate Tax Act, Sec 3(1)(a), (c), (e), (g), (m).

In a supplementary report, Dean Leal reported that the New South Wales Law Reform Commission was considering a similar proposal and also an alternative whereby the Court might set aside or restrain dispositions made for the purpose of defeating an existing or anticipated order under the Act (1966 Proc. 105).

The Conference asked the Ontario Commissioners to "make a further study and report with a Draft Act for consideration at the next meeting" (1966 Proc. 22).

(4) In 1967, the Ontario Commissioners reported (1967 Proc. 219). They withdrew their specific suggestions of 1966.

> "The specific provisions suggested for implementing the recommendations contained in the Report of August 2, 1966 and those of the Supplementary Report of the same date have been rejected to this draft. The former are too broad inasmuch as they make reference to classes of property which would be administratively difficult to recapture and the latter because they would apply only to dispositions made or proposed to be made to defeat the policy of the Act The above draft is based upon the amendments to The Decedent Estate Laws (New York) by Laws of New York, 1965, c 665 dealing with the similar problem of bolstering the surviving spouse's elective right."

Ontario's new proposal did not cover property that the testator had absolutely given away in his lifetime. It was confined to a variety of dispositions or devices whereby the testator retained some control over the property until his death. The proposed Amendment covers:

(a) gifts *mortis causa;*

(b) money deposited, together with interest thereon, in an account in the name of the testator in trust for another or others with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the testator;

(c) money deposited, together with interest thereon, in an account in the name of the testator and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of such persons with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the testator;

(d) any disposition of property made by a testator whereby property is held at the date of his death by the testator and another as joint tenants with right of survivorship or as tenants by the entireties;

(e) any disposition of property made by the testator in trust or otherwise, to the extent that the testator at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof. The provisions of this subsection shall not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the testator;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V of *The Insurance Act,* Revised Statutes of Ontario, 1960, c 190, as re-enacted by Statutes of Ontario, 1961-62, c. 63.

The New York law of 1965 from which this is taken does not include clause (f). The New York law is attached to this memo as Appendix A.

In discussing the Ontario Report, the Conference thought all insurance should be included under clause (f) even where the beneficiary is irrevocably designated. (1967 Proc. 26.) The Conference then resolved "that the matter be referred to the P.E.I. Commissioners for incorporation in the Draft Revision or Draft Amendments which they are to prepare for the next meeting of the Conference". (1967 Proc. 26) (P.E.I. had undertaken another problem in connection with the Uniform Act, namely to consider its extension to intestacy (1967 Proc. 24).

(5) In 1968 the P.E.I. Commissioners presented their report. It brings forward the amendment proposed by Ontario in 1967, including the exception respecting irrevocably designated beneficiaries. I recal no discussion of the Draft and the Proceedings for 1968 are not yet published. However, the Secretary of the Conference on 24th January confirmed my memory that the subject had been referred to the Saskatchewan Commissioners for further study and report. There the matter stands.

May I now set out my ideas as to the form an Amendment should take. I agree with the general lines of the proposal now before the Uniformity Conference. *However, I do not think we should abandon the effort to deal with outright gifts. The solution does not lie in setting them aside but rather in making the donee partly responsible for the maintenance of the dependant,* assuming the dependant is entitled to maintenance and it cannot be provided out of the estate *strictu sensu.*

The most helpful proposal I have seen is that of Macdonald. *His Model Act* (Chapter 22) is too long to set out here. The provisions designed to prevent evasion provide that *if the estate is insufficient to provide for appropriate maintenance, then the Court may order a transferee of property to contribute to that maintenance. He is obliged to do so only if the transfer to him was unreasonably large.* The Draft Act then sets out criteria of an unreasonably large transfer.

This Model Act does not contain any long list of specific transactions but rather defines transfer in a way that includes "gift, gift causa mortis, revocable or irrevocable trust, creation

of any joint interest, contract to make a will, and any contract, such as life insurance under which the decedent purchased benefits payable at his death."

In connection with outright gifts, there is a cutoff of gifts made more than three years before death and in the case of gifts in which the deceased did retain a substantial beneficial interest, the cutoff date is ten years before death

If we do not adopt some such proposal as Macdonald's but confine ourselves to the Draft now before the Uniformity Conference, the transactions in *Re Dower* and *Collier* v *Yonkers* are not affected at all. Indeed if we do adopt his proposal the transactions in both of these cases may still be outside Macdonald's proposal because the transactions, at least in part, were before the cutoff date.

It is legitimate to ask—why did New York, after years of study, confine its provisions to dispositions over which the testator kept control until death, excluding outright gifts and irrevocable trusts? The answer, I think, lies in the fact that under New York law the widow has an election between her statutory share and the will. In a scheme of this kind the legislature cannot reach property which the testator has put out of his control unless it sets aside the gift or trust This is a rather drastic step as everyone recognizes Macdonald's Model Act, on the other hand, is like the Commonwealth Statutes, which do not give the widow an election between the will and her statutory share (save for Manitoba). They provide for *maintenance* for the widow and are flexible. *The principle of Macdonald's proposal is this: if there is not enough money in the estate to provide maintenance, the Court may reach dispositions made before death, including absolute dispositions, to the extent of saying that the donee must contribute to the widow's maintenance* Thus in *Re Dower,* the gifts would not be set aside but the donees might be ordered to secure to the widow monthly payments fixed by the Court. This is not a "recapture" of assets and assures maintenance to the wife without undue disruption of the donee's affairs.

W. F. Bowker,
Director.

APPENDIX A

CHAPTER 665

An Act to amend the decedent estate law and the surrogate's court act, in relations to the right of election of surviving spouse.

Approved July 2, 1965, effective September 1, 1966.

The People of the State of New York, represented in Senate and Assembly, do enact as follows.

Section 1. The decedent estate law is hereby amended by inserting therein two new sections, to be sections eighteen-a and eighteen-b to read, respectively, as follows:

§ 18-a. Testamentary provisions

1. Where a person dies, after August thirty-first, nineteen hundred sixty-six and leaves a surviving spouse who exercises a right of election pursuant to section eighteen-b of this chapter, the following transactions effected by such decedent at any time after the date of the marriage and after August thirty-first, nineteen hundred sixty-six, whether benefiting the surviving spouse or any other person, shall be treated as testamentary provisions and the capital value thereof, as of the date of death of the decedent, shall be included in the net estate for the surviving spouse's elective right:

(a) Gifts *causa mortis*

(b) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in a savings account in the name of the decedent in trust for another or others with a banking organization, savings and loan association, foreign banking corporation or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of death of the decedent.

(c) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in the name of the decedent and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivors or survivor of such persons, with a banking organization, savings and loan association, foreign banking corporation or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of death of the decedent.

(d) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six whereby property is held at the date of his death by the decedent and another or others as joint tenants with right of survivorship or as tenants by the entirety.

(e) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invade or dispose of the principal thereof. The provisions of this section shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death.

2. Nothing in this paragraph shall affect, defeat or impair the right of any person entitled to receive (a) payment in money, securities or other property under a pension, retirement, death benefit, stock bonus or profit sharing plan, system or trust or (b) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance, or a contract by such insurer relating to the payment of proceeds or avails thereof or (c) payment of any United States savings bond payable to a designated person.

3. Transactions described in paragraphs (c) or (d) of subdivision one of this section shall be treated as testamentary provisions under this section to the extent that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entirety was furnished by the decedent. The surviving spouse shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the decedent. Where the other party to a transaction described in paragraphs (c) or (d) is a surviving spouse, such spouse shall have the burden of establishing the amount of his contribution, if any, and for the purpose of this subdivision, the surrogate's court may accept such evidence as is relevant and conpetent, whether or not the person offering such evidence would otherwise be competent to testify in the absence of this section.

4. The provisions of this section shall not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been served personally upon such corporation or person a certified copy of a temporary order enjoining such payment or transfer made pursuant to this subdivision by the surrogate's court having jurisdiction of the estate of the decedent or another court of competent jurisdiction. Personal service upon the corporation or person holding any such fund or property of a certified copy of such temporary order shall be a defense to any action or proceeding brought against such corporation or person with respect to the fund or property during the period such order is in force and effect. Upon application of the surviving spouse or other interested party and upon proof that the surviving spouse has, pursuant to subdivision six of section eighteen-b of this chapter, exercised his right of election, the court having jurisdiction of the estate of the decedent or other court of competent jurisdiction may make such temporary order. Unless the court in its discretion shall dispense therewith, notice of such application shall be given to such persons and in such manner as the court in its discretion may determine.

APPENDIX G

(*See page 36*)

HUMAN TISSUE ACT

Report of the Ontario Commissioners

The following minute appears on page 29 of the 1969 Proceedings:

> "Mr MacTavish brought the Conference up to date on the studies being made in this field It was indicated that some time in the Spring of 1970 the Committee on Human Organ Transplants of the Medico-Legal Society of Toronto hopes to produce a new draft Act.
>
> It was resolved that the Ontario Commissioners report at the next meeting on the progress of the Medico-Legal Committee with a draft attached if thought appropriate"

The Committee, which was composed of Horace Krever, Esq., Q.C., (Chairman), Dr. Gerald T. Cook, Dr. H. B. Cotnam, Dr. Kenneth G. Gray, Q.C., Dr. James A. Key, P. S. A. Lamek, Esq., H. Allan Leal, Esq., Q.C., L. R. MacTavish, Esq., Q.C., and Dr. T. P. Morley, held some ten meetings from April, 1969 into April, 1970.

In addition, the Committee held meetings with the president and representatives of the Ontario Medical Association and finally with the Council of the Medico-Legal Society of Toronto. While the O.M.A., the Council and the Committee were not in complete agreement on all points, a remarkable degree of unanimity prevailed and a number of suggestions that arose from these discussions were adopted by the Committee and incorporated in the draft Act.

On May 4, 1970, the final draft was transmitted by the President of the Medico-Legal Society, Dr. T. P. Morley, F.R.C.S., to the Minister of Health for Ontario at the latter's request.

A copy of this draft Act is attached to this Report as Schedule A.

As a matter of convenience to the members of this Conference, the medico-legal literature on transplants that the Committee had before it during its deliberations is listed in Schedule B.

Schedule C lists the various statutes, regulations, etc., that the Committee had at hand for reference purposes during its studies.

It would appear that insufficient time was available, having regard to more pressing business, for the Government of Ontario to consider this proposed measure before the Legislature adjourned on June 26th for the summer recess.

We are hopeful that the matter will move forward at the Autumn sittings of the House.

Respectfully submitted.

H. Allan Leal

Lachlan MacTavish

of the Ontario Commissioners

Toronto,

July 1, 1970.

SCHEDULE A

THE HUMAN TISSUE GIFT ACT, 1970

EXPLANATORY NOTE

The first purpose of this Bill is to facilitate transplants of organs, etc., from a living human body to another living human body or from a dead human body to a living human body for the therapeutic benefit of the recipient.

The second purpose is to facilitate the disposition of dead human bodies or parts thereof for medical education or scientific research.

The Bill is designed to achieve these objects by broadening the scope of *The Human Tissue Act, 1962-63* and up-dating its provisions, thus bringing the law into line with recent medical and scientific developments and the consequent acceleration of public interest in this field.

Arrangement

An Act to facilitate the Making of *Inter-Vivos* and *Post-Mortem* Gifts of Human Tissue

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

(a) "consent" means a consent given under this Act;

R.S.O. 1960, c. 234

(b) "physician" means a person registered under *The Medical Act*;

(c) "tissue" includes an organ, but does not include skin, bone, blood, blood constituent or any other tissue that is replaceable by natural processes of repair;

(d) "transplant" as a noun means the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings;

(e) "writing" for the purposes of Part II includes a will and any other testamentary instrument whether or not probate has been applied for or granted and whether or not the will or other testamentary instrument is valid.

PART I—*INTER-VIVOS* GIFTS FOR TRANSPLANTS

Transplants under Act are lawful

2. A transplant from one living human body to another living human body may be done in accordance with this Act, but not otherwise.

Consent for transplant

3. (1) Any person who has attained the age of majority, who is mentally competent to consent, and who is able to make a free and informed decision may in a writing signed by him consent to the removal forthwith from his body of the tissue specified in the consent and its implantation in the body of another living person.

Consent of person under age, etc.

(2) Notwithstanding subsection 1, a consent given thereunder by a person who had not attained the age of majority, who was not mentally competent to consent, or who was not able to make a free and informed decision is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority, was not mentally competent to consent, or was not able to make a free and informed decision, as the case may be.

Consent is full authority to proceed

(3) A consent given under this section is full authority for any physician,

(a) to make any examination necessary to assure medical acceptability of the tissue specified therein; and

(b) to remove forthwith such tissue from the body of the person who gave the consent.

Stale consent void

(4) If for any reason the tissue specified in the consent is not removed in the circumstances to which the consent relates, the consent is void.

PART II—*POST MORTEM* GIFTS FOR TRANSPLANTS AND OTHER USES

Consent by person for use of his body after death

4. (1) Any person who has attained the age of majority may consent,

(a) in a writing signed by him at any time; or

(b) orally in the presence of at least two witnesses during his last illness,

that his body or the part of parts thereof specified in the consent be used after his death for therapeutic purposes, medical education or scientific research.

Where donor under age

(2) Notwithstanding subsection 1, a consent given by a person who had not attained the age of majority is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority.

Consent is full authority, exception

(3) Upon the death of a person who has given a consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts for the purpose specified, except that no person shall act upon a consent given under this section if he has reason to believe that it was subsequently withdrawn.

Consent by spouse, etc., for use of body after death

5. (1) Where a person of any age who has not given a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and his death is imminent,

(a) his spouse of any age; or

(b) if none or if his spouse is not readily available, any one of his children who has attained the age of majority; or

(c) if none or if none is readily available, either of his parents; or

(d) if none or if neither is readily available, any one of his brothers or sisters who has attained the age of majority; or

(e) if none or if none is readily available, any other of his next of kin who has attained the age of majority; or

(f) if none or if none is readily available, the person lawfully in possession of the body other than, where he died in hospital, the administrative head of the hospital; or

(g) if none or if none is readily available and he died in hospital, the administrative head of the hospital,

may consent,

(h) in a writing signed by the spouse, relative or other person; or

(i) orally by the spouse, relative or other person in the presence of at least two witnesses; or

(j) by the telegraphic, recorded telephonic, or other recorded message of the spouse, relative or other person,

to the body or the part or parts thereof specified in the consent being used after death for therapeutic purposes, medical education or scientific research.

Consent is full authority, exceptions

(2) Upon the death of a person in respect of whom a consent was given under this section, the consent is binding and is, subject to section 6, full authority for the use of the body or for the removal and use of the specified part or parts for the purpose specified, except that no person shall act on a consent given under this section if he has actual knowledge of an objection thereto by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent.

Person lawfully in possession of body, exceptions

(3) In subsection 1, "person lawfully in possession of the body" does not include,

(a) the supervising coroner or a coroner in possession of the body for the purposes of *The Coroners Act*; R S O 1960, c. 69

(b) the Public Trustee in possession of the body for the purpose of its burial under *The Crown Administration of Estates Act*; R S O. 1960, c. 80

(c) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or

(d) the superintendent of a crematorium in possession of the body for the purpose of its cremation.

Coroner's direction

6. Where in the opinion of a physician the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section 7, 21 or 22 of *The Coroners Act* R.S.O 1960, c 69 may apply when death does occur and a consent under this Part has been obtained for a *post mortem* transplant of tissue from

the body, a coroner having jurisdiction, notwithstanding that death has not yet occurred, may give such directions as he thinks proper respecting the removal of such tissue after the death of the person, and every such direction has the same force and effect as if it had been made after death under section 8 of *The Coroners Act*.

R.S.O. 1960, c. 69

Determination of death

7. (1) For the purposes of a post-mortem transplant, the fact of death shall be determined in accordance with accepted medical practice by at least two physicians.

Prohibition

(2) No physician,

(a) who takes any part in the determination of the fact of death of the donor; or

(b) who has had any association with the proposed recipient that might influence his judgment,

shall participate in any way in the transplant procedures

Exception

(3) Nothing in this section in any way affects a physician in the removal of eyes for cornea transplants.

Where specified use fails

8. Where a gift under this Part cannot for any reason be used for any of the purposes specified in the consent, the subject matter of the gift and the body to which it belongs shall be dealt with and disposed of as if no consent had been given.

Lawful dealings not affected

9. Nothing in this Part makes unlawful any dealing with a body or part or parts thereof for any of the purposes of this Act that would have been lawful if this Act had not been passed.

PART III—GENERAL

Civil liability

10. No action or other proceedings for damages shall be instituted against any person for any act done in good faith and without negligence in the exercise or intended exercise of any authority conferred by this Act.

Sale, etc., of tissue prohibited

11. No person shall buy, sell or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant or any body or part or parts thereof, other than blood or a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.

12. (1) Except where legally required, no person shall disclose or give to any other person any information or document whereby the identity of any person, Disclosure of information

(a) who has given or refused to give a consent;

(b) with respect to whom a consent has been given; or

(c) into whose body tissue has been, is being or may be transplanted.

may become known publicly.

(2) Where the information or document disclosed or given pertains only to the person who disclosed or gave the information or document, subsection 1 does not apply. Exception

13. Every person who knowingly contravenes any provision of this Act is guilty of an offence and on summary conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than six months, or to both. Offence

14. Except as provided in section 6, nothing in this Act affects the operation of *The Coroners Act* R.S.O. 1960, c. 69 not affected

PART IV—MISCELLANEOUS

15. *The Human Tissue Act, 1962-63* and *The Human Tissue Amendment Act, 1967* are repealed. 1962-63, c. 59; 1967, c. 38, repealed

16. This Act comes into force on the day it receives Royal Assent. Commencement

17. This Act may be cited as *The Human Tissue Gift Act, 1970*. Short title

SCHEDULE B

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2	When is Death	Gunnar Biorck, M.D., Stockholm 1968 Wisconsin Law Review
3	Transplant Surgery	Some Legal Questions The New Law Journal, May 1968
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6	The Law of Dead Bodies:	Impeding Medical Progress B. Joan Krauskopf Ohio State Law Journal, Summer of 1958 The Law of Dead Bodies The Need for Cadaver Material The Existing Legal Problems Consent Not Given Consent of Deceased Consent of Relatives Consent of Deceased and Relatives Possible Legislative Solutions Revamping the Anatomy Acts Clarifying Conflicting Social Legislation Instituting a Basis for Donation List of U.S Anatomy Laws List of U S Donation Statutes
7	Donation of Dead Bodies and Parts for Medical Use	Jack H Olender University of Pittsburgh Law Review 1960 Case Law Nature of the Interests in Dead Bodies Survivors' Interests Right to Bury Spouse's Rights Other Relatives' Rights Elements of a Cause of Action for Improper or Unauthorized Treatment of a Dead Human Body Observations on the Case Law

13	The Ethics of Heart Transplantation Medical Ethics and Philosophy Social Goals and the Physician Consent Confidentiality and Publicity The Dangers of Overpromise Legislation and Transplantation Statutory Postmortems as Source of Organ Transplants Anatomical Gift Acts	Irving H. Page, M.D Journal of American Medical Association, January 1969
14	News About Uniform Anatomical Gift Act	National Transplant Information Centre, New York, April 1969
15	Medico-Legal, Moral and Ethical Problems Involved in Human Tissue Transplantation — The Forensic Pathologist's Role	Geoffrey T. Mann, M.D.
16	Information on the Bequeathing of One's Body	Department of Anatomy, University of Toronto, April 1969
17	The transplant question: how can enough donors be found?	Editorial, Globe and Mail, July 3, 1969
18	The Legal Aspects of Organ Transplants	Speech of H Allan Leal, Q.C. to the Second Annual Convention of The Canadian Hospital Association
19	Advice from the Advisory Group on Transplantation Problems on the Question of Amending the Human Tissue Act 1961	Her Majesty's Stationery Office, London
20	The Use of Medical Examiner-Coroner's Cases as Transplant Donors	John E Hauser, M D Extract from: The Journal of Forensic Sciences, Vol. 14 No 4, October 1969
21	The Procurement of Organs for Transplantation	David W. Louisell Northwestern University Law Review, November-December 1969
22	A uniform card for organ and tissue donation	Alfred M. Sadler, Jr et al. Modern Medicine, December 1969
23.	Transplantation — A Case for Consent	Alfred M. Sadler, Jr et al. New England Journal of Medicine, April 1969

LEGISLATION

PART I—CANADA

1. Ontario—The Human Tissue Act, 1962-63, with 1967 amendments,

—Consent form
—Proposed Government amendments.
—Private Member's Bill.

—The Coroners Act with 1960-61, 1961-62, 1965, 1966 and 1968 amendments.

—The Anatomy Act, 1967.

—Request to Bequeath Body form.
—Bequeathal form.

—R.R.O. 523, section 42, under The Public Hospitals Act

2. Newfoundland—The Human Tissue Act, 1966-67.
3. Manitoba—The Human Tissue Act (1968).
4. Saskatchewan—The Human Tissue Act, 1968.
5. Alberta—The Human Tissue Act (1967).
6. British Columbia—Human Tissue Act (1968).
7. Northwest Territories—Human Tissue Ordinance (1966).
8. Conference of Commissioners on Uniformity of Legislation in Canada—Uniform Human Tissue Act, adopted 1965.

PART II—UNITED KINGDOM

9. Human Tissue Act, 1961.
10. Bill—Renal Transplantation Act, 1968.

PART III—UNITED STATES

11. Kansas—Uniform Anatomical Gift Act (1968).
12. Virginia—Code of Virginia

—Post-Mortem Examinations
—Use of Dead Bodies for Scientific Study.

13. Conference of Commissioners on Uniform State Laws
    —Uniform Anatomical Gifts Act, adopted 1968
    —Proposed amendment to add a definition of brain death.

PART IV—FRANCE

14. Bill—for the purpose of defining "clinical death" and for permitting the removal of organs for transplanting to other persons.

PART V—SOUTH AFRICA

15. Bill—the Anatomical Donations and Post-Mortem Examinations Act, 1969.

APPENDIX H

(*See page 36*)

THE HUMAN TISSUE ACT

RECOMMENDED FOR ENACTMENT BY THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

Explanatory Note

The first purpose of this Bill is to facilitate transplants of organs, etc., from a living human body to another living human body or from a dead human body to a living human body for the therapeutic benefit of the recipient.

The second purpose is to facilitate the disposition of dead human bodies or parts thereof for medical education or scientific research.

The Bill is designed to achieve these objects by broadening the scope of *The Human Tissue Act*, adopted in 1965 by the Conference of Commissioners on Uniformity of Legislation in Canada, and up-dating its provisions, thus bringing the law into line with recent medical and scientific developments and the consequent acceleration of public interest in this field.

It is, with minor changes, the draft prepared in 1969-70 by an *ad hoc* committee of the Medico-Legal Society of Toronto.

September 25, 1970.

Model Act

HUMAN TISSUE ACT

(Revised 1970)

1. In this Act, **Interpretation**

(a) "consent" means a consent given under this Act;

(b) "physician" means a person registered under *The Medical Act* (to be adapted to provincial requirements); R.S.O. 1960, c 234

(c) "tissue" includes an organ, but does not include any skin, bone, blood, blood constituent or other tissue that is replaceable by natural processes of repair;

(d) "transplant" as a noun means the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings;

(e) "writing" for the purposes of Part II includes a will and any other testamentary instrument whether or not probate has been applied for or granted and whether or not the will or other testamentary instrument is valid.

PART I—*INTER VIVOS* GIFTS FOR TRANSPLANTS

Transplants under Act are lawful

2. A transplant from one living human body to another living human body may be done in accordance with this Act, but not otherwise.

Consent for transplant

3. (1) Any person who has attained the age of majority, is mentally competent to consent, and is able to make a free and informed decision may in a writing signed by him consent to the removal forthwith from his body of the tissue specified in the consent and its implantation in the body of another living person

Consent of person under age, etc

(2) Notwithstanding subsection (1), a consent given thereunder by a person who had not attained the age of majority, was not mentally competent to consent, or was not able to make a free and informed decision is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority, was not mentally competent to consent, and was not able to make a free and informed decision, as the case may be.

Consent is full authority to proceed

(3) A consent given under this section is full authority for any physician,

(a) to make any examination necessary to assure medical acceptability of the tissue specified therein; and

(b) to remove forthwith such tissue from the body of the person who gave the consent.

Stale consent void

(4) If for any reason the tissue specified in the consent is not removed in the circumstances to which the consent relates, the consent is void.

PART II—*POST MORTEM* GIFTS FOR TRANSPLANTS AND OTHER USES

Consent by person for use of his body after death

4. (1) Any person who has attained the age of majority may consent,

(a) in a writing signed by him at any time; or

(b) orally in the presence of at least two witnesses during his last illness,

that his body or the part or parts thereof specified in the consent be used after his death for therapeutic purposes, medical education or scientific research.

Where donor under age

(2) Notwithstanding subsection (1), a consent given by a person who had not attained the age of majority is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority.

Consent is full authority, exception

(3) Upon the death of a person who has given a consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts for the purpose specified, except that no person shall act upon a consent given under this section if he has reason to believe that it was subsequently withdrawn.

Consent by spouse, etc., for use of body after death

5. (1) Where a person of any age who has not given a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and his death is imminent,

(a) his spouse of any age; or

(b) if none or if his spouse is not readily available, any one of his children who has attained the age of majority; or

(c) if none or if none is readily available, either of his parents; or

(d) if none or if neither is readily available, any one of his brothers or sisters who has attained the age of majority; or

(e) if none or if none is readily available, any other of his next of kin who has attained the age of majority; or

(f) if none or if none is readily available, the person lawfully in possession of the body other than, where he died in hospital, the administrative head of the hospital; or

(g) if none or if none is readily available and he died in hospital, the administrative head of the hospital,

may consent,

(h) in a writing signed by the spouse, relative or other person; or

(i) orally by the spouse, relative or other person in the presence of at least two witnesses; or

(j) by the telegraphic, recorded telephonic, or other recorded message of the spouse, relative or other person,

to the body or the part or parts thereof specified in the consent being used after death for therapeutic purposes, medical education or scientific research.

Consent is full authority, exceptions

(2) Upon the death of a person in respect of whom a consent was given under this section, the consent is binding and is, subject to section 6, full authority for the use of the body or for the removal and use of the specified part or parts for the purpose specified except that no person shall act on a consent given under this section if he has actual knowledge of an objection thereto by the person in respect of whom the consent was given or by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent.

Person lawfully in possession of body, exceptions

R S.O 1960, c 69

(3) In subsection (1), "person lawfully in possession of the body" does not include,

(a) the supervising coroner or a coroner in possession of the body for the purposes of *The Coroners Act* (to be adapted to provincial requirements);

R S O. 1960, c. 80

(b) the Public Trustee in possession of the body for the purpose of its burial under *The Crown Administration of Estates Act* (to be adapted to provincial requirements);

(c) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or

(d) the superintendent of a crematorium in possession of the body for the purpose of its cremation.

Coroner's direction

R S O. 1960, c 69

6. Where in the opinion of a physician, the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section 7, 21 or 22 of *The Coroners Act* (to

be adapted to provincial requirements) may apply when death does occur and a consent under this Part has been obtained for a post-mortem transplant of tissue from the body, a coroner having jurisdiction, notwithstanding that death has not yet occurred, may give such directions as he thinks proper respecting the removal of such tissue after the death of the person, and every such direction has the same force and effect as if it had been made after death under section 8 of *The Coroners Act* (to be adapted to provincial requirements). R.S.O. 1960, c. 69

Determination of death

7. (1) For the purposes of a post-mortem transplant, the fact of death shall be determined by at least two physicians in accordance with accepted medical practice.

Prohibition

(2) No physician,

(a) who takes any part in the determination of the fact of death of the donor; or

(b) who has had any association with the proposed recipient that might influence his judgment,

shall participate in any way in the transplant procedures.

Exception

(3) Nothing in this section in any way affects a physician in the removal of eyes for cornea transplants.

Where specified use fails

8. Where a gift under this Part cannot for any reason be used for any of the purposes specified in the consent, the subject matter of the gift and the body to which it belongs shall be dealt with and disposed of as if no consent had been given.

Lawful dealings not affected

9. Nothing in this Part makes unlawful any dealing with a body or part or parts thereof for any of the purposes of this Act that would have been lawful if this Act had not been passed.

PART III—GENERAL

Civil liability

10 No action or other proceeding for damages lies against any person for any act done in good faith and without negligence in the exercise or intended exercise of any authority conferred by this Act.

Sale, etc., of tissue prohibited

11. No person shall buy, sell or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant or any body or part or parts thereof, other than blood or

a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.

Disclosure of information

12. (1) Except where legally required, no person shall disclose or give to any other person any information or document whereby the identity of any person,

(a) who has given or refused to give a consent;

(b) with respect to whom a consent has been given, or

(c) into whose body tissue has been, is being or may be transplanted,

may become known publicly.

Exception

(2) Where the information or document disclosed or given pertains only to the person who disclosed or gave the information or document, subsection (1) does not apply.

Offence

13. Every person who knowingly contravenes any provision of this Act is guilty of an offence and on summary conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than six months, or to both.

R.S.O. 1960, c. 69 not affected

14. Except as provided in section 6, nothing in this Act affects the operation of *The Coroners Act* (to be adapted to provincial requirements).

APPENDIX I

(*See page 38*)

REPORT OF THE COMMISSIONERS FOR QUEBEC ON THE IMPLEMENTATION OF CONVENTIONS ADOPTED BY THE HAGUE CONFERENCE

I—*Introduction*

In 1968, Canada joined the Hague Conference on Private International Law and Mr. L. R. MacTavish, Q.C., was chosen by our Conference to take part in the October session at The Hague that year (1968 proceedings, pages 23, 50, 60); Mr. MacTavish subsequently reported to us (1969 proceedings, pages 21 and 75) and submitted for our consideration the text of three draft conventions prepared there. The first of these dealt with recognition of divorces and legal separations, the second concerned the law applicable to traffic accidents and the third had to do with the taking of evidence abroad in civil or commercial matters.

A discussion was then held on the attitude which Canada should take toward these three conventions.

It was suggested that our Conference study each of these conventions, adopt a *model Act* for each of them and make any changes which may be deemed appropriate.

Mr. MacTavish's report, which was approved by the Conference also reflected the hope that a formula be found for the ratification of conventions passed at The Hague.

In addition, it was stressed that the same problem which had been raised regarding these three conventions applied also to other conventions adopted by the Hague Conference prior to 1968 and to all international conventions to which Canada might accede and which, like those of The Hague, deal with subjects which come wholly or partly under provincial jurisdiction.

Because of its inherent difficulties, this problem was referred to the Quebec Commissioners for solution both as regards the three Hague Conferences, covered in Mr. MacTavish's report, and international conventions in general.

In order to better find a solution, we should first of all examine what has been done until now in Canada respecting these conventions as regards both their making and their implementation.

II —*Solutions adopted until now in Canada*

A—CONVENTION MAKING

International conventions, apart from those prepared under the United Nations Organization, are chiefly prepared either at the Hague Conference or at diplomatic conferences called by a state interested in the adoption of a convention following work by such organizations as "Unidroit" or by individuals.*

Those states which take part either in the Hague Conference or in one of the diplomatic conferences prepare a text which binds them only if they subsequently ratify it formally; ordinarily, a state which has not taken part in the preparation of a convention may accede to it if this state is a member of the United Nations; delays to this effect are usually provided for in the text.

A fact worthy of note is that only in 1968 did Canada begin to take part in the Hague Conference and the provinces were consulted as to the composition of the Canadian delegation, as they are presently consulted more and more on such matters; before that year, however, the federal government also took part in the preparation of many other international conventions which dealt wholly or partly with subjects under provincial jurisdiction, but the provinces were never aware of it.

Until now, the work done at the Hague Conference as regards Canada remained a dead letter and the other international conventions which Canada helped to prepare in the past remained a dead letter or were implemented according to various methods, which yielded more or less satisfactory results

B—IMPLEMENTATION OF CONVENTIONS

These methods were principally the following:

1. The federal government engaged itself as regards the other states who were parties to the convention by ratifying it despite its lack of jurisdiction on certain subjects[1] covered by the Convention (eg.: Vienna Convention on diplomatic agents, 1961).

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* A most interesting article was written on the subject by progessor Castel of Toronto in the Canadian Bar Review, Volume 45, pages 1 and following The problem was also outlined in an article by Dean Read published in The Ansul in January 1969

[1] A C for Canada v A G for Ontario, (1937) A C. 326, (1937) 1 D.L.R. 673

2. The federal government ratified certain conventions and added a reservation restricting its obligations according to its constitutional powers (eg. Convention on Women's Political Rights, 1957).

When the convention does not specifically deal with or prohibit reservations which may be brought at the time of accedence, a state may accede to it with such reservations as it deems appropriate; these, however, must not be contrary to the object and purpose of the convention[2]; moreover, a state which is a party to the convention may always as regards itself refuse the accedence of the nation which acceded to it with reservations if it considers this reservation to be unacceptable. Also, accedence by the federal government with a reservation of the nature of that above mentioned prohibits the provinces from taking any part in the convention and prevents them from enjoying the advantages of this international agreement.

3. The federal government ratified conventions containing a so-called federal state clause; under this clause, the federal government binds itself solely within the limits of its jurisdiction but assumes the obligation to forward the text of the convention, with a favourable opinion, to the provinces.

Such clauses may be found principally in the convention of the International Labour Organization, the Convention on Refugees, adopted in 1954 and the more recent Convention on Travel Contracts, adopted in Brussels last April.

While respecting the division of legislative competence in Canada, this solution results in the exclusion of the provinces from the advantages of the convention, especially when it comprises measures of reciprocity. On the other hand, this federal state clause does not allow for a greater degree of unification of private international law since at the outset it implies that the convention will not be applied in a federal state unless the component parts legislate to the same effect as the convention; until now the Canadian provinces have been very little inclined to legislate under such circumstances.

4. The federal government ratifies a convention after making an agreement with the province or provinces concerned. This occurred in the case of the Canadian-American treaty on the

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[2] Opinion of the Court of International Justice, May 28, 1951, respecting the validity of the reservations to the Genocide Convention, December 9, 1948.

Columbia River, which was ratified following an agreement between Canada and the province of British Columbia. To the best of our knowledge this method has been used solely in bilateral treaties with the United States and in special cases.

The outline of these methods shows that by reason of the lack of adequate means of consultation and ratification, conventions dealing with subjects which fall wholly or partly under the provinces' legislative jurisdiction have not been implemented in Canada and Canadians have been deprived of the benefit of the current trend towards unification of law. We must find appropriate remedies both as regards conventions adopted until now and those which will be adopted in the future.

III—*Solutions*

A—MODEL ACTS

Because of the nature of our Conference, the first solution which comes to our mind is the adoption by the Hague Conference of model acts which could later be adopted by competent legislative authority.

The adoption of this type of solution was urged by the Americans who made it a condition for their participation in the Hague Conference; they believed that this would respect the competence of the member-states of the Union and facilitate the uniformization movement within the United States. The adoption of this method, moreover, follows a practice established in the United States, namely the adoption of model acts by a Conference similar to ours.

If we were to favour this method, the Canadian government, were it to concur, would have to recommend the adoption of this solution by the Hague Conference, so that this Conference would henceforth adopt model acts rather than conventions; the American proposal was badly received by several members of the Hague Conference, since they were more accustomed to the method of conventions; it is reasonable to assume that the Canadian proposal would be similarly received.

This solution would give rise to the same difficulties on the international scale which its implementation already faces in the United States and Canada, since several model acts of our Conferences on uniformity remain a dead letter or again are adopted

with sometimes substantial changes, and none of these has been fully adopted by all of the American States or Canadian provinces, although it appears flexible, this solution actually contributes toward lessening the opportunities to unify law among the nations. Also, the implementation of such a solution within Canada is a slow process; it is easy to see that it will be an even slower one on the international scale.

In addition, several states which have a federal structure are empowered, under their constitutions, to bind their component parts when they accede to international conventions; were this solution adopted, it would entail an increase of legislative authorities charged with adopting model acts since the means of engagement could no longer be applied (example: Switzerland).

Moreover, if a model act requires the adoption of measures on a reciprocal basis, it requires that machinery be set up to determine the states between which reciprocity exists, and this is another serious complication.

Finally, since this method does not call for a formal agreement of the states concerned, it leads to the loss of one of the greatest advantages derived from international conventions; the responsibility of the contracting parties.

Although this method of model acts may not entail a valid solution for the future on the international level, it may, as regards conventions adopted in the past, constitute an interesting mean of regeneration of the work of our Conference.

If the Conference wishes to proceed further along this line, it would be advisable to ask the Commissioners for Canada to compile those conventions which might be studied by the Conference; the Conference would then distribute to its members the subjects thus drawn both from the conventions which have already been ratified and from those which could be ratified; the former may be found in the Canada Treaty Series and the latter solely in the records of the Departments of External Affairs or Justice.

In the light of what has just been said on the model acts technique, it might be worth noting that this method, particular to our work in the past, may require revision according to the results obtained; without substantially changing it, it would be possible to enhance its value considerably by submitting our

drafts to a formal meeting of the provinces, to allow them to take a position, and thus adapting to our work methods used on the international level.

B—UNIFORM LAWS

The technique of standardization through uniform laws implies that such a law be integrated into a convention. Unlike the model act, the uniform law technique would allow for no derogation by the countries which adopt the convention containing it.

To our knowledge, this technique has not yet been applied in international law but has been considered by a subcommittee of the Hague Conference (see the above-mentioned article by Professor Castel).

If any convention comprising such a uniform law were to cover a subject under both federal and provincial jurisdiction, this method could hardly be applied in Canada

C—FEDERAL STATE CLAUSES

It has been seen how conventions in which Canada has participated and which contain federal state clauses have not been implemented because of the insufficiency of these clauses which do not allow the provinces to fully profit from the conventions

It is our belief that as regards the future, the problem of implementing international conventions bearing wholly or partly on subjects under provincial jurisdiction might be solved by inserting in these conventions a federal state clause under which the federal government could make the convention applicable in any province with the latter's approval and formalize the province's participation therein by a notice to the state which is the depositary of the instruments of the convention, so that the convention would be fully implemented in the province concerned.

So, if the Hague Convention on divorces and legal separations includes a federal state clause of the type which we have just described, the federal government, with the agreement of the government of Ontario, for example, could ratify this convention and indicate to the government of The Hague that the convention would apply fully in the province of Ontario which

would assume those obligations imposed upon it by the convention as regards legal separations; the federal government would be bound in matters of divorce.

It might be believed that the provision, contained in certain conventions, which stipulates that at the time of its accedence a state may declare that the convention "shall extend to any of the territories for whose international relations it is responsible", constitutes an applicable solution to the problem created by our federal structure. This interpretation is unreasonable since obviously, notwithstanding the division of powers, Canada constitutes one single "territory" on the international scene. Moreover, the fact that such a provision is inserted alongside the federal state clause in the same convention[3] shows clearly that the one cannot be confused with the other.

It might be possible to imagine an even more refined federal state clause which would allow the federal government to indicate to The Hague government the provinces in which the convention would be fully applied, and the obligations assumed across Canada by the federal government

A federal state clause has already been provided in article 14 of the Convention respecting the law applicable to traffic accidents and might be satisfactory if certain changes were made to its phraseology.

If Ontario agreed in the manner indicated, it would then be obliged to pass an act declaring the convention in force in that province, so that it might fulfil the undertaking contracted with the federal government.

This federal state clause could also be drawn up in the manner shown by Mr. Gerald FitzGerald and described on pages 30 and 31 of Professor Castel's article.

The outstanding advantage of this technique would be to see to it that the convention would apply in Ontario in the same manner as in an individual country, while preserving Canada's federal structure and protecting the federal government's responsibility in the field of international relations; moreover, this technique would prevent the provincial governments from amending the text of the convention, as they sometimes do to

[3] See Convention on the law applicable to traffic accidents, articles 14 and 19, and Diplomatic Convention on Travel Contracts, articles 38 and 39

model acts, and would thus ensure greater uniformity of international private law.

If such a federal state clause were adopted, the provinces would become more interested than ever in international conventions and their adoption of such conventions would formally take concrete form.

It goes without saying, however, that this solution implies that the federal government must collaborate closely with the provinces before ratifying the agreement, but must also see that they take part in the study of the drafts which usually are prepared prior to conferences held for adopting conventions.

D—CLAUSES ALLOWING FOR DIRECT ACCEDENCE BY THE PROVINCES

Another type of federal state clause may be considered; which would be inserted in the conventions, and under which any province, with the approval of the federal government, could accede directly to the convention; moreover, as soon as a province acceded to a convention, the federal government would *ipso facto* assume such responsibilities as might devolve upon it as a result of the convention.

A technique to that effect was used in a 1965 Franco-Canadian agreement under which the federal government agreed that any province might make a direct agreement with France on the subjects decided on in the Franco-Canadian agreement. (In this regard, see article by Gerald FitzGerald, 1966 Volume 60, American Journal of International Law, page 529).

E—RATIFICATION OF CONVENTION FOLLOWING A FEDERAL-PROVINCIAL AGREEMENT

One final technique may be considered; this one would imply the making of an agreement between the provinces and the central government prior to accedence by Canada to a convention or to its ratification; in this case, the federal government would have to obtain the consent of all or a significant part of the provinces contemplated in the agreement, before ratifying or acceding to it. If all the provinces did not agree although a significant number of them did, Canada's ratification could be accompanied by a reservation indicating those provinces in which

the agreement would not be implemented and the subjects which would thus be excluded, provided that the convention would allow such a reservation.

IV—*Conclusions*

We recommend:

1. That as soon as possible Canada take part in the preparation of international conventions bearing on subjects wholly or partly within the jurisdiction of the provinces, that the composition of Canadian delegations be decided upon in consultation with the provincial governments and that the Canadian authorities cause to be inserted in these conventions a federal state clause accepted by the provinces and allowing full implementation of the conventions in any province wishing it; since this is a matter of a political as well as a legal nature, it would appear expedient that this Conference not decide as such on the subject but rather that the authorities of the governments present at this Conference take note of the discussions on this report and bring this matter up with their respective governments to have it settled at a federal-provincial conference or at a conference of the Attorneys-General of Canada.

2. That for the implementation of these international conventions which include this federal state clause, the federal and provincial governments set up the machinery to allow all the parties involved to appreciate the opportunity of making such conventions applicable in each province and that the Conference of Commissioners pass a resolution, the text of which could be sent to the federal government and those of the provinces, assuring them that it would be pleased to study these conventions, if so requested by these authorities, within the framework of such machinery.

3. That the Commissioners for Canada be entrusted with compiling the international conventions which have been adopted until now and could be covered by model acts adopted at this Conference.

4. That the three Hague conventions mentioned at the beginning of this report constitute a starting-point for the above machinery since each of them includes a federal state clause which may be deemed adequate and that in the case of failure or undue slowness in the implementation of such machinery, the

second convention, covered by Mr. Fisher's report to this Conference, act as a basis for adoption of a model act in Canada; one inconvenience of this solution would be to deprive Canadians of the benefits of accedence to the convention, but since the text of the latter was not deemed appropriate at the last session of the Conference, it would at the very least give all Canadians the chance to settle many problems of international private law which may exist between Canadians of different provinces.

ROBERT NORMAND
For the Commissioners for Quebec

Quebec, August 14, 1970

Federal State Clause

Article 38 of the International Convention on Travel Contracts (C.C.V.) adopted on the 22 of April 1970.

In the case of a federal or non-unitary State, the following provisions shall apply:

1. With respect to those Articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the federal government shall, to this extent, be the same as those of parties which are not federal States.

2. With respect to those Articles of this Convention that come within the legislative jurisdiction of constituent states, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment.

3. A federal State party to this Convention shall, at the request of any other Contracting State, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action

RAPPORT DES COMMISSAIRES DU QUEBEC SUR LA MISE EN VIGUEUR DES CONVENTIONS ADOPTEES PAR LA CONFERENCE DE LA HAYE

I—*Introduction*

Le Canada a adhéré à la Conférence de La Haye de droit international privé en 1968 et notre Conférence des commissaires a délégué M. L. R. MacTavish, c.r., pour participer aux travaux de cet organisme lors de sa session du mois d'octobre de cette année-là (procès-verbaux, 1968, pages 23, 50, 60), M. MacTavish nous a ensuite fait rapport (procès-verbaux, 1969, pages 21 et 75) en portant à notre attention le texte des trois projets de conventions qui y ont été rédigées: l'une sur la reconnaissance des divorces et des séparations de corps, une autre sur la loi applicable en matières d'accidents de la circulation routière et une troisième sur l'obtention des preuves à l'étranger en matière civile ou commerciale

Une discussion s'est alors engagée sur l'attitude à adopter au Canada à l'égard de ces trois conventions.

Il a été suggéré que notre Conférence étudie chacune de ces conventions et adopte une *loi-modèle* pour chacune d'elles en y apportant les changements qui seront jugés appropriés.

D'autre part, le rapport de M. MacTavish, qui a été approuvé par la conférence, exprimait le désir qu'une formule soit trouvée pour la *ratification* des conventions adoptées à La Haye.

On a aussi souligné que le problème soulevé par ces trois conventions se posait également à l'égard des autres conventions déjà adoptées par la Conférence de La Haye avant 1968 ainsi qu'à l'égard de toutes les conventions internationales auxquelles le Canada a la possibilité d'adhérer et qui, comme celles de La Haye, portent sur des sujets relevant en totalité ou en partie de la compétence des provinces.

Devant les difficultés du problème, celui-ci a été référé aux commissaires du Québec pour qu'une solution soit esquissée tant à l'égard des trois Conférences de La Haye ayant fait l'objet du rapport de M. MacTavish qu'à l'égard des conventions internationales en général.

Pour mieux déterminer les solutions à adopter, il y a lieu d'examiner d'abord ce qui a été fait au Canada jusqu'à présent relativement à ces conventions, tant en ce qui concerne leur élaboration que leur mise en application.

II—*Solutions adoptées jusqu'à date au Canada*

A—*Elaboration des conventions*

Hors du cadre des Nations-Unies, les deux principales voies par lesquelles s'élaborent les conventions internationales sont soit la Conférence de La Haye soit les conférences diplomatiques convoquées par un pays intéressé à l'adoption d'une convention à la suite de travaux d'organismes comme Unidroit ou de travaux individuals.*

Les Etats qui participent soit à la Conférence de La Haye, soit à une telle conférence diplomatique, élaborent un texte qui ne lie ces états que si ceux-ci le ratifient formellement par la suite; il est habituellement possible pour un état qui n'a pas participé à l'élaboration du texte d'y adhérer par la suite s'il fait partie des Nations-Unies, et des délais pour cette adhésion sont habituellement prévus dans le texte.

Il est bon de rappeler que le Canada n'a commencé à participer aux travaux de la Conférence de La Haye qu'en 1968 et que les provinces ont alors été consultées sur la composition de la délégation canadienne comme elles le sont de plus en plus maintenant sur de tels sujets mais qu'avant cette année-là, le gouvernement fédéral a participé à l'élaboration de nombreuses autres conventions internationales portant en totalité ou en partie sur des sujets relevant de la compétence législative des provinces sans que celles-ci ne l'aient su.

Jusqu'ici, les travaux de la Conférence de La Haye sont restés lettre morte en ce qui concerne le Canada et les autres conventions internationales que le Canada a contribué à élaborer dans le passé sont restées lettre morte ou ont été mises en application suivant diverses techniques ayant apporté des résultats plus ou moins satisfaisants.

B—*Misc en application des conventions*

Ces techniques ont été principalement les suivantes

1° Le gouvernement fédéral s'est engagé à l'égard des autres états partie à la convention en ratifiant cette convention malgré son incompétence sur certains sujets[1] faisant l'objet de la con-

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* Un article fort intéressant sur le sujet a été écrit par le professeur Castel de Toronto dans la Revue du Barreau canadien, 967, Volume 45, pages 1 et suivantes Le problème a aussi été esquissé dans un article du doyen Read paru dans The Ansul en janvier 1969

[1] A G for Canada v A G. for Ontario, (1937) A C 326, (1937) 1 D L R 673

vention (Exemple: Convention de Vienne sur les agents diplomatiques, 1961).

2° Le gouvernement fédéral a ratifié des conventions en ajoutant une réserve limitant ses obligations suivant sa compétence constitutionnelle (Exemple: Convention sur les droits politiques des femmes, 1957).

Lorsque la convention ne traite pas spécifiquement des réserves pouvant être apportées lors de l'adhésion ou ne les interdit pas, un état peut y adhérer avec les réserves qu'il estime appropriées mais ces dernières ne peuvent aller à l'encontre de l'objet et du but de la convention[2]; de plus, il est toujours possible à un état partie à la convention de refuser quant à lui l'adhésion de l'état qui y a adhéré avec réserve s'il juge cette restriction d'engagement inacceptable. De plus, l'adhésion par le gouvernement fédéral avec une réserve fédérale de l'ordre de celle qui a été citée prohibe toute participation des provinces à la convention et les empêche de profiter des fruits de cette entente internationale.

3° Le gouvernement fédéral a ratifié des conventions contenant une clause dite clause fédérale; en vertu d'une telle clause, le gouvernement fédéral s'engage uniquement dans les limites de sa compétence tout en assumant l'obligation de communiquer le texte de la convention aux provinces avec un avis favorable.

Une telle clause se retrouve notamment dans la convention de l'Organisation internationale du Travail, dans la Convention sur les réfugiés, adoptée en 1954, et plus récemment dans la Convention sur les contrats de voyage adoptée à Bruxelles en avril dernier.

Tout en étant respectueuse des partages des compétences législatives au Canada, cette solution a pour conséquences d'exclure les provinces des avantages de la convention, principalement lorsque celle-ci comporte des mesures de réciprocité. D'autre part, cette clause fédérale ne permet pas d'atteindre un plus grand degré d'unification du droit international privé car au départ elle implique que la convention ne recevra pas d'application dans un état fédéral, si ce n'est dans les cas où les parties composantes légiféreront dans le même sens que la convention; jusqu'à présent, les provinces canadiennes ont été très peu incitées à légiférer dans ces circonstances.

[2] Avis de la Cour Internationale de Justice du 28 mai 1951 relatif à la validité des réserves à la Convention sur le génocide du 9 décembre 1948

4° Le gouvernement fédéral ratifie une convention après avoir conclu un accord avec la ou les provinces intéressées. Tel fut le cas du traité Canado-Américain sur le fleuve Columbia, dont la ratification fut précédée d'un accord entre le Canada et la province de la Colombie Britannique. Cette technique a été utilisée à notre connaissance uniquement dans des traités bilatéraux avec les Etats-Unis et pour des cas particuliers.

Il résulte de l'exposé et de l'étude de ces techniques que les conventions portant sur des sujets relevant en totalité ou en partie de la compétence législative des provinces, n'ont pas été appliquées au Canada en raison de l'absence de mécanismes adéquats de consultation et de ratification et que les canadiens n'ont pu bénéficier du courant contemporain d'unification des lois. Il nous reste à trouver les solutions appropriées pour remédier à cet état de choses tant pour les conventions adoptées jusqu'à présent que pour celles qui le seront dans l'avenir.

III—*Solutions*

A—*Lois-modèles*

Vu la nature de notre Conférence, la première solution qui nous vient à l'esprit est l'adoption par la Conférence de La Haye, de lois-modèles qui pourraient ensuite être adoptées par les autorités législatives compétentes.

Les américains ont préconisé une telle solution en faisant même une condition de leur participation à la Conférence de La Haye, voulant par ce moyen respecter la compétence des états membres de l'Union et croyant faciliter le mouvement d'uniformisation au sein des Etats-Unis. L'adoption de cette méthode s'inscrit d'ailleurs dans une pratique établie aux Etats-Unis, soit l'adoption de lois-modèles par une conférence analogue à la nôtre.

Si nous préconisions cette méthode, il faudrait alors, si le gouvernement canadien était d'accord, qu'il favorise à son tour l'adoption de cette solution par la Conférence de La Haye, de façon que celle-ci adopte désormais des lois-modèles plutôt que des conventions, or, la proposition américaine a été mal reçue par plusieurs membres de la Conférence de La Haye qui sont plus habitués à cette méthode des conventions qu'à celle des lois-modèles et il y a lieu de croire que la position canadienne serait accueillie de la même façon

Cette solution poserait toutefois à l'échelle internationale les difficultés que son application comporte déjà aux Etats-Unis ou au Canada, vu que plusieurs des lois-modèles des Conférences d'uniformisation restent lettre morte ou encore sont adoptées avec des changements quelquefois substantiels et qu'aucune de ces lois-modèles n'a été adoptée intégralement par tous les Etats américains ou toutes les provinces; sous l'apparence de la flexibilité, cette solution contribue en fait à réduire les possibilités d'unifier le droit entre les nations. De plus, la mise en œuvre d'une telle solution est déjà lente au sein du Canada; il est facile d'entrevoir qu'elle le sera encore plus à l'échelle internationale.

D'autre part, plusieurs états ayant une structure fédérale ont, en vertu de leur constitution, le pouvoir de lier leurs parties composantes lorsqu'ils adhèrent à des conventions internationales; l'adoption de cette solution entraînerait la multiplication des autorités législatives devant adopter des lois-modèles car le mécanisme d'engagement ne pourrait plus alors être mis en œuvre (Exemple : la Suisse).

De plus, si une loi-modèle fait appel à l'adoption de mesures sur une base réciproque, elle requiert l'institution d'un mécanisme permettant de déterminer les états entre lesquels il y a réciprocité, ce qui est une complication sérieuse additionnelle.

Enfin, cette technique ne reposant pas sur un engagement formel de la part des pays intéressés exclut l'un des avantages importants qui découlent des conventions internationales, à savoir la responsabilité des parties contractantes.

Si cette technique des lois-modèles ne devrait pas comporter une solution valable au plan international pour l'avenir, elle peut constituer, à l'égard des conventions adoptées dans le passé, une méthode intéressante de régénération des travaux de notre Conférence.

Si la conférence désire pousser plus avant dans cette voie, il y aurait lieu de demander aux commissaires pour le Canada de recenser les conventions qui pourraient faire l'objet d'une étude par la conférence, celle-ci distribuant ensuite entre ses membres les sujets ainsi obtenus tant parmi les conventions qui ont déjà été ratifiées que parmi celles qui pourraient l'être, les premières étant publiées dans les Recueils de traités du Canada, les secondes se trouvant uniquement dans les dossiers du ministère des affaires extérieures ou de la justice.

Il faudrait peut-être ajouter, à la lumière de ce que nous venons de dire sur la technique des lois-modèles, que cette méthode propre à nos travaux dans le passé nécessiterait peut-être d'être revisée à la lumière des résultats obtenus; sans la modifier profondément, il serait possible d'en améliorer grandement la valeur en soumettant nos projets à une réunion formelle des provinces, pour leur permettre de prendre position, adaptant ainsi à nos travaux les techniques utilisées sur le plan international.

B—*Lois uniformes*

La technique d'uniformisation par voie de lois uniformes implique qu'une telle loi soit intégrée à une convention. Contrairement à la loi-modèle, la loi uniforme ne tolère aucune dérogation de la part des pays qui adoptent la convention qui la contient.

Il s'agit là d'une technique qui n'a pas reçu d'application à notre connaissance en droit international mais qui a été envisagée par un sous-comité de la Conférence de La Haye (voir l'article précité du professeur Castel).

Si une convention comportant une telle loi uniforme portait sur un sujet relevant à la fois de la compétence du gouvernement fédéral et de la compétence des provinces, elle serait alors inapplicable au Canda.

C—*Clause fédérale*

Nous avons vu que les conventions auxquelles a participé le Canada et qui comportaient une clause fédérale n'ont pas été mises en application en raison de l'insuffisance de la rédaction de cette clause car elle ne tend pas à faire en sorte que les provinces tirent pleinement profit de la convention

Nous croyons que pour l'avenir, le problème de la mise en application des conventions internationales portant en totalité ou en partie sur un sujet relevant de la compétence des provinces pourrait être résolu par l'insertion dans ces conventions d'une clause fédérale en vertu de laquelle le gouvernement fédérale pourrait rendre la convention applicable dans une province avec l'accord de celle-ci, et en formaliser la participation de la province par un avis à l'état dépositaire des instruments de la convention, de sorte que la convention recevrait alors pleine application dans la province dont il s'agit

Ainsi, dans le cas de la Convention La Haye sur le divorce et la séparation de corps, si celle-ci comportait une clause fédérale de la nature de celle que nous venons d'indiquer, le gouvernement fédéral pourrait ratifier cette convention avec l'accord du gouvernement de l'Ontario, par exemple, en indiquant au gouvernement de La Haye que la convention s'applique pleinement dans la province de l'Ontario, cette dernière assumant les obligations que lui impose la convention en matière de séparation de corps et le gouvernement fédéral se trouvant lié en matière de divorce.

Certains peuvent penser que la disposition incluse dans certaines conventions et qui stipule que lors de son engagement un état peut déclarer que la convention "s'étendra à l'ensemble des territoires qu'il représente sur le plan international, ou à l'un ou plusieurs d'entre eux" constitue une solution applicable au problème posé par notre structure fédérale. Il s'agit là d'une interprétation abusive puisque de toute évidence le Canada constitue sur la scène internationale un seul et même "territoire" malgré le partage des compétences. D'ailleurs la présence de cette disposition à côté de la cause fédérale dans une même convention[3] indique bien qu'on ne peut les confondre l'une à l'autre.

On pourrait concevoir une clause fédérale encore plus raffinée permettant au gouvernement fédéral d'indiquer au gouvernement de La Haye les provinces dans lesquelles la convention recevra une application pleine et entière ainsi que les obligations assumées par le gouvernement fédéral à travers le Canada.

Une telle clause a d'ailleurs déjà été prévue à l'article 14 de la convention sur la loi applicable en matière d'accidents de la circulation routière et pourrait être satisfaisante avec certains changements de phraséologie.

Si l'Ontario s'engageait de la façon indiquée, il resterait alors à l'Ontario à adopter une loi déclarant que la convention est en vigueur dans cette province afin que celle-ci remplisse l'engagement contracté auprès du gouvernement fédéral.

Cette clause fédérale pourrait aussi être rédigée de la façon indiquée par M. Gerald FitzGerald et citée dans l'article du professeur Castel, aux pages 30 et 31.

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[3] Voir Convention sur la loi applicable en matière d'accidents de la circulation routière, articles 14 et 19, et Convention diplomatique sur le contrat de voyage, articles 38 et 39

Cette technique aurait l'immense avantage de faire en sorte que la convention s'appliquera en Ontario de la même façon que dans un pays unitaire, tout en ayant préservé la structure fédérale du Canada et en ayant protégé la responsabilité du gouvernement fédéral en matière de relations internationales; de plus, cette technique empêcherait les gouvernements des provinces de modifier le texte de la convention comme ils sont portés à le faire à l'égard de lois-modèles, assurant ainsi une plus grande unification du droit international privé.

Par l'adoption d'une telle clause fédérale, les provinces seraient d'ailleurs plus intéressées par les conventions internationales qu'elles ne l'ont été jusqu'à date et leur adhésion à de telles conventions se concrétiserait de manière formelle.

Il va de soi cependant que cette solution implique de la part du gouvernement central qu'il assure une étroite consultation des provinces avant de ratifier l'accord, mais également qu'il veille à associer ces dernières à l'étude des projets qui précèdent habituellement la tenue des conférences d'adoption de la convention comme il le fait depuis quelques temps.

D—*Clauses permettant d'adhésion directe des provinces*

On pourrait aussi concevoir une clause fédérale qui serait insérée dans les conventions et en vertu de laquelle une province pourrait adhérer directement à la convention, avec l'approbation du gouvernement fédéral; de plus, dès qu'une province adhérerait ainsi à une convention, le gouvernement fédéral se trouverait à assumer *ipso facto* les responsabilités pouvant lui résulter de la convention.

Cette technique a été mise en application dans un accord Franco-canadien de 1965 en vertu duquel le gouvernement fédéral acceptait que toute province puisse conclure une entente directement avec la France sur des sujets déterminés dans l'accord Franco-canadien (voir à ce sujet l'article de Gerald FitzGerald, 1966, Volume 60, American Journal of International Law, page 529).

E—*Ratification d'une convention après entente fédérale-provinciale*

Une dernière technique peut être envisagée, impliquant la conclusion d'un accord entre les provinces et le gouvernement central préalablement à l'adhésion du Canada à une convention

ou à sa ratification, dans ce cas, le gouvernement fédéral devrait obtenir le consentement de toutes les provinces visées par la convention ou d'une partie significative de celles-ci avant de ratifier la convention ou d'y adhérer. Si la totalité des provinces n'aurait pas donné son accord mais si une partie significative d'entre elles l'auraient fait, la ratification du Canada pourrait alors s'accompagner d'une réserve indiquant les provinces où la convention ne serait pas appliquée et les sujets ainsi exclus.

IV—*Conclusions*

Nous recommandons:

1° Que le Canada s'intègre le plus possible au processus d'élaboration des conventions internationales portant sur des sujets relevant en totalité ou en partie de la compétence des provinces, que la composition des délégations canadiennes soit établie en consultation avec les gouvernements des provinces et que les délégations canadiennes fassent inscrire dans ces conventions une clause fédérale acceptée par les provinces permettant la mise en application intégrale des conventions dans les provinces qui les désireront; comme il s'agit là d'un sujet ayant un caractère politique autant que juridique, il semble opportun que la conférence ne se prononce pas comme tel sur le sujet, mais que les autorités des gouvernements présents à cette conférence-ci prennent acte des discussions suscitées par le présent mémoire et saisissent leur gouvernement respectif de ce sujet pour qu'il soit réglé à une conférence fédérale-provinciale ou à une conférence des procureurs généraux du Canada.

2° Qu'aux fins de la mise en application de telles conventions internationales comportant une telle clause fédérale, le gouvernement fédéral et les provinces mettent sur pied un mécanisme permettant à toutes les parties en cause d'apprécier l'opportunité de rendre de telles conventions applicables dans chaque province et que la Conférence des commissaire adopte une résolution dont le texte pourrait être transmis au gouvernement fédéral et aux gouvernements des provinces, assurant ces gouvernements qu'elle accepterait volontiers d'étudier ces conventions si demande lui en est faite par ces autorités, dans le cadre d'un tel mécanisme.

3° Que les commissaires du Canada soient chargés de recenser les conventions internationales qui ont été adoptées jusqu'à présent et qui pourraient faire l'objet de lois-modèles adoptées par cette conférence.

4° Que les trois Conventions de La Haye qui sont à l'origine du présent mémoire servant de tremplin pour mettre en œuvre le mécanisme ci-devant mentionné puisque chacune d'elles comporte une clause fédérale pouvant être jugée adéquate et qu'en cas d'échec ou de lenteur considérable dans la mise en œuvre d'un tel mécanisme, que la deuxième convention faisant l'objet du rapport de M. Fisher à la présente conférence serve de base à l'adoption d'une loi-modèle au Canada; cette solution aura l'inconvénient de priver les canadiens des avantages de l'adhésion à la convention mais, comme le texte de celle-ci n'a pas été jugé approprié au cours de la dernière session de la conférence, elle apportera à tout le moins à l'ensemble des canadiens la possibilité de régler un bon nombre de problèmes de droit international privé pouvant exister entre canadiens des différentes provinces.

ROBERT NORMAND
Pour les commissaires
du Québec

Québec, le 14 août 1970.

APPENDIX J

(See page 40)

THE RATIFICATION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW TREATY AND ITS APPLICATION IN THE CANADIAN PROVINCES

At the meeting held on August 29, 1969, the Conference of Commissioners on Uniformity of Legislation in Canada asked the Quebec Commissioners to prepare a report for the next meeting, to be held this August in Charlottetown.

In light of their instructions, the undersigned respectfully submits in the name of the Quebec commissioners, a complete study on the problems arising out of Canada's participation at the Hague Conference on Private International Law in 1968.

A study has been made on this, and deals with the membership, objectives and structure of the Hague Conference; the methods which have been adopted by the Conference during its twelve sessions in order to unify private international law; and finally, conclusions on international and constitutional law in Canada, and solutions which should be recommended by the Commissioners Conference.

In preparing this report, the undersigned was able to consult a memoir written by the President of the Private International Law Commission at the request of the Quebec Law Reform Commission in November 1966.

After consulting this document, it appeared that the memoir has been prepared largely in the light of certain articles appearing in the *Revue Critique* on private international law, and signed by the Secretary of the Hague Conference on Private International Law, Mr. Georges A. L. Droz

Membership, Objectives and Structure of the Hague Conference

The Netherland's Government Standing Committee formed by a decree on February 20, 1897 to advise the Dutch government how to promote the unification of private international law, was told to convoke a meeting. Thus the Hague Conference met for the first time on September 12, 1893, to settle various problems. A Statute emphasizing the permanent nature of the Conference was enacted on October 31, 1951, during the Seventh Session, and it came into force on July 15, 1955.

The Statute was enacted as an international treaty, so that the work would be carried out, and so that periods of lethargy, such as had occurred between 1904 and 1925, and between 1928 and 1951, could be avoided.

Henceforth it would be a permanent organization composed of states which would have to accept the Statute formally, (articles 2 and 14).

The Statute can be revised by a two-third majority of the Conference. The main clauses of the Statute are followed by a regulation which was aimed at ensuring execution of the Statute. This regulation was drawn up by the Conference Committee and was approved by the members. Those usages established at the Conference before 1955 continue to be in force, provided that they do not conflict with the Statute or regulations.

Founding Members

Any state which had attended one or more conferences, and which accepted the statute in 1955 are founding members. Any other state whose participation would be from a juridical point of view of importance for the work of the Conference can become a member

Admission

Admission is decided by the membership. One or more states of the voting majority proposes the admission, which is ratified within six months dating from this proposal.

Final admission is contingent on the state accepting the Statute. A declaration of acceptance is given to the Netherlands government, which notifies the membership (article 2). The states are no longer invited, but rather summoned to the meetings (article 3).

A member may withdraw after a five-year period The revocation must be made known to the Netherlands Foreign Affairs Minister at least six months before the end of the Conference's budget year, and is effective at the end of the year, but only if ratification has been given.

Certain non-member states are permitted to send observers to the sessions.

The following twenty-five states are members: Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Nor-

way, The Netherlands, Portugal, Spain, Sweden, Switzerland, The United Arab Republic, The United Kingdom, the United States, Turkey and Yugoslavia.

Aim

The aim of the Conference is to work for the progressive unification of the rules on private international law.

It must be stressed here that the aim is to unify the regulations as they apply practically, and not to pursue academic arguments on them. The Conference, and between sessions, the commission, may set up special committees in order to prepare convention drafts, or to study any aspect of private international law which is in keeping with the overall aim of the Conference.

Generally speaking, the permanent bodies of the Conference and the special committees make a preliminary study of the material, and prepare drafts based on this. Then, at the Conference sessions the final plans are signed and adopted. When one of the members puts some problem on the agenda, the Permanent Bureau checks with the other members to see if there is real conflict on this point, and also to see if a unification on the matter would be accepted. If the answer is in the affirmative, then the Permanent Bureau, with help from the members, studies the existing law on the subject in order to get information.

Then a special committee of experts is set up to draft a convention. The experts work for the time being, independently of their government. The scientific approach in their work is further evidenced by the fact that only a few members are represented, and that the others have put their confidence in the impartiality of these discussions. The governments are notified of the plans, and a decision is taken on them at the full sitting. Thus, research for an ideal solution on a scientific scale (the value of which speaks for itself) is not neglected.

The Netherlands Government Standing Committee, founded in 1897, is in charge of the Conference. It directs the Conference through the Permanent Bureau. It examines all the proposals which are to be put on the Conference Agenda. It is free to set the order in which to deal with these proposals. After consulting the members, the Standing Committee sets a date and outlines an agenda for the session, and asks the Dutch Government to summon the members.

Regular sessions are held every four years. When necessary, the Commission may consult the members, and then ask the Dutch government to call a special session.

The Permanent Bureau

The Permanent Bureau sits at the Hague. It consists of a Secretary-General, and two secretaries from different nations who are nominated by the Dutch government upon appointment by the Commission. The Secretary-General and his secretaries must have a legal background and the appropriate practical experience.

Under the direction of the Standing Committee, the Permanent Bureau is principally in charge of preparing and organizing Conference sessions, special sessions and as well the work for the secretariat and meetings of special committees.

The permanent bodies of the Conference and the special committees make a preliminary examination of the material which is to be dealt with, and draft the preliminary plans. Definite texts are drawn up and signed, either at the beginning or at the end of the session These meetings are closed. The delegates are chosen and subsidized by their governments *The official language is French.*

The relations at this Conference are very relaxed. This harmony and understanding, based on reciprocal estime helps the non-political nature and substance of this work: private international relations.

Communication Between the Members

It is important to note that in order to facilitate communication, each government should appoint a national communication office. The Permanent Bureau can then correspond with all these bodies, and with other appropriate international organizations (article 6). This arrangement has given the permanent bodies of the Conference a mode for avoiding the inevitable delays and complications of the diplomatic road. It has thus helped to broaden the great scope which this organization has taken. The Conference maintains official relations with other intergovernmental organizations. For example, it dealt with the Conseil de L'Europe on December 13, 1955, so that each could outline their field of activities. It dealt with the United Nations to find a way for both secretariats to collaborate. It dealt with the Netherlands government to outline the immunities and privileges which should be granted to the Conference. The Conference acts in

special agreement with the European Economic Community. It maintains relations with several private international, scientific and professional organizations, such as The International Law Association; L'Union du Notariat Latin, the International Bailiffs and Law Officers Union, the International Social Service, etc.

The national body appointed in Belgium, for example, is the legal department of the Foreign Affairs Department. In Greece it is the Hellenic Commission on private international law, which sits in the Hellenic Institute for private international law. In Great Britain, it is the Foreign Office, in Denmark it is the Department of Justice, in the Netherlands, it is the State Commission for the codification of Private International Law. In Turkey, a law professor is the intermediary. In Canada, it is the Federal Department of Justice.

Office and Commissions Expenses

Expenses arising out of the function and maintenance of the Permanent Bureau and special committees are divided amongst the membership. This is not so for the personal expenses of delegates attending a special committee meeting. These are paid for by the governments which are represented at this meeting (article 9). The expenses incurred at the regular sessions are absorbed by the Netherland Government. When special sessions are held, each participating government shares the cost, and pays the personal expenses of its own delegates. The budget for the Permanent Bureau and special commissions is subject to approval by the Hague representatives. These representatives divide the expenses incurred amongst the members and do so from the office of the Netherlands Foreign Affaires Department. The Acts for each session are published and distributed by L'Imprimerie Nationale at The Hague. They contain various projects, reports, minutes, preliminary documents, etc.

To this day, there have been eleven regular sessions, namely in 1893, 1894, 1900, 1904, 1925, 1928, 1951, 1956, 1960, 1964 and 1968. One special session took place in 1966.

The sessions can be divided into three distinct periods: the first four sessions (1893, 1894, 1900 and 1904) were presided over by T. M. C. Asser; the fifth and sixth sessions between the two world Wars (1925 and 1928) were under the direction of B. C. J. Loder; the seventh, eighth, ninth, tenth and eleventh sessions (1951, 1956, 1960, 1964, 1968) were headed by J. Offerland, and the special session (1966) by L. J. de Winter.

PART TWO

UNIFICATION METHODS STUDIED BY THE CONFERENCE

The first article of the Statute outlines that it "aims to work for the progressive unification of the regulations on Private International Law". Since its creation in 1893, it has worked to meet this objective by unifying conflicting rules on the basis of diplomatic treaties negotiated between the member States.

A Multilateral Convention

A multilateral convention approved by the Conference must be accepted as is by those states who wish to ratify it. If a country which is not a member wishes to follow it, it must do so with or without the authorization of the member states, depending on whether the convention is "closed" or "open".

Since the convention is based on reciprocity (and is generally closed) this text does not apply unless judicial relations have been established between the contracting states. Thus, the draft *convention abolishing the requirement of legalization of Foreign Public Documents,* (1960) applies only to documents to be produced or executed in a contracting country. The documents executed or produced in a non-contracting state remain under extra-conventional rules.

If the one convention were to exclude all reciprocity, for example, by enacting uniform rules to replace the conflicting rules in force in each of the member states, these convention rules could be applied even if judicial relations had not been established with the states participating in the convention, (which is generally "open"). As an example, it is referred to the 1960 Draft Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, which presented seven laws under which a will can be valid (national law, domicile, resident, etc.).

A state participating in the convention would have to recognize this even if the law applying to the case in question is not that of a contracting state.

A Mixed System of Reciprocity

In certain instances reciprocity can be simply limited. This was so, for example, in the 1960 Draft Convention concerning

the Competence of Authorities and Law Applicable in Respect of the Protection of Minors. Article 13, paragraph 1 of the said Convention points out that this law will apply to all minors whose habitual residence is in a contracting state, without regard to whether a minor is of the nationality of another state. This is equivalent to forming a universal law. But, the same article, paragraph 3, allows the States to limit the application of this convention to minors residing in their territory, but who are nationals from one of the contracting states; because of this, the convention field is reduced, and the State employing this reservation uses its non-conventional right when it deals with non-contracting States.

Since the Hague Conference is trying to establish uniform rules on Private International Law, by means of these international conventions, those states whose federal constitution does not give the federal government the power to make international treaties to bind the member states on private law matters, have abstained from becoming members of an international organization because they cannot subscribe to the work done.

After the Eighth Session in 1956, the representatives of the United States who were invited to attend as observers, submitted a memorandum suggesting that the Conference use a uniform model law system, rather than a convention system, especially where reciprocity was not really an essential element of the treaty. By introducing such a system the constitutional problems in federal states which arise when conventions have to be ratified would be avoided. Both Canada and the United States have pluri-legislative systems, and employ this method to unify their internal law. In the United States, the National Conference of Commissioners on Uniform State Law (the Canadian counterpart is our *Conference of Commissioners on Uniformity of Legislation*) drafts model laws which will replace the common law as it exists in many areas. However, nothing can prevent a state from modifying any clause which it does not deem satisfactory. The American representatives at the Eighth Session tried to persuade the members to put conflicting international laws into this form, and not into rigid treaties, mainly because this method is of great scientific and practical value.

The question of model laws arose at the Ninth Session, and most of the delegates affirmed their preference for the treaty arrangement. A small committee was appointed to examine the

alternatives. It also reaffirmed that the Hague Conference should deal primarily with international conventions.

However, the full committee was told that it would be sensible to codify all the internal rules on private international law, so that any country who could not attend the Conferences because of its judicial system, could nevertheless make use of the unified laws.

The committee which was to draft a text was left to decide if this type of process could be used, or if strictly reciprocal conventions would continue. The committee made the following proposal which was adopted by the committee without notable change·

> "The Ninth Session, recalling that under article 1 of the Statute, the aim of the Conference is to work toward the progressive unification of the rules on private international law, takes cognizance of the increasing interest which the work of the Conference arouses beyond the circle of its members.
>
> Furthermore, it has been made aware of the fact that certain states of a federal character might be prevented by difficulties of a constitutional nature from adhering to any convention produced by the Conference or even from becoming members of the Conference It has been found that even non-member states, for which such difficulties do not exist, might prefer to adopt the substantive provisions of a convention without formally adhering to an instrument of international character, for such adherence is often made subject to conditions embodied in the text.
>
> The Ninth Session remains convinced of the need to retain the diplomatic nature of the Conference, which connotes primarily the preparation of conventions between States on the basis of negotiation and mutual concessions It notes however, that the activities or work at the Hague occupy a special place in the world today, and that henceforward, the Conference feels the need to search for means of ensuring a greater sphere of influence for the solutions evolved, and the results obtained
>
> It considers that one means of achieving this object might be found on the basis of the rearrangement of the conventions. In the first place, so far as the subject matter is appropriate, an editorial technique should be used to remove from the substantive provisions elements of a reciprocal character, which would be regrouped in a separate part of the convention. In the second place, with respect to the substance of each convention, delegations and experts should consider whether or not there is a possibility of establishing rules of conflicts free from reciprocal elements and designed for general application, without making any distinction with regard to nations between which legal relations regulated by the convention exist.

In particular, it wishes to draw the attention of the Permanent Bureau to the problems and solutions indicated in the present decision."

This decision implies the use of a redactional technique which will produce a text which will not be completely different from the treaty followed by the annex made of the uniform law of an agreement accompanied by a model which has been drafted in the light of the text of the said agreement. It needs only to separate the articles relating to the international obligations from those unifying the rules of conflict and to obtain an annex or a model.

It seemed one way to do this lay in the method used to write up the agreements. When possible, the reciprocity elements could be removed from the convention and regrouped in a separate part of the agreement. However, would it be possible to establish these laws devoid of reciprocity terms, (so that they could be applied generally) without stating which States were to be subject to the laws governing in the convention?

The Ninth Session pointed out to the Permanent Bureau the problems and solutions involved in this decision. It suggested that the text will not differ a great deal from a convention followed by uniform laws, or from an agreement accompanied by a model to this effect, if done in this way. All that would have to be done is to separate the articles pertaining to international agreement from those unifying conflicting law; an annex or model would remain.

Would the reciprocity elements be eliminated from such an agreement? In 1964, the Hague Conference adopted the following resolution:

To consider the decision rendered in the Final Act of the Ninth Session, held on October 26, 1960.

To note of what interest it would be to the United States if the Conference used a system similar to that used by the *National Conference of Commissioners on Uniform State Laws* (an analogous organization) which deals with the conflict of laws between its various states.

To consider whether or not a clause containing a judicial commitment with regard to another State, could be incorporated into the model-law text.

To ask the Permanent Bureau to give copies of the model laws attached to the conventions which appear in the Final Act, to the membership.

This resolution is naturally of great interest to Canada, since it has an organization very similar to the National Conference of Commissioners on Uniform State Law. If accepted, the new system would allow those non-member states who were unable to ratify or to enter conventions formed under the old method, to join this international organization.

Adhesion of Canada

At the 1966 meeting of the uniformity conference Mr. Ryan, on behalf of the commissioners for Canada reported to the uniform law section on the steps being taken by Canada to participate in the Hague Convention on private international law and the international institute for the unification of private law (see proceedings 1967, page 19). Doctor Horace Reed reported to the preliminary session of the Conference (proceedings 1967, appendix z, page 247) and recommended that no action should be taken by the Conference until its assistance was requested He expressed himself as being of the view that the uniformity Conference should be prepared to assist the Government of Canada and the provinces in any practical way and should therefore, when requested to do so, (a) give its advice and assistance and (b) to designate persons, not necessarily from its membership, who are best qualified to make a constructive contribution to the solution of particular problems of International uniformity of private law from time to time.

Following consultation with the provinces, Canada made a formal application to accede to the Hague Conference on private international law and accession was formally accepted in September 1968 to meet the requirements of the Conference Statute, the Department of Justice of the Government of Canada was designated as a Canadian "National Office". It was proposed that the Canadian delegation would comprise six members in order to permit representation consistent with the realities of the Canadian Legal system and institution. It was also intended by the Government of Canada that the delegation comprise a member named by the Department of Justice, a member named by the Conference of Commissioners on Uniformity of Legislation, and four members to be selected from those persons named by the Attorney General of the Provinces of Canada; one of these per-

sons would be named by the Attorney General of Quebec to ensure representations of the civil law of that province, the 3 remaining nominees would be representatives of the common law provinces.

In their report to the Conference, the Commissioners for Canada stated:

> "It seems to your Canada Commissioners that the uniformity conference is uniquely equipped for that role; it is the only body now in existence representative of all jurisdiction in Canada that prepares and recommends uniform acts, and has the most experience in the preparation of draft uniform legislation for the use of all jurisdiction in Canada."
>
> It is hoped, therefore, that the Uniformity Conference will agree to name a delegate from *amongst its members* to the session of the Hague Conference in October (1968) and be prepared to assist subsequently in preparing and recommending uniform Acts based on Conventions originating from the Hague Conference."
>
> "This report is made with the intention of preparing the ground for a formal request for assistance to the uniformity conference on the government of Canada."

(See Proceedings 1968, Appendix D, page 60)

After some discussion of the Commissioners of Canada report on the participation of Canada in the Hague Conference on private international law, Mr. Ryan moved that the President constitute a committee to study the report of the Canada Commissioners respecting Canada's accession to the Hague Conference on private international law and report back to the closing preliminary session of the Conference,

(a) recommending a person to be named by the President as a delegate to the eleventh session of the Hague Conference to be held at the Hague, from October 7 to October 26, 1968 when a formal request is received from the Government of Canada and

(b) recommending the manner in which the Conference might assist Canada's participation in the Hague Conference when a formal request is received from the Government of Canada.

The motion was carried and the President appointed the following members to constitute a committee: Messrs Bowker

(Chairman), Colas, Kennedy, Leal, J. A. Y. MacDonald, MacTavish, Rutherford and Ryan.

Mr. Bowker, Chairman of the special committee appointed at the opening of the plenary session presented the following report at the closing session

"The committee recommends that this Conference

(i) express its pleasure that the Government of Canada is to adhere to the Hague Conference on private international law;

(ii) express to the Government its appreciation of the proposal to include in the Canadian delegation to the Hague Conference a member named by this conference;

(iii) assure the Government that this Conference will be happy to participate through its President (or his nominee) in the temporary advisory body that is to prepare for the next session of the Hague Conference;

(iv) assure the Government that this Conference will be happy to participate in the deliberations and recommendations of the Hague Conference and in the implementation of its conventions in Canada, particularly in the roll of drafting uniform acts pursuant to the Hague Conventions;

(v) assure the Government that this Conference will be happy to participate in any national advisory committee that may be established to assist the Government's participation in the Hague Conference;

(vi) inform the Government that this Conference will accept an invitation of the Government to nominate a member to the forthcoming Hague Conference and will nominate L. R. MacTavish, Q C. and as an alternate Allen Leal, Q.C."

Canada thus became the twenty-fifth country to join the Conference on private international law at the Hague. The first delegation from Canada attended the eleventh regular session, held from October 6 to 26 at the Peace Palace. Heading the Canadian Delegation was Roderick Bédard, Q.C., Associate Deputy Minister of Justice, Ottawa. The other members were Paul A. Crépeau, Professor of Law, McGill University and Chairman of the Commission for the Revision of the Civil Code of Quebec; H. Allen Leal, Q.C., Chairman of the Ontario Law Reform Commission; Honourable Sterling Lyon, Q.C., Attorney-

General for Manitoba; L. R. MacTavish, Q.C., representing the Conference of Commissioners on Uniformity of Legislation in Canada and Horace E. Read, Q.C., Sir James Dunn, Professor of Law and Vice-President, Dalhousie University.

PART III—ACTIVITIES OF THE CONFERENCE

From 1893 to the Second World War

1. *The first session*

The first session of the Conference was held at the Hague from September 12 to 27, 1893. The Conference decided that it would deal with valid conditions for marriage, successions, and legal jurisdiction. Consequently four committees were appointed to study these matters and to present drafts to the Conference. Once the session had considered these drafts it adopted a protocol on marriage law, service of judicial and extra-judicial process, rogatory commission and succession.

The conference members also decided to reconvene the next year to draw up definite rules of protocol and to examine other matters of private international law.

2 *The Second Session: 1894*

In June and July 1894, the second conference on Private International Law reconvened at the Hague to further develop the plans of the preceding year. This conference had two objectives: first, to revise the solutions adopted in 1893 with regard to marriage, succession and civil procedure, and to study any remaining problems on the subject; secondly, it considered two new questions: guardianship and bankruptcy.

Five committees which were established submitted eight reports and eight drafts. With regard to the rule revisions adopted earlier, a general preliminary hearing was held in order to brief the committee in charge.

The observations exchanged at this meeting were most interesting since the delegates revealed the opinions of their governments with regard to the proposals of the final protocol of September 27, 1893, and with regard to the work of the Conference in general.

At the end of the Second Session the delegates submitted to their governments a final protocol which outlined the work of the first two sessions under five headings.

This protocol contained provisions on marriage validity, on the effects of marriage on the status of the wife and children, on divorce and separation, on guardianship, on civil procedure (service of judicial and extra-judicial process, rogatory commissions, security for costs, legal aid, imprisonment for debt) on bankruptcy, on wills and donatio mortis causa.

3. *The Third Session: 1897*

On December 20, 1897, the Netherland government outlined the agenda, in which it said that apart from a few minor changes to be submitted for appraisal, the Conference would deal with marriage, legal separation, divorce, guardianship, succession, wills and donatio mortis causa, and the final protocol regulations adopted in 1894. These rules with their minor modifications were discussed at the Third Conference. The Netherlands added its own draft on the effect of marriage on the spouse's property.

Those states which had shown interest in the discussion were asked to study the problems and to submit their opinions and modifications so that the work of the conference could be laid out

Most of the governments complied. The Netherland government analyzed all the documents which it received and gave copies to the governments of the members sometime before the opening of the conference.

The fourteen states which attended the 1894 Session, and which signed the 1896 agreement on civil procedure (service of judicial and extra-judicial process, rogatory commissions, security for costs, legal aid, imprisonment for debt) were also represented at the Third Session held from May 29 until June 18, 1900.

At the first meeting they had to decide if they would continue to study the problems which had arisen at the First Session, or if they would add new problems to the outline. After some discussion, the prevailing opinion was to set up a special committee in charge of revising the bankruptcy provisions which were dealt with in 1894, in order to draft a convention, and as well to select new matters for discussion. Three other committees were asked to present drafts on those matters outlined in the agenda; the first, on all the effects of marriage, the second, on successions and wills, and the third, on guardianship of infants.

The Conference adopted three conventions. The first regulated the conflict of laws on marriage, that is, only those conditions for marriage validity. It contained twelve articles, which can be divided into three areas: the substance of marriage; marriage form; the span of the convention, and clauses dealing with deposit, ratification, adhesion, the date it would come into force, and its duration.

The second draft convention was to deal with the conflict of laws pertaining to divorce and legal separation. It answered four main questions· What is the best solution when spouses are of the same nationality? Who has jurisdiction? What are the sanctions regarding existing rules? Which law applies to the spouses when they are of different nationalities?

The third project dealt with the conflict of laws and jurisdiction on the question of guardianship of minors. The Conference was pleased with the program outline of the rulings adopted in 1894. It modified a few minor clauses, but accepted the basic ideas. Given that a minor is living in a country other than his own, it is advisable that a guardian be appointed and act in accordance with his own national law.

Those basic rules held that during this period, the Conference would deal with personal status, and with the idea that each state should have some measure of protection for incapacitated foreigners. The Conference of 1894 had dealt with these matters. The one in 1900 continued its work, and proposed a few changes as to how these rules would be applied.

These three draft conventions adopted by the Third Hague Conference were signed on June 12, 1902, by twelve nations.

The Conference also began preliminary studies on other subjects. Since they could not yet be put into convention form, these studies were attached to the protocol as resolutions which would eventually be drafted into conventions. This provisional work dealt with the effects of marriage on the status of the wife and children, the effect of marriage on the assets of the spouse; the effect of divorce and legal separation, the tutorship of majors and bankruptcy.

4. *The Fourth Session: 1904*

The Fourth Session was prepared for in the same manner and with the same care as the preceding one. It was held from May

16 to June 7, 1904 It dealt with five areas. civil procedure, successions; testamentary dispositions, and donatio mortis causa, the effects of marriage on the property of the spouses; the effects of divorce and legal separation, guardianship and bankruptcy.

5. *The Fifth Session: 1925*

In November 1925 the Fifth Session of the Hague Conference on Private International Law took place. At the end of the session all the delegates signed a closing protocol containing the proposals and resolutions presented at the Conference. Amongst these were two convention drafts, one on bankruptcy, the other on the recognition and enforcement of foreign judgments

Successions were also discussed and agreed upon. As it was impossible to complete the discussions on this subject, it was decided that debates on the matter would be held at the next session. This Conference modified a few of the 1902 and 1905 agreements on marriage, divorce, legal separation, guardianship, married persons property, interdiction and civil procedure.

The Conference also asked the Netherland government to table the succession question for the next session, so that the discussions could be completed and a convention drafted. It was also suggested that the Conference examine the existing notification system, and any proposals for modifying the convention on civil procedure Furthermore, the Netherland government was asked to put forth a questionnaire dealing with all aspects of divorce and legal separation between married persons of different nationalities. The Conference also expressed the wish that each government proceed to perfect its legal aid legislation as soon as possible.

6. *The Sixth Session: 1928*

The Sixth Session opened January 3, 1928 and ended on January 28. Amongst the numerous projects in the final protocol to be submitted to each government for approval, a few aimed only at ensuring that the texts passed at the last session were put into force, or at correcting a few difficulties, which had arisen because of their application. Others established new conventions on important points or aimed at preparing questions for discussion at future conferences.

Still others favoured a more general development concerning legal conventions and the unification of private international law for the future.

Thus the Conference drew up (1) the final clauses of the Draft Convention on Bankruptcy, and on the Recognition and Enforcement of Foreign Judgments, as set out by the Fifth Session in 1925. (2) A new editing method outlined in article 4 of the Draft Convention on the Recognition and Enforcement of Legal Decisions, which had been drawn up in 1925.

This Conference also modified questions of nationality which had arisen in the 1902 Conventions on marriage, divorce and guardianship, and in the 1905 conventions on the effects of marriage and interdiction.

The protocol included several original drafts. The first dealt with legal aid and free delivery of extracts of acts of civil status. In truth it was really a modification of an earlier agreement rather than a new agreement. The 1905 Convention on procedure had already dealt with free legal aid for those under the jurisdiction of contracting states. The second project dealt with the conflict of laws and jurisdiction in successions and wills. This was the major contribution of the Sixth Session.

This draft was divided into two large areas: the first linked the actual conflict of successoral laws to the substantive law; the second dealt with problems of jurisdiction and procedure. It must be pointed out that the first part was really a reproduction of those tests already outlined in 1925 by the Fifth Session. The second part consisted of new work.

This Conference also studied the question of sale, and three drafts were drawn up to serve as a basis for further work. In effect, during the session, it appeared that rather than concentrating on personal problems, that is family and public order problems, it would be better to tackle the economic field, i.e. the field of international commerce.

Finally it must be pointed out two protocol projects which do not deal with a special field of private international law, but which tend to insure generally the formation of agreements and the process of unification. The first proposal which was adopted was that any state signing a treaty on an international law matter would send a copy to the Netherland government, which would be "prepared to offer its services to any government which would like to ask information regarding the historical, judicial, legal or economic nature of these agreements." The second protocol project was concerned not so much with

elaborating on these private international agreements, but with interpreting them. Thus those states which signed, recognized "the jurisdiction of the Permanent Court of International Justice to deal with all disputes arising out of the interpretation of agreements set out by the Conference on Private International Law."

After the Second World War

7. The Seventh Session: 1951

The Seventh Session was held at the Hague from October 8 - 31, 1951. It marked the opening of the Conference's most important period. In the Final Act, it adopted five conventions and put forth several recommendations and wishes. The resolutions applied to three categories: some were simply put forth to complete certain tests outlined at earlier conferences; others contained the work of the Seventh Session, and drafts on new matters of primary importance; lastly, some prepared for future conferences, not only by drawing up agendas, but even by considering new foundations for the continuance of the Conference, so that it would seem more permanently and solidly based.

Once again the Conference revised the Draft Convention Relating to Civil Procedure, which had already been amended in 1928 on a few minor points. It then asked all those who had not signed the Protocol agreeing to submit the interpretation of Draft Conventions on Private International Law Matters to the Permanent Court of International Justice, to do so as soon as possible.

The agenda for the Conference dealt with the question of recognition and enforcement of foreign judgments. As above mentioned, an agreement on this subject had already been drafted in 1925. In the meantime, it had been subject to much criticism and had not been ratified. They had hoped to re-examine this problem during the Seventh Session, but had no time to do so. Thus the Conference decided unanimously to refer the question to the Netherland Government Standing Committee, in the hope that they might find the appropriate solutions.

The Seventh Session adopted three main draft conventions a Draft Convention on the Law Relating to International Sales of Corporeal Moveable Property, a Draft Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations, and Foundations, and a Draft Convention for the

Regulation of Conflicts between the Law of Nationality and the Law of Domicile. The first two of these drafts are of considerable importance and were easily passed and adopted by unanimous vote at the Conference. The third draft was only ratified by a majority and many objections were raised.

In order to complete the Draft Convention on the law Relating to International Sale of Corporeal Moveable Property, it seemed that two agreements would have to be drafted; one would be a Draft Convention on the Law Governing the Transfer of Title in the Case of International Sale of Goods; the other would be a Draft Convention on the Jurisdiction of the Selected Forum in the Case of International Moveable property. Both projects were submitted to a committee, but no accord was reached. It was also decided that a special committee would examine (in preparation for the Eighth Session, a text on the Transfer of Property, keeping in mind the general principles set forth in the debates already in progress). A similar resolution dealing with the legal jurisdiction over the sale of such goods was drawn up.

The agenda of the Seventh Session was also supposed to deal with obligations to support minor children. Again the session ran short of time and so set up a special committee to draw up a draft on the conflict of laws in this area. This was to be referred to the Eighth Session.

The Seventh Session also concerned itself with the future of the Conference by enacting a Statute. Under the direction of the Dutch government, the Conference was to have been a permanent one. The sessions had become few and far between, and thus the Dutch government asked that this situation be corrected. Indeed the European Council, at the request of some of its members, had intended to draft some conventions on the conflict of laws. In order to avoid creating another body to do this, the European Council decided to ask the Conference to study certain questions on private international law. But, so that this collaboration might be effective the Conference had to be more permanent and have a clearly defined statute. This explains on one hand, why the Seventh Session adopted the Statute draft as outlined in paragraph 5 of the final act, and on the other hand, why they wished to enter an agreement with the European Council.

8. *The Eighth Session: 1956*

This session was held at The Hague in October 1956. The delegates of twenty States signed the Final Act on October 24. Four draft conventions were adopted and submitted to the governments for approval.

The Draft Convention on the Law Governing the Transfer of Title in the Case of International Sales of Corporeal Moveable Property, and the Draft Convention on the Jurisdicition of the Selected Forum in the Case of International Sales of Moveable Property concluded the work of the Sixth and Seventh Sessions. Both the other conventions dealt with the obligation to support minor children. It should be recalled that the Seventh Session had set up a special committee to look into this. The drafts which they prepared were accepted by the Eighth Session. The first was the Draft Convention on the Law Applicable to Obligations to Support Minor Children. It covered benefits for legitimate, illegitimate or adopted children. Basically it recognized the applicable law as that of the child's habitual residence. It must be noted that the convention dealt solely with maintenance and not with consanguinity. It outlined the conditions necessary for the recognition and enforcement of foreign judgments, but it brushed aside any profound revision. It recognized the jurisdiction of the authorities where the debtor or the creditor resides.

The Eighth Session also put forth on the agenda for the Ninth Session, which decided: that the Conference would continue to study those problems relating to the sale of goods; that a draft would be drawn up on the conflict of laws in contractual obligations; that a method would be sought to simplify the process of legalizing foreign documents; that the family law conventions would be revised, and that a draft on the formation of wills would be drawn up. It should be noted that those American delegates at the Eighth Session advised the members that the federal government and certain state governments would hesitate to sign any conventions which might affect their sovereignty. They suggested that the aims of the Conference (the unification of private international law) could be more easily attained if the multilateral convention system were abandoned. In its place, they suggested using uniform laws, which could be ratified by those states wishing to include them in their own private international law dealings, and which could even be amended by them if necessary. The same situation also exists

in Canada. The system which they propose is more pliable, and takes into consideration the sovereignty of the States and their judicial customs.

9. *The Ninth Session: 1960*

The Ninth Session took place at The Hague from October 5-26, 1960. Eighteen of the members were present. The United States sent a team of five observers, who represented all the main bodies of American jurists. The European Council, the European Economic Community, the United Nations, and other international organizations also attended the Conference. The agenda was split up and given to five dfferent committees. Three draft conventions were drawn up.

The first committee presented a Draft Convention abolishing the Requirements of Legalization of Foreign Documents. By legalization it is meant the formalities used by various diplomats in validating a document which has passed from one country to another.

To this point, this legalization system has severely hampered the free exchange of documents. From now on, authorities from the country receiving the document will just have to put forth a recommendation (apostille): this is a simple formality created by the new agreement. This recommendation (apostille) will be attached to the document itself by the authorities of the country in which it originates. No other formality at all will be required. To ensure that the practice shall be uniform, a sample recommendation was attached to the agreement.

The second committee, which drew up the Draft Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions was influenced by the *favor testamenti* principle, which is well known to internal law. The main clause of this project is found in paragraph one of the first article, which says that a will is valid as long as it fulfills one of the following laws: *lex loci actus,* the law of nationality, of domicile, of habitual residence of the testator at the moment when he makes his will, or when he dies; finally, for the disposition of immoveables *lex rei sitae.* The same rules apply to the revocation of a will, and for this reason a supplement of the law governing revocation was added.

When speaking of testamentary dispositions, it is not meant wills in a narrow sense but also last wills and testaments which

could appear in other documents as well. The draft deals with joint wills but only regarding their form It leaves the question of their admissibility open.

The conference did not try to put forth a definite form. It chose an empirical system by declaring in article 5 those conventions applying to questions which seemed the most doubtful This basically affects the interdiction of making a will in a foreign state by the holograph form which is used in some legislation. These can only be used in a very reduced form as outlined in the reserve clause of article 11.

The practical importance of this reserve clause, as with other such clauses, might seem to be of little value. It must be added that this agreement, as article 6 expressly says, contains no reciprocity conditions.

Any state may enact these rules internally without becoming party to the Convention. The only practical difference concerns diplomatic protection for those not applying convention rules. The Private International Law Committee of the office of revision of the Civil Code of the Province of Quebec has already used this agreement when it revised article 7 of the Civil Code The third committee in charge of revising the 1902 agreement on guardianship has perhaps had the most difficult task. The inconveniences of this agreement have long since appeared. The Boll judgment rendered on November 28, 1958, by the International Court of Justice brought these problems to view It revealed some very different aspects of guardianship, and the need to regulate protection for minors in all areas The New Draft Convention Concerning the Powers of Authorities and Law Applicable in Respect to the Protection of Minors covered this wider field. Even those delegates who had earlier favored a revision of the 1902 agrement, saw the need to widen the field. It was also realized that the conflict of authorities was really more important than the conflict of laws, and thus the agreement was centered on the conflict of authorities.

On the other hand, the opinion differed a great deal as to whether the principle of habitual residence or that of nationality would apply. A happy medium was reached; naturally the major jurisdiction would be given to the authorities of the child's habitual residence. But if the national authorities are not satisfied with the protection given by these authorities, they may take charge of children who fall under their jurisdiction. Furthermore,

in order to ensure uniform application, any relations resulting from the application of national law, are recognized everywhere, and not subject to subsequent intervention. In case emergency measures are needed, any contracting state may take any steps necessary with regard to minors who are on their territory.

Finally, in response to the wishes which have been expressed, we have stressed the importance of exchanging information and views amongst the various authorities. The convention has not of course been able to settle all the problems arising in this complex matter. It is hoped that a completely satisfactory system will be developed, which will eliminate positive and negative conflicts of jurisdiction, especially in the unfortunate situation where no one is taking care of a child who is in need. This situation occurs very often.

The fourth and fifth committees had no concrete objectives on which to base their discussions. The fourth committee only planned to discuss a Draft Convention on the unlimited jurisdiction of the Selected Forum in contract of sale (similar to the one drafted in April 1958). The greater problem of recognizing and enforcing foreign judgments was put on the fifth committee's agenda. It was soon realized that the problems were so closely interrelated that they should be studied together. After prolonged discussion, a solid base was laid so that the commission could proceed. The possibility of holding a multilateral conference on the recognition of state judgements was also discussed. The fifth committee made a few other decisions regarding future work at the Conference. The most important decision involved the adoption of foreign children, which presents a very particular problem. A special commission was appointed to study the conflict of law and jurisdiction in this field. Furthermore, at the suggestion of the Union internationale des Huissiers de Justice et Officiers judiciaires, a study to find a more satisfactory method of serving judicial and extra-judicial foreign documents was proposed.

Finally, the fifth committee questioned the present system in order to find out if the elaboration of diplomatic conventions could be replaced by written model laws. The conference decided to continue drawing up conventions but to find an appropriate method which would satisfy those who were partial to the model law system. Thus the conference thought that one way to achieve this might be that wherever possible the reciprocity

elements would be eliminated and regrouped in a separate convention. On the other hand, the delegates and experts had to see if it were feasible to draw up rules of conflict void of application without differentiating as to what states would be subject to the laws regulating the Convention.

The Ninth Session also decided to continue regulating conflicting laws between members and third parties.

10. *The Tenth Session: 1964*

The Tenth Session was also held at The Hague, from October 7 to 28, 1964, and covered three main areas. It proposed a Draft Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoption. A Draft Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters and a Draft Convention on the Choice of the Court.

Furthermore, the session made some important decisions regarding the future work of the Conference.[12]

The first of these conventions, regarding adoption was inscribed in the general program that the Conference had undertaken in order to protect the child's interests. This program included the Draft Convention of the Law Applicable to obligations to Support Minor Children prepared in 1956, and the Draft Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants prepared in 1960.

The 1964 Convention on adoption was concerned with two things which should be discussed before examining the clauses which were drawn up. On the one hand it aimed not at unifying actual laws, but at settling the jurisdiction of authorities and the conflict of laws. On the other hand, it was a convention of acknowledgement and not one concerned with the direct rules of competence so much in the field of conflict of authority and jurisdiction as in the field of conflicting laws.

Articles 1 and 2 of the convention outlined the field of application. In order for the convention to apply, the adopting party (or parties in the case of couples) must be of the nationality of one of the contracting countries, and must have habitual residence in one of these states. The same applies to the child.

[12] See Acte Final, Revue 1964, p 813 et Lagarde. La Dixième Session de la Conférence de la Haye de droit internationale privé, Revue 1965, p 24.

Furthermore, the child must not be married and must be under age eighteen when the application is filed.

Article 3 regulates jurisdiction of authorities, and article 7 deals with annulment or revocation of adoption. Article 3 gives jurisdiction to two authorities to deal with adoption; those authorities where the adoptive party has residence, or in the case of an adoptive couple, where they both have residence; and those authorities in the national state of the adopting party, or in the case of an adopting couple, the state of common nationality.

Article 7 (dealing with annulment and revocation of adoption) recognizes the jurisdiction of three authorities; the contracting state where the adopted party is living when the application for annulment is made; the contracting state where the adopting party has residence when the application is filed; or in case of an adopting couple when they both have residence, the authorities of the state where adoption has been decreed.

The Convention has dealt realistically with the conflict of laws, as it has tried to link legislative jurisdiction with judicial or administrative jurisdiction. Article 4 contains the following principle: "The authorities named in article 3, paragraph 1, may apply their internal law regarding adoption subject to article 5, paragraph 1."

Any authority applying its own law must be made aware of two exceptions: (a) when an authority has jurisdiction because of residence, it must respect any interdiction decreed by the national law of the adopting party, or in the case of an adopting couple, the law of their common nationality, if it relates to a declaration under article 13.

Article 13, which is referred to in article 4, states that according to its own internal law, any state may decree interdictions against adoption because there are legal descendants of the adopting party or parties, because the adoption is sought by a single person, because of a blood tie between the adopting party and the child, because of a previous adoption by someone else, because of an age difference between the parties or the child, and finally because of the fact that the child does not live with the adopting party or parties. (b) Internal law applied by the authorities does not extend past the assent of the adopted child and his family who are subject to the national law or the adopted party (article 5, sub-paragraph 1).

These fairly complex rules were required because of nationalist domicile opposition which always occurs when the individual rights are involved. Unfortunately this opposition also explains the large gap in the agreement with regard to the law applying to the effects of adoption.

The Draft Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters is based on the realization that very often a defendant may be a foreigner, and that he is not given notice, or is notified fairly late of events which should be brought to his attention. The Hague Conference has recognized this problem and in the Draft Convention Relating to Civil Procedure (held on March 1, 1954, and in force April 12, 1957) articles 1 to 7 were devoted to this This resulted in a two-fold problem. First of all, it did not really lay down an international system of notification; secondly, it was void of civil sanctions. The Tenth Session tried to draw up a convention to rectify this situation. The negotiations put forth a new system in articles 2 to 7 as follows: each contracting State is to appoint a central authority whose role it is to receive requests for service or notice which have originated in another contracting state. It will then notify the parties (article 2). Any requests are to be forwarded by the appropriate authorities to this body, and they are to be set forth as outlined in the model accompanying the act (article 3) If this body feels that the request does not conform to the convention, it must notify the plaintiff of the particular objections raised in his request. In the alternative, this body must carry out service according to the form used in the petitioning state, or according to the form required by the plaintiffs so that it does not conflict with the law in the petitioning state (article 5); this central authority must then give a notice of certification to the plaintiff (article 6).

The other problem which worried those who wrote the agreement was that of separating foreign notification from civil sanction especially when an action is begun.

Under article 15, when a foreigner has to receive notice, and the defendant does not appear (which leads to the presumption that he has not been notified) the agreement states that the judge must stay proceedings until notification has been given as required by the petitioning state, or until it has been delivered to the defendant, or to his residence as outlined in the Convention rules

The third Draft Convention on the Choice of Court raised the same problems which faced the Conference in 1956, when they put forth the Draft Convention on the Jurisdiction of the Selected Forum in the Case of International Moveable Property. It seemed that such a convention could easily extend beyond the narrow regime of sale. This is why the new convention in its first article allows the parties to choose either a tribunal from a contracting state (the best tribunal being one which is familiar with the internal law or laws of the state) or a tribunal expressly nominated by a contracting state, as long as it is familiar with the internal law of the contracting state.

The Tenth Session continued to revise the earlier agreements on family law matters begun at the Eighth Session. It set up a special committee to draft an agreement containing rules on recognition of foreign divorce decrees, on separation and annulment, and as far as possible, on legal jurisdiction, and the law applying to it. This draft was given to the Eleventh Session which was held in 1968.

The Tenth Session asked the Permanent Office to give texts of the model laws which had been drawn up and added to the Final Act, to the membership. Finally, the Tenth Session asked the Standing Committee and the Permanent Bureau to examine the possibility of adding certain subjects to future agendas.

11. *Extraordinary Session· 1966*

In accordance with the decision taken by the Tenth Session, an Extraordinary Session was held at The Hague from April 13 to 26, 1966. It continued the work of the Ninth and Tenth Sessions on recognition and enforcement of foreign judgements in civil and commercial matters. The following is an analysis of the Final Act of this Session. The convention applies to any decisions given on civil or commercial matters by a tribunal of a contracting state, without considering the nationality of the parties. It does not apply to decisions governing the following· status or personal capacities, the existence on constitution of legal entities and the powers they have, successoral matters, bankruptcy and social security; on damage in nuclear field, etc., or to decisions regarding payment of tariffs, taxes or fines.

The judgment given in one contracting State has to be recognized and enforced in another contracting state if it has been

rendered by a competent tribunal and if it can not be appealed through ordinary channels in the state of origin. If a judgment is to be declared executory in a particular state, it must be capable of being executed in the state where it originated.

Recognition or enforcement of a decision can be refused if it will upset public order, or if it is the result of a mistake in procedure, etc.

A judgment by default will not be recognized and executed unless notice of service has been received by the defaulting party, and unless this party has had sufficient time to prepare its defence. The reappraisal of the fact and the law (examen au fond) of a foreign judgment is not part of the Convention

Article 10 contains a list of instances where a tribunal from the country in which the action originated will be considered to have jurisdiction under the agreement.

The relevant procedure to ensure recognition and execution of a foreign judgment is that of the plaintiff state, except where the agreement states otherwise. The project also deals with costs and expenses, guarantees, legal aid, evidence, and *lis pendens* Article 21 states that a judgment rendered in a contracting state will be valid or executed in another contracting state, according to the preceding articles, unless these two states are in full agreement after both have become parties under the convention. This complementary agreement allows the States to interpret the terms of the convention, to increase the scope of the Convention, as well as to define jurisdictions, and the rules of procedure in order to obtain judgment, to depart from the clauses of certain articles of the agreement, etc. Thus the agreement is really sort of a framework, since a great amount of liberty has been given to the contracting states to adjust the details of recognizing and executing foreign judgments. This formula will enable a large majority of the Conference members to participate in the agreement.

It is of great interest to note that under article 30, when any state signs, ratifies or enters an agreement, it may declare that the Convention will apply to any territory which it represents on the national scale, or to one or more of them. This clause, which applies to the draft adopted at the Ninth and Tenth Session will allow federal states such as Canada and the United States to overcome its constitutional problems.[13]

[13] See page 4

12. *Eleventh Session: 1968*

The Eleventh regular Session was held from October 6 to 26, 1968 at the Peace Palace in the Hague. At this session final drafts were completed of conventions on:

1. Recognition of Divorces and legal Separations,
2. Law applicable to traffic accidents, and
3. Taking of Evidence Abroad in Civil and Commercial Matters.

A supplementary Protocol to the 1966 Convention on the Recognition and Inforcement of Foreign Judgments in Civil and Commercial Matters was also adopted.

For division of Labour, the Conference was divided into four commissions, each working on preparation of one of the draft conventions. In the draft convention on Divorce and Legal Separation jurisdiction is recognized as existing when, at the date of the institution of the proceedings in the State of the divorce or legal separation (called "the state of origin") the respondent had his habitual residence there; or the petitioner had his habitual residence there and in addition a number of further facts existed such as, for example, his habitual residence had continued for not less than one year immediately prior to the institution of proceedings, or both spouses were nationals of that State. At the instance of the common law countries it is provided that where the state of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression "habitual residence" is deemed to include domicile as the term is used in that State. Nevertheless, this shall not apply to the domicile of dependence of a wife.

Under the Highway Traffic Convention the applicable law is the internal law of the State where the accident occurred, subject to the exception that where only one vehicle is involved in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability.

The Convention on Taking Evidence Abroad provides that in civil and commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. A Contracting State shall designate a Central Authority which will undertake

to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law. Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State. The effect of this Convention is to set up reciprocal machinery between ratifying States to compel a witness residing in one of them whose evidence is required in a judicial proceeding in the other to attend and testify before a judicial officer in the State where he is resident. The certified transcript of the evidence taken under examination and cross-examination becomes a part of the record in the proceeding in the requesting State.

Two items already on the agenda for the Twelfth Session to be held in 1972 are: a) the responsibility of manufacturers for their products and b) succession to property and especially problems relating to administration of estates of deceased persons.

Part IV: Constitutional Problems

As stated above, Canada attended the Hague Conference in 1968, even though most of the questions studied pertained more to articles 92 and 93 of the BNA Act, than to article 91 Certain provinces might well have wished to attend this Conference However, according to article 2 of the Conference Statute, only international States can become members. Canadian provinces are not states with regard to international law, and as such cannot become members, unless they subscribe to the theory of dual international personality as do certain federal states. We must point out that as international law stands at present, neither Canada nor most of the members of the Conference actually recognize this dual personality theory.

Just the same, the provinces cannot practically speaking urge Canada to join an international organization under pretext that their objectives fall partly under provincial jurisdiction.

The problem differs greatly when it concerns putting into force international agreements which fall under exclusive provincial jurisdiction. At present, the provinces have constitutional powers which greatly reduce those of the federal government. It is also essential for both the federal and provincial governments to stop holding futile discussions, and to adopt a more objective and positive attitude, so that together they may find

solutions which will allow international conventions to be applied internally, and so that those injustices for which Canadians most often bear the cost, can be rectified.

It is hoped that the Conference of Commissioners on Uniformity of Legislation in Canada will be the forum for a valuable dialogue which will find solutions to these problems rapidly, not by political compromise, but by placing the problems in their proper juridical and legal context.

The Signing of Conventions Adopted by the Hague Conference

Although most of the subjects which arise at the Conference come under provincial jurisdiction, in fact the objectives and application of these agreements have touched on matters which fall under both federal and provincial jurisdiction.

On the other hand, in Canadian private international law, certain rules relate to federal legislative jurisdiction for example, navigation law, air-navigation law, bills of exchange, etc. . . . , and other rules relate strictly to matters of provincial jurisdiction.

In the Canadian Constitution there is no provision for the distribution of power with regard to making treaties.

Although considered by certain publicists as one of the characteristics of the sovereignty of the State, is it possible that the *jus tractatum* can apply not only to the central corps of the federation but also to its members?

It must be recalled that in 1965, Quebec officially took a position allowing the provinces to exercise the *jus tractatum* in fields which were under provincial jurisdiction. The argument which was raised was that any state which can execute an agreement, is certainly capable of negotiating and ratifying the agreement on its own. A convention which is to be executed must be discussed and approved by those who will execute it after it has been enacted.

It must be also mentioned that in 1932, the province of Quebec signed with some countries within the British Empire agreements to avoid double taxation in matters of succession duties. In 1961, Ontario and Manitoba agreed to build an international bridge over Pigeon River. A few years later, Manitoba and Minnesota agreed to build an international road. Finally in 1963, Quebec signed an agreement with France covering education matters. At the time, the then Minister of Education, the

Honourable Paul Gérin-Lajoie, agreed that the Canadian federation has a dual personality, one wherein the federal State has jurisdiction, and one which by virtue of the constitution, is provincial.

The federal government, as it is known, has always insisted that it has the power and the right to sign treaties with other countries. However the Minister of Foreign Affairs, the Honourable Mr. Paul Martin, at the time, has shown that the Canadian government is prepared to allow the provinces to use this power to discuss agreements which are of interest to them:

> "Thus under existing procedures, the position is that, once it is determined that what a province wishes to achieve through agreements in field of education or any other field of provincial jurisdiction falls within the framework of Canadian foreign policy, the provinces can discuss detailed arrangements directly with the competent authorities of the country concerned. When a formal international agreement is to be concluded, however, the federal power relating to the signature of treaties and the conduct of overall foreign policy must necessarily come into operation."

At the present, it must be made clear that the international power has not been given to Canadian provinces, although certain concessions have in practice been granted. The present position of the federal government thus raises the problem of representation. In fact, there must be provincial representation in any Canadian delegation to international conferences, or at any negotiation table where provincial constitutional rights are to be affected.

In practice, it must be realized that the federal government has done its utmost to ensure that the provinces have been represented at any conference which has dealt with provincial rights or treaty negotiations which affect the same.

The first time that Canada attended the Hague Conference, which was stated above, the government ensured representation by asking the provinces to send candidates and it implicitly recognized the useful role played by the Conference of Commissioners on Uniformity of Legislation in Canada by asking them to send a delegate.

It must be pointed out nevertheless that provincial representation at these conferences has always been unofficial, and

thus provincial representatives act as Canadian delegates, and not delegates of any province. Provincial representation is a phenomenon which exists at the national level, but which disappears for all practical purposes at the international level. This representation has thus never been recognized by international bodies.

Finally, there is the problem of executing agreements signed by Canada. On this point again the constitution is silent. Article 132 of the British North America Act gives to the central Parliament "All Powers necessary or proper for performing the Obligations of Canada, or any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries". When an imperial treaty is to be applied, only the federal government may legislate in all fields, including those fields which are strictly reserved for provincial jurisdiction. This is the only clause in our constitution which applies to treaty making power.

Since Canada can now make treaties without ratification by London, we might ask ourselves if article 132, which speaks of Empire treaties, applies to agreements made by the Canadian government in all domains, without regard to the division of legislative jurisdiction. In 1937, during the well known international Labour Conventions case, the Judicial Committee of the Privy Council rejected the application of article 132 and decided that even though the central government has the power to make treaties, it could not do so when the legislation applied to a provincial field. Making treaties adds nothing to the federal power. The division of powers remains the same in spite of Canada's participation in international activities. Thus, at present the federal government may make treaties but is powerless to execute them when they pertain to provincial jurisdiction. In order to avoid the consequences of this dilemma in the international labour law, the International Labor Office looked to the "federal clause" which says that with regard to Federal States, the following clauses will be applied:

(a) With regard to agreements and proposals which the federal government considers federal in nature according to the constitutional system, the duties of the federal state will be the same as those of the members who are not federal states.

(b) Where agreements and proposals appear to apply more to the states, provinces or cantons, on all or some points, according to the constitution, the government should:

(i) make arrangements to have these proposals submitted to the appropriate authorities within eighteen months of the end of the Session, so that legislation can be drawn up;

(ii) take steps to set up periodic meetings with the regional governments in order to co-ordinate efforts within the federal state to put these agreements and proposals into effect.

This clause also appears in a number of treaties. As for the Hague Conference, we have seen that the draft agreements adopted in recent sessions include a clause which says that every State may, when it signs, ratifies or participates in the agreement, declare that this agreement is to extend to all or any of the territory which is represented by the State. Meanwhile since the execution of the treaty depends on internal provincial legislation, it seems that the federal government could not subscribe to this clause before the provincial government had enacted the treaty. Mr Fitzgerald, legal adviser, has enacted the following clause which seems to solve this problem. It is based on recent agreements made between Quebec and France.

1. With respect to those articles of the convention that fall wholly or partly within the legislative jurisdiction of a political subdivision (e.g., component state, province or canton) of a federation that has signed this convention, the federal government shall bring such articles and this article to the notice of the appropriate authorities of such subdivision and shall file with the depository a declaration to that effect.

2. The filing of such declaration shall constitute authority under this convention for that subdivision, provided that it has taken appropriate constitutional means to file a declaration of its own with the depository stating that it is bound by such articles, that it has taken steps to implement them, and that it is also bound by any articles which fall within the federal jurisdiction and in respect of which the federal government has filed a declaration to the effect that it has taken steps to implement them and is bound by them.

3. The political subdivision that files a declaration as aforesaid shall in respect of those articles by which it is bound, be deemed to be an associate contracting party to this convention.

Conclusions

In the light of the above, it is evident that Canada cannot sign international conventions and give the assurance to the other countries that these rules will be applied across Canada. It is clear that in matters relating to the provinces, Canada would first have to get assent from each of the ten provinces, otherwise serious restrictions would hamper Canada's participation if only a few provinces could guarantee the application of these agreements in their jurisdiction.

Furthermore, any time a province who had accepted this application wished to amend the agreement in whole or in part, Canada would immediately have to inform the Permanent Bureau of the Conference. This would be a burdensome and complicated process and would subject the provinces to an intolerable legislative dependence. Other solutions must be found.

Since the United States joined the Conference, the agreements which have been drawn up at the Conference have had model acts attached to them. Certainly, these model acts could be studied from now on at the Uniformity Conference either at the annual meeting or at a meeting to be held in Ottawa in January or February each year.

This text could serve as a model to be adopted by the different provinces.

In view of the necessity for the provinces to conclude agreements with foreign countries, states or provinces, it is necessary to find practical solutions. Dr. Horace E. Read, Dean Emeritus, and Sir James Dunn, Professor of Law, in an article published in the January 1969 issue of the Ansul, speaking of the Hague treaties suggested that:

> "There are two ways in which Canada and its provinces can gain the advantages of membership in the Hague Conference. One is by Canada ratifying its conventions and implementing them by statutes enacted by the constitutionally competent legislatures. The other is by refraining from ratification and instead passing uniform acts that incorporate the provisions of the conventions. It is said that law reform is

generally more easily attainable in Western Europe and the United Kingdom by adopting international conventions than by uniform legislation. The draw-back to ratifying conventions is that the adhering government loses its freedom of action and the law is frozen until the other adhering countries agree to amendment of the conventions. Among the provinces and territories of Canada uniform legislation has been used with considerable success. The Conference of Commissioners on Uniformity of Legislation in Canada was organized in 1918 and since then has contributed to law reform by preparing sixty-four model statutes, most of which have been enacted by a large majority of the provincial legislatures. This seems to indicate that in this country the advantages of membership in the Hague Conference could be better gained, not by formal adherence to the conventions but by active participation in its work and use of its conventions as models for uniform acts. In this way, perhaps with an occasional slight departure from uniformity, greater flexibility and adaptability to conditions peculiar to this country could be ensured."

In fact, many solutions could be proposed but it is believed that the one suggested by Dr. Read is still the best one. Nevertheless, it is worthwhile outlining the possibilities:

1. Signature of bilateral agreements

(a) either within the framework of federal treaties;

(b) with the assent of the federal on matters in which it has not acted upon and which comes within the exclusive jurisdiction of the provinces.

2. Adoption of a law of reciprocity between the provinces and any other country, state or province.

Let us study the two solutions to determine the advantages and inconveniences.

Signature of Bilateral Agreements

There exists many multilateral agreements signed by Canada.

Any province wishing reciprocity in some of these matters would only have to declare itself willing to translate into its own legislation the norms of application of this or these agreements, in asking the federal to ratify one or more of these agreements.

(a) the signing of ad hoc agreements within the framework of federal treaties would leave little freedom to provincial initiatives not only on account of the narrowness of the field of action covered by these treaties but because their terms often render the norms of reciprocity hardly applicable and would paralyse to a certain extent the provincial courts, precisely because the federal government has signed a treaty on matters which do not fall within its jurisdiction, the province is incapable of taking the most adequate measures for their application. An agreement is usually signed to be applied, and there should be no practical reason to deprive the authorities called upon to execute such agreement of negotiating the terms and then sign the document.

(b) the signature of ad hoc agreements under the tutorship of the federal government could not constitute an acceptable solution in the elaboration of terms of reciprocity of matters which come within the exclusive competence of the provinces, although it may be on matters of concurrent jurisdiction. It is definitely inconvenient to call upon Ottawa each time a province would amend its laws in order to come within the ambit of the reciprocity conditions. Also the multiplicity of *ad hoc* agreements would result in a large increase of regimes of exception in this way that having frame of reference dealing with reciprocity, it would be necessary to proceed by separate independent agreements, varying according to the contingencies of different conjunctures to which reciprocity agreement must adapt itself.

The Adoption of a Law of Reciprocity

(a) *Principle*

The adoption of a law of reciprocity would have the advantage to specify within a well defined frame the field within which the reciprocity agreements may proceed and bring more unity in the legislative, judicial field and in the administration of justice. Such a law could contemplate all matters that could become the object of reciprocity between the provinces and the foreign country, states or other provinces.

(b) *Field of application*

The application of a reciprocity agreement would come within a well defined frame and by means of uniform procedures; for example, the exchange of letters of intent or more formal documents as a common agreement (e.g. the agreement reached between France and Quebec in 1965, on cultural and educational

matters). The whole could be ratified by the adoption of an order in council published in the Provincial Official Gazette. It is believed that in the present conditions prevailing under the Canadian Constitution it would be normal to inform Ottawa of the negotiations under way.

Such a uniform act would allow more acts or international agreements drawn-up at the Hague Conference as well as at any other international organizations such as the United Nations, Unesco, etc., to be applied under an order in council whenever a text is adopted by the Hague Conference or such other international body and recommended by the Commissioner's Conference.

It is hoped that a solution will be found by this Conference as neither Canada nor the provinces can be legislatively and judicially effective until they pass bills which fulfil the actual needs of our contemporary society. Citizens must be able to move freely about and immigration cannot be hampered by frustrating legislative barriers rigidly enacted by provincial authorities, while preoccupied with local problems. When this happens the real solutions are left to the imagination and are often forgotten with the creation of the Law Reform Commissions. The time has come when both the provinces and the federal government may play a greater international roll. It is up to Canada to find flexible, strong, yet simple solutions to assure adequate protection for all under the Law.

EMILE COLAS, Q.C.
for the Quebec Commissioners

APPENDIX K

(See page 38)

REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO TRAFFIC ACCIDENTS OF OCTOBER 26, 1968

Submitted by
HUGO FISCHER
on behalf of the
YUKON AND NORTHWEST TERRITORIES COMMISSIONERS

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REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO TRAFFIC ACCIDENTS

The Conference of Commissioners on Uniformity of Legislation in Canada, at its plenary session on August 29, 1969, as reported at page 78 of the *1969 Proceedings*, adopted unanimously a motion expressing

> its hope that a formula may be found for the ratification of any convention of the Hague Conference on Private International Law that commends itself for ratification.

Anticipating the adoption of this resolution the Uniform Law Section of the Conference instructed me to prepare a paper on the Convention of the Law Applicable to Traffic Accidents adopted by the Eleventh Session of the Hague Conference on Private International Law and, if possible, a model act based on the Convention. See page 30 of the *1969 Proceedings* Such statute, if enacted by at least one provincial or territorial legislature, would make ratification possible. Ratification limiting the application of the Convention to one or more provinces or territories is, by article 14 of the Convention, permissible.

The wording of the Convention is to be found at pages 86 and 108 of the *1969 Proceedings*. A copy of a draft model act is attached to this paper. At the time of preparing this report (April 1970) no material from the *rapporteur* had arrived. Needless to say, this report includes frequent references to the Convention and to the draft.

1. *Preliminary remarks*

Mr. Normand Lépine, writing in (1969) 47 *Can. Bar Rev.* 509, at page 529 and *passim*, criticizes the Convention as lacking in clarity and containing ambiguities and contradictions. Because of this, he says, the judiciary will refuse to make the effort to understand and apply it. In his opinion, this refusal can be explained by a natural tendency of the judiciary to find easy solutions to complex problems.

It can hardly be denied that some of Mr. Lépine's criticism is valid. I found it difficult to follow the arrangement of the various provisions of the Convention. Article 3 states a rule without reference to any exception, while article 4 contains

several exceptions, and exceptions and modifications to these exceptions, and article 6 further exceptions to those contained in article 4.

The language of the Convention is often quite different from that employed in Canadian statutes.

The expression "recourse actions", used in paragraphs (4), (5) and (6) of article 2 of the Convention, will sound strange to many Canadian practitioners.

It is rather surprising to read in paragraph (a) of article 4 that the internal law of the state of registration is applicable to determine liability towards the driver irrespective of his habitual residence when later on, in the second sentence of article 6, it is stated that, if he does not have his habitual residence in that state, the law of the state in which the vehicle is habitually stationed "shall replace" the law of the state of registration.

I was not particularly impressed by the English rendering, "the same shall be true if" of the French "il en est de même lorsque" in article 6.

For a better understanding of the Convention a reference to the *travaux préparatoires* is indicated. As to the propriety of such reference see, for instance, Oppenheim, volume I, page 957. From the preparatory material, and from the Convention itself, it appears that the Convention is not meant to be exhaustive. It is, for instance, silent on the procedure to be adopted in finding the applicable law, nor does it refer to damage to immovables, and it excludes expressly, with certain exceptions, provisions on vicarious liability. I would also refer to a remark of the President at the session on October 23, 1968, who remarked during the debate, at page 11, that "le juge tiendra compte sur ce point des règles en vigueur dans son propre pays, même si la Convention ne le dit pas". Other examples will be referred to in the appropriate places of this report.

The purpose of the draft model act is to guide the court in the finding of the applicable law. Unlike the Convention, the model act must speak for itself. *Gosselin v. The King* (1902-3), 33 S.C.R. 255, 264, and other authorities, prohibit the interpretation of our legislation with the aid of *travaux préparatoires* On the interpretation of a statute that implements an international treaty Johnson J.A. said in *Regina v. Sikyea* (1964), 43 D.L.R. (2d) 150, 162 (N.W.T. C.A.):

> We were invited by counsel for the respondent to apply to the Migratory Birds Convention those rules which have been laid down for the interpretation of treaties in international law and we have been referred to many authorities on how these treaties should be interpreted. We are not, however, concerned with interpreting the Convention but only the legislation by which it is implemented. To that statute the ordinary rules of interpretation are applicable and the authorities referred to have no application

If the purpose of the model act is to fulfil its purposes well, it should be drafted in a style familiar to our legal profession. The difference between Convention and draft is probably most noticeable in the use of the present tense and in the arrangement of the divisions, that is to say the definitions, the rules and the exceptions to the rules.

From the foregoing it is not difficult to conclude that the transformation of the Convention into a model statute is no easy task. The Commissioners' Conference has accepted the challenge, and this report is intended as a contribution to this task.

2. *The justification for a model act*

The model act here proposed would provide firm rules determining the law to be applied to tortious liability arising from traffic accidents. I hope, by this report, to convince the Commissioners, and through them their jurisdictions, that the law as here proposed will not only bring certainty and uniformity but also justice, and, if accepted across Canada, that it will prevent what has been described as "*forum* shopping". I also hope that the principles embodied in the Convention and the model act are such that Lord Hodson's *dictum* will not apply to them. He said in *Chaplin v Boys,* [1969] 2 All E.R. 1085, at page 1092G:

> The search for justice in the individual case must often clash with fixed legal principles especially perhaps when choice of law is concerned

I would in this connection refer to what Lord Pearson said in the same case, at page 1116F:

> There ought to be a general rule so as to limit the flexibility and consequent uncertainty of the choice of the substantive law to be applied

because, as Lord Wilberforce said at page 1104D, "case-to-case decisions do not add up to a system of justice."

A model act would, it is hoped, put an end to speculations, referred to in (1970), 20 *U.T.L.J.* 81, 85, whether a right to

damages is "created" or "recognized" by one jurisdiction or another and whether to apply to this branch of the law the "obligation" theory or any other doctrine.

In this report I have attempted to show why individual provisions of the model act would improve the present state of the law.

3. *The scope of the Convention*

Article 1 of the Convention sets out its aim It is to "determine the law applicable to civil non-contractual liability arising from traffic accidents".

At its meeting on October 22, 1968 (Procès-verbal No. 11), the delegates to the Eleventh Session of The Hague Conference debated at length how to limit the provisions of the Convention to liability other than that arising from contract. They adopted unanimously (at page 4) a resolution substituting the expression "responsabilité civile non contractuelle" or "extra-contractuelle" in the Draft Convention of May 4, 1968 (Preliminary document No. 4, June 1968) for "responsabilité civile délictuelle ou quasi délictuelle". For the purposes of the English version of the draft model act for the common law provinces I used the expression "tortious liability" following Winfield who, at page 2, defines this liability as follows:

> Tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

This would exclude any liability arising out of a contract or depending on the existence of a contract. In the French version for Quebec I would, however, prefer the expression "responsabilité civile extra-contractuelle" and the English equivalent.

It follows from the exclusion of contractual liability that a conflict of laws with respect to liability based on a contract of carriage has to be resolved with reference to conflict laws dealing with contractual liability.

4. *Proceedings in criminal courts and before administrative tribunals*

The concluding words of the first paragraph of article 1 refer to the proceedings by which liability arising from traffic accidents may be enforced. The article provides that it is immaterial in what kind of proceedings this happens. This means that, where

the law so permits, the aggrieved party may, as *partie civile,* join the criminal proceedings and enforce his claim in these proceedings. Such procedure is unknown to our law, and I therefore omitted any reference thereto. I also omitted to deal with the question whether a judgment for damages obtained in a criminal court may be enforced in a Canadian province because this question is outside the scope of a statute of the kind here under consideration.

Should, at some future time, our laws permit the prosecution of a claim arising from a traffic accident before a tribunal other than a court of civil jurisdiction, the model act would have to be amended so as to make it also applicable to proceedings before such tribunal.

5. *International or interprovincial conflict rules?*

Article 13 of the Convention would permit the framing of provincial legislation on the conflict of laws in a manner that would exclude the application of such legislation to accidents occurring in Canada. It is difficult to see why any provincial legislature would wish so to limit the application of the model act. Consequently, the draft does not contain any such limitation. It applies to interprovincial as well as to inter-state conflicts of laws.

As a matter of convenience, article 12 of the Convention defines as a state every territorial entity forming part of a state if that entity has its own legal system in respect to civil non-contractual liability arising from traffic accidents. The draft model act defines therefore in paragraph 1(1)(d) "state" so as to include any Canadian province or territory and implicitly any state of the Union.

6. *Rules not included in the Convention:*
Application of the lex fori
Foreign law to be pleaded and proved

Mr. Lépine in his article, at page 522, considers that the process by which liability towards a victim is to be determined involves a vicious circle. This determination, not being a question of fact alone, is to be made, as required by paragraph (6) of article 8 of the Convention, in accordance with the applicable law. Under article 4 the habitual residence of a victim determines the applicable law. In order to know, however, where this residence is, one has first to ascertain the victim.

This reasoning overlooks the fact that the Convention does not create any new law beyond what the Convention itself provides. In particular, it does not derogate from the application of the *lex fori* at a stage in the logical exercise when no other law can be invoked. The criticism of the theory of classification notwithstanding, I submit that the application of the Convention lends itself well to the process of classification as expounded by Robertson, Falconbridge and others. I would submit that the *lex fori* determines, in the first place, who is a driver, a passenger or a pedestrian, and who is a victim. Having determined this, the court will proceed to find the connecting factor in accordance with the requirements of the Convention. The connecting factor, in turn, determines the applicable law. The Convention does not go any further. It is not concerned with the possibility that the applicable law characterizes persons, things and conditions in a manner different from the primary classification.

If the process, as here described, is applied, no *circulus inextricabilis* should arise. This process, being arrived at by interpretation, is not reflected in the draft uniform act. The very fact that no reference to any foreign law is made in the interpretation section of the draft uniform act should suffice for the purpose of directing the court to the *lex fori*. The same applies to the exclusion of a foreign law on the grounds of public policy. The public policy referred to in section 10 of the draft is, of course, that of the *forum* A brief reference to the question of public policy is made at page 255 of this report.

The Convention does not mention that, as the headnote in *Key v. Key*, [1930] 3 D.L.R. 327 (Ont. C.A.) reads,

> [t]he general law of a foreign state is presumed to be the same as that of the domestic jurisdiction, and the onus of proving that it is different is upon those who so contend.

That was a collision case, but the rule is one of general application as appears from *Furlong v. Burns & Co. Ltd.* (1964), 43 D.L.R. 689, 701-702 (Ont.). G. H. Treitel writing in *Dicey and Morris,* page 1119, would prefer to abandon the terminology of presumption and simply say that the court applies the *lex fori* where a law other than the *lex fori* is not proved.

Furthermore, the Convention does not refer to the requirement that a law external to the *lex fori* has to be pleaded, nor does it refer to the mode of proof of that law.

From the foregoing it follows that it will be for the party, plaintiff or defendant, who considers a law applicable under the Convention to be more favourable than the *lex fori* to plead and prove the more favourable law unless, as is, for instance, the case under paragraph 32(s) of the Alberta *Judicature Act,* judicial cognizance is taken of a foreign law.

The model act deals with the law applicable to traffic accidents. It is not intended to contain rules generally applicable to conflicts cases. Consequently, no attempt was made to include in the draft such general rules.

7. *Finding the applicable law*

The Convention does not refer to connecting factors as such but the application of its rules leads to three different connecting factors as follows:

Connecting factor	Articles of the Convention	Draft uniform act
1. The state where the accident occurred	3	3(1)
2 The state of registration	4	4(2)
3. The state where a vehicle is habitually stationed	6	7

The internal law of each of these three jurisdictions constitutes the proper law of the tort. The Convention refers in article 3 to the first alternative as "the applicable law", in article 4 to cases falling under the second alternative as "exceptions" and says that the third alternative "replaces" the second. It is easier to understand the arrangement of the Convention and of the draft uniform act if we discard this nomenclature in favour of three different sets of circumstances each leading to a specific connecting factor and thus to the applicable law.

8. *Application of the Convention:*

(1) Primary classification and connecting factor

The second paragraph of article 1 of the Convention explains what is meant by a traffic accident. It means "an accident which involves one or more vehicles, whether motorized or not, and is connected with traffic on a public highway", etc. Two expressions, namely "highway" and "vehicle", appear to require a comprehensive definition. While, in my opinion, the Con-

vention does not sufficiently define the expressions "highway" etc. and "vehicle", it sets out certain criteria which may have no parallels in existing provincial highway traffic laws. It is for this reason that I consider it essential to provide definitions for the purpose of primary classification.

These definitions will enable the court

(a) to decide, by way of primary classification, whether there was a traffic accident within the meaning of the Convention and therefore within the meaning of the model act;

(b) to determine the connecting factor in accordance with the Convention and the model act; and thus

(c) to apply the internal law of the jurisdiction to which the connecting factor refers.

The court may then conceivably come to the conclusion that, had it applied the law mentioned under (c) in the first place, it would have held that the spot where the accident occurred was not situated "on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access" as required by the second paragraph of article 1. Such apparent anomaly is not unknown in the conflict of laws. Suffice it to refer to the leading case of *Re Berchtold,* [1923] 1 Ch. 192. I shortly restate the facts of the case.

An intestate, domiciled in Hungary, left a freehold situated in England. This land was subject to a trust for sale. Under the equitable doctrine of conversion, as enunciated by Sewell M.R. in *Fletcher v. Ashburner* (1779), 1 Bro. C.C. 497, 499, 28 E.R. 1259, 1260, such land would, in the eyes of equity, be considered to be money. Under the English conflict rules intestate succession is governed by the *lex situs* in the case of immovables but by the *lex domicilii* in the case of movables. It was argued that by reason of the trust for sale the land was to be considered money because of the equitable doctrine of conversion, that money was a movable, and that therefore the devolution was governed by Hungarian law. Russell J. held the interest in land to be an immovable for the purpose of referring to English law as the law of the *situs*, and personal estate under the English law of succession, and he therefore ordered distribution according to English law.

I have quoted *Re Berchtold* only for the purpose of showing that there is no anomaly in classifying one thing differently for different purposes.

The divergence in classification may be illustrated by reference to section 71 of the British Columbia *Motor-vehicle Act* that exempts a driver from liability unless he was guilty of gross negligence. This defence applies to an action by a person who was "a passenger on or [was] entering or alighting" from the motor vehicle. That section equates the position of a person entering or alighting from a vehicle with that of a passenger. The Convention, however, differentiates between passengers and persons who were "outside the vehicle at the place of the accident".

Sometimes there may be a divergence in classification that is more apparent than real. The following may serve as an illustration. In Alberta, as in other Canadian jurisdictions, a "guest" or gratuitous passenger can only recover on proof of gross negligence or wanton and wilful misconduct. This is declared in subsection 211(1) of the *Highway Traffic Act*. In *Cote v. Gauvreau* (1960), 24 D.L.R. (2d) 587 (Alta.) the Court said, *obiter*, that the owner of a vehicle who is driven as a passenger is not a "guest" To prevent this *dictum* from becoming part of Alberta jurisprudence, a provision was enacted which is now subsection 211(3) of the *Highway Traffic Act*. It reads as follows:

> (3) Where the owner of a motor vehicle is being driven in his own motor vehicle by another person, subsection (1) applies as if the owner were the guest of the driver.

The Convention distinguishes in paragraph (a) of article 4 between the owner and "a victim who is a passenger". At first sight therefore the owner appears to be in a position different from that of a passenger. However, from the context it would appear that the owner is classified as such only where he has suffered material damage and was not in danger of being injured. Where he was carried on the vehicle I would be inclined to classify him as a passenger for the purpose of primary classification.

With respect to definitions I had three courses open in drafting the model act. I could follow the Convention and omit almost all definitions. This appeared to me to invite litigation, and I therefore avoided this possibility. Secondly, I could refer to definitions existing in other statutes, and thirdly, I could draft new definitions. I chose the last course chiefly because a reference to definitions existing in various traffic acts would not, or

not necessarily, make for uniformity. Uniformity in a statute that adopts an international convention appears to be of even greater importance than in any other statute based on a uniform act. A statute that adopts the Convention will, to some extent at least, affect citizens of countries that ratified it, and it would be difficult to justify *vis-à-vis* any such country that, for instance, the word "highway" as a concept used in the process of primary classification does not mean the same thing in all parts of Canada to which the Convention applies. I am not unmindful of the fact that the creation of new definitions might cause anomalies. These are, however, as I have pointed out, apparent only and not real.

(2) The connection with traffic

The first paragraph of article 1 of the Convention limits its application to accidents that are "connected with traffic" ("lié à la circulation") on a highway, etc. This means that at least one person or one vehicle involved in the accident must be in motion. It does not mean that there must be a causal nexus between the traffic and the accident.

Mr. Eric W. Essén, in Preliminary document No. 4, on page 8, would include the case where a vehicle leaves the highway and damages a house or where a vehicle causes stones to be propelled from the road against a building. On the other hand, he would exclude damage caused by vandals to a stationary car or damage caused to a car by explosives deposited by saboteurs but not involving any person outside the car. From this I would conclude that if in the last mentioned example pedestrians were injured, liability towards them would be determined by the Convention. One could not therefore say in such case that the accident was "caused" by the traffic. It was merely "connected" with traffic, and this is the expression used in the Convention and the draft uniform act.

(3) The place of the accident

For the purpose of applying the conflict rules of the Convention the accident must be "connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access". The definition of "highway" at page 113 of the *1967 Proceedings*, prepared by the Manitoba Commissioners, has not yet been adopted by this Conference but, in the absence of any other or better definition, I propose to adapt it by including the areas excluded in subpara-

graphs (i) and (ii) thereof. Subparagraph (i) excludes "a publicly owned area . . . for the parking of vehicles" etc., while article 1 includes "grounds open to the public". I therefore drafted the definition of "highway" as shown in paragraph 1(1)(b).

While the definition adopted in the draft model act does not refer to "grounds open to the public or [to] . . . private grounds to which certain persons have a right of access", I submit that these words are implicit in the definition.

It should be noted that the definition of "highway" as it appears in the draft model act is not at all intended to define a highway in the usually accepted sense or as defined in a provincial statute. It is intended to cover all the places which, in conformity with the second paragraph of article 1 of the Convention, ought to be included in the definition of "accident". The difference in the definition of "highway" in the draft model act and a provincial *Highway Traffic Act* becomes apparent in the process of classification.

In *Gill v. Elwood,* [1969] 2 O.R. 49, [1970] 2 O.R. 59 (Ont. C.A.) the defence was that the plaintiff, whose car collided with that of the defendant on a shopping centre parking plaza, ought to have yielded the right of way to the defendant's vehicle which was on his right. This defence was based on the assumption that the plaza was a highway within the meaning of the Ontario *Highway Traffic Act.* The trial judge and the Court of Appeal held, however, that the place where the accident occurred was not a highway, that the ordinary principles governing the law of negligence applied and that therefore the defence failed. Similarly, in *Brinton v Sieniewicz* (1970), 7 D L.R. (3d) 545 (N.S.) it was held that a shopping centre parking plaza was not a highway as defined in the *Motor Vehicle Act,* R.S N.S. 1967, c 191.

Supposing that in these cases a foreign element had been involved requiring the application of the Convention. The draft model act accomplishes this application by way of defining "highway" so as to include an accident occurring on a shopping centre parking plaza. This does not, of course, mean that thereby the *Gill* or *Brinton* cases are abrogated. On the contrary: if a foreign element were present in a similar case, the application of the *Gill* and *Brinton* cases would be predicated on the inclusion of a shopping centre parking plaza in the definitions that would require the application of the model act

For the purpose of primary classification "highway" includes a shopping centre parking plaza, and therefore the model act applies. If, because of the facts of the case, the connecting factor were Ontario or Nova Scotia, the rule enunciated in *Gill v. Elwood* would apply pursuant to article 7 of the Convention and, under secondary classification, the application of the *Highway Traffic Act* or the *Motor Vehicle Act* would be excluded.

In summary, for the purpose of primary classification a shopping centre parking plaza is a highway and for the purpose of secondary classification it is not.

For good reasons, article 3 of the Convention refers to the law of the state where the accident, and not to that where, for instance, the death of a victim, occurred. The latter place may be quite fortuitous.

(4) What is a vehicle?

As far as the definition of "vehicle" is concerned I propose to adopt part of that given in paragraph 1(zc) of the model *Rules of the Road Act* in *Model Acts . . . 1968 to 1961*, at page 275. It reads as follows:

> "vehicle" means a device in, upon or by which a person or thing is or may be transported or drawn upon a highway except a device [designed to be moved by human power or] used exclusively upon stationary rails or tracks.

The definition of "vehicle" is wide enough to include an automobile, motorcycle, bicycle, a vehicle designed to be driven or drawn on snow, ice, or both, a traction engine, farm tractor, self-propelled implement of husbandry, road-building machine and a mobile power shovel.

The Convention expressly refers to vehicles, "whether motorized or not", and out of abundant caution I added this expression after the word "device" and deleted the expression "designed to be moved by human power" shown above in brackets. Although the Convention does not refer to railways, or vehicles designed to move exclusively on rails, it would appear from the context that they are beyond its scope.

(5) Other definitions

The definition of "accident" in the draft uniform act follows closely the definition given in the second paragraph of article 1 of the Convention.

The definition of "state" follows the provision of article 12.

I added the definition of "pedestrian" for convenience only. It avoids the repeated reference to a person who "is outside the vehicle at the place of the accident" in article 4 and a similar reference in article 5.

It must, however, be borne in mind that the "persons outside the vehicle . . . at the place of the accident" need not be pedestrians in the commonly accepted sense. Mr. Essén, *op. cit*, page 12, point 3.6, mentions the exceptional case of a tortfeasor who "a causé l'accident en mettant une bombe à retardement dans une automobile".

9. *Avoidance of renvoi*

Happily, the Convention avoids the possibility of *renvoi*, remission and transmission. Wherever the application of the law of a state is mentioned, the reference is to its internal law. Thus, article 3 refers to the internal law of the state where the accident occurred, article 4 to the internal law of the state of registration and article 6 to the internal law of the state where a vehicle is habitually stationed. In this way the courts need not inquire into the conflict rules of a foreign jurisdiction. This is also the intended effect of subsection 1(2) of the draft uniform act.

10. *Avoidance of intertemporal conflicts of laws*

The Convention refers only in article 7 to the time a law was in force when the accident occurred. It is, however, submitted that implicit in the reference in article 4 to the law of the state of registration and in article 6 to the law of the state where a vehicle is habitually stationed, is the assumption that what is meant is the law of the state where a vehicle was registered or habitually stationed at the time of the accident. I would likewise submit that the habitual residence mentioned in articles 4 and 6 means the habitual residence at the time of the accident.

For greater certainty I referred in the draft explicitly to the time of the accident wherever I considered it desirable in an effort to avoid an intertemporal conflict of laws. This reference is found in subsections 1(3), 3(2) and in section 7. The reference to "the place of the accident" in the context of paragraph 1(1)(c) is intended to include the time the accident occurred.

As far as the avoidance of intertemporal conflict of laws is concerned I am not unmindful of the position taken by the *rapporteur* during the morning session of October 11, 1968, of the Eleventh Hague Conference. He would have left the solution of such conflict to the *lex fori*. In reply to a question posed by Dr. Read he said that

> il s'agit là des conflits de lois dans le temps. Cette question est hors de la convention. Tout dépend de la loi interne déclarée applicable par la convention. De toute façon le problème n'a pas été résolu dans la convention.

This notwithstanding, I would submit that it would be of considerable assistance to the courts if our uniform act provided, as far as possible, rules that avoid intertemporal conflicts.

11. *Exclusions: (1) Manufacturers' liability*

Paragraph (1) of article 2 of the Convention excludes from its application the liability of manufacturers, sellers and repairers of vehicles. As, by article 1, the Convention applies only to tortious liability, and a suit against sellers and repairers will most likely be for breach of contract, the exclusion of paragraph (1) of article 2 appears to be directed at claims against manufacturers under the principle enunciated by Lord Atkin in *Donoghue (or McAlister) v Stevenson*, [1932] All E.R. Rep. 1, 11G (H.L.). Nevertheless, out of abundant caution, I included in paragraph 2(2)(a) of my draft a reference to all three, namely manufacturers, sellers and repairers of vehicles.

Exclusions: (2) Liability to visitors

Paragraph (2) of article 2 of the Convention excludes from its application in effect liability towards visitors, that is, invitees, licensees and trespassers on land. The Convention speaks of "the responsibility of the owner, or of any other person, for the maintenance of a way open to traffic or for the safety of its users". I would prefer the language used in paragraph 3(1)(b) of the *Crown Liability Act*, S.C. 1952-53, c. 30, which refers to "a breach of duty attaching to the ownership, occupation, possession or control of property", and, consequently, I have used this expression in paragraph 2(2)(b) of the draft.

The liability here referred to can be considered under two headings. It may follow from a breach of the duty to maintain a road, and here the distinction between misfeasance and non-feasance may come into play. Liability may, however, also follow

from a breach of duty to insure the safety of the users of the road, that is the safety of visitors. The Convention excludes from its application liability arising under either heading.

Exclusions: (3) Vicarious liability

At the suggestion of the president of The Hague Conference (October 22, 1968, page 11) the delegates refrained from putting into the Convention a reference to a parent's liability for a wrongful act of his child. At common law, as expressed by Sirois J. in *Paterson v Hardy* (1968), 62 W.W.R. 219 (Sask.) at page 226,

> a parent . . is liable for his own negligence, and he is under a duty to exercise such control over his children as a prudent person would exercise.

The wrong, as for instance found to have been committed in *Black v Hunter*, [1925] 2 W.W R. 393 (Sask.), is the parent's own tort, and his liability is therefore not vicarious. The exclusion mentioned in paragraph (3) of article 2 of the Convention does not, therefore, apply to the parent's own tortious liability consisting in a failure to exercise a proper control over his child.

Exclusions: (4) Other exclusions

The Convention further does not apply to certain other persons and things enumerated in paragraphs (4) to (6) of article 2. They are to be found in paragraphs 2(2)(c) to (e) of the draft. In my draft I rendered the phrase "recourse actions" occurring in the Convention as actions for contribution, indemnity or any relief over.

12 *The proper law of the tort.*

(1) The lex loci delicti commissi

The criticism of Ehrenzweig (St. Paul, Minnesota, 1962, pages 18, 548 and 582) notwithstanding, I am sometimes referring in this report to the law which, under the Convention, should be applied, as the proper law. It is referred to in the draft model act as "the law applicable to tortious liability" (section 2), "the law applicable under section 2" (subsection 3(1) and sections 8 and 9), as "the law" that "determines" either liability (subsection 4(2)) or other enumerated matters (section 8), and as "the law" that "applies" (section 7) instead of another (namely that mentioned in section 4).

Subsection 3(1) of the draft, corresponding to article 3 of the Convention, refers to the law of the state where the accident occurred as the law generally applicable to tortious liability for traffic accidents. This is a radical departure from the rule stated by Willes J. in the leading case of *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, 28-29, as follows:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First the wrong must be of such character that it would have been actionable if committed in England. . . Secondly, the act must not have been justifiable by the law of the place where it was done.

The two *Phillips v. Eyre* rules are, in my submission, obsolete. With respect to the first rule, namely that the act complained of must be actionable under the laws of the *forum*, J.A. Clarence Smith, writing in (1970), 20 *U.T.L.J.* 81, says, at page 86, that

> [t]he narrow point of this rule is that one cannot obtain damages for . . . [certain wrongs] from a court which . does not deal in these wrongs.

Thus, a gratuitous passenger who under the law of the province or state where he habitually resides and, under paragraph (a) of article 4 of the Convention, would be entitled to damages, would not, except in the case of gross negligence, be entitled to recover these damages in a *forum* which "does not deal in these wrongs" or, in other words, anywhere in Canada outside Quebec. He would thus be tempted to choose an "appropriate" *forum*, a procedure which any conscientious legislator should attempt to prevent.

As will be shown later, the *lex loci* is only one of several to be applied under the Convention. Where a law other than the *lex loci* is to be applied, and its application is not contrary to public policy, the second rule in *Phillips v. Eyre* is also obsolete. Moreover, as Professor Smith in his article, *supra*, at pages 83 and 84, shows, the second rule may also encourage *forum* shopping.

The following illustrates the application of the second rule in *Phillips v Eyre, supra* In *Machado v. Fontes*, [1897] 2 Q.B. 231 (C.A.) the plaintiff recovered damages for a libel published in Brazil. In Brazil such publication did not constitute a tort but a crime only. The court held that this was sufficient under the second rule of *Phillips v Eyre*, namely that the act was not justifiable under the *lex loci delicti commissi*. Had the court applied this law, it would have dismissed the action.

In both cases, namely in *Phillips v Eyre* and in *Machado v. Fontes,* the act complained of was a tort acocrding to the *lex fori.* In the *Phillips* case, the acts committed by the defendant had been declared lawful *ex post facto* by the legislature of Jamaica, the *locus delicti commissi.* Hence the conclusion reached by Paul-André Crépeau, who was also one of the Canadian delegates to the Eleventh Hague Convention, in (1961) 39 *Can. Bar Rev.* 3, 25 on examining the *Phillips* case as a whole. According to him, Willis J. meant to apply the *lex loci delicti commissi* He says:

> Ce texte fondamental . . . constitue l'expression claire et précise du principe de la territorialité. . .

As far as English law is concerned, *Machado v Fontes* is not binding. This was held by Lord Denning M R. in *Boys v. Chaplin,* [1968] 1 All E.R. 283, 289C, and by Lord Hodson, [1969] 2 All E.R. 1085, 1091F, and quoted with approval by Smith Co.Ct.J. in *Gronlund v Hansen* (1968), 69 D.L.R (2d) 598, 603 (B.C.).

A good example of the application of the rule in *Phillips v Eyre* is the decision by the Supreme Court of Canada in *McLean v Pettigrew,* [1945] S.C.R. 62 (from Que.). In this case the respondent plaintiff, a gratuitous passenger in the car of the appellant defendant, was injured in an accident that took place in Ontario. The claim was based on an alleged contract, but Taschereau J. held (at page 75) that the act complained of was tortious. He said:

> Je suis donc d'opinion que cette faute doit être délictuelle ou quasi-délictuelle . .
>
> Je n'ai pas de doute que, si l'accident pour lequel des dommages sont réclamés dans la présente cause s'était produit dans la province de Québec, l'appelant serait quasi-délictuellement responsable.

The learned judge (at page 76) applied the *Phillips v Eyre* test as phrased in the 5th edition of *Dicey* He decided (at page 77) that, had the quasi-delict been committed in Quebec, it would have been actionable under article 1053 of the *Civil Code.* In other words, the *lex fori* classified the act complained of as a tort. As far as Ontario was concerned the driving without due care and attention was, notwithstanding the acquittal of the driver in Ontario, an infringement of the *Highway Traffic Act* and thus, as the learned judge held, at page 79, " 'wrongful' dans Ontario parce qu'il constitue une violation d'un statut provincial." The court therefore upheld the award of damages to the gratuitous passenger. Had the *lex loci delicti commissi* been applied, the

action by the gratuitous passenger would have failed in the absence of evidence of gross negligence. For a criticism of *McLean v. Pettigrew* see, *e g.*, Read, in 1 *Canadian Legal Studies* 277. In *Martin v. Marmen* (1969), 6 D.L.R. (3d) 77 (N.B. C.A.) an appeal by a gratuitous passenger against the dismissal of his action failed because the court applied the *lex loci* As a precedent the case is weak because the court also held that the driver was not negligent at all.

A recent English case shows the difficulty in arriving at a satisfactory choice among the various laws that may be applied to a collision case. In *Boys v. Chaplin, supra,* Diplock L.J. (at page 302E) put this dilemma aptly thus: *Les propria delicti, lex fori, lex loci delicti; quot iudices, tot sententiae.*

It is submitted that the Convention solves the dilemma not only in a way that is ingenious but also in a way that takes into account all the circumstances of the persons and matters involved in the accident. I would submit that the Convention, to use the words of J.H.C. Morris in *Dicey and Morris,* page 8, appears to be

> based on the desire to apply to any given set of circumstances that legal system which will afford results most in agreement with . . . convenience, equity and public policy

In *Boys v. Chaplin, supra,* the plaintiff who rode on the pillion of his friend's motorcycle was injured in a motor accident in Malta caused by the negligence of the defendant car driver. Both parties were British nationals who were domiciled and normally resident in England but were serving with British forces stationed in Malta. Only special damage was recoverable under Maltese law. Under English law general damages for pain and suffering were assessed by the trial judge at £2,250 in addition to special damages. The courts of all three instances applied English law, but for different reasons. The trial judge relied on *Machado v. Fontes, supra,* which Lord Denning M.R., [1968] 1 All E.R. at page 288G, held to be not binding. Lord Denning also said, at page 289G, that he was applying the *Phillips v. Eyre* test, and so did Lord Upjohn, while Lord Diplock L.J. dissented. In the House of Lords, Lords Hodson, Donovan and Pearson also applied *Phillips v Eyre* Lord Guest applied English law because the tort was actionable both under the *lex loci* and the

lex fori, and Lord Wilberforce because no argument had been suggested why an English court, if free to do so, should renounce its own rule.

Lord Denning further said that English law had the closest connection with the tort and added that the plaintiff "gets justice here in that he gets fair compensation whereas the law of Malta gives him less than fair compensation." If this and Lord Wilberforce's reasoning are to be understood as meaning that a judge will try to circumvent any rule that would exclude his own law, the very *raison d'être* of the conflict of laws would be called in question.

Traffic rules

Article 7 of the Convention requires that

> in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the time and place of the accident.

I restated this requirement in subsection 3(2) of the draft, but this Conference may question the advisability of placing this rule in section 3. I did so for convenience only being well aware of the fact that the rules of the road do not operate as "rules of decision" but as "factual data" ("éléments de faits") to which the *lex loci* is applied. See, in this connection, Ehrenzweig, *op cit.*, p. 549, and *Dicey & Morris*, pages 928-929. I retained the reference to the law in force at the time of the accident so as to avoid any intertemporal conflict of laws.

Should this Conference feel that the placing of the present subsection 3(2) is ill advised, I would, as an alternative, suggest to delete it and to place after the present section 9 a new section which would be identical with article 7 of the Convention. In such case the present section 10 of the draft would become section 11. [This suggestion was accepted by the Conference.]

The proper law of the tort:

(2) The law of registration

(a) Two preliminary requirements

Article 4 of the Convention requires in certain cases the application of the law of the state where the vehicle is registered instead of the law of the state where the accident occurred.

The first requirement for the application of this law is that the vehicle or vehicles are not registered in the state where the accident occurred. This is provided for in the introductory part of paragraph (a) of article 4.

Paragraph (b) of article 4 is, in my submission, not entirely unambiguous. It says that, where more than one vehicle is involved in an accident, paragraph (a) applies only if all vehicles are registered in the same state. Paragraph (a) provides for the application of the law of the state of registration to the question of liability. Paragraph (b) does not repeat the requirement that the state of registration of each vehicle involved in the accident must be a state other than that where the accident occurred. Judging from the context, however, I assume that this requirement is implied in paragraph (b), and I drafted the corresponding provision of the uniform act accordingly.

Where a pedestrian caused or contributed to the accident, it would be unfair to determine his liability by applying the law of the state of registration unless he had his habitual residence in that state. The application of that law is therefore also predicated on the requirement that, where one or more persons outside a vehicle at the place of the accident caused or contributed to it, all these persons must have their habitual residence within the state of registration. Stated negatively: the law of the state of registration has no application if there is a pedestrian involved in the accident whose habitual residence is outside that state.

Generally speaking, I would agree with the effect of the first requirement. In the normal course of events the registration of a vehicle is not fortuitous. An individual usually has his car registered where he lives, a corporation where the vehicle operates. If two vehicles collide which are both registered in the same state, there can be little objection to the application of the law of that state to the liability of the tortfeasor.

Nevertheless, the first requirement appears to be a departure from the conflict rules that can be deduced from *Boys v. Chaplin, supra.* Supposing that in that case the plaintiff had been riding the front seat of the motorcycle instead of riding on the pillion. Given these facts, applying requirement No. 1 and disregarding the alternative provided in article 6 of the Convention, he could have recovered general damages only if both, his motorcycle and the car driven by the defendant, would have been registered in

England. The case was decided by Lord Denning in the plaintiff's favour because both parties were British servicemen and not Maltese citizens or residents; both parties were insured in England by an English company; and both parties were habitually resident and, probably, also domiciled in England.

It does not appear from the decisions in the *Boys* case where the vehicles of the parties were registered at the time of the accident. This question was apparently considered to be irrelevant.

I would invite comments from members of the Conference with respect to the first requirement. Is it just to apply the law of the state of registration when the place of registration may be fortuitous? In the hypothetical case based on *Boys v Chaplin, supra,* both vehicles, or one of them, may well have been registered in Malta. According to the judgment of the court of first instance and according to all, and not only the majority opinions in the Court of Appeal, this would apparently not have made any difference.

Should we differentiate in case one or both parties are servicemen? Lord Justice Diplock does not think so. He stresses that the parties were members of the British (and not the English) forces, of which a Maltese citizen might be a member.

If the first requirement is not met, namely that all vehicles involved in the accident are registered in the same jurisdiction and outside the *locus delicti commissi*, the *lex loci* applies. Thus, where two cars collide in Ontario, one being registered in Ontario and the other in Quebec, and the principles embodied in the Convention are applied, the law of Ontario would determine liability towards the injured passengers in both cars. Mr. Lépine, in his article, *supra,* at page 520, while admitting that the place of registration would not be an appropriate connecting factor in this case, nevertheless questions whether the "new" connecting factor, namely the place of the accident, is not perhaps somewhat unreal ("un peu illusoire").

A gratuitous passenger can, under subsection 105(2) of the Ontario *Highway Traffic Act*, recover against the owner or driver of a non-commercial vehicle for loss or damage resulting from bodily injury only where the loss or damage was caused or contributed to by the gross negligence of the driver. Failing such negligence, the action fails. On the other hand, it will succeed in Quebec if *McLean v Pettigrew, supra,* is followed. The aim

of paragraph (b) of article 4 of the Convention is, apparently, to prevent this anomaly and thus to prevent *forum* shopping. While this paragraph does not represent ideal justice, it is certainly not remote from reality.

The second requirement deserves special attention. This requirement is that all persons presently to be mentioned have their habitual residence in the state of registration. Paragraph (c) of article 4 speaks of persons outside a vehicle at the place of the accident who are "involved" in the accident and "may be liable" ("sont impliquées"). In the opinion of M. Loussouarn, a French delegate, "l'expression anglaise 'involved and may be liable' équivaut donc au mot française 'impliqué'". Does this mean that the presence of a pedestrian can be disregarded for the purpose of determining the law applicable to liability towards the various classes of victims if they are not made defendants? If this is the case, the plaintiff might have it in his hand, by joining or not joining such pedestrians, to determine the applicable law.

Supposing the law of the state of registration is more favourable to the plaintiff than the *lex loci*, and a pedestrian whose habitual residence is outside the state of registration merely contributed to a lesser degree to the accident. The plaintiff may then choose to sue the principal tortfeasor only, thus precluding an inquiry into the question whether the pedestrian "may be liable". Unless the defendant succeeds in causing that pedestrian to be joined as co-defendant, the plaintiff will be able to have a more favourable law applied to his claim than he would have been able had he also sued the pedestrian.

Supposing, on the other hand, that the *lex loci* is more favourable to the plaintiff than the law of the state of registration which, under articles 4 and 5, would apply. It seems to me that, if a pedestrian was on the scene of the accident—and there may have been many—whose habitual residence is outside the state of registration, the plaintiff will be tempted to join at least one of these pedestrians as defendants for the sole reason of being able to allege that that pedestrian "may be liable" or is "impliqué". As the Convention reads such scheme would probably succeed unless it could be plainly shown that it was an abuse of the process of the court. It would certainly succeed if the plaintiff made out a good arguable case in favour of the pedestrian's liability even if the action against him fails. I tried to avoid the

possibility of what I consider to be an inadmissible manipulation. I therefore referred in paragraph 4(1)(b) of the draft to the habitual residence of a pedestrian only if he caused or contributed to the accident, that is if the court has found, as a matter of fact, that he did so. While this may be a digression from the letter of the Convention, I hope it expresses its spirit.

Mr. Lépine, in his article, *supra*, at page 517, criticizes the application of the law of the state of registration to the determination of the tortfeasor's liability. He says that

> c'est l'auteur du délit qui risque le plus souvent de se voir appliquer un système juridique qui est sans rapport réel avec sa situation personnelle . ,

and he gives as an example the case of a jay walker who causes the driver of a car registered in Quebec to swerve into a pole in Ottawa. It does not appear to me to be anomalous that such pedestrian, if his habitual residence is in Quebec, could be justified in objecting to the application, under paragraph (a) of article 4, of the laws of his own province to the question of his liability. The Convention aims at treating him in these circumstances as if he had committed the tort in front of his own house.

Another example is that of a pedestrian whose habitual residence is in Ontario, in one of the states of the Union or in Germany. If one of these pedestrians causes damage in Ontario to a car registered in Quebec, paragraph (c) of article 4 precludes the application of Quebec law. In such case the *lex loci* applies under article 3. Is it unjust to apply the same law to all three of them? If the *lex loci* is harsher to a tortfeasor than, for instance, the law of the tortfeasor's home state, should he claim the privilege of its more lenient laws? I would answer both questions in the negative. I submit that a tortfeasor, no matter where he comes from, has no reason to complain if he is treated no worse than any person who is at home in the state where the accident occurred. In other words, if you go to a foreign country you take the law as you find it.

The proper law of the tort:

(2) The law of registration

(b) Three classes of claimants

In addition to the two requirements mentioned—registration of all vehicles involved in the accident in the same state but outside the *locus delicti* and absence of a pedestrian tortfeasor

who has his habitual residence outside the state of registration—the following further rules apply. They are three in number. Liability towards each of the following classes is determined in a manner appropriate to each class. These classes are:

(i) the driver, owner and any other person having control of, or an interest in, the vehicle;

(ii) a passenger; and

(iii) a person who is outside the vehicle at the place of the accident.

(i) Where the driver, owner or any other person having control of, or an interest in, the vehicle is claimant, liability towards him is determined by the law of the state of registration. This is provided in the first alternative in paragraph (a) of article 4 which also states that the habitual residence of these persons is immaterial. It follows, however, from article 6 that where none of these persons has his habitual residence in the state of registration at the time of the accident, the law of the state is to apply where the vehicle is habitually stationed.

While article 7 of the Draft Convention defined "habitual residence" of a legal person as its administrative headquarters (le siège social réel), neither paragraph (a) of article 4 nor article 6 of the Convention resolves the question that arises when the owner or the person having control of, or an interest in, the vehicle is a corporation.

(ii) Where a passenger is claimant, liability towards him is determined by the law of the state of registration if the passenger has his habitual residence outside the state where the accident occurred. This need not be the state of registration. This is the second alternative of paragraph (a) of article 4.

(iii) Where a person is claimant who was outside the vehicle at the place of the accident, liability towards him is determined by the law of the state of registration if that person has his habitual residence within that state.

Application of the law of the state of registration is thus predicated in two classes of cases, here referred to under (ii) and (iii), on the habitual residence of the victim. A passenger will have liability towards himself adjudicated under the law of the state of registration if he has his habitual residence outside the *locus delicti*, but a pedestrian can have this only done if his own habitual residence is within the state of registration.

Simplicity and practical economy seem to have been the reasons for having the law of the state of registration apply to a victim's claim. The President of the Hague Conference, Procès-verbal No. 5, October 15, 1968, page 11, gave as example the case of a tourist who, on a visit, hires a car in Holland and has an accident in a third state. The reason given by the President for the application of the laws of Holland in such case is that the car will, most likely, be insured in Holland. This reasoning appears to be more convincing than that of Mr. Lépine. Mr. Lépine says, *op. cit.*, page 517, that

> [o]n considère alors le véhicule comme une extension du territoire de l'Etat où il est immatriculé,

and again, at page 519,

> il est logique de considérer le véhicule où la victime a pris place comme une "parcelle" ou une extension du territoire de l'Etat d'immatriculation du véhicule. .

If, as it was held in *Chung Chi Cheung* v. *The King,* [1938] 4 All E R. 786 (P.C. from Hong Kong), at page 789, a warship is not to be considered a floating part of the flag state, still less can, it is submitted, a private car be considered to be part of the jurisdiction wherein the car is registered.

In *McLean* v. *Pettigrew, supra,* the habitual residence of the plaintiff is not expressly mentioned. Taschereau J. (at page 63) said that "[e]lle avait accepté, à Montréal, l'invitation de se rendre à Ottawa en compagnie de l'appellant". If, as is likely, her habitual residence was within the Province of Quebec, the case would fall under (ii), that is the second alternative, and had the court applied the rule provided in the second alternative of paragraph (a) of article 4, the decision would have been the same.

It therefore follows that in a case similar to *McLean* v. *Pettigrew,* the Convention would not create new law where the passenger has his habitual residence outside the *locus delicti commissi.* Where driver and passenger have their habitual residence in the same jurisdiction and there agree to make a trip, and they have an accident outside the jurisdiction, the law of the country with which the parties and the act have the most significant connection, namely the law of the habitual residence of the parties, is the proper law of the tort The facts underlying this conclusion would be similar to the *McLean* case and also to the Dutch case of *de Beer* v. *de Hondt,* referred to by Dr. Read in his article, *supra,* note 83.

In this connection I would refer to the case of *Haguet v Delassausse* (1968), Tribunal de grande instance de Dinan, discussed in *Clunet (Journal du droit international)* [1970], No. 1, p. 95. The parties were French nationals. The plaintiff was a guest passenger in the defendant's car. The journey started and ended in France. While in Spain, the car, under circumstances not evident from the judgment, fell into a ravine, and the plaintiff was injured. The French court applied the *lex fori*, that is French law, in preference to Spanish law, the *lex loci*, not because France had the closest connection with the facts of the case, but on the ground that the contract between the parties had been made in France. The short reply to this classification is that in French law an agreement to carry a gratuitous passenger is not a contract of carriage imposing a duty of safe transportation. This duty is based on the law of tort. While the result of the decision is correct, the reasoning appears to be faulty.

I have referred to this case for the purpose of showing, as Mr. R. Dayant, the commentator, says (at page 96), that

> [l]e domaine de la loi du for se trouve enfin élargi par le jeu d'une qualification tendancieuse, qui permet au juge de faire prédominer les principes de son droit interne

If a passenger accepts a ride outside his home state he can expect that some foreign law will be applied in case of an accident, and the foreign registration plate ought to be sufficient notice as to what law might govern a potential claim. If, finally, the accident occurs within the state of his habitual residence, he need not be concerned with the application of any foreign law, because he will be in the same position as if he had accepted a short ride from his friend next door.

In tabular form, article 4 of the Convention and sections 4 and 5 of the draft might be represented as follows:

TABLE 1

L = *locus, lex loci*

R = (law of) state of registration

IF:—

1. accident occurred in L; and
2. all cars involved registered in R; and
3. no pedestrian involved who habitually resides outside R:—

THEN:—
R determines liability
towards

driver, passenger, pedestrian	whose habitual residence is	irrelevant, not L, R

IN ALL OTHER CASES:
L determines liability

The proper law of the tort:

(3) The law of the garage

Article 6 of the Convention substitutes the law of the garage, that is to say the law of the state in which the vehicle involved in an accident is habitually stationed, in the following three circumstances. The first two are to be found in paragraph 7(a), the third in paragraph 7(b) of the draft model act.

(a) The vehicle is not registered. I take this to mean that, at the time of the accident, it was not registered. It may since then have been registered in a place that has or has no connection with the residence of its owner. Non-registration will, within Canada, most likely apply only to non-motorized vehicles

(b) At the time of the accident the vehicle was registered in more than one jurisdiction.

(c) One or more persons who usually would have a close connection with the state where the car is registered have in the particular case a lesser connection with that state because their habitual residence is outside that state. These persons are: the owner of the car, the person in possession or control thereof and the driver.

If at least one of these persons has his habitual residence within the state of registration, the law of that state applies. The question has been put (in Mr. Lépine's article at page 528), whether there is not perhaps a discrepancy between the first alternative in paragraph (a) of article 4 and the second sentence of article 6. In article 4 the habitual residence of the persons towards whom liability is to be determined is expressly declared to be irrelevant, whereas article 6 requires that that residence be outside the state of registration. Where all these persons have their habitual residence outside that state, article 4 is to be read in conjunction with article 6 and modified accordingly. Article 4 should, in such case, be understood to read as follows:

> The internal law of the state of registration is applicable to determine liability towards the driver, owner or any other person having control of or an interest in the vehicle irrespective of their habitual residence *if only that residence is outside the state of registration.*

Following the arrangement of the articles of the Convention the draft uniform statute embodies the provisions relating to the law of the garage in section 7. This law is to be applied in substitution of the law of the state of registration under the circumstances referred to in that section. Section 7 thus modifies section 4. Section 5 refers to the law to be applied under section 4. It would thus perhaps appear to be more in keeping with logic, to rearrange the sections so that the present section 7 would follow immediately section 4.

13. *Plurality of applicable laws*

The last sentence of paragraph (a) of article 4 of the Convention requires that "where there are two or more victims the applicable law is determined separately for each of them", and this requirement is incorporated in subsection 4(3) of the draft uniform act.

Where, for instance, there are two passengers in a car, one having his habitual residence outside the state where the accident occurred and the other within, liability for injury to the former is determined under the law of the state of registration or of the state of the garage, as the case may be, and to the latter under the *lex loci*

Liability towards gratuitous passengers is to be determined in the same way as to any other passenger whose claim is for tortious liability. Thus where, to take Mr. Essén's example in *op. cit.*, page 15, point 9, a Norwegian hires a car in Germany and gives a lift to three gratuitous passengers, one of whom has his habitual residence in Norway, one in Denmark and the third in France, and the car is involved in an accident that takes place in France, the law of Germany as the law of registration determines liability towards the Norwegian and Danish passengers under paragraph (a) of article 4 of the Convention and the *lex loci* towards the French passenger under article 3

The plurality of laws applicable to various classes of victims may cause anomalies. Mr. Lépine, by way of criticism, puts this rhetoric question in his article, *supra,* at page 519

> pourquoi tenir compte de l'Etat de résidence habituelle de la victime-passager, au point d'en appliquer les lois, et ne pas faire la même chose pour la victime non-passager?

Where passenger and pedestrian have their habitual residence in a state other than the state of registration and the state where the accident occurred, the passenger may have liability towards himself adjudicated under the law of the state of registration which may be more favourable than the *lex loci* or the *lex fori*. In a jurisdiction where a foreign law has to be proved, the pedestrian has the choice between the *lex loci* and the *lex fori* If he fails to prove the former, the latter will apply.

14. *Residence of armed forces personnel and others*

In the case of a Canadian serviceman the situation may be no less complicated than in the case of *Boys v. Chaplin, supra.* What is his habitual residence? The place where he is stationed at the time of the accident? It was said in *Raeburn v Raeburn* (1928), 44 T.L.R. 384, 386 that

> [a] seaman ordinarily absent from this country is resident in the home which he provides here for his wife So is a man of business whose employment keeps him abroad.

However, the wives of our service personnel are often resident where their husbands are, and the same applies in the case of businessmen.

The Convention does not refer to domicile but to habitual residence. The intention to remain in a certain place is thus not necessarily relevant as it would be if domicile were the connecting factor.

I would invite the opinion of this Conference on the question whether there should be a special provision in the model act dealing with the habitual residence of service personnel. I would not favour such provision for these persons alone because others may be in the same situation, as, for example, students, or, as mentioned above, businessmen.

15. *The extent of the proper law:*

(1) Personal injury and property damage

The French version of article 5 of the Convention shows that the application of the proper law of the tort is not limited to the liability mentioned in this article but is additional to any other liability. The French text says that

> [l]a loi applicable en vertu des articles 3 et 4 à la responsabilité envers le passager régit *aussi* la responsabilité pour les dommages aux biens transportés dans le véhicule. . . .

Under the English version,

> [t]he law applicable under articles 3 and 4 to liability towards a passenger . . . governs liability for damage to goods carried in the vehicle. . . .

I would have modified the word "governs" by the word "also". Liability for damage to goods is therefore additional to liability for injury to the person. I have embodied the provision of article 5 of the Convention in section 5 of the draft rearranging the provisions so as to observe the sequence followed in subsection 4(2) of the draft.

The distinctions drawn in article 5 of the Convention ensure that the same law is applied to liability for injury to the person and to damage to goods. I have deduced the following four rules.

(a) The law that governs the claim for personal injuries to a passenger governs also the claim for damage to, or loss of, his chattels and chattels entrusted to his care that were carried on the vehicle. This is provided in the first paragraph of article 5 of the Convention and in subsection 5(2) of my draft.

(b) The law that governs the claim by the owner of a vehicle governs also the claim for damage to, or loss of, chattels carried on the vehicle other than those belonging to a passenger or entrusted to a passenger's care. This is provided in the second paragraph of article 5 of the Convention and in subsection 5(1) of my draft.

(c) The law that governs the claim for personal injuries to anyone who was not carried on a vehicle at the time of the accident governs also the claim for damage to, or loss of, chattels belonging to such person. This is provided in the last sentence of article 5 of the Convention and in subsection 5(3) of my draft.

(d) Claims for damage to, or loss of, chattels not mentioned under the foregoing three rules are governed by the *lex loci*. This follows from the general provision of article 3 of the Convention and also from the first sentence of the last paragraph of article 5. These provisions are to be found in sections 3 and 6 of the draft.

It must be admitted that the wording of article 5 invites criticism. The first two paragraphs speak, in the English version,

of "goods carried in the vehicle" but, in the French version, of "biens transportés *dans* le véhicule" and "biens transportés *par* le véhicule" in paragraphs 1 and 2 respectively. If we were to accept Mr. Lépine's reasoning in his article, pages 523-524, paragraph 1 of article 5 would apply only to those goods of a passenger which are carried inside the vehicle and not those carried on the roof thereof. Mr. Lépine suggests, with hesitation, to consider these goods as "personal belongings of the victim outside the vehicle" referred to in the third paragraph. Thus, the law applicable to the goods carried in the vehicle and on the roof thereof would still be identical. I changed in the uniform act the preposition "in" to "on" so that the phrase reads, in the first and second paragraphs of article 5, "goods carried on the vehicle".

Mr. Lépine criticizes that the expression "biens", unlike the expression "goods" in the English version, covers immovables in addition to moveables. The context of the first two paragraphs excludes, however, immovables because both paragraphs refer to goods that are being carried in the vehicle. The same expressions, namely "goods" and "biens", appear in the third paragraph, and, unless there were good reasons to the contrary, I would hesitate to give to these expressions a meaning different from that of the same expressions in the first two paragraphs. Furthermore, the English version is sufficiently precise so as to exclude immovables

The question whether vehicles involved in the accident are covered by section 5 of the Convention should, it is submitted, be answered in the negative. Liability for damage to, or loss of, a vehicle is mentioned in the first alternative to paragraph (a) of article 4 which speaks of "liability towards . . . any . . person having . . . an interest in the vehicle". If such person was not present when the accident occurred, this liability can only mean liability for damage to, or loss of, the vehicle.

The table that follows adds to Table 1 (page 245) the law applicable to the loss of, or damage to, chattels and the law of the garage whenever it is to be substituted for the law of the state of registration.

TABLE 2

L = *locus, lex loci*

R = (law of) state of registration*

IF:—

1. accident occurred in L; and
2. *all* cars involved registered in R; and
3. *no* pedestrian involved who habitually resides outside R:—

THEN:—

* R determines liability

(1) for personal injury towards	whose habitual residence is	and also (2) for damage to chattels situated
(a) driver etc.	irrelevant*	on vehicle and not belonging to (b) or (c)
(b) passenger	not L	on vehicle and belonging to (b)
(c) pedestrian	R*	anywhere if belonging to (c)

IN ALL OTHER CASES:
L determines liability

* SUBSTITUTE: (law of) state of garage, in case of

(i) non-registration; or
(ii) multiple registration; or
(iii) where driver, etc. has habitual residence outside R

15. *The extent of the proper law:*

(2) Specific cases

Articles 8 of the Convention and section 8 of the draft model act refer to the extent of the applicable law under eight points. These points are not exhaustive, and this is made clear by the words "in particular" in the sentence, "The applicable law shall determine, in particular. . . ." The following points require comment.

Clause (1) speaks of "the basis and extent of liability". This refers to intrinsic elements of the tort, as to the question whether liability presupposes negligence, the definition of negligence, any presumption of negligence as *res ipsa loquitur*, the burden of proof, the question of causation, the person to be held liable and so on.

The grounds of exemption mentioned in clause (2) refer to extrinsic elements, as, for instance, an act of God or *novus actus interveniens*. Clause (2) refers also to limitation and division of liability. Under this heading falls the theory of the last clear chance and the liability of joint tortfeasors.

Clause (3) covers such questions as to whether only special or also general damages are recoverable and, if general damages, to what extent (*damnum emergens, lucrum cessans*), etc. Under

this heading would also fall the question of the limitation of the amount of damages where, for instance, under Swiss law, the tortfeasor is in financial difficulties or the victim is affluent.

Clause (4) answers the question apparent in *Chaplin v. Boys, supra,* namely whether the amount of damages is a matter of remedy or of right.

Clause (6) aims at deciding who, apart from the direct victim, may claim damages as, for instance, a father for the loss of the services of his daughter or a master for those of his servant.

Clause (8) that refers to rules of prescription and limitation deserves special attention. Under Rule 184 of *Dicey & Morris,* page 1089, "[a]ll matters of procedure are governed by the . . . *lex fori*", and "the term 'procedure' includes . . . 3. Statutes of Limitation . . .". Let us recall that these statutes are of two kinds: those which merely bar the remedy and those which extinguish a right. The *Civil Code* puts it thus:

2183 . . . La prescription extinctive ou libératoire repousse et en certains cas exclut la demande en accomplissement d'une obligation, ou en reconnaissance d'un droit, lorsque le créancier n'a pas réclamé pendant le temps fixé par la loi.

. . Extinctive or negative prescription is a bar to, and in some cases precludes, any action for the fulfilment of an obligation or the acknowledgement of a right when the creditor has not preferred his claim within the time fixed by law.

Ontario's *Highway Traffic Act* classifies the statute of limitation as procedural, and following Rule 184, *supra,* the Ontario Court of Appeal in *Allard v. Charbonneau,* [1953] 2 D.L.R. 442, allowed an appeal from a judgment for damages resulting in a motor accident. The accident occurred in Quebec. Quebec was the proper law of the tort, and under Quebec law the limitation period was two years. Under Ontario law, however, it was one year. The action was brought more than one year but less than two years after the date of the accident. The Court of Appeal applied the *lex fori* to the question of limitation, and dismissed the action.

A succinct statement on the Canadian law of limitation and prescription was made by Mr. Crépeau, one of the Canadian delegates, on October 19, 1968 (Onzième session, Commission II, P.V. No. 9—Corr. 4). He said that

> en Common law canadien on distingue la prescription et la déchéance, l'une touchant à la procédure, l'autre au fond. En droit civil canadien on distingue également la prescription et la déchéance mais, dans les deux cas, sur le plan de la qualification, il s'agirait d'une question de

fond. Après examen, la délégation accepte le projet tel qu'il est rédigé par la Commission spéciale.

If authority for this pronouncement on the civil law were required I would refer to *Catellier v. Bélanger,* [1924] S.C.R. 436, where Mignault J., relying on articles 2188 and 2267 of the *Civil Code,* classified the prescription of an action for damages resulting from offences or quasi-offences (paragraph 2 of article 2261) as being part of the substantive law. These sections read as follows:

2188. Les tribunaux ne peuvent pas suppléer d'office le moyen résultant de la prescription, sauf dans les cas où la loi dénie l'action.

2261. L'action se prescrit par deux ans dans les cas suivant: . . . .

2. Pour dommages résultant de délits et quasi délits, à défaut d'autres dispositions applicables; . . . .

2267. Dans tous les cas mentionnés aux articles 2250, 2260, 2261 et 2262 la créance est absolument éteinte, et nulle action ne peut être reçue après l'expiration du temps fixé pour la prescription.

2188. The court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied.

2261. The following actions are prescribed by two years: . . . .

2. For damages resulting from offences or quasi-offences, whenever other provisions do not apply; . .

2267 In all the cases mentioned in article 2250, 2260, 2261 and 2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.

The learned judge said (at page 440):

> Dans tous les cas mentionnés aux articles 2250, 2260, 2261 et 2262, la créance est absolument éteinte, et nulle action ne peut être reçue après l'expiration du temps fixé pour la prescription (art. 2267). Cette prescription est une véritable déchéance et la loi déniant l'action, les tribunaux peuvent, *et j'ajoute doivent,* suppléer d'office le moyen résultant de la prescription (art. 2188). Il n'importe donc pas que l'appelant n'ait pas plaidé prescription [Stress supplied].

Clause (8) of article 8 of the Convention classifies all statutes of limitation as being part of the substantive proper law of the tort.

If in a case similar to *Allard v. Charbonneau, supra,* the proper law of the tort were the law of Quebec, this law would, under the Convention, apply to all questions of limitation, and therefore the plaintiff's claim would succeed.

The distinction between procedural statutes of limitation and those barring the remedy comes into play at a later stage, namely in the process of secondary classification when the *lex causae* is being applied. Thus, if under the applicable law merely the

action is barred, the plaintiff should succeed if the defendant failed to plead the statute of limitations The Convention does not deal with this question.

16. *Actions against insurers*

Article 9 of the Convention permits in certain circumstances the victim of a traffic accident to bring a direct action against the tortfeasor's insurer. Such right exists where the victim has it under the law applicable pursuant to articles 3, 4 or 5. Article 3 refers to the *lex loci* and articles 4 and 5 to the law of the state of registration. The corresponding sections in the draft are 3(1), 4, 5 and 6.

Where the *lex loci* applies but does not give the victim a right of direct action against the insurer, such action may nevertheless be brought if the law governing the insurance policy so permits. This is the combined effect of the first and third paragraphs of article 9. The draft restates this in subsection 9(2).

Where the law of the state of registration applies but does not provide for a right of direct action against the insurer, such action may nevertheless be brought if either the *lex loci* or the law governing the insurance policy so permits. This is provided in the second paragraph of article 9 of the Convention and in subsection 9(3) of the draft

Under article 6 the law of the garage "shall replace" ("remplace") in the circumstances there mentioned the law of the state of registration. The question arises whether, in a case where the law of the state where a vehicle is habitually stationed applies under article 6 and provides for a right of direct action against the insurer of the person liable, such action lies under that law. In the preliminary remarks I submitted that the Convention was not meant to be exhaustive. The maxim *designatio unius est exclusio alterius et expressum facit cessare tacitum* (to mention one thing is to exclude another; and when you mention a thing expressly, anything which you have not mentioned is out of the matter) would thus not appear to apply. The omission, in article 9 of the Convention, of any reference to article 6 and thus to the law of the garage, indicates, however, in my submission, an intention not to permit a direct action against an insurer of a party that may be liable even if the law of the garage applies under article 6 and permits such direct action. The opposite view could be argued by relying on the wording of article 6 which,

in effect, substitutes the law of the garage to the law of the state of registration mentioned in articles 4 and 5 and thus imports into article 9 a reference to article 6. I consider the latter argument to be weak because if the "substitution" were meant to apply also to article 9, and not only to articles 4 and 5, it would probably follow article 9. The draft follows the Convention in this respect and is silent on this point. I would invite the views of the Commissioners.

While article 9 does not refer to article 6, it permits expressly a direct action against an insurer if the law governing the insurance policy so permits.

17. *Public policy*

J. H. C. Morris writing in *Dicey and Morris,* says, at page 75, that apart from two groups of cases, namely contracts and status, "examples of the exclusion of foreign law on the ground of public policy are rare". He adds, at page 76, that, in particular, "there is no general principle that the application of a foreign law is contrary to public policy merely because it operates retrospectively". An example is *Phillips v. Eyre, supra.* At the time the acts complained of were committed they were tortious under the *lex loci,* but the defendant pleaded that they had been subsequently legalized by an Act of Indemnity passed by the local legislature with retrospective effect, and the English court gave effect to this defence.

For the purpose of the present study suffice it to quote from J-G. Castel, *op. cit.*, at page 183:

> No general statement can be made defining the scope of public policy, as it is subject to public opinion and thus varies with time. The courts have wide discretion in this respect, but they will generally be guided by prohibitory statutes, previous decisions, the dominant opinion in the community, social and international consequences.
>
> In principle a foreign law or a foreign judgment to be refused any recognition and enforcement in the forum, should violate some *fundamental* principle of justice or some prevailing conception of good morals; in other words, it should infringe a *distinctive* local policy. This is essentially true when the foreign law or judgment involved is that of another province of Canada.

Article 10 of the Convention permits the rejection of a foreign law only when it is manifestly contrary to the public policy of the *forum.* The corresponding provision is section 10 of the draft uniform act.

18. *Reciprocity*

Under article 11 the application of the preceding articles is not to be made dependent on reciprocity.

The rules to be established by the uniform act are to be part of the internal law of a province. If adopted here and abroad they will ensure that the parties will be treated in all jurisdictions in the same manner. Thus, the incentive for looking for a *forum* that will afford better treatment will be diminished.

One may ask whether it is politic not to require reciprocity. Suffice it in this context to quote Morris, *op cit.*, page 7:

> Is or is not the enforcement of foreign law a matter of "comity"? It is clear that the motive for giving effect to, *e g*, French law [as the proper law] is not the desire to show courtesy to the French Republic, but the impossibility of determining the rights of the parties . . . justly if that law be ignored.

By deleting in the model act any reference to reciprocity I would expect that a court would not refuse the application of a law other than that of the *forum* except where it manifestly contravenes public policy.

19. *Ratification and accession*

Under article 14 of the Convention Canada, being "a state having a non-unified legal system", may ratify the Convention with respect to all its jurisdictions or to one or several of them. The same article and article 16 prescribe the ratification procedure. Accession is dealt with in article 18.

The articles here mentioned do not deal with conflicts of laws and need not therefore be included in the model act.

20. *Derogation by other conventions*

Article 15 declares that the Convention is not to prevail over other conventions in special fields containing provisions concerning civil non-contractual liability arising out of a traffic accident. The observations made in the next preceding paragraph are here applicable also.

21. *Duration of the Convention*

The entry into force of the Convention is dealt with in article 18 and the duration of the Convention in article 20. The notification procedure is regulated by article 21.

Should it appear to be convenient to postpone the entry into force of the uniform act, the following section may be added at the end thereof:

This Act shall come into force on a day to be fixed by proclamation.	La présente loi entrera en vigueur à une date qui sera fixée par proclamation.

Respectfully submitted,

HUGO FISCHER,

for the Yukon and Northwest Territories Representatives.

Discussion Draft
of a uniform
Conflict of Laws (Traffic Accidents) Act

1. (1) In this Act,

(a) "accident" means an accident that involves one or more vehicles and is connected with traffic on a highway;

(b) "highway" means any place or way, including any structure forming part thereof, which the public is ordinarily, or persons are, entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor and includes all the space between the boundary lines of any right-of-way or land taken, acquired or used therefor, and includes

(i) a privately owned area designed and intended and primarily used for the parking of vehicles and the necessary passage ways thereon, and

(ii) a publicly owned area designed and intended to be used exclusively for the parking of vehicles and the necessary passage ways thereon;

(c) "pedestrian" includes any person who, at the place of the accident, was not carried on a vehicle;

(d) "state" includes a province [and territory] of Canada and a territorial entity of a state, if this entity has its own legal system in respect of tortious liability arising from an accident; and

(e) "vehicle" means a device, whether motorized or not, in, upon or by which a person or thing is or may be transported or drawn upon a highway except a device used exclusively upon stationary rails or tracks.

(2) A reference to the laws of a state shall be read as a reference to its internal laws excluding the conflict rules.

(3) A reference to the registration of a vehicle shall be read as a reference to its registration at the time of the accident in question.

(4) The reference to chattels carried on a vehicle shall be read as a reference to chattels lying, standing or resting on any part of the vehicle.

2. (1) Subject to subsection (2) and to section 10, this Act determines the law applicable to tortious liability arising from an accident.

(2) This Act does not apply

(a) to the liability of manufacturers, sellers or repairers of vehicles;

(b) to the liability arising out of a breach of duty to maintain a highway or attaching to the ownership, occupation, possession or control of land;

(c) to an action by or against a person who caused or contributed to an accident for contribution, indemnity or any other relief over;

(d) to an action for contribution or indemnity from, or any other relief over against, an insurer or a subrogation action by an insurer;

(e) to an action by or against a person administering a workmen's compensation fund, a social insurance or similar scheme, by or against an unsatisfied judgment fund or any person administering a similar fund, or to any exemption from liability provided by the law governing these persons, institutions, funds or bodies; or

(f) to vicarious liability,

but, notwithstanding paragraph (f), this Act does apply to the liability of the owner of a vehicle, and to the liability of a principal and of a master.

3. (1) Subject to sections 4, 5, 6 and 7, the law applicable under section 2 is the law of the state where the accident occurred.

(2) The law of the state where the accident occurred, and in force at that time, determines the rules relating to the control and safety of traffic.

4. (1) Where

(a) one vehicle is involved in the accident and is registered in a state other than the state where the accident occurred, or, where more than one vehicle is involved, each is registered in the same state being a state other than the state where the accident occurred; and

Alternative to paragraph 4(1)(a):

(a) each vehicle involved in the accident is registered in the same state being a state other than the state where the accident occurred; and

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(b) each pedestrian, if any, who caused or contributed to the accident has his habitual residence in the state mentioned in paragraph (a) [whether or not he is also a victim of the accident],

the law of the state of registration, subject to section 7, determines

(c) liability to the driver, owner or any other person having control of, or a proprietary interest in, the vehicle, if at least one of these persons has his habitual residence within the state of registration;

(d) liability to a passenger whose habitual residence is in a state other than the state where the accident occurred, but not necessarily in the state mentioned in paragraph (a); and

(e) liability to a pedestrian whose habitual residence is in the state mentioned in paragraph (a).

(2) Where there are two or more victims, the applicable law is determined separately for each of them.

5. (1) The liability mentioned in paragraph (c) of subsection (1) of section 4 includes liability for damage to chattels carried on the vehicle other than chattels mentioned in subsection (2).

(2) The liability mentioned in paragraph (d) of subsection (1) of section 4 includes liability for damage to chattels that are carried on the vehicle and that are either owned by the passenger or have been entrusted to his care.

(3) The liability mentioned in paragraph (e) of subsection (1) of section 4 includes liability for damage to chattels owned by the pedestrian, whether or not the chattels were carried on a vehicle.

6. Liability for damage to chattels not carried on a vehicle at the time of the accident, except those mentioned in subsection (3) of section 5, is governed by the law of the state where the accident occurred.

7. The law of the state where a vehicle was habitually stationed at the time of the accident applies, instead of the law mentioned in subsection (2) of section 4, where

(a) the vehicle is registered in more than one state or is not registered at all; or

(b) at the time of the accident, none of the persons mentioned in paragraph (c) of subsection (1) of section 4 had his habitual residence in the state of registration.

Alternative to section 7:

7. Where

(a) a vehicle is registered in more than one state or is not registered at all; or

(b) at the time of the accident, none of the persons mentioned in paragraph (c) of subsection (1) of section 4 had his habitual residence in the state of registration,

the law of the state where the vehicle was habitually stationed at the time of the accident applies instead of the law mentioned in subsection (1) of section 4.

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8. The law applicable under section 2 determines, in particular,

(a) the existence of liability and its extent;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence and kind of injury or damage for which damages may be claimed;

(d) the amount of damages;

(e) the question whether a right to damages may be assigned or inherited;

(f) the persons who have suffered injury or damage and who may claim damages in their own right;

(g) the liability of a principal or master for the acts of his agent or servant; and

(h) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of that period.

9. (1) In this section, "insurer" means an insurer of the person alleged to be liable.

(2) Where the law applicable under section 2 is the law of the state where the accident occurred, a direct action against an insurer lies if such action is authorized by that law or by the law governing the insurance policy.

(3) Where the law applicable under section 2 is the law of the state of registration, a direct action against an insurer lies if such action is authorized by that law, the law of the state where the accident occurred or by the law governing the insurance policy.

10. No law that would be applicable under this Act applies if its application is manifestly contrary to public policy.

APPENDIX L

(See page 40)

CONFLICT OF LAWS (TRAFFIC ACCIDENTS) ACT

Recommended for enactment by the Conference of Commissioners on Uniformity of Legislation in Canada

1. In this Act,

(a) "accident" means an accident that involves one or more vehicles and is connected with traffic on a highway;

(b) "highway" means any place or way, including any structure forming part thereof, which the public is ordinarily, or a number of persons are, entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor and includes all the space between the boundary lines of any right-of-way or land taken, acquired or used therefor, and includes

(i) a privately owned area designed and intended and primarily used for the parking of vehicles and the necessary passage ways thereon, and

(ii) a publicly owned area designed and intended to be used excusively for the parking of vehicles and the necessary passage ways thereon;

(c) "pedestrian" includes any person who, at the place of the accident, was not carried on a vehicle;

(d) "state" includes a province [and territory] of Canada and a territorial entity of a state, if this entity has its own legal sytem in respect of tortious liability arising from an accident; and

(e) "vehicle" means a device, whether motorized or not, in, upon or by which a person or thing is or may be transported or drawn upon a highway except a device used exclusively upon stationary rails or tracks.

(2) A reference to the laws of a state shall be read as a reference to its internal laws excluding the conflict rules.

(3) A reference to the registration of a vehicle shall be read as a reference to its registration at the time of the accident in question.

(4) The reference to chattels carried on a vehicle shall be read as a reference to chattels lying, standing or resting on any part of the vehicle.

2. (1) Subject to subsection (2) and to section 11, this Act determines the law applicable to tortious liability arising from an accident.

(2) This Act does not apply

(a) to the liability of manufacturers, sellers or repairers of vehicles,

(b) to the liability arising out of a breach of duty to maintain a highway or attaching to the ownership, occupation, possession or control of land;

(c) to vicarious liability other than that of the owner of a vehicle, of a principal, or of a master,

(d) to an action by or against a person who caused or contributed to an accident for contribution, indemnity or any other relief over;

(e) to an action for contribution or indemnity from, or any other relief over against, an insurer or a subrogation action by an insurer; or

(f) to an action by or against a person administering a workmen's compensation fund, a social insurance or similar scheme, by or against an unsatisfied judgment fund or any person administering a similar fund, or to any exemption from liability provided by the law governing these persons, institutions, funds or bodies

3. Subject to sections 4, 5, 6 and 7, the law applicable under section 2 is the law of the state where the accident occurred.

4. (1) Where

(a) one vehicle is involved in the accident and is registered in a state other than the state where the accident occurred, or, where more than one vehicle is involved, each is registered in the same state being a state other than the state where the accident occurred; and

(b) each pedestrian, if any, who caused or contributed to the accident has his habitual residence in the state mentioned in clause (a), whether or not he is also a victim of the accident,

the law of the state of registration, subject to section 7, determines

(c) liability to the driver, owner or any other person having control of, or a proprietary interest in, the vehicle, if at least one of these persons has his habitual residence within the state of registration;

(d) liability to a passenger whose habitual residence is in a state other than the state where the accident occurred, but not necessarily in the state mentioned in clause (a); and

(e) liability to a pedestrian whose habitual residence is in the state mentioned in clause (a).

(2) Where there are two or more victims, the applicable law is determined separately for each of them.

5. (1) The liability mentioned in clause (c) of subsection (1) of section 4 includes liability for damage to chattels carried on the vehicle other than chattels mentioned in subsection (2).

(2) The liability mentioned in clause (d) of subsection (1) of section 4 includes liability for damage to chattels that are carried on the vehicle and that are either owned by the passenger or have been entrusted to his care.

(3) The liability mentioned in clause (e) of subsection (1) of section 4 includes liability for damage to chattels owned by the pedestrian, whether or not the chattels were carried on a vehicle.

6. Liability for damage to chattels not carried on a vehicle at the time of the accident, except those mentioned in subsection (3) of section 5, is governed by the law of the state where the accident occurred.

7. The law of the state where a vehicle was habitually stationed at the time of the accident applies, instead of the law mentioned in subsection (1) of section 4, where

(a) the vehicle is registered in more than one state or is not registered at all; or

(b) at the time of the accident, none of the persons mentioned in clause (c) of subsection (1) of section 4 had his habitual residence in the state of registration.

8. The law applicable under section 2 determines, in particular,

(a) the existence of liability and its extent;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence and kind of injury or damage for which damages may be claimed;

(d) the amount of damages;

(e) the question whether a right to damages may be assigned or inherited;

(f) the persons who have suffered injury or damage and who may claim damages in their own right;

(g) the liability of a principal or master for the acts of his agent or servant; and

(h) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of that period.

9. (1) In this section, "insurer" means an insurer of the person alleged to be liable

(2) Where the law applicable under section 2 is the law of the state where the accident occurred, a direct action against an insurer lies if such action is authorized by that law or by the law governing the insurance policy.

(3) Where the law applicable under section 2 is the law of the state of registration, a direct action against an insurer lies if such action is authorized by that law, the law of the state where the accident occurred or by the law governing the insurance policy.

10. The law of the state where the accident occurred, and in force at that time, determines the rules relating to the control and safety of traffic.

11. No law that would be applicable under this Act applies if its application is manifestly contrary to public policy.

(We are indebted to the Quebec Commissioners for supplying the French version that follows.)

Loi sur les conflits de lois
(accidents de circulation routière)

1. (1) Dans la présente Loi, l'expression

a) "accident" désigne tout accident de la circulation routière impliquant un ou plusieurs véhicules sur une voie publique;

b) "voie publique" désigne tout lieu ou toute voie, y compris toute construction intégrante, que le public ou un certain nombre de personnes ont ordinairement le droit ou la permission d'utiliser gratuitement ou moyennant péage pour y faire circuler des véhicules et comprend tout espace visé par un droit de passage ou terrain pris, acquis ou utilisé à cette fin, de même que

(i) une propriété particulière aménagée et utilisée surtout pour le stationnement de véhicules, ainsi que ses voies d'accès; et

(ii) une propriété publique aménagée et utilisée uniquement pour le stationnement de véhicules, ainsi que ses voies d'accès;

c) "piéton" comprend toute personne qui se trouve sur les lieux d'un accident et qui n'était pas à bord d'un véhicule au moment de l'accident;

d) "Etat" comprend une province ou un territoire du Canada, ou une circonscription territoriale d'un Etat, si cette circonscription possède son propre système de droit concernant la responsabilité civile extra-contractuelle en matière d'accidents de la circulation routière; et

e) "véhicule" désigne tout appareil, automoteur ou non, dans lequel ou par lequel une personne est ou peut être transporté ou tirée sur une voie publique, à l'exception de tout appareil utilisé exclusivement sur des voies ferrées.

(2) Toute mention des lois d'un Etat s'entend des lois internes dudit Etat, à l'exclusion des règles qui régissent le droit international privé.

(3) Toute mention de l'immatriculation d'un véhicule désigne l'immatriculation du véhicule au moment de l'accident.

(4) Toute mention des effets à bord d'un véhicule désigne les effets qui se trouvent dans un véhicule ou sur une partie quelconque du véhicule.

2. (1) Sous réserve du paragraphe (2) et de l'article 11, la présente loi détermine la loi applicable à la responsabilité civile extra-contractuelle en matière d'accidents de la circulation routière.

(2) La présente loi ne s'applique pas

a) à la responsabilité des fabricants, vendeurs et réparateurs de véhicules ;

b) à la responsabilité découlant d'un manquement au devoir d'entretien d'une voie publique ou liée au droit de propriété, à l'occupation, à la possession ou à la surveillance d'un terrain ;

c) aux responsabilités du fait d'autrui, à l'exception de celle du propriétaire du véhicule et de celle du commettant ;

d) à un recours exercé par ou contre une personne qui a causé un accident ou y a contribué, en vue d'obtenir une contribution, une indemnité ou tout autre redressement ;

e) aux recours et aux subrogations concernant les assureurs ;

f) aux actions et aux recours exercés par ou contre un administrateur d'un fonds d'indemnisation des accidents du travail, d'un régime d'assurance sociale ou d'un autre régime semblable, par ou contre l'administration d'un fonds pour jugements non exécutés ou tout administrateur d'un tel fonds, ainsi qu'aux cas d'exclusion de responsabilité prévus par la loi dont relèvent ces personnes, institutions, fonds ou organismes.

3. Sous réserve des articles 4, 5, 6 et 7, la loi applicable conformément à l'article 2 est la loi de l'Etat sur le territoire duquel l'accident est survenu.

4. (1) Lorsque

a) un seul véhicule est impliqué dans un accident et est immatriculé dans un Etat autre que celui sur le territoire duquel l'accident est survenu, ou que plusieurs véhicules sont impliqués dans un accident et sont tous immatriculés dans un même Etat, autre que celui sur le territoire duquel l'accident est survenu ; et

b) tout piéton, le cas échéant, qui a causé l'accident ou y a contribué, a sa résidence habituelle dans l'Etat mentionné à l'alinéa a), qu'il soit ou non victime de l'accident,

la loi de l'Etat d'immatriculation du véhicule détermine, sous réserve de l'article 7,

c) la responsabilité envers le conducteur, le détenteur, le propriétaire ou toute autre personne ayant un droit sur le véhicule, si au moins une de ces personnes a sa résidence habituelle dans l'Etat d'immatriculation du véhicule;

d) la responsabilité envers un passager dont la résidence habituelle se trouve dans un Etat autre que celui sur le territoire duquel l'accident est survenu, mais non nécessairement dans l'Etat mentionné à l'alinéa a) ; et

e) la responsabilité envers un piéton dont la résidence habituelle se trouve dans l'Etat mentionné à l'alinéa a).

(2) En cas de pluralité de victimes, la loi applicable est déterminée séparément à l'égard de chacune d'entre elles.

5. (1) La responsabilité mentionnée à l'alinéa c) du paragraphe (1) de l'article 4 comprend aussi la responsabilité pour les dommages aux effets à bord du véhicule, à l'exception de ceux qui sont mentionnés au paragraphe (2).

(2) La responsabilité mentionnée à l'alinéa d) du paragraphe (1) de l'article 4 comprend aussi la responsabilité pour les dommages aux effets à bord du véhicule, qui appartiennent au passager ou qui lui ont été confiés.

(3) La responsabilité mentionnée à l'alinéa e) du paragraphe (1) de l'article 4 comprend aussi la responsabilité pour les dommages aux effets appartenant à un piéton, que ces effets aient été ou non à bord d'un véhicule

6. La loi applicable à la responsabilité pour les dommages aux effets qui n'étaient pas à bord d'un véhicule au moment de l'accident, à l'exception de ceux qui sont mentionnés au paragraphe (3) de l'article 5, est celle de l'Etat sur le territoire duquel l'accident est survenu.

7. La loi de l'Etat dans le territoire duquel un véhicule était habituellement stationné au moment de l'accident, s'applique au lieu de la loi mentionnée au paragraphe (1) de l'article 4, lorsque

a) le véhicule est immatriculé dans plus d'un Etat ou n'est pas du tout immatriculé ; ou,

b) aucune des personnes mentionnées à l'alinéa c) du paragraphe (1) de l'article 4 n'avait sa résidence habituelle

dans l'Etat d'immatriculation du véhicule, au moment de l'accident.

8. La loi applicable en vertu de l'article 2 détermine notamment

a) le fait de la responsabilité et son étendue ;

b) les causes d'exonération, ainsi que toute limitation et tout partage de responsabilité ;

c) l'existence et la nature des dommages pour lesquels des dommages—intérêts peuvent être réclamés ;

d) l'étendue des dommages ,

e) la transmissibilité du droit à réparation ;

f) les personnes ayant droit à réparation en raison des blessures ou des dommages qu'elles ont subis ;

g) la responsabilité du patron ou du commettant du fait de son préposé ou employé ; et

h) les prescriptions et les déchéances fondées sur l'expiration d'un délai, y compris le point de départ, l'interruption et la suspension des délais.

9. (1) Dans le présent article, "assureur" désigne l'assureur de la personne présumée responsable.

(2) Lorsque la loi applicable en vertu de l'article 2 est la loi de l'Etat sur le territoire duquel l'accident est survenu, une action peut être prise directement contre un assureur, si le droit à telle action est reconnu par ladite loi ou par la loi régissant la police d'assurance.

(3) Lorsque la loi applicable en vertu de l'article 2 est la loi de l'Etat d'immatriculation du véhicule, le droit à une action directement contre un assureur peut être exercé si ce droit est reconnu par ladite loi, par la loi de l'Etat sur le territoire duquel l'accident est survenu, ou par la loi régissant la police d'assurance.

10. La loi en vigueur dans l'Etat sur le territoire duquel l'accident est survenu au moment de cet accident, détermine les règles de circulation et de sécurité.

11. Aucune loi déclarée applicable en vertu de la présente loi ne s'applique si son application est manifestement incompatible avec l'ordre public.

APPENDIX M

(See page 39)

Draft Uniform Act

CRIMINAL INJURIES COMPENSATION ACT

Remarks of T. D. MacDonald

1. First I should like to pay tribute to the excellent work that has been done by Art Stone in preparing this draft uniform *Act* Modesty prevents me from complimenting the Committee itself which worked with Art Stone because I had the honour to be associated with that Committee I believe that the draft uniform *Act* compares favourably with any other Act that I know of, anywhere, dealing with this subject matter

2. I do not propose, at first at least, and unless you so wish, to go into technical details of drafting, though I am prepared to do so if you so desire and time permits I propose, rather to begin with a number of important matters of principle.

3. First of all, I expect that you are interested at this stage or will be at a latter stage, when the draft Act comes up for discussion, particularly in those Provinces which have no such legislation to date, in some estimate of the cost of covering Canada with programmes of this kind. (Read from Memorandum Item 9(24)). For the immediate future I would suggest that, on the average, $2,000,000 annually or about 10 cents per capita, would be a reasonable estimate for Canada on the basis of proposed legislation and once it has reasonably got underway. In the initial years the amount should be much smaller—down to between $100,000 and $200,000. These are very rough and ready estimates based on little available statistics.

4. As to administrative machinery, I suggest that, whenever possible, use should be made of an existing board or tribunal. (Read from Memorandum, Item 9(3))

5. Next, and now I come to a point which affects the drafting itself, I suggest that provision should be made for the determination of at least minor and straightforward cases without a formal hearing (Read from Memorandum Item 9(5) and read S. 12(1) of original N Z Act and S 3 of 1969 Amending Act)

6 Next, I am going to make a controversial proposal but one that I believe to be warranted. It is that pain and suffering should be eliminated as a ground of compensation or at least restricted to cases of permanent or long term pain and suffering and that disfigurement as a ground should be restricted to such as imposes a grievous social embarrassment

7 As to financial need, I believe that the present draft is correct in not making this a factor to be taken into consideration by the

agency, notwithstanding some arguments that can be advanced for it and notwithstanding that it is a factor under certain *Acts* e g the Saskatchewan and New York legislation. (Read from Memorandum Item 9(17))

8. For the time being at least, I suggest that there should be a Schedule of offences as the draft proposes, but that it should be modified in the manner I shall later propose. There should be no authority in the Executive to vary the Schedule and the Schedule or the *Act* itself should exclude motor vehicle offences (except when the vehicle is used as a weapon) except possibly to the extent of the Manitoba and Alberta legislation.

9. I suggest that any Federal participation should, in the interest of promoting uniformity, be restricted to specified offences and I also suggest that Federal participation not cover any costs of administration.

10. I should like to refer briefly at this point to the Balitmore Conference (Read from Memorandum at Item 11)

11. Now I would like to go direct to the Schedule and after to the individual sections of the *Act* and then to return for decision on any of the points of principle above mentioned that have not been covered in dealing with the Schedule and the sections. (Section references in earlier memorandum are cross-referenced to this Memorandum).

August 24, 1970.

MEMORANDUM

Draft Uniform Act

"The Criminal Injuries Compensation Act"

1. The Minutes of the Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada, for 1969, contain the following paragraph (page 36) :

> 1 *Compensation for Victims of Crime*
>
> The Commissioners discussed the question whether there should be federal-provincial participation in compensating victims of crime A motion was adopted to refer the matter to the Uniform Law Section with a request that it give consideration to the preparation of a draft Uniform Act which would contemplate federal participation. The matter was considered by the Uniform Law Section and the Commissioners from Ontario and Quebec, in co-operation with the federal Commissioners, were designated to prepare a draft Bill to be placed before the Conference at next year's meeting

2. The Committee so created met in Ottawa on January 26, 1970 to consider a draft prepared by Mr. A. R. Stone. The present draft, dated February 3, 1970, and also prepared by Mr. Stone, is the result of the Committee's work. The Committee comprised·

The Chairman	Mr. Emile Colas, Q.C.
from Quebec	Mr. Antonio Dubé, Q.C. Mr. R. Normand Mr. C. Rioux
from Ontario	Mr. H. Allan Leal, Q.C. Mr. A. N. Stone
from the federal Department of Justice	Mr. D. S. Thorson, Q.C. Mr. D. H. Christie, Q.C. Mr. T. D. MacDonald, Q.C. Miss P. M. Sprague

3. The leading characteristics of the draft uniform *Act* are as follows :

(1) It is to be administered by a Board (sections 2(1)(a), (4)) ;

(2) Injury in respect of which compensation may be payable means actual bodily injury and includes pregnancy and mental or nervous shock (section 2(1)(d));

(3) It extends to all cases arising within the Province without regard to the place of residence of the claimant (section 6(1));

(4) The injury must have been incurred through (a) the commission of an offence mentioned in the Schedule or (b) in lawfully arresting or attempting to arrest an offender or suspected offender or in assisting a peace officer in making an arrest or (c) in preventing or attempting to prevent the commission of an offence or suspected offence or assisting a peace officer therein (section 6(1));

(5) Compensation is payable to (a) the victim or (b) a person responsible for the maintenance of the victim or (c) when the victim is killed, his dependents or anyone responsible for his maintenance at time of death (section 6(1));

(6) No compensation is payable in respect of injury or death to a peace officer where he or his dependents are otherwise entitled to compensation from public funds (section 6(2));

(7) Compensation covers (a) expenses arising from the injury or death and (b) pecuniary loss or damages incurred by the victim as a result of disability affecting his capacity to work and (c) pecuniary damages incurred by dependents as a result of the victim's death and (d) other pecuniary loss or damages resulting from the victim's injury and "any expense that, in the opinion of the Board, it is reasonable to incur" (section 8(1));

(8) In addition to the immediately foregoing, when the injury occurs in the course of law enforcement (section 6(1)(b), (c)), the Board may award compensation to the injured person for physical disfigurement or pain and suffering (section 8(2));

(9) An order of the Board is final except for an appeal on a question of law (section 22);

(10) The total amount awarded by the Board to all applicants in respect of "any one occurrence" may not exceed, in the case of lump sum payments a total amount to be specified by each Province, and in the case of periodic payments, a total of so much per month, to be similarly specified, but such limits do not apply to law enforcement cases (section 25), and, at the other end, no award is to be made where the compensation payable would be under $100 (section 6(3)).

4. *Newfoundland, Ontario, Saskatchewan* and *Alberta* already have legislation in force along the lines of the draft uniform Act and a similar Act was assented to in *Manitoba* on July 16, 1970 but it is not known whether it has yet been proclaimed. The *Law Enforcement Officers Assistance Compensation Act* of British Columbia in effect brings within the coverage of the *Workmen's Compensation Act* of British Columbia any person, (and his dependents) other than a peace officer acting in the course of his employment, who suffers personal injury or death in the course of law enforcement. The *Workmen's Compensation Act* of New Brunswick brings within the coverage of that Act any person who assists a peace officer. It is understood that legislation along the lines of the draft uniform Act is under active consideration in Quebec.

5. The *Ontario Act* does not contain a Schedule of offences. It refers, instead, to the "commission of an offence against any statute of Canada or Ontario, not including an offence involving the use or operation of a motor vehicle . . . but including assault by means of such motor vehicle" (section 3(1)). The *Ontario Act* itself confers no right of appeal from the Board, which is to decide cases "in its discretion exercised in accordance with this Act . . . and the decision of the Board is final and conclusive for all purposes" (section 3(1)). Another difference between the draft uniform *Act* and the *Ontario Act* is that the latter covers pain and suffering in all cases coming thereunder, except that of a relative of the offender or a member of his household. The maximum limits fixed by the *Ontario Act* are $10,000 for lump sum payments and $500 per month for periodic payments. There are no minimum limits on awards.

6. The Schedule to the *Saskatchewan Act* does not include all the Criminal Code sections contained in the Schedule to the

draft uniform *Act*, notably section 86 (dangerous use of firearms); section 148 (indecent assault on male); section 165 (common nuisance causing harm); section 374 (arson); and section 378 (false fire alarm). On the other hand the Saskatchewan Schedule contains an express reference to section 191 (criminal negligence) which is apparently unnecessary in view of the references to sections 192 and 193. Under the *Saskatchewan Act* the Board is directed to take into account "the financial need of the person who was injured or of the dependents of the victim" (section 9(b)) The Board may not award compensation where the injury or death giving rise to the claim "resulted from an act or omission of a member of the person's [victim's] family living with him" (section 10(1)(c)). Compensation may be awarded for "pain and suffering of the victim" in all cases (section 11(e)) The Lieutenant Governor in Council may fix the maximum amounts of awards and no award may be made for compensation under $50 (section 19). The Board may order an offender, who has been convicted of the offence giving rise to the award, to pay to the Board all or part of the compensation awarded by the Board (section 24). There is no appeal from a decision of the Board, except on the part of an offender ordered to reimburse the Board, and a decision of the Board is not reviewable by *certiorari*, *mandamus*, prohibition, injunction or other proceeding (section 28). The Lieutenant Governor in Council may add to, or delete from, the Schedule (section 32).

7. The *Manitoba Act* provides that "any one member of the board may . . . hold an inquiry or conduct a hearing for the board" (section 4(3)). No compensation may be awarded where the injury or death resulted from an offence by a member of the victim's family including a common-law wife (section 6(2)). The *Act* contains limitations in respect of non-residents corresponding to those in the *Alberta Act*, as to which, see below (section 6(4)) The Act expressly covers the maintenance of a child born as a result of rape (section 12(1)). Where the injury occurred in the course of law enforcement the Board may award compensation, not exceeding $15,000, for physical disability or disfigurement and pain and suffering (section 12(2)). Compensation may be awarded for loss of or damage to clothing, eyeglasses or other like property, except money, on the person of the victim (section 12(3)(a)). There are two schedules, as in the case of the *Alberta Act*. Schedule 1 sets out the offences in respect of which compensation may ordinarily be granted. It follows the

Schedule of the draft uniform Act with certain exceptions: it omits section 221 (criminal negligence in operation of motor vehicle and dangerous driving); section 222 (driving while intoxicated); section 223 (driving while impaired); and section 378 (false fire alarm). It includes section 138 (sexual intercourse with female under fourteen) and section 141 (indecent assault on female). Schedule 2 contains section 221 (criminal negligence in operation of motor vehicle: dangerous driving); section 222 (impaired driving); and section 224 (driving with more than 80 mgs. of alcohol in blood). Section 12(3) and (4) provides that no compensation may be awarded in respect of offences arising out of the operation of a motor vehicle except that, where a person is killed as a direct result of an offence in Schedule 2, a spouse of the deceased is eligible. An appeal lies from the Board on a question of jurisdiction or law but the proceedings of the Board are not otherwise reviewable by *certiorari, mandamus*, prohibition, injunction or other proceeding (section 21). The Lieutenant Governor in Council may fix the maximum amount of compensation that may be awarded any applicant (section 23(1)(c)) and no award may be made where the amount of the award would be less than $150 (section 12(3)(c)). The Lieutenant Governor in Council may add to or delete from either Schedule 1 or Schedule 2.

8. The *Alberta Act* excludes cases of non-residents of Alberta except where the injury or death occurred in the course of law enforcement or there is reciprocity between Alberta and the jurisdiction in which the person injured or killed resides (section 7(3)) It expressly extends to the "maintenance of a child born as a result of rape" (section 13(1)(d)). In the case of injury incurred in the course of law enforcement, the Board may award compensation, up to the limit of $10,000, "for physical disability or disfigurement and pain and suffering"; the Board may award compensation for clothing, eyeglasses and other like property carried on the person of the victim; and no award may be made for compensation less than $100 (section 13). There is an appeal from the Board on a question of jurisdiction or law but its proceedings are not reviewable by *certiorari, mandamus*, prohibition, injunction or other like proceeding (section 22). The Lieutenant Governor in Council may fix the maximum amounts of compensation except for physical disability or disfigurement and pain and suffering (section 24(1)(c)). The main Schedule to the Act —Schedule 1—does not include all the *Criminal Code* offences

included in the Schedule to the draft uniform Act, notably section 86 (dangerous use of firearms); section 165 (common nuisance causing harm); section 220 (interfering with transportation facilities); section 221 (criminal negligence in operation of motor vehicle and dangerous driving section 222 (driving while intoxicated); section 223 (driving while impaired); or section 378 (false fire alarms). Schedule 2 contains section 221 of the *Criminal Code* (criminal negligence in operation of motor vehicle: dangerous driving) and the effect of the two schedules and 7(1)(a) and 13(3) and (4) is that no compensation may be awarded in respect of the operation of a motor vehicle except that where a person is killed as the direct result of an offence under section 221 of the *Criminal Code*, the spouse only, of the victim is eligible The Lieutenant Governor in Council may amend either schedule (section 24(2)).

9. The following points appear to require consideration or further consideration:

(1) *Section 2(1)(c).* The word "relative" is defined in *The Shorter Oxford English Dictionary* as "One who is connected with another . . by blood or affinity". Do the words "or other relative" include a distant relative by blood or marriage and, if so, what is the rationale of distinguishing between such a person and an unrelated person whom the victim has in fact supported out of a feeling of moral or compassionate responsibility.

(2) *Section 2(2)* In the first draft of the uniform Act the cohabitation had to be "of some permanence" and there had to exist "a legal impediment" to marriage. Such are the provisions of the *Alberta Act* (section 2(2)) and the *Manitoba Act* (section 1(2)). Thus, the existence of a legal impediment ran in favour of the surviving party. In the present draft such an impediment runs against the surviving party, by requiring a cohabitation of not less than seven years, as against a cohabitation of merely "a number of years" when there is no such impediment". I suggest that there should be one simple rule and that it should require cohabitation for two years and omit any reference to impediment.

(3) *Section 4.* Most jurisdictions opt for a Board rather than a Court, because of the more informal and quicker procedure that a Board provides This is an unfortunate

state of affairs because it means that the Courts are failing in adaptation to necessary innovation and decreasing in social relevance. However, the fact that Boards are the pragmatic solution must apparently be accepted. The only jurisdiction, that comes to mind, in which the Courts are employed is Massachusetts where the program appears to be functioning well. Once having decided on a Board, for purposes of flexibility, care must be taken to ensure that the rigidities which are sought to be avoided do not creep back into the system through other doors. This observation is relevant to the point, raised elsewhere, as to why a formal hearing should be necessary in all cases. Another rigidity that has manifested itself in some instances is the preparation of too elaborate decisions involving too much time on the part of too many members of the Board. Another possible rigidity is the tendency to exclude all representations before a Board except by counsel. Where a Board is opted for, serious thought should be given to conferring jurisdiction upon an existing Board. There is apparent some tendency for Boards that are appointed only for the purposes of this legislation to maximize administration costs and to regard themselves as crusaders for this kind of legislation and the extension thereof instead of devoting themselves merely to the carrying out of their terms of reference. Costs of administration in the hands of a separate Board can run very high: in one case at the end of several years experience they were running to about 60 per cent of total cost.

(4) *Section 6(1).* It has been suggested that the words "or indirectly" be inserted after "directly" and, as the reason, a Baltimore case is cited in which an innocent bystander was killed by police bullets fired at burglars.

(5) *Section 6(1).* Is it necessary or desirable to insist upon a hearing in all cases? It is understood that the experience of the *Ontario* Board, at least, is in the direction of authority to have the investigation conducted and award determined by one person, subject to confirmation by the Board, and without a formal hearing unless the applicant requests one, and there is some reason to believe that the experience of the *Alberta* Board is in the

same direction. (The *Manitoba Act* provides that any one member of the Board may hold an inquiry or conduct a hearing for the Board.)

(6) *Section 6(1)(b)(c)* The last line of paragraph (b) should read "in making or attempting to make an arrest". The last line of paragraph (c) should be changed accordingly. There is some danger of the words "offender" and "offence" in section 6(1)(b) and (c) taking colour from paragraph (a) to the exclusion of Provincial offences.

(7) *Section 6(2)* What if the benefits under the draft uniform *Act* would be greater than under the "other Act"?

(8) *Section 8(1).* Are paragraphs (a) and (d) wide enough to cover legal fees; should they be provided for in addition to compensation; and in any event should the *Act* limit the fees that may be taken? The Summary of Directions of Conference, elsewhere referred to, directs that compensation should cover maintenance of a child resulting from rape but should not include pain and suffering.

(9) *Section 8(2).* What is the rationale of this distinction; if A is attacked without warning or justification and mutilated, he receives no compensation under subsection (2) but if B, who comes to his assistance, is mutilated, he does receive such compensation. Also, should there be a maximum allowance for disfigurement, pain and suffering as e.g. in the *Manitoba Act* (section 12(2))?

(10) *Section 11.* To preserve the atmosphere of informality, should not the word "initiative" be substituted for "motion" in subsection (1)(a), the words "at the request" for "on the motion" in subsection 1(b), the word "require" for "command" in subsection (2)?

(11) *Section 11(6)(c).* Should the paragraph not read simply "does any other thing that, if done in a court of law, would be a contempt"?

(12) *Section 12* To avoid any implication of necessity of counsel and to preserve the atmosphere of informality, should this section not read "may but need not"? All five *Provincial Acts* provide that an applicant may be

represented by counsel, but is there a case for representation by agent also, particularly if legal aid is not available? See also the comment under subsection (8) above

(13) *Section 17(1).* Should not such words as "among other relevant matters" be inserted after "contain"?

(14) *Section 18(1)* Are the words "for service" necessary or desirable, in the penultimate line?

(15) *Section 19.* Again, in the interest of informality, should not the words "on its own initiative" be substituted for "of its own motion"?

(16) *Section 21(1).* The same comment as in subsection (15) above.

(17) *Section 23* This section does not direct the Board to take into consideration financial need, nor did the Summary of Directions of Conference elsewhere referred to contain such a direction. The *Newfoundland* and *Saskatchewan* Acts do contain such a direction (sections 14(b) and 9(b) respectively) and so does the legislation of some other jurisdictions, e.g. New York. The political tendency is generally against means tests, and the questions that arise are (a) whether this is to be regarded as welfare or compensatory legislation and (b) as a pragmatic consideration, what can a jurisdiction afford and what are its priorities. In at least one jurisdiction where a means test exists (New York) the opinion has been expressed that in practice it eliminates only a small proportion of claims and all such claims are, of course, subject to the maximum payments prescribed in the legislation.

(18) *Section 25(1).* It is inconsistent to limit the total amount of a lump sum payment but not the total amount of periodic payments.

(19) *Section 25(2)* The words "awards that would otherwise have been made" should be substituted for "claims". It is understood, also, that the *Ontario* Board is having difficulty with the interpretation of the expression "one occurrence" in section 10 of the *Ontario Act.*

(20) *Section 25(3).* As in the case of section 8(2), what is the rationale of this distinction?

(21) *Section 26(2).* The reference to "section 6" should be to "section 8".

(22) *Section 26(3)* This kind of *de minimis* provision has been criticised in some jurisdictions on several grounds. It is said that it militates against many poor persons upon whom a loss of even $100 may impose real hardship; it is said that it leads to the exaggeration of claims; and it is said that for the latter reason and other reasons including ignorance of the limitation, it does not appreciably lessen the work of a Board.

(23) *Section 27(3).* What if the settlement or release was prior to the application?

(24) *Section 28.* One thing that emerged from the discussions at the Baltimore Conference on Compensation to Victims of Crime held in May of this year (1970) was that no one yet has any clear idea as to what compensation programs are going to cost when fully implemented, and that the costs are steadily increasing as the programs become better publicized. On the basis of such information and estimates as are available, relating to Canada and other countries, one can only hazard an estimate that if the scope of Canadian programs is kept within those of the existing *Provincial Acts*, the over-all cost, for Canada, including awards and administration, will run between one and three million dollars annually when the programs are reasonably under way. An extension of the programs or any increase in the crime rate could send these estimates upward generally and unusual multi-victim crimes could send the cost up sharply at particular periods. For such reasons it is eminently desirable that compensation programs start off moderately until their actual costs can be estimated and the priority of an extensive program measured against other priorities.

(25) *Section 31* This section might read better: "This Act applies in respect of claims for compensation arising from an act or omission that occurs after this Act comes into force."

(26) The draft uniform *Act* contains no provision to the effect that an offence is committed, for the purposes of the *Act*, irrespective of any question of legal capacity. See in this respect sections 13(2), 8(2), 2(3) and 1(3) of the *Newfoundland, Saskatchewan, Alberta* and *Manitoba Acts*, respectively. Note also the wording of section 6 of the draft uniform *Act* and of sections 12, 13, 16 and 139 of the *Criminal Code*. There is a question as to whether such a provision is necessary or desirable.

(27) A number of "Residual" points, all or mostly technical, are set out in a separate Memorandum.

(28) *Schedule.* By way of general observation, some of the section references could be simplified and some of the descriptions improved: e.g., the reference to section 206 might simply read "206 murder", and the description of section 79 might more correctly read "intentionally causing death or bodily harm by explosive substances". (These proposed changes are set out in detail in a separate Memorandum).

Section 86. It is doubtful whether this section should be included, since it deals with potential and not actual harm and if harm ensued, it would constitute some other offence already included. This section is found in the *Manitoba* Schedule but not in those of *Newfoundland, Saskatchewan* or *Alberta*.

Section 148 If this section is included, why not section 141 (indecent assault on female), as in the *Alberta* Schedule?

Section 189 This may not seem strictly a crime of violence but it is included in all the *Provincial* schedules.

Section 190. There seems to be no reason for excluding paragraph (b) (omitting to provide apprentice or servant with necessaries of life) if section 189 is to be included, although all the *Provincial* schedules do exclude paragraph (b).

Section 221 In connection with this and other sections contained in the Schedule it should be noted that the Summary of Directions of the Uniformity

Conference, dated November 28, 1969 and presumably compiled by Mr. Stone, directs the exclusion of motor vehicle offences other than assault by motor vehicle.

Section 222. This should read "222 driving while ability is impaired"; but must not a nexus be spelled out between cause and effect?

Section 223 This section should be omitted and possibly replaced by "224 driving with more than 80 mgs. of alcohol in blood", but see comment under section 222 above. *Note*, however, that the *Ontario Act* excludes "an offence involving the use or operation of a motor vehicle . . . but including assault by means of such motor vehicle" (section 3(1)(a)), while the *Alberta* and *Manitoba Acts* limit, to widows of victims, the persons who may be compensated in respect of offences arising out of the operation of a motor vehicle (*Alberta*, section 13(3); *Manitoba*, section 12(3)).

Section 237(1) Should this subsection be included at all, since it would appear that the only logical reason for inclusion would be to cover the remote case of a forced or surreptitious abortion?

Section 366(1)(a). If paragraph (a) is to be included, why not at least paragraph (b) also?

Section 378 Two points arise here. First, it is not the act of creating the false alarm that causes an injury, but the subsequent behaviour of the fire truck, etc. so that the injury is covered by implication only. Second, is it desirable, from the standpoint of policy, to extend the Schedule to such indirect consequences of crime? This section is not included in the *Newfoundland, Saskatchewan* or *Alberta* Schedules nor in the *Manitoba* Schedule.

In addition to the foregoing points, consideration should also be given as to whether it might be preferable to go over to the *Ontario* scheme of not using a schedule (section 3(1)(a)). If the schedule technique is retained, it would appear that consideration should be given to the

inclusion of additional offences in the Schedule, e.g. section 46(1)(6)(d) of the *Criminal Code* (violence in the course of treason), section 52 (sabotage), section 87 (delivering firearm to juvenile), section 186 (failure to provide necessaries), section 229 (sending or taking unseaworthy ship to sea), section 316 (delivering threatening messages) and section 377 (setting fire wilfully or by negligence). A complete list of *Criminal Code* sections that might be considered has been compiled in a separate Memorandum.

10. Consideration should be given to the situations dealt with in such provisions as section 5A and section 419 *et seq.* of the *Criminal Code* relating to offences that cannot be said or shown to have been committed in a particular locality.

11. The Second International Conference on the Compensation of Victims of Violent Crime was sponsored by the State of Maryland Criminal Injuries Compensation Board and held in Baltimore on May 26-29, 1970. Representatives of the crime compensation agencies of Maryland, New York, Hawaii, Massachusetts, Ontario and Alberta attended, as well as other persons who included representatives of the Federal Department of Justice (Canada) and the Department of Justice for Quebec and a number of academics. Views and experience were exchanged and tentative arrangements were made for the formation of an international organization to promote legislation and assist administration in this field. It was proposed that such an organization might have the following principal functions:

1. The collection and distribution of statistics.
2. The collection and distribution of literature on the subject.
3. The collection and distribution of texts and the decisions of Boards and Courts.
4 The fostering and recommending of desirable changes in legislation
5 The encouragement of uniformity of legislation in homogeneous areas.
6. The encouragement of the coverage of all victims of violent crime

7. The supply of information and expertise to other jurisdictions wishing to set up programs.

8. The drafting of uniform legislation.

A steering committee was set up to plan for a third Conference, possibly to be held in *Ontario* next year, and to present thereto a draft constitution for the proposed organization. The co-chairmen of the steering committee are the Chairman of the *Alberta* and *New York* Boards with Professor A. M. Linden of Osgoode Hall Law School and an opposite member from the United States as co-secretaries. It was envisaged that after next year, conferences might be held on a biennial basis.

Additional Matters Arising Out of Minutes of Committee Meeting of January 26, 1970 (Paragraphs 12 and 13)

12 The expression "peace officer" is defined in section 2(1)(e) of the draft uniform *Act* by reference to the definition in the *Criminal Code*. This definition (section 2(30)) is very broad, and when the Committee met on January 26, 1970, Mr. Christie proposed that it be given a narrow interpretation and this was agreed to Nevertheless no change has been made in the present draft. However, if the persons included in the *Criminal Code* definitions are all given the same powers, it seems doubtful that any distinction should be made among them or that the definition should be restricted for purposes of this legislation.

13 Section 6(1)(b) and (c) of the draft uniform *Act* refer to "assisting a peace officer in making an arrest" and to "assisting a peace officer . . . preventing or attempting to prevent the commission of an offence or suspected offence" respectively. The *Saskatchewan Act*, at least, is broader, using the words "rendering assistance to any law enforcement officer in Saskatchewan who was carrying out his duties with respect to the enforcement of law" (section 8(1)(c)). These wider words could cover e.g. the execution of a search warrant.

AN ACT TO PROVIDE FOR THE PAYMENT OF COMPENSATION IN RESPECT OF PHYSICAL INJURY OR DEATH TO INNOCENT VICTIMS OF CRIMINAL CONDUCT

Short title

1. This Act may be cited as *The Criminal Injuries Compensation Act.*

Interpretation

2. (1) In this Act,

(a) "Board" means The Crimes Compensation Board established under this Act;

(NOTE: *Where a Province prefers to add to the duties of an existing Board, insert here the name of the appropriate Board.*)

(b) "child" includes an illegitimate child and a child to whom a victim stands *in loco parentis*;

(c) "dependant" means a spouse, child or other relative of a deceased victim who was, in whole or in part, dependent upon the income of the victim at the time of his death and includes a child of the victim born after his death;

(d) "injury" means actual bodily harm and includes pregnancy and mental or nervous shock;

1953-54, c 51 (Can.)

(e) "peace officer" means a peace officer as defined in the *Criminal Code* (Canada);

(f) "victim" means a person injured or killed in the circumstances set out in subsection (1) of section 6.

Unmarried spouse

(2) The Board may direct that persons were spouses of each other for the purposes of this Act where the Board finds that, although not married, they cohabited as man and wife and they were known as such in the community where they lived,

(a) for a period of not less than seven years where they were prohibited by law from marrying because of a previous marriage of either to another person; or

(b) for a number of years where they were not prohibited by law from marrying,

and the Board may direct that any person to whom a victim or applicant was married and who was living apart from the victim

or applicant under circumstances that would disentitle such person to alimony was not a spouse of the victim or applicant for the purposes of this Act.

Administration of Act

3. The Minister of (Provincial Minister) is responsible for the administration of this Act.

The Crimes Compensation Board established

4. (1) The Crimes Compensation Board is established and shall be composed of not fewer than three and not more than five members who shall be appointed by the Lieutenant Governor in Council, and the Lieutenant Governor in Council shall appoint one of such members as chairman and one or more of them as vice-chairmen.

Board a corporation

(2) The Board is a corporation to which *The Corporations Act* does not apply

Quorum

(3) Two members of the Board, one of whom must be the chairman or a vice-chairman, constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board

Duties of chairman

(4) The chairman shall have general supervision and direction over the conduct of the affairs of the Board, and shall arrange the sittings of the Board and assign members to conduct hearings as circumstances require.

(NOTE. *Where an existing Board is adopted under section 2(1)(a), the Province should omit the parts of section 4 that are provided for elsewhere in the Provincial legislation.*)

Publishing reports

5. The Board shall prepare and periodically publish a summary of its decisions and the reasons therefor.

Injuries compensable

6. (1) Where any person is injured or killed by any act or omission in (Province) of any other person occurring in or resulting directly from,

(a) the commission of an offence within the description of any criminal offence mentioned in the Schedule,

(b) lawfully arresting or attempting to arrest an offender or suspected offender, or assisting a peace officer in making or attempting to make an arrest, or

(c) preventing or attempting to prevent the commission of an offence or suspected offence, or assisting a peace officer therein,

the Board, on application therefor and after a hearing, may make an order that it, in its discretion exercised in accordance with this Act, considers proper for the payment of compensation to,

(d) the victim,

(e) a person who is responsible for the maintenance of the victim,

(f) where the death of the victim has resulted, the victim's dependants or any of them or the person who was responsible for the maintenance of the victim immediately before his death.

Peace officers excepted

(2) Subsection 1 does not apply in respect of the injury or death of a peace officer occurring under circumstances entitling him or his dependants to compensation payable out of public moneys under any other Act.

Minimum loss

(3) Where a claim is for less than $100, no application shall be entertained by the Board and where the award determined is less than $100, no award shall be made.

Limitation period for application

7. An application for compensation shall be made within two years after the date of the injury or death but the Board, before or after the expiry of the two-year period, may extend the time for such further period as it considers just.

Compensation

8. (1) Compensation may be awarded for,

(a) expenses actually and reasonably incurred or to be incurred as a result of he victim's injury or death;

(b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work;

(c) pecuniary loss or damages incurred by dependants as a result of the victim's death;

(d) other pecuniary loss or damages resulting from the victim's injury and any expense that, in the opinion of the Board, it is reasonable to incur.

Idem

(2) Where the injury to a person occurred in the circumstances mentioned in clause (b) or (c) of subsection (1) of section 6 of the Board may, in addition to the matters set out in subsection (1), award compensation to the injured person for physical disfigurement or pain and suffering.

Notice of hearing

9. (1) Where an application is made to the Board, the Board shall fix a time and place for the hearing of the application and shall at least ten days before the day fixed cause notice thereof to be served upon the applicant, upon the Attorney General and upon the offender where practicable and upon any other person appearing to the Board to have an interest in the application

Idem

(2) The notice of hearing shall contain,

(a) a statement of the time and place of the hearing;

(b) a reference to the rules of procedure applicable to the proceedings;

(c) a concise statement of the grounds for the application, and

(d) a statement that, if a party who has been duly notified does not attend at the hearing, the Board may proceed in his absence and he is not entitled to notice of any further proceedings

Parties

10. (1) Every person upon whom notice of a hearing is served and any other person specified by the Board are parties to the proceedings.

Failure to attend

(2) If any party to the proceeding does not attend the hearing, the Board may proceed in his absence.

Adjournment

11. (1) A hearing may be adjourned from time to time by the Board on reasonable grounds,

(a) on its own motion; or

(b) on the motion of any party to the proceedings.

Summonses

(2) The Board may, in the prescribed form, command the attendance before it of any person as a witness.

Oaths

(3) The Board at a hearing may require any person,

(a) to give evidence on oath; and

(b) to produce such documents and things as the Board may require.

Evidence

(4) The Board may receive in evidence any statement, document, information or matter that, in its opinion, may assist it to deal effectually with the matter before it, whether or not the

statement, document, information or matter is given or produced under oath or would be admissible as evidence in any court of law

Objection re self-incrimination

(5) Every person appearing before the Board as a witness shall be advised by the Board of his right to object to answer any question under section—of *The Evidence Act* and section 5 of the *Canada Evidence Act*

R.S.C. 1952, c. 307

Offences

(6) Any person who, without lawful excuse,

(a) on being duly summoned as a witness before the Board, makes default in attending; or

(b) being in attendance as a witness before the Board refuses to take an oath legally required by the Board to be taken, or to produce any document or thing in his power or control legally required by the Board to be produced by him, or to answer any question to which the Board may legally require an answer; or

(c) does any other thing that would have been contempt of court if the Board had been a court of law having power to commit for contempt,

is guilty of an offence punishable under subsection (7).

Enforcement

(7) The Board may certify an offence under subsection (6) to the High Court and that court may thereupon inquire into the offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

Right of party to counsel

12. Any party may be represented before the Board by counsel.

Right of witness to counsel

13. (1) Any witness may be represented before the Board by counsel, but at the hearing the counsel may only advise the witness and state objections under the provisions of the relevant law.

Idem

(2) Where a hearing is held *in camera*, a counsel for a witness shall be excluded except when that witness is giving evidence.

Right of parties at hearing

14. At a hearing before the Board, any party may call and examine his witnesses, cross-examine opposing witnesses and present his arguments and submissions.

Hearings to be open to public; exceptions

15. All hearings shall be open to the public except where, in the opinion of the Board, a public hearing,

(a) would be prejudicial to a fair criminal prosecution of the offender; or

(b) would be damaging to the victim,

in which case the Board shall hold the hearing or the part thereof affecting such matters *in camera.*

Interim compensation

16. Where,

(a) the applicant is in actual financial need, and

(b) it appears to the Board that it will probably award compensation to the applicant,

the Board may, in its discretion, order interim payments to the applicant in respect of maintenance and medical expenses and, if compensation is not awarded, the amount so paid is not recoverable from the applicant.

Decision to be in writing

17. (1) The final decision of the Board, including the reasons therefor, shall be in writing.

Contents of reasons for decision

(2) The reasons for the final decision shall contain,

(a) any agreed findings of facts;

(b) the findings of fact on the evidence; and

(c) the conclusions of law based on the findings mentioned in clauses (a) and (b).

Notice of decision

(3) The Board shall cause to be served on the parties a copy of its final decision, including the reasons therefor.

Service

18. (1) Any notice or document required to be served under this Act or the regulations is sufficiently served if delivered personally or sent by registered mail addressed to the person upon whom service is required to be made at the latest address for service appearing on the records of the Board.

Idem

(2) Where any notice or document mentioned in subsection (1) is served by registered mail, the service shall be deemed to be made on the third day after the day of mailing.

Exception

(3) Notwithstanding subsections (1) and (2), the Board may order any other method of service of any notice or document mentioned in subsection (1).

Compensation not dependent on a conviction

19. An order for compensation may be made whether or not any person is prosecuted for or convicted of the offence giving rise to the injury or death but the Board may, of its own motion or upon the application of the Attorney General, adjourn its proceedings pending the final determination of a prosecution or intended prosecution.

Release of exhibits

20. The Board shall, upon request, release documents and things put in evidence at a hearing to the lawful owner or person entitled to possession within a reasonable time after the matter in issue has been finally determined.

Variation of orders

21. (1) The Board may, at any time, of its own motion or on the application of the offender or any person in whose favour an order is made, review the order and revoke, confirm or vary the order as the Board considers appropriate in the circumstances.

Procedure etc., on review

(2) The provisions of this Act, except section 7, apply to a review under subsection (1) in the same manner as to an application for compensation.

Appeal

22. Subject to section 21, the order of the Board is final except that an appeal lies to the Court of Appeal from any decision of the Board on any question of law.

Considerations of Board

23. (1) In determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his injury or death.

Idem

(2) In determining the expenses and pecuniary loss and damages resulting from the victim's injury or death, the Board shall take into account any recovery or right to recover in respect thereof from any other source.

Form of compensation

24. The Board may order compensation to be paid in a lump sum or in periodic payments as the Board thinks fit.

Maximum payments

25. (1) The total amount awarded by the Board to be paid to all applicants in respect of any one occurrence shall not exceed,

(a) in the case of lump sum payments a total of ————; or

(b) in the case of periodic payments, a total of ———— per month.

(NOTE: *Each Province insert its own maximums.*)

Pro rata distribution

(2) Where the total amount awarded in respect of any one occurrence exceeds the maximum amount prescribed by subsection (1), the amount prescribed shall be distributed *pro rata* in proportion to the amounts of the claims.

Application of ss (1) and (2)

(3) Subsections (1) and (2) do not apply where the victim's injury or death was incurred under clause (b) or (c) of subsection (1) of section 6.

Conditions of payment

26. (1) An order for the payment of compensation may be made subject to such terms and conditions as the Board thinks fit,

(a) with respect to the payment, disposition, allotment or apportionment of the compensation to or for the benefit of the victim or the dependants, or any of them; or

(b) as to the holding of the compensation or any part thereof in trust for the victim or the dependants, or any of them, whether as a fund for a class or otherwise.

Idem

(2) Any compensation payable for expenses under section 6 may, in the discretion of the Board, be paid directly to the person entitled thereto.

Civil proceedings

27. (1) Subject to subsections (2), (3) and (4), nothing in this Act affects the right of any person to recover from any other person by civil proceedings damages in respect of the injury or death.

Subrogation

(2) The Board is subrogated to all the rights of the person to whom compensation is awarded under this Act in respect of the injury or death and may maintain an action in the name of such person against any person against whom such action lies, and any amount recovered by the Board shall be applied,

(a) first, to payment of the costs actually incurred in the action and in levying execution; and

(b) second, to reimbursement to the Board of the value of the compensation awarded,

and the balance, if any, shall be paid to the person whose rights were subrogated.

Settlement

(3) Any settlement or release does not bar the rights of the Board under subsection (2) unless the Board has concurred therein

(4) An applicant for or a person awarded compensation shall forthwith notify the Board of an action he has brought against the offender who caused the injury or death of the victim. Civil actions

28. (1) Compensation ordered to be paid shall be paid out of [the moneys appropriated therefor by the Legislature *or* the Consolidated Revenue Fund *as the Province considers appropriate*] Payment of compensation

(2) Any money recovered by the Board under section 27 shall be paid into the Consolidated Revenue Fund. Disposition of money recovered

29. The Lieutenant Governor in Council may make regulations, Regulations

(a) prescribing rules of practice and procedure in respect of applications to the Board and proceedings of the Board;

(b) requiring the payment of fees in respect of any matter in the jurisdiction of the Board, including witness fees, and prescribing the amounts thereof;

(c) prescribing forms for the purposes of this Act and providing for their use;

(d) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

30. The Crown in right of *(Province)*, represented by the Minister of (Provincial Minister referred to in section 3), with the approval of the Lieutenant Governor in Council, may make agreements with the Crown in right of Canada respecting the payment by Canada to *(Province)* of such part of the expenditures required for the purposes of administering this Act as is agreed upon. Agreements with Canada

31. This Act applies in respect of claims for compensation arising from an injury or death resulting from an act or omission after this Act comes into force. Application of Act

32. This Act comes into force on a day to be named by the Lieutenant Governor by his proclamation. Commencement

SCHEDULE

Section of Criminal Code	*Description of Offence*
78	failure to take reasonable care in respect of explosives where death or bodily harm results
79	causing explosion with intent to cause damage
86	dangerous use of firearm
136	rape
137	attempted rape
148	indecent assault on male
165	common nuisance causing harm
189	abandoning child
190(a)	causing bodily harm to apprentice or servant
192	causing death by criminal negligence
193	causing bodily harm by criminal negligence
206(1)	capital murder
(2)	non-capital murder
207	manslaughter
210	attempted murder
216	causing bodily harm with intent
217	administering poison
218	overcoming resistance to commission of offence
219	setting traps likely to cause death or bodily harm
220	interfering with transportation facilities
221(1)	criminal negligence in operation of motor vehicle
221(4)	dangerous driving
222	driving while intoxicated
223	driving while impaired
226A(1)	dangerous operation of vessel or towed object
226A(4)	impaired operation of vessel
231(1)	common assault
231(2)	assault causing bodily harm

Section of Criminal Code	*Description of Offence*
232(1)	assault with intent to commit indictable offence
232(2)	assault interfering with lawful process
233(1)	kidnapping
233(2)	illegal confinement
237(1)	procuring miscarriage
289	robbery
366(1)(a)	intimidation by violence
374	arson
378	false fire alarm

APPENDIX N

(See page 39)

November 19, 1970.

Dear Commissioner: *Re: Uniform Criminal Injuries Compensation Act*

Attached is a copy of a new draft of the above Act incorporating the decisions of the 1970 Conference completed with the assistance of T.D MacDonald, Q.C.

The decisions made in Charlottetown included the incorporation of the offences in Schedule 2 of the Manitoba Act in the manner adopted by that Province. These offences are,

Section

221 criminal negligence in operation of motor vehicle; dangerous driving;

222 impaired driving;

224 driving with more than 80 mgs. of alcohol in blood.

The right to compensation in these cases is given only to common law wives. The Alberta Act is similar. As the purpose seems to be to supplement a gap in the provincial legislation respecting insurance and unsatisfied judgment funds and the Conference had not considered this question, I have concluded that it should be left out of the draft to be dealt with more appropriately under provincial insurance legislation

Please note also section 27 in respect of which the instructions of the Conference were most general and unformulated

It will be recalled that the enclosed Act was adopted at the 1970 meeting subject to the changes being incorporated and subject to the usual resolution that the Act is adopted if it is not disapproved by two or more jurisdictions by notice to the Secretary on or before the 30th day of November, 1970.

A. N. STONE

Legislative Counsel

THE CRIMINAL INJURIES COMPENSATION ACT

Recommended for enactment by the Conference of Commissioners on Uniformity of Legislation in Canada

Interpretation

1. (1) In this Act,

(a) "Board" means The Criminal Injuries Compensation Board established under this Act;

(NOTE: *Where a Province prefers to add to the duties of an existing Board, insert here the name of the appropriate Board.*)

(b) "child" includes an illegitimate child and a child to whom a victim stands *in loco parentis*;

(c) "dependant" means a spouse, child or other relative of a deceased victim who was, in whole or in part, dependent upon the victim for support at the time of his death and includes a child of the victim born after his death;

(d) "injury" means actual bodily harm and includes pregnancy and mental or nervous shock and "injured" has a corresponding meaning;

(e) "peace officer" means a peace officer as defined in the *Criminal Code* (Canada); R S C 1970, c 34

(f) "victim" means a person injured or killed in the circumstances set out in subsection (1) of section 5.

Unmarried spouse

(2) The Board may direct that persons were spouses of each other for the purposes of this Act where the Board finds that,

(a) although not married, they cohabited as man and wife and were known as such in the community where they lived; and

(b) the relationship was of some permanence,

and the Board may direct that any person to whom a victim or applicant was married and who was living apart from the victim or applicant under circumstances that would have disentitled such person to alimony was not a spouse of the victim or applicant for the purposes of this Act.

Administration of Act

2. The Minister of (Provincial Minister) is responsible for the administration of this Act.

The Criminal Injuries Compensation Board established

3. (1) The Criminal Injuries Compensation Board is established and shall be composed of not fewer than three and not more than five members who shall be appointed by the Lieutenant Governor in Council, and the Lieutenant Governor in Council shall appoint one of such members as chairman and one or more of them as vice-chairmen.

Board a corporation

(2) The Board is a corporation to which (*The Companies Act*, or as appropriate) does not apply.

Quorum

(3) Two members of the Board, one of whom must be the chairman or a vice-chairman, constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

Duties of chairman

(4) The chairman shall have general supervision and direction over the conduct of the affairs of the Board, and shall arrange the sittings of the Board and assign members to conduct hearings as circumstances require.

(NOTE: *Where an existing Board is adopted under paragraph 2(1)(a), the Province should omit the parts of section 4 that are provided for elsewhere in the Provincial legislation.*)

Publishing reports

4. The Board shall prepare and periodically publish a summary of its decisions and the reasons therefor.

Injuries compensable

5. (1) Where any person is injured or killed by any act or omission in (Province) of any other person occurring in or resulting from,

(a) the commission of an offence within the description of any criminal offence mentioned in the Schedule, except an offence arising out of the operation of a motor vehicle but including assault by means of a motor vehicle;

(b) lawfully arresting or attempting to arrest any offender or suspected offender, or assisting a peace officer in making or attempting to make an arrest; or

(c) lawfully preventing or attempting to prevent the commission of any offence or suspected offence, or assisting a peace officer in preventing or attempting to prevent the commission of such offence or suspected offence,

the Board, on application therefor, may make an order that it, in its discretion exercised in accordance with this Act, considers proper for the payment of compensation to,

(d) the victim;

(e) a person who is responsible for the maintenance of the victim;

(f) where the death of the victim has resulted, the victim's dependants or any of them or the person who was responsible for the maintenance of the victim immediately before his death or who has, on behalf of the victim or his estate, incurred an expense referred to in clause (a) or (e) of subsection (1) of section 7.

Peace officers excepted

(2) Subsection (1) does not apply in respect of the injury or death of a peace officer occurring under circumstances entitling him or his dependants to compensation payable out of public moneys under any other Act of (the Province) or of Canada or payable by an organization that is supported in whole or in part by public funds.

Minimum loss

(3) Where a claim is for less than $100, no application shall be entertained by the Board and where the award determined is less than $100, no award shall be made.

Limitation period for application

6. An application for compensation shall be made within one year after the date of the injury or death but the Board, before or after the expiry of the one-year period, may extend the time for such further period as it considers warranted.

Compensation

7. (1) Compensation may be awarded for,

(a) expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death;

(b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work;

(c) pecuniary loss or damages incurred by dependants as a result of the victim's death;

(d) maintenance of a child born as a result of rape;

(e) other pecuniary loss or damages resulting from the victim's injury and any expense that, in the opinion of the Board, it is reasonable to incur.

Idem

(2) Where the injury to a person occurred in the circumstances mentioned in clause (b) or (c) of subsection (1) of section 5 the Board may, in addition to the compensation referred

to in subsection (1), award compensation to the injured person for any other damage resulting from the injury for which compensation may be recovered at law, other than punitive or exemplary damages

Notice of hearing

8. (1) Where an application is made to the Board, the Board shall fix a time and place for the hearing of the application and shall at least ten days before the day fixed cause notice thereof to be served upon the applicant, upon the Attorney General, upon the offender where practicable and upon any other person appearing to the Board to have an interest in the application

Idem

(2) The notice of hearing shall contain,

(a) a statement of the time and place of the hearing,

(b) a reference to the rules of procedure applicable to the proceedings;

(c) a concise statement of the grounds for the application; and

(d) a statement that, if a party who has been duly notified does not attend at the hearing, the Board may proceed in his absence and he is not entitled to notice of any further proceedings.

Parties

9. (1) Every person upon whom notice of a hearing is served and any other person specified by the Board is a party to the proceedings.

Failure to attend

(2) If any party to the proceedings does not attend the hearing, the Board may proceed in his absence.

Hearing dispensed with

10. With the consent of the applicant, the Board may make an order for compensation without a hearing and sections 8 and 9 do not apply.

Adjournment

11. (1) A hearing may be adjourned from time to time by the Board on reasonable grounds,

(a) on its own initiative; or

(b) on the request of any party to the proceedings.

Summonses

(2) The Board may, in the prescribed form, command the attendance before it of any person as a witness.

Oaths

(3) The Board at a hearing may require any person,

(a) to give evidence under oath; and

(b) to produce such documents and things as the Board may require.

Evidence

(4) The Board may receive in evidence any statement, document, information or matter that, in its opinion, may assist it to deal effectually with the matter before it, whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in any court of law.

Conviction as conclusive evidence

(5) If a person is convicted of a criminal offence in respect of an act or omission on which a claim under this Act is based, proof of the conviction shall, after the time for an appeal has expired or if an appeal was taken, it was dismissed and no further appeal is available, be taken as conclusive evidence that the offence has been committed.

Protection for witnesses

(6) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against him in any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury or an offence against section 116 of the *Criminal Code* (Canada) in giving such evidence.

R S C 1970, c 34

Offences

(7) Any person who, without lawful excuse,

(a) on being duly summoned as a witness before the Board, makes default in attending; or

(b) being in attendance as a witness before the Board refuses to take an oath legally required by the Board to be taken, or to produce any document or thing in his power or control legally required by the Board to be produced by him, or to answer any question to which the Board may legally require an answer; or

(c) does any other thing that if done in a court of law would be contempt,

is guilty of an offence punishable under subsection (8).

Enforcement

(8) The Board may certify an offence under subsection (7) to the appropriate court and that court may thereupon inquire into the offence and after hearing any witnesses who may be

produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

Administration of oaths

(9) A member of the Board has power to administer oaths and receive affirmations for the purposes of any of its proceedings.

Right of party to counsel

12. Any party may be represented before the Board by counsel.

Right of parties at hearing

13. At a hearing before the Board, any party may call and examine his witnesses, cross-examine opposing witnesses and present his arguments and submissions.

Right of witness to counsel

14. (1) Any witness may be represented before the Board by counsel, but at the hearing the counsel may only advise the witness and state objections under the provisions of the relevant law.

Idem

(2) Where a hearing is held *in camera*, a counsel for a witness is not entitled to be present except when that witness is giving evidence.

Hearings to be open to public; exceptions

15. All hearings shall be open to the public except where,

(a) the person whose act or omission caused the injury or death has not been charged with a criminal offence or, if charged, has not been convicted of any criminal offence,

(b) it would not be in the interests of the victim, or of the dependants of the victim, of an alleged sexual offence to hold the hearings in public; or

(c) it would not be in the interest of the public morality to hold the hearings in public.

Publication of evidence

16. (1) The Board may make an order prohibiting the publication of any report or account of the whole or any part of the evidence at a hearing where the Board considers it necessary for one of the reasons mentioned in section 15, but in making an order under this subsection the Board shall have regard to the desirability of permitting the public to be informed of the principles and nature of each case.

Offence

(2) Any person who publishes a report or account of any evidence at a hearing contrary to an order of the Board under

subsection (1) is guilty of an offence and on summary conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both.

Corporations

(3) Where a corporation is convicted of an offence under subsection (2), the maximum penalty that may be imposed upon the corporation is $25,000 and not as provided therein.

Interim compensation

17. Where,

(a) the applicant is in actual financial need; and

(b) it appears to the Board that it will probably award compensation to the applicant,

the Board may, in its discretion, order interim payments to the applicant in respect of maintenance and medical expenses and, if compensation is not awarded, the amount so paid is not recoverable from the applicant.

Decision to be in writing

18. (1) The final decision of the Board, including reasons therefor, shall be in writing.

Contents of reasons for decision

(2) The reasons for the final decision shall include,

(a) any agreed findings of facts;

(b) the findings of fact on the evidence; and

(c) the conclusions of law based on the findings mentioned in clauses (a) and (b).

Notice of decision

(3) The Board shall cause to be served on the parties a copy of its final decision, including the reasons therefor.

Service

(19) (1) Any notice or document required to be served under this Act or the regulations is sufficiently served if delivered personally or sent by registered mail addressed to the person upon whom service is required to be made at the latest address for service appearing on the records of the Board.

Idem

(2) Where any notice or document mentioned in subsection (1) is served by registered mail, the service shall be deemed to be made on the third day after the day of mailing.

Exception

(3) Notwithstanding subsections (1) and (2), the Board may order any other method of service of any notice or document mentioned in subsection (1).

Compensation not dependent on a conviction

20. (1) An order for compensation may be made whether or not any person is prosecuted for or convicted of the offence giving rise to the injury or death but the Board may, on its own initiative or upon the application of the Attorney General, adjourn its proceedings pending the final determination of a prosecution or intended prosecution.

Capacity for *mens rea*

(2) Notwithstanding that a person for any reason is legally incapable of forming criminal intent, he shall, for the purposes of this Act, be deemed to have intended an act or omission that caused injury or death for which compensation is payable under this Act.

Release of exhibits

21. The Board shall, upon request, release documents and things put in evidence at a hearing to the lawful owner or the person entitled to possession thereof within a reasonable time after the matter in issue has been finally determined

Variation of award

22 (1) The Board may at any time on its own initiative or on the application of the victim, any dependant of the victim, the Attorney General or the offender, vary an order for payment of compensation in such manner as the Board thinks fit, whether as to terms of the order or by increasing or decreasing the amount ordered to be paid, or otherwise.

Idem

(2) In proceedings under subsection (1), the Board shall consider,

(a) any new evidence that has become available,

(b) any change of circumstances that has occurred since the making of the order or any variation thereof, as the case may be, or that is likely to occur; and

(c) any other matter the Board considers relevant.

Procedure, etc, on review

(3) This Act, except section 6, applies to a review under subsection (1) in the same manner as to an application for compensation.

Costs

23. The Board may, with respect to any hearing or other proceeding under this Act, make such order as to costs as it thinks fit, including a counsel fee not exceeding $50.

Appeal

24 Subject to section 22, a decision of the Board is final except that an appeal lies to the Court of Appeal from any decision of the Board on any question of law.

Considerations of Board

25. (1) In determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his injury or death.

Idem

(2) In determining the amount of compensation, if any, to be awarded to an applicant, the Board shall deduct,

(a) any amount recovered from the person whose act or omission resulted in the injury or death, whether as damages or compensation, pursuant to an action at law or otherwise; and

(b) any benefits received or to be received,

(i) by the victim in respect of his injury, or

(ii) by the applicant in respect of the death of the victim, under an Act of Canada or of (*Province*) or of any other province or territory of Canada other than benefits under a pension plan or program under such an Act.

Form of compensation

26. The Board may order compensation to be paid in a lump sum or in periodic payments, or both, as the Board thinks fit.

"Rate" defined

27. (1) In this section, "rate" means the rate for Government of Canada securities of ten years and over as published in the Bank of Canada Statistical Summary.

Maximum awards

(2) The amount awarded by the Board to be paid in respect of the injury or death of one victim shall not exceed,

(a) in the case of lump sum payments, $15,000; and

(b) in the case of periodic payments, the income from a capital sum of $50,000 calculated at the rate for the month of January in respect of the first six months of each year and for the month of July in respect of the second six months of each year,

and where both lump sum and periodic payments are awarded, one only but not both may exceed half of the maximum therefor prescribed in clause (a) or (b), as the case may be.

Pro rata distribution

(3) When the total amount of the awards that would, but for subsection (2), have been made in respect of the injury or death of one victim exceeds the maximum amount prescribed by subsection (2), such maximum award shall be distributed in propor-

tion to the amounts of the awards that would, but for subsection (2), have been made.

Maximum total of payments for occurrence

(4) The total amount awarded by the Board to be paid to all applicants in respect of any one occurrence shall not exceed,

(a) in the case of lump sum payments, a total of $100,000; and

(b) in the case of periodic payments, the income from a capital sum of $350,000, calculated in the manner prescribed by clause (b) of subsection (2).

Pro rata distribution

(5) Where the total amount of the awards that would, but for subsection (4), have been made in respect of any one occurrence exceeds the maximum amount prescribed by subsection (4), such maximum award shall be distributed in proportion to the amounts of the awards that would, but for subsection (4), have been made.

Acts deemed an occurrence

(6) For the purposes of this section the Board may deem more than one act to be one occurrence where the acts have a common relationship in time and place.

Exception re claims under cls (b), (c) of subs (1) of s 5

(7) Subsections (1) to (5) do not apply to amounts awarded in respect of an injury or death incurred in the circumstances referred to in clause (b) or (c) of subsection (1) of section 5, and such amounts shall not be taken into account in determining maximum awards.

Award not subject to garnishment

28. Any compensation or other amount awarded as costs paid or payable under this Act is not subject to garnishment, attachment, seizure or any other legal process and the right thereto is not assignable.

Conditions of payment

29. (1) An order for the payment of compensation may be made subject to such terms and conditions as the Board thinks fit,

(a) with respect to the payment, disposition, allotment or apportionment of the compensation; or

(b) as to the holding of the compensation or any part thereof in trust for the victim or the dependants, or any of them, whether as a fund for a class or otherwise.

Idem

(2) Any compensation payable for expenses under section 7 may, in the discretion of the Board, be paid directly to the person entitled thereto.

Civil proceedings

30. (1) Subject to subsections (2), (3) and (4), nothing in this Act affects the right of any person to recover from any other person by civil proceedings damages in respect of the injury or death.

Subrogation

(2) The Board is subrogated to all the rights of the person to whom payment is made under this Act to recover damages by civil proceedings in respect of the injury or death and may maintain an action in the name of such person against any person against whom such action lies, and any amount recovered by the Board shall be applied,

(a) first, to payment of the costs actually incurred in the action and in levying execution; and

(b) second, to reimbursement to the Board of the value of the compensation awarded,

and the balance, if any, shall be paid to the person whose rights were subrogated.

Settlement

(3) Any settlement or release does not bar the rights of the Board under subsection (2) unless the Board has concurred therein.

Civil actions

(4) An applicant for or a person awarded compensation shall forthwith notify the Board of any action he has brought against the offender who caused the injury or death of the victim.

Payment of compensation

31. (1) Compensation ordered to be paid shall be paid out of (the moneys appropriated therefor by the Legislature *or* the Consolidated Revenue Fund *as the Province considers appropriate.*)

Disposition of money recovered

(2) Any money to which the Board is entitled under section 30 shall be paid into the Consolidated Revenue Fund.

Regulations

32. The Lieutenant Governor in Council may make regulations,

(a) prescribing rules of practice and procedure in respect of applications to the Board and proceedings of the Board;

(b) requiring the payment of fees in respect of any matter in the jurisdiction of the Board, including witness fees, and prescribing the amounts thereof;

(c) prescribing forms for the purposes of this Act and providing for their use;

(d) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Agreements with Canada

33. The Crown in right of (*Province*), represented by the Minister of (Provincial Minister referred to in section 2), with the approval of the Lieutenant Governor in Council, may make agreements with the Crown in right of Canada respecting the payment by Canada to (*Province*) of such part of the expenditures required for the purposes of this Act as is agreed upon.

Application of Act

34. This Act applies in respect of claims for compensation arising from an injury or death resulting from an act or omission that occurs after this Act comes into force.

SCHEDULE

Section of Criminal Code	*Description of Offence*
66	taking part in a riot
78	failure to take reasonable care in respect of explosives where death or bodily harm results
79	intentionally causing death or bodily harm by explosive substance
136	rape
137	attempted rape
138	sexual intercourse with female under 14 or under 16 years of age
141	indecent assault on female
148	indecent assault on male
165	common nuisance causing harm
186	failure to provide necessaries
189	abandoning child
190(a)	causing bodily harm to apprentice or servant
192	causing death by criminal negligence
193	causing bodily harm by criminal negligence
206	murder
207	manslaughter
210	attempted muder
216	causing bodily harm with intent
217	administering poison
218	overcoming resistance to commission of offence
219	setting traps likely to cause death or bodily harm
220	interfering with transportation facilities
226A(1)	dangerous operation of vessel or towed object
226A(4)	impaired operation of vessel
227	impeding attempt to save life
231(1)	common assault

231(2)	assault causing bodily harm
232(1)	assault with intent to commit indictable offence
232(2)	assault interfering with lawful process
233(1)	kidnapping
233(2)	illegal confinement
289	robbery
366	intimidation by violence
372(2)	mischief causing actual danger to life
374	arson
377	causing fire resulting in loss of life
378	false fire alarm

APPENDIX O

(See page 40)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS, 1969

REPORT OF NOVA SCOTIA COMMISSIONERS

This Report is made in response to the Resolution adopted at the 1968 Conference (1969 Proceedings pp. 27-28) and consists of an Appendix with a list of judicial decisions and a summary note for each case.

The Appendix is in the form of the 1968 Report (1969 Proceedings p. 165) and was prepared by reference to the Table of Model Statutes which appears at page 16 of the 1969 Proceedings and the volumes of the Canadian Current Law for 1969. The Report covers the calendar year 1969 only.

HOWARD E. CROSBY
for
Nova Scotia Commissioners.

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS, 1969

APPENDIX

Bills of Sale

1. *Re Len Plumbing & Heating Co. Ltd.* (1969) 2 O.R. 698, Ont. Sup. Ct. (Bankruptcy), Lacourciere J., Ont. Bills of Sale and Chattel Mortgages Act.

NOTE:—A chattel mortgage from "Union Mechanical Company" was declared null and void because the name was misleading; the mortgagor being Len Plumbing and Heating Co. Ltd. which carried on business under the name "Union Mechanical". In addition, the onus is upon the mortgagee to prove compliance with the Act when the mortgage is challenged.

2. *Fowler v. Triad Oil Manitoba Ltd.* (1969) 70 W.W.R. 470, Alberta Sup. Ct. (Bankruptcy), Riley J., Alberta and Saskatchewan Bills of Sale Act.

NOTE:—The requirement of subsection 6(1) which refers to the filing of a bill of sale was considered and the filing of a notarial copy was determined to be of "no force or effect whatever". Accordingly, the chattel mortgage was declared void

Bulk Sales

3. *Busuttil v. Diamond T Trucks (Toronto) Ltd et al* (1969) 1 O.R. 245, Ont. Ct. of Appeal, Ont. Bulk Sales Act.

NOTE:—A sale of automotive parts constituting inventory was made by a company to a related company and the price paid after resales over a three-year period The sale was declared void for non-compliance with the Bulk Sales Act. The Court considered that, in the absence in the arrangement of a reservation of title or a security interest by the vendor, an immediate sale with a contemporaneous passing of the property must be inferred.

Conditional Sales

4. *C.A.C Leasing Co v. Calce* (1969) 2 O R. 707, Ont. Ct. of Appeal, Ont. Conditional Sales Act.

NOTE:—The Act did not apply to a transaction in which a cash register was leased and the right of the lessee to acquire title excluded. The Court held the word "hire" in the Act applies only to situations in which title is or can be obtained and not "the simple leasing of goods".

5. *Industrial Acceptance Corp. Ltd v Firestone Tire & Rubber Corp.* (1969) 70 W.W.R. 547, Alberta S.C. Ap. Div., Alberta Conditional Sales Act.

NOTE:—Where tires were purchased under conditional sales agreement and placed on a truck purchased under a conditional sales agreement as replacement tires, the vendor of the tires was deprived of his security in favour of the vendor of the truck on the basis that the utility of the principal chattel would be destroyed or seriously impaired by removal.

6. *Industrial Acceptance Corp v. Cote* (1969) 1 N.B.R. (2d) 576, N.B. Sup. Ct., Pichette J., N.B. Conditional Sales Act.

NOTE:—Where the seller's assignee failed to comply with Section 14 of the Act, his claim for the deficiency after repossession and sale was dismissed. The notice given by the assignee did not state accurately the balance due, nor did he conduct the sale or prove the date of sale as required.

Interpretation

7. *McGrane v British Columbia Ferry Authority* (1969) 1 D.L.R. (3d) 562, B.C. Sup. Ct., Wootton, J., B.C. Interpretation Act.

NOTE:—An action was brought against the B.C. Ferry Authority which could be sued prior to the enactment of a Statute vesting the undertaking in the Crown. The Court held the right of action for injuries before the enactment was preserved by Section 12 of the *Interpretation Act*

Limitation of Actions

8. *Karkut v Highway Traffic Board* (1969) 70 W.W.R. 168, Sask. Q.B., MacPherson, J., Sask. Limitation of Actions Act.

NOTE:—A judgment arising out of a motor vehicle accident had been recovered in Manitoba against the applicant and assigned to the Provincial Treasurer upon payment out of the Unsatisfied Judgment Fund. After the lapse of ten years, the applicant sought mandamus to direct issuance of a driver's license on the ground that the judgment was "discharged" by reason of its being barred under the *Limitation of Actions Act* of both Manitoba and Saskatchewan. The Court held that this Act only takes away the remedies of action or set-off and does not prevent recovery by other means.

Reciprocal Enforcement of Judgments

9. *Weshler Sales Promotion Ltd. v. Koltz* (1969) 2 O.R. 134, Ont. Sup. Ct. (Sr. Master), Ont. Judicature Act.

NOTE:—Where action was brought in Ontario on a judgment recovered upon default in Quebec, the fact that process in the Quebec action was served in Ontario while the defendant was present there precluded the operation of Section 52 of the *Judicature Act* which barred defences that could "have been set up to the original action".

Reciprocal Enforcement of Maintenance Orders

10. *Morrissey v. Morrissey* (1969) 70 W.W.R. 140, Sask. Dist. Ct., Friesen J., Sask. and B.C. Reciprocal Enforcement of Maintenance Orders Act.

NOTE:—A provisional maintenance order in favour of a girl over sixteen years was made in British Columbia where the *Wives' and Children's Maintenance Act* defines a child as a person under twenty-one years. Confirmation of the order was sought in Saskatchewan where the *Deserted Wives' and Children's Maintenance Act* limited children to those under sixteen years. It was held the law of Saskatchewan governed and there was no jurisdiction to confirm the provisional order

11. *Pasowysty v. Foreman* (1969) 69 W.W.R. 99, B.C. Sup. Ct., Rae, J., B.C. Reciprocal Enforcement of Maintenance Orders Act.

NOTE:—A maintenance order was made in Ontario while all the parties resided there and was registered in the Family and Children's Court when the father moved to British Columbia. It was held that the Family and Children's Court had no jurisdiction under the B.C. Act to vary or discharge the order.

12. *Re Ritchie and Ritchie* (1969) 3 D.L.R. (3d) 676, B.C. Family and Children's Court (de St. Jorre Ct. J.).

NOTE:—Where a judge of the Supreme Court of B.C. made a maintenance order in favour of a wife after granting a divorce decree, it was held that the order could be enforced by the Family and Children's Court and that a provision of the *Supreme Court Act Amendment Act* which permitted enforcement of such an order was *intra-vires* (See Report of British Columbia Commissioners, 1969 Proceedings p. 162).

Sale of Goods

13. *Western Tractor Ltd. v. Dyck* (1969) 70 W.W.R. 215, Sask. Ct. of Appeal, Sask. Sale of Goods Act.

NOTE:—The implied warranty pursuant of subsection 16(4) of the *Sale of Goods Act* was not displaced by an express warranty which included a statement that the warranty was "in lieu of all other warranties . "

14. *Lightburn v. Belmont Sales Ltd. et al.* (1969) W.W.R. 734, B.C. Supreme Court, Ruttan J., B.C. Sale of Goods Act.

NOTE:—The defendant was not entitled to "take refuge behind the exclusionary clause" which stated that the express warranty was in lieu of all the warranties where the unfitness of the vehicle sold for the intended purpose amounted to a fundamental breach of the contract

15. *R. G. McLean Ltd. v. Canadian Vickers Ltd. et al.* (1969) 2 O.R. 249, Ont. High Ct., Wilson J., Ont. Sale of Goods Act.

NOTE:—A disclaimer clause in the sales contract had no application where there was held to be a fundamental breach in respect of a printing machine that could not perform work to the buyer's disclosed requirements.

Testator's Family Maintenance

16. *Re Pfrimmer Estate* (1968) 66 W.W.R. 574, Manitoba Ct. of Appeal, Manitoba Testators Family Maintenance Act.

NOTE:—The judgment of Deniset, J., (reported in 1968 Report) was reversed and it was held that a testator was under a moral duty to a physically disabled dependant even though his needs were being provided by the government at state expense.

17. *Re Quon* (1969) 4 D.L.R. (3d) 702, Alberta Sup. Ct., Kirby J., Alberta Family Relief Act.

NOTE:—Where a testator was married to a woman in China and had a second wife in Canada, it was held that the Chinese wife was entitled to relief under the *Family Relief Act* and the Canadian wife, who was not entitled under the Act, had a moral claim and the provision for her in the will was left intact.

18. *Re Page Estate* (1969) 67 W.W.R. 407, B.C. Sup. Ct., Gould J., B.C. Testator's Family Maintenance Act.

NOTE:—Where the petitioner, who was the testator's son, was partially disabled and received a pension that would be reduced proportionately to estate benefits, it was held that this was properly taken into consideration by the testator in providing for his son.

19. *Re Brown Estate* (1969) 70 W.W.R. 543, Sask. Q.B., Bence C.J., Sask. Dependants' Relief Act.

NOTE:—Where an application is made for relief, the time at which to consider whether reasonable provision was made is the date of death of the testator. See also, *Re Novikoff* (1969) 66 W.W.R. 164 (B.C.).

Variation of Trusts

20. *Re Mitchell* (1969) 2 O.R. 272, Ont. High Ct., Osler J., Ont. Variation of Trust Act.

NOTE:—An application under the Act to increase the investment powers of the trustees beyond those authorized by the *Trustee Act* should be granted only in "special circumstances".

Vital Statistics

21. *Earle v. Earle* (1969) 69 W.W.R. 699, B.C. Sup. Ct., Wootton, J., B.C. Change of Name Act and Legitimacy Act.

NOTE:—A change of name was requested by a divorced woman pursuant to a provision of the *Change of Name Act* which permitted a change of name if there was "no issue of the marriage" under twenty-one. A child was born to the woman before her marriage to the father and it was held that Section 2 of the *Legitimacy Act* made the child "issue of the marriage".

Wills

22. *Re McLean* (1969) 1 N.B.R. (2d) 500, N.B. Sup. Ct. Ap. Div., N.B. Wills Act.

NOTE:—Where the testator made a will providing several specific bequests of corporate shares it was held that the bequests were adeemed by virtue of an agreement made by the testator to sell all the shares.

Section 20 of the *Wills Act* which provides for a substitute gift did not apply because the agreement applied to all the shares and not to the specific shares in each bequest. See 1969 Proceedings p. 27

23. *Re Griffiths Estate* (1969) 68 W.W.R. 1, Sask. Surrogate Ct., Friesen, J., Sask. Wills Act.

NOTE:—Where a testator made a formal will and then altered it by a holograph codicil, it was held, after reviewing the *Wills Act*, that the codicil could be admitted to probate as a "legal testamentary document".

24. *Re McGinn Estate* (1969) 70 W.W.R. 159, Alberta Sup. Ct., Riley, J., Alberta Wills Act.

NOTE:—The testator made a will and, after suffering a stroke which impaired his "thinking processes", he tore the will in pieces but saved the pieces in an envelope It was held that there was no "intention of revoking" the will in the circumstances as required by Section 16.

25. *Re Pluto Estate* (1969) 69 W.W.R. 765, B.C. Sup. Ct., Hinkson, L.J.S.C., B.C. Wills Act.

NOTE:—Testator made a will leaving property to "my wife Mary Beatrice Pluto" to whom he was married the day following. Section 16, which provides that a will is revoked by marriage unless there is a declaration that the will is made "in contemplation of marriage", was applied on the ground that an explicit provision was required. Inferences drawn from the language used were not sufficient to preclude application of Section 16

26. *Tottrup v. Patterson et al.* (1969) 70 W.W.R. 47, Alberta Sup. Ct. Ap. Div., Alberta Wills Act

NOTE:—Testator gave the residue of his estate to his brother "to hold unto him, his heirs, executors . . .". The brother predeceased testator but left a daughter surviving. The majority of the Court held the words were words of limitation and not substitution and that the gift lapsed and there was an intestacy

APPENDIX P

(See page 40)

REPORT OF CANADA COMMISSIONERS

MINIMUM AGE FOR MARRIAGE

All the provinces of Canada, EXCEPT the Provinces of Newfoundland and New Brunswick have now established a statutory minimum age for marriage, as follows —

Prince Edward Island	— The Marriage Act, R.S.P.E.I., 1951, c. 91; 1968, c. 36.
Nova Scotia	— The Solemnization of Marriage Act, R.S.N.S., 1967, c. 287.
Quebec	— Civil Code of the Province of Quebec, Article 115.
Ontario	— The Marriage Act, R.S.O., 1960, c. 228.
Manitoba	— The Marriage Act, R.S.M., 1954, c. 154; 1956, c. 42.
Saskatchewan	— The Marriage Act, R.S.S., 1965, c. 338.
Alberta	— The Marriage Act, S.A., 1965, c. 52.
British Columbia	— The Marriage Act, R.S.B.C., 1960, c. 232.

The minimum age for marriage provided for by the above Statutes (the provisions of which are set out in the Annex) vary between twelve, fourteen, fifteen and sixteen years. In one Province, Quebec, the minimum age for marriage is different for a woman than for a man. In some provinces, the minimum age for marriage is absolute; in other provinces a marriage may be celebrated, even if a party is under age, in order to prevent illegitimacy of offspring.

Recently an organization of women has made representations to the Attorney-General for Canada requesting him to place before the Conference the question of a uniform minimum age throughout Canada.

Your Commissioners for Canada, therefore, respectfully request that the Conference, with uniformity in mind, give consideration to the question of establishing a uniform minimum age for marriage and make such recommendations, if any, as seems to the Conference to be desirable in the circumstances.

J. W. RYAN

On behalf of the Commissioners for Canada.

ANNEX

PRINCE EDWARD ISLAND — *The Marriage Act,* R.S.P.E.I., 1951, c. 91.

— *An Act to amend The Marriage Act,* P.E.I. Acts, 1968, c. 36.

8B. (1) No person shall

(a) issue a marriage license for,

(b) issue a permit for the publication of banns of marriage for, or

(c) solemnize the marriage of any person under the age of sixteen years.

(2) Subsection (1) of this section does not apply with respect to a female who is shown by the certificate of a duly qualified medical practitioner to be either pregnant or the mother of a living child.

NOVA SCOTIA — *Solemnization of Marriage Act,* R.S.N.S., 1967, c. 287.

18. (1) Notwithstanding any other provision in this Act, no person shall issue or authorize the issuance of a license to or solemnize the marriage of any person under the age of sixteen years.

(2) This section shall not apply in the case of a female who

(a) deposits with the person issuing a marriage license a certificate from a qualified medical practitioner that the marriage is necessary to prevent illegitimacy of offspring; and

(b) has obtained any other consent or authorization required by this Act.

QUEBEC — *Quebec Civil Code*

115. A man cannot contract marriage before the full age of fourteen years, nor a woman before the full age of twelve years.

ONTARIO — *The Marriage Act,* R.S.O., 1960, c. 228.

8. No person shall,

(a) issue a license or special permit to; or

(b) solemnize, under the authority of publication of banns, the marriage of,

— any person under the age of fourteen years unless section 7 is complied with and a certificate of a legally qualified medical practitioner, stating that the marriage is necessary to prevent illegitimacy of offspring, is deposited with the person issuing the license or special permit or solemnizing the marriage.

MANITOBA

— *The Marriage Act*, R.S.M., 1954, c. 154, s. 22

22. (1) Except as provided in section 23, no license shall be issued to, or proclamation of intention made or dispensation granted in respect of, any person under the age of sixteen years.

(2) Except as provided in section 23, no person shall solemnize a marriage between any two persons if either of them, to the knowledge or according to the information of the person solemnizing the marriage, is under the age of sixteen years.

(3) Any person who issues a license or makes a publication or grants a dispensation, for the marriage of two persons, and any minister, clergyman, or other person, who celebrates the ceremony of marriage between two persons, knowing or believing either of them to be an idiot or insane, is guilty of an offence and liable, on summary conviction, to a fine of five hundred dollars.

S.M., 1956, c. 42

— 23. (1) Where there is produced to the issuer, or to the person making the proclamation of intention to marry or granting a dispensation thereof,

(a) a certificate signed by a duly qualified medical practitioner showing that the woman desiring to enter into a marriage is pregnant; and

(b) if either of the parties to the intended marriage is, or both of the parties are, under the age of sixteen years, the consent or consents to which clause (b) of subsection (1) of section 21 and subsection (2) of that section refer;

the issuer may issue a license to the persons desiring to enter into the marriage, or the proclamation may be made, or a dispensation thereof granted, in respect of those persons.

(2) Where a license is issued, a proclamation made, or a dispensation granted, under this section, the issuer or the person making the proclamation or granting the dispensation shall securely attach the certificate of the duly qualified medical practitioner and, where it is required, the written consent, to the license or to the certificate of publication of intention to marry or of dispensation thereof, as the case may be.

SASKATCHEWAN — *The Marriage Act,* R.S.S., 1965, c. 338.

31. (1) No license shall be issued to a person under fifteen years of age, and no marriage of such person shall be solemnized under the authority of the publication of banns unless there is furnished to the issuer or clergyman, as the case may require, a certificate of a duly qualified medical practitioner, stating that immediate marriage is necessary in order to avoid illegitimacy of offspring.

(2) Such medical certificate shall not relieve any person from the requirements of sections 38 and 40.

(3) This section applies to all persons including Doukhobortsi.

ALBERTA — *The Marriage Act,* S.A., 1965, c. 52.

16. (1) No person shall

(a) issue a marriage license for, or

(b) solemnize the marriage of,

any person under the age of sixteen years

(2) This section does not apply with respect to a female who is shown by the certificate of a duly qualified medical practitioner to be either pregnant or the mother of a living child.

BRITISH COLUMBIA — *The Marriage Act,* R.S.B.C., 1960, c. 232.

30. (1) Except as provided in subsection (2), no marriage of any person under the age of sixteen years shall be solemnized, nor shall any license therefor be issued.

(2) Where, on application to a Judge of the Supreme Court or to a Judge of any County Court, a marriage is shown to be expedient and in the interests of the parties, the Judge may, in his discretion, make an order authorizing the solemnization of and the issuing of a license for the marriage of any person under the age of sixteen years. Every order made under this section is subject to the observance of the provisions of section 29, and shall be filed in like manner as provided in subsection (3) of that section in respect of a consent or declaration.

APPENDIX Q

(See page 41)

1970

Personal Property Security

At the 1969 meeting of the Conference a committee composed of Messrs. Bowker, Leal, MacTavish and Tallin was appointed to report on policy and drafting of the proposed Uniform Personal Property Security Act, proposed by the Commercial Law Section of the Canadian Bar Association. (1969 Proceedings p. 29.)

Your committee met in Toronto on the 10th and 11th of April and the 29th and 30th of May 1970, and reviewed the draft in detail. Your committee was in contact with Mr. Jacob Ziegel, chairman of the Bar's Committee concerning a number of matters arising from the draft. Also Messrs. Bowker and Tallin of your committee attended a meeting of the Bar's Committee in Winnipeg in June.

Your committee studied the drafting of the proposed Act and has a number of recommendations to make in that respect. However, a sub-committee of the Bar's Committee is still considering the drafting of the proposed Act and has recommended a number of further changes which your committee has not had an opportunity to consider. Nor has the Bar's Committee had an opportunity to discuss the changes in drafting that your committee recommends. We feel that little value would accrue from the consideration of the recommendations in drafting at this time.

There are, however, several matters of policy in respect of which your committee would like to present its recommendations at this time.

1. *Corporate Securities*

The uniform draft Act departs from the Ontario Act in that the uniform draft Act is intended to apply to corporate securities. These are presently filed under provisions of the Companies Acts of the several provinces or under separate Corporate Securities Registration Acts. The application of the Act to corporate securities required changes in the draft Act in the following area:

(a) Filing of corporate securities in a separate office suitable for a review of these documents

(b) Renewal of filing is not required in the case of corporate securities

(c) The liability of the assurance fund would have to be limited in respect of corporate securities

(d) The provisions relating to procedure on default are varied to take into account the detailed procedures usually outlined in trust deeds relating to corporate securities. These changes usually take the form of excluding corporate securities from the application of specific provisions

Your committee recommends that corporate securities come under the Act but that further study be given in the four areas mentioned and in the matter of the definition of "corporate security".

2. *Leases and Consignment Agreements*

The Ontario Act applies only to those leases and consignment agreements intended as security. The Uniform Act applies to all leases and to a larger class of consignment agreements.

Your committee recommends that the Ontario approach be adopted in this matter and that the Act apply only to those leases and consignment agreements intended as security.

3 *Document Filing and Notice Filing*

The Ontario Act requires that the security agreement itself be filed. The Uniform Act requires that only a notice of the security interest be filed and provides a procedure by which certain persons may require the creditor to disclose the security agreement itself

Your committee recommends that the principle of Document Filing be retained

4 *Open Filing—Time Limit on Filing*

The Ontario Act requires that the filing be made within a specified period after execution of the agreement. Under the Uniform Act, filing may be effected at any time

Your committee recommends that the principle of requiring filing within a fairly short period after execution be retained

5. *Floating Charges*

The Ontario Act applies to floating charges without any special provisions relating to floating charges. The Uniform Act contains a number of special provisions applicable only to floating charges.

Your committee recommends that the special references to floating charges, (except in 2(a)(i)) be deleted.

6. *Effect of Filing as Notice*

The Ontario Act provides that filing of the security agreement is notice for three years to all persons claiming an interest in the collateral. The Uniform Act provides that the filing is effective for three years.

Your committee recommends that the principle of filing being notice be retained.

APPENDIX R

(See page 42)

OCCUPIERS' LIABILITY

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS—1970

1. The last draft of an Occupiers' Liability Act proposed by the British Columbia Commissioners was set out as Appendix J on page 98 of the 1968 Proceedings. At that meeting it was resolved that the Commissioners from other jurisdictions send their comments on the draft Act to the British Columbia Commissioners (page 27, 1968 Proceedings).

2. As a result of comments from Alberta and Manitoba Commissioners, we presented an oral report at the 1969 meeting requesting direction of the Conference on a number of issues raised by those comments, and the following resolution was adopted:—

> "RESOLVED that the matter be referred back to the British Columbia Commissioners for a further report at the next meeting of the Conference with a draft giving effect to the decisions made at this meeting."

3. Since then we have received the admirable report of the Institute of Law Research and Reform of Alberta dealing with "Occupiers' Liability" and we are of the opinion that in any redrafting of the proposed Act serious consideration must be given to the research and recommendations of the Alberta report. W. F. Bowker, Q.C., of the Institute was kind enough to send us sufficient copies of the report so that a copy has been sent to each jurisdiction

4. Furthermore, we have just received the report of the New Zealand Torts and General Law Reform Committee on "Occupiers' Liability to Trespassers".

5. As a result of our consideration of the decisions of the last Conference and of the two recent reports referred to above, we present for the consideration of the Conference a revised draft which is attached to this report. For the convenience and information of the Commissioners, not all of whom have been able to have considered the detailed reports, we have included a commentary to support the changes made in our previous draft of 1968.

6. The British Columbia Commissioners, although recommending adoption of the attached draft, wish to point out to the Conference that we are advised that the Ontario Law Reform Commission has, in 1970, also commenced a study of "Occupiers' Liability" as a project of the Commission. Although at this time it is difficult to determine when the project will be completed and reported, we suggest that this Conference may wish to consider delaying the adoption of this draft Act until we have the benefit of that report. Unless the Commissioners deem it an urgent requirement to adopt an Occupiers' Liability Act at this session, we would recommend that adoption of this draft be deferred for one year for the purpose of enabling the British Columbia Commissioners to receive and consider the Ontario Law Reform report and to make any changes in the attached draft they may consider advisable in light of that report, and report back to the next Conference.

7. Furthermore, as a result of our examination of this subject this year, the British Columbia Commissioners suggest that consideration be given to a change in policy which we believe might result in a simplification of the Uniform Act; namely, that the Act deal only with the elimination of the invitee, licensee categories under the one concept of visitor, and that, instead of establishing an artificial "common duty of care", the ordinary common law rules of negligence apply to define the occupiers' liability to such visitor.

OCCUPIERS' LIABILITY ACT

DRAFT

OF

BRITISH COLUMBIA COMMISSIONERS, 1970

1. This Act may be cited as the Occupiers' Liability Act. [same as 1968 draft]

2. In this Act, unless the context otherwise requires,

(a) "common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using premises for the purpose for which he is invited or permitted by the occupier to be there, *or is permitted by law to be there*; *and the common duty of care applies in respect of the condition of the premises, activities on the premises and the conduct of third parties on the premises*,

[same as 1968 draft excepting the italicized words, which are added as a result of a recommendation contained in Report No. 3 of the Institute of Law Research and Reform of Alberta, 1970, (hereafter called the "Institute Report") at page 47, in which we concur. The words "permitted by law to be there" would cover with the same mantle of common duty of care persons entering private premises for a purpose authorized by law; e.g., policemen, firemen, inspectors, meter readers, etc., and which might not be included in the definition of visitor below. The English Occupiers' Liability Act, 1957, covers this separately under section 2(6) of their Act. (The English Act is set out in full in the 1967 Conference Proceedings at page 187.) The balance of the added words would bring under the common duty of care all incidents whether arising from the condition of the premises, the activities of the occupier thereon or the activities of third persons thereon, which have sometimes been treated differently in the Courts (see Institute Report, page 28, 29).]

(b) "occupier" means an occupier of premises, *and includes a person who, although not in possession, has substantial control over premises, and for the purposes of this Act, there may be more than one occupier of premises*;

[same as 1968 draft excepting the italicized words, which are added as a result of a recommendation in the Institute Report

at page 6, in which we concur. This extension of the term "occupier" is in line with recent cases. *Wheat v. Lacon,* 1966 AC 552; *Kearney v. Waller,* 1965 3 All ER 352; *Fisher v C. H. T.,* 1966 1 All ER 88.]

(c) *"premises" includes*

(i) *ships and vessels*;

(ii) *trailers and portable buildings designed or used for a residence, business or shelter*;

(iii) *trains and railway cars*; *and*

(iv) *land and any thing erected on land but, except as provided in paragraph (subclause) (ii), does not include portable structures and equipment*;

[This is a new definition and is prompted by the discussion and recommendation of the Institute Report at page 78 to 86. The recommendation there set out is that the definition of premises not extend beyond real property or things used as part of or in conjunction with real property except to include staging, scaffolding and other structures erected on land, poles, standards, pylons and wires for electricity, telegraph or telephone. We agree that, although the original principle that the duty of an occupier arises from the use of real property and "premises" in the real property sense, that, in line with the trend of the cases the duty should be extended to other structures that are not strictly "premises".]

(d) *"visitor" means*

(i) *a person whose presence on premises is not unlawful, or*

(ii) *a person whose presence on premises has become unlawful and who is taking reasonable steps to leave the premises*;

[This is a new definition in substitution of the one in the 1968 draft Act. It follows the recommended definition in the Institute Report at page 50 and the reasoning behind it appeals to us. We have, however, substituted the word "premises" for "real property" as we prefer a word that is defined in the Act and can see no particular reason for using the words "real property". That would exclude from the definition of visitor, for example, passengers on board an unsafe ship and would conflict with the definition of premises.]

3. (1) An occupier of premises owes a common duty of care to all visitors to the premises, *and that common duty of care is to be determined by taking into account all relevant circumstances.*
[same as 1968 draft Act excepting italicized words, which are a rewording of the balance of the 1968 draft section, and which excludes clauses (a) and (b) of the 1968 draft section. In dropping clause (a) we agree with the Institute Report recommendation on page 57. In dropping clause (b) we are influenced by the fact that the New Zealand Occupiers' Liability Act of 1962 removed this clause from the 1957 Act. We also feel that it is unwise to particularize this particular circumstance which in any case would be included in the italicized addition to the above subsection (1).

We have also removed the exception from the 1968 draft subsection (1) and made it in slightly altered form a new subsection (2) (see below).]

(2) *Liability of an occupier under subsection (1) may be* extended, restricted, modified, or excluded by *express* agreement *or by express stipulation where the occupier takes reasonable steps to bring the restriction, modification or exclusion of liability in the agreement or stipulation to the attention of the visitor.*

[the non-italicized words are the same as were formerly included in the 1968 draft section 3(1); the additional italicized words are as recommended by the Institute Report at page 76. We agree that there should be a right to contract out of the duty imposed by the Act but there should be a statutory restriction on that right especially in regard to strangers to the agreement who may not be covered by the right conferred on strangers under section 5(1) below.]

(3) In applying subsection (1),

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe;

[no change from 1968 draft Act, section 3(2)(a), supported by Institute Report at page 26, except for the deletion of the words "without more", which are considered unnecessary.]

(b) *unless otherwise provided in any other Act, where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance, or repair by an independent contractor employed by the occupier, the occupier is not, on that account, liable for the damage if, in all the circumstances,*

(i) *he took reasonable steps to satisfy himself that the contractor was competent;*

(ii) *he took reasonable steps to ensure that the work was properly done; and*

(iii) *it was reasonable to entrust the work to an independent contractor*; and

[this clause is completely new, being a reversal of the principle of section 2(b) of the 1968 draft. Under the prior draft, the occupier was not absolved from duty by reason only of hiring an independent contractor. Concern was expressed by this Conference in the 1968 discussion of the 1968 draft, and the British Columbia Commissioners were instructed to consider this further and report back. (1968 Proceedings, p. 27). As a result of further consideration, Mr. Higenbottam of the British Columbia Commissioners reported verbally to the 1969 Conference, recommending that the policy of the English Act be adopted instead, namely, that an occupier who hired an independent contractor would, in certain circumstances, be absolved from liability. This position was bolstered by the Institute Report at page 71. Therefore this clause (b) is a rewording of the English Act, s. 2(4)(b), preceded by the words "Unless otherwise provided in any other Act". This latter addition is designed to prevent an override of any other statutory provision making an occupier liable for the acts of an independent contractor, and is recommended by the Institute Report at page 72.]

(c) the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor.

[same as 1968 draft Act and supported by Institute Report at page 27.]

4. Section 3 applies to a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not visitors to the premises.

[Clause (a) of the 1968 draft Act has been removed as certain movable structures and vessels have been included in the definition of premises (section 2(c)) and we have decided to delete vehicles and aircraft in the former draft Act, following the recommendations of the Institute Report. Section 4, therefore, now consists only of clause (b) of the former draft The retention is supported by the Institute Report at page 103.]

5. (1) Where an occupier of premises is bound by contract to admit as a visitor to the premises a person who is not entitled to the benefit of the contract as a party or assignee of or other successor to a party thereto, the occupier owes the visitor *the common duty of care notwithstanding any restriction or exclusion in that contract.*

[same as 1968 draft excepting italicized words, which replace the following words of the 1968 draft, ", in addition to the common duty of care, the duty of carrying out his obligations under the contract whether undertaken for the benefit of the vistor or not." We agree with the Institute Report at page 77 that it is not desirable to give third parties the benefit of a duty imposed by contract as in the English Act, section 3(1), and our 1968 draft.]

5. (2) Where, by the terms or conditions governing tenancy, including a statutory tenancy, either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section applies as if the tenancy were a contract between the landlord and tenant.

[same as 1968 draft Act. As the Institute Report does not deal in landlord-tenant relations, there is no comment on this subsection, which we recommend retaining as is.]

6. (1) A landlord of occupied premises who owes to the occupier thereof a duty under the tenancy of maintenance or repair of the premises is, for the purposes of this Act, in respect of dangers arising from any default by him in fulfilling that duty, the occupier thereof and all persons who or whose goods are lawfully on the premises are visitors thereto.

(2) Subsection (1) applies:

(a) to any superior or mesne landlord who owes to the occupier of premises a duty under a sub-tenancy of maintenance or repair of the premises, and

(b) to any superior landlord where subsection (1) applies to a mesne landlord and where the superior landlord owes a like duty of maintenance or repair to the mesne landlord.

(3) Where premises are put to a use not permitted by a tenancy and the landlord of whom they are held under the tenancy is not debarred by acquiescence or otherwise from objecting or from enforcing his objection, subsection (1) does not apply to impose any duty on that landlord or any landlord superior to him towards a person whose presence or the presence of whose goods on the premises is due solely to that use of the premises, whether or not, in respect of an inferior landlord, the person or goods is or are lawfully there.

(4) A landlord is not in default in fulfilling his duty under subsection (1) unless the default is actionable at the suit of the occupier of the premises or, where subsection (1) applies by virtue of subsection (2), at the suit of the inferior landlord of the premises.

(5) Nothing in this section relieves a landlord of any duty which he is under apart from this section.

(6) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy and any contract conferring the right of occupation and "landlord" has a corresponding meaning.

(7) This section applies to tenancies created before the commencement of this Act, as well as those created after the commencement.

[same as 1968 draft Act. Again, as these deal with landlord-tenant relationships, there is no Institute Report in relation thereto, so we recommend retaining as is.]

7. (1) *Where an occupier knows or has reason to know*

(a) *that a child who is not a visitor is on his premises; and*

(b) *that the condition of, or activities on, the premises create a danger to that child,*

the occupier of those premises owes a common duty of care to that child.

7. (2) *The circumstances to be taken into account in applying the common duty of care under subsection (1) include*

(a) *the age of the child*;

(b) *the degree of risk of danger to that child*;

(c) *the circumstance that the child may be incapable of appreciating the risk of danger*; *and*

(d) *the burden of eliminating or diminishing the danger or of protecting the child from the risk thereof.*

[This is entirely new and arises from the request of the Conference in 1967, 1967 Proceedings, page 181, that the British Columbia Commissioners devise a special rule dealing with child trespassers. This was further discussed in 1968 but the 1968 draft had no such provision, leaving trespassers to be dealt with under the common law. However, in the 1969 Conference, G. A. Higenbottam of the British Columbia Commissioners recommended in his oral report that special rules be added dealing with infant trespassers, following generally the Second Restatement of the Law of Torts. The Institute Report supports this view with certain modifications to cover the principle of the leading cases of Commissioner for Railways v. Cardy and Thompson v. Bankstown (see page 53). The foregoing new section 7 is our draft of the recommended proposals in this area. We agree with the Institute Report that the word "child" should not be defined (see page 57).

We have also examined the 1970 Report of the Torts and General Law Reform Committee of New Zealand on the subject of Trespassers, generally. The recommendation of the Report is that trespassers be divided into two classes, protected and unprotected. The unprotected class would consist, generally,

(a) of those persons over 16 years who enter premises in the course of committing a crime; or

(b) of those persons who have been adequately warned of the very danger causing the injury; or

(c) of those persons who know the existence and nature of the very danger causing the injury

and the duty of care toward them would be not to injure them by a wilful or reckless act. (the Commissioner of Railways v. Quinlan standard of care) (see New Zealand report, page 8).

All other trespassers would be considered protected trespassers and would enjoy a standard of care which is "such care as in all the circumstances is reasonable not to expose him to any danger existing on the premises" (New Zealand report, page 7). Thus child trespassers, generally, would be considered protected trespassers under the New Zealand proposals.

We consider that the special rules which we have set out in section 7 impose a higher standard of care toward child trespassers than the New Zealand proposals and, for that reason, after consideration, we have recommended section 7 above.]

8. *Subject to section 7, where a person on premises is not a visitor, the occupier is liable to that person for damages only to the extent that they are caused by the wilful or reckless conduct of the occupier.*

[This is a new section as we considered that, in order to make an Occupiers' Liability Act complete and in accordance with its title, the Act should cover trespassers, and this is recommended by the Institute Report, page 102.]

9. The Tortfeasors and Contributory Negligence Act [or the Contributory Negligence Act] applies to this Act.

[This section is new and is recommended by the Institute Report at page 28 and we concur in this recommendation to remove doubts.]

10. (1) Except as otherwise provided in subsection (2) the Crown in right of the Province is bound by this Act.

[This subsection is new but was recommended by G. A. Higenbottam in his report last year, and also recommended by the Institute Report at page 99.]

10. (2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada, or to a municipality, where the Crown or the municipality is an occupier of a public highway or public road [or a road under the Forest Act and the Private Roads Act.]

[This subsection is new and is recommended by the Institute Report. It is inserted here for cautionary purposes to draftsmen who will vary to correspond with local conditions and Provincial Statutes.]

APPENDIX S

(See page 42)

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

REPORT OF MANITOBA COMMISSIONERS

At the 1969 meeting of the Conference, the British Columbia Commissioners recommended certain amendments to the above mentioned Uniform Act The matter was referred to the Manitoba Commissioners for report this year with a draft of any recommended amendments. (1969 Proceedings, page 27)

The first proposal of the British Columbia commissioners was for the addition of a subsection (1A) to section 3 of the Act as follows:

> (1A) Where it appears to the Court that an order received for registration contains matter, or forms part of a judgment, that deals with matter other than an order for maintenance, the order may be registered in respect of those matters only which constitute the maintenance order.

The Manitoba Commissioners agree with this proposal and recommend it as an amendment to the Uniform Act.

The next proposal of the British Columbia Commissioners was to add to subsection (2) of section 3 the following words·

> The Court in which the order is registered has power to enforce the order in accordance with this Act, notwithstanding it is an order in proceedings in which the Court has no original jurisdiction, or it is an order which the Court has no power to make in the exercise of its original jurisdiction.

The Manitoba Commissioners agree with the substance of this recommendation, but believe the words should be added as a new subsection of section 3 with a slight change in wording; and therefore recommend that a subsection (2A) be added to section 3, immediately following subsection (2) thereof, as follows:

> (2A) The Court in which the order is registered may enforce the order in accordance with this Act, notwithstanding that it is an order in proceedings in which the court has no original jurisdiction, or that it is an order that the court has no power to make in the exercise of its original jurisdiction.

The British Columbia Commissioners next recommended that in place of adding, as Manitoba has done, a section numbered 7A dealing with appeals, a new section be added as follows:

> A Court in which an order has been registered under this Act or by which an order has been confirmed under this Act and the officers of the Court shall take all proper steps for enforcing the order, and the provisions of the *Wives' and Children's Maintenance Act* apply, with the necessary changes, in respect of enforcement or variation of, or appeal from orders so registered or confirmed.

The Manitoba Commissioners, however, recommend that a section 7A be added to the uniform Act, immediately following section 7, as follows:

> 7A. Where
>
> (a) a maintenance order has been registered in (Manitoba); or
>
> (b) a court in (Manitoba) has, by its order, confirmed, or varied and confirmed, a provisional order made in a court of a reciprocating state; or
>
> (c) officers of a court in (Manitoba) have taken, or are about to take, steps to enforce an order so registered or a provisional order so confirmed;
>
> any party to the matter may appeal against the registration or the confirming order, or against the enforcement thereof; and the relevant provisions of *The Wives' and Children's Maintenance Act* apply, *mutatis mutandis*, in respect of the enforcement of, or appeal from, the registration, confirmation, or variation, of the maintenance order.

All of which is respectfully submitted. Dated at Winnipeg the 21st day of August, 1970.

G. S. RUTHERFORD
for the Manitoba Commissioners

APPENDIX T

(See page 42)

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT AMENDMENT

The *Reciprocal Enforcement of Maintenance Orders Act* is amended by

(a) adding to section 3 immediately after subsection (1), the following:

(1.1) where it appears to the court that an order received for registration contains matter, or forms part of a judgment, that deals with matter, other than order for maintenance, the order may be registered in respect of those matters only which constitute the maintenance order.

(b) by adding to subsection (3) thereto immediately after subsection (2) of the following:

(2.1) The court in which the order is registered may enforce the order in accordance with this Act, notwithstanding that it is an order in proceedings in which the court has no original jurisdiction, or that it is an order that the court has no power to make in the exercise of its original jurisdiction.

(c) by adding immediately after section 7 thereto the following new section:

(7.1) Where

(a) a maintenance order has been registered in (Manitoba); or

(b) a court in (Manitoba) has, by its order, confirmed, or varied and confirmed, a provisional order made in a court of a reciprocating state; or

(c) officers of a court in (Manitoba) have taken, or are about to take, steps to enforce an order so registered or a provisional order so confirmed

any party to the matter may appeal against the registration or the confirming order, or against the enforcement thereof; and the relevant provisions of *The Wives' and Children's Maintenance Act* apply, *mutatis mutandis,* in respect of the enforcement of, or appeal from, the registration, confirmation, or variation, of the maintenance order.

APPENDIX U

(See page 43)

THE RULE AGAINST PERPETUITIES

REPORT OF THE ALBERTA COMMISSIONERS

N.B. Members will want to have in front of them the Ontario Perpetuities Act 1966. It appears in the 1967 Proceedings at pp. 195-203. Members will also find of help Dr. Gosse's Commentary on the Ontario Act.

The Conference referred this matter to the Alberta Commissioners in 1969. We begin by reviewing the Conference's treatment of this subject to date.

1965—Mr. Leal of the Ontario Commissioners described the report of the Ontario Law Reform Commission and the draft Bill which followed it. The Conference agreed to put the subject on the agenda and asked the Ontario Commissioners to report at the next meeting as to developments (1965 Proc., p. 28).

1966—Mr. Leal reported on the developments in Ontario including the amended report of the Law Reform Commission and the Perpetuities Act, 1966, passed pursuant to that report (1966 Proc., pp. 78-80). It was agreed to study the subject using the Ontario Act as a guide, and the matter was referred to the British Columbia Commissioners for study and report (1966 Proc., p. 21).

1967—The British Columbia Commissioners made a report (1967 Proc., pp. 194-206). They recommended adoption of the Ontario Act as a Uniform Act and also recommended adoption of the British Columbia Accumulations Act, which was based on Ontario's with one or two minor changes. The Conference referred the matter of the two Acts back to British Columbia with directions to prepare a draft Perpetuities Act and a draft Accumulations Act in accordance with the decisions arrived at and that these drafts be circulated, and if not disapproved by two or more jurisdictions by November 30th, they be recommended for enactment. The copies were not distributed in time so the subject of both Acts was put on the 1968 agenda (1967 Proc., pp. 25-26).

1968—(a) *Accumulations* — the British Columbia Commissioners again presented the draft Act with a new provision exempting employee-benefit trusts. It was resolved that the draft Act be deemed to have been distributed and that subject to two disapprovals by November 30, the Act be recommended for enactment. Two disapprovals were not received so the Act was adopted (1968 Proc., p. 28).

(b) *Perpetuities*—Mr. Brissenden of the British Columbia Commissioners read a memorandum received from Mr. Scott-Harston commenting on the Ontario Act. It was agreed that Mr Brissenden circulate it and that Mr. Leal would prepare a report thereon and circulate it for discussion at the next meeting (1968 Proc., p. 28).

1969—Mr. Leal made an oral report and explained why the Scott-Harston memorandum had not been circulated; and he referred to comments made by Dr Gosse on the memorandum. It was resolved that the matter be referred to the Alberta Commissioners for report at the next meeting with a draft Act if necessary.

We assume the matter was referred to us because Alberta's Institute of Law Research and Reform has been studying the subject with a view to recommendations to the Alberta Legislature. One of the Alberta Commissioners is a member of the Institute and the opinions which follow in this report reflect those of the Institute. Its report has been drafted but has not yet been settled in every detail. This report will be a discussion of the main policy issues as they have emerged not only in Ontario and Alberta but in recent literature on the subject and recent Statutes enacted in the Commonwealth and United States.

I

Retention of the Rule

Alberta agrees that the policy behind the rule, namely, to control the time within which interests in real and personal property must vest, is a sound one. In other words we do not favour abolition of the rule, although abolition would probably not bring about any substantial number of eccentric dispositions which would do great damage to the economy or society. On the other hand we agree with Professor Leach that the rule in its

present form often works harshly and capriciously and renders void many dispositions which do not violate the spirit of the rule and which should not be void.

II

Harshness and Main Avenues of Reform

The rule states: NO INTEREST IS GOOD UNLESS IT MUST VEST, IF AT ALL, NOT LATER THAN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST. Professor Leach has done much to show that in its application the rule renders void many dispositions which should in fact be saved. Thus the purpose of reform of the law is to preserve the rule but to remove those aspects of it which render gifts void which should be preserved.

The modern Statutes designed to modify the rule take one or more of the following three forms:

1 To create a wait and see rule,

2. To permit cy pres dispositions,

3 To abolish or change various particular rules which are not defensible and which work hardship.

The Ontario Act, like the English Act of 1964, uses all of these devices. We agree that they are all desirable and will expand our discussion below.

III

The Wait and See Rule

If a Testator gives all his property to "my issue alive when Edmonton reaches the population of 500,000" the gift is bad even though in the event the specified population is reached well within the perpetuity period and even six months after the Testator's death. To avoid this result many reformers advocate the "wait and see" rule. The Ontario and English Act both employ it. It must not be thought however that it is without vigorous opponents. Mr. Sheard's objections to the original Ontario report are based on two grounds.

1. Where the wait and see period is related to lives in being it is often hard to answer the question, whose lives?

2. During the wait and see period income almost inevitably accumulates and the trustees are put in a difficult position as to what to do with the income, as to distributions after the Accumulations Act comes into effect and as to tax problems. The English Law Reform Committee faced this argument. It recognized the advantages of being able to determine at the outset whether a gift is good or not and then said:

> But convenience may be too dearly bought, and we do not consider that such inconvenience as may inevitably attend the application of the "wait and see" principle in the manner above proposed affords any sufficient justification for avoiding an interest which would otherwise in fact have vested in due time merely because, in events which did not happen, it might not have done so.

We favour the wait and see rule. In our opinion it must be accompanied by (1) a provision like Ontario's s. 5 which permits applications to the Court to make a ruling as to the validity or invalidity on the facts existing and events that have occurred at the time of the application. This means that a ruling as to validity or invalidity under the rule can often be made long before the expiration of the wait and see period; (2) trustees should have a power such as that given by the English Trustee Act, ss. 31 and 32, to make advances of income and also of capital to potential or contingent beneficiaries. They think that this should be applicable during the wait and see period. We might mention that Alberta has in its Trustee Act ss. 27 and 28 which are taken from the two English sections but which are not as extensive. It appears that neither Ontario nor British Columbia has such a provision and the objections of Messrs. Sheard and Scott-Harston are in part at least based on the absence of such provisions. The power of a Court of Equity (apart from Statute) to direct income to contingent beneficiaries is highly restricted and our understanding is that there is no power with respect to capital.

We point out too that although the difficulties as to disposition of income during "wait and see" do in fact exist, they also exist in connection with many dispositions to take effect in future and which are well within the rule against perpetuities as it stands.

IV

Length of the "Wait and See" Period

At this point we come to a divergence between the Ontario and English Acts. The English Act lists specified living persons whose lives may be considered and the period consists of any of those lives which is applicable plus twenty-one years. The original Ontario report adopted this principle but in its amended report adopted a different principle. It will be seen from s. 6 of the Ontario Act that the lives are expressed in a negative way. No life can be used unless it limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur. Some writers, notably Morris and Wade, have sternly criticized the English provision because it includes some lives that should not be included and excludes others that should be included. On the other hand Dr. Gosse's commentary on the Ontario Act shows that there are difficulties in determining lives that are a "relevant factor". The Alberta Institute spent much time in considering the pros and cons of these two approaches and concluded on balance to adopt the English method, with an important change involving the "unborn widow" which we describe later. One cannot be dogmatic on this point. The English scheme leaves the common law where it was in determining when the rule is violated but uses a separate list of lives for determining the period of "wait and see". This may seem unattractive but we think the great virtue in specifying the lives is to give certainty to the wait and see period.

One other important difference between the English and Ontario Statutes is this: England permits a settlor or testator to specify in the instrument a period of up to 80 years as the period for wait and see. The object was to "wean" settlors and testators away from "royal lives" clauses.

Ontario rejected the English provision permitting specification of a period up to 80 years, for the reason that royal lives clauses are not in common use in Canada and inclusion of a provision like the English one would encourage artificial prolongation of the period.

Once again it is a question of judgment. We do not share the fear that a provision like England's will tempt Canadian

testators to postpone vesting as long as possible and we favour its inclusion.

Under the English Act the lives which are to be used for the purpose of wait and see are the following.

3. (5) The said persons are as follows:—

(a) the person by whom the disposition was made;

(b) a person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied,

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of any power, option or other right, the person on whom the right is conferred;

(c) a person having a child or grandchild within subparagraphs (b) (i) to (iv) above, or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within those subparagraphs;

(d) any person on the failure or determination of whose prior interest the disposition is limited to take effect.

We favour a provision on these lines though in the case of subsection (5)(b)(v) we would delete the phrase "option or other right". In addition we would add as a life in being the "unborn widow" as explained in the next section.

V

Lives in Being and the "Unborn Widow"

Where a gift is made to A for life and then to the wife who survives him for life and then an ultimate remainder to their children alive at the death of the survivor, the ultimate remainder is bad because the widow is not a life in being. She could have been born after the testator died. Then she could survive her husband by more than 21 years, and it is only on her death that the ultimate remainder vests. Professor Leach did much to attract attention to this situation. There is a consensus that the remainder should be saved. England dealt with this problem (s 5) by accelerating the date of vesting to a time immediately before the end of the perpetuity period. Ontario dealt with it in s. 9 by providing that she is deemed to be a life in being. We favour the Ontario provision but instead of having it in a separate section would include it with the other lives in being already enumerated. This would remove one of Mr. Scott-Harston's criticisms, namely that the Ontario Act is not clear as to which of the two provisions applies first. The inclusion of the unborn widow requires some drafting changes in the provision.

VI

Special Cy Pres

There are two types of disposition frequently made and which can easily run afoul of the rule: (1) a gift to an unborn person to take effect when he is an age greater than 21, (2) a gift to a class in such terms that not all members will be ascertained within the perpetuity period. In this case the harsh result is that the whole class gift is bad. This is patently unfair to those members of the class who had in fact acquired a vested interest before the expiration of the period. Both England (s. 4) and Ontario (s. 9) have a provision which remedies the harshness in each of these situations. In connection with a gift to a person at an age exceeding 21 years, the disposition is to be read as though the gift were to take effect at the age nearest to the specified age which would have saved the disposition. In the case of class gifts, the solution has been to provide for "class splitting" whereby persons within the class whose inclusion would render the gift void are to be excluded.

In connection with the age reduction provision questions have been raised as to its application. For example in the case of a gift to the first son of A to reach 30, and at A's death she has a six-year old and an eight-year old, is the section first applied to the eight-year old and then separately to the six-year old? If so the first has to attain 29 years to take whereas the second need only to attain 27. This would be "phased reduction" and the consensus is that it is undesirable and that there should be one age reduction which will embrace the younger. It seems to be assumed that this is the position under the English and Ontario provision. It is also the intent of this provision that it shall come into play only after "wait and see".

In Ontario the main class splitting provision is s. 8(3). One might have difficulty understanding the purpose and effect of s. 8(2). The example usually given is that of a gift to a composite class of children and grandchildren. Dr. Gosse at p. 41 explains how the subsection works. It excludes those persons who prevent the age reduction provision from applying. Once they are excluded age reduction can be applied.

Before leaving this provision we note that England dealt with the special case where there is a different age specified in relation, e.g., to daughters and sons. England's s. 4(2) is designed to cover this specific case. Ontario omitted it. Although it may not rise often in Canada we favour its inclusion.

VII

General Cy Pres

The provision last described covering age reduction and class splitting is sometimes described as a "special cy pres provision". Presumably it covers the situations that arise most often. However some of the modern Acts have a general cy pres provision. Such a provision renders unnecessary the special cy pres provision but on the other hand it might be desirable to retain the special provision and include a general one as well. We do not yet have a firm opinion as to whether a general cy pres section should be included. If so it would probably be wise to retain the special section, though not strictly necessary.

VIII

Capacity to Have Children

One of the sub-rules which operate to render void many dispositions that would otherwise be good is the irrebuttable presumption that a person is capable of having more children no matter what his age. England's s. 2 and Ontario's s. 7 put an end to this and enable the Court to decide whether a person is capable of having a child. Special provision is made for the case of a person who, in spite of a judicial finding, does at a later date have a child. The Court is empowered to make such order as it sees fit to protect the right of the child. We have been concerned about the provision which directs the Court to ignore the possibility that the person in question will have a child by "adoption, legitimation, or by means other than by procreation or giving birth to a child". We do not know what the third category covers, and in the case of adoption we are troubled by the prospect that a person may apply for a finding of inability to have children at the very moment that he is contemplating the adoption of a child. We have concluded however that it must be left to the Court to deal with this problem.

IX

Applications to Determine Validity and Interim Income

It seems to be desirable to provide as Ontario has done (s. 5(1)) for applications to the Court for a ruling on validity or invalidity of dispositions in relation to the Rule. This section seems to have particular reference to wait and see though it does direct the Court to have in mind the cy pres section. We favour this provision in principle, though perhaps it should be amended specifically to enable the Court to make age reductions and split classes.

With respect to interim income, Ontario's s. 5(2) says that it is to be treated as income arising from a valid contingent interest. This is fine as far as it goes but it does not solve the problem mentioned earlier as to what the trustee may do with the income. We have already recommended provisions like ss. 31 and 32 of England's Trustee Act.

X

Validity of Subsequent Interests, Classification of Powers of Appointment and Exemption of Administrative Powers

We lump these three separate subjects together for convenience because they appear in consecutive sections (10, 11, and 12) in the Ontario Act and can be disposed of shortly.

(1) The subrule that a disposition is void merely because it follows one that is void and even though taken by itself it is valid under the rule should be abolished. Ontario's s. 10 so provides and we agree with it.

(2) As to classification of powers of appointment, this is a complicated subject. We think that Ontario's s. 11 classifying powers is sound.

(3) With respect to exemption of administrative powers, it is a paradox that although a disposition may be good, the exercise of administrative powers such as the power of sale, may be exercisable beyond the period and hence void. The purpose of s 12 is to abolish this illogical result. We agree with it.

XI

The Rule and Commercial Transactions

Some persons argue that the rule should not apply to commercial transactions at all. We see some force in this but on balance are not prepared to render the rule completely inapplicable to commercial transactions. On the other hand the effect of the rule in its common law form is to render void transactions which were entered into in good faith and do not violate the spirit of the rule. The case for modifying the rule in commercial transactions is, if anything, stronger than it is for dispositions in trusts and wills In making the distinction, we recognize that there may be some transactions which are hard to classify. This however is not sufficient reason not to treat commercial transactions differently from the others. We begin with two propositions. (1) the period should not be tied in with lives in being, and (2) it should be substantially longer than 21 years. Under the English and Ontario Acts some commercial dispositions are allowed a period unrelated to lives in being but other commercial dispositions can be made to last in connection with lives in being Under both Acts a royal lives clause could be used, e.g.,

in connection with the time limit on an agreement to sell or lease land at some future date. We have heard of cases in Alberta in which a buy-sell agreement must be exercised within a royal lives clause and we have also heard of land transactions with a similar provision. We think that people should not only be "weaned" away from royal lives clauses in commercial transactions but that royal lives clauses should not be permitted. These observations are by way of introduction to the sections immediately following.

XII

Lease Options

The Supreme Court of Canada held in the *Frobisher* case in 1960 that an option to acquire an interest in real property creates an interest in that property. The *Harris* case decides that an option contained in a lease whereby the lessee is given an option to purchase the reversion is within the rule. This was held to be so even as between the original parties, which seemingly is a deviation from the previous understanding. Both England (s. 9(1)) and Ontario (s. 13(1)) now provide that the rule does not apply to such an option if it is exercisable only by the lessee or his successors in title and if it is exercisable within a year of the determination of the lease. We agree with these provisions. We think there is no need to extend this provision to the case of personal property both because the rule may not apply anyway and because we doubt that there are ever options in leases of personal property which could possibly violate the rule

XIII

Options in Gross

Both in England (s. 9(2)) and Ontario (s. 13(3)) options in gross to acquire for valuable consideration any interest in land have a perpetuity period of 21 years. Ontario specifically provides that the rule against perpetuities does not apply to options to renew a lease We agree with this and indeed this provision was included *ex abundanti cautela,* because the rule never has applied to options to renew a lease.

We defer our own comments on this subject until the next section for reasons that will appear. It will be noted that the

England and Ontario sections dealing with options in gross are confined to options respecting an interest in land. A question arises as to whether they should be extended to options to acquire personal property.

XIV

Acquisition of Interests in Land and Personal Property in General

The discussion which follows describes the recent thinking of the Alberta Institute, though as already stated its recommendations are not completely crystallized. The proposition which we put forward is that commercial transactions whereby an interest in real or personal property may be acquired in the future should all be subject to the rule. This of course includes options in gross but also many other transactions such as an agreement to lease or sell land in the future. In England a period as long as 80 years can be used and alternatively a royal lives clause. We think that in Ontario a royal lives clause could be used. We think it preferable to prescribe a period in years and that it should be longer than 21 years. Once this policy is accepted then the question arises, how long should the period be. One cannot be dogmatic. In its sections dealing with contingent easements and profits à prendre (s. 14) and dealing with determinable interests (s. 15) Ontario has fixed a 40-year period (the period in connection with determinable interests is more complicated but the 40-year period is used). Because we have recommended that parties in trusts and wills shall be permitted if they wish to provide for vesting 80 years in the future we think this period should apply to commercial transactions. The sense of the provision would be that in the case of all options other than lease options and in the case of all other contractual rights under which an interest in real or personal property may be acquired for valuable consideration, the perpetuity period is 80 years. We should add that this provision would apply to rights of first refusal or pre-emption.

XV

Contingent Easements, Profits à Prendre and Restrictive Covenants

Maybe profits à prendre may not need to be dealt with here because they probably come under the last recommendation. However we include them because Ontario in s. 14 has a special

provision dealing with contingent easements and profits à prendre.

It is probably true that contingent easements are rare. However they have been encountered in England and it has been held that the rule against perpetuities applies to them. The Alberta Institute considered carefully whether to exclude easements from the rule and it will be noted that England's law of Property Act, 1925, excludes them when they are ancillary to the right to get out minerals, timber, repair land, build and repair sewers, water pipes etc. In view of the fact that the English authority indicates that other easements are within the rule it might be wisest to deal with them specifically as Ontario has done. Another point that the Alberta Institute has considered is whether to include contingent restrictive covenants along with contingent easements and profits. The present inclination is to do so though the case for arguing that they are outside the rule is stronger than the argument that easements should be outside the rule. Assuming that all three types of contingent interests are either within the rule or will be brought within it, then the question arises as to the period. Ontario's period for easements and profits is 40 years. For the same reasons that we have advanced in connection with agreements to acquire future interests in property generally we favour an 80-year period.

XVI

Determinable Interests

At the outset it is necessary to understand the difference between a determinable interest and an interest which is defeasible on breach of a condition subsequent. We shall use as an example an interest in fee simple. Example of determinable fee: a grant of Blackacre for so long as it is used for a school. Example of fee simple defeasible on breach of condition subsequent: Grant of Blackacre but if it should cease to be used for a school then the grantor or his representatives may enter and repossess Blackacre.

These two dispositions seem very much alike but on accepted doctrine the rule has nothing to do with former disposition because the right of reverter which exists when a determinable fee has been granted is regarded as a vested interest. On the other hand the right of entry on breach of the condition in the

second example is a future interest and the rule of perpetuities applies to it. The view taken both in England (s. 12) and Ontario (s. 15) is that the two should be treated alike and both should be subject to the rule.

The English Act does not have any specific provision as to what the period should be so the general provision applies. In Ontario, the period is 21 years if there is no relevant life and if there is the period is the shorter of 40 years or the relevant lives plus 21 years (s. 15(2), (3)).

We agree that the two types of interest should be treated in the same way and that they should both be under the rule as they now are in England and Ontario. With respect to the period, we do not have a firm opinion. To be consistent with the position we have already taken, the period should be 80 years but if the transaction is a noncommercial one then lives in being plus 21 years should be possible as an alternative.

XVII

Specific Non-Charitable Purpose Trusts

One begins with the general rule that every trust must be in favour of a beneficiary who can enforce it. There is an exception in the case of charitable trusts with which we are not concerned and a further exception in the case of certain specific trusts for non-charitable purposes. These are trusts for the upkeep of graves and tombs, for the care of animals, the saying of masses and there is a fourth category "miscellaneous" which covers a gift for the promotion of fox hunting. Unless a time limit is imposed the trust could continue indefinitely and so they are confined to the perpetuity period. Strictly speaking this is not a case of remoteness of vesting but rather of inalienability. Ontario's s. 16 makes them valid for 21 years and then provides that at the end of that time, the unexpended income or capital shall go to the person to whom it would have gone had the trust been invalid from the beginning. The device used in the Ontario Act is to say that a trust of this kind is to be construed as a power to appoint income or capital. We agree with the Ontario provision.

XVIII

Abolition of the Rule in Whitby and Mitchell

This is sometimes called the old rule against perpetuities or the rule against double possibilities. It says that a gift to the unborn child of an unborn child is void. The consensus is that this rule is no longer needed and Ontario's s. 17 abolishes it. We agree.

XIX

Exemption of Employee-Benefit Trusts

Ontario's s. 18 makes the rule inapplicable to these trusts. There has been a Uniform Act to the same effect since 1954 and we think this subject requires no discussion. There is however one suggestion. Two of the Australian Acts have an identical provision with respect to the same type of trust set up in favour of people who are not employees. We do not know whether such trusts occur in Canada but we see no harm in extending the section to include them.

XX

Application of Act to Crown

In England, "this Act binds the Crown". The Ontario Act is silent so the Crown is not bound. The Statutes of New Zealand and Victoria provide: "This Act and the Rule against Perpetuities shall bind the Crown except in respect of dispositions of property made by the Crown". This exception is important. For example if the Crown makes a disposition of Crown lands subject to the payment of royalties with a provision that the land shall be returned to the Crown on breach of payment of royalty, the question is whether the Crown should be able to assert its claim after the perpetuity period. We think it should and therefore favour the provision just quoted.

XXI

Definitions

Ontario uses the word "limitation" whereas England uses "disposition". We favor the latter as the more modern term. It is also desirable to define power of appointment. We have no criticism of Ontario's definition.

XXII

Accumulations

This subject was not referred to us, doubtless because the Conference adopted a Uniform Act in 1968 (1968 Proc., p. 28). However an account of the Alberta position on this subject might be of interest. The Alberta position is that the Accumulations Act (which so far as Alberta is concerned is the English Act of 1800) should be repealed. Prior to that Act an accumulation was good as long as it was within the limits of the rule against perpetuities. In 1797 a man named Thellusson died. His estate was large and he directed an accumulation during the lives of all his living sons, grandsons and great-grandsons and on the death of the survivor the corpus and accumulations were to go to his male descendants then alive. The direction to accumulate was of course valid because it came to an end within the perpetuity period. The alarm was so great that Parliament in 1800 passed the Accumulations Act (Thellusson's Act). It is the basis of the Uniform Act though the alternate periods within which an accumulation is permitted are now six in number instead of four. The important point is that the permissible period is much shorter than the perpetuity period. The period which is most frequently applicable is that which reads "twenty-one years from the death of the grantor, settlor, or testator". The accumulation is of course not void but is ineffective after the expiration of the 21 years. After that time the income which was directed to be accumulated shall "go to and be received by such person as would have been entitled thereto if such accumulation had not been so directed".

In Canada the position so far as an English-type Accumulations Act is concerned is this:

(1) Provinces with English-type Acts:
British Columbia: Accumulations Act, 1967, c. 2.
Ontario: Accumulations Act, R.S.O. 1960, c. 4.
am. 1966, c. 2.
New Brunswick: Property Act, R.S.N.B., 1952, c. 177, ss. 1, 2.

(2) Provinces taking the law of England as of July 15, 1870 and in which the English Act has been assumed to apply:
Alberta: Re Burns Estate (1961), 25 D.L.R. (2d), 427.

Saskatchewan: Re Fossum Estate (1960), 32 W.W.R. 372.

Manitoba: Re Aikens Trusts (1961), 35 W.W.R. 143.

Note: The only considered examination of the question whether the English Act is in force is the dissenting judgment of Porter J.A. in *Re Burns*. There is great force in his judgment which holds that the Act was not applicable to conditions in the North West Territories a hundred years ago. The point had not been argued and the other members of the Court assumed the English Act to be in force in Alberta.

(3) Provinces in which the English Act may apply:

Newfoundland: (the date of reception of English law is 1832).

(4) Provinces in which the English Act does not apply:

Nova Scotia: (The date of receipt of English law was the time of settlement, before Thellusson's Act was passed).

(5) Provinces with specific legislation equating the accumulations period to the perpetuity period:

Prince Edward Island: Perpetuities Act, R.S.P.E.I., 1951, c. 108 (lives in being plus 60 years in each case).

We think that no important policy is served by restricting accumulation to the short periods allowed by the Uniform Act. We agree that accumulations should not be permitted beyond the perpetuity period but the rule against perpetuities looks after that problem. Directions to accumulate for lengthy periods the incomes from large estates are, we think, rare and we think there is no danger of a few small fortunes being created a century hence at the expense of children and grandchildren now living. In Thellusson's case the evidence was that there would be a colossal fortune at the end of the period but as it turned out this did not occur. Professor Leach says that administrative costs and the continuous litigation kept the fortune at a much smaller figure than the actuaries had predicted. At the present day the imposition of tax is another factor which checks the rate of growth. It is true that interest rates are high at the moment but for long periods they are low.

In addition to the general proposition that the policy of the Act is unwise, there are objections to the way in which the Act works. After the allowed period has expired the income is to be "released". To whom is it released? It is released to "such person as would have been entitled thereto if such accumulation had not been so directed". It seems safe to say that in many if not most cases a dispute immediately arises as to who is entitled. Sometimes the will gives directions but usually not. In most cases the accumulation has been directed with respect to residue and so the released income goes to the next of kin on intestacy. It seems to us that if income is to be released at all it should go to those whom the testator had in mind. Generally, however, it does not. Sometimes the beneficiary can ask for and receive the corpus in accordance with *Saunders v. Vautier*. However he must show that no one else is interested in the fund, as in *Wharton v. Masterman* However later cases show it is practically impossible for the beneficiary of the fund to show that no one else is interested. Thus the released income goes to the next of kin. Taking *Re Burns* as an illustration of the working of Thellusson's Act, and without analyzing it in detail, we are of the opinion that no good purpose was served by the interference with Senator Burns will which application of the Act required.

As a random illustration of the working of the Act one can take a recent Ontario case, *Re Major* (1970), 10 D.L.R (3d) 107. The Testatrix gave her nephew an annuity of $1,500 and provided that if anything were left on his death it would go to his children. The Testatrix died in 1946 and in 1967 the nephew was still alive and there was a small annual surplus above his annuity. The executor asked the Court eight questions in connection with the accumulation problem. One finds it hard to see any social purpose served by releasing the income to the next of kin The annuitant was 63 years old at the end of the 21-year period. The small accumulation in favour of his children would have met the Testatrix's intention and it would not have shaken the economy or torn the social fabric.

We agree with the criticism of Morris and Leach of Thellusson's Act (2 ed. pp. 304-5):

> But the Thellusson Act remains to this day as a memorial to the shock which one man's testamentary dispositions administered to contemporary opinion. Judge after judge has complained of the looseness of its drafting It has proved to be one of the most difficult Acts on

the Statute Book to apply. It has produced a vast mass of intricate case law which abounds with fine distinctions and some sharp differences of judicial opinion. . . .

The Act frustrates the quite reasonable dispositive schemes of settlors and testators and has proved a great hindrance to conveyancing. Thus, an implied direction to accumulate may lurk behind the most innocent-looking dispositions, so attracting the Act and causing windfalls to result to residuary legatees or next-of-kin who were never intended to enjoy the property. The interest which so results is a legal abortion, being usually an interest for a term of years or an estate *pur autre vie* which contrives to be both wasting and reversionary. Again, a settlor cannot easily direct an accumulation which does not begin or end on his own death, thereby attracting estate duty.

The legal case for the repeal of the Act seems overwhelming. Would this be attended by any untoward economic or social consequences? The present authors believe that it would not. After all, accumulation is merely saving, and to save is an economic virtue. No property is withdrawn from commerce, for the property has to be invested—the property is working and the income is working, but the income is not distributed

XXIII

Conclusion

Our purpose here has been to describe the avenues of reform and especially those of England and Ontario. It has also been our purpose to describe alternate solutions to some of the problems. The Alberta Institute's draft Act will be ready shortly. It should be of assistance to the Conference in choosing between policy alternatives and ultimately of settling on a draft Uniform Act.

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