1971

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# PROCEEDINGS

OF THE

# FIFTY-THIRD ANNUAL MEETING

OF THE

# CONFERENCE OF COMMISSIONERS

ON

# UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

## JASPER, ALBERTA

AUGUST 23RD TO AUGUST 27TH, 1971

## 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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## OFFICERS OF THE CONFERENCE, 1971-72

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

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

*Prince Edward Island:*

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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.)*

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STEVEN CUDDIHY, Chief Crown Prosecutor, Palais de Justice, Montreal.

JAMES K. HUGESSEN, Suite 2260, 630 Dorchester West, Montreal 101.

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*Saskatchewan:*

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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.

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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. Otto E. Lang.
*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. T. A. Hickman, Q.C.
*Attorney-General of Nova Scotia:* Hon. Leonard L. Pace.
*Minister of Justice and Attorney-General of Ontario:* Hon. Allan F. Lawrence, 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. Roy J. Romanow.

## 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 - 1971 |
| A. R. Dick, Q.C., Toronto | 1971 - |

## 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
1971. Aug. 23-27, Jasper

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 | Alta. | Adopted B.C. | Man. | N.B. | Nfld. | N.S. |
|---|---|---|---|---|---|---|---|---|
| 1 | Accumulations | 1968 | | 1967 | | | | |
| 2 | Assignments of Book Debts | 1928 | '29, '58* | | '29, '51*, '57* | 1952‡ | 1950‡ | 1931 |
| 3 | | | | | | | | |
| 4 | Bills of Sale | 1928 | 1929 | | '29, '57* | ——$ | 1955‡ | 1930 |
| 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‡ | 1930 |
| 9 | Conflict of Laws (Traffic Accidents) Act | 1970 | | | | | | |
| 10 | Contributory Negligence | 1924 | 1937* | '25, '70 | | '25, '62* | 1951* | '26, '54* |
| 11 | Cornea Transplant | 1959 | 1960‡ | ——¶ | ——¶ | ——$ | 1960 | ——$ |
| 12 | Corporation Securities Registration | 1931 | | | | | | 1933 |
| 13 | Defamation | 1944 | 1947 | ——$ | 1946 | 1952‡ | | 1960$¶ |
| 14 | Devolution of Real Property | 1927 | 1928 | | | 1934† | | |
| 15 | Domicile | 1961 | | | | | | |
| 16 | Evidence | 1941 | | | 1960† | | | |
| 17 | | | | | | | | |
| 18 | Foreign Affidavits | 1938 | '52, '58* | 1953† | 1952 | 1958‡ | 1954* | 1952 |
| 19 | Judicial Notice of Statutes and | | | | | | | |
| 20 | Proof of State Documents | 1930 | | 1932 | 1933 | 1931 | | |
| 21 | Officers, Affidavits before | 1953 | 1958 | ——$ | 1957 | | 1954 | |
| 22 | Photographic Records | 1944 | 1947 | 1945 | 1945 | 1946 | 1949 | 1945 |
| 23 | *Russell v. Russell* | 1945 | 1947 | 1947 | 1946 | | | 1946 |
| 24 | Fatal Accidents | 1964 | | | | 1968 | | |
| 25 ● | Fire Insurance Policy | 1924 | 1926 | 1925$ | 1925 | 1931 | 1954‡ | 1930 |
| 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$¶ | 1924 | 1924 | 1931 | 1925 |
| 39 | Limitation of Actions | 1931 | 1935 | | '32, '46‡ | | | |
| 40 | Married Women's Property | 1943 | | | 1945 | 1951$ | | |
| 41 | Partnership | | 1899° | 1894° | 1897° | 1921° | 1892° | 1911° |
| 42 | Partnerships Registration | 1938 | | | | ——$ | | |
| 43 | Pension Trusts and Plans | | | | | | | |
| 44 | Perpetuities | 1954 | | 1957‡ | 1959 | 1955 | 1955 | 1959 |
| 45 | Appointment of Beneficiaries | 1957 | 1958 | 1957‡ | 1959 | | 1958 | 1960 |
| 46 | Presumption of Death | 1960 | | 1958$ | 1968‡ | | | 1963‡ |
| 47 | Proceedings Against the Crown | 1950 | 1959‡ | | 1951 | 1952† | | 1951$ |
| 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, '71 | '46, '61* | 1951‡ | '51‡, '61*† | 1949 |
| 54 | Regulations | 1943 | 1957‡ | 1958‡ | 1945‡ | 1962 | | |
| 55 | Sale of Goods | | 1898° | 1897° | 1896° | 1919° | 1899° | 1910° |
| 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 | 1941 |
| 59 | Testamentary Additions to Trusts | 1968 | | | | | | |
| 60 | Testators Family Maintenance | 1945 | 1947‡ | ——$ | 1946 | 1959 | | ——$ |
| 61 | Trustee Investments | 1957 | | 1959† | 1965‡ | 1970 | | 1957† |
| 62 | Variation of Trusts | 1961 | 1964 | 1968 | 1964 | | | 1962 |
| 63 | Vital Statistics | 1949 | 1959‡ | 1962‡ | 1951‡ | | | 1952‡ |
| 64 | Warehousemen's Lien | 1921 | 1922 | 1922 | 1923 | 1923 | | 1951 |
| 65 | Warehouse Receipts | 1945 | 1949 | 1945‡ | 1946‡ | 1947 | | 1951 |
| 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.

[illegible] Association of Superintendents

| Ont. | P.E.I. | Adopted Que | Sask | Can | N W T | Yukon | Remarks |
|---|---|---|---|---|---|---|---|
| .... | .... | | | | | | |
| 1931 | 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. New |
| | 1934 | .. | 1957$ | | 1948‡ | 1954‡ | Am. '27, '29, '30, '33, '34 & '42; Rev. '47 & '55; Am. '59 New |
| | 1938* | | 1944x | | 1950*‡ | 1955‡ | Rev '35 & '53; Am. '69 |
| ——¶ | 1960 | . | ——¶ | . | ——¶ | 1962 | Sup. '65, Human Tissue Act |
| 1932 | 1949 | | 1932 | | | 1963 | |
| .... | 1948 | | | | 1949*‡ | 1954 | Rev. '48; Am. '49 |
| . . | | | 1928 | | 1954 | 1954 | Am. '62 |
| 1960† | .. | | | | 1948*‡ | 1955‡ | Am. '42, '44 & '45; Rev. '45; Am. '51, '53 & '57 |
| '52, '54* | .. | | 1947 | 1943 | 1948 | 1955 | Am. '51; Rev. '53 |
| .. | 1939 | | | | 1948 | 1955 | Rev. '31 |
| 1954 | | | | | | 1955 | |
| 1945 | 1947 | | 1945 | 1942$ | 1948 | 1955 | |
| 1946 | 1946 | | 1946 | | 1948 | 1955 | |
| 1924 | 1933 | | 1925 | | | | Stat. Cond. 17 not adopted |
| | | | 1934 | | | | Rev. '64 |
| 1949 | 1949 | | | | 1956 | 1956 | |
| | .. | | | | | | Rev. '58; Am. '67 |
| | .... | | | | | .... | |
| ——$ | | | 1968‡ | | 1966 | | Rev. '70; Am '71 |
| | 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 |
| '21, '62* | 1920 | ——$ | '20, '61‡ | | '49‡, '64* | 1954† | Rev. '59 |
| 1924 | 1933 | | 1924 | | | | |
| | 1939‡ | | 1932 | | 1948† | 1954* | Am. '32, '43 & '44 |
| | | | | | 1952† | 1954† | |
| 1920° | 1920° | | 1898° | | 1948° | 1954° | |
| | ... | | 1941† | | | | Am. '46 |
| 1954 | | | 1957 | | | 1968 | Am '55; Rev. '71 |
| 1954$ | 1963 | | 1957$ | | | | |
| | | | | | 1962 | 1962 | |
| 1963‡ | . . | | 1952‡ | | | | |
| 1929 | | | 1924 | | 1955 | 1956 | Am. '25; Rev '56; Am. '57; Rev. '58; Am. '62 & '67 |
| | | | | | | | Rev. '66 |
| '48‡ '59*‡ | 1951‡ | 1952$ | 1968 | | 1951‡ | 1955‡ | Rev. '56 & '58; Am. '63, '67 & '70 |
| 1944‡ | | . | 1963 | 1950$ | | 1968‡ | |
| 1920° | 1919° | | 1896° | | | | |
| | | | ——$ | | | | |
| 1940 | 1940 | | '42, '62* | | 1962 | 1962 | Am. '49, '56 & '57; Rev. '60 |
| | ... | | | | | .. | |
| | .. | | 1940 | | | | Am. '57 |
| | | | 1965 | | 1964 | 1962 | Am '70 |
| 1959 | 1963 | | 1969 | . | | | |
| 1948$ | 1950‡ | | 1950$ | | 1952 | 1954‡ | Am '50 & '60 |
| 1924 | 1938 | | 1921 | | 1948 | 1954 | |
| 1946‡ | . | | | | | | |
| .. | . | | 1931 | | 1952 | 1954‡ | Am. '53; Rev. '57; Am. '66 & '68 |
| 1954 | | . | .. | | | . | Rev. '66 |

x As part of Commissioners for taking Affidavits Act.
† In part.
‡ With slight modification.
¶ Adopted and later repealed.

## PROCEEDINGS OF THE DRAFTING WORKSHOP

(SUNDAY, AUGUST 22, 1971)

10:00 a.m. - 5:20 p.m.

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

Leslie R. Meiklejohn
Glen W. Acorn
Alberta
G. Allan Higenbottam
Dr. Gilbert D. Kennedy, Q.C.
British Columbia
James W. Ryan, Q.C.
Canada
Andrew C. Balkaran
Rae H. Tallin
Manitoba
Mel M. Hoyt, Q.C.
New Brunswick
Hugo Fischer
Northwest Territories
and Yukon Territory
Frank G. Smith
Northwest Territories
Arthur N. Stone, Q.C.
Ontario
Robert Normand, Q.C.
Quebec
Peter Johnson
Saskatchewan
Padraig O'Donoghue, Q.C.
Yukon Territory

Professor Elmer A. Driedger, Q.C., LL.D., attended at the invitation of the workshop (see p. 23 of the 1970 Proceedings). He presented his report (Appendix I, page 20), and a discussion followed.

Moved by Mr. Acorn, seconded by Mr. Higenbottam, that a committee be constituted consisting of the representatives of Alberta, Canada and Manitoba, and that this committee be instructed

(a) to rewrite the "Discussion Draft" (pages 19 to 22 of the 1970 Proceedings) having regard to the remarks and criticisms made by Dr. Driedger;

(b) to review, on the same basis, the "Observations and Suggestions on the Drafting of Legislation" contained in *Uniformity of Legislation in Canada — an Outline and Rules of Drafting* (1949) with a view to determining those subjects in it that might be dealt with in the redraft; and

(c) submit the redraft at the 1972 meeting of the workshop.

Carried.

Dr. Driedger expressed his readiness to co-operate with the committee.

Moved by Mr. Normand, seconded by Mr. Stone, that the workshop express its readiness to the Conference to consider the uniform Interpretation Act and Statutes Act with a view to presenting a final draft for the consideration and approval by the Conference. Carried.

Mr. Acorn then brought to the attention of the Workshop the report on the draft uniform Interpretation Act and Statutes Act prepared by the Alberta Commissioners (Appendix II, page 25). After discussion, it was agreed that the Workshop would review the draft if it were referred to it by the Conference.

Mr. Ryan was again elected chairman for 1972.

The members of the workshop will reconvene at the notice of the chairman.

The meeting adjourned at 5.20 p.m.

## APPENDIX I

### *Rules of Drafting*

The question is whether the so-called Rules of Drafting issued by the Uniformity Conference should be revised or re-issued. The answer depends entirely on what is intended to be accomplished thereby. The present rules are a mixture of three classes of instructions:

(1) rules of structure — e.g. form, style, arrangement, etc.;

(2) rules of language (grammar and syntax) — e.g. voice, tense, mood, words and expressions;

(3) rules of drafting (composition) — e.g. 5(7) (8), 15.

Class (1) is designed to secure uniformity in structure, so that statutes of the different provinces look alike. This is a desirable objective, and is no doubt designed to promote the acceptance of uniform drafts. Most of the rules fall into this class.

Class (2) has to do more with language generally than with legislative expression. The rules are in the field of grammar and syntax, rather than composition. About seven or eight rules fall into this class.

Class (3) deals with the composition of legislation. There are only two or three.

It may be that the objective of class (1) has been attained and that these rules are no longer needed. There is now substantial uniformity in style, not only as between provincial statutes but also as between federal and provincial statutes, and it may be expected that this will continue to be so.

There is question in my mind whether classes (2) and (3) should be there at all. I have found them useless. Some are so vague that they are no guide at all (e.g. where possible, long sections and long subsections shall be avoided or where possible, the active voice shall be used), some cannot be and are not followed by anybody (the cases and conditions shall be stated first, followed by the rule) and some I disagree with (e.g. Provisoes may be used when necessary etc.).

The Rules of Drafting—as a drafting guide or desk book to be kept at my elbow when drafting—I found useless. Many years ago I tried to produce my own guide book; this was published under

the title Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation. This deals to a large extent with form and style, but also to some extent with the technique or art of legislative expression. It was intended as instructions to myself and those working with me and my hope was that it would be a useful thing to have at one's elbow while drafting. This Memorandum has fifteen pages of text, compared to four for the uniformity rules, but even this expanded treatment does not go very deeply into the art of drafting, and leaves vast areas untouched.

Later, I did a more extensive piece—Composition of Legislation —which runs to 165 pages of text; this was followed by my Legislative Forms and Precedents with 175 pages of text.

But now that I am teaching this subject, I find that what I have written is far from a complete treatment of the subject, some of what I have written I am now modifying and expanding, and about some things I have changed my mind. But of one thing I am convinced: it is impossible to produce a short desk manual that will tell you much about drafting.

Let us take rule 5(4) as an example. Here are five lines on what I call "paragraphing"; some call it tabulation. I have 2 pages on that in my memorandum, and 26 pages in Composition of Legislation. But in the course of my teaching, I have added another 10 pages of material.

Rules 7, 8, 9 deal with Voice, Tense and Mood, a total of 10 lines. I have 50 lines in my Memorandum and 6 pages in my text. In the course of my teaching, I have now added lectures on

(1) The creative *shall*

(2) *Shall* in the pure future

(3) Legislative Auxiliaries

(4) Tenses of the Infinitive

(5) The progressive or expanded tense

(6) Action verbs in static situations

(7) Continuing verbs and conditions precedent

and I have changed or modified some of the things I previously said. For example, I no longer say it is wrong to write "He shall be entitled". I have come to the conclusion that *he is* and *he shall be* are both grammatically and linguistically correct, but I say that I

prefer the former and I can state my reasons. But they are too involved to state here. If you now asked me to write four or five lines on tense, voice and mood I would answer that I couldn't do it. Nothing I could say in 10 or 20 lines would be complete, correct or useful. On the contrary. It would be incomplete, incorrect and useless.

You all know what my views are on provisoes. Therefore I would leave out Rule 15, but it took 4 pages in my text to explain why, and another 7 pages to justify my stand.

Rule 7 says that where possible, the active voice shall be used. I disagree. There are many situations where the active voice could be used but it is better to use the passive. For example, have a look at your own draft Limitation Act. And look at any statute that establishes standards of quality or performance. The real rule, if there is one, is not that the active voice should be used or preferred, but that the person who is to be the subject of the law should be identifiable—*if it matters* (e.g. in This Act may be cited, or No action shall be brought, it does not matter). But even in the passive form the subject can be identified if it matters.

Rule 5(8) about cases or conditions is nonsense. I have been teaching this subject for a year now, using actual legislative materials. I have yet to find a single legislative sentence consisting of Coode's four elements and arranged exactly in the order he recommended. I do not recall ever having written one.

I think you will have concluded by now that in my view it is impossible to produce a manual or desk book in short compass on the art of writing legislation, that would have any real value. It could do no more than put into capsule form a few things you now do instinctively and as a matter of course. You are all experienced draftsmen. Why tell you that different words or expressions shall not be used to denote the same thing, that long sections shall be avoided or that the words *aforesaid* and *before-mentioned* shall be avoided? For whom are the rules intended if not for you? Do you ever look at them? I suggest that is the test you should apply in reaching your decision: What can you say that will be of any value to you?

If you drop classes (2) and (3), you are then left with class (1). This is a different kettle of fish. These are rules or instructions you are expected to look at and to follow. It is the only way you will get uniformity in form and style, and if you still regard that as a

desirable objective and want to ensure continuance of this objective even though it may now be substantially attained, then I would certainly recommend that you re-issue your rules.

I would suggest, however, that they be not called Rules of Drafting. A better title would be Rules of Form and Style, or something like it. It might also contain a separate section on printing style—printer's instructions, so to speak. The subject-matter I have in mind is dealt with under the heading Formalities, in chapter IX of Composition of Legislation and chapter I of Legislative Forms and Precedents. I am not suggesting for a moment that these chapters should be taken as your starting point. I mention them only to indicate the subject-matter you might consider it useful to express in rule form.

There are, of course, many different forms for many different situations, and every draftsman has his own way of doing things. Sometimes he writes something one way because that is what came to his mind; sometimes he looks at other statutes; sometimes he looks at his own private collection of precedents.

I am not suggesting that a book of precedents should be prepared. I believe, however, that there are many types of common clauses that are constantly used in many statutes in all jurisdictions, and it occurs to me that a few dozen or so might be selected for general use. This would, I believe, promote uniformity in style and form, and, to the extent that the provisions are substantive, uniformity in law as well.

A manual might then consist of three Parts, as follows:

Part I —Formalities
(e.g. Titles, short titles, divisions and their nomenclature, headings, marginal notes, references and cross-references, arrangement, citation)

Part II —Printing Style
(Capitals, italics, punctuation, indentations, tabulations, schedules, spacing, type)

Part III—Some standard clauses
(Power to make regulations, Penalties, Forfeitures, Evidence, Repealing and Amending, Commencement and Duration, Proclamation)

A manual along these lines would probably be a useful thing to have at one's elbow while drafting.

I conclude by repeating my main theme: There is no point in telling yourself to do things that you as experienced draftsmen will do anyway without being told, or things you will not or cannot do.

Ottawa, July 27, 1971 E. A. Driedger

Since writing these notes I have received a case book on Legislation prepared by Messrs. Nutting, Elliott & Dickerson. I heartily endorse the following quotation from p. 557:

> ". . . the established practice of including in general treatments of legislation a short miscellany of helpful hints on drafting mechanics and style, like those found in the many state drafting manuals or the brief "do's and don'ts" adopted by the National Conference of Commissioners on Uniform State Laws, is here rejected, not because such treatments include improper materials but because of the misleading implications they create by what they omit. The wistful hope that somehow the difficulties of statutory draftsmanship can be overcome by a few handy rules like the Ten Commandments, compliance with which will keep the draftsman out of legislative trouble, produces offerings to the student that are not only inadequate but dangerous for their illusion of completeness. Their preoccupation with form also implies that good legislative draftsmanship is largely a matter of developing a simple, straight-forward style. Such an approach over-emphasizes verbal facade and implies that problems of substance and architecture either do not exist or are simple preliminaries that may be taken for granted. Either assumption is fatal to adequate drafting.
>
> In general, it is important to remember that, as stated in several state legislative drafting manuals,
>
> Legislative drafting requires more definite, more exacting qualities of language, and demands greater skill in composition than other writing *** Bill drafting must have the accuracy of engineering, for it is law engineering; it must have the detail and the consistency of architecture, for it is law architecture."

APPENDIX II

*(See page 19)*

Report of the Alberta Commissioners on

THE INTERPRETATION ACT

and

THE STATUTES ACT

At the 1967 Conference the Manitoba Commissioners presented a report consisting primarily of a draft Interpretation Act with annotations. This draft was discussed in some detail at the 1968 Conference and was then referred to the Alberta Commissioners for further consideration in light of the discussions at the meeting and for a report at the next meeting. Unfortunately, as the responsibility for the report was in the hands of the legislative draftsmen among us, the preparation of the Revised Statutes of Alberta 1970 made it impossible for us to prepare a report for either the 1969 or 1970 meetings.

We are now pleased to submit this report to the Conference. It consists primarily of the attached drafts of The Interpretation Act and The Statutes Act. This reflects a decision at the 1968 Conference to split the draft Act into two so as to separate out those provisions which do not primarily relate to the interpretation of statutes and which are commonly found in the various Statutes Acts of the provinces. Each draft is interspersed with our commentary following the provisions involved.

The original instructions of the Conference were to prepare a new Act using the Senate Bill for The Interpretation Act of Canada as the basis for discussion. While we have canvassed the existing Model Act, the since enacted Federal Act and the other provinces' Interpretation Acts, we are drawing particular attention to The Interpretation Act (Northern Ireland) 1954 and have included in the source reference notes the equivalent provisions of that Act. This is done primarily for the convenience of those who wish to refer to the excellent article by Mr. W. A. Leitch and Dr. A. G. Donaldson entitled "Commentary on The Interpretation Act (Northern Ireland) 1954", Northern Ireland Legal Quarterly, May 1955, and its sequel by Mr. Leitch entitled "The Interpretation Act —10 Years Later" in the Northern Ireland Legal Quarterly, June 1965, Page 215.

We also referred on occasion to the Interpretation and General Clauses Act, 1970 of Guyana. We were fortunate in obtaining a complimentary copy of this Act after Guyana gained its independence and found a number of interesting innovations which we thought might be considered. Some of them we have included in the draft and others we have referred to in the commentary.

Respectfully submitted,

Glen W. Acorn,
W. F. Bowker,
S. A. Friedman,
L. R. Meiklejohn,
W. E. Wilson,
W. E. Wood,

Alberta Commissioners.

Edmonton
July 30, 1971

CONTENTS

THE INTERPRETATION ACT

# THE INTERPRETATION ACT
# AND
# THE STATUTES ACT

Abbreviations used in source references and comments:

| | | |
|---|---|---|
| Federal | — | Interpretation Act (Canada) S.C. 1967, c. 7, as amended by s. 28 of the Statutory Instruments Act, S.C. 1970-71-72, c. 38. |
| Model | — | Interpretation Act, Model Acts of the Conference 1919-61, p. 152. |
| Guyana | — | Interpretation and General Clauses Act 1970, (Guyana), Act No. 8 of 1970. |
| N. Ireland | — | Interpretation Act (Northern Ireland), 1954, (1954, c. 33) |
| 1967 Draft | — | Draft Interpretation Act of the Manitoba Commissioners, 1967 Proceedings, p. 124. |

A source reference in a "NOTE" after a section indicates that the provision referred to is the same as or similar to the provision in the draft, or deals with the same subject matter.

## THE INTERPRETATION ACT

1. (1) In this Act,

(a) "Act" means an Act of the Legislature;

(b) "enact" includes to issue, make, establish or prescribe;

(c) "enactment" means an Act or a regulation or any portion of an Act or regulation;

(d) "public officer" includes any person in the public service of the Province

(i) who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or

(ii) upon whom a duty is imposed by or under an enactment;

(e) "regulation" includes an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, instrument, proclamation, by-law, resolution or other instrument enacted,

(i) in the execution of a power conferred by or under the authority of an Act, or

(ii) by or under the authority of the Lieutenant Governor in Council;

(f) "repeal" includes revoke, cancel or rescind.

(2) For the purposes of this Act, an enactment that has expired or lapsed or otherwise ceased to have effect shall be deemed to have been repealed.

NOTE: 1. Model s. 2; Federal s 2; N. Ireland ss 1 and 28(4); 1967 Draft s. 2

*COMMENT: 1. In some cases the Federal section 1 uses words defined elsewhere in the section, i.e., "Act" and "regulation" in the definition of "enactment", "enactment" in the definition of "public officer". To be consistent with section 2(2) of this draft, we used the term "Legislature", defined in section 26, in the definition of "Act" and "enacted" in the definition of "regulation" in place of the Federal wording "issued, made or established": see the definition of "enact" Where section 26 of the draft defines an expression, we are using the defined expression elsewhere in the draft and in section 26 itself.*

*2. Subsection (1)(b): In the definition of "enact" we have added "prescribe" because of its frequency of use, especially in conjunction with forms and tariffs of costs and fees.*

*3. Subsection (1)(d): We are not convinced of any compelling need for the addition of the clause in the 1967 Draft which read "who performs a duty in the performance of which the public has an interest and whose remuneration is paid from and out of the Consolidated Fund".*

*4. Subsection (1)(f): We suggest the addition of "rescind" because of its frequency of use, in Alberta at least, in conjunction with regulations, orders, by-laws etc.*

## APPLICATION

2. (1) Every provision of this Act extends and applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

(2) The provisions of this Act apply to the interpretation of this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.

NOTE: 2. Model section 3; Federal section 2; N. Ireland section 2, 1967 Draft s. 1.

*COMMENT: 1. Subsection (1): This wording follows Northern Ireland section 2(1) rather than Model section 3(1) and Federal section 3(1) which read:*

*2. (1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.*

*2. This section raises the question of the extent of the application of the Act Is it intended to deal only with the interpretation of enactments? In the case of the Federal Act the answer is no, on the basis that at least one provision, section 33, extends to "documents". Apart from that, the answer is not clear because some provisions expressly say "in an enactment" while others don't. This difference could give rise to an inference that any provision in the latter category might extend to the interpretation of something that is not an "enactment". In other words, there may be a possibility that the omission of "in an enactment" in a rule of construction in the Act may have the effect of extending the rule to documents that are not enactments.*

*The draftsman of the Northern Ireland Act took pains to remove any doubt on the point and consistently wrote every provision so that it referred to enactments. We are following his example here. A possible alternative is to add a subsection to section 2 of the draft to the effect that the Act applies only to enactments, unless a contrary intention is expressed, but there may be difficulties in that approach that we are not presently aware of.*

*3. In passing, we also wish to be consistent on another usage. The Model Act and Federal Act variously use expressions such as "construed", "deemed", "read", "read and construed", "understood", "considered" and "taken to mean" We are using the term "construed" only except in some cases where "deemed" is still appropriate.*

*In fact, in section 2(2) it might be more accurate to speak of "the construction of this Act" rather than "the interpretation of this Act".*

## OPERATION

### *Commencement*

3. (1) Where no other date of commencement is provided in an Act, the date of assent to the Act is the date of the commencement of the Act.

(2) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date

of assent to the Act, that provision shall be deemed to have come into force on the date of assent to the Act.

(3) Where an Act provides that certain provisions thereof are to come or shall be deemed to have come into force on a day other than the date of assent to the Act, the remaining provisions of the Act shall be deemed to have come into force on the day of assent to the Act.

(4) In this section, "the date of assent" with reference to an Act that has been reserved for the signification of the Governor General's pleasure, means the date of the signification of the Lieutenant Governor that the Governor General in Council assented to the Act.

NOTE: Federal s. 5; N. Ireland s. 13(1); 1967 Draft s. 5(4) to (6).

*COMMENT: We are not certain why subsection (2) refers only to the case of an Act or portion thereof coming into force "on a day later than the date of assent" rather than "on a day other than the date of assent" as in subsection (3). Subsection (4) is new.*

*Date Fixed for Commencement or Repeal*

4. (1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force immediately on the expiration of the previous day.

(2) Where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect immediately on the commencement of the following day.

(3) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

(a) in the case of an Act, upon the expiration of the day immediately before the day the Act was enacted;

(b) in the case of a regulation of a class that is not exempted from the application of The Regulations Act, upon the expiration of the day immediately before the day the regulation was filed pursuant to the Act;

(c) in the case of a regulation of a class that is exempted from the application of The Regulations Act or a regulation to which that Act does not apply, upon the expiration of the day immediately before the day the regulation was enacted.

NOTE: Model section 4(1); Federal section 6; N. Ireland section 14. The Regulations Act is the one in the Model Acts 1919-1961.

*COMMENT: 1. This follows Federal section 6, as amended, except for a variation in subsection (3)(c) to add "or a regulation to which that Act does not apply".*

*2. N. Ireland section 14 says "come into force or operation" but we do not see any significance in the addition of the words "or operation".*

*3. N. Ireland section 14(2) also elaborates on the expression "particular day" by adding "(whether such day is before or after the date of the passing of such enactment . . . and whether such day is named in the enactment or is to be appointed or fixed or ascertained in any other manner)".*

### *Regulation Prior to Commencement*

5. (1) Where an enactment that is in force contains provisions conferring power

(a) to make regulations, or

(b) to do any other thing,

that power may be exercised at any time after its commencement, but a regulation so made or a thing so done has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective upon its commencement.

(2) Where an enactment is to come into force on a day to be fixed by proclamation,

(a) the proclamation may apply to, and fix a day for the commencement of, any portion of the enactment, and

(b) proclamations may be issued at different times in respect of any portion of the enactment.

NOTE: Model section 4(2); Federal section 7; 1967 Draft section 7; N. Ireland section 16; Guyana section 20.

*COMMENT: 1. Subsection (1) follows (with one omission) Federal section 7 which refers to the power to make regulations or to "do any other thing", while the Model section has another five clauses enumerating the specified powers. Both are intended to be exhaustive as to those powers and thus we see no advantage in spelling out the additional five clauses.*

*2. Guyana section 20 includes as one of the powers in subsection (1) any power "exercisable by making (regulations)".*

*3. In subsection (1), we have omitted after the words "that power may" the phrase, "for the purpose of making the enactment effective upon its commencement,". In our view this involves a decision in any given case as to whether or not the purpose of the exercise of the power was to make the enactment "effective upon its commencement". What if it does not? For example, if a complete set of regulations is made in advance of commencement, could some of them be held invalid on the*

*ground that they had no bearing on the matter of "making the enactment effective upon its commencement"? In our view, the question need not arise and the distinction need not be made, as long as the saving provision is there which says that whatever is done has no effect until commencement day "except in so far as may be necessary to make the enactment effective upon its commencement".*

*4. The saving clause quoted immediately above is on its face puzzling by its unfortunate use of the word "effective", especially in an Act and in a group of sections that uses the word "effect" in the sense of "being in force". "Effective in this section is presumably intended to have the sense of "workable" or "operational" and while we have no firm alternative to offer, we would prefer a different word nevertheless.*

*5. Subsection (2) is the 1967 Draft section 7(2) with drafting modifications.*

### *Territorial Operation*

6. (1) Every enactment applies to the whole of the Province, unless it is otherwise expressed therein.

(2) Where an enactment that does not apply to the whole of the Province is amended, no provision in the amending enactment applies to any part of the Province to which the amended enactment does not apply, unless it is therein provided that the amending enactment applies to that part of the Province or to the whole of the Province.

NOTE: Federal section 8; N. Ireland section 6

*COMMENT: This was not in the 1967 Draft but it did not indicate any reason for omitting it.*

## RULES OF CONSTRUCTION

### *Private Acts*

7. No provision in a private Act affects the rights of any person, except only as therein mentioned or referred to.

NOTE: Model section 8; Federal section 9; 1967 Draft section 9.

### *Enactments Always Speaking*

8. Every enactment shall be construed as always speaking, and where anything is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment and every part thereof according to its true spirit, intent and meaning.

NOTE: Model s. 6(1); Federal s. 10; N. Ireland s. 31(1); 1967 Draft s. 10.

*COMMENT: 1. This follows N. Ireland s. 31(1) rather than the Model or the Federal Act. Note especially that "The law shall be considered as always speaking" changed to "Every enactment shall be construed as always speaking."*

*2. There is an inconsistency in the Model s. 6(1) and others like it in referring initially to "The law" and then to "the enactment". It is only enactments that we are concerned with.*

*Enactments Remedial*

9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

NOTE: Model s. 11; Federal s. 11; 1967 Draft s. 11.

*Preambles and Marginal Notes*

10. The preamble of an enactment shall be construed as part thereof intended to assist in explaining its purport and object.

NOTE: Model s. 9; Federal s. 12; 1967 Draft s. 12; N. Ireland s. 10(1).

11. References to former enactments after the end of a section or other division of an enactment and marginal notes in an enactment form no part of the enactment, but shall be construed as being inserted for convenience of reference only.

NOTE: Model s. 10; Federal s. 13; 1967 Draft s. 13.

*COMMENT: This follows Federal s. 13. Model s. 10 includes "headings" and the 1967 Draft s. 13 included "headings and tables of contents".*

*Application of Definitions*

12. (1) Definitions or rules of interpretation contained in an enactment apply to the construction of the provisions of the enactment that contain those definitions or rules of interpretation, as well as to the other provisions of the enactment.

(2) Where an enactment contains an interpretation section or provision, it shall be construed as being applicable to the whole enactment unless a contrary intention appears in the enactment.

NOTE: Model ss. 6(5) and 3(2); Federal s. 14; 1967 Draft s. 14; N. Ireland s. 34.

*COMMENT: 1. Subsection (2) has been rewritten in the hope that it is clearer and more happily worded. We are still not entirely satisfied with it. It appears on its face to overlap subsection (1) in this sense: Subsection (1) says that "definitions or rules of interpretation" apply to the construction of the provisions containing them and to the other provisions of the enactment, that is, to the whole enactment.*

*Subsection (2) (as it appears in the Model) says that an "interpretation section or provision" shall be construed "as being applicable". Applicable to what? Obviously, "to the whole enactment", and thus our addition of those words in our subsection (2).*

*Assuming we are correct in doing this, what does subsection (2) now say that subsection (1) doesn't? If a difference can be demonstrated then it must lie in some distinction between the "definitions and rules of interpretation" mentioned in subsection (1) and "an interpretation section or provision" mentioned in subsection (2). We are of the view that they refer to the same things but for no reason are described differently. If there is no difference, they should be described in the same way, assuming subsection (2) remains at all.*

2. *Federal s. 14(2) reads:*

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(*a*) as being applicable only if the contrary intention does not appear, and

(*b*) as being applicable to all other enactments relating to the same subject matter unless the contrary intention appears.

*We have omitted clause (b) intentionally as being too broad and essentially a source of pitfalls and unintended results.*

13. Where an enactment confers power to enact regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

NOTE: Model s. 12; Federal s. 15; 1967 Draft s. 15; N. Ireland s. 33; Guyana s. 18(3).

*COMMENT: 1. Guyana s. 18(1) provides that a reference in a regulation to "the Act" shall be construed as a reference to the Act under which the regulation is made.*

*2. Guyana s. 18(2) provides that in an enactment a reference to an Act shall be deemed to include a reference to any regulations made under the Act to which the reference was made.*

### *Her Majesty*

14. Unless the enactment otherwise provides, an enactment is not binding on Her Majesty nor does it affect Her Majesty or Her Majesty's rights or prerogatives in any manner.

NOTE: Model s. 13; Federal s. 16; 1967 Draft s. 16; N. Ireland s. 7.

*COMMENT: 1. This is the 1967 Draft s. 16 which differed in wording from the Model s. 13 and Federal s. 16. Our notes from the 1968 meeting indicate that the words "Unless the enactment otherwise provides" were to be struck out on the reasoning that section 2(1) [of this draft] made the phrase redundant. While there is merit in the reasoning we have left the phrase in so that the subject may be canvassed again. Our point in doing so is that, if this phrase is to be struck out in this case, the same*

*or similar phrases elsewhere in the draft would also have to be removed on the basis of the same reasoning and for the sake of consistent drafting.*

*2. If the opening phrase stays in it might be more accurate to refer to "Act" rather than "enactment" so that it is consistent with the rule that Crown prerogatives can only be removed by the Legislature.*

*3. N. Ireland s. 8(2) states in effect that the Crown is bound by the Interpretation Act itself.*

*4. At the 1968 Conference the position of Crown corporations was discussed. This problem is somewhat complex, beginning with the problem of identifying a "Crown corporation", and we are unable presently to agree on what provision should be made regarding them, if any provision is to be made at all.*

*Proclamations*

15. (1) Where the issue of a proclamation is authorized by an enactment, the proclamation shall be construed as being a proclamation issued pursuant to an order of the Lieutenant Governor in Council but it is not necessary to mention in the proclamation that it is issued pursuant to such an order.

(2) Where the Lieutenant Governor in Council has authorized the issue of a proclamation, the proclamation may purport to have been issued on the day its issue was so authorized, and the day on which it so purports to have been issued shall be deemed to be the day on which the proclamation takes effect.

(3) Where an enactment is expressed to come into force on a day fixed by proclamation, judicial notice shall be taken of the issue of the proclamation and the day fixed thereby without being specially pleaded.

NOTE: Model s. 16; Federal s. 17; 1967 Draft s. 17.

*COMMENT: Section 17(1) of the 1967 Draft, which is similar to Federal s 17(1) says in effect that a reference to a proclamation shall be understood to be a proclamation of the Lieutenant Governor. Federal s. 28 (28), however, defines "proclamation" as being "a proclamation under the Great Seal". In our view this is a complete duplication of Federal s. 17(1) and our choice is to omit subsection (1) and retain the definition.*

*2. Subsection (1) of our draft contains some rewording, especially in the opening words. It is confined to proclamations authorized by an enactment and thus does not extend to those issued by authority of the prerogative. Should it be so confined?*

*3. We were curious as to the references in Federal s. 17(1) to a "proclamation of the Governor in Council" and the fact that s. 17(2) says "Where the Governor General is authorized to issue a proclamation". We have always assumed that a proclamation is an instrument of the Lieutenant Governor even though it is authorized by an order in council.*

*4. Subsection (2) above is from Federal s. 17(3) and was not in the 1967 Draft.*

*GENERAL COMMENT: Federal sections 18 and 19 are omitted, as they were in the 1967 Draft.*

*Corporations*

16. Words in an enactment establishing a corporation shall be construed.

(a) to vest in the corporation power

(i) to sue in its corporate name,

(ii) to contract and be contracted with by its corporate name,

(iii) to have a common seal and to alter or change it at pleasure,

(iv) to have perpetual succession,

(v) to acquire and hold personal property or movables for the purposes for which the corporation is established and to alienate the same at pleasure, and

(vi) to regulate its own procedure and business;

(b) to make the corporation liable to be sued in its corporate name;

(c) to vest in a majority of the members of the corporation the power to bind the others by their acts;

(d) to exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment establishing the corporation;

(e) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, to vest in the corporation power to use either the English or French form of its name or both forms and to show on its seal both the English and French forms of its name or to have two seals, one showing the English and the other showing the French form of its name.

NOTE: Model s. 14; Federal s. 20; 1967 Draft s. 20; N. Ireland s. 19; Guyana s. 25.

*COMMENT: 1. This follows Federal s. 20(1) with some variations adapted from N. Ireland s. 19 and Guyana s. 25. These include the addition of subclause (vi) in clause (a), regarding the corporation's power to regulate its own procedure and business, and the addition of clause (b). The latter involves the removal of "and be sued by" in clause (a)(i) on*

*the likely ground that it is incongruous to confer on a corporation a "power" to be sued.*

*2. N. Ireland s. 19(a)(iv) extends our subclause (v) to confer on a corporation a "right to acquire and hold, without licence in mortmain, any real . . . property". Guyana s. 25 contains a similar right. (Incidentally, N. Ireland and Guyana refer to "powers" in some cases and "rights" in others.*

*3. N. Ireland s. 19(a)(ii) contains a significant departure from the common law with the aim of abolishing the doctrine of ultra vires in corporate contracts, a step recommended in paragraph 12 of The Report of the Cohen Committee on Company Law Amendment (1945 Cmd. 6659). Their subclause reads:*

> *(ii) the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has;*

*This applied only to corporations incorporated by Acts passed after the commencement of Northern Ireland's Act. Guyana has the same provision. Even if it were the choice of the Conference to adopt a proposal for the abolition of the doctrine, we are not satisfied that The Interpretation Act is the appropriate place to deal with it.*

### *Majority and Quorum*

17. (1) Where in an enactment an act or thing is required or authorized to be done by more than two persons, a majority of them may do it.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members (in this section called the "association"),

(a) if the number of members of the association provided for by the enactment is a fixed number, then at least one-half of that number of members constitutes a quorum at a meeting of the association;

(b) if the number of members of the association provided for by the enactment is not a fixed number but is within a range having a maximum or minimum, or both, and the number of members is within that range, then at least one-half of the number of members in office constitutes a quorum at a meeting of the association;

(c) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, shall be deemed to have been done by the association;

(d) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the

right of the members in office to act, if the number of members in office is not less than a quorum.

NOTE: Federal s. 21; Model s. 18(*d*) as to subsection (1); 1967 Draft s. 21.

*COMMENT: 1. This follows Federal s. 21 except that where the matter of quorum is dealt with in one clause in the Federal Act, it is dealt with in two clauses, (a) and (b), here. Our object was to make the provisions more readable but if the Conference feels that it is not, or that a single clause is desirable, we would have no objection to reverting to the Federal s. 21(2)(a).*

*2. Guyana s. 27(2) states that a chairman or member presiding has a casting vote as well as an original vote. We might consider something similar or at least deal with the case of breaking a tied vote, if it is felt that the problem arises with sufficient frequency to be dealt with here.*

*Judges and Court Officers*

18. (1) Where by an enactment judicial or quasi-judicial powers are given to a judge or officer of a court, the judge or officer shall be deemed to exercise those powers in his official capacity and as representing that court, and he may for the purpose of performing the duties imposed upon him by the enactment, subject to the provisions thereof, exercise the powers he possesses as a judge or officer of that court.

(2) Without restricting the generality of subsection (1), where under any enactment an appeal is given from any person, board, commission or other body to a court or judge, an appeal lies from the decision of the court or judge as in the case of any other action, matter or proceeding in that court or in the court of which the judge is a member.

(3) Where an enactment provides that a proceeding, matter or thing shall be done by or before a judge, the word "judge" in all such cases means a judge of the court referred to in the enactment.

NOTE: Model s. 5; 1967 Draft s. 8.

*COMMENT: 1. This follows the Model with some drafting modifications. There is no equivalent in the Federal Act.*

*2. As to subsection (1), the 1967 Draft raised the question "should some provision be added excluding from the application of this subsection judges appointed as commissioners under The Public Inquiries Act, etc.?" Our answer is that the exclusions should be dealt with individually in the Acts where the exclusion is desired.*

*Appointment, Retirement and Powers of Officers*

19. (1) Every public officer appointed before or after the commencement of this Act, by or under the authority of an enactment

or otherwise, shall be deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment or in his commission or appointment.

(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued shall be deemed to be the day on which the appointment takes effect.

(3) Where in an enactment there is authority to appoint a person to a position or to engage the services of a person, otherwise than by instrument under the Great Seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which such person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than 60 days before the day on which the instrument is issued, shall be deemed to be the day on which the appointment or engagement takes effect.

(4) Where a person is appointed to an office by or under the authority of an enactment, the appointing authority may fix, vary or terminate his remuneration.

(5) Where a person is appointed by or under the authority of an enactment to an office effective on a specified day, the appointment shall be deemed to have been effected immediately upon the expiration of the previous day.

(6) Where the appointment of a person by or under the authority of an enactment is terminated effective on a specified day, the termination shall be deemed to be effective immediately upon the expiration of that day.

NOTE: Model s. 16; Federal s. 22, 1967 Draft s. 22; N. Ireland s. 18.

*COMMENT: 1. This is almost the same as Federal s. 22.*

*2. As to subsection (1), there was some discussion in 1968 on the necessity for the words "before or after the commencement of this Act" and also the significance of and need for the words "or otherwise". We have left them intact and assume the points will be again raised for discussion.*

*3. As to subsection (3), we questioned whether the period of 60 days for retroactive appointments was too long. We assume here that if the appointment is not made within the 60-day period that any appointment purporting to be made effective more than 60 days prior is itself void, and that any instruments of legal consequence made by that officer are likewise void.*

*4. Our subsection (5) follows Federal subsection (5) to the extent of dealing with the effective time of appointments. But we disagree with Federal subsection (5) on the matter of the effective time of a termination of an appointment on a specified day. The Federal Act says it is effective "immediately on the expiration of the previous day". The choice in our subsection (6) is to make it effective at the expiration of the specified day.*

*While it can be argued that Federal subsection (5) is consistent in applying the same rule to appointments and terminations, nevertheless their rule as to terminations seems to us to be inconsistent with other rules of construction in the Act. Where on enactment is repealed, the repeal is effective at the expiration of the day specified for repeal. (Federal s. 6(1) ). Federal s. 25(4) says that where a time is expressed to end on a specified day, or to continue to or until a specified day, the time includes the specified day, that is, the whole of that day. Yet, on terminations of appointment, a different tack is taken. Thus, if someone were appointed to an office for a term from January 1, 1971 to December 31, 1971, then, applying Federal s. 25(4), his last day in office is December 31, 1971. If he had an appointment without a term and the appointment was terminated effective December 31, 1971, then applying Federal s. 23(5), his last day in office is December 30, 1971.*

*Apart from this argument, we feel that people generally, including lawyers, on learning that an appointment is terminated on a specified day will more often assume that that day was the appointee's last day in office, rather than the day prior.*

20. Words in an enactment authorizing the appointment of a public officer shall be construed to vest in the appointing authority the power to

(a) terminate his appointment or remove or suspend him;

(b) reappoint or reinstate him;

(c) appoint another in his stead or to act in his stead;

(d) appoint a person as his deputy.

NOTE: Model s. 17(1); Federal s. 23(1); 1967 Draft s. 23; N. Ireland s. 18(2); Guyana s. 24.

*COMMENT: 1. This follows Federal s. 23(1) with drafting modifications.*

*2. Guyana s. 24(1)(c) contains a power in the appointing authority to fix the term of office of the officer.*

*3. Another possibility is the addition of a clause to permit the appointing authority to determine the terms and conditions of the appointment.*

*4. 1967 Draft s. 23(1)(e) dealt with the fixing etc. of remuneration, while the Federal Act dealt with this in s. 22(4). The former deals with "public officers" while the latter deals with "a person appointed to an office". We saw no reason to vary the Federal Act in the manner of the 1967 Draft.*

21. (1) Words in an enactment directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, shall be construed to include

(a) his deputy;

(b) a Minister acting for him and the deputy of the Minister so acting;

(c) if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council and the deputy of the Minister so designated;

(d) his successors in the office and their respective deputies;

but nothing in this subsection shall be construed to authorize a deputy to exercise any authority conferred upon a Minister to enact a regulation as defined in The Regulations Act.

(2) Words in an enactment directing or empowering any other public officer to do any act or thing, or otherwise applying to him by his name of office, shall be construed to include

(a) his deputy, and

(b) his successors in the office and their respective deputies.

(3) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

NOTE: Model s. 17(2) (3) (4); Federal s. 23(2) (3) (4); 1967 Draft s. 23(2) (3) (4); N. Ireland s. 18(3).

*COMMENT: 1. This follows Federal s. 23. We have broken subsection (1) into clauses in an attempt to be more precise as to who is literally included in the reference to Minister and to avoid the usage "his or their deputy". By doing so we hope to be able to demonstrate here some difficulties we have with it.*

*There might be some argument as to whether the deputy of the acting Minister should be included in clause (b). We know of no occasion in Alberta where it has been resorted to or where it need have been resorted to.*

*The inclusion in clause (c) of "the deputy of the Minister so designated" raises this point: isn't he supposed to be the same person as "his deputy" in clause (a)? We think so; but the draft on its face makes it look as though they are not. For example suppose Hon. Mr. M. is Minister of Justice and Mr. D. is Deputy Minister of Justice". Mr. M. resigns and Hon. Mr. A.M. is designated "Acting Minister of Justice". Before Hon. Mr. M. resigned Mr D. was "his deputy" and afterward hopefully he becomes the*

*"deputy of the Minister so designated", i.e., Hon. Mr. A.M. But is there cause for doubt if Hon. Mr. A.M. has another Ministerial post and thus someone who is his "deputy" in the other post?*

*If there is a vacancy in the office of Minister and no one is designated by O.C. as Acting Minister then presumably the holder of the office of Deputy Minister is not included because he does not fit the description in either clause (a) or clause (c). It is also possible in that case that no one fits the description in clause (b) because it appears to refer to a person who is Acting Minister only when the office of Minister is not vacant, otherwise there would be no need to deal with the vacancy in clause (c). If that is so, then no one would fit any description in clause (a), (b), (c) or (d) until a successor is appointed.*

*We are wondering whether both "his deputy" and "deputy of the Minister so designated" should be scrapped in favour of a reference to "the holder of the office of deputy Minister", or words along those lines. After all, in the example, Mr. D. is the holder of an office, i.e., Deputy Minister of Justice whether or not anyone currently held the office of Minister of Justice.*

*2. We question the need in subsections (1) and (2) to "his successors in the office". Firstly, it appears to be redundant to subsection (3). Secondly, even without subsection (3), it appears to be unnecessary in view of the rules saying that enactments are always speaking and shall be applied to circumstances as they arise etc.*

*3. There has always been some difficulty in deciding who fits the description of "deputy" and our advice to our own people has been to restrict it to those holding the office of "Deputy Minister". Alberta has no "Associate Deputy Minister" in its administration but we are not sure whether that office is included. A question that arises here is whether "deputy" in subsection (1) extends to an "Assistant Deputy Minister" when, in the absence etc. of the Deputy Minister, he becomes "Acting Deputy Minister". We think it should but wonder if it need be spelled out more precisely.*

### *Evidence*

22. Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact shall be deemed to be established in the absence of any evidence to the contrary.

NOTE: Federal s. 24(1).

*COMMENT: The 1967 Draft omitted Federal s. 24(1) and (2) entirely. We have included here subsection (1) only on the ground that it is relevant to the construction of an enactment even though it is incidentally a rule of evidence. Federal s. 24(2) however, appears to deal with a problem that is peculiar to federal Acts.*

*Computation of Time*

23. (1) Where in an enactment the time limited for the doing of a thing expires or falls upon a holiday, the thing may be done on the day next following that is not a holiday.

(2) Where in an enactment the time limited for registration or filing of any instrument, or for the doing of any thing, expires or falls on a day on which the office or place in which the instrument or thing is required to be registered, filed or done is not open at any time during that day, the instrument or thing may be registered, filed or done on the day next following on which the office or place is open.

(3) Where in an enactment a thing is required to be done on or during each of a number of specified days being not more than seven days, the thing does not have to be done on or during any day that is a holiday or any day on which the office or place in which the thing is required to be done is not open, but the thing shall be done on or during one additional day next following the end of the number of days so specified for each holiday or day on which the office or place in which the thing is required to be done was not open during the specified days.

(4) Where an enactment contains a reference to a number of clear days or to "at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen.

(5) Where an enactment contains a reference to a number of days, not expressed to be clear days or "at least" or "not less than" a number of days, between two events, in calculating the number of days there shall be excluded the day on which the first event happens and there shall be included the day on which the second event happens.

(6) Where in an enactment a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

(7) Where in an enactment a time is expressed to begin after or to be from a specified day, the time does not include that day.

(8) Where an enactment provides that any thing is to be done within a time after, from, on or before a specified day, the time does not include that day.

(9) Where an enactment contains a reference to a period of time consisting of a number of months after or before a specified

day, the number of months shall be counted from, but not so as to include, the month in which the specified day falls, and the period shall be reckoned as being limited by and including

(a) the day immediately after or before the specified day, according as the period follows or precedes the specified day, and

(b) the day in the last month so counted having the same calendar number as the specified day, but if such last month has no day with the same calendar number, then the last day of that month.

(10) Where an enactment contains a reference to time expressed as a specified time of the day, the time shall be construed as a reference to

(a) Standard Time, or

(b) Daylight Saving Time,

whichever is being used or observed as provided in The (Time) Act.

(11) For the purpose in construing a reference in an enactment to a specified number of years of age of a person, a person shall be deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number, of the day of his birth.

NOTE: Model s. 18(1) (k) (l) (m); Federal s. 25; 1967 Draft s. 25; N. Ireland s. 39; Guyana s. 32.

*COMMENT: 1. This follows 1967 Draft s. 25 which in turn followed Federal s. 25 with the addition of subsections (2) and (3). Subsection (3) appeared as subsection (11) in the 1967 Draft.*

*2. Subsection (2) is found in Manitoba's Act but we have changed "on a day on which the office . . . is closed" to "on a day on which the office . . . is not open at any time during that day."*

*The choice of "not open" instead of "closed" is made to avoid a misreading of "closed" as including a case where the office is open but is physically closed later in the course of the same day.*

*The words "at any time during that day" are added primarily to raise the point as to whether the section should deal only with whole days (such as Saturdays) but also with parts of a day. An example in Alberta of this situation is the case of a half-day holiday for Government offices in Edmonton during "Klondike Days". Another might be the case of closure due to a fire or other physical cause arising during the course of a day on which the office is normally required to be open. Should the section deal with this situation?*

*Incidentally, Alberta's equivalent of subsection (1) is expressly made "subject to" its equivalent of subsection (2) above. (see Interpretation Act, R.S.A. 1970, c. 189, s. 18(2)(3)).*

*3. In our discussions the question arose as to whether subsection (1) extended to cases where something must be done on a particular day as in the example of an election that must take place on the 14th day after nomination day. Is that 14th day itself "the time limited for the doing of a thing" within subsection (1)? Or does subsection (1) refer only to periods of two days or more?*

*Guyana section 32(1) has the equivalent of our subsection (1) but deals with both the situation of a period of days and a particular day in separate clauses, as follows:*

(c) if the last days of the period is a public holiday the period shall include the next following day, not being a public holiday;

(d) when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be a public holiday, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day following not being a public holiday;

*4. In passing we thought it might be of interest to refer to another novel provision in Guyana section 32(1):*

(e) when an act or proceeding is required or allowed to be done or taken

(i) within any time not exceeding six days, public holidays shall not be reckoned in calculating the computation of the time;

(ii) within any time exceeding six days, public holidays shall not be reckoned so as to reduce the time to less than six days not being public holidays.

*5. In subsection (4) we have added the reference to "not less than" a specified number of days because of its frequency of use. See Maxwell on the Interpretation of Statutes (11th Ed.) p. 340. In subsection (5) we added the references to "at least" and "not less than" a specified number of days, only to have it correspond with the wording in subsection (4).*

*6. Subsection (10) is a variation of Federal section 25(8) made by adapting Alberta's section 18(1)(l), assuming that most or all of the provinces have a statute dealing with Daylight Saving Time.*

*7 Subsection (11) has been changed to add the opening words so that it is clear that it is a rule of construction only and not a rule of law.*

### *Miscellaneous Rules*

24. (1) Where in an enactment anything is required or authorized to be done by or before a judge, magistrate or justice of the peace, or any functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done.

(2) Where in an enactment power is given to a person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person to do or enforce the doing of the act or thing.

(3) Where in an enactment a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(4) Where in an enactment a power is conferred to make regulations, the power shall be construed as including a power exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal or amend the regulations and make others.

(5) Where in an enactment the doing of an act that is expressly authorized or required to be done by a person is dependent upon the doing of any other act by another person, that other person has the power to do that other act.

NOTE: Model s. 18(a) (b) (c) (e) (f); Federal s. 26(1) to (4); 1967 Draft s. 25(1) to (4) & (9); N. Ireland s. 17(1) (2) (3) (5).

*COMMENT: 1. In subsection (2), "person" is used rather than "person, officer or functionary" as in Federal s. 26(4) on the ground that "person" presumably includes all three.*

*2. In subsection (4) "or vary" is omitted as being redundant to "amend".*

*3. Subsection (5) is not found in Federal section 26 but is derived from Model section 18(c) Our subsection (5) extends to all cases and is not restricted to cases where the other act is to be done only by the Lieutenant Governor in Council or a public officer. We are unable to see the need for the restriction.*

25. (1) Where a form is prescribed by or under an enactment, deviations therefrom, not affecting the substance or calculated to mislead, do not invalidate the form used.

(2) In an enactment words importing gender include other genders.

(3) In an enactment, words in the singular include the plural, and words in the plural include the singular.

(4) Where a word or expression is defined in an enactment, other parts of speech and grammatical forms of the same word or expression have corresponding meanings.

NOTE: Model s. 18(g) (h) (i) (j); Federal s. 26(5) to (8); 1967 Draft s. 26(5) to (8); N Ireland sections 25, 35, 37(1) (2).

*COMMENT: 1. Subsection (2) extends to cases of all genders, not just the male gender as in Federal s. 26(6).*

*2. Subsection (4) now extends to expressions as well as words.*

*GENERAL COMMENT: Federal s. 27 dealing with indictable and summary conviction offences is omitted.*

26. In an enactment,

1. "Assembly" means the Legislative Assembly of the Province;
2. "bank" or "chartered bank" means a bank to which the Bank Act (Canada) applies;
3. "broadcasting" means the dissemination of any form of radio electric communication, including radio telegraph, radio telephone, the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves, intended to be received by the public either directly or through the medium of relay stations;

*COMMENT: Does this extend to closed circuit television and cable television?*

4. "commencement" used with reference to an enactment, means the time at which the enactment comes into force;
5. "Commonwealth", "British Commonwealth", "Commonwealth of Nations" or "British Commonwealth of Nations" means the association of countries named in the Schedule to the Interpretation Act (Canada) as amended from time to time by proclamation of the Governor in Council, and "Commonwealth country" means a country that is a member of the Association of such countries;

*COMMENT: This is an adaption of Federal s. 28(5). By incorporating the Federal Schedule by reference in this way, it would not be necessary for each province to amend its own Schedule every time Canada does. In any event, Alberta's records show that there are only two or three references to the Commonwealth in our Statutes which makes the need for this definition relatively unimportant.*

6. "Executive Council" means the Executive Council of ;
7. "Gazette" means The Gazette published by the Queen's Printer of ;
8. "Government" or "Government of " means Her Majesty acting for the Province;
9. "Government of Canada" means Her Majesty acting for Canada;

*COMMENT: Clauses 8 and 9 are from 1967 Draft and are not found in the Model or the Federal Act.*

10. "Governor", "Governor of Canada" or "Governor General" means the Governor General for the time being of Canada

or other chief executive officer or administrator, by whatever title he is designated, carrying on the government of Canada on behalf and in the name of the Sovereign;

11. "Governor in Council" or "Governor General in Council" means the Governor General acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada;

*COMMENT: Federal s. 28(12) refers to the "Governor General of Canada". We have referred here to the "Governor General" so that it will have the meaning given to it by clause 10.*

12. "Great Seal" means the Great Seal of the Province;

13. "hereafter" shall be construed as referring to the time when the enactment or the portion thereof containing that word came into force;

14. "herein" used in a section or part of an enactment shall be construed as referring to the whole enactment and not to that section or part only;

*COMMENT: Three provinces include "hereof" in this definition. Another term that might be defined is "hereinafter".*

15. "Her Majesty", "His Majesty", "the Queen", "the King", "the Crown" or "the Sovereign" means the Sovereign of the United Kingdom, Canada and Her other realms and territories and Head of the Commonwealth;

16. "holiday" includes

(i) Sunday, New Year's Day, Good Friday, Easter Monday and Victoria Day;

(ii) the birthday or the day fixed by proclamation for the celebration of the birth of the reigning Sovereign;

(iii) Dominion Day, Labour Day, Remembrance Day and Christmas Day;

(iv) the 26th day of December;

(v) any day appointed by proclamation of the Governor General or the Lieutenant Governor to be observed as a day of general prayer or mourning or as a day of public rejoicing or thanksgiving;

(vi) any day appointed by proclamation of the Governor General or the Lieutenant Governor for a public holiday;

*COMMENT: 1 This is something of a consensus of what the various Interpretation Acts include in "holiday". It will probably be necessary to*

*agree on a definition which contains what most jurisdictions now have. There are many variations in the provincial Acts such as Epiphany, the Ascension, All Saints Day, Ash Wednesday.*

*2. We have added December 26th, recognizing that some provinces have variations here as well. In Alberta, for example, December 27th is a holiday if December 26th falls on Sunday If December 26th falls on Monday then both December 26th and 27th are observed holidays.*

*3. Federal s. 28(17(b) includes municipal holidays.*

17. "Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Assembly;

18. "Lieutenant Governor" means the Lieutenant Governor for the time being of the Province, or other chief executive officer or administrator, by whatever title he is designated, carrying on the government of the Province on behalf and in the name of the Sovereign;

*COMMENT: As to the reference to the "chief executive officer" we note in passing that while section 62 of The B.N.A. Act refers to "Chief Executive Officer or Administrator", section 66 of that Act refers to the appointment of "an Administrator" only.*

19. "Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council;

20. "may" is to be construed as permissive and empowering;

*COMMENT: Federal s. 28(22) does not include words "and empowering". The Model s. 6(3) does.*

21. "month" means a calendar month;

*COMMENT: A difficulty here is that "calendar month" itself is given two meanings by the Oxford Dictionary. (See definitions of "calendar month" and "month".) "Calendar month" is defined thus:*

> *"one of the twelve months into which the year is divided according to the calendar; also the space of time from any date (e.g. the 17th) of any month to the corresponding date (the 17th) of the next, as opposed to a lunar month of four weeks".*

*We feel that one of these two meanings should be chosen for the definition of "month". The former meaning would seem to be preferable so as to be consistent with "calendar year" in clause 39.*

22. "now" and "next" shall be construed as referring to the time of commencement of the enactment containing the word;

*COMMENT: This follows Model s. 6(2) and 1967 Draft s. 28(54) in referring to the commencement date. Federal s. 28(25) refers to "the time when the enactment was enacted".*

23. "oath", in the case of persons for the time being allowed or required by law to affirm or declare instead of swearing, includes affirmation and declaration and the word "swear" in the like case includes affirm and declare;

*COMMENT: This is the same as 1967 Draft s. 28(55). The Model s. 21(1)(m) differs only in referring to "affidavit" as well as "oath". Federal s. 28(26) is the same in substance but differs in wording. The federal wording may, however, be preferable.*

24. "person" or any word or expression descriptive of a person, includes a corporation;

*COMMENT: 1. This is the same as Federal s. 28(27). We see no reason to include the addition in Model s. 21(1)(m) of "and the heirs, executors administrators or other legal representatives of a person."*

*2. At least three provinces include "partnership". Presumably the Federal definition extends to partnerships on the basis of the rule that the singular includes the plural and thus a reference to "person" includes a body or group of two or more persons. Guyana s. 4(2) deals with this point in another way by saying that "person" includes "any body of persons corporate or unincorporate".*

25. "prescribed" means prescribed by or under the enactment in which the word occurs;

*COMMENT: This is added for consideration. It is an adaptation of Guyana s. 4(4)(c) except that that clause also includes "provided". It is often found necessary to define "prescribed" as meaning "prescribed by the regulations" and we feel that the frequency of the need for this definition will commend it for inclusion here.*

26. "proclamation" means a proclamation under the Great Seal;

*COMMENT: See paragraph 1 in the comments after s. 16.*

27. "Province" means the Province of ;

28. "province" when used as meaning a part of Canada other than , includes the Northwest Territories and the Yukon Territory;

*COMMENT: This is an adaptation of Federal s 28(29) and 1967 Draft section 28(63) which combine clauses 27 and 28 above in one clause.*

29. "security" means sufficient security;

30. "shall" is to be construed as imperative;

31. "statutory declaration" or "solemn declaration" means a solemn declaration made under section 20 of The Evidence Act;

*COMMENT: This refers to the Model Evidence Act.*

32. "sureties" means sufficient sureties and when that word is used, one person is sufficient therefor, unless otherwise expressly required;

*COMMENT: This follows 1967 Draft s. 28(81) which differs from Model S. 21(1) (r). The Federal Act defines "sureties" and "security" in s. 28(37).*

33. "telecommunication" means any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system;

*COMMENT: This is Federal s. 28(38) and is not in the Model Act.*

34. "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland;

35. "United States" means the United States of America;

36. "will" includes a codicil;

37. "words" includes figures, punctuation marks and typographical, monetary and mathematical symbols;

*COMMENT: We added this in order to raise it for discussion. It is from Guyana s. 4(2). It has one advantage in amending enactments. The usage in most jurisdictions in striking out, for example, "25 per cent" or "not less than $25,000" is to refer to portion quoted as "the words and figures". Alberta, without the benefit of Guyana's definition, has been referring only to "the words" in recent years.*

38. "writing", "written" or any term of like import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form;

39. "year" means any period of twelve consecutive months, except that a reference to a "calendar year" means a period of twelve consecutive months commencing on the first day of January and a reference by number to a Dominical year means the period of twelve consecutive months commencing on the first day of January of that Dominical year.

NOTE: Model s. 6(2)(3)(4) and 21(1); Federal s. 28; 1967 Draft s. 28; N. Ireland ss. 11(11), 21(4)(5), 31(2), 37(1), 38, 39(6)(7)(8), 41 to 46; Guyana s. 4, 6, 7.

Each of the Interpretation Acts in Canada contain a number of definitions which are included usually because of their frequency of use in the Statutes of that jurisdiction. Section 26 above includes those that can be

used in any jurisdiction's Act since none of them are peculiar to the circumstances of any one jurisdiction. The following is an enumeration of some of those optional definitions that are presently used in some Interpretation Acts and can be adapted by any jurisdiction to its needs.

For convenience they are grouped in categories:

1. *Municipal bodies*
   "city"
   "county"
   "local government district"
   "municipality"
   "rural municipality"
   "town"
   "unorganized territory"
   "village"

2. *Courts and judicial administration*
   "county court"
   "court of appeal"
   "district court"
   "divisional court"
   "jail" or "correctional institution"
   "judicial district" or "judicial division"
   "justice"
   "magistrate"
   "Supreme Court" or "High Court"
   or "Queen's Bench"
   "two justices"

3. *Professional persons*
   "architect"
   "barrister" or "solicitor" or "barrister and solicitor"
   "dentist"
   "medical practitioner" or "physician" or "duly qualified
   medical practitioner"
   "pharmacist"
   "professional engineer"
   "surveyor"
   "veterinary surgeon"

4. *Others*
   "affidavit"
   "cattle"
   "Consolidated Fund" or "Consolidated Revenue Fund"
   "electoral division"
   "imprisonment"
   "issue" (referring to lineal descendants)
   "mail"
   "mental defective", "mental deficiency",
   "mentally ill person", "mental illness",
   "mentally incompetent" or "mentally disordered person"
   "newspaper"
   "official time"

"peace officer" or "police officer" or "constable"
"personal representative"
"regular forces"
"reserve forces"
"Revised Statutes"
"rules of court"
"school district"
"standard time"
"statutory declaration"

*COMMENT: 1. Our choice here is to separate "optional" definitions from those we feel should be included as "standard" definitions in a Model for use in Canada It may be that the Conference will wish to switch an "optional" definition to a "standard" one or vice versa, or to add new definitions to either category.*

*2. Northern Ireland has some other interesting provisions. Section 39(6) also deals with references to midnight (the point of time at which that day ends), week-days (a day other than Sunday) and a "financial year" (a period of 12 months ending March 31st. Section 39(7) defines "night". Section 43(2) defines "authorized analyst" and "public analyst". Section 45(3) deals with instances where the enactment empowers a person to "dispose of land" by conferring various implied powers in the owner, e.g., sell, lease, exchange etc. Section 46(1) defines "signature" and "signed" as including the making of a mark. Section 46(2) defines "individual".*

*GENERAL COMMENT: Federal sections 29 (defining "Minister of Finance") and 30 (defining "telegraph") are omitted as inappropriate for a Model.*

27. In an enactment the name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing, means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation thereof.

NOTE: Model section 21(2); Federal section 31; 1967 Draft section 31; N. Ireland section 36.

*GENERAL COMMENT: Federal section 32 (power of the Government to define a fiscal year) is omitted.*

### *References and Citations*

28. In an enactment a citation of or reference to an enactment shall be construed as a citation of or reference to the enactment as amended from time to time whether before or after the commencement of the enactment in which the citation or reference occurs.

NOTE: Model section 19(2); Federal section 33(2); 1967 Draft section 32(2).

*COMMENT: 1. Section 33(1) of the 1967 Draft, which was almost the same as Federal section 33(1), read as follows:*

*33. (1) In an enactment or document*

*(a) an Act may be cited by reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted, or by reference to its long title or short title, with or without reference to its chapter number; and*

*(b) a regulation may be cited by reference to its long title or short title, by reference to the Act under which it was made or by reference to the number or designation under which it was registered under The Regulations Act.*

*We have omitted the subsection for the following reasons. It is not related to the construction of enactments but rather to citations of or reference to them. It relates, in any event, to "documents" as well as enactments. Clause (a) appears to be more appropriate to the Statutes Act and so we have transferred that provision to our draft model of that Act. Clause (b), to the extent that it deals with regulations filed under the Model Regulations Act is already covered by section 8(2) of that Act as regards the filing number. Admittedly, this may leave a gap in relation to "regulations" as defined in the Model Interpretation Act that are not "regulations" as defined in the Model Regulations Act. However, we do not see this as a particular problem since all that is presumably necessary in those cases is a description sufficient to identify them.*

*2 As to section 28 above, we have added after the words "as amended" the additional words suggested in a comment in the 1967 Draft. Mr. Rutherford pointed out that case authority says that where one Act is cited in a second Act, the citation to the first Act refers to the time of the enactment of the second Act and not to any later amendments.*

29. (1) A reference in an enactment by number or letter to two or more parts, divisions, sections, subsections, clauses, subclauses, paragraphs, subparagraphs, schedules, appendices or forms shall be construed as including the number or letter first mentioned and the number or letter last mentioned.

(2) A reference in an enactment to a part, division, section, schedule, appendix or form shall be construed as a reference to a part, division, section, schedule, appendix or form of the enactment in which the reference occurs.

(3) A reference in an enactment to a subsection, clause, subclause, paragraph or subparagraph shall be construed as a reference to a subsection, clause or subclause, paragraph or subparagraph of the section, subsection, clause, subclause or paragraph, as the case may be, in which the reference occurs.

(4) A reference in an enactment to regulations shall be read as a reference to regulations made under the enactment in which the reference occurs.

(5) A reference in an enactment by number or letter to any section, subsection, clause, subclause, paragraph, subparagraph or other division or line of another enactment shall be read as a reference to the section, subsection, clause, subclause, paragraph, subparagraph or other division or line of such other enactment as printed by authority of law.

NOTE: Model section 20; Federal section 34; 1967 Draft section 34; N. Ireland section 11(4) to (8).

*COMMENT: 1. Subsection (5) above raises an interesting point about cross-references to subdivisions of a section or subsection in relation to the opening and closing portions of the section or subsection apart from that subdivision. Guyana section 50 deals with it in this way:*

> *50 In any written law a description or citation of a portion of any other written law shall, unless it is otherwise expressly provided or the context otherwise requires, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation"*

*("Written law" in the section is the equivalent of "enactment" in our draft). Thus when a reference is made to "section 17, clause (a)" it is assumed that it refers to not just clause (a) alone but to the opening words and the closing words, if any, of section 17, that is, all of the section except the clauses other than clause (a). This assumption, however, is not crystallized in any rules of construction here. On the other hand, if an amending enactment says that "section 17 is amended by repealing clause (a)" it is readily assumed that clause (a) alone is repealed and not the opening and closing words of section 17.*

*2. Another point that might be considered is the problem of changes in section references that result from Statute Revisions. In particular we are thinking of the case of a reference in a provincial Act to a section of a federal Act which is changed as a result of the Revised Statutes of Canada, 1970. The Interpretation Act does not deal with this situation and our concern here is whether it should.*

30. An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

NOTE: Model section 22(3); Federal section 35(3); 1967 Draft section 35(3); N. Ireland section 12(2).

*COMMENT: We felt that the subject matter of Model section 22(1) regarding reservation to the Legislature of the power to repeal, amend etc., and Model section 22(2), regarding repeal or amendment during the same Session, were more appropriate to the Statutes Act and have been included there. These are found in Federal section 35(1)(2) and 1967 Draft section 35(1)(2).*

*2. Section 30 above might be better located under the heading "RULES OF CONSTRUCTION".*

*Repeal and Amendment*

31. Where an enactment is repealed in whole or in part, the repeal does not

(a) revive any enactment or anything not in force or existing immediately before the time when the repeal takes effect;

(b) affect the previous operation of the enactment so repealed or anything done or suffered thereunder;

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;

(d) affect any offence committed against or a contravention of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed; or

(e) affect any investigation, proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, proceeding or remedy as described in clause (e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.

NOTE: Model s. 23(1); Federal s. 36; 1967 Draft s. 36; N. Ireland s. 28(2).

*COMMENT: 1. Section 32 of this draft deals with cases where an enactment is repealed "and another enactment is substituted therefor". Section 31 deals with repeals and does not refer to substituted provisions. The inference is that section 31 thus is restricted to cases where there is a repeal only with no provisions being substituted. We feel that some of the clauses at least should apply to cases of repeal and substitution as well as repeal alone. We ask the Conference to consider whether section 31 should commence with "Where an enactment is repealed in whole or in part, whether or not another enactment is substituted therefor".*

*2. Clause (a): This refers to the revival of any enactment or "anything not in force or exising, etc. If "anything" is intended to refer to the common law and old English statutes still in force, we are wondering why the word "law" is not used instead. If "anything" is intended to mean something besides the common law and applicable English statutes, then we would like to know what that something is.*

*We have changed "at the time" to "immediately before the time" because we think it is clearer that way and conveys the intention better.*

*We raise a point of principle here in regard to the application of the clause to common law rules (and also English statute law made*

*applicable). The section is intended to prevent the revival of a common law rule if the purpose of the repealed enactment had been to change the common law. Thus if the enactment abolished a common law rule and the enactment itself is repealed, the common law rule is not revived and there is then no rule at all. If the enactment varied or modified a common law rule, it is hard to know what kind of a vacuum is left when that enactment is repealed. The difficulty then is, if the common law rule is to be revived, then the Legislature must re-enact it. To attempt to re-state or codify a common law rule founded on a body of case law could present the draftsman with a formidable and perhaps impossible task. We suggest that it might be preferable that the general rule should be that the common law revives in these cases. If that happens, then at least the Legislature theoretically knows what is being revived. Under the rule in clause (a) everyone is left to guess.*

*To take an example, Alberta has a provision that restricts the action of a gratuitous passenger to cases of gross negligence of the driver. If Alberta repealed that provision with nothing more, what is the position of the gratuitous passenger? On the basis of clause (a), we don't know. If the common law revived, we would know.*

*3. Clause (b): The word "duly" is omitted because we see no reason to distinguish between things "duly done" and things unduly done.*

*4. Clause (e): The word "legal" is omitted before the word "proceeding". We see no compelling reason to refer to a "legal proceeding" when section 32(c) refers simply to a "proceeding".*

32. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,

(a) every person appointed or elected under the former enactment shall continue to act as if appointed or elected under the new enactment without the necessity for a new appointment or election or the retaking of any oath;

(b) every bond and security given under the former enactment remains in force;

(c) all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal so far as they are consistent with the new enactment;

(d) every proceeding commenced but not concluded under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

(e) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

(i) in the recovery or enforcement of penalties and forfeitures incurred under the former enactment,

(ii) in the enforcement of rights existing or accruing under the former enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(f) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(g) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(h) all regulations made under the former enactment remain in force and shall be deemed to have been made under the new enactment in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(i) any reference in an unrepealed enactment to the former enactment shall, as regards a subsequent transaction, matter or thing, be construed as a reference to the provisions of the new enactment relating to the same subject matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject matter, the former enactment shall be construed as being unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

NOTE: Model s. 23(2) and 24(1); Federal s. 37; 1967 Draft s. 37; N. Ireland s 29.

*COMMENT: 1. Clause (a): This clause is rewritten for a number of reasons. We suggest that the word "acting" is somewhat vague and perhave equivocal here and we have substituted "appointed or elected". The Model clause (a) refers to "appointed" and we suggest the addition of "or elected" to remove doubt whether the one term includes the other.*

*We feel that the words "shall continue to act . . . until another is appointed in his stead" are not literally accurate or even needed. A person's appointment continues until it is terminated. There may be and often is a period of time between the termination and the new appointment. Instead, we have substituted a different thought in adding "without the necessity for a new appointment or election or the retaking of an oath", a thought borrowed from section 34(1)(b), below (Demise of the Crown)*

*2. Model clause (b) and Federal clause (b) have been split into two clauses, (b) and (c), on the ground that there are two distinct subject matters involved. This results in a renumbering of succeeding clauses, all of which are in Federal s. 37. Federal clause (f), incidentally, tis not in the Model.*

*3. As to clause (b) above, we have widened it to refer to any bond or security given under the former enactment. We saw no need to restrict it to those given by persons previously appointed.*

*4. Clause (d): Our change here is the replacement of "taken" by "commenced but not concluded" which we feel conveys more accurately what the clause is dealing with. We seriously considered another approach here which may commend itself, that is, to say that "steps taken in a proceeding under the former enactment shall be deemed to be steps taken in that proceeding under the new enactment".*

*5 Clause (e) is divided into subclauses for the sake of readability.*

*6. Clause (f) deals with the case of a new enactment with a lesser penalty than the previous one. It is silent on the converse case and we are wondering if the Act should be silent.*

*In our discussions, there were opposing views on the principle involved in clause (f). An argument can be made that since the offence is committed while the former enactment is in force and it is not itself affected by the repeal, the penalty should not be affected either. The only difference between those whose penalties were imposed under the former enactment and those whose penalties are imposed under the new one is a lapse of time. The convicted person can gain by delaying. Another argument is that there is an inconsistency between the rule in this clause and the rule in section 31(c) above which says that a repeal does not affect an obligation or liability incurred under the enactment so repealed.*

33. (1) The repeal of an enactment in whole or in part shall not be construed to be or to involve a declaration that the enactment was or was considered by the Legislature or other body or person by whom the enactment was enacted to have been previously in force.

(2) The amendment of an enactment shall not be construed to be or to involve a declaration that the law under such enactment was or was considered by the Legislature or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

(3) The repeal of an enactment in whole or in part or the amendment of an enactment shall not be construed to be or to involve any declaration as to the previous state of the law.

(4) A re-enactment, revision, consolidation or amendment of an enactment shall not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been

placed upon the language used in the enactment or upon similar language.

NOTE: Model s. 25; Federal s. 38; 1967 Draft s. 38; N. Ireland s. 28(1).

*COMMENT: In the strict sense, where subsections (1) and (3) speak of "the repeal of an enactment in whole or in part" the words "in whole or in part" are surplusage since "enactment" by definition in section 1 (c) includes "any portion" of an Act or regulation. Presumably this means any word or group of words besides an actual numbered subdivision of the enactment.*

34. (1) Where there is a demise of the Crown,

(a) the demise does not affect the holding of any office under the Crown in right of , and

(b) it is not necessary by reason of the demise that the holder of any such office be appointed to it again or that, having taken an oath of office or allegiance before the demise, he take that oath again.

(2) No writ, action or other process or proceeding, civil or criminal, in or issuing out of any court established by an Act of the Legislature is, by reason of a demise of the Crown, determined, abated, discontinued or affected; but every such writ, action, process or proceeding remains in full force and may be enforced, carried on or otherwise proceeded with or completed as though there had been no such demise.

NOTE: Federal s. 39.

*COMMENT: We have made some drafting touches in subsection (1)(b).*

# THE STATUTES ACT

1. (1) The enacting clause of an Act of the Legislature may be in the following form:

"Her Majesty, by and with the advice and consent of the Legislative Assembly of , enacts as follows:".

(2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview or body of the Act shall follow in a concise and enunciative form.

NOTE: Federal s. 4; 1967 Draft s. 4.

2. (1) The Clerk of the Assembly shall endorse on every Act, immediately after the title thereof,

(a) the day, month and year when the Act was assented to by the Lieutenant Governor, or

(b) the day, month and year when the Act was reserved by the Lieutenant Governor for the signification of the Governor General's pleasure.

(2) Where an Act is reserved for the signification of the Governor General's pleasure, the Clerk of the Assembly shall also endorse on the Act the day, month and year when the Lieutenant Governor signified

(a) by speech or message to the Assembly, or

(b) by proclamation,

that the Act received the assent of the Governor General in Council.

(3) The endorsements made under subsections (1) and (2) are part of the Act.

NOTE: Federal s. 5(1) in part; 1967 Draft s. 5.

*COMMENT: As to rewording of s. 2(1)(b) and (2), we are following as literally as possible the wording of s. 57 of the BNA Act, 1867 with the variations required by section 90.*

3. All Acts passed before, at or after the commencement of this Act shall be and shall continue to remain of record in the custody of the Clerk of the Assembly.

NOTE: Alberta's s 5 (RSA 1970, c. 351).

*COMMENT: We are including Alberta's ss. 5 to 8 only for discussion. We haven't checked the other provinces' Statutes Act but assume they contain something similar.*

4. (1) The Clerk of the Assembly shall affix the Great Seal to certified copies of all Acts

(a) intended for transmission to the Secretary of State or required to be produced before courts of justice, and

(b) in any other case in which the Lieutenant Governor in Council so directs.

(2) Copies of Acts so certified and sealed shall be held to be duplicate originals, and also to be evidence of the Acts and of their contents as if printed by lawful authority.

NOTE: Alberta's s. 6.

5. The Clerk of the Assembly shall furnish a certified copy of an Act to a person applying for the same upon receiving from that person such fee, not exceeding 10 cents for each 100 words, as the Lieutenant Governor in Council may from time to time direct.

NOTE: Alberta's s. 7.

6. The Clerk of the Assembly shall

(a) insert at the foot of each copy of the Acts required to be certified a written certificate duly signed and authenticated by him to the effect that such copy is a true copy, and

(b) add the following words where the Act is disallowed after it comes into force "but disallowed by the Governor General in Council, which disallowance took effect on the day of , 19 ".

NOTE: Alberta's s. 8.

7. (1) Every Act shall be construed as reserving to the Legislature the power of repealing or amending it and of revoking, restricting or modifying a power, privilege or advantage thereby vested in or granted to a person.

(2) An Act may be amended or repealed by an Act passed in the same session of the Legislature.

NOTE: Model s. 22(1,2); Federal s. 35(1,2); 1967 Draft s. 35(1,2); N. Ireland s. 12(1).

8. An Act may be cited by reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted, or by reference to its title, with or without reference to its chapter number.

NOTE: Model s. 19(1); Federal s. 33(1)(a); 1967 Draft s. 33(1)(a).

*COMMENT. The reference to "long or short" title is removed because of Conference's rule as to a single title for an Act.*

## ADDITIONAL PROVISIONS FOR CONSIDERATION

### 1. RULES OF CONSTRUCTION FOR REVISED STATUTES

The typical Act authorizing a statute revision contains rules of construction as to the Revised Statutes themselves, e.g., sections 8 to 11 of An Act respecting the Revised Statutes of Canada S.C. 1964-65, c. 48. Our experience is that most lawyers are unaware of them and on that account alone, we invite discussion as to whether these rules of construction should be included in a model Interpretation Act.

### 2. SERVICE OF DOCUMENTS

N. Ireland s. 24 reads as follows:

24.—(1) Where an enactment authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver" or "send" or any other word is used, the service of the document may be effected by prepaying, registering and posting an envelope addressed to the person on whom the document is to be served at his usual or last known place of abode or business and containing such document; and, unless the contrary is proved, the document shall be deemed to have been served at the time at which such envelope would have been delivered in the ordinary course of post.

(2) Where an enactment authorises or requires a document to be served on any person without directing it to be served in a particular manner the service of that document may be effected either—

(a) by personal service; or

(b) by post in accordance with sub-section (1); or

(c) by leaving it for him with some person apparently over the age of sixteen at his usual or last known place of abode or business; or

(d) in the case of a corporate body or of any association of persons (whether incorporated or not), by delivering it to the secretary or clerk of the body or association at the registered or principal office of the body or association or serving it by post on such secretary or clerk at such office; or

(e) if it is not practicable after reasonable enquiry to ascertain the name or address of an owner, lessee, or occupier of premises on whom the document should be served, by addressing the document to him by the description of "owner" or "lessee" or "occupier" of the premises (naming them) to which the document relates, and by delivering it to some person on the premises or, if there is no person on the

premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises.

Guyana s. 6 deals with service by mail. Alberta's s. 18(4) also deals with service by mail in terms similar to N. Ireland's s. 24(1).

3. "REPRINTS"

N. Ireland s. 30 contains interesting provisions regarding "reprints" of Acts with subsequent amendments consolidated. It provides for a kind of official "office consolidation".

4. POWER OF DELEGATION

Guyana s. 23 reads:

23(1) Where any written law confers power on any person to delegate the exercise on his behalf of any function conferred upon him under any written law—

(a) such delegation shall not preclude the person so delegating from exercising the functions so delegated;

(b) such delegation may be conditional, qualified or limited in such manner as the person so delegating may think fit;

(c) where the delegation may be made only with the approval of some person, such delegation may be conditional, qualified or limited in such manner as the person whose approval is required may think fit; and

(d) the delegation may be to a named person or to the person for the time being holding any office designated by the person so delegating.

(2) The delegation of any power shall be deemed to include the delegation of any duty incidental thereto or connected therewith and the delegation of any duty shall be deemed to include the delegation of any power incidental thereto or connected therein.

# MINUTES OF THE OPENING PLENARY SESSION

(MONDAY, AUGUST 23RD, 1971)

10:00 a.m. - 12:05 p.m.

*Opening*

The fifty-third annual meeting of the Conference opened at the Andrew Motor Lodge, Jasper Park, Alberta, at 10:00 a.m. with the Honorary President, Mr. Emile Colas, Q.C., in the Chair. The Honorary President explained the unfortunate absence of the President and Vice-Presidents through illness and that he had assumed the Chair in order to call the meeting to order. It was then moved by Mr. J. G. McIntyre and seconded by Mr. Rendall Dick that the Honorary President be Chairman for the plenary session.

The motion was carried and Mr. Colas formally assumed the Chair for the plenary session.

The Chairman welcomed the members of the Conference and, in particular, the new members. The members then introduced themselves.

*Minutes of Last Meeting*

*Adoption*

The following resolution was adopted:

> RESOLVED that the Minutes of the 1970 Annual Meeting as printed in the 1970 Proceedings, which were circulated, be taken as read and adopted.

*President's Address*

The Chairman then read to the meeting the following report of the President:

> "For more than half a century the Conference has made an unobtrusive but important contribution to the laws and unity of Canada. During this period Canada has successfully met many challenges which threatened its existence. Nonetheless old challenges press and new arise. Events are moving more rapidly. Values are changing with alarming swiftness. New life styles are emerging. Questions about religion, sex, drugs, environment and population are being asked. Experts are forecasting sweeping changes in our social and economic life.
>
> These forecasts indicate qualitative rather than quantitative changes. From them it seems that questioning of all beliefs will increase. History

and precedent as guides will decrease in importance. Our traditions, our values, our acceptance of the old rules governing our social, environmental, economic and political lives will be drastically modified if not destroyed. This will happen from new knowledge and new experience Nothing can stop our old beliefs from further erosion.

What can the Conference do in this changing society—this new world that is about to emerge from these new values and from rampant automation, computers and cybernetics?

The Conference can help to meet these challenges and can continue to contribute substantially to the unity and welfare of our country. Law is a cohesive which binds it together. Uniformity of the law is our concern. Law that is essentially the same in every province of Canada is one of the strongest bonds among our people; the law that governs their conduct and relationships is more fundamental than how and when we bring the constitution home to Canada however desirable that may be.

The Conference provides an objective and a political forum, the kind of atmosphere that is essential to achieve the purpose for which the Conference exists. How can it best meet the challenge of this changing society, these new and untried values?

The Conference can

1. help to decelerate and deemphasize too rapid change by examination of proposals for uniformity. This can be and is constantly done without unduly encroaching upon policy. It can be done positively by an evaluation of the worth of the new values. Perhaps it might even help to bring wisdom to those who are so eager to reject our laws, our traditions, our customs and our mores;
2. continue to obtain aid from and assist our law reform bodies and special study groups in academic, professional and other fields;
3. use the technical aids of automation, computers and cybernetics;
4. be alert to prevent the soulless trinity last mentioned from destroying us as human beings It can use them and it should but already their obscene tentacles are reaching into our vitals. Use but control them within the Conference and without, if possible.

Later during this meeting of the Conference we will discuss in the plenary session the future of the Conference. I hope the thoughts I have expressed will be of some help in our deliberations."

The Chairman then addressed the meeting. (Appendix B, page 119.)

*Treasurer's Report*

The Treasurer, Mr. Howard E. Crosby, presented the Treasurer's Report. (Appendix C, page 123.)

The Report was, on motion, received.

Messrs. Hugessen and Acorn were named as auditors to report at the closing plenary session.

*Secretary's Report*

The Secretary, Mr. Ryan, presented the Secretary's Report (Appendix D, page 125), which, on motion, was received.

A discussion followed concerning the matters raised in Mr. T. B. Smith's letter to the Secretary about the preparation and implementation of matters of private international law which originated with the Hague Conference and UNIDROIT.

After discussion, the following resolution was adopted;

> RESOLVED that a committee consisting of a Commissioner from the Province of Quebec and two common law provinces and the Canada Commissioners, (Chairman to be chosen by the committee) be constituted to consider the action to be recommended on the matters raised by Mr. Smith and to report with recommendations to the final plenary session of the conference.

Following adoption of this resolution, the Chairman designated Messrs. Ryan, Normand, Leal and Bowker to constitute the special committee.

*Appointment of Resolutions Committee*

The following persons were named to the Resolutions Committee:

Messrs. Normand, Dick and MacLeod.

*Appointment of Nominating Committee*

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

Messrs. Bowker (Chairman), Meldrum, Hoyt, Colas and Dr. Kennedy.

Dr. E. A. Driedger, Q.C., who was attending as a visitor of the Conference, was invited by the Chairman to attend the Nominating Committee meetings.

*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.

*Law Reform and Uniformity*

Messrs. Hurlburt and Field appeared on behalf of the Alberta Institute of Law Research and Reform and presented a report on the means by which the Commissioners on Uniformity of Legislation in Canada can assist and be assisted by Canadian law reform organizations. The report was presented by Messrs. Field and Hurlburt (Appendix E, page 129).

Following the report by Messrs. Hurlburt and Field, the Chairman, on behalf of the meeting, thanked these gentlemen for an extremely interesting presentation. The Chairman then asked for comments from the meeting.

Dr. Driedger pointed out to the meeting that the final step to law reform is usually a legislative proposal which involves the drafting of appropriate bills. He noted the shortage of trained legislative draftsmen in Canada. Attention was drawn to the legislative training course that he was giving at the University of Ottawa with support from the Federal Department of Justice and suggested that if the shortage of legislative draftsmen in Canada were to be overcome, governments should take the initiative and send lawyers to the legislative training course. He also referred to the scholarships in this area being offered by the Department of Justice.

Dr. Gilbert Kennedy commented that he feared that if too much stress were placed on representation of law reform bodies at the annual Conference, there would be a danger that the Uniform Law Section of the Conference might become an annual meeting of law reform bodies. Mr. Leal observed that he would not like to see this happen. He felt, however, that law reform bodies in Canada would get together otherwise than at the Uniformity Conference. He believed that law reform bodies should have representation at the Conference and that the Conference could benefit, as well as law reform bodies, through the representation of law reform bodies in Canada at the Conference. He was of the view that Mr. Field and Mr. Hurlburt had contributed a great deal to this expectation.

*Future Role and Structure of Conference*

The Chairman suggested that since the matter of the future role and structure of the Conference was one on which members would wish to take thought after having studied the President's report, it would be advisable if the plenary session reconvened at 9:00 a.m.

Thursday, August 26th to consider the future role and structure of the Conference.

This was agreed to by the meeting.

*Next Meeting*

The Chairman indicated that the annual meeting of the Canadian Bar Association would be held in 1972 in Montreal. After some discussion, it was agreed that the Commissioners from Quebec should report at the closing plenary session with their suggestions about the place of the 1972 meeting of the Conference.

*Expressions of Regret to Members and Executive*

Dr. Gilbert Kennedy reported that the President, Mr. P. R. Brissenden, Q.C., had recently been operated upon and his condition was improved. He conveyed Mr. Brissenden's personal regrets at not being able to attend the Conference.

The Secretary was instructed to write to the absent members of the executive to express the regret of the Conference at their inability to attend. The Secretary was also instructed to send some flowers to Mr. Brissenden

The Plenary Session then stood adjourned until 9:00 a.m. Thursday, August 26th.

## MINUTES OF PLENARY SESSION (Continued)

(THURSDAY, AUGUST 26TH, 1971)

9:05 a.m. - 12:00 noon

*Future Role and Structure of Conference* (Continued)

The plenary session reconvened at 9:05 a.m. with Mr. Emile Colas in the chair to consider the future role and structure of the Conference.

The report entitled "The Conference–Policy and Procedure" circulated prior to the meeting by the President, Mr. Brissenden, was presented by the Chairman. (Appendix F, page 135.)

The first item discussed was the question of whether or not the Conference should have a permanent secretariat. The matter of the permanent secretariat was spoken to by Mr. W. F. Bowker who was in favour of some form of secretariat; by Mr. Warner who

related his remarks particularly to the functions carried on by the Criminal Law Section; by Mr. A. R. Dick who pointed out the distinction between the Criminal Law Section and the Uniform Law Section and who generally supported a rotating Secretary and the provision of added support to the office; by Mr. A. Leal who directed his remarks to the Uniform Law Section and approved some form of assistance to the Secretary, not necessarily full-time assistance. He also thought it might be useful to have mid-year meetings of the Conference in order to improve the work of the Conference. Mr. Ryan, the Secretary, spoke of the increasing problems and amount of work involved in the duties of the Secretary and the difficulty of getting that work done in an adequate manner by relying upon legislative draftsmen, and pointed out that there had been two secretaries in the first seven years of the Conference and that in the fifty-three years in which the Conference had been in existence, the office of Secretary had been held by professors of law for nineteen years and by legislative draftsmen for thirty-four years. The Honourable Mr. Peterson observed that the Conference should continue the work it is doing but he did not favour a permanent secretariat. The Honourable Mr. Mackling mentioned that he was concerned with the amount of coordination between the work of the Uniformity Conference and the law reform commissions and that duplication should be avoided and referred to the possibility that a common secretariat with law reform commissions might be feasible.

Mr. Maxwell spoke of the arrival of law reform commissions on the legal scene in Canada and thought that it might be useful if the Uniformity Conference stood at arm's length with law reform commissions. He favoured some form of a permanent secretariat. Dr. Kennedy spoke of differences in view of what a permanent secretariat would be required to do and agreed that a rotating secretary might best serve the Conference. He also expressed the wish that the Criminal Law Section retain the services of a member of Department of Justice as Secretary of that section. Mr. Bowker pointed out that money was required to strengthen the committee work of the Conference through the greater use of special committees and for additional meetings of the executive. It was important to consider the relationship of the Conference to law reform bodies in his view.

After further discussion and an examination of the amount of time involved in carrying out the duties of the Secretary, the following resolution was adopted:

RESOLVED that this Conference record its recognition of the workload now placed upon the Secretary of the Conference and take necessary action to provide additional assistance to the Secretary.

A further discussion then ensued with respect to the financing that would be required to provide the additional assistance to the Secretary and to meet the new needs of the Conference.

On motion of Dr. Kennedy, seconded by Mr. Dick, the Conference agreed that a committee consisting of Messrs. Colas, Crosby, Dick, Thorson, Ryan, Normand and Tallin be constituted to consider the future financing required by the Conference and the role of the Secretary in view of additional assistance authorized by the meeting.

The Conference then addressed its attention to the matters for consideration to improve the work and value of the Conference, beginning at Item 5 of Mr. Brissenden's report (Appendix F, page 137).

(i) Shorter annual agenda—The shorter annual agenda which has been a matter referred to from time to time in previous Conferences was again briefly discussed but no conclusion reached.

(ii) New matter—A discussion of the manner in which new subject matter should be added to the agenda took place. After discussion, it was, on motion, agreed that the executive of the Conference should review the present rules respecting the organization and procedure of the Uniform Law Section and report thereon to the next meeting of the Conference with any recommendations they consider suitable for improving the work of the Conference.

(iii) The steps to be taken by the Conference to be a source of informed opinion regarding Private International Law Conventions was then discussed but no conclusion was reached on the matter.

(iv) Practical difference between law reform and uniformity were briefly discussed but no conclusions were reached.

(v) Whether standing committees should be used for special tasks—It was agreed after discussion that the present practice of the Uniformity Conference seemed satisfactory; where occasion demanded, special committees should be used for special tasks.

(vi) Additional funds—This matter was left to be taken up by the special committee previously constituted.

(vii) Changes, if any, in members and personnel of the Conference—After discussion, it was noted by the Honourable Mr. Mackling that there seemed to be a need for more counsel representation in the Criminal Law Section. Mr. Bowker referred to the matter of voting in the Civil Law Section. In his view, also, there should be more practitioners at the Conference. No conclusions were reached on this item.

(viii) After discussion, it was agreed that no steps should be taken that would result in the Criminal Law Section separating from the Conference or that would diminish the main function of the Conference, that is, uniformity.

(ix) On this matter, it was the consensus that the representation of persons from law reform bodies provided coordination with law reform bodies of Canada and there did not seem to be any need of a full-time researcher.

(x) It was concluded that there was room for fruitful cooperation between the Uniformity Conference and law reform bodies.

(xi) This item was already dealt with by the decision of the Conference to provide additional assistance for the Secretary and not to have a permanent secretariat.

(xii) The matter of semi-annual meetings of the Conference and of the executive had been earlier referred to the executive for consideration of the report.

(xiii) No discussion took place in this regard.

The plenary session then adjourned.

## MINUTES OF THE UNIFORM LAW SECTION

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

*Alberta:*

Messrs. G. W. Acorn, W. F. Bowker, L. R. Meiklejohn and W. E. Wilson.

*British Columbia:*

Honourable D. Fulton and G. A. Higenbottam.

*Canada:*

Messrs. J. W. Ryan and D. S. Thorson.

*Manitoba:*

Honourable A. Mackling, and Messrs. A. C. Balkaran, F. C. Muldoon, R. G. Smethurst and R. Tallin.

*New Brunswick:*

Mr. M. M. Hoyt.

*Northwest Territories and Yukon Territory:*

Messrs. H. Fischer, P. O'Donoghue and F. G. Smith.

*Nova Scotia:*

Messrs. W. H. Charles and H. E. Crosby.

*Ontario:*

Messrs. H. A. B. Leal and A. N. Stone.

*Prince Edward Island:*

Messrs. J. M. Campbell and K. R. MacDonald.

*Quebec:*

Messrs. Y. Caron, E. Colas, J. K. Hugessen and Robert Normand.

*Saskatchewan:*

Messrs. D. R. Ching, G. Doherty and P. Johnson.

## FIRST DAY

(MONDAY, AUGUST 23RD, 1971)

*First Session*

12:10 p.m. - 12:35 p.m.

The first meeting of the Uniform Law Section opened at 12:10 p.m. Mr. Emile Colas presided.

*Hours of Sitting*

It was agreed that the Uniform Law Section sit from 9:30 to 12:30 p.m. and from 2:00 p.m. to 4:30 p.m. each day during the meeting.

*Contributory Negligence* (Tortfeasors)

*Limitation of Actions*

A brief discussion took place concerning these two matters after which the following resolution was adopted:

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

*Consumer Protection*

At the request of the Manitoba Commissioners, the following resolution was adopted:

> RESOLVED that the matter of Consumer Protection be referred back to the Manitoba Commissioners for a report at the next meeting of the Conference.

*Family Relief Act*

Mr. Johnson, on behalf of the Saskatchewan Commissioners, requested that this matter be put over for another year. After an explanation by Mr. Johnson, the following resolution was adopted:

> RESOLVED that the matter be referred back to the Saskatchewan Commissioners for a report at the next meeting.

*Interpretation Act and Statutes Act*

Mr. Acorn, on behalf of the Alberta Commissioners, reported on the matter of the draft Interpretation Act and Statutes Act. The Alberta Commissioners had previously distributed a report dated July, 1971 attaching drafts of both Acts with interspersed commentary. The problem involved in these Acts had been discussed at the Legislative Drafting Workshop on Sunday, August 22nd. Because there were technical problems connected with these Acts that were

of great interest to legislative counsel, and because so much of the discussion would involve legislative counsel, Mr. Acorn sought the agreement of the Uniform Law Section to refer the drafts to the Legislative Drafting Workshop for review, and agreement, if possible, before submitting them at the next meeting of the Uniform Law Section of the Conference.

After discussion, it was agreed, on motion, that the Alberta Commissioners' drafts dated July, 1971 of the Uniform Interpretation Act and Uniform Statutes Act be referred to the Legislative Drafting Workshop for study with a view to presenting redrafts of those Acts to the next meeting of the Conference.

*Second Session*

2:00 p.m. - 4:45 p.m.

*Amendments to Uniform Acts*

The report on Amendments to Uniform Acts was presented by Mr. Tallin (Appendix G, page 140). The report, on motion, was received.

It was agreed that each local secretary should study the Table of Model Acts and notify the Secretary as to any changes that are necessary to bring the Table up-to-date.

*Human Tissue Act*

Mr. Leal presented the report, on behalf of the Ontario Commissioners (Appendix H, page 144). After a discussion of the change made by section 7 in the Ontario Act and a consideration of section 11 of the uniform Act whereby the sale of blood was permitted, and the new subsection 5(2) of the Ontario Act, the following resolution was adopted:

> RESOLVED that the matter of the Uniform Human Tissue Act be referred back to the Ontario Commissioners for revision in accordance with the amendments agreed upon at this meeting and that the draft as so revised be sent to 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, 1971, 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, 1971.

The revised draft is set out in Appendix I, page 152.

*Judicial Decisions Affecting Uniform Acts*

Mr. H. E. Crosby presented the report of the Nova Scotia Commissioners (Appendix J, page 157).

The report, on motion, was received.

The case of *Active Petroleum Ltd. v. Duggan* (1970) 72 W.W.R. 486, B.C. C.A., (*Bills of Sale Act*) was considered.

After discussion, the matter raised in this case was referred to the Manitoba Commissioners for report and recommendation 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.

*Age of Majority*

The report of the Ontario Commissioners was presented by Mr. Leal (Appendix K, page 161).

After a discussion of the various ages prescribed by the provinces in recent years with respect to general capacity, the following resolution was adopted:

RESOLVED that the Conference of Commissioners on Uniformity of Legislation in Canada recommend the adoption by the provinces of the uniform age of eighteen for general capacity.

*Minimum Age for Marriage*

The report of the Canada Commissioners was presented by Mr. D. S. Thorson (Appendix L, page 164) on behalf of the Canada Commissioners. After a general discussion of the problem relating to the capacity to marry and general capacity, the following resolutions were adopted:

RESOLVED that the Conference express its feeling that a minimum age in respect of the capacity to marry should be eighteen for both males and females, subject to reconsideration following the study undertaken in the Federal Department of Justice, which was not then before the meeting but the results of which are to be presented at the next meeting by the Canada Commissioners.

RESOLVED that the matter of the minimum age for marriage be referred back to the Canada Commissioners for a report at the next meeting of the Conference.

## SECOND DAY

(TUESDAY, AUGUST 24TH, 1971)

*Third Session*

9:30 a.m. - 12:25 p.m.

*Perpetuities*

Mr. Bowker presented the report of the Alberta Commissioners and made a detailed comparison of the Alberta draft attached to the report and the Ontario and English Acts (Appendix M, page 166).

During Mr. Bowker's presentation, the Attorney General of Manitoba, the Honourable A. Mackling, joined the meeting and was introduced by the Chairman to the members.

Following a discussion of the draft bill, the following resolution was then adopted:

> RESOLVED that the draft Act to modify the Rule Against Perpetuities be referred back to the Alberta Commissioners, that the Commissioners who have comments to make on the draft communicate them to the Alberta Commissioners following this Conference and that the Alberta Commissioners prepare for the next meeting of the Conference a report and draft Act in the light of comments received.

*Personal Property Security Act*

Mr. Tallin reported on the Personal Property Security Act on behalf of the Special Committee consisting of Messrs. Bowker, Leal, Tallin and MacTavish (1970 Proceedings, page 41).

During the discussion of this draft, subsection 45(3) was referred for redrafting for the purpose of providing limits in respect of corporate securities. Drafting suggestions by the Commissioners were invited by the Special Committee of Commissioners reporting on the Personal Property Security Act as soon as possible after the end of this Conference.

After further discussion of the draft and a consideration of the questions of the extension of time for registration and of the consideration of notice filing and document filing, it was agreed that subsection 63(1) be redrafted in accordance with the suggestion made during the course of the discussion. At the conclusion of the discussion, the following resolution was adopted:

> RESOLVED that the Personal Property Security Act be referred back to the Special Committee of Commissioners with a request 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, 1971, 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, 1971.

The revised draft is set out in Appendix N, page 181.

*Fourth Session*

2:00 p.m. - 4:36 p.m.

*Presumption of Death Act*

Dr. Hugo Fischer presented the report on the Presumption of Death Act on behalf of the Commissioners of the Northwest Territories (Appendix O, page 218).

After discussions, the following resolutions were adopted:

RESOLVED that the matter be referred back to Dr. Hugo Fischer to prepare a report for the next Conference, in the light of discussions at this meeting, setting out the policy issues that have to be determined by the Conference in order to prepare a Uniform Presumption of Death Act.

RESOLVED that the Conference recommend that the Government of Canada give favourable consideration to amending the Divorce Act to enable the dissolution of marriage to be obtained upon a petition to the court for a decree presuming the other party to the marriage to be dead and dissolving the marriage thereupon thus effecting the solution referred to in Appendix B of Dr. Fischer's report.

*Occupiers Liability*

Mr. Higenbottam presented the report of the British Columbia Commissioners (Appendix P, page 225).

A discussion then began on the matter of the report.

THIRD DAY

(WEDNESDAY, AUGUST 25TH, 1971)

*Fifth Session*

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

*Occupiers Liability* (continued)

The position of trespassers on property was discussed by the meeting. The British Columbia Commissioners wished the meeting to decide whether or not child trespassers should be excluded from the general rule being provided by subsection 1(2) of this draft bill.

After considerable discussion, the meeting agreed that it accept the B.C. policy proposal regarding the duty and care set out in the draft Act in subsection 1(2), that is, that the occupiers should be required to show towards persons entering upon the premises such care as in all the circumstances of the case is reasonable to see that such person will not suffer injury or damage by reason of any danger due to the state of the land or premises, or anything done or omitted to be done on them by himself or a third party and for which he is law responsible.

Section 3 of the draft B.C. Act was then discussed following which the meeting agreed that the distinction made in draft clause 3 respecting landlord's responsibility be retained but that the draft text be revised to accord with the approach taken in section 3 of the Scottish Act.

The next point considered by the meeting was whether or not to permit exclusion of liability by stipulation. After discussion, it was agreed to delete the whole of subsection 2(2) of the B.C. draft and to alter subsection 2(1) to refer to "express agreement" rather than a bare "agreement".

The provisions of draft subsection 1(3) were next considered and after discussion, it was agreed that the Scottish subsection 2(2) should be included in the draft Act. After further consideration of the Scottish Act, subsections 3(3) and 3(2) of the draft Act, subsection 5(2) and other matters, the following resolution was adopted:

> RESOLVED that the matter of Occupiers Liability be referred back to the British Columbia Commissioners 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, 1971, 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 received by the Secretary by November 30th, 1971.

The revised draft Act is set out in Appendix Q, page 238.

*Condominium Insurance*

The first report on this matter was presented by Mr. Higenbottam on behalf of the British Columbia and Manitoba Commissioners (Appendix R--Part I, page 241).

An Addendum to the report was presented by Mr. Smethhurst (Appendix R—Part II, page 250).

After discussion, the following resolution was adopted:

RESOLVED that the draft Condominium Insurance legislation submitted by the Manitoba and B.C. Commissioners be sent to each of the local secretaries for distribution by them to the Commissioners in their respective jurisdictions; and that if the draft is not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1971, it be recommended for enactment in that form.

NOTE: Copies of the draft were distributed in accordance with the above resolution. Disapprovals by two or more jurisdictions were not received by the Secretary by November 30th, 1971.

The draft condominium provisions are therefore recommended for enactment in that form.

It was recommended that the draft Condominium Insurance provisions, as agreed upon by this meeting, be sent by the Commissioners of British Columbia and Manitoba to the Association of Superintendents of Insurance by the 3rd week of September, 1971, for the information of that body.

*Sixth Session*

2:30 p.m. - 4:36 p.m.

*New Business*

*Reciprocal Enforcement of Maintenance Orders*

Mr. Leal, on behalf of the Ontario Commissioners, referred to the Reciprocal Enforcement of Maintenance Orders and discussed the desirability of reviewing this matter. After discussion, it was agreed, on motion, that the matter be left to the Ontario Commissioners to consider whether a request should be made to put the matter on the agenda of the Conference.

*Status of Women*

Mr. Ryan read to the meeting letters to the Secretary of the Conference from Freda L. Paltiel, Co-ordinator, Status of Women, Privy Council Office, Government of Canada, and from Miss E. I. MacDonald, Chairman, Working Party on Women in the Public Life and Judicial Process, Government of Canada (Appendix S, page 257).

The meeting considered the substance of Miss Paltiel's letter and directed the Secretary to acknowledge receipt of the letter on

behalf of the Conference. With respect to the recommendations of the Royal Commission on the Status of Women referred to in that letter, the Secretary was instructed to reply to Miss Paltiel noting the following matters:

> Recommendation 105: The Conference draws attention to the Uniform Domicile Act prepared by the Conference in 1961 and recommended by the Conference for adoption in 1961. That Uniform Act does not equate a wife's domicile to her husband's and accords, therefore, with the spirit of recommendation 105. No jurisdiction in Canada has adopted the Uniform Act, probably because the Act would require adoption in all jurisdictions.

With regard to recommendations 107, 108, 110 and 111, the Conference notes that these matters fall within the ambit of family law and that in many of the provinces, the recently created uniform law reform bodies are involved in family law projects. It is, therefore, too soon for uniform legislation having regard to the manner in which the Uniformity Conference carries out its functions. It should be noted also that the Conference cannot force its recommendations upon jurisdictions but can merely recommend uniform legislation for the consideration of governments.

With regard to the correspondence from Miss E. I. MacDonald, (Appendix S, page 257) the meeting instructed the Secretary to seek from Miss MacDonald more information concerning the matter of the identification of married women in registers, etc. It was noted that so far as property title is concerned, the Province of Quebec generally uses the maiden name of a woman as the name in which the title is registered. Regarding other registries, there was insufficient information available to the meeting to make any judgment.

*Protection of Privacy*

The report of the Special Committee of Commissioners (1970 Proceedings, page 38) was presented by Mr. Thorson (Appendix T, page 260).

## FOURTH DAY

(THURSDAY, AUGUST 26TH, 1971)

*Seventh Session*

2:30 p.m. - 5:05 p.m.

*Protection of Privacy* (continued)

The report of the Special Committee on Privacy was concluded by Mr. Thorson and a discussion followed. Mr. Leal indicated that

he had some fears that provincial jurisdictions might avoid their obligations in the protection of privacy because the matter of eavesdropping was being considered for the Criminal Code. He mentioned the licensing of private detectives as perhaps being a desirable area in which provinces might exercise control for the purpose of protecting privacy. Mr. Mackling suggested it might be better if there were uniform legislation rather than waiting judicial development of remedies in tort.

The meeting then discussed the areas in which provincial legislation might be relevant. These included tort law, licensing provisions, consumer protection, credit bureau reporting.

It was generally agreed by the meeting after considerable discussion that there were so many aspects to the protection of privacy that the subject should be divided among the Commissioners. The following resolutions were then adopted:

> RESOLVED that the tort of invasion of privacy be referred to the Manitoba, Saskatchewan and British Columbia Commissioners to prepare a report and draft bill, if possible, for consideration at the next Conference.
>
> RESOLVED that the Ontario and Quebec Commissioners undertake a survey of the protection of privacy in the area of credit and personal data reporting and, if possible, report at the next meeting of the Conference with a draft uniform Act.
>
> RESOLVED that the evidence rule developed by 167G of Bill C-252 (Protection of Privacy Act) (A bill to amend the Criminal Code) be reviewed by the Quebec Commissioners and a report made to the next meeting of the Conference recommending how this matter might be dealt with in provincial Evidence Acts.
>
> RESOLVED that the matter of the collection and storage of personalized information generally be referred to the Canada Commissioners for a report thereon at the next meeting of the Conference in terms of practical means of protecting the privacy of the persons reported upon and the security of the information so collected and stored.

*Uniform Survivorship Act*

The report of the British Columbia Commissioners was presented by Mr. Higenbottam (Appendix U, page 409).

After discussion, it was agreed that the wording of the uniform Act should be used throughout and necessary modifications to describe the circumstances "where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others."

## FIFTH DAY

(FRIDAY, AUGUST 27TH, 1971)

*Eighth Session*

1:00 p.m. - 2:30 p.m.

*Uniform Survivorship Act* (continued)

After further discussion of the Uniform Survivorship Act, the following resolution was adopted:

> RESOLVED that the matter of the Uniform Survivorship Act be referred back to the British Columbia Commissioners 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, 1971, 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, 1971.

The revised draft Act is set out in Appendix V, page 412.

The draft as therein set out is therefore recommended for enactment in that form.

*New Business* (continued)

*International Convention on Travel Agents*

Mr. Normand raised the matter of Uniform Travel Agents legislation and described the situation giving concern on the international level with respect to travel agents contracts.

After discussion the following resolution was adopted:

> RESOLVED that this matter be referred to the Quebec Commissioners for a report thereon at the next meeting of the Conference.

*Rule in Hollington v. Hewthorn*

Mr. Wilson, on behalf of the Alberta Commissioners, referred to the Rule of Evidence in *Hollington v. Hewthorn.*

This particular rule of evidence makes a certificate of conviction in a criminal action inadmissible in evidence in a civil case in which the commission of the crime is relevant. The rule becomes important sometimes in divorce actions, motor vehicle causes, and

even occasionally in succession actions. The rule was abolished in England by the Civil Evidence Act 1968 but it still survives in some jurisdictions in Canada. [See G. v G. 1971, 16 D.L.R. (3d) 107 (N.S.)]

The Alberta Commissioners asked that this matter be placed on the Agenda of the Conference.

After discussion the following resolution was adopted:

> RESOLVED that this matter be referred to the Alberta Commissioners for a report thereon at the next meeting of the Conference with a draft uniform Act if possible.

*Status of Women* (continued)

The meeting again considered the matter of Women's Status and discussed the report of the Royal Commission on the Status of Women. After discussion it was agreed that the Secretary should inquire what forty recommendations of the Royal Commission on the Status of Women appeared to relate to matters under provincial jurisdiction and advise the Conference thereon at the next meeting.

*UNIDROIT*

Mr. Normand drew the attention of the meeting to the paper prepared by Mr. Ryan for publication in the Yearbook of Unidroit. It was agreed, on motion, that the report should be printed in this year's Proceedings (Appendix W, page 414).

The Uniform Law Section adjourned at 2.40 p.m.

# MINUTES OF THE 1971 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, Ottawa |
| W. B Common, Q.C. | Commissioner, Toronto, Ontario |
| Stephen Cuddihy | Chief Crown Attorney, Montreal |
| A. R. Dick, Q.C. | Deputy Attorney General, Ontario |
| S. A. Friedman, Q.C. | Deputy Attorney General, Alberta |
| Gordon F. Gregory, Q.C. | Deputy Minister of Justice, N.B. |
| William Henkel, Q.C. | Department of the Attorney General, Alberta |
| Gilbert D. Kennedy, Q.C. | Deputy Attorney General, British Columbia |
| Hon. A. H. Mackling, Q.C. | Attorney General, Manitoba |
| Wendal MacKay | Assistant Deputy Minister of Justice, P.E.I. |
| D. S. Maxwell, Q.C. | Deputy Minister of Justice, Canada |
| Vincent P. McCarthy, Q.C. | Deputy Minister of Justice, Newfoundland |
| N. A. McDiarmid | Department of the Attorney General, B.C. |
| J. G. McIntyre, Q.C. | Commissioner, Regina |
| Roy S. Meldrum, Q.C. | Deputy Attorney General, Regina |
| Bruce M. Nickerson, Q.C. | Commissioner, Halifax |
| Hon. L. R. Peterson, Q.C. | Attorney General, B.C. |
| G. E. Pilkey, Q.C. | Deputy Attorney General, Manitoba |
| John E. Warner, Q.C. | Department of the Attorney General, N.B. |

Chairman: Mr. John E. Warner

Secretary: Mr. D. H. Christie

The following matters were considered by the Criminal law Section:

1. *Juries—Majority Verdicts*
   A majority of the Commissioners were against the introduction of majority verdicts in relation to the trial of criminal matters.

2. *Women on Juries in Criminal Cases*
   The Commissioners did not favour the following recommendation contained in the Report of the Royal Commission on the Status of Women in Canada:

   "141. We recommend that the provinces which have not already done so require women to be liable for jury duty on the same terms as men".

3. *Section 717(3) of the Criminal Code*
   "717. (1) Any person who fears that another person will cause personal injury to him or his wife or child or will damage his property may lay an information before a justice.

   (2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

   (3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the informant *has* reasonable grounds for his fears,

   (a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, or

   (b) commit the defendant to prison for a term not exceeding twelve months if he fails or refuses to enter into the recognizance.

   (4) A recognizance and committal to prison in default of recognizance under subsection (3) may be in Forms 28 and 20, respectively.

   (5) The provisions of this Part apply, mutatis mutandis, to proceedings under this section."

   The Commissioners did not favour a recommendation that the word "has" in subsection 3 be replaced by the word "had".

4. *Subsection 413(2) of the Criminal Code—Exclusive Jurisdiction of Superior Courts of Criminal Jurisdiction*

A majority of the Commissioners favoured allowing an accused to elect trial without a jury with respect to a number of offences enumerated in Subsection 413(2) of the Criminal Code, namely, sections 53, 62, 76, 101, 136, paragraph 316(1)(a) and the offences mentioned in paragraphs 413(2)(d) and (e). It was agreed that this recommendation was in no way intended to affect the provisions of Sections 480, 487 and 489 of the Criminal Code.

5. *Criminal Negligence in the Use of Aircraft*

The Commissioners agreed that Sections 221 and 226A be amended to include the offences of criminal negligence in the operation of an aircraft and criminal negligence in the operation of a vessel and that there be created offences of the dangerous operation of an aircraft and the impaired operation of an aircraft.

6. *Return of Stolen Merchandise to Rightful Owner and Provision for Secondary Evidence at Trial*

A majority of the Commissioners agreed that the law should be amended to provide for the return to the owner of property seized for evidentiary purposes and for the introduction of secondary evidence with respect thereto subject to the approval of and such conditions as may be prescribed by a court.

7. *Restitution of Property After Trial*

This matter was left in abeyance on the understanding that Dr. Kennedy might wish the matter to be considered at next year's meeting.

8. *Disposition of Unclaimed Exhibits*

The Commissioners agreed that Section 424 of the Criminal Code should be amended to make it clear that rules of court can be made thereunder dealing with the disposition of unclaimed exhibits and that the Lieutenant Governor in Council be authorized to make rules of court in relation to courts of criminal jurisdiction other than superior courts of criminal jurisdiction and courts of appeal.

9. *Control of the Drinking Driver*

The Commissioners did not agree with a recommendation that it be made an offence for anyone over the age of 16 not being

the spouse of the driver to ride as a passenger in a car being driven by someone who is impaired.

10. *Amendments to Appeal Procedure With Respect to Indictable Offences: Section 583(1)(a)(ii), or Section 598*

This item was worded as follows:

> "The views of the Commissioners will be sought with respect to a recommendation for an amendment to remove the right of a convicted person to appeal a conviction on factual grounds or, alternatively, to provide the Supreme Court of Canada with jurisdiction to review decisions of the provincial Courts of Appeal which have reversed jury findings; it has been suggested that, in the event of dissent in the Court of Appeal, perhaps the Crown should have an absolute right to appeal to the Supreme Court of Canada, while, if the Court of Appeal's decision is unanimous, perhaps leave should be required."

The Commissioners directed that this matter be deferred for further consideration at next year's meeting.

11. *Section 325—Burden of Proof in Offence of Fraudulent Manipulation of Stock Exchange Transactions*

The Commissioners approved as a matter of principle that there should be effective provisions outlawing wash trading and the Commissioners further agreed that after consultation with provincial authorities concerned with trading in securities that they would let the secretary know which of the suggested draft amendments to Section 325 of the Criminal Code they prefer. The draft amendments were circulated with the agenda.

12. *Offence of Possessing, Without Lawful Excuse, any Card or Certificate of Identification of Another Person*

It was recommended that an offence be created of being in possession, without lawful excuse, of any card or certificate of identification of another person.

The Commissioners agreed that this item should be transferred to the Civil Law Section of the Uniformity Conference.

13. *Establishment of the Standardization of Procedures For Certifying Analysts to Conduct an Independent Analysis of the Breath Sample—Section 224A(1)(c)(i), (f)(iii)(A); (5)(b)*

The Commissioners agreed that Attorneys General should be advised that in certifying private analysts the same criteria

should be applied as is applied in designating analysts who are employed by governments.

14. *Privileged Communications Between a Solicitor and Client—Proposed Amendment to the Criminal Code Similar to Section 126A of the Federal Income Tax Act*

A majority of the Commissioners were not in favour of amending the Criminal Code to make special provisions regarding Solicitor and client privilege in relation to searches carried out under the authority of the Criminal Code. In particular, the Commissioners did not favour enacting provisions in the Criminal Code analogous to Section 126A of the *Income Tax Act.*

15. *Paragraph 316 (1) (a) of the Criminal Code—Threatening Death or Injury by Letter Etc.*

Mr. Common submitted a report to the meeting in which he advised that great caution should be exercised in relation to any proposal to extend the provisions of 316A to oral threats.

The Commissioners adopted Mr. Common's report.

16. *Publication of Instructions on How to Commit Criminal Offences*

The Commissioners did not approve a suggestion that the publication of advice on how to commit criminal offences be made an indictable offence. It was suggested, however, that the issue whether describing how to commit criminal offences can amount to inciting to the commission of such offences is one that could properly be the subject of judicial determination.

17. *Preferred Indictment—Criminal Code Sections 487 and 489*

The Commissioners agreed that the Criminal Code should be amended to allow an accused to elect with the consent of the Attorney General for trial by a judge alone where a preferred indictment has been issued against him.

18. *Subsection 315 (3) of the Criminal Code—Harassing Telephone Calls to Debtors by Collection Agencies*

The Commissioners did not favour a recommendation that the Criminal Code be amended to make it an offence for credit agencies to place repeated telephone calls to the home or place of business of a debtor where such calls are accompanied by threats causing apprehension.

19. *Section 224A of the Criminal Code*

The Commissioners agreed with the suggestion that Section 224A(4) of the Criminal Code be amended to make it clear that the Crown may require the attendance of an independent analyst consulted by an accused to conduct a breath analysis for the purposes of cross examination. This proposal will have practical ramifications when a suitable "approved container" comes into being.

20. *Section 467 of the Criminal Code—Absolute Jurisdiction of Magistrate*

The Commissioners did not approve a recommendation that Section 467 of the Criminal Code be amended to give judges absolute jurisdiction under paragraph (a) thereof where the alleged value of the property does not exceed $500.

The Commissioners re-affirmed the views they expressed in 1969 and 1970 that the upper limit should be $200.

21. *Assizes—Quebec*

The Commissioners did not agree with the suggestion that the Criminal Code be amended to permit judges, other than Superior Court Judges, to conduct trials by judge and jury in the Province of Quebec.

22. *Provincial Bail Registries*

The Commissioners did not favour the establishment of provincial bail registries in accordance with the recommendation contained in the Report of the Canadian Committee on Corrections. Instead the Commissioners recommended that the information should be gathered by and made available from the Canadian Police Information Centre at R.C.M.Police Headquarters in Ottawa. It was suggested that provincial bail registries might not always be kept up-to-date and if this happened then injustices might be perpetrated by securing misleading information from them.

23. *Section 391—Definitions Relating to Currency Offences*

The Commissioners did not consider it necessary that a definition of "defacing" should be added to Section 391 of the Criminal Code.

24. *The Report of the Royal Commission on the Status of Women in Canada and the Criminal Law*

The Commissioners agreed with recommendation 109 in the Report of the Royal Commission on the Status of Women in Canada. A majority of the Commissioners agreed with recommendations 124 and 150 and a majority were not in favour of recommendations 126 and 127. A majority of the Commissioners did not favour recommendation 151, but the same majority favoured the repeal of paragraphs (b) and (d) of Section 164 of the Criminal Code and the transfer of paragraph (e) of Section 164 to Part XXI of the Code. The Commissioners referred recommendation 152 to a Committee which is to report to next year's meeting. The membership of the committee is Mr. Friedman (Chairman), Dr. Kennedy and Mr. Meldrum. In the meantime, the Commissioners recommended that Sections 141 and 148 of the Criminal Code be combined in such a way that indecent assault will be dealt with without specific regard to sex.

The Commissioners agreed that recommendation 153 be left in abeyance pending receipt of the report from the above mentioned committee.

With respect to recommendation 154, the Commissioners recommended that Subsection 23(3) of the Criminal Code be referred to the Canada Law Reform Commission for consideration, together with Section 4 of the *Canada Evidence Act.*

25. *Trespass and Interference With the Use of Property by "Sit-ins"*

The Commissioners did not favour amending the Criminal Code further to deal specifically with "sit-ins".

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

Mr. Common and Mr. McDiarmid presented a report to the Commissioners on the above mentioned matter in which they concluded that:

> "Our present view is that notwithstanding the incongruous difference between the procedure set out in Section 523 as applicable to indictable offences, and a complete absence of a similar procedure on summary conviction offences, that

the situation should not be made worse by making Section 523 or some similar section applicable to summary conviction cases. If the accused exhibits a condition of mental illness in a summary conviction matter, the prosecution and defence should rely on the appropriate provincial legislation and the information dismissed by the prosecution offering no evidence or the informant could withdraw the charge."

The Commissioners adopted the report.

27. *Sentencing for Soliciting for the Purpose of Prostitution, and Male Prostitution*

Mr. Common received considerable material from the Centre of Criminology at the University of Toronto in relation to the above mentioned matters.

The Commissioners agreed that the same committee mentioned in paragraph 24 above, with the addition of Mr. Common, should study this material and report back to next year's meeting.

28. *Subsection 170(2) of the Criminal Code*

A majority of the Commissioners did not favour amending the definition of "slot machine" to exclude slot machines used strictly for purposes of entertainment.

29. *Theft of Telecommunications Services*

A majority of the Commissioners favoured amending the Criminal Code by the addition of a new Section 273A to be worded as follows:

"273A (1) Every one who makes, has in his possession or uses, whether by himself or with any other person any instruments, apparatus, equipment or other device which is designed, adapted or can be used or employed for the purpose of

(a) obtaining telecommunication service, or

(b) concealing the existence or place of origin or destination of any telecommunication service

is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) In this section, "telecommunication" means any transmission, emission or reception of signs, signals, writing, messages or sounds or intelligence of any nature by wire or cable or otherwise."

The majority of the Commissioners also agreed that the maximum punishment for the proposed offence should be two years' imprisonment.

30. *Auto Theft—Obliteration of Manufacturers' Identifying Numbers*

The Commissioners considered a motion that it be prima facie evidence of being in possession of stolen property to be in possession of a motor vehicle the serial number of which has been altered or rendered undecipherable.

The Commissioners agreed to "take the sense of the resolution as passed" and, in addition, the Commissioners would discuss the problem of auto theft with their respective provincial motor vehicle administrators with a view to considering what provincial legislation might be enacted to assist in dealing with the problem.

31. *Bail Bill—National Manual on Bail*

The Commissioners agreed that January 1, 1972 would be a suitable date on which to proclaim the Bail Reform Act in force. It was also agreed by the Commissioners from all provinces except B.C., Ontario and Quebec that the Bail manual prepared by the federal Department of Justice in consultation with the R.C.M.P. and provincial law enforcement authorities should be printed in English and French by Information Canada and be made available at the most economical price possible in such numbers as may be ordered by the provincial authorities. The Commissioners from B.C., Ontario and Quebec indicated their intention to prepare and distribute their own manual which would, however, be very much similar to the federal manual.

32. *Section 654(3) and (4) of the Criminal Code—Civil Disability Arising Out of Conviction for Certain Offences*

The Commissioners agreed that subsection (3) of Section 654 of the Criminal Code should be repealed. Subsection 654(3)

provides that no person convicted of an offence under Section 102, 105 or 361 of the Criminal Code has, after that conviction, capacity to contract with Her Majesty or to receive any benefit of a contract between Her Majesty and any other person or to hold office under Her Majesty.

33. *Contempt of Court—Section 9 (1) of the Criminal Code*

The majority of the Commissioners were not in favour of a suggestion that a sentence to be imposed for contempt in the face of a court shall be determined by a judge other than the judge who is the subject of the contempt.

The Commissioners were evenly divided on a suggestion that there be an appeal from a conviction for contempt in the face of a court.

34. *Sunday Observance Legislation—Report of the Ontario Law Reform Commission*

A majority of the Commissioners agreed with a suggestion that Parliament vacate the field occupied by the *Lord's Day Act*. The Commissioners also agreed that if the *Lord's Day Act* is to be continued as a federal statute the penalties should be increased to a $500 fine or six months' imprisonment or both. The Commissioners also agreed that Section 16 of the *Lord's Day Act* which requires leave of provincial Attorneys General to prosecute for alleged violations of the Act should not be repealed. The Commissioners further agreed that authority to grant any exemptions which may be granted under the *Lord's Day Act* in relation to intra provincial trucking should be vested in provincial transportation commissions.

35. *Time for Leave to Appeal to the Supreme Court of Canada—Section 598 (1) (b) of the Criminal Code*

The Commissioners agreed that Section 598(1)(b) of the Criminal Code which deals with applications for leave to appeal to the Supreme Court of Canada by Attorneys General should be amended to increase the time within which the application may be granted from 21 days to 30 days after the judgement to be appealed is pronounced.

36. *Possession of Firearms by Persons of Unsound Mind*

The Commissioners agreed that the provisions of the Criminal Code were adequate in relation to the matter of possession of firearms by persons believed to be of unsound mind.

37. *Probation Orders—Paragraph 638(4)(c)—Requirement that the Court Making the Order Inform the Accused of the Provisions of Subsection 639(4) and of Section 640A of the Criminal Code*

The Commissioners agreed that Paragraph 638(4)(c) of the Criminal Code should be amended to provide that in cases where court of appeal imposes a probation order, the court itself need not inform the accused of the provisions of Subsection 639(4) and Section 640A.

38. *Section 527A of the Criminal Code—Provincial Boards of Review*

The Commissioners did not agree with a recommendation that Section 527A of the Criminal Code be amended to spell out more clearly the authority of the Lieutenant Governor to act thereunder.

39. *Resolutions Passed by the Canadian Bar Association at its Fifty-second Annual Meeting in Halifax, N.S., on Friday, September 4, 1970*

The Commissioners considered the following ten resolutions adopted by the Canadian Bar Association. These minutes set out the nature of the resolutions and each resolution is followed by an indication of the views of the Uniformity Commissioners with respect thereto.

A. *Resolution*

RESOLVED:

That the Canadian Bar Association recommends that Subsections 16(2) and (3) of the Criminal Code be repealed and the following substituted:

(2) For the purposes of this Section, a person is insane if as a result of mental disease or defect he was incapable of either appreciating the legal or moral wrongfulness of his conduct or of controlling his conduct.

*Comment*

The Commissioners were of the view that this was a very superficial attempt to deal with a problem of extraordinary difficulty. They were of the view that this subject should be considered in depth by the Canada Law Reform Commission.

B. *Resolution*

RESOLVED:

WHEREAS: The Canadian Bar Association recognizes the need for legal services to persons charged with criminal offences or statutory offences and to persons in connection with civil matters,

AND WHEREAS: The Canadian Bar Association recognizes that such legal services should be provided for persons unable to pay for same, either wholly or in part,

AND WHEREAS: Legal services should be available to all persons on an equal basis, regardless of geographical location,

BE IT THEREFORE RESOLVED THAT: The Canadian Bar Association recommends that the Parliament of Canada do allocate and provide funds to the Provinces of Canada and the Territories for the purpose of providing such legal services.

*Comment*

The Commissioners agreed with this resolution.

C. *Resolution*

RESOLVED:

That The Canadian Bar Association recommends that the Criminal Code be amended to provide a clear distinction between joy riding and theft of an automobile and that joy riding be made an included offence of theft of an automobile.

*Comment*

The Commissioners agreed that there was no need to act on this resolution.

D. *Resolution*

WHEREAS: Certain Statutes of Canada, namely, the Narcotics Control Act, the Customs Act, the Excise Act and the Food and Drug Act, contain provisions for Writs of Assistance and general search warrants whereby peace officers can be authorized to conduct general searches of persons or places (including dwelling places) during day or night,

AND WHEREAS: Such provisions place unreasonable and unnecessary power in the hands of any holder of such Writ at the expense of individual liberty and privacy,

THEREFORE BE IT RESOLVED: That The Canadian Bar Association recommends that the said statutes be amended by deleting therefrom any provision which gives peace officers any powers of entry, search and seizure in dwelling places beyond the powers presently contained in the Criminal Code.

*Comment*

The Commissioners agreed that this matter should be referred to the Canada Law Reform Commission with the suggestion that the law provide a reasonable remedy to a person who has been subject to a search under a writ of assistance in the absence of reasonable grounds for such search.

E. *Resolution*

WHEREAS: The Canadian Bar Association notes with approval the recent steps taken by the judiciary, the Minister of Justice, and some of the Attorneys General in ensuring respect for the rights of accused native persons and in particular:

(a) in implementing more liberal bail terms, and

(b) in providing more efficient assistance to native persons involved with the law.

RESOLVED: That this Association urges the Minister of Justice and all Attorneys General to ensure the continuation and extension of the above measures and to consider immediate implementation of:

(a) a system of native court workers, with adequate legal assistance, to advise accused native persons in their own language

(b) a system whereby the legal caution and the right to Legal Aid are communicated to accused native persons at the earliest opportunity in comprehensible terms and language.

*Comment*

The Commissioners recognized the desirability of what is recommended by the Bar resolution and some of the Commissioners

reported that the concept of native court workers was already being developed in their provinces.

F. *Resolution*

RESOLVED:

That the Canadian Bar Association recommends that Section 490 of the Criminal Code be amended to provide that, where there is a stay of proceedings, the Attorney General shall proceed on the charge within one year from entering the stay, otherwise the charge shall be deemed to be dismissed; except that when a person was in custody under a warrant of the Lieutenant-Governor pursuant to Sections 524 and 527 of the Criminal Code and is released from custody, the charge shall be deemed to be dismissed if no proceedings are taken within one year of the release from custody.

*Comment*

A majority of the Commissioners did not approve this resolution.

G. *Resolution*

RESOLVED:

That the Canadian Bar Association recommends that Section 119 of the Criminal Code be amended to increase the maximum penalty from 2 years to 10 years' imprisonment.

*Comment*

A majority of the Commissioners agreed that the maximum penalty for violations of Paragraphs 119(2)(a), (b) and (c) be increased from 2 - 10 years' imprisonment, but that the maximum penalty for a violation of Paragraphs 119(2)(d) or (e) remain at two years' imprisonment.

H. *Resolution*

RESOLVED:

That Section 716 and 744 (of the Criminal Code) dealing with costs in criminal matters be repealed.

*Comment*

The Commissioners agreed that no action be taken on this resolution.

I. *Resolution*

RESOLVED:

That the Canadian Bar Association recommends that the Criminal Code be amended to establish a procedure for the disposition of all outstanding charges against a person who is imprisoned, without the necessity of his entering a guilty plea, as soon as possible during his imprisonment.

*Comment*

The Commissioners agreed that no action be taken on this resolution.

J. *Resolution*

RESOLVED:

That the Canadian Bar Association recommends that the Canada Evidence Act be amended to provide as follows:

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or charged with an offence other than that wherewith he is then charged, or is of bad character, unless

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged or

(ii) he has personally or by his counsel asked questions of the witness for the prosecution with a view to establishing his own good character or has given evidence of his good character, or the nature of conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or

(iii) he has given evidence against any other person charged with the same offence.

*Comment*

A majority of the Commissioners did not favour this resolution.

40. *Manufacture and Distribution of Lottery Tickets*

A majority of the Commissioners agreed that the Criminal Code should be amended in order that it will not be an offence to print lottery tickets anywhere in Canada for use in relation to a lottery that is lawful in any part of Canada.

40A. *Trading Stamps*

At this stage of the proceedings Mr. T. D. MacDonald, Q.C. presented a paper to the Commissioners on behalf of the Minister of Consumer and Corporate Affairs with respect to trading stamps. This item had not been included in the agenda which was circulated to the members of the Criminal Law Section. After hearing Mr. MacDonald, the Commissioners expressed the view that the Criminal Law should clearly prohibit dealing with trading stamps.

The Commissioners were also of the view that the provisions of the Criminal Code relating to trading stamps should be transferred to special legislation relating to the protection of consumers.

41. *Electronic Eavesdropping*

Bill C-252 entitled the *Protection of Privacy Act* received first reading in the House of Commons on June 28th, 1971. The Commissioners had a number of comments to make with respect to the proposed legislation including:

(a) a suggestion that the statutory declaration to be filed in support of an application for authorization to resort to electronic eavesdropping should include reference to the occupation or nature of the business, if known, of the person who is to be subject to the eavesdropping. The particular thought behind this suggestion was that if the phone of a barrister or solicitor was to be tapped this should be brought home to the judge to whom the application for authorization is made;

(b) that the Bill be amended to provide that an application for authorization and the material in support thereof shall be kept in the custody of the Attorney General or Solicitor General, as the case may be, on whose behalf the application for authorization is made or in the custody of a police officer or public officer designated by the Attorney General or Solicitor General.

Also that the authority itself shall be kept in similar custody;

(c) that the authority to grant authorization to resort to electronic eavesdropping should be vested in Attorneys General or the Solicitor General of Canada and not in the judiciary;

(d) that the provisions of the Bill requiring Provincial Attorneys General to report annually in relation to electronic eavesdropping be deleted on the ground that this constitutes an unwarranted interference with Provincial Attorneys General in the discharge of their duties regarding the administration of the criminal law; and

(e) that it would be contrary to the interests of the administration of justice to introduce the doctrine of the suppression of evidence in Canadian criminal law and that consequently the provisions of the Bill in this regard should be deleted.

42. *Obscene Literature*

The Commissioners did not agree with a recommendation that the words "knowingly, without lawful justification or excuse" be deleted from Subsection (2) of Section 150 of the Criminal Code or with a recommendation that Subsection 150A(4) should be made to apply to Section 150.

43. *Section 451 (b) of the Criminal Code*

The Commissioners agreed to a recommendation that where an accused is in custody and he consents to a remand for preliminary inquiry that remand may be for a period in excess of 8 days.

44. *Proof of Service of Criminal Process by Affidavit*

The Commissioners did not agree with the suggestion that the Criminal Code be amended to provide that subpoenas, summonses, notices of appeal and all criminal process may be proved by Affidavit. In this regard, reference was made to Section 442(5) and Section 444F(3) of the *Bail Reform Act.*

45. *Section 288 of the Criminal Code–Robbery*

The Commissioners did not favour taking any action with respect to the following representations which were placed before them with respect to the offence of robbery:

"It would appear that the robbery section is in need of revision. In a good many instances the so called robber will pass a note to the teller stating, "This is a hold-up, give me your money". Or he might simply just say, "This is a hold-up" but without making any gesture of any kind. It seems to me that the word "hold-up" carries with it an implied assault; if it does not then the section should be amended so that it does. If a note containing a threat of violence to shoot a person does not constitute an assault (unless accompanied by some act or gesture which does clearly come within the definition of assault), then again either the robbery section or the definition of assault should be revised.

While discussing this general subject, I should mention another problem relating to robbery which has been bothering me for some time. This relates to the question of whether only one offence or several is committed, when more than one teller has money taken from her individually during the course of the one incident. In order to avoid argument about admissibility of evidence in connection with either what occurred or what was said by the accused at the various tellers' stations, we charge as many counts as there are separate tellers or persons involved. While, in the vernacular, one often speaks of "robbing a bank", the fact is that the bank is not robbed under the present law because it is somewhat difficult to "assault" a bank. Consequently it is the individual teller which must figure in the actual wording of the charge. My own view is that it should be possible to charge in so many words that the accused did rob such and such a branch of such and such a bank rather than have several counts of robbing tellers. In other words, one charge should be sufficient instead of several."

46. A number of resolutions adopted in 1971 by the General Council of the Quebec Bar were considered by the Commissioners. The resolutions and their comments are as follows:

THE QUEBEC BAR RECOMMENDS that the Canadian Criminal Code be amended so that any person found guilty of contempt of court may appeal the verdict of guilty and the sentence.

*Comment*

The Commissioners did not favour amending the provisions of the Criminal Code in relation to criminal contempt of court.

*Resolution*

1. THAT the presiding judge in a criminal court refrain from giving his opinion on the facts, which should be left for the jury alone to consider;

2. THAT the federal Minister of Justice propose that Parliament amend the Canadian Criminal Code accordingly.

*Comment*

The Commissioners did not favour taking any action with respect to this resolution.

*Resolution*

THAT the Canada Evidence Act and the Code of Civil Procedure be amended so as to establish the right of all witnesses before criminal and civil courts to choose, before giving testimony, between taking oath and making a solemn declaration.

*Comment*

The Commissioners were of the view that there was no need to amend the *Canada Evidence Act* and in this regard reference was made to Sections 14 and 15 thereof.

47. *Election of Officers*

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

## MINUTES OF THE CLOSING PLENARY SESSION

(FRIDAY, AUGUST 27TH, 1971)

2:30 p.m. - 3:10 p.m.

The plenary session resumed with the Honorary President, Mr. Emile Colas, in the chair.

*Report of Criminal Law Section*

Mr. John E. Warner, Chairman of the Criminal Law Section, reported that twenty-two members of the Conference attended meetings of the Criminal Law Section from Monday, August 23rd to Friday, August 27th. Seventy topics, including forty-six questions that were submitted to the Section, and 4 additional matters, were discussed. Papers were heard from officials of the Department of Justice and the Department of Consumer and Corporate Affairs and several reports of committees were studied by the Section. All matters on the original and supplementary agendas, as well as other topics arising at the meeting, were considered by the Section.

Questions relating to better organization of agendas and procedure for priority selection of topics for subsequent meetings were discussed by the members of the Criminal Law Section at a business meeting after the agenda had been dealt with.

Gordon E. Pilkey, Q.C., Winnipeg, was elected Chairman of the Section for the coming year and Donald H. Christie, Q.C., Ottawa, was re-elected Secretary.

*Special Committee on Finance*

The following report of the Special Committee on Finance was read by Mr. Dick on behalf of the Committee:

> A special Committee was constituted at the second plenary session, consisting of Messrs. Colas, Dick, Tallin, Thorson, Normand, Crosby and Ryan, and directed to consider the finances and budget of the Conference in relation to increased costs, the additional assistance approved for the Secretary, and the position of the Conference in the light of the new matters arising from law reform and international conventions.
>
> Your Committee recommends the following:
>
> (1) That the governments of the provinces of Ontario, Quebec, New Brunswick, Nova Scotia, Manitoba, British

Columbia, Saskatchewan, Alberta and Newfoundland be assessed $1,500.00 for their contribution to the Conference;

(2) That the government of Prince Edward Island, Yukon Territories, and the Northwest Territories be assessed $750.00 for their contribution to the Conference; and

(3) That the Government of Canada be assessed $1,500.00 for its contribution to the Conference.

Your Committee also proposes the following estimated budget for the year 1971-72:

| | |
|---|---|
| Printing and publication of the Proceedings | $8,000.00 |
| Cost of additional assistance for the Secretary | 4,000.00 |
| Meetings of the Executive and Committees | 3,000.00 |
| Correspondence, letterheads, postage, etc. | 500.00 |
| Administrative costs of annual meetings | 500.00 |
| TOTAL | $16,000.00 |
| Estimated surplus | $ 1,250.00 |

The recommendations were, on motion, adopted.

*Report of Special Committee on International Conventions on Private International Law*

The following report of the Special Committee was presented by Mr. Leal on behalf of the Committee:

> REPORT OF SPECIAL COMMITTEE CONSISTING OF MESSRS. LEAL, BOWKER, NORMAND AND RYAN on the request of the Federal Department of Justice to make any recommendations and comments that the Conference might wish to make upon the matter of Canadian participation in the Hague Conference and UNIDROIT and other organizations in the field of private international law.

Your Committee met on three occasions to consider the matter referred to it at the first plenary session.

The subjects referred to your Committee are complex and voluminous and not capable of facile solution. Yet the Conference is committed, in the view of your Committee, to make an

effort to assist the federal authority in devising federal-provincial machinery to prepare for and implement international conventions in the field of private international law.

After due deliberation, your Committee proposes the following resolution for the consideration of the Conference:

WHEREAS the Conference of Commissioners on Uniformity of Legislation in Canada notes that the Department of Justice (Canada) has invited the Conference to make any recommendations and comments that it may wish to make upon Canadian participation in the Hague Conference on Private International Law and in the International Institute for the Unification of Private Law (UNIDROIT) and other organizations in the field of private international law and has more particularly invited the comments of this Conference on such assorted matters as:

(a) The Convention on the Recognition of Divorces and Legal Separations;

(b) The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters;

(c) The Report and Questionnaire on Maintenance Obligations in Respect of Adults in the Field of Private International Law;

(d) The Report of the Special Commission on Products Liability in the Conflict of Laws;

(e) The Draft Convention providing a Uniform Law on the Form of Wills and the Report of the UNIDROIT Secretariat thereon;

AND WHEREAS there are other international conventions in existence which might usefully be considered by this Conference for the purpose of developing uniform model Acts;

AND WHEREAS this Conference has already suggested that machinery be set up as soon as possible by the federal and provincial governments to assess the merits of implementing any conventions elaborated by international bodies and has also indicated that the Conference would be pleased to collaborate fully with federal and provincial governments on such matters, if so requested. (1970 Proceedings, pp. 41-42);

AND WHEREAS the Conference notes that the next meeting of the Hague Conference on Private International Law will take place in the autumn of 1972 and that the National Organ of that Conference (the Department of Justice, Ottawa) intends to send replies to the Permanent Bureau of the Hague Conference in October, 1971, on the Report and Questionnaire on Maintenance Obligations in Respect of Adults in the Field of Private International Law and has solicited comments from this Conference thereon:

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

REALIZING that the required federal-provincial machinery does not yet exist to prepare for and implement international conventions in matters of private international law, and

REALIZING the difficulties involved in establishing such machinery in a federal state such as Canada and aware of the interest and initiative taken by this Conference in the matter of Canada's adhesion to the Hague Conference on Private International Law and UNIDROIT,

HEREBY RESOLVES:

(1) That a Committee be appointed, consisting of a Commissioner from one of the four western provinces, from one of the Atlantic provinces and one from each of the Ontario, Quebec and Canada Commissioners, the members whereof shall be designated by the Commissioners from those jurisdictions, to make comments on the various matters relating to international conventions drawn to the attention of this Conference by the appropriate federal authority, on behalf of the Conference, if time permits the Committee to bring the matter before the Conference for direction, or on their own initiative, without binding the Conference, when time does not permit the matter being brought before the Conference;

(2) That the Chairman of the Committee be designated by the President of the Conference;

(3) That the Committee meet as soon as possible with the appropriate officials of the federal Department of Justice to provide whatever assistance it may to that Department in the matter of establishing federal-provincial

machinery to prepare for and implement international conventions in Canada;

(4) That the Committee attempt to compile and assess those international conventions already adopted by international organizations concerned with private international law that might usefully be embodied in uniform model Acts by this Conference, and report thereon to the Conference;

(5) That the Committee report back to the Conference at its next meeting on the foregoing matters with such recommendations and suggestions as the Committee thinks desirable.

The recommendations were, on motion, adopted.

*Next Meeting*

Mr. Normand reported on behalf of the Quebec Commissioners and invited the members to hold the next annual meeting of the Conference at Lac Beauport in the Province of Quebec. The members expressed their appreciation and agreed to meet at Lac Beauport in 1972.

*Appreciations*

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

RESOLVED that the Conference express its sincere appreciation

(a) to the Alberta Commissioners for the excellent accommodation and services provided for the meetings of the Conference and the Drafting Workshop and in particular for their warm hospitality and constant desire to see that everything was provided for the comfort of the Commissioners and their families;

(b) to Messrs. W. H. Hurlburt, Q.C. and H. G. Field, Q.C. for the thoughtful consideration and assistance in advising the Conference on Law Reform and Uniformity;

(c) to the Law Society of Alberta and the Edmonton Bar Association for the reception on Monday at the Jasper Park Lodge Golf Club House;

(d) to Mr. and Mrs. Clare Liden for the Ladies' Sherry Party at the Howard T. Emery Cottage on Tuesday at Lake Edith;

(e) to Mr. and Mrs. W. F. Bowker for the reception on Thursday at the Jasper Park Lodge Golf Club House;

(f) to the Government of the Province of Alberta for the dinner on Thursday at the Jasper Park Lodge Golf Club House;

(g) to the wives of the Alberta Commissioners for the gracious and thoughtful hospitality extended to the wives and children of the visiting members of the Conference and in particular for their arrangements of the sightseeing tour on Wednesday and the trail rides on Thursday;

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 53rd annual meeting of the Conference.

*Report of Auditors*

Mr. Hugessen reported that he and Mr. Acorn had examined the statement of the Treasurer and certified that they had found it to be correct.

*Report of Nominating Committee*

Mr. Bowker, on behalf of the Nominating Committee, submitted the following nominations of officers of the Conference for the year 1971-72:

| | |
|---|---|
| Honorary President | P. R. Brissenden, Q.C., Vancouver |
| President | A. R. Dick, Q.C., Toronto |
| 1st Vice-President | R. H. Tallin, Winnipeg |
| 2nd Vice-President | D. S. Thorson, Q.C., Ottawa |
| Treasurer | H. E. Crosby, Q.C., Halifax |
| Secretary | R. Normand, Q.C., Quebec |

The report of the Committee was adopted and those nominated were declared elected.

*Close of Meeting*

The Chairman, Mr. Emile Colas, thanked the members of the Conference for their assistance and cooperation during the meeting.

The President-elect, Mr. A. R. Dick, Q.C., assumed the Chair on the invitation of the Chairman and expressed the appreciation of the Conference for the efficiency with which Mr. Colas had guided

the proceedings of the Conference at Jasper. He expressed his appreciation for the confidence shown in him by the members and expressed the view that because of the generous spirit and kindness of the members, the position was not as fearful as it might otherwise be. He expressed, on behalf of the Conference and himself, regret that the members of last year's executive would not be able to assume their rightful positions on the executive because of the unfortunate circumstances that had developed during the year. They were worthy of the recognition but unfortunately are not able to take on the positions. He expressed the hope that the circumstances of last year did not indicate any occupational hazard. He noted the advent of more law reform members on the Conference and considered it to be a great asset and hoped that the steps taken at this meeting to provide additional assistance and more financial resources would improve the working conditions of the Secretary's office and advance the work of the Conference. Most of all, he looked forward to the coming year and to the interesting work and associations on the Conference.

At 3:10 p.m. the meeting adjourned.

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## STATEMENT OF PROCEEDINGS

### Address of Mr. Emile Colas at Opening Session of Annual Meeting of the Canadian Bar Association Banff—September 1971

Mr. President, M. le Bâtonnier de Paris, distinguished guests, dear Confreres, Ladies and Gentlemen:

As you are aware, the Conference of Commissioners on Uniformity of Legislation in Canada held last week its 53rd annual meeting at Jasper, Alberta. The President, Mr. P. R. Brissenden, Q.C., and the two Vice-Presidents could not attend on account of illness. I was thus requested as Honorary President to act as President of the annual meeting for the second year. The 10 provincial jurisdictions, the Yukon and the Northwest Territories as well as Canada were represented at the Conference by either their respective Deputy Attorneys General and Associate Deputy Attorneys General. There were also present the Ministers of Justice of Manitoba and British Columbia, as well as the Presidents or Executive Directors of the Law Reform Commissions of at least five Provinces.

The agendas of the Uniform Law Section and the Criminal Law Section were quite heavy but it was nevertheless possible to complete the work on time for the closing plenary session.

The future role and structure of the Conference were fully discussed at a special plenary session held on Thursday last and far-reaching decisions were arrived at unanimously. The Commissioners have agreed to ask each jurisdiction to contribute a much larger amount annually in order to guarantee the independence of the Conference and allow its executive to pay the services of a part-time Assistant Secretary who would come under the immediate control of the elected Secretary. It will also be possible to call meetings of the executive and of the various committees more regularly and also to accept urgent mandates from the various governmental jurisdictions.

It will thus be possible for the Secretary to:

(a) supervise more easily, through the Assistant Secretary, all arrangements with the various jurisdictions and to remind those responsible to get the work done and circulated in time for consideration by members of the Conference prior to its annual meeting;

(b) receive and circulate all reports from the jurisdictions of the Conference;

(c) collect and relate all information and material on work done by other bodies and especially the various Law Reform Commissions which are relevant to the work of the Conference;

(d) provide facilities for research, particularly when the Conference is asked to do something quickly; and

(e) assist the members and executive of the Conference to plan future projects.

I must say that at the opening session very interesting comments on the means by which the Commissioners can assist and be assisted by Canadian Law Reform Organizations were made by Mr. Hurlburt, Q.C., President of the Alberta's Institute of Law Research and Reform, and by Mr. Field, Q.C., one of its members.

Among the topics that were on the agenda of the Uniform Section and which have been completed this year were:

(a) Condominium Insurance Legislation;

(b) Uniform Age of Majority;

(c) Minimum Age for Marriage (which as you know is a federal matter);

(d) Occupiers Liability.

Here, I must say that we have drawn heavily on the Scottish Act which was passed in 1960. In doing so, we have achieved two principal objectives:

(i) eliminate the artificial distinctions between invitee, licensee and trespasser;

(ii) allow the ordinary rules of negligence to apply in relations between occupiers of premises and other persons, instead of artificial "common duty of care" as in the English Act of 1957.

The Commissioners have felt that in their view the Scottish Act admirably achieves the objectives previously referred to and furthermore, has been commended by the Court of Appeal of England who were critical of the English Act for its failure to deal with trespassers in the way the Scottish Act did (by eliminating any distinctions).

(e) Personal Property Security Act—

The special committee appointed in 1969 reported on policy and drafting and submitted a uniform act which was approved with some amendments;

(f) Presumption of Death Act;

(g) Protection of Privacy—

The Canada Commissioners have submitted a very extensive report on this subject to help the members of the Conference:

(i) delineating the areas in which legislation appeared to be needed to provide adequate safeguards against invasion of privacy, and

(ii) developing recommendations for consideration by the appropriate authorities relating to legislation for the protection of privacy in those areas.

The federal Bill C-252 entitled "An Act to amend the Criminal Code, the Crown Liability Act and the Official Secrets Act" which had its first reading on June 28th last was studied, and it was decided to investigate some of the aspects of the invasion of privacy coming within provincial jurisdiction such as credit bureaus, credit

reports, private investigation organizations, tort with respect to privacy, data banks and the law of evidence.

Drafts will be submitted by various provincial jurisdictions on these topics at the next annual meeting which will be held at Lake Beauport near Quebec the last week of August 1972.

This is, Mr. President, a very sketchy and incomplete report of the work done by the Uniform Law Section, but I hope that the proceedings of this year's Conference will be distributed to the Canadian Bar members as in the past.

For its part, the Criminal Law Section under the chairmanship of J. E. Warner, Q.C., had more than forty items on its agenda and was able to deal with all of them before the end of the Conference.

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

| | |
|---|---|
| Honorary President | Mr. P. R. Brissenden, Q.C., Vancouver |
| President | Mr. A. R. Dick, Q.C., Deputy Attorney General, Toronto |
| First Vice-President | Mr. R. H. Tallin, Legislative Counsel, Winnipeg |
| Second Vice-President | Mr. D. S. Thorson, Q.C., Associate Deputy Minister of Justice, Ottawa |
| Secretary | Mr. Robert Normand, Q.C., Associate Deputy Minister of Justice, Quebec |
| Treasurer | Mr. Howard E. Crosby, Q.C., Legislative Counsel, Halifax |

EMILE COLAS, Q.C.

# APPENDIX A

## AGENDA

### OPENING PLENARY SESSION

1. Opening of Meeting
2. Minutes of Last Meeting
3. President's Address
4. Treasurer's Report and Appointment of Auditors
5. Secretary's Report
6. Appointment of Resolutions Committee
7. Appointment of Nominating Committee
8. Publication of Proceedings
9. Law Reform and Uniformity
10. Future Role and Structure of Conference
11. Next Meeting
12. Adjournment

### UNIFORM LAW SECTION

1. Amendments to Uniform Acts—Report of Mr. Tallin (see 1970 Proceedings, page 35)
2. Contributory Negligence (Tortfeasors), Limitation of Actions, Interpretation Act—Report of Alberta Commissioners (see 1970 Proceedings, page 35)
3. Condominium Insurance Legislation—Report of Messrs. Tallin and Higenbottam (see 1970 Proceedings, page 43)
4. Consumer Protection—Report of Manitoba Commissioners (see 1970 Proceedings, page 42)
5. Family Relief Act—Report of Saskatchewan Commissioners (see 1970 Proceedings, page 36)
6. Judicial Decisions Affecting Uniform Acts—(see 1970 Proceedings, page 40)
7. Majority, Uniform Age of—(Added at the request of the Ontario Commissioners)
8. Minimum Age for Marriage—Report of Canada Commissioners (see 1970 Proceedings, page 40)
9. Occupiers Liability—Report of British Columbia Commissioners (see 1970 Proceedings, page 42)

10. Perpetuities—Report of the Alberta Commissioners (see 1970 Proceedings, page 43)
11. Personal Property Security Act—Report of committee consisting of Messrs. Bowker, Leal, Tallin and MacTavish (see 1970 Proceedings, page 41)
12. Presumption of Death Act (see 1970 Proceedings, page 43)
13. Protection of Privacy—Report of Special Committee (see 1970 Proceedings, page 37)
14. Reciprocal Enforcement of Custody Orders Act—(Added at the request of Saskatchewan Commissioners)
15. Survivorship Act—(see 1970 Proceedings, page 43)
16. 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. Juries—majority verdicts
2. Women on Juries in Criminal Cases
3. Section 717(3) of the Criminal Code
4. Section 413(2) of the Criminal Code—exclusive jurisdiction of Superior Court of Criminal Jurisdiction
5. Sections 191, 192, 193, 221, and 226A of the Criminal Code—criminal negligence in the use of aircraft where death does not ensue
6. Return of stolen merchandise to rightful owner and provision for secondary evidence; section 432 of the Criminal Code and an amendment to the Evidence Act
7. Criminal Code—restitution of property provisions
8. Disposition of unclaimed exhibits
9. Control of the drinking driver
10. Amendments to appeal procedure with respect to indictable offences: section 583(1)(a)(ii), or section 598
11. Section 325—burden of proof in offence of fraudulent manipulation of stock exchange transactions
12. Offence of possessing, without lawful excuse, any card or certificate of identification of another person

13. Establishment of the standardization of procedures for certifying analysts to conduct an independent analysis of the breath sample—section 224A(1)(c)(i), (f)(iii)(A); (5)(b)
14. Privileged communications between a solicitor and client—proposed amendment to the Criminal Code similar to section 126A of the Federal Income Tax Act
15. Section 316(1)(a) of the Criminal Code—threatening death or injury by letter, etc.
16. Publication containing instructions on how to commit criminal offences with a high degree of safety
17. Section 489 of the Criminal Code
18. Section 315(3) of the Criminal Code—harassing telephone calls to debtors by collection agencies
19. Section 224A of the Criminal Code
20. Section 467 of the Criminal Code—absolute jurisdiction of magistrate
21. Criminal Assizes—Quebec
22. Bail Registry
23. Section 391—Definitions relating to currency offences
24. The Report of the Royal Commission on the Status of Women in Canada and the criminal law
25. Section 162 of the Criminal Code—trespassing at night
26. Verdict of not guilty on account of insanity in summary conviction proceedings
27. Sentencing for soliciting for the purpose of prostitution, and male prostitution
28. Section 170(2) of the Criminal Code
29. Theft of telecommunications services
30. Auto Theft—obliteration of manufacturers' identifying numbers
31. Bail Bill—National manual on bail
32. Section 654(3) and (4) of the Criminal Code—civil disability arising out of conviction for certain offences
33. Contempt of court—section 9(1) of the Criminal Code
34. Sunday Observance Legislation—Report of the Ontario Law Reform Commission
35. Time for leave to appeal to the Supreme Court of Canada—section 598(1)(b) of the Criminal Code
36. Possession of firearms by persons of unsound mind

37. Probation orders—section 638(4)(c)—requirement that the court making the order inform the accused of the provisions of section 639(4) and of section 640A of the Criminal Code
38. Section 527A of the Criminal Code—Provincial Boards of Review
39. Resolutions passed by the Canadian Bar Association at its fifty-second annual meeting in Halifax, N.S. on Friday, September 4, 1970

## 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 66*)

*Remarks by Chairman of Meeting, Mr. Emile Colas*

I am sure you have appreciated the very interesting and stimulating thoughts that are contained in Pearley Brissenden's remarks and I hope that you will agree that some of his suggestions should be discussed in the course of this week. I believe that the necessary steps should be taken rapidly to adapt the work of our Conference to our changing times. Meanwhile, I suggest that the Conference send to Pearley Brissenden some tangible expression of our best wishes for a prompt recovery and that messages should also be forwarded by the secretary to our two vice-presidents.

Before passing on to the agenda, may I say that I hope this year the Conference will allow us a period of reflection on our own aims, activities and future. You may recall the discussions we had last year on the creation of a permanent secretariat and the views that were expressed at that time. You may also remember the new obligations and responsibilities that were bestowed upon us at the Hague Conference, Unidroit and special mandates that we have received from the Canadian Minister of Justice on topics that fall within the ambit of the concurrent jurisdictions of the provinces and the federal. But, for these reasons, we should remain aware of the problems that face our nation at the present time. Most of you are taking an active and personal part in the decision-making process of one or more of our Canadian governments. You have in your hands a very grave, and at the same time, challenging responsibility and you should not avoid or fail to fulfil that responsibility in an enlightened and dynamic way.

The events that took place in Quebec in October 1970 should serve as a valuable experience for the future as they have proved that our Canadian democracy is a very fragile institution and that the Canadian people are not fully protected at time of crisis. We should have proper permanent legislation that clearly defines the rights of the majority of the law abiding citizens and thus we could avoid in the future the floating and uncertain period in which we have lived and which, had it not been for the good common sense of the bulk of the Quebec population, could have been a disaster, first

for Quebec but also for the rest of Canada. Liberal democracy as we know it is possible only when everything goes on smoothly and works according to our own moral principles. Unfortunately the day it has become threatened by ideologies which are contrary to our own thinking and when illegal and fanatic methods are used to destroy our institutions, then we are faced with chaos. Let us not fall into the easy path of the language differences to explain the October events. Then we would be embarrassed to explain the present Irish situation as there all people speak English with the same accent. We have to realize honestly and objectively that our society is presently undergoing a profound transitory period and that world revolution is sought by the enemies of democracy which have been at work for the last hundred years and who feel that they are now able, through the results achieved in the destruction of the fundamental moral principles and the religious institutions, to achieve their goal of universal chaos under the black flag of anarchy.

Law drafters have a responsibility greater than politicians and we will have to answer for our deeds to our fellow Canadians if we do not fulfil our duty diligently, honestly and faithfully.

We must not be swayed by the minority cries which are inspired by the international Mafia of a pseudo intelligentsia whose morality has never gone further up than the belt and which has, through our ignorance, indifference and sheer lack of interest, occupied the prominent places of the media of information and even governmental bureaucracy.

We should see to it that the frightful proliferation of legislation should not become a new source of chaos where the indivdual is overwhelmed by the texts rather than by the spirit of the law. On the contrary, we should strive towards a higher quality of the text, a higher precision in the definition of the rights and obligations of the individuals and of the collectivity and we should avoid to allow the text to transgress fundamental and natural principles for the sake of satisfying vociferous minorities which favour all types of nonsense as part of a general desire to destroy democracy at any cost.

The time has come, even though it may be too late, to see that common sense be still the basis of our society. Notwithstanding the nonsense uttered in some sectors of our universities, especially in the social science departments, and in our media of information,

whether radio, television or newspapers, we find that fundamentally our active population still enjoys that great national quality which is common sense. We should find that same quality in our public men who seem to be swayed more often by the hues and cries of some editorialists who serve as spokesmen for subversive groups rather than by the real desires of the population upon whom are imposed solutions encouraged by minorities. We should not overplay the idea of a plural society. This is in fact a false problem that serves to satisfy the demands of vocal minority groups but which does not fulfil the real purpose of good legislation. We could also talk about the nonsense uttered about drugs, abortion and pornography. Life is a too valuable God blessed gift to allow people to destroy it.

Il est temps de mettre de l'ordre dans l'Etat à une époque où les conditions économiques et politiques deviennent de plus en plus complexes pour ne pas dire chaotiques. Les positions ambigues de législation à la mode forcent le témoin lucide à s'interroger sur l'avenir de notre société face à ces contradictions flagrantes. D'une part, on veut protéger le consommateur, on interdit la publicité sur la cigarette, on dépense des millions pour sauver ceux qui sont victimes des conséquences funestes du tabac et de l'alcoolisme et, d'autre part, l'on veut permettre la légalisation de la drogue sans avoir pesé toutes les conséquences d'une telle décision. Mais comme cela fait dans le vent, il ne faut pas reculer devant l'absurde.

Que dire de la pornographie qui envahit et pollue nos écrans, nos revues, nos journaux et place nos enfants dans un climat malsain et desséchant. La liberté de l'individu doit s'exercer dans le strict respect de la liberté d'autrui, et à chaque droit doit nécessairement correspondre une obligation réciproque et complémentaire. C'est à ce prix seulement que la législation peut être respectée et que le règne de la loi peut s'affirmer. Autrement l'on met en péril les institutions démocratiques qui sont issues de la volonté de la majorité et non de la fantaisie des groupes minoritaires, contestataires et marginaux.

Bien plus, on porte un coup mortel à l'ordre judiciaire qui, devant l'incertitude, l'imprécision et la contradiction d'une législation bâclée, doit jouer le rôle d'un législateur incapable d'expliquer sur la place publique les raisons de décisions qui peuvent devenir contraires aux fins de la justice.

We should have the courage to say so and to live our principles, if we still have some. Unfortunately, it seems that the law of silence has prevailed for too long, and that the silent majority has preferred to be shocked by the prevailing situation rather than to speak up and denounce the evils which it sees around it. It will take a lot of courage—a lot of energy—a lot of sacrifice—but it is at this cost alone that we can save our Canadian democracy and, at the end of the road, you can be sure that the sun shines.

# APPENDIX C

(*See page 67*)

## TREASURER'S REPORT

### FOR THE YEAR 1970-71

| | | |
|---|---|---|
| Balance on hand—August 4, 1970 | | $ 6,102.52 |
| **RECEIPTS** | | |
| Province of British Columbia<br>February 26, 1971 | $400.00 | |
| Province of Alberta<br>March 4, 1971 | 400.00 | |
| Bar of the Province of Quebec<br>March 12, 1971 | 100.00 | |
| Province of Manitoba<br>March 4, 1971 | 400.00 | |
| Government of Canada<br>April 13, 1971 | 400.00 | |
| Province of Prince Edward Island<br>April 13, 1971 | 200.00 | |
| Province of Saskatchewan<br>April 21, 1971 | 400.00 | |
| Province of Newfoundland<br>May 13, 1971 | 400.00 | |
| Province of New Brunswick<br>May 19, 1971 | 400.00 | |
| Province of Nova Scotia<br>June 25, 1971 | 400.00 | |
| Province of Ontario<br>August 16, 1971 | 400.00 | |
| | | 3,900.00 |
| Rebate of Sales Tax—Government of Canada | | 217.62 |
| Bank Interest—October 31, 1970 | | 67.96 |
| Bank Interest—April 30, 1971 | | 86.38 |
| TOTAL RECEIPTS | | $10,374.48 |

| | | |
|---|---|---|
| Total Receipts brought forward | $10,374.48 | |
| DISBURSEMENTS | | |
| J. W. Ryan | | |
| Petty Cash, October 21, 1970 | | $ 10.00 |
| Lowe-Martin Co. Ltd. | | |
| Printing Letterhead, November 27, 1970 | | 29.57 |
| Clerical Assistance | | |
| Honoraria, December 22, 1970 | | 225.00 |
| Emile Colas, February 3, 1971 | | |
| Travelling Expenses, October 18, 1970, Ottawa meeting | | 49.72 |
| P. R. Brissenden, February 22, 1971 | | |
| Travelling Expenses, October 18, 1970, Ottawa meeting | | 438.00 |
| Canadian Pacific Express Company, June 30, 1971, Shipping costs balance 1970 Proceedings | | 7.30 |
| Clerical Assistance | | |
| Honorarium, July 11, 1971 | | 100.00 |
| CCH Canadian Limited, July 11, 1971 | | |
| Printing 1970 Proceedings | | 6,141.21 |
| Lowe-Martin Company Limited, July 16, 1971, Printing Agenda | | 89.38 |
| TOTAL DISBURSEMENTS | | $ 7,090.18 |
| Cash in Bank | | 3,284.30 |
| | $10,374.48 | $10,374.48 |

Howard E. Crosby
Treasurer
August 16, 1971.

# APPENDIX D

(*See page 68*)

## SECRETARY'S REPORT

*Proceedings*

In accordance with the resolution passed at the 1970 meeting of the Conference (1970 Proceedings, page 33), 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.

When arrangements were to be made with the Executive Director 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, the office of the Executive Director of the Association informed your Secretary that the Canadian Bar Association had decided not to distribute copies of our Proceedings to the Council in future. This determination was made in the Fall but no notice of it was given to the Conference.

The cost of having the 1970 Proceedings printed was $6,141.21, including provincial and federal sales tax, a considerable increase over the 1969 costs which were $2,187.87, including tax. This increase occurred by reason of the volume of the 1970 Proceedings, a 12% increase in the printing rates and edits brought about by the great number of cross references within the body of the reports.

The gratitude of the Conference is extended to Mrs. Audrey Brady of the Department of Justice, Ottawa, who rendered valuable assistance by making arrangements for supervising the printing, proofreading and distribution of the Proceedings.

*Appreciations*

In accordance with the resolution adopted at the Closing Plenary Session of the 1970 Conference (1970 Proceedings, page 69), letters of appreciation were sent to all concerned.

*Sales Tax*

Applications for remission of sales tax amounting to $919.09 paid in respect of the printing of the 1970 Proceedings were made to the federal government and the Ontario government.

In addition, an application for remission of sales tax amounting to $13.38 paid in respect of the printing of the 1971 Agenda was made to the federal government and the Ontario government.

*In Memoriam*

Since the last meeting of the Conference, we have lost an ex officio member of the conference, a member of the Conference and a former member of the Conference.

*Honourable J. Elmer Blanchard, Q.C.*, former Attorney General of the Province of Prince Edward Island, ex officio member of the Conference, and one of the hosts of the Conference in 1970, died shortly after the Conference last year.

*Antonio Dubé, C.R.*, former Deputy Minister of Justice, Quebec, and Chairman of the Criminal Law Section of the Conference, died suddenly in December, 1970.

*L. J. Salembier*, who became a Commissioner representing Saskatchewan in 1966, died in Ottawa in July, 1971.

I am sure that all members of the Conference join in recording our deep sense of loss occasioned by their deaths.

*UNIDROIT*

In 1954, the then Secretary of the Conference, Mr. Henry Muggah, wrote a report on the Conference for the Unidroit Yearbook. In 1969, the officials of Unidroit asked me to bring that report up to date. In collaboration with Mr. Gregoire Lehoux, a student at the University of Ottawa, I had a report prepared, in French and English, for the Unidroit Yearbook. At the request of the President, Mr. Brissenden, I have had copies of that report prepared for those members of the Conference who may be interested.

*Hague Conference on Private International Law*

*International Institute for the Unification of Private Law (Unidroit)*

In August, a letter, a copy of which is appended, was received from Mr. T. B. Smith, Q.C., Director of the Advisory and International Law Section of the Department of Justice, Ottawa. The reports and other documents referred to in that letter are available for the perusal of the members of the Conference. The Conference may wish to consider how it can best respond to the letter of Mr. Smith.

*General*

Your Secretary regrets any inconvenience caused the members of the Conference by the delay in preparing the 1970 Proceedings. Apart from the volume of the Proceedings and the difficulties encountered in preparing them, the services of the editing staff of the Legislation Section of the Department of Justice were not available during the winter of 1970-71 to assist in preparing these Proceedings and the time available to your Secretary for this purpose was considerably reduced by circumstances beyond his control.

J. W. RYAN
Secretary

Dear Mr Secretary:

The Department of Justice, as National Organ of the Hague Conference on Private International Law and as the Department responsible for the administration of the Canadian participation in the International Institute for the Unification of Private Law (UNIDROIT), has noted the interest recently expressed by the Conference in the work of the Hague Conference and UNIDROIT and has considered with great interest the various reports and studies prepared for the Conference in this regard.

The Department of Justice has noted the work presently being undertaken by the Conference on the Draft Uniform Law on the Law Applicable to Traffic Accidents, pursuant to the Hague Convention of 1968 on the Law Applicable to Traffic Accidents. I forward to you under cover of this letter for your information and for whatever attention you may deem appropriate the Convention on the Recognition of Divorces and Legal Separations and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters also adopted by the Hague Conference in 1968.

The Department of Justice, as National Organ of the Hague Conference, has lately received the Report and Questionnaire on Maintenance Obligations in Respect of Adults in the Field of Private International Law. I forward this document to you for your information and for whatever further action you may deem appropriate I would note in this regard that the National Organ intends to send replies to the Permanent Bureau of the Hague Conference in the month of October, 1971. Any comments which the Conference may wish to make upon this Report and Questionnaire will be received with great interest.

Two Special Commissions of the Hague Conference, namely, the Special Commission on Products Liability in the Conflict of Laws and the Special Commission on Succession have lately completed work on the preparation of draft conventions to be submitted to the twelfth session of the plenary Hague Conference, to be convened during the autumn of 1972. For your information and for any other action which you may deem appropriate, I am enclosing a copy of the Report of the Special Commission on Products Liability in the

Conflict of Laws. Unfortunately, the French text of this Report has not yet been prepared. The Report of the Special Commission on Succession has not yet been prepared; it is therefore only possible to send you an unofficial text of the Draft Convention at the present time.

A Canadian delegation attended the meeting of the Committee of Government Experts on the Form of Wills convened by UNIDROIT in May, 1971. For your information and for whatever action you may deem appropriate, I am enclosing a copy of the Draft Convention providing a uniform law on the Form of Wills together with the Report of the UNIDROIT Secretariat on that meeting. Unfortunately, the English texts of these documents have not yet been issued.

The question of ensuring full federal-provincial co-operation with respect to Canadian participation in the Hague Conference and UNIDROIT and other organizations in this field is presently under study in the Department of Justice. Any recommendations and comments which the Conference may wish to make upon this important subject will be studied with great interest by the Department of Justice.

Yours very truly,

T. B. SMITH,
Director,
Advisory and International Law Section,
Department of Justice.

# APPENDIX E

(*see page 69*)

## COMMENTS ON THE MEANS BY WHICH THE COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA (THE COMMISSIONERS) CAN ASSIST, AND BE ASSISTED BY CANADIAN LAW REFORM ORGANIZATIONS

### I INTRODUCTION

The purpose of these comments is to outline the organization and modus operandi of Alberta's Institute of Law Research and Reform (The Institute) and to then suggest areas in which

(i) Law Reform organizations need help from the Commissioners, and

(ii) the Commissioners can be assisted by the Law Reform organizations.

The Commissioners have been in operation much longer than any of the formal Law Reform organizations in Canada. It is only in the very recent past that the various Canadian jurisdictions have set up law reform organizations, but the trend in this direction has accelerated rapidly. The jurisdictions that now have such bodies and the year in which they came into being[1] are:

(1) 1955, Quebec, Revision of Civil Code,

(2) 1964, Ontario, Law Reform Commission,

(3) 1967, Alberta, Institute of Law Research and Reform

(4) 1969, British Columbia, Law Reform Commission,

(5) 1969, Nova Scotia, Law Reform Advisory Commission,

(6) 1970, Prince Edward Island, Law Reform Commission,

(7) 1970, Manitoba, Law Reform Commission

(8) 1970, Canada, Law Reform Commission,

(9) 1971, Saskatchewan, Law Reform Commission.

There are now such a large proportion of Canadian jurisdictions that have law reform organizations, that some of you, or your sponsoring governments may raise the question as to whether the Commissioners have ceased to serve a useful purpose, or if some purpose survives, what is that purpose?

[1] In each case except Alberta the date shown is that of the authorizing statute.

In the view of the Institute the answer to these questions is that the Commissioners can, and we expect will, perform an even more useful role in the future, and we wish to outline to you how this might be achieved.

In order to put these suggestions forward in a clear way, we propose to outline for you the organization of the Institute and its working procedure.

## II ORGANIZATION OF THE INSTITUTE

The Institute came into existence by a contract, effective 1 November 1967 between the Law Society of Alberta, the University of Alberta, and the Attorney General of Alberta, and still operates under that agreement. It does not have statutory authority. The agreement provides (as amended) for an Institute Board consisting of eight persons. These eight are:

The Director—jointly appointed by the Institute Board and the University, whose full time responsibility is to the Institute

1 Member appointed by the Law Society

1 Member appointed by the Attorney General

1 Member appointed by the Faculty of Law

3 Members appointed by the Institute's appointed members, at present these three are one academic lawyer and two practitioners.

The eighth member is the Vice-President Academic of the University.

The Board has power to appoint non-voting advisory members, of whom there are presently three.

A glance at the foregoing will indicate that the working membership of the Board is seven persons, and those seven are:

the Director,
a lawyer from the Attorney-General's Department,
two academic lawyers,
three practitioners.

This "mix" of legal talent has proven very valuable. The academics know the law and explain it to the practioners, and the

practitioners have a strong sense of what is practical and will function, and explain these mundane matters to the academics.

Our experience, which we are sure is the same elsewhere, has been that in studying law reform this "balance" of talents is sound.

Our most serious deficiency is the lack of a legislative draftsman on the Board.

## III MODUS OPERANDI

1. The Board presently meets two full days a month, and operates from a written agenda circulated in advance to its members.

2. The procedure that is followed in the selection and subsequent work on a law reform topic is, generally speaking, this—

*Step One* —Selection of the topic. The topic may originate via a request from the Attorney General (Guarantor's Acknowledgement Act), the Law Society (Family Court Structure), or may be proposed by a member of the Institute (Rule against Perpetuities). The Board then debates whether the topic is of sufficient importance to justify a study, and if so, what priority should be allotted to it.

*Step Two* —If the Board decides to proceed with a topic, the Director has the responsibility of retaining a suitable expert in the field to do a research paper for the Institute. When the right person has been commissioned, he is asked to give an estimate on when his paper will be completed.

*Step Three*—Liaison between the Director's office and the researcher to ensure the project keeps moving and to ensure that the work is done in accordance with the program anticipated, so that the study does not go off on a tangent.

*Step Four* —The research paper is completed and delivered to the Institute. All Board members (other than the Vice-President Academic) will study it, and the Director's office will also do a point by point summary of the various items which will have to be settled by the Board members. This summary will serve (usually) as the agenda for debate on the topic and serves a very useful purpose in keeping the discussion under control and in maintaining a logical sequence.

*Step Five* —Draft working papers. When the points are settled in the debate, the Director's office will begin drafting the formal report or reports. These drafts usually point up areas that have been inadequately considered or which are inconsistent in treatment, resulting in these matters being referred back to the Board for decision.

*Step Six* —Wherever possible the Board will submit drafts of its tentative reports, or even working papers, to people or organizations working in areas of law involved. The comments of those to whom the drafts are submitted are invited, and the Board will reconsider points where useful suggestions are made.

*Step Seven*—Publication of final reports. The Institute's reports which are a summary of the law, coupled with recommendations, are not subject to any restriction as to release. They are sent to the Law Society and to the Attorney General before public release as a matter of courtesy.

*Step Eight*—Follow up. The Institute attempts to assist legislative counsel with legislation by providing explanation as to background law, drafting precedents from other jurisdictions, etc.

We are not certain that other Law Reform bodies proceed in exactly this way, but we believe most do follow procedures similar in essential points. The result is usually slow to attain, but thorough, and generally acceptable to those responsible for legislative action.

## IV AREAS IN WHICH THE UNIFORMITY COMMISSIONERS CAN HELP LAW REFORM ORGANIZATIONS

If a Law Research organization has done an extensive study on a topic and the home province decides to implement the recommendations, it may produce a marked change, and hopefully, an improvement in the law on that subject. It would be most unfortunate if this improvement cannot be passed on to the other Provinces. We do not suggest it be swallowed whole, but we do think that a great deal can be accomplished in minimizing duplication of research effort, and in producing standardization of legislation where the same point is being legislated.

An interesting illustration of where the Commissioners could be very helpful is the modification of the Rule in *Saunders v. Vautier.*

It will be recalled that the rule, stated in over simplified form, is that where property is vested absolutely in an adult person (or persons) and no other person has any right as to income or capital, then attempts by the settlor or donor to dole out, or otherwise defer immediate enjoyment are ineffectual, and the owner of the beneficial interest can call for immediate delivery of the whole of the fund. The Institute has examined this rule and is in the course of preparing its formal report which will recommend that the rule be changed so that the beneficiary will be required to persuade the Court that he should have immediate enjoyment of the property before he can get it. This is a change which will materially alter the law of wills and trusts, but, without the Commissioners help, how will the change operate? A beneficiary seeking to obtain immediate enjoyment of the property may assert as against the Trustee that

(i) the law applicable is that of another Province, because he is there, or the trust property is there, or

(ii) that the jurisdiction in which proceedings are to be brought to test his rights are elsewhere than Alberta.

Uniform treatment of this subject across the Country would be highly desirable.

We wish to conclude this part with a summary of those areas in which the Commissioners can assist law reform bodies,

(1) to assist in funnelling research information to cut down duplication of effort,

(2) to examine law reform recommendations for implementation in other provinces,

(3) to assist greatly in producing standardization of legislative language on these topics,

(4) to assist generally with drafting legislation to implement the reforms.

## V AREAS IN WHICH LAW REFORM ORGANIZATIONS CAN ASSIST THE COMMISSIONERS

1. One area is to provide to the Commissioners the research background on a topic which the Law Reform body has studied and which the Commissioners wish to pursue. There was a useful illustration of this three years ago when the Commissioners wanted to examine quickly the problems relating to legislation on compensation for victims of crime. The Institute's research on the topic made

it relatively easy to isolate the problems while at the same time leaving the Commissioners free to adopt any solution on any facet of the subject that seemed to meet the Commissioners' requirements.

The Commissioners have some difficulty mustering research in depth. Why not pick the brains of the Law Reform bodies?

2. We do not see why the Commissioners should not propose to any of the Law Reform bodies that a certain topic appears to be treated inconsistently in various provinces, and that the Commissioners hope that uniform legislation on the topic can be achieved. Why couldn't the Law Reform body to whom the request is made undertake a research of the topic and provide the results of that research to the Commissioners?

3. We believe the Law Reform organization in each jurisdiction can play a part in supporting the Commissioners' proposals. When the Commissioners recommend uniform legislation on a topic, it seems logical that the Law Reform organizations will support those recommendations and assist in their implementation.

If such a procedure were evolved, we suggest it probably would

(a) give greater depth to research on any topic than the Commissioners are presently equipped to provide,

(b) give considered recommendations for reform in a point by point form so as to shorten and sharpen debate on them by the Commissioners,

(c) increase the volume of material that the Commissioners can effectively handle because one very slow step in the process, that of the intensive background study, could in these cases be eliminated.

## VI THE CRIMINAL SIDE

The criminal side of Uniformity is largely devoted to matters under Federal jurisdiction.

We are not certain what links presently exist between the Federal Law Reform Commission and the Uniformity Commissioners.

We would expect that many of the points we have raised in discussing the relationship of the Commissioners with Law Reform Organizations in regard to the civil side would be equally applicable to the relationship between the criminal side and the Federal Law Reform Commission. Mutual assistance between these bodies appears to us to be logical and in the public interest.

# APPENDIX F

(*See page 70*)

## THE CONFERENCE

### POLICY AND PROCEDURE

1. *Introduction*

Although this paper is prompted by the question of whether or not the Conference should establish a permanent secretariat it will raise substantive and procedural matters. Most of the matters are not new. They have been from time to time the subject of discussions, reports and papers, some of which are referred to below. The proposal that the Conference establish a permanent secretariat affords the opportunity of a fresh look at what we are doing, how we are doing it and what changes should be made to improve the work and value of the Conference. Questions will be asked but not answered. Points will be raised without comment.

2. *History*

As a background it is not only desirable but essential that each Commissioner again read and consider

(i) Uniformity of Legislation in Canada—an outline by L. R. McTavish, K.C., Canadian Bar Review, January 1947, page 36—Reprinted in pamphlet form 1949;

(ii) the Rutherford Report, 1954 Proceedings, page 102—reprinted in pamphlet form 1957;

(iii) presidential address of Mr. W. F. Bowker, Q.C. 1965 Proceedings, page 16;

(iv) proposal of Emile Colas, C.R., our Honorary President, 1969 Proceedings, page 22. (Copies of letter and proposed resolution referred to may be obtained from the Secretary).

3. *Résumé of meeting in Ottawa on 18 October, 1970 with executive of the Canadian Bar Association*

This meeting was held upon the invitation of Mr. Lorne Campbell, Q.C., President of the Association. The Conference was represented by Mr. Colas, Honorary President, Mr. Brissenden, President, Mr. Allan Leal (on behalf of the first Vice-President, Mr. Alcombrack) and Mr. Ryan, Secretary. The invitation was made as

a result of discussions which had taken place between Mr. Colas and Mr. de Grandpre regarding the establishment of a secretariat.

The work of the Conference was summarized, how it operates, how it is financed, possible advantages of coordination on a permanent basis with law reform bodies in Canada, legal researchers for the C.B.A. and law faculties. It became clear that probably the Conference's only source of funds for a secretariat, amounting to possibly $50,000.00 or more per annum, would be the Provincial and Federal governments. It was agreed that if a joint secretariat were established it should be on the basis of shared accommodation and equipment only. Personnel employed and paid by each of the C.B.A. and the Conference would be independent and subject only to direction and control of each employer.

It was suggested by the C.B.A. that there might be advantages if the C.B.A. made representations on behalf of the Conference to the governments involved for the necessary moneys. It was agreed that Mr. John Farris, Vice-President of C.B.A., and your President would meet to consider the nature of a brief which might be used for this purpose.

The meeting was exploratory and no commitments were made by the Commissioners attending on behalf of the Conference. Soon after the meeting your President told Mr. Farris that the meeting between them must be postponed until it was decided by the Conference what should be done.

4. *Permanent Secretariat*

For the purpose of consideration there follows a list of functions which might be performed by a secretariat. The list is not exhaustive but it includes ideas expressed either in the past or recently by members of the Conference. The secretariat might

(a) be the custodian of the archives and records of the Conference;

(b) perform the work presently done by the Secretary of the Conference;

(c) supervise all assignments to the various jurisdictions and remind those responsible to get the work done and circulated in time for consideration by members of the Conference prior to its meeting;

(d) receive and circulate all reports;

(e) collect and relate all information and material on work done by other bodies which are relevant to the work of the Conference;

(f) provide or obtain facilities for research, particularly when the Conference is asked to do something quickly;

(g) assist the members and executive of the Conference to plan future projects;

(h) provide personnel to assist in implementing international conventions by uniform or model statutes; and

(i) scrutinize each piece of legislation (civil and criminal) implementing recommendations of a law reform body and report thereon to the Conference.

5. *Matters for consideration to improve the work and value of the Conference*

(i) Shorter annual agenda.

(ii) Before a new matter is placed on the agenda or a new project undertaken evidence should be obtained from Attorneys-General or Ministers of Justice of at least three jurisdictions indicating the likelihood that a uniform Act produced by the Conference would be adopted in their jurisdictions.

(iii) What steps, including the appointment of a standing committee, should be taken so that the Conference is a source of informed opinion for Federal and Provincial authorities regarding conventions arising from Canada's participation in the Hague Conference, Unidroit, Unicitral and I.M.C. and, in particular, to

(a) prepare for and participate in conferences, and

(b) implement agreements by drafting necessary legislation for both Provincial and Federal levels.

(iv) Decide whether a practical difference exists between law reform and uniformity.

(v) Whether standing committees, including more than one Provincial jurisdiction, should be used for special tasks. (Example: model Personal Property Security Act.)

(vi) If additional funds are required should they be requested by a resolution of the Conference followed by direct

representations from the Commissioners of each jurisdiction or by the executive of the Conference or by the C.B.A.

(vii) Whether changes, if any, should be made in numbers and personnel of the Conference.

(viii) In arriving at any decision care must be exercised so that no step will be taken

(a) which would result in the Criminal Law Section separating from the Conference;

(b) to diminish the main function of the Conference, namely, uniformity.

(ix) Whether a representative on the Conference from each of the law reform bodies is sufficient coordination.

(x) Whether the Conference should be concerned directly with law reform.

(xi) Whether, instead of a secretariat to include a researcher as well as clerical staff, the Conference should engage a full-time secretary.

(xii) Should semi-annual meetings be held of
(a) the Conference;
(b) the executive.

(xiii) What technological aids, for example, computers, should be used to further the work of the Conference.

6. *Conclusion*

A mid-week plenary session of the Conference will be held at Jasper to discuss, consider, answer and decide the questions and matters raised in this paper.

The Conference can be proud of its more than half century of accomplishment. However the immediate past decade of that half century has brought sweeping changes: social, economic, technological; changes in outlook, thinking and relationships on international, Federal, Provincial and personal levels. It is time therefore for the Conference to pause and consider what it should do to fulfil its responsibilities in this changed environment.

I urge each Commissioner to consider the questions asked and the matters raised but not to reach any irrevocable answers or conclusions until the questions and matters are debated. The debate should prove interesting and stimulating and it will be important.

One can expect wit and wisdom. Hopefully there will be levity to leaven differences of opinion. Not only will your deliberations help us to arrive at sound conclusions but the subject deserves your attention as the Conference considers how to prepare for the last three decades of the 20th century.

P. R. Brissenden
President

## APPENDIX G

(*See page 76*)

## AMENDMENTS TO UNIFORM ACTS, 1970-71

Report of R. H. Tallin

*Assignment of Book Debts Act*

New Brunswick amended its Assignment of Book Debts Act in 1970 for purposes of adaptation to provincial requirements.

*Bills of Sale Act*

Alberta amended section 31 of its Bills of Sale Act in 1970 to make the renewal provisions binding upon the Crown.

Alberta further amended its Act in 1971 in two respects:

1. The provisions in section 10 respecting Bills of Sale covering motor vehicles were made applicable to Bills of Sale covering aircraft and trailers.
2. Prior to amendment, section 16 of the Act provided for the registration of both complete and partial discharges of a chattel mortgage. The amendment replaces this with a new section which provides that, where a chattel mortgage has been paid off in full, the mortgagee must deliver a memorandum thereof to the mortgagor for registration, but where it has been paid off in part, the mortgagee must deliver the memorandum only upon the mortgagor's demand.

The New Brunswick Act, similar to but not identical with the Uniform Act, was amended in 1970, again for purposes of adaptation to provincial requirements.

*Conditional Sales Act*

New Brunswick amended its Conditional Sales Act in 1970, also for purposes of adaptation to provincial requirements.

*Contributory Negligence Act*

British Columbia repealed section 6 of its Contributory Negligence Act in 1970, in line with the prior repeal in 1969 of section 71 of its Motor Vehicle Act upon which section 6 was based. As a result, the owner or driver of a vehicle may now presumably be

held fully or contributorily liable for injury to a gratuitous passenger in the same way as for injury to a paying passenger.

In the same year, British Columbia further amended its Contributory Negligence Act by adding section 10 which makes the Act applicable in cases where the injured party could have avoided the consequences of the other's negligent act, but negligently or carelessly failed to do so.

*Criminal Injuries Compensation Act*

Ontario passed The Compensation for Victims of Crime Act in 1971, not identical with, but similar to the Model Act.

Manitoba passed a Criminal Injuries Compensation Act in 1970 and amended it in 1971. The Act varies from the Uniform Act in several important aspects. In particular, the method of fixing compensation is based on Workmen's Compensation formulae.

*Devolution of Real Property Act*

Alberta amended its Devolution of Real Property Act in two respects in 1970:

1. Section 12 was amended to provide that an infant is bound by a sale of real property in which he is interested, where the sale is made with the written consent or approval of the Public Trustee or a Court order.
2. The second amendment was made pursuant to the recommendations of Alberta's Institute of Law Research and Reform and permits an executor or administrator, who is empowered to sell real estate, to grant an option to purchase the real estate if the period for exercising the option is not longer than one year and subject to the same requirements as in the case of an outright sale.

*Human Tissue Act*

Ontario passed The Human Tissue Gift Act in 1971, being substantially the same as the Model Act recommended by the Conference of Commissioners. This enactment will be the subject of a report by the Ontario Commissioners.

*Intestate Succession Act*

Alberta amended its Intestate Succession Act in 1970 to conform with the amendment to the Uniform Act made by the Conference of Commissioners in 1958.

The amendment replaces sections 15 and 17 of the Alberta Act with a new section 15 which is identical with section 16 of the Model Act and provides more complete coverage in cases of intestate successions where an illegitimate child or person is involved.

Saskatchewan similarly amended its Act in 1971, replacing existing provisions respecting succession by or from an illegitimate child or person, with a new section identical with section 16 of the Model Act.

*Reciprocal Enforcement of Maintenance Orders Act*

New Brunswick amended section 7 of its Reciprocal Enforcement of Maintenance Orders Act in 1970 by making its Deserted Wives and Children Maintenance Act applicable to orders made in the province to enforce maintenance orders of a reciprocating jurisdiction. The purpose of the amendment was to remedy the situation resulting from the taking away of civil jurisdiction from magistrates in the province.

In the same year, Nova Scotia added subsection (4) to section 6 of its Act, making its Summary Convictions Act and its Wives' and Children's Maintenance Act applicable to proceedings taken under the Reciprocal Enforcement Act.

In 1971, British Columbia adopted one of the amendments recommended by the 1970 Conference of Commissioners, by adding section 7A to its Reciprocal Enforcement Act. The new section provides for appeals from orders made in the province to enforce maintenance orders of a reciprocating jurisdiction, and also makes relevant provisions of the province's Wives' and Children's Maintenance Act applicable.

*Trustee Investments Act*

The Model Act, as amended, was adopted by New Brunswick and N.W.T. in 1970.

*Vital Statistics Act*

In Saskatchewan, where The Vital Statistics Act is similar in effect to the Model Act, subsection (1) of section 8 of its Act was amended in 1971 to conform with the practise not to register a birth without a given name.

In addition, sections were added to the Act dealing with

1. changes of registered names of children of void marriages; and
2. changes of names of illegitimate children.

*Wills Act*

Alberta amended its Wills Act in 1970, pursuant to the recommendation of its Institute of Law Research and Reform, to provide that, unless a contrary intention appears in a will, a power of sale in the will includes a power to grant an option to purchase, where the period of the option is not longer than one year.

Saskatchewan made the same amendment to its Wills Act in 1971. In addition, Saskatchewan adopted section 34 of the Model Act respecting the status of illegitimate children in testamentary dispositions.

Several provinces have enacted Age of Majority legislation. This legislation affects many Uniform Acts where age is a factor. e.g. The Wills Act.

Several provinces amended the rules of the road legislation, some of which was similar to the uniform rules of the road.

# APPENDIX H

(*See page 76*)

## THE HUMAN TISSUE ACT

### Report of the Ontario Commissioners

It will be recalled that at last year's Conference Mr. Leal presented a progress report and a draft Act that was then being considered for legislative action by the Ontario Government (1970 Proceedings, pp. 138-150).

After discussion of the draft Act, a resolution was passed (1) approving of it as presented by the Ontario Commissioners with the changes in the text agreed upon during the discussion and (2) recommending it for enactment in that form (1970 Proceedings, p. 36).

In June of this year the Ontario Government introduced in the Legislature a Bill that was substantially the Model Act recommended by this Conference. This Act received Royal Assent and came into force on the twenty-eighth of last month.

A comparison of the Model Act (1970 Proceedings, pp. 151-156) and the Act that is now law in Ontario (a copy is attached to this report) shows the following differences:

1. The Ontario Act has the word "Gift" after the word "Tissue" in the long and the short titles.
2. Clause (g) of subsection (1) of section 5 of the Model Act does not appear in the Ontario Act.
3. A new subsection (2) appears in section 5 of the Ontario Act.
4. The first comma in the second line of subsection (2) of section 5 of the Model Act has been omitted in what is subsection (3) of section 5 of the Ontario Act.
5. Subsections (1) and (2) of section 7 of the Model Act have been replaced in the Ontario Act by three subsections.
6. Section 9 of the Model Act does not appear in the Ontario Act but a somewhat similar provision appears as section 12 of the Ontario Act.

7. The comma in the third line of section 11 of the Model Act has been moved forward to follow the word "transplant" in the corresponding provision (section 10) of the Ontario Act.
8. Section 15 of the Ontario Act, a transitional provision, does not appear in the Model Act.

No doubt the subject matter of this report would in the ordinary course be dealt with under the head "Amendments to Model Acts". However, due to the fact that the Ontario Act was not passed until July 28, it would not likely be possible for Mr. Tallin to include it in his report this year.

The Ontario Commissioners feel that the Conference will want to be brought up to date on this matter and therefore take this first opportunity so to do, for whatever action the Conference may think is appropriate.

H. Allan Leal
of the Ontario Commissioners

Toronto,
August 12, 1971.

STATUTES OF ONTARIO, 1971

CHAPTER 83

BILL 65 1971

Royal Assent July 28, 1971

# The Human Tissue Gift Act, 1971

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 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.

(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 of person under age, etc

(3) A consent given under this section is full authority for any physician, Consent is full authority to proceed

(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.

(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. Stale consent void

## PART II

### *POST MORTEM* GIFTS FOR TRANSPLANTS AND OTHER USES

4. (1) Any person who has attained the age of majority may consent, Consent by person for use of his body after death

(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.

(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. Where donor underage

(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 is full authority exception

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,

may consent,

(g) in a writing signed by the spouse, relative or other person; or

(h) orally by the spouse, relative or other person in the presence of at least two witnesses; or

(i) 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.

Prohibition

(2) No person shall give a consent under this section if he has reason to believe that the person who died or whose death is imminent would have objected thereto.

Consent is full authority, exceptions

(3) 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.

(4) In subsection 1, "person lawfully in possession of the body" does not include, Person lawfully in possession of body, exceptions

(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.

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* 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*. Coroner's direction

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. Determination of death

(2) No physician who has had any association with the proposed recipient that might influence his judgment shall take any part in the determination of the fact of death of the donor. Prohibition

(3) No physician who took any part in the determination of the fact of death of the donor shall participate in any way in the transplant procedures. Idem

(4) Nothing in this section in any way affects a physician in the removal of eyes for cornea transplants. Exception

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. Where specified use fails

## PART III

GENERAL

Civil liability

9. 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

10. 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

11. (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.

Lawful dealings not affected, exception

12. Any dealing with a body or part or parts thereof that was lawful before this Act came into force shall, except as provided in this Act, continue to be lawful.

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*.

Transitional provision

1962-63, c. 59

15. A request made or an authorization given under *The Human Tissue Act, 1962-63* before this Act came into force may be acted upon in accordance with that Act notwithstanding the repeal of that Act.

## PART IV

MISCELLANEOUS

16. *The Human Tissue Act, 1962-63* and *The Human Tissue Amendment Act, 1967* are repealed. 1962-63, c. 59; 1967, c. 38, repealed

17. This Act comes into force on the day it receives Royal Assent. Commencement

18. This Act may be cited as *The Human Tissue Gift Act, 1971*. Short title

# APPENDIX I

(*See page 76*)

## HUMAN TISSUE GIFT ACT

(Revised 1971)

Interpretation

1. In this Act,

(a) "consent" means a consent given under this Act;

(b) "physician" means a person (to be adapted to refer to licensing or registration under provincial Medical Act);

(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 for 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 afree and informed decision, as the case may be.

(3) A consent given under this section is full authority for any physician. Consent is full authority to proceed

(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.

(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. Stale consent void

## PART II—*POST MORTEM* GIFTS FOR TRANSPLANTS AND OTHER USES

4. (1) Any person who has attained the age of majority may consent. Consent by person for use of his body after death

(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.

(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. Where donor under age

(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 is full authority, exception

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, Consent by spouse, etc., for use of body after death

(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,

may consent,

(g) in a writing signed by the spouse, relative or other person; or

(h) orally by the spouse, relative or other person in the presence of at least two witnesses; or

(i) 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.

Prohibition

(2) No person shall give a consent under this section if he has reason to believe that the person who died or whose death is imminent would have objected thereto.

Consent is full authority, exceptions

(3) 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

(4) 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);

(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 refer to provincial provisions for administration of estates by the Crown);

(c) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or

(d) the superinendent 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 of *The Coroners Act* (to be adapted to refer to provincial provisions making the death a coroner's case) 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 of *The Coroners Act* (to be adapted to refer to provincial provision empowering coroner to permit interference with body after death).

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 who has had any association with the proposed recipient that might influence his judgment shall take any part in the determination of the fact of death of the donor.

Idem

(3) No physician who took any part in the determination of the fact of death of the donor shall participate in any way in the transplant procedures.

Exception

(4) 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.

## PART III—GENERAL

Civil liability

9. 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

10. 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

11. (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.

Lawful dealings not affected, exception

12. Any dealing with a body or part or parts thereof that was lawful before this Act came into force shall, except as provided in this Act, continue to be lawful.

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.

Application of *The Coroners Act*

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 J

(*See page 77*)

## JUDICIAL DECISIONS AFFECTING UNIFORM ACTS, 1970

REPORT OF NOVA SCOTIA COMMISSIONERS

This Report is made in response to the Resolution adopted at the 1970 Conference (1970 Proceedings p. 40) and consists of an Appendix with a list of judicial decisions and a summary note for each case.

The Appendix is in the same form as in the past and was prepared by reference to the Table of Model Statutes which appears at page 16 of the 1970 Proceedings and the volume of the Canadian Current Law for 1970. The Report covers the calendar year 1970 only.

HOWARD E. CROSBY *for*
Nova Scotia Commissioners

## JUDICIAL DECISIONS AFFECTING UNIFORM ACTS, 1970

### APPENDIX

*Accummulations*

1. *Re Major* (1970) 2 O.R. 121, Ont. High Ct., Wells C.J., Ont. Accummulation Act.

NOTE:—Where surplus income was accumulated for twenty-one years after testator's death and was then required to be distributed, a reserve set up out of such surplus to ensure certain annuities was not an accumulation within the Act.

*Bills of Sale*

2. *Active Petroleum Products Ltd. v. Duggan* (1970) 72 W.W.R. 486, B.C. Ct. of Appeal, B.C. Bills of Sale Act.

NOTE:—The decision of Seaton J., that a chattel mortgage was ineffective because the instrument showed a "model number" in addition to a "serial number", was affirmed. (See 1969 Proceedings, p. 165).

3. *Canadian Acceptance Corp. Ltd. v. Mowatt* (1970) 2 N.B.R. (2d) 390, N.B. Sup. Ct., Barry J., N.B. Bills of Sale Act.

NOTE:—The requirement of Section 24 of the Act (See Uniform Act, Sec. 20(5)), that an affidavit of an agent or other representative must state that the deponent is aware of the circumstances and has personal knowledge of the facts, applies only to an affidavit "of bona fides" even though the quoted words are not contained in the provision.

*Conditional Sales*

4. *Re Frontier Construction & Development Ltd.* (1970) 12 D.L.R. (2d) 410, B.C. Sup. Ct., Dryer J., B.C. Conditional Sales Act.

NOTE:—Where the time for registration was extended pursuant to the provisions of the Act and bankruptcy of the purchaser occurred, it was held that the saving provision which protected persons who acquired title in the interim "by purchase and possession" did not extend to the trustee in bankruptcy The provisions of the B.C. Act differ from those of the Uniform Act and the latter might have a different result. (See Sec. 19).

*Contributory Negligence*

5. *Anders v. Sim* (1970) 73 W.W.R. 2, 263, Alberta Sup. Ct., Riley J.

NOTE:—The theory that failure to use a seat belt constituted contributory negligence in a fatal motor vehicle accident was again rejected by Riley J. who held the defendant solely liable for the accident.

*Defamation*

6. *Barber v. Lupton* (1969) 71 W.W.R. 383, Man. Sup. Ct., Hall J., Man. Defamation Act.

*Limitation of Actions*

NOTE:—The provision of the Defamation Act requiring notice of intention to bring an action was reviewed. It was decided that the purpose of the requirement was to give the defendant the opportunity to make amends before the action so that substantial compliance was sufficient.

7. *Philippon et al v. Legate et al* (1970) 1 O.R. 392, Ont. Ct. of Appeal, Ont. Limitations Act.

NOTE:—A claim was brought by an infant in a medical negligence case after the expiry of the special Limitation periods prescribed by the Medical Act and Public Hospitals Act. It was held that the general provisions of the Limitations Act extending the periods during infancy did not apply to preserve the claim beyond the prescribed periods

*Partnership*

8. *Blundun v. Storm* (1969) 7 D.L.R. (3d) 418; N.S. Sup. Ct. (Ap. Div.), N.S. Partnership Act.

NOTE:—The parties had entered into a partnership agreement respecting the recovery of treasure from a sunken wreck. One partner, who recovered the treasure, had given a notice of intention to dissolve the partnership. Because the agreement was "for an indefinite period of time . . .", the notice was not effective to terminate the partnership under Section 34 of the Act which enabled a partnership for an "undefined time" to be terminated by such a notice.

*Reciprocal Maintenance Orders*

9. *Attorney General v. Buschkewitz* (1970) (unreported) B.C. County court, Schultz, Co. Ct. J., B.C. Recip. Enforcement of Maintenance Orders Act.

NOTE:—Where a court in Germany issued a "final" order against the respondent who was served with process in British Columbia, the B.C. Court held there was no jurisdiction to make such a "final" order and enforcement was refused. The County Court Judge appeared to follow *Re Kenney* (1951) O R. 153.

10. *Wegner (Graves) v. Fenn* (1970) 71 W.W.R. 76 B.C. Co. Ct., Tyrwhitt-Drake, Co. Ct. J., B.C. Reciprocal Enforcement of Maintenance Orders Act.

NOTE:—Where an order of filiation made in Saskatchewan contained a maintenance provision, the B.C. Court refused to enforce it even though it was a final order because of a defect apparent on the record that affected the jurisdiction of the Saskatchewan Court. The defect was that the Saskatchewan Court failed to hear evidence of the father's financial ability to support the child in accordance with the statutory requirement.

*Sale of Goods*

11. *Gorman v. Ear Hearing Services Ltd.* (1970) 8 D.L.R. (3d) 765, P.E.I. Sup. Ct., Trainor J., P.E.I. Sale of Goods Act.

NOTE:—Where a salesman in the course of selling a hearing aid to an elderly lady, said it would "help her" and where the device in fact made previously inaudible sounds unintelligible, there is a sale of goods in reliance upon the seller's skill or judgment within Section 16(1) of the Act.

*Testator's Family Maintenance*

12. *Rill v. Miller* (1970) 9 D.L.R. (2d) 211, Sask. Ct. of Appeal, Sask. Dependants' Relief Act.

NOTE:—Where the deceased and his widow lived apart for many years and he left a modest estate to his "common law wife", the Court refused the widow's claim under the Act on the ground that she enjoyed reasonable living standards and the onus was on her to show that she was without reasonable provision for her maintenance.

*Variation of Trusts*

13. *Re Burns Trust* (1970) 74 W.W.R. 321, B.C. Sup. Ct., Burns JJ., B.C.. Variation of Trusts Act.

NOTE:—An enlargement of the trustee's power was permitted in an inter-vivos trust so that estate tax and succession duties on the settler's death could be minimized. The settled property consisted of shares in the settler's company and the settler wanted the investment power extended to any type of security.

*Wills*

14. *Totrup v. Patterson et al* (1970) 71 W.W.R. 388, Sup. Ct. of Can., Alberta Wills Act.

NOTE:—The decision of the Alberta Supreme Court was upheld by the Supreme Court of Canada. (See 1970 Proceedings p. 318) The Alberta Court held that a gift lapsed where the gift was to a deceased brother whose daughter survived him; the words used by the testator ("to hold unto him, his heirs, executors . . .") were not words of substitution.

15. *Re Armstrong* (1970) 7 D.L.R. (3d) 36, Sup. Ct., Cowan C.J.T.D., N.S. Wills Act.

NOTE:—The testator devised his home and effects to his brother who was an attesting witness to the will and directed that he dispose of the property in consultation with his executor. It was held that the provisions of the Wills Act voiding a gift to an attesting witness applied only to beneficial gifts and this gift involved a secret trust benefitting another and was therefor not void.

# APPENDIX K

(*See page 77*)

## THE AGE OF MAJORITY

### REPORT OF THE ONTARIO COMMISSIONERS

1. The Ontario Commissioners wish to express their thanks to the Commissioners of all jurisdictions for their assents in permitting this matter to be added to the agenda for the 1971 Conference. Requests were sent to the secretaries of all jurisdictions and replies were received from nine (including the Canada Commissioners), all of which were favourably disposed to having this matter discussed.

2. In opening the door on the discussion of this topic, we have set our feet in a very large room, indeed. Even assuming that there is a consensus favouring uniformity as a general principle, there probably is a substantial difference of opinion concerning the application of this general principle to specific areas.

3. Although the age of majority (full age) has been uniform in Canada until the developments of the last two years, there has been a disparity for some time in the age stipulation for capacity in relation to specific matters. For example, the age of free marriage (solemnization of marriage without parental consent) in Ontario has been fixed at 18 years for some time, while in Quebec the age of 21 applies.

4. The accompanying schedule prepared with the assistance of Miss Maureen J. Sabia, legal research officer, and Miss Kathy Newman and Mr. James Courtright, student research assistants with the Ontario Law Reform Commission, shows not only the disparity which recent legislation has created with respect to the age of majority or general capacity but also the disparity in a given jurisdiction between the age of majority or general capacity and the age at which capacity is acquired for certain specific purposes, such as voting, drinking, electoral qualification, etc. These charts are merely illustrative of the problem and not meant to be exhaustive. They do not deal with such obvious things as capacity to make wills, capacity to marry, etc. The latter does not cause any difficulty since it is a matter falling within federal legislative competence. It should be added, as well, that the accuracy of the information is

not certified and for a definitive statement resort must be had to the various provincial enactments.

5. No elaboration of conflict of laws principles is necessary to appreciate that the recent changes may cause difficulties where more than one provincial jurisdiction is involved. For example, a person aged 18 who has the status of a minor and who is thus incapable of entering into a valid contract under Saskatchewan law, his *lex domicilii,* enters into an agreement of which the law of Alberta is the proper law. Without denying his status as a minor, the court would hold the contract to be valid, because capacity to contract is governed by the proper law and in accordance with that law (Alberta) a person of 18 years of age has full contractual capacity. (See Dicey and Morris, The Conflict of Laws, 8th ed., 228.)

6. It is appreciated that it may be undesirable, or unattainable even if desirable, that there be uniformity between the various provinces in all matters of age stipulation for purposes of conferring capacity, just as there would appear to be no case within a given province for having a given age uniform for acquiring capacity for all purposes.

7. A strong case can be made, however, for settling on a uniform age for age of majority or general capacity applicable to all provinces.

8. It is submitted that the Conference should undertake the task of designating those areas in which uniformity is desirable and fixing the recommended age.

H. Allan Leal
of the Ontario Commissioners

## CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA
## PROJECT ON AGE OF MAJORITY

| | Voting | Drinking | Electoral Qualification | Free Marriage | Maintenance | Parental Control | Consent to Medical Treatment | General Capacity | Special |
|---|---|---|---|---|---|---|---|---|---|
| itish Columbia<br>Age of Majority Act 1970 | 19 | 19 | 19 | 19 | 19 | 19 | General capacity governs | 19 | Marriage Settlement<br>Male 19<br>Female 17 |
| berta<br>Age of Majority Act 1971 | 18 | 18 | 18 | 18 | 18 | 18 | do. | 18 | Marriage Contract<br>Female 17 |
| skatchewan<br>The Coming of Age Act 1970 | 18 | 19 | 18 | 19 | No Limit | 16 | do. | 19 | |
| anitoba<br>Age of Majority Act 1970 | 18 | 18 | 18 | 18 | 18<br>Wives' & Children's Maintenance Act, R.S.M. 1970, c. W-170, s. 3 (1) | | do. | 18 | |
| ntario<br>Age of Majority Act 1971 | 18 | 18 | 18 | 18 | 16 or 17 if disabled<br>Children's Maintenance Act;<br>Deserted Wives & Children's Maintenance Act | 16 | Human Tissue Act—18<br>General Consent—18<br>Public Hospitals Act, Para. 42, Reg. 522 | 18 | Marriage Settlement<br>Male 18<br>Female 16 |
| ebec | 18 | 18 | 18 | 21 | 21 | 21 | | 18 | |
| w Brunswick | 18 | 21 | 18 | 18 | 16 | 16 | General capacity governs | 21 | |
| rthwest Territories | 19 | 19 | 19 | 19 | 18 | 19 | 19 | 19 | 19 |
| va Scotia<br>Age of Majority Act 1971 | 19 | 19 | 19 | 19 | CMA —18?<br>WCMA—16? | 16? | 19 | 19 | |
| nce Edward Island | 21 | 21 | 21 | 21 males<br>18 females | 17 | | | 21 | Minimum Age of Employment Act "under 15" |
| wfoundland | 19 | 21 | 19 | 21 | 17 or up to 21 if disabled | 16 | Human Tissue Act 18 | 21 | |

# APPENDIX L

(*See page 77*)

## MINIMUM AGE FOR MARRIAGE

### Report of Canada Commissioners

It will be recalled that at last year's Conference, following representations made to the Attorney General of Canada requesting him to seek the views of the Conference on the question of establishing a uniform mininum age for marriage throughout Canada, the Commissioners for Canada placed before the Conference a request that the Conference give consideration to this question and make such recommendations, if any, as might seem to it to be desirable (see 1970 Proceedings of the Conference, Appendix P, page 319).

Following a general discussion of the matter during which the desirability of establishing such a uniform minimum age and the various alternative means of achieving its establishment were considered, the Conference resolved that the subject matter 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". At least some of the Commissioners who took part in the discussion expressed the view that while observations and suggestions could be offered by individual Commissioners (based on studies already undertaken concerning minimum ages for other matters such as contractual capacity, the right to vote, the right to consume alcohol, etc.) the matter of the minimum age or ages at which males and females, respectively, should acquire the capacity to marry, either with consent or otherwise, merited consideration in the context of studies specifically directed to this particular important and sensitive subject. Mention was made of at least three such studies in recent years, namely the Report of the Latey Committee in England on the Age of Majority, 1967, the Report of the Ontario Law Reform Commission on Family Law, 1970 and the Report of the Royal Commission on the Status of Women in Canada, published late in 1970 following last year's meeting of the Conference.

The Canada Commissioners accordingly made arrangements to have a research study done in the Department of Justice, by the

newly-established Research and Planning Section of the Department. Unfortunately, due to pressure of other more urgent work, the completion of the study was somewhat delayed and the report on it did not become available to the Canada Commissioners until very recently.

Because of the fact that the report (which runs to some fifty pages including appendices) deals with a number of matters relating to marriage law, in addition to the minimum age for marriage, and because of the fact that the report was received too late for all of the Canada Commissioners to consider and assess it properly prior to the commencement of the Conference, the Canada Commissioners feel that they should seek the concurrence of the Conference to postpone their own report until the next meeting of the Conference. In making this recommendation, the Canada Commissioners are aware of the fact that the Government of Canada is expected shortly to be considering what action it should take, if any, by way of legislative proposals and other appropriate action, to implement certain of the recommendations of the Report of the Royal Commission on the Status of Women in Canada (which include a recommendation to establish by federal law a minimum age for marriage of eighteen years for both males and females) but the Canada Commissioners have no information that would lead them to believe that the Conference, by delaying its consideration of this matter, might thereby be foreclosed by events from expressing its views at a later time. In any event the Canada Commissioners do not feel that it would be either fair or reasonable to invite the Conference again at this time to give a formal expression of its views when it has not had an opportunity to consider the matter in the light of such information and study material as is now known to be available.

Respectfully submitted,

August 16, 1971.

Commissioners for Canada.

# APPENDIX M

(*See page 78*)

## THE RULE AGAINST PERPETUITIES

### REPORT OF ALBERTA COMMISSIONERS

N.B. Members will want in front of them the Ontario Act (1967 Proc. pp. 195-203) and last year's Alberta report (1970 Proc. pp. 341-359).

At the 1970 meeting one of the Alberta Commissioners spoke to the Alberta report but there was little time for discussion and the Conference reached no decisions on policy. The purpose of this year's report is to supplement last years and to furnish a comparison between the attached Alberta draft and the Ontario Perpetuities Act. The former was prepared by Alberta's Institute of Law Research and Reform, and the report of which it is a part will probably be made public before the 1971 meeting. At the present time one cannot say whether the draft Act will be enacted at the next session of the Alberta Legislature.

Both the Ontario Act and the Alberta draft are based on the recommendations of the English Law Reform Committee in 1956. These recommendations were, in large measure, adopted by the British Parliament in 1964 and by the recent Acts in Western Australia, New Zealand and Victoria.

The Conference could attempt to frame an Act quite different from the existing statutes. At the 1970 meeting the Chairman made an earnest plea for a simpler Act. The Alberta Commissioners have not found any suitable way of achieving this end. Admittedly some of the provisions in the existing Acts are difficult and others may rarely be invoked. On balance, however, we think it best to adhere to the general principles of the other modern statutes.

The Alberta Commissioners suggest that the Conference can now decide whether to accept in principle a given provision which is common to Ontario and Alberta, and in the case where the provisions differ from one another, to make a choice or reject both. For example neither Ontario or Alberta recommends a provision like England's which permits a settlor or testator to stipulate that the perpetuity period shall be a specific number of years up to 80. The Conference might prefer such a provision.

The following comparative summary is designed to assist the Conference to see the similarities between the Ontario Act and the Alberta draft, and the differences between them.

## COMPARATIVE SUMMARY

The symbol—means "no provision"

| *Alberta* | *Ontario* |
|---|---|
| Preamble | — |
| s. 1(1) Definitions | s. 1 |
| Court | same |
| disposition | limitation |
| in being | same |
| perpetuity period | — |
| power of appointment | — |
| will | same |
| (2) disposition in will runs from death | — |
| s. 2 Preservation of rule as amended | same — s. 2 |
| s. 3 Possibility of late vesting: not void | same — s. 3 |
| s. 4 Wait and see: | |
| (1) in general | same — s. 4(1) |
| (2) general powers | (2) |
| (3) special powers | (3) |
| s. 5(1)(a) lives must be in being, ascertainable and not too many | — |
| (b) if no lives, 21 years | same — s. 6(3) |
| (2) Long list of lives, including unborn, widow | No life can be used that is not relevant to vesting — s. 6(1): Unborn, widow — s. 9: |
| No counterpart to Ontario's 6(2) but 5(2) is same in effect | Life relevant to part of class relevant to all — s. 6(2) |

| | *Alberta* | *Ontario* |
|---|---|---|
| s. 6(1) | Age-reduction | same — s. 8(1) |
| (2) | excludes "phased" reduction | — |
| (3) | special provision where different ages are specified | — |
| (4) | exclusion of persons who prevent (1) from operating | same — s. 8(2) |
| (5) | Class splitting | same — s. 8(3) |
| | — | Definition of class members s. 8(4) |
| s. 7 | General *cy-près* | — |
| s. 8 | Ability to have children | |
| (1) | presumptions | same — s. 7(1) |
| (2) | conclusiveness | same — s. 7(2) |
| (3) | birth of "impossible" child | same — s. 7(3) |
| (4) | ignoring possibility of legitimation or adoption | same, plus "other means" — s. 7(4) |

NOTE:—England's counterpart re legitimation and adoption (s. 2(4)) is hard to follow and seemingly excludes possibility of legitimation or adoption only in the case of a woman over 55 (Morris & Leach, Supp. p. 7).

| | | |
|---|---|---|
| s. 9 | Applications to Court: priorities of curative provisions | same<br>— |
| s. 10 | Interim income: same as if from valid contingent interest | same — c. 5(2) |
| | ss. 32 and 33 Trustee Act apply | — |
| s. 11(1) | Disposition, if good by itself, is good though it follows void disposition | same — s. 10(1) |
| (2) | no prohibition against acceleration | same — s. 10(2) |

| | *Alberta* | *Ontario* |
|---|---|---|
| s. 12(1) | Special powers of appointment | same – s. 11(1) |
| (2) | General powers | same – s. 11(2) |
| (3) | certain powers in will treated as general | same – s. 11(3) |
| s. 13(1) | Administrative powers of sale and lease are valid | same – s. 12(1) |
| (2) | retroactive application | same – s. 12(2) |
| s. 14 | Disposition void under rule not enforceable in contract between original parties | same, but confined to options in gross – s. 13(3) |
| s. 15(1) | Rule n/a to one-year option to buy reversion | same, but omits "renewal" and "personal property" – s. 13(1) |
| (2) | agreements for lease | same – s. 13(2) |
| (3) | rights of first refusal and pre-emption | – – |
| (4) | Rule n/a to option to renew lease | same, but omits "personal property" – s. 13(4) |
| s. 16(1) | All commercial transactions; 80 years | options in gross: 21 years – s. 13(3) |
| (2) | specific dispositions, not restricting generality | Easements and profits 40 years – s. 14 |
| (3) | dispositions in wills and trusts are not commercial | – |
| s. 17(1) | Possibilities of reverter are within rule | same – s. 15(1) |
| (2) | Perpetuity period: 40 years | lives with 40 year maximum – s. 15(2) and (3) |
| (3) | where charitable purpose, *cy-près applies* | – |
| (4) | Rule n/a to gift over from charity to charity | – |

| | *Alberta* | *Ontario* |
|---|---|---|
| s. 18(1) | Non-charitable purpose trusts good for 21 years | same — s. 16(1) |
| (2) | unexpended sums go to those entitled if trust void | same — s. 16(2) |
| s. 19 | Rule in *Whitby* v. *Mitchell* abolished | same — s. 17 |
| s. 20 | Rule n/a to pension plans | same — s. 18 |
| s. 21 | Application to Crown | — |
| s. 22 | Accumulations Act no longer in force | Ontario has English-type Act, same as Uniform Accumulations Act. |

In conclusion the Alberta Commissioners point out that the above comparative summary together with their 1970 report is designed to assist the Conference in reaching policy decisions for a Uniform Act.

Respectfully submitted,
W. F. Bowker,
Glen W. Acorn,
S. A. Friedman,
L. R. Meiklejohn,
W. E. Wilson, and
W. E. Wood,
Alberta Commissioners.

The following is the "Alberta Draft" referred to in the report of the Alberta Commissioners dated 28 July, 1971.

AN ACT TO MODIFY THE RULE AGAINST PERPETUITIES

eamble

WHEREAS the rule of law known as the rule against perpetuities provides that 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,

AND WHEREAS it is desirable to amend the rule to remove certain hardships which arise in its application,

THEREFORE, Her Majesty, with the advice and consent of the Legislative Assembly of the Province of Alberta enacts as follows:

(Rec. #2)

Interpretation

1. (1) In this Act

(a) "Court" means the Supreme Court of Alberta,

(b) "disposition" includes the conferring of a power of appointment and any provision whereby any interest in property or any right, power or authority over property is disposed of, created or conferred and also includes a possibility of reverter or resulting trust, and a right of re-entry on breach of a condition subsequent,

(c) "in being" means living or *en ventre sa mere,*

(d) "perpetuity period" means the period within which at common law as modified by this Act an interest must vest,

(e) "power of appointment" includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration,

(f) "will" includes codicil. (Rec. #28)

Rule to continue; saving

2. The rule of law known as the rule against perpetuities shall continue to have effect except as provided in this Act. (Rec. #1)

Possibility of vesting beyond period

3. No disposition creating a contingent interest in real or personal property shall be treated as or declared to be void as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period. (Rec. #3)

Presumption of validity; "wait and see"

4. (1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 6 or 7 shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid. (Rec. #4)

General power of appointment

(2) A disposition conferring a general power of appointment, which but for this section would be void on the ground that it might become exercisable beyond the perpetuity period, shall be presumptively valid until such time, if any, as it becomes established

by actual events that the power cannot be exercised within the perpetuity period. (Rec. #5)

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(3) A disposition conferring any power other than a general power of appointment, which apart from this section would have been void on the ground that it might be exercised beyond the perpetuity period, shall be presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the power is not fully exercised within the perpetuity period. (Rec. #6)

asure- nt of petuity iod: lives eing

5. (1) Where section 4 applies to a disposition, the perpetuity period shall be determined as follows:

(a) where any persons falling within subsection (2) of this section are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) and (c) of subsection (2) shall be disregarded if the number of persons of that description is such as to render it impractical to ascertain the date of death of the survivor;

(b) where there are no lives under paragraph (a) the period shall be twenty-one years.

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(2) The said persons are as follows:

(a) the person by whom the disposition is 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) where, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of

the period, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of a power of appointment the person on whom the power is conferred.

(c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) above, or such a person any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent, fall within those sub-paragraphs;

(d) any person who takes any prior interest in the property disposed of and any person on whose death a gift over takes effect;

(e) where a disposition is made in favour of any spouse of a person who is in being and ascertainable at the commencement of the period, or where an interest is created by reference to the death of the spouse of such a person, or by reference to the death of the survivor, the same spouse whether or not he or she was in being or ascertainable at the commencement of the period. (Rec. #7)

Reduction of age

6. (1) Where a disposition creates an interest in real or personal property by reference to the atttainment by any person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

(a) that the interest, apart from this section, would be void as incapable of vesting within the perpetuity period, but

(b) that it would not be void if the specified age had been twenty-one years,

the disposition shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

Idem

(2) To remove doubt, one age reduction to embrace all potential beneficiaries shall be made pursuant to subsection (1).

Idem

(3) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons—

(a) the reference in paragraph (b) of subsection (1) above to the specified age shall be construed as a reference to all the specified ages, and

(b) that subsection shall operate to reduce each such age so far as in necessary to save the disposition from being void for remoteness. (Rec. #8)

Exclusion of class members to avoid remoteness

(4) Where the inclusion of any persons, being potential members of a class, or unborn persons who at birth would become potential members of the class, prevents subsections (1) and (3) from operating to save a disposition from being void for remoteness, those persons shall be excluded from the class for the purposes of the disposition and the said subsections shall have effect accordingly.

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(5) Where, in the case of a disposition to which subsection (4) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, apart from this subsection the inclusion of any persons being potential mmebers of a class or unborn persons who at birth would become members or potential mmebers of the class, would cause the disposition to be treated as void for remoteness, such persons shall for all the purposes of the disposition be excluded from the class. (Rec. #9)

General *cy-près*

7. (1) Where it has become apparent that, apart from the provisions of this section, any disposition would be void solely on the ground that it infringes the rule against perpetuities, and where the general intention originally governing the disposition can be ascertained in accordance with the normal principles of interpretation of instruments and the rules of evidence, the disposition shall, if possible and as far as possible, be reformed so as to give effect to that general intention within the limits of the rule against perpetuities.

(2) Subsection (1) shall not apply where the disposition of the property has been settled by a valid compromise. (Rec. #10)

Presumptions and evidence as to future parenthood

8. (1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

(a) it shall be presumed,

(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and

(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but,

(b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

Idem

(2) Subject to subsection (3), where any question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that may arise concerning the rule against perpetuities in relation to the same disposition notwithstanding that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

Idem

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(4) The possibility that a person may at any time have a child by adoption or legitimation shall not be considered in deciding any questions that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children. (Rec. #11)

Applications to determine validity; order of application of remedial provisions

9. An executor or a trustee of any property or any person interested under, or in the validity or invalidity of, an interest in such property may at any time apply for the opinion, advice or direction of the Court pursuant to section 38 of the Trustee Act with respect to the validity or invalidity with respect to the rule against perpetuities of an interest in that property and with respect to the application of any provision of this Act; and to remove doubt it is declared that the remedial provisions of this Act shall apply in the following order:

(a) capacity to have children; (section 8)

(b) wait and see; (section 4)

(c) age reduction; (section 6, subsections (1), (2) and (3))

(d) class splitting; (section 6, subsections (4) and (5))

(e) general *cy-près*. (section 7) (Rec. #12)

Interim income; ss 32 and 33 Trustee Act

10. Pending the treatment or declaration of a presumptively valid interest within the meaning of section 4 as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the disposition will ultimately prove to be void for remoteness shall be disregarded; and sections 32 and 33 of the Trustee Act shall apply. (Rec. #13)

Saving

11. (1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not such disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid disposition.

Acceleration of expectant interests

(2) Where a prior interest is invalid under the rule against perpetuitities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest. (Rec. #14)

Powers of appointment

12. (1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless,

(a) in the instrument creating the power it is expressed to be exercisable by one person only; and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

Idem

(2) A power that satisfies the conditions of clauses (a) and (b) of subsection (1) shall, for the purpose of the rule against perpetuities, be treated as a general power.

Idem

(3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is

void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed.

(Rec. #15)

Administrative powers of trustees

13. (1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.

Application of ss. (1)

(2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is conferred by an instrument that took effect before that time. (Rec. #16)

Avoidance of contractual rights in cases of remoteness

14. Where a disposition *inter vivos* would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect. (Rec. #17)

Options to acquire reversionary interests

15. (1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease, or renewal of a lease and whether the lease or renewal be of real or personal property

(a) if the option is exercisable only by the lessee or his successors in title; and

(b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease or renewal.

Application of ss. (1)

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

Idem

(3) Subsection (1) applies to a right of first refusal or pre-emption as it applies to an option. (Rec. #18)

Rule not applicable to options to renew

(4) The rule against perpetuities does not apply to options to renew a lease of real or personal property. (Rec. #19)

Commercial transactions

16. (1) In the case of a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time, the perpetuity period is 80 years from the date of the contract, and if the contract provides for the acquisition of such an interest at a time greater than 80 years, then the interest may be acquired up to 80 years and not thereafter.

Idem

(2) In particular and not so as to restrict the generality of subsection (1), it applies to all contracts relating to a future sale or lease, to options in gross, rights of pre-emption or first refusal, and to future profits a prendre, easements and restrictive covenants.

Wills and trusts excepted

(3) To remove doubt this section does not apply to any provision in a will or *inter vivos* trust. (Rec. #20)

Possibilities of reverter and conditions subsequent

17. (1) In the case of,

(a) a possibility of reverter on the determination of a determinable fee simple; or

(b) a possibility of a resulting trust on the determination of any determinable interest in real or personal property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, where the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

Perpetuity period

(2) The perpetuity period for the purpose of a possibility of reverter or a possibility of a resulting trust or of a right of re-entry on breach of a condition subsequent or equivalent right in personal property shall be 40 years.

Charitable purposes; *cy-près*

(3) Subsection (1) shall not apply where the event, which determines the prior interest, or on which the prior interest could be determined, is the cessation of a charitable purpose but in such a case if the cessation of the charitable purpose takes place after the expiration of the perpetuity period the property shall be treated as if it were the subject of a charitable trust to which the *cy-près* doctrine applies.

(4) This section does not apply, nor does the rule against perpetuities apply, to a gift over from one charity to another. Exception

(Rec. #21)

18. (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of twenty-one years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section. Specific non-charitable purpose trusts

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons or his or their successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such expended income or capital. (Rec. #22) Idem

19. The rule of law prohibiting the disposition, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without affecting any other rule relating to perpetuities. (Rec.#23) Rule in *Whitby* v. *Mitchell* abolished

20. The rules of law and statutory enactments relating to perpetuities and to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or persons not being employees engaged in any lawful calling or to their widows, dependants or other beneficiaries. (Rec. #24) Employee benefit trusts: rule not applicable

Crown

21. This Act and the rule against perpetuities shall bind the Crown except in respect of dispositions of property made by the Crown. (Rec. #25)

Accumulations of income

22. (1) The Act of the Parliament of Great Britain, 39 and 40 Geo. III (known as the Accumulations Act, 1800), ceases to apply in the province.

Idem

(2) Where property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is or may be valid but not otherwise.

Idem

(3) Nothing in this section affects the right of any person or persons to terminate an accumulation that is for his or their benefit or any jurisdiction or power of the Court to direct payments from accumulations pursuant to any statute.

Application of section

(4) This section applies to instruments taking effect before or after this Act comes into force except where the period of accumulation permitted by the Accumulation Act, 1800 has expired before this Act comes into force. (Rec. #26)

Application of Act

23. Except as provided in subsection (2) of section 13 and section 20 and subsection (4) of section 22 this Act applies only to instruments taking effect after this Act comes into force, and such instruments include an instrument made in the exercise of a general or special power of appointment after this Act comes into force even though the instrument creating the power took effect before this Act comes into force. (Rec. #27)

# APPENDIX N

(*See page 79*)

## UNIFORM PERSONAL PROPERTY SECURITY ACT

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

(Assented to)

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

Definitions

1. In this Act

(a) "accessions" means goods that are installed in or affixed to other goods;

(b) "account" means any monetary obligation not evidenced by any chattel paper, instrument or securities;

(c) "account debtor" means a person who is obligated on chattel paper or on an intangible;

(d) "chattel paper" means one or more than one writing that expresses both a monetary obligation and a security interest in specific goods;

(e) "collateral" means property that is subject to a security interest;

(f) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

(g) "corporate security" means every security interest in personal property or fixtures created by a corporation and contained

(i) in a trust deed or other writing to secure bonds, debentures or debenture stock of the corporation or of any other corporation; or

(ii) in any bonds, debentures or debenture stock of the corporation as well as in the trust deed or other writing securing the same, or in a trust deed or other writing securing the bonds, debentures or debenture stock of any other corporation; or

(iii) in any bonds, debentures or debenture stock or any series of bonds or debentures of the corporation not secured by a separate writing;

(h) "creditor" includes an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver, and an executor, administrator or committee;

(i) "debtor" means a person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes an assignor of accounts or chattel paper, and an assignee of the debtor's interest in the collateral referred to in subsection (1) of section 49, or such one or more of them as the context requires; but, where the debtor and the owner of the collateral are not the same person, the term "debtor"

(i) includes the owner of the collateral in any provision of the Act dealing with the collateral,

(ii) means the obligor in any provision dealing with the obligation, and

(iii) includes both the owner of the collateral and the obligor where the context so requires;

(j) "default" means the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event whereupon, under the terms of the security agreement, the security becomes enforceable;

(k) "document of title" means any writing that purports to be issued by or addressed to a bailee and purports to cover such goods in the bailee's possession as are identified or fungible portions of an identified mass, and that, in the ordinary course of business, is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers;

(l) "equipment" means goods that are not inventory or consumer goods;

(m) "goods" means all chattels personal other than choses in action and money, and includes emoluments and industrial growing crops, and oil, gas and other minerals to be extracted, and timber to be cut, and goods are either consumer goods, equipment or inventory;

(n) "instrument" means a bill, note or cheque within the meaning of the Bills of Exchange Act (Canada), or any other writing that evidences a right to the payment of money and is of a type that, in the ordinary course of business, is transferred by delivery with any necessary endorsement or assign-

ment, but does not include a writing that constitutes part of chattel paper, a document of title or securities;

(o) "intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments or securities;

(p) "inventory" means goods that are held by a person for sale or lease, or that are to be furnished or have been furnished under a contract of service, or that are raw materials, work in process or materials used or consumed in a business or profession;

(q) "judge" means a judge of the court;

(r) "notify" means to take such steps as are reasonably required to give information to the person to be notified so that

(i) it comes to his attention, or

(ii) it is directed to such person at his customary address or at his place of residence, or at such other place as is designated by him over his signature,

and "notification" has a corresponding meaning;

(s) "prescribed" means prescribed by the regulations;

(t) "proceeds" means personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral and the proceeds therefrom, and includes payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom;

(u) "purchase-money security interest" means a security interest that is

(i) taken or reserved by the seller of the collateral to secure payment of all or part of its price, or

(ii) taken by a person who gives value that enables the debtor to acquire rights in or the use of the collateral, if that value is applied to acquire those rights;

(v) "registrar" means the registrar of personal property security;

(w) "regulations" means the regulations made under this Act;

(x) "secured party" means a party who has a security interest;

(y) "securities" means shares, stock, warrants, bonds, debentures, debenture stock or the like issued by a corporation or other person, or a partnership, association or government;

(z) "security agreement" means an agreement that creates or provides for a security interest;

(aa) "security interest" means

(i) an interest in goods, fixtures, documents of title, instruments, securities, chattel papers or intangibles that secures payment or performance of an obligation, and

(ii) an interest arising from an assignment of accounts or chattel paper not intended as security,

but does not include an assignment under the Assignments and Preferences Act;

(bb) "value" means any consideration sufficient to support a simple contract.

## PART I

## GENERAL

Application of Act

2. Subject to subsection (1) of section 3, this Act applies

(a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust deed or trust receipt, and

(ii) an assignment, lease or consignment intended as security;

(b) to every assignment of accounts not intended as security other than an assignment for the general benefit of creditors to which the Assignments and Preferences Act applies; and

(c) to every assignment of chattel paper not intended as security.

Where Act does not apply

3. (1) This Act does not apply

(a) to a lien given by statute or rule of law except as provided in section 32, clause (b) of subsection (3) of section 36 and clause (b) of subsection (2) of section 37; or

(b) to a transfer of an interest in or under a policy of life insurance or contract of annuity; or

(c) to a transfer of an interest in or under a policy of insurance other than life insurance except insofar as section 27 applies to the proceeds thereof; or

(d) to a transaction under The Pawnbrokers Act.

Rights under Sale of Goods Act

(2) The rights of buyers and sellers under The Sale of Goods Act are not affected by this Act.

Errors, omissions, etc., in document

4. (1) A document to which this Act applies is not invalidated, nor shall its effect be destroyed by reason only of a defect, irregularity, omission or error therein or in the execution thereof unless, in the opinion of the judge or court the defect, irregularity, omission or error is shown to have actually misled some person whose interests are affected by the document.

Errors, omissions, etc., in registration

(2) A registration under this Act is not invalidated, nor shall its effect be destroyed, by reason only of a defect, irregularity or error therein unless, in the opinion of the judge or court, the defect from irregularity or error is shown to have actually misled some person whose interests are affected by the registration.

Conflict of laws

5. (1) The validity and perfection of a security interest and the possibility and effect of proper registration with regard to intangibles or with regard to goods of a type that are normally used in more than one jurisdiction, if the goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others, shall be governed

(a) where the chief place of business of the debtor is in , by this Act; and

(b) where the chief place of business of the debtor is not in , by the law, including the conflict of laws rules, of the jurisdiction in which the chief place of business is located.

Where a registration not provided in other ju isdiction

(2) If a jurisdiction does not provide, by registration or recording in that jurisdiction, for perfection of a security interest of the kind referred to in subsection (1), the security interest may be perfected by registration in .

Conflict of laws (continued)

6. (1) Where personal property, other than that governed by subsection (1) of section 5, was already subject to a security interest when it was brought into the validity of the security interest in is to be determined by the law, including the conflict of laws rules, of the jurisdiction where the property was when the security interest attached; but, where the parties to the security agreement understood at the time that the security interest attached that the property would be kept in and it was brought into within thirty days after the security

interest attached for purposes other than transportation through , the validity of the security interest in shall be determined by the law of .

Right of revendication

(2) Where goods brought into are subject to the seller's right to revendicate, unless the seller registers a caution in the prescribed form within twenty days after he receives notice that the goods were brought into , but in any case not later than sixty days after the day on which the goods were brought into , the right is unenforceable against a third party.

Security interest perfected outside

7. (1) Subject to section 5, a security interest in collateral already perfected under the law of the jurisdiction in which the property was when the security interest attached and before being brought into continues perfected in for sixty days and also thereafter if, within the sixty day period, it is perfected in.

Where notice received

(2) Subject to section 5, and notwithstanding subsection (1), where the secured party receives notice within the sixty day period mentioned in subsection (1) that the collateral has been brought into , the security interest in the collateral ceases to be perfected in unless he registers the security agreement covering the collateral within fifteen days after the date he receives the notice, or upon the expiration of the sixty day period, whichever is earlier.

Subsequent perfection

(3) A security interest that has ceased to be perfected in due to the expiration of the sixty day period may thereafter be perfected in , but the perfection takes effect from the time of its perfection in .

Perfection after bringing within province

8. Subject to section 5, where a security interest was not perfected under the law of the jurisdiction in which the collateral was when the security interest attached and before being brought into , it may be perfected in within thirty days from the date the collateral is brought into , in which case perfection dates from the time of perfection in .

## PART II

## VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OR PARTIES

Effectiveness of security agreement

9. Except as otherwise provided by this or any other Act, a security agreement is effective according to its terms between the parties to it and against third parties.

Enforceability of security interest

10. A security is not enforceable against a third party unless

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement that contains a description of the collateral sufficient to enable it to be identified.

Delivery of copy of agreement

11. Where a security interest is created or provided for by a security agreement, the secured party shall deliver a copy of the security agreement to the debtor within ten days after the execution thereof, and, if he fails to do so after a request by the debtor, a judge may, on summary application by the debtor, make an order for the delivery of such a copy to the debtor and may make such order as to costs as he deems just.

When security interest attaches

12. (1) A security interest attaches when

(a) the parties intend it to attach;

(b) value is given; and

(c) the debtor has rights in the collateral.

When debtor has rights and collateral

(2) For the purposes of subsection (1), the debtor has no rights in

(a) crops until they become growing crops; or

(b) fish until they are caught; or

(c) the young of animals until they are conceived; or

(d) oil, gas or other minerals until they are extracted; or

(e) timber until it is cut.

After acquired property

13. (1) Except as provided in subsection (2), a security agreement may cover after acquired property.

Exceptions

(2) No security interest attaches under an after acquired property clause in a security agreement

(a) to crops that become such more than one year after the security agreement has been executed, except that a security interest in crops that is given in conjunction with a lease, purchase or mortgage of land may, if so agreed, attach to crops to be grown on the land concerned during the term of the lease, purchase or mortgage; or

(b) to consumer goods other than accessions, unless the debtor acquires rights in them within ten days after the secured party gives value.

Limitation of coverage

14. A purchase-money security interest in consumer goods does not attach to any collateral other than those consumer goods.

Future advances

15. A security agreement may secure future advances or other value whether or not the advances or other values are given pursuant to commitment.

Agreement not to assert defence against the assignee

16. Except as to consumer goods, an agreement by a debtor not to assert against an assignee any claim or defence that he has against his seller or lessor is enforceable by the assignee who takes the assignment for value, in good faith and without notice, except as to such defences as may be asserted against the holder in due course of a negotiable instrument under the Bills of Exchange Act (Canada).

Seller's warranties

17. Where a seller maintains a purchase-money security interest in goods,

(a) The Sale of Goods Act governs the sale and any disclaimer, limitation or modification of the seller's conditions and warranties; and

(b) except as provided in section 16, the conditions and warranties in a sale agreement shall not be affected by any security agreement.

Provision to accelerate

18. Where a security agreement provides that the secured party may accelerate payment or performance when he deems himself insecure, the provision shall be construed to mean that he has power to do so only if he, in good faith, believes that the prospect of payment is impaired.

Care of collateral

19. (1) A secured party shall use reasonable care in the custody and preservation of collateral in his possession, and, unless otherwise agreed, in the case of an instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against prior parties.

Rights and duties of secured party in possession of collateral

(2) Unless otherwise agreed, where collateral is in the possession of the secured party,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in the custody and preservation of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage;

(c) the secured party may hold as additional security any increase or profits, except money, received from the collateral, and money so received, unless remitted to the debtor, shall be applied forthwith upon its receipt in reduction of the secured obligation;

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(e) the secured party may create a security interest in the collateral upon terms that do not impair the debtor's right to redeem it.

Liability for loss

(3) A secured party is liable for any loss or damage caused by his failure to meet any obligations imposed under subsection (1) or (2), but does not lose his security interest.

Use of collateral

(4) A secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement; or

(b) for the purpose of preserving the collateral or its value; or

(c) pursuant to an order of

(i) the court before which a question relating thereto is being heard, or

(ii) a judge upon application by originating notice to all persons concerned.

Liability for loss caused by use

(5) A secured party

(a) is liable for any loss or damage caused by his use of the collateral otherwise than as authorized by subsection (4); and

(b) is subject to being ordered or restrained as provided in subsection (1) of section 63.

Information from the secured party

20. (1) A debtor, execution creditor or other person with a legal or equitable interest in the collateral may, by a notice in writing, containing his address for reply and sent or delivered to the secured party at the address set forth in the security agreement, require the secured party to send or deliver to him at that address

(a) a statement in writing of the amount of the indebtedness and of the terms of payment thereof as of the date specified in the notice; or

(b) a written approval or correction as of the date specified in the notice of the itemized list of the collateral attached to the notice; or

(c) a written approval or correction as of the date specified in the notice of the amount of the indebtedness and of the terms of payment thereof; or

(d) a copy of the security agreement;

or any one or more of the foregoing.

Security interest in collateral of a class

(2) If a notice is sent or delivered in accordance with clause (b) of subsection (1), and if the secured party claims a security interest in all of a particular type of collateral owned by the debtor, he may so indicate in lieu of approving or correcting the itemized list of collateral attached to the notice.

Reply to notice

(3) The secured party shall reply to a notice given under subsection (1) within fifteen days after he receives it, and, if without reasonable excuse he fails to do so or his answer is incomplete or incorrect, the person who has given the notice is entitled

(a) to recover from the secured party any direct loss or damage caused thereby; and

(b) to apply to a judge for an order requiring the secured party to comply with the notice.

Disclosure of successor

(4) Where the person receiving a notice under subsection (1) no longer has an interest in the obligation or collateral, he shall, within fifteen days after he receives the notice, disclose the name and address of the latest successor in interest known to him, and, if without reasonable excuse he fails to do so or his reply is incomplete or incorrect, he is liable for any direct loss or damage caused thereby to the person who has given the notice.

Successor deemed to be secured party

(5) A successor in interest shall be deemed to be the secured party for the purposes of this section when he receives a notice under subsection (1).

Powers of judge

(6) A judge may

(a) exempt, in whole or in part, the secured party from complying with a notice given under subsection (1), if the person giving the notice, not being the debtor, does not establish to the satisfaction of the judge that he has a legal or equitable interest in the collateral; or

(b) extend the time for answering the notice; or

(c) make such further or other order as is reasonable and just.

Charges by secured party

(7) The secured party may require payment of

(a) dollars for each reply to a notice under subsection (1) but the debtor is entitled to a reply without charge once in every six months; and

(b) fifty cents per page for each copy of the security agreement.

## PART II

## PERFECTION AND PRIORITIES

Time when perfected

21. A security interest is perfected when

(a) it has attached; and

(b) all steps required for perfection under any provision of this Act have been completed;

regardless of the order of occurrence.

Subordination of unperfected security interest

22. (1) Except as provided in subsection (3), an unperfected security interest is subordinate to

(a) the interest of a person

(i) who is entitled to a priority under this or any other Act, or

(ii) who assumes control of the collateral through legal process, or

(iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver; and

(b) the interest of a transferee who is not a secured party to the extent that he gives value without knowledge of the security interest and before it is perfected

(i) in chattel paper, documents of title, securities, instruments or goods in bulk or otherwise, not in the ordinary course of business of the transferor and where the transferee receives delivery of the collateral, or

(ii) in intangibles.

Rights of trustee in bankruptcy, etc.

(2) The rights of a person under sub-clause (iii) of clause (a) of subsection (1) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representatives if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest.

Purchase-money security interest

(3) A purchase-money security interest that is registered before or within ten days after the debtor's possession of the collateral commences has priority over

(a) an interest set out in sub-clause (ii) or (iii) of clause (a) of subsection (1); and

(b) transfers in bulk or otherwise, not in the ordinary course of business, occurring between the date on which the security interest attached and the date on which it is registered.

Continuity of perfection

23. (1) If a security interest is originally perfected in any way permitted under this Act, and is again perfected in some way under this Act without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Act.

Assignees

(2) An assignee of a security interest succeeds insofar as its perfection is concerned to the position of the assignor at the time of the assignment.

Perfection by possession

24. Except as provided in section 26, possession of the collateral by the secured party, or on his behalf by a person other than the debtor or the debtor's agent, perfects a security interest in

(a) chattel paper; or

(b) goods; or

(c) instruments; or

(d) securities; or

(e) letters of credit and advices of credit; or

(f) negotiable documents of title;

but, subject to section 23, only during its actual holding as collateral.

Perfection by registration

25. (1) Subject to section 21, registration perfects a security interest

(a) in chattel paper; or

(b) in goods; or

(c) in intangibles; or

(d) in documents of title; or

(e) in any type of collateral the security interest in which arises under a floating charge.

(2) A security interest is not perfected until it is registered except in the case of a security interest

Security interest not perfected until registered

(a) in collateral in possession of the secured party under section 24; or

(b) temporarily perfected in instruments, securities or negotiable documents of title under section 26.

Temporary perfection

26. (1) A security interest in instruments, securities or negotiable documents of title is a perfected security interest for the first ten days after it attached to the extent that it arises for new value given under a written security agreement.

Temporary perfection where collateral under control of debtor

(2) A perfected security interest in

(a) an instrument that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange, or

(ii) presentation, collection or renewal, or

(iii) registration of transfer; or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping, or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange;

remains perfected for the first ten days after the collateral comes under the control of the debtor.

Beyond ten days

(3) Beyond the period of ten days referred to in subsection (1) or (2), a security interest under this section becomes subject to the provisions of this Act for perfecting a security interest.

Perfecting as to proceeds

27. (1) Subject to this Act, where proceeds arise from some dealing with the collateral, or from damage or loss to the collateral, the security interest in the collateral

(a) continues as to the collateral unless the secured party expressly or impliedly authorized the dealing with the collateral; and

(b) extends to the proceeds.

Continuation of perfection

(2) Where a security interest in collateral was a perfected security interest at the time proceeds mentioned in subsection (1) arose,

(a) the security interest under clause (a) of subsection (1) is perfected insofar as sections 23, 24 and 25 are satisfied; and

(b) the security interest under clause (b) of subsection (1) becomes unperfected ten days thereafter unless a registered security agreement or notice of intention relating to the original collateral also covers the proceeds therefrom or the security interest in the proceeds is perfected before the expiration of the ten day period.

Non-identifiable proceeds, etc.

(3) Notwithstanding subsections (1) and (2), there is no perfected security interest in proceeds that are not identifiable or traceable.

Perfecting as to goods held by bailee

28. (1) A security interest in goods in the possession of a bailee who has issued a negotiable document of title covering them is perfected by perfecting a security interest in the document, and any security interest in them otherwise perfected while they are so covered is subject thereto.

Where no negotiable document of title issued

(2) A security interest in goods in the possession of a bailee, other than a bailee mentioned in subsection (1), is perfected by

(a) issuance of a document of title in the name of the secured party; or

(b) a holding on behalf of the secured party pursuant to section 24; or

(c) registration as to the goods.

Goo s returned or repossessed

29. (1) A security interest in goods that are the subject of a sale or exchange and that are returned to, or repossessed by,

(a) the person who sold or exchanged them; or

(b) a transferee of an intangible or chattel paper resulting from the sale of them;

re-attaches to the extent that the secured indebtedness remains unpaid.

Where security interest registered

(2) Where the security interest was perfected by a registration that is still effective at the time of the sale or exchange, it re-attaches as a perfected interest; but otherwise requires for its perfection a registration or a taking of possession by the secured party.

Security interest of transferee

(3) A transferee of

(a) an intangible resulting from a sale; or

(b) chattel paper resulting from a sale;

has a security interest in the goods as against the transferor.

Priority of transferee of intangible

(4) The security interest arising under subsection (3) of a transferee of intangibles is subordinate to a security interest under subsection (1) that was perfected when goods became the subject of sale or exchange.

Priority of transferee of chattel paper

(5) The security interest arising under subsection (3) of a transferee of chattel paper has priority over the security interest asserted under subsection (1) to the extent that the transferee of the chattel paper is entitled to priority under section 30.

Priority of security interest of unpaid transferee

(6) The security interest of an unpaid transferee asserted under subsection (3) is subordinate to the interests of the transferor and purchasers of the returned or repossessed goods unless it is perfected before their interests arise.

Rights of purchaser in ordinary course of business

30. (1) A purchaser of goods from a seller who sells the goods in the ordinary course of business takes them free from any security interest therein given by his seller even though it is perfected and the purchaser actually knows of it.

Rights of purchasers of chattel paper

(2) A purchaser of chattel paper who takes possession of it in the ordinary course of his business has, to the extent that he gives new value, priority over any other security interest in it

(a) that was perfected under section 25 if he did not actually know at the time he took possession that the chattel paper was subject to a security interest; or

(b) that has attached to proceeds of inventory under section 27, whatever the extent of his knowledge.

Rights of purchaser of non-negotiable instrument

(3) A purchaser of a non-negotiable instrument who takes possession of it in the ordinary course of his business has priority to the extent that he gives new value over a security interest in it that was perfected under section 26 if he did not actually know at the time he took possession that the instrument was subject to a security interest.

Application of subsection (1)

(4) For the purposes of subsection (1), the sale may be

(a) for cash; or

(b) by exchange for other property; or

(c) on credit; or

(d) by delivery of goods or documents of title under a pre-existing contract for sale;

but not by way of a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

Rights of certain purchasers

31. (1) The rights of

(a) a holder in due course of an instrument; or

(b) a holder of a negotiable document of title who takes it in good faith for value; or

(c) a bona fide purchaser of securities;

are to be determined without regard to this Act.

Effect of registration

(2) Registration under this Act is not such notice as to affect the rights of persons mentioned in subsection (1).

Priority of possessory liens

32. (1) Where a person in the ordinary course of business furnishes materials or services with respect to goods in his possession that are subject to a security interest, any lien that he has in respect of the materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have such priority.

Priority of non-possessory liens

(2) Where a person in the ordinary course of business furnishes materials or services with respect to goods not in his possession that are subject to a security interest, any lien that he has under any Act in respect of the materials or services has such priority over a perfected security interest as is given by that Act.

Alienation of right of debtor

33. The rights of a debtor in collateral may be transferred voluntarily or involuntarily notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default; but no transfer prejudices the rights of the secured party under the security agreement or otherwise.

Special priorities in crops

34. (1) A perfected security interest in crops or their proceeds given for a consideration to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise has priority over an earlier perfected security interest to the extent that the earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise,

even though the person giving the consideration knew of the earlier security interest.

Purchase-money security interest in inventory

(2) Subject to sections 30 and 31, and to subsection (3), a purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral

(a) if the purchase-money security interest was perfected at the time the debtor received possession of the collateral;

(b) if any secured party, whose security interest was actually known to the holder of the purchase-money security interest or who prior to the registration by the holder of the purchase-money security interest had registered a security agreement, notice of intention or caution covering the same items or type of inventory, had received notification of the purchase-money security interest before the debtor received possession of the collateral covered by the purchase-money security interest; and

(c) if such notification states that the person giving the notice had or expected to acquire a purchase-money security interest in inventory of the debtor, describing the inventory by item or type.

Priority of security interest in accounts

(3) A security interest in proceeds does not have priority over a security interest in accounts given for new value where the security agreement, or a notice of intention or caution, relating thereto had been registered before the purchase-money security interest in inventory was perfected or the security agreement or a notice of intention or caution relating thereto was registered.

Purchase-money security interest in goods other than inventory

(4) A purchase-money security interest in collateral, or its proceeds, other than inventory, has priority over any other security interest in the same collateral if the purchase-money security interest was perfected at the time the debtor obtained possession of the collateral or within ten days thereafter.

General rule as to priorities

35. (1) If no other provision of this Act is applicable, priority between security interests in the same collateral shall be determined

(a) by the order of registration, if the security interests have been perfected by registration;

(b) by the order of perfection, unless the security interests have been perfected by registration; or

(c) by the order of attachment under subsection (1) of section 12, if no security interest has been perfected.

Effect of continuous perfection

(2) For the purposes of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

Application of section

36. (1) This section does not apply to building materials.

Priority of security interests, fixtures

(2) Subject to subsection (4) of this section and notwithstanding subsection (3) of section 34, a security interest that attached to goods before they became fixtures has priority as to the goods over the claim of any person who has an interest in the real property.

Priority of security interests in fixtures

(3) Subject to subsection (4) a security interest that attached to goods after they became fixtures has priority over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest attached to the goods and who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

Exceptions

(4) The security interests referred to in subsections (2) and (3) are subordinate to the interest of,

(a) a subsequent purchaser or mortgagee for value of an interest in the real property;

(b) a creditor with a lien on the real property subsequently obtained as a result of judicial process; or

(c) a creditor with a prior encumbrance of record on the real property in respect of subsequent advances,

if the subsequent purchase or mortgage was made or the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for, as the case may be, without knowledge of the security interest and before it is registered in accordance with the provisions of Act.

Removal of collateral

(5) If a secured party, by virtue of subsection (1) or (2) and subsection (4) has priority over the claim of a person having an interest in the real property, he may on default, subject to the provisions of this Act respecting default, remove his collateral from the real property if, unless otherwise agreed, he reimburses any encumbrancer or owner of the real property who is not the debtor for the cost of repairing any physical injury excluding diminution in the value of the real property caused by the absence of the goods

removed or by the necessity for replacement, but a person so entitled to reimbursement may refuse permission to remove until the secured party has given adequate security for any reimbursement arising under this subsection.

Retention of collateral

(6) A person having an interest in real property that is subordinate to a security interest by virtue of subsection (2) or (3) and subsection (4) may, before the collateral has been removed from the real property by the secured party in accordance with subsection (5), retain the collateral upon payment to the secured party of the amount owing under the security interest having priority over his claim.

Accessions

37. (1) Subject to subsection (2) and to section 38 and notwithstanding subsection (3) of section 34,

(a) a security interest in an accession that attached before the goods became an accession has priority as to the accession over the claim of any person in respect of the whole; and

(b) a security interest in goods that attached after the goods became an accession has priority over the claim of any person who subsequently acquired an interest in the whole, but not against a person who had an interest in the whole at the date of attachment of the security interest in the accession and who has not consented in writing to the security interest in the accession or disclaimed an interest in the accession as part of the whole.

Exceptions

(2) A security interest referred to in subsection (1) is subordinate to the interest of,

(a) a subsequent purchaser for value of an interest in the whole; or

(b) a creditor with a lien on the whole, subsequently obtained as a result of judicial process; or

(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances,

if the subsequent purchase was made, the lien was obtained or the subsequent advance under the prior perfected security interest was made or contracted for without knowledge of the security interest and before it is perfected.

Removal of collateral

(3) If a secured party, by virtue of subsections (1) and (2), has an interest in an accession that has priority over the claim of any

person having an interest in the whole, he may, on default, subject to the provisions of this Act respecting default, remove his collateral from the whole if, unless otherwise agreed, he reimburses any encumbrancer or owner of the whole who is not the debtor for the cost of repairing any physical injury excluding diminution in value of the whole caused by the absence of the goods removed or by the necessity for replacement, but a person so entitled to reimbursement may refuse permission to remove until the secured party has given adequate security for any reimbursement arising under this subsection.

Retention of collateral

(4) A person having a security interest in the whole that is subordinate to a security interest by virtue of subsections (1) and (2) may, before the collateral has been removed by the secured party in accordance with subsection (3), retain the collateral upon payment to the secured party of the amount owing under the security interest having priority over his claim.

Commingled goods

38. A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass, and, if more than one security interest attaches to the product or mass, the security interests rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

Priority subject to subordination

39. A secured party may, in the security agreement or otherwise, subordinate his security interest to any other security interest.

Account debtors

40. (1) Unless an account debtor has made an enforceable agreement not to assert defences or claims arising out of a contract, the rights of an assignee are subject to,

(a) all the terms of the contract between the account debtor and the assignor and any defence or claim arising therefrom; and

(b) any other defence or claim of the account debtor against the assignor that accrued before the account debtor received notice of the assignment.

Modification of contract after assignment

(2) So far as the right to payment under an assigned contract right has not been earned by performance, and notwithstanding notification of the assignment, any modification of or substitution

for the contract made in good faith and in accordance with reasonable commercial standards and without material adverse effect upon the assignee's right under, or the assignor's ability to perform, the contract, is effective against an assignee unless the account debtor has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract, and the assignment may provide that such modification or substitution is a breach by the assignor.

Payment by account debtor

(3) The account debtor may pay the assignor until the account debtor receives notice, reasonably identifying the relevant rights, that the account has been assigned, and, if requested by the account debtor, the assignee shall furnish proof within a reasonable time that the assignment has been made, and, if he does not do so, the account debtor may pay the assignor.

Registration system

41. (1) A registration system, including a central office and branch office, shall be established for the purposes of this Act.

Central office

(2) The central office of the registration system shall be located at

Branch offices

(3) Branch offices of the registration system shall be established at such places as are designated by the regulations.

Registration office for corporate securities

(4) The Office of the shall be the registration office for corporate securities.

Registrar, appointment

42. (1) There shall be a registrar or personal property security and a branch registrar for each branch office.

Functions

(2) It shall be the function of the registrar, under the direction of the Inspector of Legal Offices, to supervise the operation of the registration system established for the purposes of this Act.

Seal of office

(3) The registrar and each branch registrar shall have a seal of office in such form as the Lieutenant Governor in Council approves.

Signing Officers

43. The registrar and each branch registrar may designate one or more persons on the staff of his office to act on his behalf.

Registrar's certificate

44. (1) Upon the request of any person and upon payment of the prescribed fee,

(a) the registrar shall issue a certificate stating whether there is registered at the time mentioned in the certificate a security agreement or other document in which the person

named in the certificate is shown as a debtor and, if there is, the registration number of it, and any other information recorded in the central office of the registration system;

(b) any registered security agreement or other document shall be provided for inspection at the branch office where it was registered; and

(c) a certified copy of any security agreement or other document shall be furnished at the branch office where it was registered.

Proof of certificates

(2) A certificate issued under clause (a) of subsection (1) is prima facie evidence of the contents thereof.

Proof of certified copies

(3) A certified copy furnished under clause (c) of subsection (1) is prima facie evidence of the contents of the document so certified.

Assurance Fund

45. (1) There shall be an account in the Consolidated Revenue Fund to be known as "The Personal Property Security Assurance Fund", referred to in this section as "the Fund", into which shall be paid the prescribed portion of the fees received under this Act.

Interest

(2) Interest shall be credited to the Fund out of the Consolidated Revenue Fund at a rate to be determined from time to time by the Lieutenant Governor in Council, and such interest shall be made up at the close of each fiscal year upon the balance in the Fund at the end of the previous calendar year.

Persons suffering damage to be compensated

(3) Any person who suffers loss or damage as a result of his reliance upon a certificate of the registrar issued under section 44 that is incorrect because of an error or omission in the operation of the system of registration, recording, and production of information under this Part, is, subject to subsection (4), entitled to have compensation paid to him out of the Fund in an amount not exceeding dollars, if he makes a claim therefor under subsection (5) within one year from the time of his having suffered the loss or damage.

Compensation for loss under issue of corporate securities

(4) The total of all claims for compensation paid out of the Fund to all holders of interests in any single issue of corporate securities shall not exceed dollars.

Claim for compensation

(5) A person claiming to be entitled to payment of compensation out of the Fund shall make application therefor in writing to

the registrar, setting out therein his full name and address and the particulars of his claim.

Reference

(6) The registrar shall refer the application to the who shall issue such directions as he thinks proper, hold a hearing, determine the claimant's entitlement to compensation, the amount thereof, and, if awarded, the costs of the proceedings.

Certificate

(7) The shall make his findings and embody his conclusions in the form of a certificate and send by registered mail one copy thereof to the claimant at the address shown in the application and one copy to the registrar.

Confirmation of certificate

(8) The certificate of the shall be deemed to be confirmed at the expiration of thirty days from the date of mailing it to the claimant, unless notice of appeal is served within that time.

Appeal

(9) The claimant or the registrar may appeal to the at any time before the certificate of the Master is confirmed, and the procedure thereon shall be the same as upon an appeal from a report when a whole action has been referred under .

Payment out of fund

(10) When the registrar received a certificate of the under subsection (7) and the time for any appeal has expired or, where an appeal is taken, it is disposed of, and it is finally determined that the claimant is entitled to payment of compensation out of the Fund, the registrar shall certify to the the sum found to be payable, including any costs awarded to the claimant, and the shall pay such sum to the claimant out of the Fund.

Where documents to be registered

46. (1) Subject to subsection (2), documents to be registered under this Act shall be tendered for registration at any branch office established under subsection (3) of section 41.

Corporate securities

(2) Corporate securities, and documents relating thereto, to be registered under this Act shall be tendered for registration at the office.

Effective time of registration

(3) Any registration under this Act is effective only from the time of the recording of the prescribed particulars thereof in the central office and the assignment thereto of a registration number.

Registration of security agreement or copy

47. (1) In order to register under this Act for the purpose of perfecting a security interest, the security agreement, or a copy

thereof, signed by the debtor shall, subject to subsection (3), be registered, and it shall contain and legibly set forth at least

(a) the full name and address of the debtor;

(b) the name and address of the secured party;

(c) the date of execution of the security agreement;

(d) a description of the collateral sufficient to identify it; and

(e) the terms and conditions of the security agreement.

Registiation of notice of intention

(2) Where the collateral is inventory or accounts, a notice of intention to give security signed by the debtor, which contains and legibly sets forth at least

(a) the full name and address of the debtor;

(b) the full name and address of the secured party; and

(c) a description of the collateral sufficient to identify it;

may, in lieu of the security agreement under subsection (1), be registered before a security agreement is signed or a security interest otherwise attaches, in order to perfect a security interest in the inventory or accounts.

Where collateral brought into province

(3) Where the collateral was subject to a security interest in another jurisdiction at the time the collateral was brought into Ontario, or where it is desired to perfect a security interest in the proceeds of collateral included in an already perfected security interest, the secured party may register a copy of the security agreement signed by the debtor or a caution in the prescribed form.

What constitutes registration

(4) Registration of a copy of the security agreement signed by the debtor, a notice of intention signed by the debtor, or a caution under this section, constitutes registration for the purposes of this Act.

Time limit

(5) Where the collateral is other than instruments, securities, letters of credit, advices of credit, negotiable documents of title or goods to be held for sale or lease with respect to which a notice of intention has been registered, the security agreement shall not be registered after thirty days from the date of its execution.

Errors

(6) An error of a clerical nature or in an immaterial or non-essential part of a security agreement, caution or notice of intention that does not mislead does not invalidate the registration or destroy the effect of the registration.

Assignments

48. (1) An assignment, or a copy thereof, signed by the secured party of record, of a security agreement, notice of intention or caution may also be registered, if the security agreement, notice of intention or caution has been registered under this Act previous to the registration of the assignment, if the assignment contains and legibly sets forth at least

(a) the full name and address of the debtor;

(b) the full name and address of the secured party of record;

(c) the full name and address of the assignee; and

(d) the registration number given at the time where the registration of the security agreement, notice of intention or caution or, if the assignment is presented for registration at the same time as the security agreement or caution, the registration number of the security agreement or caution that is then endorsed thereon.

Assignee becomes secured party

(2) Upon the registration of an assignment or a copy thereof under subsection (1), the assignee becomes the secured party of record.

Assignment of collateral by debtor

49. (1) Where a security interest has been perfected by registration, and the debtor with the consent of the secured party assigns his interest in the collateral, the assignee becomes a debtor and the security becomes unperfected unless the secured party registers a notice in the prescribed form within fifteen days of the time he consents to the assignment.

Where a security interest becomes unperfected

(2) Where a security interest has been perfected by registration, and the secured party learns that the debtor has assigned his interest in the collateral, the security interest becomes unperfected fifteen days after the secured party learns of the assignment and the name and address of the assignee, unless he registers a notice in the prescribed form within the fifteen days.

Second registration

(3) A security interest that becomes unperfected under subsection (1) or (2) may thereafter be perfected by registering a notice in the prescribed form or as otherwise provided by this Act.

Amendments of security agreement

50. (1) An amendment, or a copy thereof, of a security agreement registered under this Act that refers to the registration number of the security agreement, notice of intention or caution that it amends and that is signed by the secured party of record and, subject to subsection (3), by the debtor, may be registered at any time

during the period that the registration of the security agreement, notice of intention or caution is effective.

Amendment adding collateral

(2) Where an amendment adds collateral, it is effectively registered as to the additional collateral only from the date of registration of the amendment.

Dispensing with debtor's signature

(3) Upon notice to the debtor, a judge may make an order dispensing with the signature of the debtor on an amendment to be filed under this section.

Subordination

51. A separate agreement signed by the secured party of record that provides for the subordination of a security interest created or provided for by a security agreement registered under this Act or as to which a notice of intention or caution is registered under this Act and that refers to the registration number of the security agreement, notice of intention or caution may be registered at any time during the period that the registration of the security agreement, notice of intention or caution is effective.

Renewal statements

52. A renewal statement in the prescribed form that is signed by the secured party of record may be registered at any time.

Effect of registration

53. (1) Where the collateral covered by a security agreement is other than instruments, securities, letters of credit, advices of credit or negotiable documents of title, registration under this Act

(a) of a security agreement, notice of intention or caution constitutes notice thereof to all persons claiming any interest in the collateral during the period of three years following the registration;

(b) of a renewal statement constitutes notice of the security agreement, notice of intention or caution to which it relates to all persons claiming any interest in the collateral during the period of three years following the registration; and

(c) of any other document constitutes notice thereof to all persons claiming any interest in the collateral during the remainder of the period for which the registration of the security agreement, notice of intention or caution is effective.

Fixtures

(2) Where the collateral is or includes fixtures or goods that may become fixtures, or crops, or oil, gas or other minerals to be extracted, or timber to be cut, the security agreement or any other document that may be registered under this Act containing a description of the land affected sufficient for registration under

(The Land Titles Act or The Registry Act) as the case may be, may, whether or not it is registered under this Act, be registered under (The Land Titles Act or The Registry Act).

Corporate securities

(3) The time limits set out in clauses (a), (b) and (c) of subsection (1) do not apply to corporate securities.

Discharge of security agreement

54. (1) Upon performance of all obligations under a security agreement, it shall be discharged, and, upon written demand delivered either personally or by registered mail during the period that the registration of the security agreement or caution is effective by any person having an interest in the collateral to the secured party, the secured party shall sign and deliver personally or by registered mail to the person demanding it, at the place set out in the demand, a certificate of discharge in the prescribed form together with unregistered assignments, if any, of the security agreement.

Discharge of notice of intention

(2) Where there are no outstanding obligations under any security agreement covered by registered notice of intention, the secured party, upon written demand delivered either personally or by registered mail by a person having an interest in the collateral, shall sign and deliver personally or by registered mail to the person demanding it, at the place set out in the demand, a certificate of discharge of the notice of intention in the perscribed form.

Release of part of collateral

(3) Where it is agreed to release part of the collateral upon payment or performance of certain of the obligations under a security agreement, then, upon payment or performance of the obligations and upon written demand delivered either personally or by registered mail during the period that the registration of the security agreement or caution is effective by any person having an interest in the collateral to the secured party, the secured party shall sign and deliver personally or by registered mail to the person demanding it, at the place set out in the demand, a release in the prescribed form of the collateral as agreed.

Failure to deliver

(4) Where the secured party, without reasonable excuse, fails to deliver the required discharge and assignments or release, as the case may be, within ten days after receipt of a demand therefor under subsection (1), (2) or (3), he shall pay one hundred dollars to the person making the demand and any damages resulting from the failure, which sum and damages are recoverable in any court of competent jurisdiction.

Security or payment into court

(5) Upon application to the county or district court by originating notice to all persons concerned, the judge may

(a) allow security for or payment into court of the amount claimed by the secured party and such costs as he may fix, and thereupon order that the registration of the security agreement, notice of intention or caution be discharged or that a release of collateral be registered, as the case may be; or

(b) order upon any ground he deems proper that the registration of the security agreement, notice of intention or caution be discharged or that a release of collateral be registered, as the case may be.

Registration of discharges and releases

(6) Any discharge of a security agreement or notice of intention, and any release of collateral, may be registered under this Act.

Meaning of "true copy"

55. (1) In this section "true copy" includes a legible copy of the original document produced by photographic, electrical or mechanical means and certified as a true copy by notarial certificate or certificate of the debtor.

Registration of true copies

(2) A document that is required or permitted to be registered under this Act may be either the original document or a true copy hereof.

Copies of signatures on true copies

(3) Where a true copy of a document is registered, any signature thereon may be a reproduction of the signature on the original document or a copy thereof in type or writing indicated by means of inverted commas.

## PART V

## DEFAULT—RIGHTS AND REMEDIES

Rights and remedies cumulative

56. (1) The rights and remedies referred to in this Part are cumulative.

Secured party's rights and remedies

(2) Where the debtor is in default under a security agreement, the secured party has, in addition to any other rights and remedies, the rights and remedies provided in the security agreement except as limited by subsection (5), the rights and remedies provided in this Part and, when in possession, the rights, remedies and duties provided in section 19.

Appointment of Receiver

(3) Nothing in this Act prevents the parties from agreeing that the secured party may appoint a receiver or prevents a court from appointing a receiver and determining his rights and duties.

Secured party's remedies

(4) The secured party may enforce the security interest by any method available in or permitted by law and, if the collateral is or includes documents of title, the secured party may proceed either as to the documents of title or as to the goods covered thereby; and any method of enforcement that is available with respect to the documents of title is also available, mutatis mutandis, with respect to the goods covered thereby.

Debtor's rights and remedies

(5) Where the debtor is in default under a security agreement, he has, in addition to the rights and remedies provided in the security agreement and any other rights and remedies, the rights and remedies provided in this Part and section 19.

Waiver and variation of rights and duties

(6) Except as provided in sections 61 and 62, the provisions of subsections (3), (4) and (5) of sections 59 and of sections 60, 61, 62 and 63, to the extent that they give rights to the debtor and impose duties upon the secured party, shall not be waived or varied, but the parties may by agreement determine the standards by which the rights of the debtor and the duties of the secured party are to be measured, so long as such standards are not manifestly unreasonable having regard to the nature of such rights and duties.

Where agreement covers both real and personal property

(7) Where a security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property, in which case this Part does not apply.

No merger in judgment

(8) A security interest does not merge merely because a secured party has reduced his claim to judgment.

Collection rights of secured party

57. (1) Where so agreed and in any event upon default under a security agreement, a secured party is entitled

(a) to notify any account debtor or any obligor on an instrument to make payment to him whether or not the assignor was theretofor making collections on the collateral; and

(b) to take control of any proceeds to which he is entitled under section 27.

Collection in commercially reasonable manner

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse

against the debtor and who undertakes to collect from the account debtor or obligors on instruments shall proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

Secured party's right to take possession upon default

58. Upon default under a security agreement

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

(b) if the collateral is equipment and the security interest has been perfected by registration, the secured party may, in a reasonable manner, render the equipment unusable without removal thereof from the debtor's premises, and the secured party shall thereupon be deemed to have taken possession of the equipment; and

(c) the secured party may dispose of collateral under section 59 on the debtor's premises;

but, if the collateral is goods that have become a fixture, the secured party shall not remove the fixtures from the debtor's lands unless he has given a notice in writing of his intention to remove the fixtures to each person who appears by the records of the (Land Titles Office) to have an interest in the lands, and unless each person so notified fails to pay the amount due and payable on the fixture for a period of twenty days after the giving of the notice to him, or for such longer period as a judge of the county court may fix on cause shown to his satisfaction.

Secured party's right to dispose of collateral on default

59. (1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to

(a) the reasonable expenses of retaking, holding, repairing, processing, preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement and not prohibited by law, any other reasonable expenses incurred by the secured party;

(b) the satisfaction of the obligation secured by the security interest of the party making the disposition; and

(c) the satisfaction of the obligation secured by any subordinate security interest in the collateral if written demand

therefor is received by the party making the disposition before the distribution of the proceeds is completed.

Request for proof of interest

(2) Where a written demand under clause (c) of subsection (1) is received by the secured party, he may request the holder of the subordinate security interest to furnish him with reasonable proof of the holder's interest, and, unless the holder furnishes the proof within a reasonable time, the secured party need not comply with the demand.

Methods of disposition

(3) Collateral may be disposed of in whole or in part, and the disposition may be by public sale, private sale, lease or otherwise and, subject to subsection (5), may be made at any time and place and on any terms so long as every aspect of the disposition is commercially reasonable.

Secured party's right to delay disposition

(4) The secured party may, subject to subsection (1) of section 61, retain the collateral in whole or in part for such period of time as is commercially reasonable.

Secured party to give notice of disposition of collateral

(5) Unless the collateral is perishable or unless the secured party believes on reasonable grounds that the collateral will decline speedily in value, the secured party shall give to the debtor and to any other person who has a security interest in the collateral and who has registered a security agreement, notice of intention or caution under this Act indexed in the name of the debtor or who is known by the secured party to have a security interest in the collateral not less than fifteen days notice in writing containing

(a) a brief description of the collateral;

(b) the amount required to satisfy the obligation secured by his security interest;

(c) the sums actually in arrear, exclusive of the operation of any acceleration clause in the security agreement, or a brief description of any other provisions of the security agreement for the breach of which the secured party intends to dispose of the collateral;

(d) the amount of the applicable expenses referred to in clause (a) of subsection (1) or, in a case where the amount of those expenses has not been determined, his reasonable estimate thereof;

(e) a statement that, upon payment of the amounts due under clauses (b) and (d), the debtor may redeem the collateral;

(f) a statement that upon payment of the sums actually in arrear or the curing of any other default, as the case may be, together with the amounts due under clause (a) of subsection (1), the debtor may reinstate the security agreement;

(g) a statement that unless the collateral is redeemed or the security agreement is reinstated the collateral will be disposed of and the debtor may be liable for any deficiency; and

(h) the date, time and place of any public sale or of the date after which any private disposition of the collateral is to be made.

Service of notice

(6) The notice required under subsection (5) shall be served personally upon or left at the residence or last known place of abode of the party to be served or may be sent by registered mail to his last known post office address.

Secured party's right to purchase collateral

(7) The secured party may purchase the collateral or any part thereof only at a public sale.

Effect of disposition of collateral

(8) Where collateral is disposed of in accordance with this section, the disposition discharges the security interest of the secured party making the disposition and, if the disposition is made to a bona fide purchaser for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral.

Effect of disposition otherwise than under this section

(9) Where collateral is disposed of by a secured party after default otherwise than in accordance with this section,

(a) in the case of a public sale, if the purchaser has no knowledge of any defect in the sale and if he does not purchase in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith;

the disposition discharges the security interest of the secured party making the disposition and, where the disposition is made to a purchaser for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral.

Certain transfers of collateral

(10) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

Application of subsec (5) and (6)

(11) Subsections (5) and (6) do not apply

(a) to corporate securities; or

(b) where a receiver or manager has been appointed by a court or pursuant to the security agreement.

Surplus

60. Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57 or has disposed of it in accordance with section 59 or otherwise, he shall account for any surplus to any person, other than the debtor, whom the secured party knows to be the owner of the collateral, and, in the absence of such knowledge, he shall account to the debtor for any surplus.

Compulsory disposition of collateral, consumer goods

61. (1) Where the security agreement secures an indebtedness and the collateral is consumer goods and the debtor has paid at least sixty per cent of the indebtedness secured and has not signed, after default, a statement renouncing or modifying his rights under this Part, the secured party who has taken possession of the collateral shall, within ninety days after taking possession dispose of or contract to dispose of the collateral under section 59, and, if he fails to do so, the debtor may proceed under section 63 or in an action for damages or loss sustained.

Retention of collateral

(2) In any case other than that mentioned in subsection (1), a secured party in possession of the collateral may, after default, propose to retain the collateral in satisfaction of the obligation secured, and notification of the proposal shall be given to the debtor and to any other person whom the secured party knows to be the owner of the collateral and, except in the case of consumer goods, to any other person who has a security interest in the collateral and who has registered a security agreement under this Act indexed in the name of the debtor or who is known by the secured party in possession to have a security interest in the collateral.

Requirement to dispose of collateral

(3) If any person entitled to notification under subsection (2) objects in writing within fifteen days after being notified, the secured party in possession shall dispose of the collateral under section 59, and, in the absence of any such objection, the secured party shall, at the expiration of the period of fifteen days, be deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation secured, and thereafter is entitled to hold or dispose of the collateral free of all rights and interests therein of any person entitled to notification under subsection (2) who was given such notification.

Redemption of collateral

62. (1) At any time before the secured party has disposed of the collateral by sale or exchange or contracted for the disposition under section 59 or before the secured party shall be deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation under subsection (2) of section 61, the debtor, or any person other than the debtor who is the owner of the collateral, or any secured party in possession, may, unless he has otherwise agreed in writing after default

(a) redeem the collateral by tendering fulfillment of all obligations secured by the collateral; or

(b) reinstate the security agreement by paying the sums actually in arrear, exclusive of the operation of any acceleration clause, or by curing any other default by reason whereof the secured party intends to dispose of the collateral;

together with a sum equal to the reasonable expenses of retaking, holding, repairing, processing, preparing the collateral for disposition and in arranging for its disposition, and, to the extent provided for in the security agreement, the reasonable solicitor's costs and legal expenses.

Rights under corporate security

(2) Upon application of the secured party under a corporate security, a judge may order that the debtor under the corporate security does not have any right to reinstate the security agreement under clause (b) of subsection (1).

Remedies for failure of secured party to comply with this Part

63. (1) Where a secured party in possession of collateral is not complying with any of the obligations imposed by section 19, or, after default, is not proceeding in accordance with this Part or the account is disputed, the debtor or any person who is the owner of the collateral or the creditors of either of them or any person other than such secured party who has an interest in the collateral may apply to the x x x x x court having jurisdiction with respect thereto, and the court may, upon hearing any such application direct that the secured party comply with the obligations imposed by section 19, or that the collateral be or be not disposed of, or order an account to be taken or make such other or further order as the court deems just.

Rights of debtor

(2) If the disposition of the collateral has been made otherwise than in accordance with this Part,

(a) the debtor or any other person entitled to notice under subsection (5) of section 59 or whose security interest has

been made known to the secured party prior to the disposition has a right to recover from the secured party any loss or damage caused by his failure to comply with this Part; and

(b) where the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

Removal of proceedings into Supreme Court

(3) Where an application under subsection (1) is made to a county or district court, a respondent may, by notice served on the applicant and on the other respondents, if any, and filed with proof of service thereof with the clerk of the county or district court not later than the two days preceding the day of the return of the application, require the proceedings to be removed into the court.

Transmission of proceedings

(4) Upon the filing of the notice and proof of service thereof, the clerk of the county or district court shall forthwith transmit the papers and proceedings to the proper office of the x x x x x court in the county or district in which the application is made.

Removal of proceedings

(5) When the papers and proceedings are received at the proper office of the x x x x x court, the proceedings are ipso facto removed into the x x x x x court.

Reference to master

(6) Where an application under subsection (1) is made to or is removed into the x x x x x court, the court may refer any question to a master or other officer for inquiry and report.

Appeal

(7) An appeal lies to the Court of Appeal from any order made under this section.

## PART VI

## MISCELLANEOUS

Extension of time

64. (1) Where, in this Act, any time is prescribed within which or before which any act or thing must be done, a judge on application may, upon such terms and conditions and with such notice, if any, as he may order, extend the time for doing the act or thing upon being satisfied that the failure to do the act or thing within or before the time prescribed was accidental or due to inadvertance or impossibility or other sufficient cause.

Copy of order attached to docu ent

(2) A copy of an order made under this section shall be registered with the document to which the order relates.

Rights protected

(3) The rights of other persons accrued up to the time of the registration of the order made under this section are not affected by the order.

Application of Act in respect of attach ent

65. (1) This Act applies only where the security interest attaches on or after the day on which this section came into force, and, where the security attached before this Act came into force, the security interest continues to have force and effect as if this Act had not been passed.

Application of prior law on priorities

(2) The order of priorities between a security interest validly created under any prior law and a security interest validly created under this Act shall be determined by the prior law.

Registration under prior law

66. Every security interest that was covered by an unexpired filing or registration under The Assignment of Book Debts Act, The Bills of Sale and Chattel Mortgages Act and The Conditional Sales Act when this section came into force shall be deemed to have been registered and perfected under this Act and, subject to this Act, the registration continues the effect of the prior filing or registration for the unexpired portion of the filing or registration period.

R les of practice

67. Unless otherwise provided by this Act or the regulations, the Rules of Practice and Procedure of the x x x x x court apply to proceedings under this Act.

Destruction of docu ents

68. Where books, documents, records, cards or papers have been preserved for the purposes of this Act for so long that it appears they need not be preserved any longer, the Inspector of Legal Offices may authorize their destruction.

Conflicting provisions

69. Where there is conflict between a provision of this Act and a provision of The Consumer Protection Act, the provision of The Consumer Protection Act prevails and, where there is conflict between a provision of this Act and a provision of any general or special Act, other than The Consumer Protection Act, the provision of this Act prevails.

Reference to this Act

70. The provisions of any general or special Act that relate to a security interest and that refer to The Assignment of Book Debts Act, The Bills of Sale Act or The Conditional Sales Act or any provision thereof shall be deemed to refer to this Act or to the corresponding provision of this Act, as the case may be, and not to

The Assignment of Book Debts Act, The Bills of Sale Act or The Conditional Sales Act, as the case may be.

Regulations

71. The Lieutenant Governor in Council may make regulations

(a) designating branch offices;

(b) approving the form of the seal of the registrar and each branch registrar;

(c) prescribing the duties of the registrar and branch registrars;

(d) prescribing business hours for the offices of the registration system or any of them;

(e) respecting the registration system;

(f) requiring the payment of fees and prescribing the amounts thereof;

(g) prescribing the portion of the fees received under this Act that shall be paid into The Personal Property Security Assurance Fund;

(h) governing practice and procedure applicable to proceedings under this Act;

(i) prescribing forms and providing for their use;

(j) prescribing the particulars referred to in section 46;

(k) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Expenses of administration

72. The moneys required for the purposes of this Act shall be paid out of the Consolidated Revenue Fund until the . day of , 19 , and thereafter out of such moneys as are appropriated therefor by the Legislature.

Commencement of Act

73. This Act, except sections 1 to 40, 44 and 46 to 70, comes into force on the day it receives Royal Assent, and sections 1 to 40, 44 and 46 to 70 come into force on a day to be named by the Lieutenant Governor by his proclamation.

Crown bound

74. The Crown is bound by this Act.

## APPENDIX O

(*See page 79*)

### REPORT ON A DRAFT AMENDMENT TO THE UNIFORM PRESUMPTION OF DEATH ACT

On August 26, 1969, the Conference of Commissioners on Uniformity of Legislation in Canada instructed me to prepare a draft amendment to the uniform *Presumption of Death Act* that would incorporate section 3 of the *Family Relief Act*, R.S.A. 1955, c. 109, and whatever would be advisable from *The Absentee Act, 1969*, S.S. 1969, c. 1: see page 25 of the *1969 Proceedings*. Because of other business the Conference was unable to receive this report last year.

I shall deal with the problems that present themselves under the following headings: 1. The remarriage of the absentee's spouse, 2. The persons entitled to an absentee order, and 3. The proceedings.

1. *The remarriage of the absentee's spouse*

For the reasons I shall mention later, I submit that if the provisions of section 3 of the Alberta Act were simply added to the uniform Act the result would not be entirely satisfactory. Subsection 3(1) of the uniform Act authorizes the court to declare that a person shall be presumed dead *for all purposes*. This provision has to be read in conjunction with head 91(26) and head 92(12) of the *British North America Act, 1867*. The power of Parliament to legislate in respect of marriage and divorce is only restricted by the power of the provincial legislatures to legislate in respect of the solemnization of marriage within the province. See, in this connection, *Re Marriage Law of Canada* (1912), 7 D.L.R. 629 (P.C.). The presumption of death for all purposes whereof the uniform Act speaks can only mean all those purposes in respect of which the province may legislate. It therefore excludes implicitly a declaration of death which would dissolve the marriage of the person in respect of whom the declaration was made. It would, however, be preferable, if, instead of having to imply this limitation, the Act expressly restricted a declaration of death to matters of property. I consider such explicit restriction particularly necessary if a provision similar to section 3 of the Alberta Act were added to the uniform Act. This section reads as follows:

> 3. Where a judge makes a declaration of death and the spouse of the person presumed to be dead goes through a form

> of marriage with another person in accordance with the law in force at the place where the marriage ceremony is performed, then notwithstanding that it is later found that the person presumed to be dead was alive when such marriage ceremony was performed, the parties to such marriage ceremony and their children have the same rights *under this Act* as they would have had if the person presumed to be dead had in fact died before such marriage ceremony.

Although this section expressly refers to the rights under the *Family Relief Act*, the inference might easily be drawn that the Act purports to give the spouse of an abstentee the right to remarry with all that this implies, that is to say, that the second marriage is a valid marriage for all purposes. This is not, and cannot be, the effect of this section, because only Parliament has the power to make laws with this effect.

I invite this Conference to examine the question whether the Government of Canada should be requested to consider placing before Parliament a bill similar to section 14 of the U.K. *Matrimonial Causes Act, 1965* (Appendix B). It would provide that where under a provincial statute a court or judge declares a person presumed to be dead, the court or judge may declare the marriage of that person to be dissolved and to determine the day the dissolution takes effect and that such declaration may be made either simultaneously with the declaration of presumption of death or at any time thereafter. A provision in an Act of Parliament to this effect would obviate the disadvantages that the person would suffer with whom the spouse of the absentee went through a form of marriage and the children of such union.

I should submit that the wording of section 3 of the Alberta Act can be improved upon. The section requires that merely the formalities of the marriage ceremony, in order to give to the parties thereto the rights envisaged in the Act, have to be observed in accordance with the *lex loci celebrationis*. There is no doubt in my mind that the requirement of the marriage ceremony to be in accordance with the *lex loci celebrationis* is good law. If authority for this proposition were needed, I should refer to *Frew v. Reed* (1969), 69 W.W.R. 327 (B.C.) where it was held that, as far as the formalities of the marriage ceremony are concerned, it is sufficient that the *lex loci celebrationis* be complied with. The foregoing notwithstanding, I have two objections to the reference regarding the validity of the subsequent marriage by the "widowed" spouse.

(1) My first objection is that the section 3 here under consideration deals only with the formal and not with the intrinsic validity of the marriage, that is to say, with capacity and consent. From this omission the inference could conceivably be drawn that, in order to fulfil the terms of this section, compliance with the formal requirements of the marriage ceremony is sufficient.

(2) My second objection to this section is that it incidentally deals with a conflicts question, namely that a marriage ceremony performed in accordance with the *lex loci celebrationis* governs the validity of the marriage of a person in respect of whose prior spouse a court has made a declaration of presumption of death. In my submission all conflicts questions pertaining to one field of law—in this case the law of marriage and divorce—should be dealt with, as far as possible, comprehensively and not piecemeal. My reason for saying so is that to do otherwise may result in discrepancies.

I should therefore recommend that the uniform Act make no reference to a law in compliance with which a marriage ceremony here under consideration has to be performed. Instead, I propose that the Act speak of a marriage that would be valid had the absentee died prior to its celebration. It would, in part, read as follows:

> (1) In this section, . . . "marriage" means a marriage that would be valid had the absentee been dead when it was celebrated.
>
> (2) Where an absentee is alive on the day a marriage was celebrated between his spouse and another person, the absentee is deemed to have been dead on that day for the purpose of determining the rights, powers, duties and disabilities in relation to property of the partners of such marriage and their issue.

The full text is proposed as section 4 of the appended discussion draft.

The restriction to property rights would ensure that the provision is *intra vires* under head 92(13) of the *British North America Act, 1867*. The reference to disabilities would, it is submitted, also revoke wills made by the absentee's spouse and her new marriage partner in accordance with section 20 of the *Wills Act*, R.S.O. 1960, c. 433, and other provincial statutes to a similar effect.

2. *The persons entitled to an absentee order*

The uniform *Presumption of Death Act* is silent on the question who may apply for an order declaring a person presumed to be dead. Section 3 of *The Absentee Act, 1969* enumerates, in five paragraphs, the persons entitled to the order, and I would suggest that the uniform Act incorporate these provisions.

The uniform Act is also silent on the question who may apply for the setting aside of an order or who may appeal the order. I suggest that section 7 of the Saskatchewan Act be adopted with the modifications indicated in the appendix to this report.

3. *The proceedings*

I do not consider it in the best interest of the persons affected by an absentee order that, as section 2 of the Saskatchewan Act provides, it be made *ex parte* in any event. The requirement of notice to interested persons as stated in the uniform Act, is in my submission, preferable. The same applies to an application for the setting aside of the order.

I should add to the three grounds for making application given in the uniform Act and other provincial Acts as, for example, the *Survivorship and Presumption of Death Act,* R.S.B.C. 1960, c. 375, one further ground, namely, that the person has, on a certain date or at a certain time, been in such danger that there is little likelihood of survival. This would be applicable when a person took part in a military expedition or was present in a place where an earthquake, conflagration or similar disaster took place.

A discussion draft of a revised uniform *Presumption of Death Act* is attached to this report as Appendix A.

Respectfully submitted,

Hugo Fischer,
for the Yukon and
Northwest Territories
Representatives.

APPENDIX A

*Discussion Draft*
*March 1970*

## PRESUMPTION OF DEATH ACT

1. (1) Upon application to the . . . Court by originating notice of motion, and if satisfied that

(a) a person has

(i) on a certain day or within a certain period of time, been exposed to such danger as may have resulted in his death, or

(ii) been absent

and not heard of or from by the applicant, or to the knowledge of the applicant by any person, since a day named;

(b) the applicant has no reason to believe that the person is living; and

(c) reasonable grounds exist for supposing that the person is dead,

the Court may make an order declaring that the person shall be presumed to be dead for all purposes in relation to property rights or for such purposes only as are specified in the order.

(2) The order shall state the date on which the person is presumed to have died or the date after which the person is presumed not to be living.

2. An application under section 1 may be made

(a) by the Attorney General;

(b) by any one or more of the next of kin of the person mentioned in subclause (i) or (ii) of clause (a) of subsection (1) of section 1;

(c) by the spouse of that person;

(d) by a creditor of that person; or

(e) by anyone interested in the affairs of that person.

3. An order made under section 1, or a certified copy thereof, is proof of death in all matters referred to or specified in the order that require such proof.

4. (1) In this section,

(a) "absentee" means a person who, under this Act, has been declared to be presumed dead; and

(b) "marriage" means a marriage that would be valid had the absentee been dead when it was celebrated.

(2) Where an absentee is alive on the day a marriage was celebrated between his spouse and another person, the absentee is deemed to have been dead on that day for the purpose of determining the rights, powers, duties and disabilities in relation to property of the partners of such marriage and their issue.

5. A person aggrieved or affected by an order made under this Act may apply for an order superseding, vacating or setting aside such order and may appeal any order made under this Act to the Court of Appeal.

APPENDIX B

*United Kingdom*

## MATRIMONIAL CAUSES ACT 1965

14. Presumption of death and dissolution of marriage.

(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, subject to the next following subsection, present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable grounds exist, make a decree of presumption of death and dissolution of the marriage...

(3) In any proceedings under this section the fact that for a period of seven years or more the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that the other party is dead until the contrary is proved...

# APPENDIX P

(*See page 79*)

## Alternative Draft of the Occupiers' Liability Act

### Report of British Columbia Commissioners

1. The first draft of this Act was presented to the Conference in 1970 and appears in the proceedings on page 330.

2. As indicated on page 42 of the proceedings' minutes, it was resolved that the matter be referred back to the British Columbia Commissioners for report at the next meeting of the Conference with a draft giving effect to the decisions made at that meeting. Those decisions were

(1) The British Columbia Commissioners were to consider the impending report of the Law Reform Commission of Ontario on the subject and make any changes in our draft considered necessary as a result of that report.

(2) The British Columbia Commissioners were to examine the possibility of carrying out their own suggestion, which appears as section 7 of their report on page 329 of the proceedings' minutes; namely, that not only should the artificial distinctions of invitee, licensee, etc., be eliminated, but that the oridinary common law rules of negligence should apply instead of an artificial concept of "common duty of care" of the English Act and the draft Act of the Alberta Institute.

3. The report of the Law Reform Commission of Ontario is not yet available, so has not been considered.

4. The attached alternative draft Act and notes thereto is intended to carry out our previous suggestion of eliminating the artificial concept and definition of "common duty of care" in favour of the common law rules of negligence. We have gone further and eliminated the special rules and categories pertaining to trespassers, whether children or adults, for reasons which appear in the notes. The result is a much simpler and shorter Act but an

Act which, we believe, is adequate for the purpose; namely, to define the extent of liability of an occupier of premises to other persons.

Respectfully submitted,
G. A. Higenbottam,
for British Columbia Commissioners.

In this alternative draft of the Occupiers' Liability Act we had two principal objectives;

(1) To eliminate the artificial distinctions between invitee, licensee (and trespasser, if possible);

(2) To allow the oridinary rules of negligence to apply in relations between occupiers of premises and other persons, instead of an artificial "common duty of care" as in the English Act (English Occupiers' Liability Act, 1957) and adopted by the British Columbia Commissioners in our 1968 and 1970 draft Acts; (1968 draft, 1968 proceedings' minutes, page 98, 1970 draft, 1970 proceedings' minutes, page 330)

(3) To shorten and simplify the 1968 and 1970 draft Acts.

In achieving these objectives we have drawn heavily on the Scottish Act which was passed in 1960, three years after the English Act of 1957 which formed the bases of our previous drafts. (Occupiers' Liability (Scotland) Act, 1960) a copy of which is appended (hereafter called the "Scottish Act"). In our view the Scottish Act admirably achieves the objectives previously referred to, and, furthermore, has been commended by the Court of Appeal of England, who were critical of the English Act for its failure to deal with trespassers in the way the Scottish Act did (by eliminating any distinctions), and by A. L. Goodhart, Editor-in-Chief of the Law Quarterly Review in an article in Vol. 87, April, 1971, copy of which is appended.

*Occupiers' Liability Act*

1. (1) The provisions of this Act apply, in place of the rules of the common law, for the purpose of determining the care that a person occupying or having control of land or other premises (in this Act referred to as an "occupier of premises") is required, by

reason of such occupation or control, to show toward persons entering on the premises in respect of dangers (to them or to their property) that are due to the state of the land or other premises, or to any thing done or omitted to be done on them by himself or a third party and for which he is by law responsible.

This subsection abrogates the common law rules relating to the position of a licensee, invitee, trespasser, etc., and substitutes the provisions of the Act. It is taken from the Scottish Act, section 1(1). The words "to them or to their property" have been added in the seventh line to make certain that the Act applies to damage to property as well, as contained in the 1968 and 1970 (section 4) draft Acts and recommended by Report of the Alberta Institute of Law Reform (hereafter called the "Institute Report"), page 92. The words "by himself or a third party" have been added in the ninth and tenth lines to make certain that acts of third parties for which the occupier is in law responsible be included in the Act as contained in our 1970 draft, section 2(a), and the Institute Report, pages 28, 29.

(2) Subsection (1) does not apply to alter the rules of the common law that determine the person on whom, in relation to the land or other premises, a duty to show care toward persons entering thereon is incumbent.

Taken from Scottish Act, section 1(2).

(3) The provisions of this Act apply in like manner and to the same extent in relation to

(a) ships and vessels;

(b) trailers and portable structures designed or used for a residence, business, or shelter;

(c) trains and railway cars;

(d) any structure erected on land, but not including portable structures and equipment except those included in clause (b); and

(e) property of persons who have not themselves entered on the land or premises or other place designated in this subsection.

This subsection is a modification of section 1(3) of the Scottish Act in view of the previous 1970 draft (section 2(c)) and the recommendation of the Institute Report, pages 78-86.

2. (1) The care that an occupier of premises is required by reason of his occupation or control of land or premises to show towards a person entering thereon in respect of dangers that are due

(a) to the state of the land or premises; or

(b) to anything done or omitted to be done thereon by the occupier or by third parties on the land or premises

and for which the occupier is by law responsible shall, (except in so far as he is entitled to and does extend, restrict, modify, or exclude by express agreement his obligations toward that person), be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

This subsection is the crucial section and sets out the duty of care under the Act of occupiers toward other persons, and is the standard test of ordinary negligence. It is taken from the Scottish Act (section 2(1)) with the addition of the words "or by third parties" to ensure that acts of third parties for which the occupier is responsible are included as in section 1(1) and for the same reasons.

(2) The occupier may extend, restrict, modify, or exclude his obligations under subsection (1) by express agreement, [or by express stipulation where the occupier takes reasonable steps to bring the extension, restriction, modification, or exclusion to the attention of the person entering the land or premises].

This subsection is not in the Scottish Act but is inserted by reason of being in the previous 1968 and 1970 drafts (section 3(2)) and was recommended by the Institute Report, page 76.

(3) Where an occupier of premises is bound by contract or by the terms and conditions of a tenancy, including a statutory tenancy, to admit to land or premises a person who is not entitled to the benefit of the contract as a party, or an assignee of, or other successor thereto, the occupier of premises shall show the same care as under subsection (1) in respect of dangers to that person notwithstanding any restriction or exclusion in the contract.

This subsection is not in the Scottish Act but is inserted by reason of being in the previous 1968 and 1970 drafts (section 5(1)) and was recommended by the Institute Report, page 77.

(4) Notwithstanding subsection (1), an occupier is not responsible to a person entering on land or premises in respect of risks willingly accepted by that person.

This subsection is taken from the Scottish Act (section 2(3)) and was in the 1970 draft (section 3(3) (c)).

3. (1) A landlord of occupied premises who owes the occupier a duty under the tenancy of maintenance or repair of the premises is, for the purpose of this Act, in respect of dangers arising from any default by him in fulfilling that duty, the occupier thereof in relation to all persons who or whose goods are lawfully on the premises.

This and the following subsections are taken from the 1968 and 1970 drafts (section 6) and is similar to section 3 of the Scottish Act.

(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.

4. The Tortfeasors and Contributory Negligence Act [or the Contributory Negligence Act] applies to this Act.

This section is taken from the previous 1970 draft (section 9).

5. (1) Except as otherwise provided in subsection (2), the Crown in right of the Province is bound by this Act.

(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 section is taken from the previous 1970 draft (section 10).

### Occupiers' Liability Towards Trespassers

When the Occupiers' Liability Act 1957 was enacted there were numerous gloomy prophecies that land owners would be faced with a dismal financial future. It is, of course, impossible to determine what the exact situation is at present, but apparently the land owners do not feel dissatisfied with the law. It was also said that section 2(2) which provides that "the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there," was too imprecise to be of value in the decision of particular cases. Here again the reported cases do not seem to support this criticism.

There were, however, some persons who regretted that an Act entitled "Occupiers' Liability Act" should have been limited to "persons or goods *lawfully* (italics added) on any land" as many of the most difficult occupation problems relate to trespassers, and to the distinction drawn between adult and infant trespassers. This omission was referred to as follows in a note in (1963) 79 L.Q.R. 579:

> "This was due in part to the fact that the law concerning trespassers was so uncertain that an attempt to consider it in detail would have caused a long delay. As the number of cases in which trespassers are involved is a comparatively small one it was wise not to risk this."

On further consideration it might have been wiser for the Committee to take a a more courageous stand because three years later the Occupiers' Liability (Scotland) Act 1960, omitting any reference to "lawful," provided that an occupier of premises must use "such care as in all the circumstances is reasonable." Edmund Davies L.J. in *Herrington v. British Railways Board* [1971] 2 W.L.R. 477 has pointed out (p. 489) that when this was enacted the alarmists predicted that "the occupation of property would be rendered intolerably burdensome" but that this did not deter "the Scots from devising a rule which meets the situation admirably."

The facts in the *Herrington* case can be stated briefly. The defendant, the British Railways Board, owned two miles of electrified line which was separated by a fence from a meadow in which children played. When the fence became dilapidated the stationmaster was informed that children had been seen on the line but he merely informed the police. Two months later the plaintiff, aged six, climbed through the broken fence and was severely burned by the live rail.

The plaintiff, by his next friend, claimed that the accident had been caused by the negligence of the defendant railway. It filed a defence denying that it owed him a duty of care. Cairns J. held that as it was reasonably foreseeable that a child would climb through the hole in the fence the defendant was guilty of negligence. The grounds on which the learned judge based his conclusion were brief and clear but the Court of Appeal held they were irrelevant as they were in conflict with the established law. Their Lordships were, however, able to reach the same result by a round-about way. All three of the Lords Justices felt, with varying degrees of regret, that they were bound by Lord Hailsham L.C.'s judgment in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] A.C. 358, 365 in which he held that an occupier could be held liable to a trespasser only if the injury was

> "due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at

> least some act done with reckless disregard of the presence of the trespasser."

In the present case the "reckless disregard" was found in the stationmaster's failure to take adequate steps to see that the fence was repaired. Whether that is the interpretation that Lord Hailsham L.C. would himself have placed on the word "reckless" may be open to some doubt.

Although Salmon L.J. held that he was bound by *Addie v. Dumbreck (supra)*, he made a powerful attack on the law which it seems to have established. He said (p. 481):

> "The defendants contend that the judgment in favour of the plaintiff is contrary to the decision of the House of Lords in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] A.C. 358, a case which I confess I am unable to read, 40 years on, without a sense of shock."

He was, however, able to reach a satisfactory conclusion in the present case on its peculiar facts. He held that (p. 488):

> "The stationmaster gave no instructions, took no steps and indeed did nothing except inform the police . . . It seems to me that the irresistible inference from these unexplained facts is that the stationmaster washed his hands of the matter. He could not have cared whether or not children were electrocuted, although no doubt he hoped that they would not be."

This, if we may say so with respect, is a rather harsh judgment on the stationmaster who may have felt that having reported the situation to the police they would take the necessary steps to see that the fence would be repaired by the defendants.

Edmund Davies L.J. agreed that the duty owed by the occupier of premises to trespassers was in a regrettably confused state. He strongly favoured the simple rule of law established by section 2(1) of the Occupiers' Liability (Scotland) Act 1960. He quoted the statement by Pearson L.J., in *Videau v. British Transport Commission* [1963] 2 Q.B. 650, 677:

> "surely it must be a heresy to suggest that occupation of land is a ground of *exemption* from liability, inasmuch as the occupier by virtue of his right of control may reasonably bear some responsibility for the state of the land and for what is done on it."

He referred to Lord Gardiner L.C.'s statement in *Commissioner for Railways v. McDermott* [1967] A.C. 169, 190 that "the duty [to a trespasser] is a duty of a very limited character—not to injure him wilfully, and not to behave with reckless disregard for his safety."

The learned Lord Justice held (pp. 492, 493),

> "I should like to be able to say that in my judgment the law is that the test for liability to a trespasser rests upon reasonable foreseeability and that the 'reckless disregard' test is simply another way of expressing the duty of care owed to a trespasser in the light of all the relevant facts. But with the utmost diffidence, I have to say that I think the law is otherwise."

Reckless disregard was therefore the yard-stick that must at present be applied. He concluded (p. 495) that, "The occupier-trespasser relationship is outside the field of negligence altogether and is in a class quite apart from the tort that bears that name". Owing to the extreme danger from the electric current, which was particularly dangerous to a small child, this was more than negligence. The defendants had "a clear warning of an alarming state of affairs involving a high probability of the greatest danger to young children". (p. 496).

Cross L.J. placed the major emphasis of his judgment on an analysis of the *Addie* case *(supra)* and *Excelsior Wire Rope Co. Ltd. v. Callan* [1930] A.C. 40. These two cases were decided more than 40 years ago during which there have been a great number of cases in which the law has been discussed in detail. The result has been two conflicting views of the law. The choice was between the foreseeability test and the reckless conduct test. He found that in the present case the failure to maintain the fence was reckless.

If we may say so with great respect, the result reached in the *Herrington* case is clearly a satisfactory one but the law is left as confused as ever. It is unfortunate that it may still be necessary to chose between foreseeability and the reckless tests because these words may be misleading. Thus foreseeability by itself does not necessarily create liability because in all negligence cases more than foreseeability is required. Liability depends on the degree of care that must be exercised so as to avoid these consequences. In the present case great emphasis was placed on the mortal danger created by the live rail, but what would have been the decision if the plaintiff had not touched the rail but had been struck by a

passing train? The defendant Railways Board would have been able to foresee that a child would trespass in the same way but would the result have been different under these different circumstances? Would it not be simpler for a court to consider the question whether it was reasonable for the occupier to take steps to protect a trespassing child than to discuss whether the failure to do so was "reckless" or not?

As all the judges seem to be agreed that the present law, whatever it may be, is unsatisfactory is it not desirable that some steps should be taken to alter it? This could be done in two ways. The first is that the House of Lords, which is no longer absolutely bound by its own precedent decisions, should disregard the judgments in *Addie's* case *(supra)* with its emphasis on "recklessness" and substitute for it the test of reasonable care in the circumstances of the particular case as Cairns J. did in the present instance. This method of altering the law may, however, be both slow and uncertain as there might be conflicting speeches in the House of Lords so that the ratio of the case might be uncertain.

The second method of reforming the law is the more sensible one. This is for the Law Commission to prepare a Bill along the lines of the Scottish law for consideration by Parliament. This could be done in the near future as it would not be necessary for the Commission to follow the rather slow procedure it has adopted in other circumstances of consulting all parties that might have an interest in the matter. All possible interests have already been presented and debated in the vast literature on this subject, both in the cases and in the text-books, not only in Great Britain but in the Commonwealth countries, and in other legal systems. If we may say so with great respect the Commission should rely on its own judgment, fortified by the experience of the Scottish Commission. By introducing this inevitable reform in the law as soon as possible it will be serving the interests both of future litigants and of those who are called on to advise them.

A.L.G.

(Law Quarterly Review, [Vol. 87, April 1971] pp. 168-172)

# OCCUPIERS' LIABILITY (SCOTLAND) ACT, 1960

An Act to amend the law of Scotland as to the liability of occupiers and others for injury or damage occasioned to persons or property on any land or other premises by reason of the state of the premises or of anything done or omitted to be done thereon; and for purposes connected with the matter aforesaid.

[2nd June, 1960]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. (1) The provisions of the next following sections of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land or other premises (in this Act referred to as an "occupier of premises") is required, by reason of such occupation or control, to show towards persons entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which he is in law responsible.

(2) Nothing in those provisions shall be taken to alter the rules of the common law which determine the person on whom in relation to any premises a duty to show care as aforesaid towards persons entering thereon is incumbent.

(3) Those provisions shall apply, in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon,—

(a) in relation to a person occupying or having control of any fixed or moveable structure, including any vessel, vehicle or aircraft, and to persons entering thereon; and

(b) in relation to an occupier of premises or a person occupying or having control of any such structure and any property thereon, including the property of persons who have not themselves entered on the premises or structure.

2. (1) The care which an occupier of premises is required by reason of his occupation or control of the premises, to show towards

a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

(2) Nothing in the foregoing subsection shall relieve an occupier of premises of any duty to show in any particular case any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

(3) Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.

3. (1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility aforesaid as is required by virtue of the foregoing provisions of this Act to be shown by an occupier of premises towards persons entering on them.

(2) Where premises are occupied or used by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.

(3) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(4) For the purposes of this section, any obligation imposed on a landlord by any enactment by reason of the premises being subject to a tenancy shall be treated as if it were an obligation imposed on him by the tenancy, "tenancy" includes a statutory tenancy which does not in law amount to a tenancy and includes also any

contract conferring a right of occupation, and "landlord" shall be construed accordingly.

(5) This section shall apply to tenancies created before the commencement of this Act as well as to tenancies created after its commencement.

4. This Act shall bind the Crown, but as regards the liability of the Crown for any wrongful or negligent act or omission giving rise to liability in reparation shall not bind the Crown any further than the Crown is made liable in respect of such acts or omissions by the Crown Proceedings Act, 1947, and that Act and in particular section two thereof shall apply in relation to duties under section two or section three of this Act as statutory duties.

5. (1) This Act may be cited as the Occupiers' Liability (Scotland) Act, 1960, and shall extend to Scotland only.

(2) This Act shall come into operation at the end of the period of three months beginning with the day on which it is passed.

## APPENDIX Q

(*See page 80*)

## OCCUPIERS' LIABILITY ACT

1. (1) The provisions of this Act apply, in place of the rules of the common law, for the purpose of determining the care that a person occupying or having control of land or other premises (in this Act referred to as an "occupier of premises") is is required, by reason of such occupation or control, to show toward persons entering on the *land or other* premises in respect of dangers to them or to their property that are due to the state of the land or other premises, or to any thing done or omitted to be done on them by himself or a third party and for which he is by law responsible.

(2) Subsection (1) does not apply to alter the rules of the common law that determine the person on whom, in relation to the land or other premises, a duty to show care toward persons entering thereon is incumbent.

(3) The provisions of this Act apply in like manner and to the same extent as in subsection (1) to persons entering on the following structures:—

(a) ships and vessels;

(b) trailers and portable structures designed or used for a residence, business, or shelter;

(c) trains, railway cars, vehicles, and aircraft while not in operation; and

(d) any structure erected on land, but not including portable structures and equipment except those included in clause (b),

and to their property thereon, and to the property of persons who have not themselves entered on the land, premises, or structure.

(4) Nothing in this Act shall relieve an occupier of premises of any duty to show, in any particular case, any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

2. (1) The care that an occupier of premises is required by reason of his occupation or control of land or premises to show towards a person entering thereon in respect of dangers that are due

(a) to the state of the land or premises; or

(b) to anything done or omitted to be done thereon by the occupier or by third parties on the land or premises

and for which the occupier is by law responsible shall, except in so far as he is entitled to and does, by express agreement, extend, restrict, modify, or exclude his obligations toward that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

(2) Where an occupier of premises is bound by contract or by the terms and conditions of a tenancy, including a statutory tenancy, to admit to land or premises a person who is not entitled to the benefit of the contract as a party, or an assignee of, or other successor thereto, the occupier of premises shall show the same care as under subsection (1) in respect of dangers to that person notwithstanding any restriction or exclusion in the contract.

(3) Notwithstanding subsection (1), an occupier is not responsible to a person entering on land or premises in respect of risks willingly accepted by that person.

3. (1) Where land or premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the land or premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the land or premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility as is required by virtue of the provisions of this Act to be shown by an occupier of premises towards persons entering on them.

(2) Where land or premises are occupied or used by virtue of a subtenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the land or premises comprised in the subtenancy.

(3) Where land or 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 land or premises is due solely to that use of the land or 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 land or 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.

4. The Tortfeasors and Contributory Negligence Act [or the Contributory Negligence Act] applies to this Act.

5. (1) Except as otherwise provided in subsection (2), the Crown in right of the Province is bound by this Act, and the Proceedings Against the Crown Act applies.

(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]

# APPENDIX R

(*See page 80*)

## CONDOMINIUM INSURANCE

REPORT OF THE BRITISH COLUMBIA AND MANITOBA COMMISSIONERS

### PART I

The 1970 Conference of Commissioners on Uniformity of Legislation in Canada instructed the British Columbia and Manitoba Commissioners to prepare a report and draft enactment to be inserted in the Condominium Acts or Strata Titles Acts of the various Provinces to provide for a uniform method of dealing with the insurance of condominium or strata developments.

The request for such uniform legislation was received from the Association of Superintendents of Insurance of Canada in 1969 in the form of the following resolution:—

> "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."

At present, with the possible exceptions of New Brunswick and P.E.I., all Provinces have enacted a Condominium or Strata Titles Act. The Acts are, in general, quite uniform and whatever Provincial differences there are have not, except for the insurance provisions, created any problems that would indicate the desirability of a complete Uniform Act. However, in respect of the provisions relating to insurance, different considerations arise, as insurance companies are usually national in scope and it is important that their policies be in standard form for all Provinces and that the underwriting procedures relating to condominiums be on a uniform basis.

As previously stated, most of the Provinces now have Condominium or Strata Titles legislation, and, for the purpose of this report, your Commissioners examined the insurance provisions of the British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario Acts. We will not refer to the Nova Scotia provisions as the only reference made therein to insurance is a requirement that the

by-laws must provide for the application of the proceeds of insurance due to fire or other hazards. We also drew heavily upon two reference texts; *Condominium Law & Practice* by Rohan & Reskin, published in the United States by Matthew Bender & Co. (hereafter referred to as "Rohan & Reskin"), and *Condominium in Canada* by Alvin Rosenberg of the Ontario Bar, published by Canada Law Book Ltd. (hereafter referred to as "Rosenberg"); and the Report of the Ontario Law Reform Commission, 1967, on the Law of Condominium.

The first problem to be decided is how a condominium project is to be insured, as the incidence of fire and other perils, measured in terms of frequency and disruptive effect, constitutes a real threat to the continuity of a condominium venture (Rohan & Reskin, p. 11-2).

One way is to require each unit owner to insure his unit, and the corporation to insure the common elements. This is the American approach where the practice is to insure all the units and common elements under a master policy for all the owners, as a group policy, with an individual certificate to each unit owner. This has been modified under the United States Federal Housing Act Regulations, which require such a policy to be written in the name of the manager or board of directors as trustee for each of the co-owners (Rohan & Reskin, p. 11-12). Quebec has adopted this principle but this follows because Quebec does not establish a corporation, but simply provides for the appointment of trustees (administrators) for the coproprietors who may be empowered by the declaration to take out insurance. The advantages of this method are

(1) The unit owner has an insurable interest.

(2) The unit owner can arrange his own insurance to suit his requirements.

(3) The unit owner can insure his own mortgage.

On the other hand, the disadvantages of this method are

(1) There may be gaps in the total insurance coverage of the project.

(2) The insurance is more costly.

(3) The personal property of the corporation may not be covered.

(4) There may be difficulties in settling losses with unit owners, thereby delaying restoration until the last owner settles.

The other way is to have the corporation insure all the units and common elements. However, as a mere management device of the unit owners, the corporation does not own any part of the real estate and, therefore, has no insurable interest. This can be cured in one of two ways, namely:—

Firstly, by providing for an insurable interest in the corporation by statute; or

Secondly, by providing that the corporation insure not the real estate but its liability to repair and maintain the property which gives it an insurable interest in the entire property.

The advantages of this method are

(1) The corporation, which has the capacity and authority to restore all damaged areas, can settle the losses quickly, obtain the proceeds, and deal with the contractors.

(2) Insurance is less expensive in bulk.

(3) The corporation is in the best position to evaluate complete coverage for the project.

(4) Personal property of the corporation can be covered.

(5) Special insurance, such as boiler insurance, elevator insurance, vandalism, plate glass, etc., can be included. (See Rosenberg, p. 10-12.)

Therefore, your Commissioners accept the view that insurance on the units and common elements should be the responsibility of the corporation. This is the accepted method in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario.

However, two different methods have been adopted by the legislators in providing for such insurance by the corporation. One is insurance of the property and the other is insurance of the liability to repair. Ontario and Manitoba have taken the view that as the corporation owns no property it has no insurable interest, so these Provinces simply insure the liability of the corporation to repair damage to all the property which gives it an insurable interest. Thus the Ontario section (s. 15(1)) is silent on the matter of "insurable interest". Manitoba follows Ontario in this view but apparently out of abundance of caution adds the words "and for

that purpose the corporation has insurable interest to the replacement value of the units and common elements". (s. 17(1)).

British Columbia, Alberta, and Saskatchewan, on the other hand, provide that one of the duties of the corporation is to insure and keep insured the building to the replacement value thereof against fire and other risks, and then add words to the effect that the corporation "shall be deemed to have an insurable interest to the replacement value of the building".

There is very little to choose between insuring the building, or insuring the liability to repair, as both are equally effective. However, the following considerations lead us to recommend the insurance of the building, both the units and the common elements.

Firstly, insuring a liability to repair is difficult for underwriters to work with as many factors may affect that liability. On the other hand, underwriters find it easier to grasp the concept of insuring the replacement value of property; as a result, such insurance coverage on condominiums may be easier to obtain and cheaper than liability insurance.

Secondly, the Ontario and Manitoba Statutes that provide for insurance on the corporations' liability to repair must then set out with particularity the extent of that liability on the corporation. (See Ontario s. 16; Manitoba s. 18.) This is not necessary in the other Provinces, where there appears simply a requirement of the corporation to maintain common elements.

Thirdly, Resolution 9 of the Standing Committee on General Insurance Legislation of the Superintendent of Insurance Conference in 1969 reads "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".

Fourthly, it is simpler in drafting a uniform section applicable to all Provinces because the other alternative would also require changes to the provisions respecting responsibilities for repairs and maintenance.

Other policy questions that your Commissioners have considered and accepted are:—

(1) That corporation insurance should be used only to pay for repair or replacement, not for the benefit of mortgagees.

(2) That mortgagees' interests be protected under unit owners' policies.

(3) That unit owners be permitted to place their own coverage on their units for additional improvements, mortgage insurance, plate glass, public liability, etc., but that such insurance will not be brought into contribution with the corporation insurance.

The attached draft uniform sections carry out the recommendations in this report, and additional comments on the reasons therefor are given in relation to each section.

As there has been some reluctance on the part of insurance underwriters to enter the field of condominium insurance, the draft also attempts to embody such principles as will make the insuring of condominium projects a practical and attractive business proposition for the underwriters while retaining maximum protection for the unit owners. (See note 24, Rosenberg, p. 10-9.)

The draft relies basically on the Manitoba Act, section 17, except for the difference of policy outlined above respecting property vs. liability insurance. The Manitoba Act, according to Rosenberg, p. 10-10, combines the best features of all the Acts referred to; hence it was used as the best basic document, with such changes as were considered by your Commissioners to be desirable or necessary.

Respectfully submitted,

British Columbia and
Manitoba Commissioners.

## DRAFT INSURANCE PROVISIONS

1. (1) The corporation shall insure and keep insured the units and the common elements to the replacement value thereof against fire, and against such other supplemental perils as may be specified by the declaration or by-laws, to the extent required by the declaration or the by-laws; and for this purpose the corporation has an insurable interest to the replacement value of the units and the common elements, and an insurable interest in the subject matter of any other supplemental perils insurance.

NOTES: 1. In this draft the words "units", "common elements" and "declaration" are used throughout in view of the wide general use of these words. Where a Provincial Act uses other terms such as "strata lot", "common property", "condominium plan", or "strata plan", the necessary substitutions are required.

2. As recommended in the Report, the insurance is in respect of the property, not on the liability to repair.

3. Although the requirement of insurance appears to be mandatory, it is only "to the extent required by the declaration or by-laws". "This section probably should not and will not be interpreted as imposing an obligation on the corporation to insure, and as permitting the declaration and the by-laws to regulate only the extent of insurance. The nature of the obligation would be too vague to be meaningful, and a distinction between an obligation to insure and a power to regulate the extent of the insurance that must be obtained is impossible to make." (See Rosenberg, p. 10-5) The Ontario and Manitoba wording is likewise mandatory. Other jurisdictions provide that the corporation has a duty to insure, but likewise provide that the unit owners, by resolution, may waive this requirement. The provisions will therefore allow the unit owners some freedom of action in this regard if, for example, the unit owners decide to handle their own insurance on their units and the only corporation insurance necessary would be on the common elements.

4. The corporation is given an insurable interest in the property by statute as it otherwise has no interest therein. (See Report.)

5. The corporation is also given an insurable interest in the subject matter of supplemental perils insurance as in the British Columbia, Alberta, and Saskatchewan Acts.

(2) Any payment by an insurer under a policy of insurance entered into under subsection (1) shall, notwithstanding the terms of the policy, be paid to or to the order of the corporation; and, subject to section , the corporation shall forthwith use the proceeds for the repair or replacement of the damaged units and common elements so far as the same may lawfully be effected.

NOTES: 1. Under the existing Acts there may be some uncertainty as to whether or not a mortgage is entitled to appropriate the proceeds of the insurance. This subsection is similar to the British Columbia, Alberta, and Saskatchewan Acts., redrafted to remove this uncertainty and prohibit payment under the corporation's policy to a mortgagee. This is recommended by Rosenberg, p. 10-12.

2. The latter part of this subsection is felt to be necessary because in some cases it is the practice of the developer or a mortgage company controlled by him to take back all the mort-

gages on the units in a condominium project. At the time he becomes the mortgagee on each unit mortgage, the developer either takes an assignment of the share of the unit owner in the corporation as part of his security, and thereupon exercises the rights of the unit owners as shareholders of the corporation, or the Act, itself, provides that a mortgagee may exercise those rights. (See s. 7, British Columbia Act.) Under such circumstances, by-laws could then be passed circumventing the intent of this section by appropriating the insurance proceeds to reduction of the mortgage and not rebuilding the project. The latter part is intended to prevent this occurring and to safeguard the interests of the unit owners. Manitoba may not have this problem because section 10(2) of their Act provides that the members of the corporation are the owners, and the definition of owners excludes mortgagees unless the mortgagee is in possession. (Also see Ontario s 9(1))

3. This subsection also preserves the insurer's traditional right to repair the property, a right which is preserved in the statutory conditions of each Province.

4. The words "subject to section —" are necessary to refer to the particular section in each Act dealing with termination of the project after substantial damage when the application of the insurance proceeds required by this subsection would not be appropriate.

(3) A policy of insurance issued to a corporation under subsection (1) is not liable to be brought into contribution with any other policy of insurance except another policy issued on the same property under subsection (1); and, notwithstanding the provisions of the policy, shall be deemed not to be other insurance in relation to such other policy.

NOTES: 1. The scheme of permitting both the corporation and the unit owner to insure the same property (although for diverse purposes) under subsection (1) and subsection (4) would break down under the doctrine of contribution whereby all policies on the same property are compelled to contribute to the total loss and double recovery is prevented. This subsection and subsection (6) following are therefore required to prevent contribution, with full recovery going to the corporation under a statutory duty to rebuild, and full recovery going to a unit owner to rebuild if the corporation fails, or to apply on his mortgage.

2. The first part of this subsection is common to all the present Acts except Ontario. It may be argued that the subsection is not necessary as such insurance is not "other insurance" in relation to the unit insurance policy and, therefore, the doctrine of contribution does not apply, but we are of opinion that this should be clearly dealt with by statute. (Rosenberg, p. 10-13).

3. Many policies of insurance declare that the contract will be declared void by the acquisition of other insurance on the same property without the insurer's permission. The latter part of this subsection is intended to prevent the operation of such a declaration. This latter part does not appear in any other Act but is intended to make clear that a combination of a corporation policy and a unit owner policy on the same property is not violative of a "no other insurance clause" in a policy.

(4) Notwithstanding subsection (1), the Insurance Act, or any other law relating to insurance, a unit owner may insure in respect of damage to

(a) his unit, to the replacement value thereof, against fire and such other supplemental perils to the extent that it is not so insured by the corporation under subsection (1);

(b) improvements to his unit, to the extent the improvements are not so insured by the corporation under subsection (1);

(c) his unit, in a sum equal to the amount owing at the date of any loss referred to in the policy on a mortgage of his unit; and

(d) his unit, against any other supplemental perils, where the supplemental perils are not insured by the corporation.

NOTES: 1. This subsection permits the unit owner to place his own insurance on the unit in certain cases, the main one being under clause (c) to satisfy the security requirements of a mortgagee of his unit. It enables a mortgagee to require the insurance proceeds to be applied on the mortgage debt, notwithstanding subsection (1). (See the following subsection (5).) This is a requirement that mortgagees jealously guard, so is preserved under this section in order to facilitate mortgage financing of these projects.

2. Clause (a) follows the British Columbia, Alberta, and Saskatchewan provision. (Ontario does not provide for unit owners' separate insurance.) The Ontario Law Reform Commission Report states on page 30 "Doubtless most of the units and common interests will be mortgaged (or charged), at least at the outset, and the mortgagee will require insurance protection for the security. A conflict is posed between the interest of the mortgagees or chargees in control of insurance payments after loss in electing payment or reconstruction, and the interest of the owners in unified control. This conflict may be resolved by the use of separate policies on the interests of mortgagees.", but Rosenberg points out (p. 10-6) that without some statutory provision such separate policies on the interests of the mortgagees would be brought into contribution and thereby jeopardize the special interests created by a condominium project.

3. Clause (b) permits insurance on improvements to individual units. This is not clearly allowed under the present provisions, but is recommended by Rosenberg, p. 10-11.

4. Clause (c) permits the unit owner to deal with his own mortgagee and give full insurance protection to his own mortgagee. His own mortgagee may, at his option, receive the proceeds of insurance in reduction of the mortgage debt, (see subsection (5) following) and such insurance is not liable to be brought into contribution with the main policy issued to the corporation under subsection (1) (see subsection (6) following).

5. Clause (d) permits insurance on plate glass, public liability, alternative accommodation insurance, etc.

(5) Notwithstanding the Insurance Act, or the terms and conditions of the policy, any payment by an insurer under a policy of insurance entered into for the purpose of clause (c) of subsection (4) shall be made to the mortgagees, if the mortgagees, or any of them, so require, in the order of their priorities; and the insurer is then entitled to an assignment of the mortgage or a partial interest in the mortgage to secure the amount so paid.

NOTES: 1. This is copied in substance from the Manitoba Act (s. 17(3)). However, the words "Notwithstanding the Insurance Act, or the terms and conditions of the policy" are added to exclude the statutory conditions giving the insurer the right to repair.

2. This concept is common to all Acts, except Ontario, which does not refer to mortgagee insurance.

3. The purpose of this subsection, along with subsection (4)(c), is to enable mortgagees of units to be fully secured, and not to be required to repair, but to use the proceeds to reduce the mortgage debt As stated, this is a right that is jealously guarded by mortgagees (see Rosenberg, p. 10-3).

4. The British Columbia, Alberta, and Saskatchewan sections do not contain the words "if the mortgagees, or any of them, so require", and the equivalent section in those Provinces appears to make payment to the mortgagees mandatory, although a mortgagee may be quite satisfied to have the unit rebuilt under either the corporation or the unit policy. The words used here are in the Manitoba section and appear to overcome this problem.

5. The latter part of the subsection is common to all Acts except Ontario and is designed to prevent double recovery by a unit owner in view of the statutory prevention of the doctrine of contribution under subsection (6) following.

(6) A policy of insurance issued to a unit owner under the authority of subsection (4) is not liable to be brought into contribution with any other policy of insurance except another policy

issued on the same property under subsection (4); and, notwithstanding the provisions of the policy, shall be deemed not to be other insurance in relation to such other policy.

NOTE: 1. See notes to subsection (3) as this is a parallel subsection.

(7) Subsection (1) does not restrict the capacity of any person to insure otherwise than as provided in that subsection.

NOTE: 1. This subsection is common to all Provinces.

## PART II

## ADDENDUM TO REPORT OF THE BRITISH COLUMBIA AND MANITOBA COMMISSIONERS ON CONDOMINIUM INSURANCE

There is one aspect of the main report dated May 13th to which the Manitoba Commissioners would draw special attention because of the diverse opinions received from many of those that have been particularly involved in the development of Condominiums. The matter in question involves the policy decision as to whether the statute should allow mortgagee's interests to be protected under separate Policies taken out by the unit owners or whether the statute should specifically exclude such insurance protection.

On page 5 of the main report dated May 13th, the British Columbia and Manitoba Commissioners indicate their acceptance of the policy decision that mortgagee's interests should be protected under unit owner's Policies. This decision is reflected in Section 1(4)(c) of the draft insurance provisions. As the notes to this draft Section indicate, this particular Subsection permits the unit owner to place his own insurance on the unit to the extent of the balance owing from time to time on the Mortgage in order to satisfy the security requirements of a mortgagee of the unit. This enables a mortgagee to require the insurance proceeds to be applied on the Mortgage debt. In such instances, the insurance company, by virtue of Section 1(5) is then entitled to an assignment of the Mortgage or a partial interest in the Mortgage to secure the amount so paid.

The Manitoba Commissioners made numerous inquiries from both lawyers and those in the insurance industry in order to determine if there was a consensus of opinion on this particular subject. To date, six replies have been received of which three have indicated their preference for deletion of such a provision, and three

have spoken in favour of it. Somewhat surprisingly, two lawyers and one person from the insurance industry have spoken in favour, and two lawyers and the other insurance agency representative have spoken against such provision. Those opposed to the provision include Alvin B. Rosenberg, Q.C., of Toronto, author of the text "Condominium in Canada"; Mr. John I. Zeiler of the Toronto law firm of Shiff, Gross, who are solicitors for Bramalea Consolidated Developments Ltd., a company with substantial interests in the Condominium field; and Sylvan Leipsic, Executive Vice-President of the Winnipeg insurance firm of Aronovitch & Leipsic Limited.

Those in favour of the retention of this provision include Mr. Arthur A. Kennedy of the Toronto law firm of Kennedy & Kennedy who act for some developers in this field; Wilson E. McLean, Q.C., of the Toronto law firm of McLean, Lyons & Kerr, who is, I believe, a consultant to the insurance industry; and Joseph Wray of Kopas & Burritt Insurance Agency Limited, a Toronto firm who have handled the insurance for a number of Condominium developments in the Toronto area.

The arguments presented by the previously named gentlemen can be summed up as follows:

1. Those opposed to the provision question the necessity of same, the practicality from the insurance industry's standpoint, and the additional cost to the unit owner.
2. Those in favour of the provision feel it is necessary because of the different interests that must be recognized in a Condominium development, and to make Condominium Mortgage loans more attractive from the lender's standpoint and thus increasing the funds available for such developments.

Attached hereto are copies of the relevant comments by each of the previous mentioned for your consideration.

Respectfully submitted,

Manitoba Commissioners.

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EXCERPT FROM ALVIN B. ROSENBERG'S LETTER OF JUNE 2nd, 1971.

The major problem, and the major difference between the Western Acts and the Acts in the other provinces is the provision eliminating contribution. See for example Section 14(4) of the Strata Titles Act of B.C. and the provision respecting what might be called mortgage insurance, (see Strata Titles Act Section 15 for an example).

Although from a purely academic point of view this provision appears to solve the problem, in that it allows the building to be rebuilt in the event that the mortgagee demands the insurance proceeds, to my knowledge no such insurance has ever been written in Canada, and until I have correspondence with a number of people and a number of companies, I have not found any company willing to write such insurance. I believe that the practical difficulties for the time being prevent any possibility of such insurance being written. Some of these difficulties are:

(a) The risk should be very, very small and the premium very low, since the insurance companies would only have to pay if

(i) there was a fire or other damage, and

(ii) the mortgagee demanded the money.

The second half of this risk is very difficult to assess. Even if the insurance company had to advance the money, it would receive an assignment of the security, so that presumably it would suffer no loss, even if it had to make payment. It is difficult where the insurance companies are not used to dealing in this type of situation to understand or to assess the risk of this type of policy.

(b) A further difficulty that none of the companies have raised, but which I foresee in my text is that what they are really giving is a future mortgage commitment under very remote circumstances. Since each company has a very definite investment policy, some as a result of laws, and some as a result of its own investment committee, etc., how would it treat these mortgage commitments? If it had a thousand such policies in existence, theoretically these could become mortgages in its portfolio. My conclusion was that although the sections seemed to solve the problem from an academic point of view, and represented a very ingenious approach to the problem as put forth by the draftsmen of the Legislation, these sections will never be used.

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Mr. R. G. Smethurst,
D'Arcy and Deacon,
300-286 Smith Street,
WINNIPEG 1, Manitoba.

Dear Mr. Smethurst:

*Re: Insurance on Condominium Units*

Replying to your letter of May 28th and reiterating my comments at our previous meeting:

(1) The principal difficulty in reference to Insurance arises out of Section 17(2) in the Manitoba Act and similar paragraphs in most of the other Acts, which are either almost identical to Manitoba or in the case of Ontario are somewhat ambiguous—Section 15(2).

This office in insuring two condominium projects; one in Manitoba and one in British Columbia, encountered considerable difficulty with both the

mortgage company in wanting the owner to insure the balance of his mortgage under 17 (2). In addition, considerable difficulty was encountered with insurance companies as follows:—

(a) It put the insurance company in the mortgage business by having to take over a mortgage if the unit burnt even though theoretically they may not suffer a financial loss after the owner completed payment under the mortgage. It was very difficult to arrive at a proper and equitable premium for the risk and in any case the premium was an additional unnecessary expense to the unit owner.

(b) In the case of the Manitoba project, the mortgagee was C.M.H.C. who were finally agreeable not to call for individual policies. In the case of the B.C. project, the mortgagee, a small mortgage company, was similarly induced to waive this provision.

It is evident from the foregoing that the existence of Clause 17 (2) creates an unnecessary expense to the unit owner and should such insurance be called for by the mortgagee, most General Insurance Companies would be reluctant to insure because they do not want to be involved in the mortgage business.

(2) Policies issued to the condominium corporation are a standard policy and the requirements of the corporation to insure are specified in the by-laws or declarations—see attached copy.

(3) Discussions were held between the writer and several Insurance Companies and more particularly the Winnipeg Branch of the Canadian Underwriters Association (James Macpherson).

(4) We do not feel that the mortgagee should have the right to demand such a policy of the owner for the reasons stated in (1) above. Furthermore, we do not believe that the elimination of this provision will in any way hinder the obtaining of mortgages from conventional lenders.

Yours very truly,

ARONOVITCH & LEIPSIC LIMITED

SL/fr
Encl.

Sylvan Leipsic,
Executive Vice President.

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11. *INSURANCE BY CORPORATION*

The Corporation shall have an insurance appraisal of the property at least once in 3 years and shall, in accordance with this appraisal, carry insurance against damage resulting from fire, tempest and such other perils as is normally carried by the prudent owner of a project of this kind for the full insurable value thereof on a replacement cost basis, and if replacement value insurance is not available at reasonable prices, then it shall carry insurance for the full insurable value of the project. The *corporation shall also carry liability insurance.* For the purpose of the provision respecting replacement value insurance, replacement value insurance shall be deemed to be available at reasonable prices unless at a meeting for that purpose, the price of replacement value

insurance is discussed, and 80% of the unit owners vote in favour of a resolution to insure the project only to the full insurable value and not for its replacement value.

*JOHN I. ZEILER — LETTER OF JUNE 24th, 1971*

"At present, I do not feel that the suggestion of coverage set out in paragraph 4 of your letter should be encouraged. It would be my impression that it would be more of a nuisance than value. It would appear to me to put insurance companies in an advantageous position and because of the potential risk of non-payment by a mortgagee would not be willing to reduce their premium rates. As far as I am concerned, the mortgagor is certainly well protected as they have the right of voting in lieu of the unit owner as provided in our condominium statute."

*ARTHUR A KENNEDY — LETTER OF JUNE 18th, 1971*

"The writer feels very strongly that an individaul unit owner and the mortgagee of an individual unit should be able to insure their interests in the unit separately from the policy carried by the condominium corporation. The reason for this thinking is primarily economic. Condominiums are very new in this jurisdiction and it is the writer's feeling that everything should be done to encourage their development, and one of the problems which concerns both unit purchasers and mortgagees is the position in the event that a loss occurs. In a large condominium development the single unit owner and single mortgagee are in no position to exercise any degree of control and their respective interests may in no way correspond with the interests of the majority. Specifically, in the event of a loss the majority elects to rebuild, a specific owner could have a totally demolished unit which would take close to a year to reconstruct. He might also not have the means to obtain alternative accommodation during reconstruction and he also might have been intending to sell his property during that year and, of course, under the circumstances, it would be most unlikely that a purchaser would be available Also his mortgagee would be in a position of holding totally non-liquid security and looking for payments to a man who had suffered serious financial loss. The writer thinks that some form of policy should be available which would reimburse the unit owner and the mortgagee for their costs involved, but with a right of subrogation against them It appears to the writer that this type of policy should bear a relatively low premium rate since, if the condominium corporation is properly insured and is economically viable, all payments would be recoverable when the property had been restored to its original condition."

*WILSON E MCLEAN, Q.C. — LETTER OF JULY 22nd, 1971*

"The statutes in certain provinces provide for the owner insuring his unit, especially in cases where there is a mortgage on the unit. For example, British Columbia has some specific provisions in its Act. See Section 15.

Obviously there should be no contribution between insurance effected by the unit owner and that effected by the corporation either as to the actual structure or to any building fixtures. It seems to me that Saskatchewan Section 22 is a fairly good precedent, especially when taken with Section 23."

*JOSEPH WRAY — LETTER OF JUNE 4th, 1971*

*SECTION III*

Robert Ardrey in his book "Territorial Imperative" points out that every individual has the psychological need to belong to a specific piece of real estate; in order for the family to develop some economic security they must have a substantial guarantee against inflation. In densely populated urban areas, the condominium type of development is the only satisfactory answer to these accommodation requirements. Since the condominium concept in Canada is new to the financing institutions, these companies are reluctant to commit themselves until more experience has been gained in this field: I believe we must do everything in our power to entice the lenders to commit a substantial portion of their portfolio to this concept. We must attempt to keep the mortgagees happy by relieving them of the risk of having their monies tied up for an extended period of time in the event of substantial damage to one unit, or in the event of a 17-2 situation whereby the Corporation is wound up.

I think it reasonable that the mortgagee be permitted to be paid out if the unit owner, or the other unit owners in the development, wish to have the damaged unit re-built. It seems reasonable that even in the event the Corporation, having been wound up, that the mortgagee should be permitted to be paid out immediately rather than having to wait until the affairs of the Corporation have been settled and the monies distributed.

The exposure to the mortgagee of a unit is its loss of liquidity for a prolonged period of time In the event that one unit is substantially damaged, and the declarations state that the unit must be re-built, the unit owner, due to his financial dilemma may not be in a position to pay the mortgage payment for the interim period unitl such time as his unit is restored, under which conditions, there is not much point in a mortgagee, having one unit of a 200 unit condominium development, foreclosing solely with respect to that unit. Regardless of which path they choose, they are likely to lose the loss of liquidity for an extended period of time. The situation is much more serious in the 17-2 type loss whereby the Corporation has wound up and the mortgagee finds himself interested in one-half of one per cent of the entire economic value of the project, because, under those conditions, the status of the unit owner converts to that of a tenant in common with all other unit owners; the right of foreclosure under these circumstances to an individual mortgagee committed to one unit, is almost meaningless in terms of speedy disposal of the property; the mortgagee is obviously obliged to wait until the entire property is sold and the assets of the Corporation dispersed. In this latter situation, the right of the mortgagee to be paid out is even more desirable.

The mortgage company, particularly in the event of the winding up of the condominium corporation, if it should be unfortunate enough to be interested in a minimal number of units in a large development, cannot be expected to withstand the loss of its liquidity for the period of time involved to straighten out the affairs of the Corporation and disperse its assets.

The solution would seem to be for the lender to purchase a policy against the same perils which are named in the master blanket contract which would agree to pay the mortgagee the outstanding amount of the mortgage at the

time of loss, thereby permitting the insurance company upon payment, to take an assignment of the outstanding mortgage. The insurance company, in this contract with the mortgage company, would obviously have to waive his right of subrogation against the unit owner. Such a policy would be a financial guarantee as opposed to a policy of indemnity; it, in fact, would be a contract guaranteeing against the lenders sustaining a loss of liquidity relative to the specific mortgage in question. The insuring company would ultimately recover its loss in its entirety plus accrued interest.

Provided that an insuring company agrees to underwrite only those institutions chartered under the Loan and Trust Company Act and the Insurance Companies Act, operating in the first mortgage field, there is little probability of an ultimate loss to the insuring company. Providing the mortgage is directly underwritten, and we do not suffer a national economic disaster, the security of the loan, and the real estate value of the condominium will ultimately provide a guarantee to the insurance company.

In order to write such a policy in favour of a mortgage company, the policy must provide that the specific condominium declarations require that a properly worded blanket policy be drawn up, that the mortgage itself meet certain minimum standards, and that the perils insured by this document, be identical with those insured by the blanket master policy. This policy could be written either on specific units, specific developments or blanket over the entire condominium portfolio of a lender. I suggest the rate be somewhere in the neighbourhood of 25% of the rate charged on the master blanket policy.

# APPENDIX S

(*See page 81*)

## STATUS OF WOMEN

August 17, 1971

Mr. J. W. Ryan,
Secretary to the Conference
of Commissioners for the
Uniformity of Legislation
in Canada,
Department of Justice,
Ottawa, Ontario.

Dear Mr. Ryan:

We are writing to request your cooperation in bringing to the attention of the Conference of Commissioners for the Uniformity of Legislation in Canada the following recommendations dealing with matters affecting the family, namely Recommendations 105, 107, 108, 110 and 111, the texts of which are attached.

As you may know our Interdepartmental Committee and the five Working Parties attached to it have been closely examining the Status of Women Report in terms of the feasibility and ways and means of implementing the recommendations therein. As some 40 recommendations deal with matters within provincial jurisdiction we are seeking the most expeditious way of bringing these to the attention of the provinces at the appropriate federal/provincial forum.

Your assistance at this time is greately appreciated

Very cordially yours,

Freda L. Paltiel,
Co-ordinator,
Status of Women

Attach

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Recommendations 105, 107, 108, 110 & 111:

"The Working Party agreed that the recommendations might be referred to Mr. J. W. Ryan of the Department of Justice (Secretary to the Conference of Commissioners for the Uniformity of Legislation in Canada) to take up informally with the said Conference" (Minutes of W.P. 4 — Tuesday, July 13, 1971.)

105. We recommend that the provinces and territories amend their legislation so that a woman, on marriage, may retain her domicile or, subsequently, acquire a new domicile, independent of that of her husband. (paragraph 53)

107. We recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources. (paragraph 89)

108 We recommend that the provinces and territories, which have not already done so, amend their laws so that a wife who is financially able to do so may be held to support her husband and children in the same way that the husband may now be held to support his wife and children. (paragraph 98)

110. We recommend that those provinces and territories which have established maximum amounts for maintenance orders remove such ceilings. (paragraph 107)

111. We recommend that the provinces and territories, which have not already done so, adopt legislation to set up Family Courts. (paragraph 111)

Ottawa K1A 0H8
August 17, 1971

Re: The Identity of Married Women

Dear Mr. Ryan:

I am writing to request your cooperation in bringing to the attention of the Conference of Commissioners for the Uniformity of Legislation the annexed recommendation relating to the Identity of Married Women. This recommendation was approved by the Interdepartmental Committee set up to consider the recommendations of the Royal Commission on the Status of Women. While the recommendation was one that evolved out of consideration of the Report of the Royal Commission, it was not a recommendation originally made by the Royal Commission.

If the Commissioners consider that the Conference is not an appropriate forum for the consideration of the problem of the identity and identification of married women in its provincial legislative and administrative aspects, we should appreciate any advice you may be able to provide as to how the problem might best be brought to the attention of the appropriate provincial officials.

Yours truly,

(Miss) E I. MacDonald,
Chairman, Working Party on Women
in the Public Life and Judicial
Process.

SUBMISSION TO: INTERDEPARTMENTAL COMMITTEE ON THE STATUS OF WOMEN

FROM: WORKING PARTY ON WOMEN IN THE POLITICAL AND JUDICIAL PROCESS

RE: Identity of Married Women

The Working Party has observed, in the course of discussions, that a married woman, in changing her name, loses the identity of her single self upon marriage and gains the identity of her married self. This fact has particular effect when information about individuals is registered, filed, or stored in any way that uses the individual's last name as its index. If only the maiden name or only the married name of a woman is known, it may be impossible to retrieve information about her. Thus, for example, a chain of title may be lost with respect to property, or it may be impossible to locate an heir to a succession.

The Working Party recommends that

1. both the maiden name and married name of married women be included in all federal documents relating to married women in which the identity of the person has legal significance, for example, citizenship cards.
2. information that is recorded about individuals be indexed, wherever possible, under both maiden names and married names, and that all such records be cross-referenced.
3. the problem of the continuing identity and identification of a woman who marries be raised at the Conference of Commissioners on Uniformity of Legislation in Canada, and that the provinces be urged to take any steps that may be necessary to ensure that both maiden names and married names of married women be used and recorded so that information relating to a married woman is not lost or obscured.

# APPENDIX T

(*See page 82*)

## PROTECTION OF PRIVACY

### Report of Chairman of Ad Hoc Committee

At last year's meeting of the Conference, two resolutions were adopted by the Conference following a general discussion during which members of the Conference considered the possible role of the Conference in the matter of

(a) delineating the areas in which legislation, including uniform laws, appeared to be needed to provide adequate safeguards against invasions of privacy, and

(b) developing suggestions and recommendations for consideration by the appropriate authorities relating to legislation for the protection of privacy in those areas.

It appeared to be the view of the Conference that, given the wide compass of problems involved and the very considerable difficulty of defining the areas in which legislation was most obviously desirable, at least some preliminary work of delineation and definition should be undertaken and made available to the Conference, in order that the Conference might be in a position to assess what kind of contribution it could reasonably expect to make in this field. Accordingly, the Conference resolved that a committee of the Conference be established by the President "to gather legislation and related material on privacy including the tort of invasion of privacy and that dealing with control of procedures of credit bureaus and to report to the Conference at its meeting next year" (see 1970 Proceedings of the Conference, page 38).

[It may also be recalled that the Conference was concerned that action on this matter should not be held up pending the completion of the work of the committee, and following a discussion of the difficulties that faced the Conference, having regard to the limited resources available to it, in attempting to undertake directly the task of developing suggestions and recommendations relating to legislation, the Conference by a further resolution requested the Minister of Justice "to seek the cooperation of the federal law Reform Commission, acting with such other law reform bodies in Canada as it may see fit to associate with it", to proceed immediately

with the necessary studies and to recommend for the purposes of the Conference the matters of policy that should be included in any uniform legislation, "with the intent that this Conference will proceed forthwith thereafter to draft model legislation on the protection of privacy". The writer is able to report that this resolution was subsequently placed before the Minister of Justice, who will shortly be considering various matters to be discussed with the Law Reform Commission of Canada as possible subjects for study and recommendation, and the priorities that should attach to each of them respectively].

In the period following the adoption of the resolution of the Conference relating to the establishment of a study committee, certain events transpired which resulted in a series of heavy demands being placed on the time of the writer, making it impossible for him to carry out his duties as chairman of the committee. Accordingly the writer wrote to your President last winter, suggesting that Mr. G. V. La Forest, Q.C., Assistant Deputy Attorney General, carry on in his place. Subsequently Mr. La Forest spoke by telephone with your President and advised him of his proposal to proceed with a preliminary study gathering together the existing legislation and other material relating to the tort of invasion of privacy and the protection of privacy. Because of pressure of work on Mr. La Forest, in turn, he too found himself unable to arrange a meeting of the committee, but did direct the preparation and completion by the Research and Planning Section of the Department of Justice of the preliminary study discussed by him with Mr. Brissenden. The study was prepared by Miss Ann R. Johnstone of that Section of the Department of Justice.

That study, which is intended as background material only and not as any kind of expression of the views of the Department of Justice, is appended hereto[1] in the hope that it will be of some assistance to the Conference in enabling it to assess what further steps, if any, should now be taken by the Conference relating to this matter.

Respectfully submitted,
D. S. Thorson.

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[1] A separate bibliography relating to the study has been prepared and is available to those who may be interested Because of the length of the bibliography, it was decided not to include it as part of the study itself

Ottawa, August, 1971.

Preliminary Report on Privacy and the Law
prepared for the
Uniformity Commissioners' Committee on Privacy

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## I THE PROBLEM

The rapidly developing use of computers and other electronic devices by both private and public enterprise has in recent years generated a growing concern for the survival of the individual as a genuinely free and independent member of society. In particular, many lawyers, sociologists, philosophers and psychologists have expressed intense concern as to the effect that the widespread use of the technology may have on what is described broadly as "the right of privacy", a concept that appears to encompass such indefinable ideals as dignity, personal integrity, individual liberty and inalienable rights in property. Specific technological advances that presently threaten individual privacy are dealt with in Part IV of this paper; here it is proposed to deal more generally with the several ways in which privacy may be invaded.

Invasions of privacy may occur in three distinguishable areas: in gathering information, in storing it and in disseminating it. As will be seen below in the discussion of relevant cases and legislation, there are or could be remedies for tortious behaviour in all these areas. However, these remedies are of no avail where the individual is unaware of any invasion, and an analysis of the various possible forms of invasion clearly indicates that they are almost all characterized by their invisibility: it is only exceptionally that individuals have discovered that their rights were being infringed.

A. *Collection of information.* Information may be collected secretly, quasi-secretly or openly.

Secret investigations, by their very nature, are beyond remedy except in so far as the methods used are illegal and the perpetrator is discovered. Apart from the use of electronic devices too numerous to mention here (some of which are outlawed by the *Protection of Privacy Act* now before Parliament), such investigations may involve trespass, breaking and entering, bribery, breach of confidence and other illegal behaviour, most of which is specifically banned in the British Columbia and

Manitoba *Privacy Acts*, and is in any event tortious or criminal. However, these are methods that generally threaten the millionaire, the criminal, the corporation and sometimes the litigant (matrimonial and accident cases); it is seldom necessary to subject the man in the street to such devious methods. Indeed, there is evidence that some large institutions are beginning to find it more economic to pay certain kinds of claims routinely rather than conduct lengthy investigations that might lead to the discovery of a few unjustifiable claims.

Quasi-secret investigations can be much more pernicious, since they generally involve no breach of the law and since any complaint could probably be answered by an assertion of implied consent. Such investigations include those made by credit-granting agencies, insurance companies, educational institutions, employers, landlords, welfare agencies and others to whom an individual has chosen to address himself. They may involve, as well as mutual exchanges of information, interviewing neighbours, colleagues and tradesmen; and it could well be argued that the individual is or should be aware that his affairs will be investigated in this way. Even if he is not, no breach of the law may have taken place. The danger arising out of this form of investigation is that information acquired may be inaccurate and the individual may have no means of correcting it since he is not legally entitled to demand to see his dossier and, if he does see it, can only have it corrected or destroyed, if at all, by means of a difficult and expensive court action (see Part II).

Open investigations, as where the individual completes a questionnaire or answers questions during an interview, are obviously unimpeachable in common law, although morally they may often involve a degree of coercion (an individual looking for a job, for housing, for a business loan is often impelled to reveal information not strictly relevant to his request that he would normally keep to himself). However, in the absence of legislation, actions can only lie where the information is carelessly handled or confidence is abused, and it is interesting to note in this respect that some credit companies have now added the following clause to their customer application forms:

> I hereby authorize the person to whom this application is made, or any credit bureau or any other investigative agency employed by such person, to investigate the references herein listed, or statements,

> or other information, oral or written, obtained from me or any other person pertaining to my credit and financial responsibility . . . I hereby release any claims, damages and suits whatsoever which may at any time be asserted by me by reason of such investigation.

B. *Storage of information.* Most agencies whose principal occupation is the handling of information about individuals probably take measures to guard against unauthorized inspection, although even they appear to be vulnerable at times (e.g., the recent theft of files from the RCMP offices in Cornwall and from executive placement agencies in Toronto, and the *Guardian's* recent exposé of loose government security in England). The greatest risk to individual privacy, however, is more likely to lie with agencies whose principal function is not the handling of information; for example, educational institutions, hospitals, welfare agencies, publishers, even local police authorities. These latter, whose objectives are socially admirable, may often lose sight of individual rights in the pursuit of their aims.

C. *Dissemination of information.* The dissemination of information appears to constitute the greatest danger to individual privacy. The investigation, however unscrupulous, the storage, however careless, are often innocuous in themselves: it is the fact that private information may become generally available, not necessarily with measurably harmful results, that offends against our sense of propriety. Where measurable damage arises demonstratably out of the misuse of information, whether malicious or careless, or the dissemination of inaccurate information, remedies are usually available. But no means exist by which an individual can lawfully require disclosure of the information that is being broadcast about him; he is thus unable to correct misstatements or to control the use to which the information is put. (The recipient of false information who acts on it to his detriment is, of course, in a much better position to claim damages.)

In sum, the only means by which an individual can legitimately hope to control the quality and quantity of information available about him would appear to be a system, such as that existing in Sweden, that regulates the validity of investigations, enforces strict standards of security and provides ample opportunity for correction of misinformation. Various proposals for legislation to this end have been made and are discussed in Part III.

## II RESPONSE OF THE COURTS

In describing the evolution of the notion of privacy in law it is necessary to consider separately what has happened in the British common law, in Canada and in the United States. This is not only because each has a different notion of the function of the courts and the legislature, but also because each has a different social ethos: thus, matters and events that are abhorrent to one society may be regarded as trivial in another and even admirable in a third. It is therefore very important, when seeking guidelines, not to attempt to import jurisprudence directly. Not only would it be technically difficult to do so, but it might also be socially unacceptable.

### A. *Common law.*

1. *British experience.* The notion of privacy is not foreign to the common law: the first recorded use of the term was in 1709 in *Cherrington v. Abney,*[1] an ancient lights case in which it was asserted that: "privacy is valuable". However, a right of privacy has never been pleaded as such and the courts have therefore been able to avoid recognizing or denying its existence in law. Instead, individual privacy has been protected by applying precedents arising out of the laws of trespass, nuisance, property, defamation, contract and trust, to mention the principal areas only. Nevertheless, some authorities[2] argue that it is still open to the courts to apply the principles of *Wilkinson v. Downton*[3] to contemporary invasions of privacy. In that case damages were awarded for "nervous shock" resulting from a practical joke on the following grounds:

> The defendant has . . . wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety . . . that proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused . . . is imputed to the defendant.[4]

In examining the history of English decisions it is important to bear in mind the changing role of the courts. The procedural forma-

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[1] 2 Vern. 646; 23 E.R. 1022.

[2] E.g., Brian Neill (*The Protection of Privacy*, 25 M L.R. 393) and Gerald Dworkin (*The Common Law Protection of Privacy*, 2 U of Tasmania Law Rev 418).

[3] (1897), 2 Q B. 57.

[4] *Ibid*, per Wright, J. at p 59 These principles were later applied in the case of *Janvier v Sweeney* (1919), 2 K B. 316, where it was held that both master and servant were liable for causing nervous shock when the servants (private detectives) uttered false statements and threats knowing that they might cause physical injury to the person to whom they were spoken.

lities which at one point stultified the working of the law had in their origin an approach which might now usefully be recalled: the courts approached new problems from the point of view of granting a remedy, rather than recognizing a right. The opposite is now the case, as Lord Denning explained in his dissenting judgment in *Abbot v. Sullivan*:[5] "I should be sorry to think that if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on. We should then be going back to the days when a man's rights depended on whether he could fit them into a prescribed form of action; whereas in these days the principle to be applied is that where there is a right there should be a remedy. . . ". This may explain why there has been so much reluctance to recognize, to the point of defining, a new right. But as will be shown, the common law can still recognize new rights (otherwise it would be obsolete) and these need not relate to property but merely extend the basic notion of tort law that people must be protected from harm by others.

As far as privacy is concerned, it is also important to bear in mind that it is an ideal entrenched in English society, a part of everyday life, and that consequently the courts have seldom had to deal with situations such as those that have frequently arisen in the United States. In addition, of course, the English libel laws are much more strict than those of the United States. As two American writers have put it:

> How does England explain remaining less perturbed than we in the area of privacy? Perhaps the strictness of British libel law has deterred invasions such as we experience. Or perhaps privacy is maintained by a habit of reserve, a societal taste that respects the individuality of personality, while some Americans relish publicity even when deployed in its most tawdry—but nonlibelous—aspects [6]

The history of privacy is, in a sense, the history of individual rights and freedom. As Warren and Brandeis long ago pointed out,[7] the common law first protected the citizen's physical integrity (private remedies for assault); then his physical comfort (private remedies for nuisance and trespass) and, by the middle of the 14th century, his reputation (private remedies for defamation). Indeed, in a series of actions *per quod servitium amisit* in the late 18th and early 19th centuries the courts awarded damages for injury to parental feelings and reputations caused by the seduction

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[5] (1952), 1 K B. 189, at p 200. The case was not one relating to privacy

[6] Morris L. Ernst and Alan U Schwartz—*Privacy: The Right to be Let Alone*, Macmillan (New York), 1962

[7] *"The Right to Privacy"* (1890), 4 Harvard Law Rev. 193.

of dependent children. This line of cases, which might have served as a useful precedent where the modern law of privacy is concerned, were, unfortunately, declared to be *sui generis* as early as 1800 in *Bedford v. McKow.*[8] Meanwhile the theory that property was the basis of individual freedom, as propounded by John Locke,[9] among others, pervaded the attitude of the courts to the point where if an injury could not be found to relate to property, it went without remedy, particularly in the Court of Chancery. An examination of the cases relating privacy must thus be divided into several parts: cases where assignable proprietary rights were asserted (including those arising under the laws of contract and trusts); those where personal rights were asserted (defamation, personal injury); and, since there is obviously a good deal of overlapping, those cases where both aspects were present.

(a) *Property rights and privacy*: The first reported case in which property rights were called in aid to remedy what was essentially an invasion of privacy was *Pope v. Curl,*[10] where Alexander Pope successfully brought an action for an injunction to prevent the publication of his letters. It was allowed on the grounds that the recipient of a letter has "at most . . . only a joint property with the writer". In 1816, Lord Byron was similarly successful in asking for an injunction to restrain the publication of poems ascribed to him which he denied having written[11]; no reasons were given and this case is therefore referred to below in the category of overlapping rights.

The flexibility of the law of torts was further demonstrated in the case of *Chapman v. Pickersgill.*[12] The defendant laid an information declaring the plaintiff bankrupt but took no further action; the plaintiff then brought an action for false and malicious suing out of a commission of bankrupt and in awarding damages to the plaintiff the court declared:

> Now wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable that he should have

[8] (1800), 3 Esp. 119; 170 E R 560

[9] "Man being born . with a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature . . hath by nature a power not only to preserve his property—that is, his life, liberty and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of the law in others . Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person', the 'labour' of his body and the 'work' of his hands"
*Of Civil Government*, 1690.

[10] (1741), 2 Atk 342; 26 E R. 608

[11] (1816), 2 Mer. 29; 35 E R. 851.

[12] (1762), 2 Wils. K B. 145; 95 E.R. 734

> an action to repair himself . . . But it is said, this action was never brought . . . I never wish to hear this objection again. This action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instument of mischief . . .[13]

There followed a series of cases involving the concept of property in ideas. The first of these was *Millar v. Taylor*,[14] involving a claim to property in an unpublished manuscript. Although the judgments display a certain amount of muddled thinking appropriate to the time,[15] Mansfield, L.C., probably affirmed for the first time that property rights could attach to intangible objects when he described a manuscript and its contents as incorporeal property which could only be conveyed expressly. Next came *Lord Byron v. Johnston*, already referred to. Then, in *Yovatt v. Winyard*,[16] an injunction was granted to prevent the communication or sale of certain medical recipes on the grounds that the knowledge was acquired in confidence and that revealing it would constitute a breach of trust. Again, in *Abernethy v. Hutchinson*,[17] an injunction was granted to prevent the publication of oral lectures on the grounds that there was an implied contract on the part of the auditor not to publish for profit and that the publisher had no right to take advantage of his breach of confidence; there was no comment on whether there can be property in oral expressions of knowledge or sentiment, other than Lord Eldon's remark that it is "a question of mighty importance".

Probably the best known case in this context is *Prince Albert v. Strange*[18] where it was held that the right and property of an author of any unpublished work would be protected from invasion. The case was distinguished from those where the court refuses to grant an injunction until a legal right has been established on the grounds that it was of the kind where the court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right or breach of contract or confidence. However, it was left to two later cases finally to settle first, what may constitute property and precisely how the court should approach this type of case, and second, that breach of confidence is in itself actionable.

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[13] Per the Lord Chief Justice at p 146 (Wils.), p 734 (E R.).

[14] (1769), 4 Burr 2303; 98 E.R. 201.

[15] See the comments in *Jefferys v. Boosey* (1854), 4 H.L.C. 815, discussed at p 269 above

[16] (1820), 1 Jac & W 394; 37 E R 425

[17] (1825), 3 L J. Ch 209.

[18] (1849), 1 Mac. & G 25; 41 E R. 1171

The first was *Jefferys v. Boosey*,[19] an action for breach of copyright, in which Erle, J., commenting on some aspects of *Millar v. Taylor*,[20] declared:

> The notion . . . that nothing is property which cannot be earmarked and recovered in detinue or trover may be true in an early stage of society . . . but it is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated

He made it clear, however that the definition of the right must precede the remedy, because looking for the existence of a right in existing remedies is like "supposing that the mark on the ear of an animal is the cause instead of the consequence of the property therein".[21]

The second was *Saltmann Engineering Co. Ltd. v. Campbell Engineering Co.*[22] where an action for breach of confidence was upheld even though it did not rely on contract, copyright or conversion. There Lord Greene endorsed the formula that:

> The obligation to respect confidence is not limited to cases when the parties are in contractual relationship . . . If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.[23]

(b) *Personal rights and privacy*: The first case in which a person's reputation was protected by injunction was *Lord Byron v. Johnston*.[24] This is probably the first time that an injunction was granted to restrain a potentially harmful publication; presumably it was granted in order to protect the author's "property" in his name and reputation, but no reasons were given. However, an injunction was again granted to restrain a publication shortly thereafter in the case of *Routh v. Webster*.[25] There the plaintiff was wrongly named as a trustee in a company prospectus and the injunction was granted in view of the obvious financial risks and liabilities to which the plaintiff was thereby exposed.

It should be noted, however, that the application of *Routh v. Webster* was subsequently limited in *Prudential Assurance Co. v.*

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[19] (1854), 4 H.L.C. 815; 10 E.R. 681 (H.L.).

[20] (1769), 4 Burr. 2303; 98 E.R. 201

[21] (1854), 10 E.R. 681 (H.L.) at p. 703. Cf. Lord Denning's remarks in *Abbot v. Sullivan*, cited at p. 266 above

[22] (1963), 3 All E.R. 413n

[23] *Ibid*, at p. 414. Cf. the earlier case of *Tournier v. National Provincial and Union Bank* (1924) 1 K.B. 461 (A.C.) where it was held that there was an implied term in a banker's contract with his client that he would maintain confidentiality

[24] (1816), 35 E.R. 851 (referred to at p. 267 above)

[25] (1847), 10 Beav. 561; 50 E.R. 698

*Knott.*[26] There the defendant published a pamphlet suggesting that the plaintiffs were incompetent and unreliable, but the court held that, unlike *Routh*, the plaintiffs had not shown that publication would probably cause them irreparable damage. Consequently the plaintiffs were obliged to rely on any remedy they might have in damages after publication. As Lord Cairns, L.C., put it:

> I am at a loss to understand upon what principle the court of Chancery could possibly interfere as a *censor morum* or critic to restrain the publication of statements or expressions which would be held justifiable in a Court of Common Law. If, on the other hand, these comments do amount to a libel, then . . it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel.[27]

In 1884, in the case of *Hermann Loog v. Bean,*[28] an injunction was granted, applying *Routh v. Webster*, to restrain slander by a former employee that was injurious to the plaintiff's business reputation (the point being that an injunction must be as available in cases of slander as it would be for libel). The availability of this remedy was considerably extended in the case of *Monson v. Tussauds Ltd.*,[29] although the interlocutory injunction asked for was in fact refused. The plaintiff sought immediately to restrain the defendants from displaying a wax statue of himself as part of an exhibition of statues of notorious criminals. The interlocutory injunction was refused because the affidavits showed that the results of his action for damages were not certain and a libel will be restrained only where it is so clear that a contrary verdict by a jury would be set aside. However, Lord Halsbury was at pains to point out that injunctions restraining libel were no longer confined to cases affecting trade or business, remarking:

> Is it possible to say that everything which has once been known may be reproduced with impunity . . and justified since, in truth, such an incident really did happen? That it is done for gain does not in itself make it unlawful . . but it is not altogether immaterial as excluding such a publication from the category of those which are made in the fulfilment of some moral or legal duty . The Court of Chancery had no jurisdiction in libel cases; but they had jurisdiction to issue injunctions to restrain injuries to trade; and efforts were occasionally made to treat libels as injuries to trade, so as to bring them within the jurisdiction (of) the Court of Chancery; but . . the Judicature Acts have rendered all of them idle. In all cases where the Court shall think it just and convenient

[26] (1875), 10 Ch. App. 142.
[27] *Ibid*, at p 144.
[28] (1884), 26 Ch. D. 306.
[29] (1894), L Q B. 671

> the remedy exists I should have thought the protection of a man's character much more important than the protection of his trade.[30]

In the early part of this century a number of decisions involving personal privacy were thought to have established the fact that no right of privacy as such could be upheld by the common law. In *Dockrell v. Dougall*,[31] it was held that the unauthorized use of a person's name was not intrinsically libellous; in *Corelli v. Wall*,[32] it was held that the unauthorized publication of an unflattering photograph could not be restrained on the basis of libel or absence of consent ("The plaintiff has not established, for the purpose of this motion, that she has any such right".); and in the oft-cited case of *Tolley v. J. S. Fry & Sons Ltd.*,[33] it was held that the unauthorized use of a well-known person's portrait for advertising purposes was not defamatory: "The defendants . . . acted in a manner inconsistent with the decencies of life . . . but unless . . . the publication can be said to be defamatory . . . it cannot be made the subject matter of complaint by action at law".[34] It is noteworthy that in the same period an injunction to restrain a libel was granted in the case of *Dunlop Rubber Co. Ltd. v. Dunlop*[35] which involved a misleading and unauthorized depiction of the plaintiff; since the action was settled out of court, there was no discussion of the merits of the case. However, in an article written as a result of these decisions Professor Winfield pointed out that in no case was a right of privacy claimed as such and that they in no way fetter the power of the courts (certainly of the House of Lords) to create or recognize a remedy for invasion of privacy.[36]

In recent times it has also become a common practice for defendants in libel actions to claim qualified privilege, i.e., that it was the duty of the defendant to communicate the defamatory matter to a third party having a common interest and duty and that the communication was made without malice or recklessness.[37] The English response to this defence, which has long been paralleled by that of the Canadian courts, though not by those of the United States, may be summed up as follows: commercial information agencies cannot claim qualified privilege in publishing defamatory

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[30] *Ibid*, at p. 687

[31] (1899), 80 L T. 556

[32] (1906), 22 T L R. 532.

[33] (1930), 1 K.B 467

[34] Per Greer, L J., at p. 478.

[35] (1921), 1 A.C. 367

[36] Winfield, Percy H , *"Privacy"*, 185 L.Q.R 23 (1931).

[37] For a complete summary of the current meaning and confines of qualified privilege, see *Beach and another v. Freeson* (1971), 2 All E.R 854

information,[38] but a private, non-profit-making trade protection association can.[39]

That the English courts have by no means lost sight of the need to protect the individual from unwarranted incursions into his private life, while still not enouncing a right of privacy, is amply demonstrated in two recent cases. In *Williams v. Settle,*[40] where a photographer sold pictures of a murder victim which had been taken at his son's wedding, exemplary damages were awarded. Sellers, L.J., stated:

> It is sufficient to say that it was a flagrant infringement of the right of the plaintiff, and it was scandalous conduct and in total disregard not only of the plaintiff's legal rights of copyright but of his feelings and his sense of family dignity and pride It was an intrusion into his life, deeper and graver than intrusion into a man's property.[41]

In *Argyll v. Argyll,*[42] an injunction was granted to restrain publication of information acquired during a marriage on the grounds that it was an impermissible breach of confidence whther or not the matter was defamatory. Ungoed-Thomas, J., had this to say:

> If this were a well-developed jurisdiction, doubtless there would be guides and tests to aid the court in exercising it. If, however, there are communications which should be protected and which the policy of law recognizes should be protected, even to the extent of being a foundation of the old rule making husband and wife incompetent as witnesses against each other, then the court is not to be deterred merely because it is not already provided with fully developed principles, guides, tests, definitions and the full armament for judicial decision. It is sufficient that the court recognizes that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction: and I have no hesitation in this case in concluding that publication of some of the passages complained of would be in breach of marital confidence.[43]

(c) *Overlapping cases:* Although many of the cases referred to above obviously involve mixed notions of property and individual integrity, there remain several others that simply cannot be fitted precisely into either category, and yet must be dealt with if the activities of credit companies are to be borne in mind. A selection of these cases, which are set out briefly in chronological order below, lay down general principles that have an important relation to the protection of privacy.

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[38] *Macintosh v. Dunn* (1908) A C 390.
[39] *London Association for Protection of Trade v. Greenlands Ltd* (1916), 2 A.C 390
[40] (1960), 2 All E.R. 806.
[41] *Ibid,* at p. 812.
[42] (1965), 1 All E R. 611.
[43] *Ibid,* at p 625

The first is the well-know case of *Allen v. Flood*[44] where it was held that it is not actionable for a single person lawfully to dissuade another from entering into a contract with a third. This suggests that a credit company might quite legitimately refuse to sanction a loan, however this reflected on the reputation of a third party.[45] On the other hand, in *Pratt v. British Medical Association*[46] where a doctor was effectively prevented from practising as a result of the Association's propaganda, McCardie, J., held that:

> The rule of law is reasonably clear that a single person, or a body of persons, will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business, even though the unlawful means may not comprise any specific act which is *per se* actionable.[47]

More recently, the problem of property arose in a new form in *Sim v. H. J. Heinz Co. Ltd.*,[48] where a perfect imitation of an actor's voice was used in a broadcast advertisement. The plaintiff's claim for an injunction was refused on the grounds that one would not be available for libel because there was no evidence of a risk of irreparable damage; there was no argument as to proprietary right to one's voice. It is interesting to note that the Australian courts refused to follow this decision in *Henderson v. Radio Corporation Pty. Ltd.*[49] which involved the unauthorized use of a picture of two well-known dancers on a record cover. An injunction was granted on the grounds that the tort of passing-off could be extended to protect a new right based on the recognition of the fact that a person's reputation or identity might have commercial value.

Finally, it is worth noting in this context the decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[50] where it was held that a client who receives inaccurate information through the informer's negligence may sue for compensation for any resulting damage.

In sum, the English courts have protected privacy in various ways, but never as such; and the House of Lords has never dealt with the problem or answered the question raised by Lord Halsbury in *Monson v. Tussauds Ltd.* as to whether truth is an eternal licence.[51] As a result, there has, in recent years, been a spate of

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[44] (1898), A C. 1

[45] See, for example, *Taylor v. Despard* (1956), O R. 963; 6 D.L R. (2d) 161 (C A ), discussed at p. 275 below

[46] (1919), 1 K.B. 245.

[47] *Ibid*, at p. 260. The case of *Rookes v. Barnard* (1964), A C. 1129, is also relevant in this context

[48] (1959), 1 All E.R. 547.

[49] (1960), S.R. (N.S W ) 576

[50] (1964), A C. 465

[51] (1894), L.Q B 671, cited at p 270 above

legislation introduced in both Houses of Parliament, reflecting the suddenly increased ability of the mass media as well as government and private enterprise not only to invade but to broadcast the private affairs of individuals. This legislation is dealt with in Part III.

2. *Canadian experience.* Most of the Canadian common law in this area follows the British decisions and the cases here referred to relate mainly to the definition of qualified privilege,[52] with particular reference to statements relating to the plaintiff's credit.

As early as 1886 it was held in *Lemay v. Chamberlain*[53] that the publication for gain of inaccurate information is not protected by qualified privilege. However, in *Todd v. Dun, Wiman & Co.*,[54] where the information was supplied at a subscriber's request, it was explained that payment alone did not bar a claim of qualified privilege unless there was general publication. (A similar decision was handed down in *Lion Brewery v. Bradstreet Co.*[55]). Nevertheless, in *Cossette v. Dun*,[56] the Supreme Court of Canada made it clear that even where information is supplied confidentially by a mercantile agency to a subscriber at the latter's request, the agency will be liable for damages arising from false information resulting from its culpable negligence, imprudence or lack of skill. What amounts to culpable negligence was subsequently discussed in *Robinson v. Dun*[57] and in *Smith v. Dun.*[58] In the former case it was held that mere want of care does not amount to malice: there must be recklessness amounting to bad faith. And in the latter, that an exact copy of a public record cannot be defamatory where there is qualified privilege, although an inexact one may be, even when provided by a government employee.

Other cases relating to qualified privilege in Canada are worth noting. In *Harper v. Hamilton Retail Grocers' Association*,[59] it was held that publication to a clerk of a list of persons who should not be given credit is necessarily made in the course of business and is therefore protected by qualified privilege. In *Hare & Grolier Society Ltd. v. Better Business Bureau of Vancouver*,[60] the court held that an assertion of fraudulence on the part of the plaintiffs

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[52] See p. 271 above, and footnote 37.
[53] (1886), 10 O.R. 638 (C A )
[54] (1888), 15 O.A.R. 85
[55] (1903), 9 B C.R. 435
[56] (1890), 18 S.C R. 222.
[57] (1897), 24 O.A.R. 287
[58] (1911), 19 W.L R. 17
[59] (1900), 32 O R 295 (C.A.).
[60] (1946), 2 W W R 630.

which was published to members and to the public at large was not privileged, even though made in good faith. In *Taylor v. Despard,*[61] it was established that an agent benefits from the same qualified privilege as his employer when acting in the normal course of business, and that it is the business of a credit company to tell its customers why their applications for financing have been rejected, even if the facts are incorrect. And in *Banks v. Globe & Mail,*[62] the right to report and comment on matters of public interest was held not to amount to qualified privilege in an action for defamation.

Several other Canadian cases affecting individual privacy are worth noting. They are: *Greene v. Minnes,*[63] which appears to hold that a general advertisement of indebtedness would not be defamatory if the facts were as stated; *Orchard v. Tunney,*[64] which holds that a false report to an employer (who had contracted to run a closed shop) that one of his employees was no longer a union member was an actionable tort; and, possibly most important, *Krouse v. Chrysler Canada,*[65] where in an action for invasion of privacy and loss of saleable property in a photograph, a motion to strike out the statement of claim for failure to disclose a cause of action was refused. Two other well-known cases are dealt with below: *Robbins v. Canadian Broadcasting Corporation* and *Davis v. McArthur.*

*Quebec Civil Law*

The principal provision of the Quebec Civil Code that may afford protection of privacy is Article 1053:

> Every person capable of distinguishing right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill.

On the basis of this provision the plaintiff in *Robbins v. Canadian Broadcasting Corporation*[66] successfully sued for damages for "nuisance" (his name, address and telephone number were broadcast to television viewers who were invited to, and did, harass him with letters and telephone calls), and some writers have since suggested that in fact it was his right of privacy that was being protected.[67]

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[61] (1956), O R. 963; 6 D L R (2d) 161 (C A )
[62] (1961), S C.R. 474.
[63] (1891), 22 Ont. R 177.
[64] (1957), S C.R. 436.
[65] (1970), 3 O.R. 135 This case has now been argued, but at the time of writing, no judgment has been rendered
[66] (1958), 12 D L.R. (2d) 35
[67] E G., David Cornfield, *The Right to Privacy in Canada,* 25 Faculty of Law Review 103, at p. 108.

Two other cases in which it was complained that privacy was being interfered with were *Dame Monette v. Dame Mathieu*[68] and *Riel Investment Corporation v. Kithala*.[69] In the former case, however, the plaintiff based her claim (relating to extensions into the river planned by her riparian neighbour) on the *Navigable Waters Protection Act*.[70] And the latter claim (lack of privacy due to faulty construction of walls in an apartment building) was referred to Article 1614 of the Civil Code, which provides that:

> The lessor is obliged to warrant the lessee against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not.

The case was dismissed for lack of evidence, not, be it noted, for lack of right.

In sum, it appears that Article 1053 of the Civil Code is sufficiently broad to be called in aid where damage resulting from an invasion of privacy can be proved. There are obvious limits to the application of this Article, but it may be that other Articles of the Civil Code provide protection of privacy in more particular ways.

B. *United States Cases.*

Many of the United States cases on privacy involve principles of the United States Constitution, which are beyond our purview, but an attempt is made here to give a brief description, in an historical context, of some of the principles that have been developed.[71]

The best place to start is probably with the well-known article by Warren and Brandeis, published in the Harvard Law Review in 1890.[72] Although the incident that inspired the article (a newspaper report of the wedding of Warren's sister) would hardly be a matter of controversy now (if it was then), it led the authors to examine existing law and past decisions to determine whether or not there was or should be a common law right of privacy. They came to the conclusion that a right to privacy existed and that no legislation was necessary:

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[68] (1958), CS 259.

[69] (1964), CS 223

[70] R.S.C 1970, c N-19.

[71] The omission of cases involving constitutional law, of course, precludes any discussion of that form of invasion of privacy which probably most concerns residents of the United States: electronic surveillance by government agents

[72] *"The Right to Privacy"* (1890) 4 Harvard Law Rev. 193, discussed at p 266 above

> We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and . . . the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.
>
> If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.[73]

Although their analysis derived from their desire for protection from the "yellow" press, it resulted in a series of judicial decisions and legislation throughout the United States which sought to establish "privacy" as a right separate from those arising under the laws of contract, trust, property or defamation. Only the States of Texas, Rhode Island and Wisconsin have expressly denied the existence of any such right; and only New York, Utah and Virginia have limited the right by legislation. Four possible definitions of the right of privacy have been pronounced by the courts of the United States:

(1) "the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned"[74]

(2) "the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity"[75]

(3) "the right of an individual to be free from unwarranted publicity, or, in other words, to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities"[76]

(4) "the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities"[77]

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[73] *Op cit*, at p 213
[74] *Brents v. Morgan* (1927), 55 A L.R 964, discussed at p 279 below
[75] *Jones v Herald Post* (1929), 230 Ky 227.
[76] *McGovern v Van Rider* (1945), 43 A. (2d) 514
[77] Approved by the Indiana Appelate Court in *Continental Optical Co. v Reed* (1949), 14 A L R (2d) 743

A general rule is set out in the 1939 *Restatement of Torts* as follows:

> *Interference with Privacy.* A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.

The cases are examined below and relevant legislation is discussed in Part III. As will be seen, where there is no legislation, the right of privacy has been very broadly, not to say vaguely, defined, but where there is legislation, notably in New York,[78] the statute has been very strictly interpreted.

Lawyers in the United States, unlike their English colleagues and almost certainly under the influence of Warren and Brandeis, began to claim a "right of privacy" at a very early stage, with divers results. For example, in *Schuyler v. Curtis*,[79] where the plaintiffs sought to restrain the erection of a statue of their deceased aunt on the grounds that it would be an invasion of their privacy, the court was not unsympathetic although it was held that if such a right existed it was not transferable. Peckham, J., stated:

> It may be admitted that the courts have power in some cases to enjoin the doing of an act, where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used is involved . . [80]

But a few years later, in *Atkinson v. Doherty*,[81] a Michigan court held that Warren and Brandeis were wrong. There, the plaintiff sought to restrain the use of her deceased husband's portrait to advertise cigars and the court maintained that equitable jurisdiction was based solely on property rights and that the courts therefore could not restrain a libel (a ruling consistent with the English decisions preceding the Judicature Acts); in any event, there existed no right to privacy except in so far as it was protected by the laws of defamation and further protection could only come through legislation. The same reasoning was later applied to similar facts in *Roberson v. Rochester Folding Box Co.*,[82] disapproving *Schuyler v. Curtis*, where it was again held that legislation was the only solution. As a direct result the New York Civil Rights Law was enacted (see Part III).

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[78] New York Civil Rights Law, 1903, ss. 50, 51.
[79] (1895), 49 Am. St. Rep. 671 (N.Y.).
[80] *Ibid*, at p. 675.
[81] (1899), 80 Am. St. Rep. 507 (Mich.).
[82] (1902), 80 Am. St. Rep 507 (N.Y.).

By contrast, the Georgia courts recognized the existence of a common law right of privacy three years later in *Pavesich v. New England Life Insurance Co.*[83] As Cobb, J., put it:

> If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy. . The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law . . [84]

He added that the Roman notion of *injuria* has been carried into common law, as in the concept of nuisance where "there is really no injury to property, and the gist of the wrong is that the individual is disturbed in his right to have quiet"; in other words, the violation of the right of privacy is a tort.

Subsequent decisions have either directly affirmed the existence of a right of privacy or have provided (or refused) remedies for infringement of that right, on some other basis. The leading cases in which a right of privacy has been recognized as such are *Foster-Milburn Co. v. Chinn*,[85] another advertising case, where the right of privacy was affirmed as an aspect of defamation; *Munden v. Harris*,[86] where it was held that property may exist in incorporeal rights and that the right of privacy is one of these and will be protected in equity; and *Brents v. Morgan*,[87] where *Foster-Milburn* was approved and an attempt was made to define the right of privacy.[88]

More recently two notorious cases have suggested a growing recognition of the right of privacy, although no decision on the matter was made. In *Pearson v. Dodd*,[89] a journalist was held not to be liable for the rifling of a United States Senator's files, although he profited by it, but the court stated *obiter* that: "We approve the extension of the tort of invasion of privacy to instances of intrusion whether by physical trespass or not, into spheres from which an ordinary man . . . could reasonably expect that the particular . . . (snooper) should be excluded". And in *Nader v. General Motors*

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[83] (1905), 106 Am St Rep 104 (Ga.)
[84] *Ibid*, at p. 109.
[85] (1909), 135 Am. St Rep 417 (Ky )
[86] (1911), 134 S.W. 1076 (Mo.); *Pavesich* followed and *Roberson* rejected
[87] (1927), 299 S.W. 1967 (Ky )
[88] See p 277 above.
[89] (D.C. Cir. 1969), 410 F. (2d) 701.

*Corporation*,[90] where the plaintiff was beset on all sides by human and electronic spies, although it was decided that an action was only available for wiretapping and surveillance, the court expressed the opinion that even if certain acts were not actionable as such, a whole course of conduct might amount to an illegal invasion of privacy. (The case was subsequently settled out of court.)

Since *Roberson* and *Pavesich*, those cases in which the courts have rejected the notion of a right of privacy have either been resolved on the basis of statutory law or according to the law of defamation.

The principal cases brought under the laws of defamation start with *Henry v. Cherry & Webb*,[91] yet another advertising case, where it was held that if there were a right to privacy it would be personal and involve interference with seclusion, not publication, but that in fact no such right was contemplated in the torts of nuisance, assault or libel, or at all. This was followed by a series of increasingly discouraging decisions so far as the plaintiffs were concerned.

In *Mell v. Edge*[92] the defendant sent a malicious letter to the plaintiff's employer which caused the plaintiff to become ill, although there was no loss of job or wages. It was held, in an action for libel *per se*, that a mere statement that a person whose occupation does not depend on credit is a recalcitrant debtor is not actionable; special damage must amount to more than mere mental or physical distress. *Hudson v. Slack Furniture*,[93] where the defendant sent a forged wage assignment to the plaintiff's employer, knowing that they were forbidden, it was held that there was no libel *per se* because there was no proof of special damage. Again, in *Watwood v. Stone's Mercantile Agency*,[94] where a childless married woman was described by a credit agency as an unmarried mother who had failed in a breach of promise suit, the agency was held to be protected by qualified privilege and not bound to prove that its subscriber had a legitimate interest in the information provided. In the words of Edgerton, J.: "The harm that such statements occasionally do to applicants for credit is believed to be small in relation to the benefits that subscribers derived from frank reports".

[90] (1970), 255 N.E. (2d) 765.
[91] (1909), 136 Am. St. Rep. 928 (R I )
[92] (1942), 22 S.E (2d) 738 (Ga.).
[93] (1943), 47 N E. (2d) 502 (Ill )
[94] (1952), 194 F. (2d) 160 (D.C.).

Finally, in *Wetherby v. Retail Credit Co.*,[95] where a business woman was unable to get life insurance because the credit company accused her of loose and lewd behaviour, the court held that in view of the company's qualified privilege, there was no need for it to plead justification and no action lay.

The cases in which the plaintiff has relied on statutory protection have, with one exception, been equally unavailing. The exception was *Melvin v. Reid*,[96] where the plaintiff successfully restrained distribution of a film based on her past life (she had been a prostitute and been tried for murder). No right of privacy was claimed in respect of matters of public record and a demurrer was sustained in relation to her claim for damage to property rights in her name and history. The decision was based on the plaintiff's claim that her right to happiness as guaranteed by s. 1, art. 1 of the Constitution of California had been infringed and Warren and Brandeis' definition of privacy[97] was expressly held to be inapplicable. This decision was followed by a Federal Court in *Mau v. Rio Grande Oil Co.*[98] on the grounds that it was bound to follow the law of the place where the tort was committed, and it was made clear that the decision could not be construed as a recognition of a "right of privacy".

In conspicuous contrast to the above, two New York cases may be cited. In *Humiston v. Universal Film Mfg. Co.*,[99] it was held that the New York Civil Rights Law does not protect persons shown in films of current events (the statute, being penal, must be strictly construed). And in *Sidis v. F-R Publishing Corp.*,[100] where the plaintiff's (respectable) life history was published and it was held that no relief was available because the subject was a matter of public interest and the publication did not offend against "the community's notions of decency". The plaintiff committed suicide shortly thereafter.

A similar decision was handed down in Virginia (which has similar legislation to that of New York) in *Holloman v. Life Insurance Co. of Virginia*.[101] An insurance policy on the plaintiff's life was issued to her son against her express wishes and without her knowledge, by means of the agent's fraud. Her action for invasion

[95] (1964), 201 Atl. Rep (2d) 344 (Md.).
[96] (1931), 112 Cal. App 285
[97] *Op cit.* at p 266 above
[98] (D.C. Cal. 1939), 28 F. Supp. 845.
[99] (1919), 189 App. Div. 467, 178 N.Y S 752.
[100] (1940), 113 F. (2d) 806.
[101] (1940), 192 S C 454, 7 S E. (2d) 169.

of privacy was dismissed on the grounds that there was no publicity and the act did not amount to a commercial use of her name.

In sum, it would appear that the courts of the United States, although more aware of the need to protect individual privacy than those following the British tradition, have yet to find a generally satisfactory solution to the complex problem of developing reasonable and workable safeguards against breaches of privacy, in some cases even where their legislatures have intervened in the development of the law.

## III LEGISLATION

### A. *General*

While legislation directly relating to the right of privacy is not extensive, there is growing pressure for its protection at both the international and national levels.

At the international level, individual privacy is protected to a certain degree by three instruments: the *Universal Declaration of Human Rights*,[102] which Canada has signed and which is expressly subscribed to in the constitution of fifteen African nations; the *International Covenant on Civil and Political Rights*,[103] which substantially repeats the above but which Canada has not signed; and the *European Convention for the Protection of Human Rights*.[104] It should also be noted that most nations of the world have constitutional provisions protecting the inviolability of the person and of the domicile and secrecy of correspondence; and twelve specifically protect either "private and family life" or honour or reputation.[105]

Here we shall limit our discussion to Canadian, United States and English legislation.

### B. *Canadian*

#### 1. *Federal*

While there are no federal statutes relating specifically to the subject of privacy as such, there are a number offering protection

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[102] Art. 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

[103] Part III, Art. 17, ss. 1 and 2.

[104] Section 1, Art. 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence".

[105] Cyprus, Iran, Jamaica, Malta, Monaco, Portugal, Sierra Leone, Spain, Tanzania, Trinidad and Turkey.

to privacy in certain situations. Among the many examples that may be mentioned are the *Statistics Act*,[106] which prohibits the publication of particulars contained in statistical returns, the *Income Tax Act*,[107] which prohibits officials from revealing information acquired in the administration of the Act, and the *Criminal Code*, which prohibits various types of behaviour involving invasions of privacy.[108] In addition, there are numerous statutes that limit, by means of prohibitions or restrictions placed on the admissibility of evidence, the use to which various particular kinds of privileged or confidential information may be put.

In recent years, however, pressure for more general laws relating to the protection of privacy has noticeably increased, with the result that more and more Bills are being introduced by individual members of Parliament, designed to deal with particular aspects of the law of privacy.

Shortly before the summer adjournment of the current session of Parliament, the Minister of Justice, Mr. John N. Turner, introduced a bill in the House of Commons, entitled the *Protection of Privacy Act*. The Bill, which is reproduced at the end of this report, would create a new Part of the *Criminal Code* entitled *"Invasion of Privacy"*. It would make it an offence wilfully to intercept a private communication by means of electromagnetic, acoustic, mechanical or other devices. A private communication is defined as an oral communication, or any telecommunication, made under circumstances where it is reasonable for its originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it. By "intercept" is meant to listen to, record or acquire a communication or its substance, meaning or purport. The Bill would make it an offence to possess, sell or purchase any of the devices mentioned whose design renders it primarily useful for surreptitious interception of private communications. A third offence would prohibit disclosure of any information obtained by a person by means of an unlawful interception, or by disclosure, without proper authority, of information obtained lawfully.

Two basic exceptions to the general prohibition against interception of private communications are provided by the Bill. The

[106] Statutes of Canada, 1970-71, c. 15

[107] R.S.C 1970, c. I-5.

[108] R.S C 1970, c. C-34; see, for example, ss. 119 (personating peace officer), 173 (trespassing), 261-281 (defamatory libel), 296 (criminal breach of trust), 330 (conveying false information and harassment) and 381 (intimidation and watching and besetting).

first involves interceptions or seizures directed towards prevention or detection of espionage, sabotage or any other subversive activity directed against Canada or detrimental to the security of Canada where such interception or seizure is necessary in the public interest. Secondly a judge of a superior court of criminal jurisdiction may authorize interceptions in aid of a criminal investigation. Provision is also made in the Bill for certain other exceptions. Interceptions would be excused where a person intercepts with the consent of only one of the parties to a communication, or where the interception is necessarily incidental to the ordinary duties of a telephone company employee.

Before a judge grants an authorization to intercept a private communication under the Bill he must be satisfied: (a) that other investigative procedures have been tried and have failed; (b) that other investigative procedures are unlikely to succeed; or (c) that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures. Authorization can only be granted in respect of indictable offences, and the interception so authorized will not be valid for more than 30 days. There is provision for renewal if the judge is satisfied by further evidence that the renewal is necessary.

The Bill also makes provision for an emergency permit to intercept a communication for a period not exceeding 36 hours if an Attorney General or the Solicitor General, or a peace officer or public officer designated in writing by him, is satisfied that conspiratorial activities are being, or will be, carried on involving persons suspected of being engaged in organized crime, and that the situation requires that the interception commence before an authorization could, with reasonable diligence, be obtained. However, under such emergency procedure, an application for an authorization would have to be made as quickly as possible.

A private communication unlawfully intercepted would be inadmissible as evidence, but any evidence obtained directly or indirectly as a result of that interception could be used. Before an intercepted private communication could be used in a trial, notice of the intention to use it, together with a transcript of the contents, would have to be given to the accused person.

Disclosure of the existence of a private communication or the contents thereof would be prohibited except: (a) where the disclosure is made in the course of giving evidence under oath; (b)

in connection with duties related to a criminal investigation; (c) in the course of normal operation of a telecommunication system; or (d) where a disclosure to a peace officer is intended in the interests of justice.

The Bill would also amend the *Crown Liability Act*[109] to provide that where a servant of the federal Crown commits an offence under the provisions of the Act, the federal government would be liable for all loss or damage caused by his actions. Provision is also made for the recovery of punitive damages in the amount of $5,000.

In introducing the Act Mr. Turner expressed the hope that protection of privacy would be extended in future to cover such matters as the information stored by computers and data banks, and other forms of surveillance. He further hoped that provincial legislatures would also create a similar right of recovery in damages for illegal surveillance.

Three other Bills were introduced by private members during the current session of Parliament, namely: Bill C-38, An Act to prevent the invasion of privacy resulting from the misuse of information stored in data banks (Mr. Goode); Bill C-96, An Act to amend the Criminal Code (Wire Tapping, etc.) (Mr. Orlikow); and Bill C-128, An Act respecting fair credit reporting (Mr. Rose).

2. *Provincial*

Although most of the provinces presently have the matter of privacy under review, only three appear to have directly relevant legislation or proposed legislation. Provincial legislation incidentally affecting the matter, such as laws regulating the professions and the civil service, have not been examined.

(a) *British Columbia*: British Columbia was the first province to enact a *Privacy Act*.[110] The Act makes it a tort, actionable without proof of damage, "wilfully and without claim of right, to violate the privacy of another" (s. 2) or to make use of a person's name or portrait (including impersonation or caricature), without consent, for the purposes of trade or commerce. According to s. 2(2):

> The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a

[109] R S C 1970, c. C-38.
[110] S B.C., 1968, c. 39.

> violation of the privacy of another, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

The defences prescribed are: consent, defence of person or property, legal duty, public interest, fair comment and privilege as understood in the law of defamation. A copy of the Act is attached at the end of this report.

It remains to be seen how successful this legislation will prove to be in protecting the individual from invasions of privacy by electronic means. So far only one action has been brought, under section 2, in which the plaintiff became ill as a result of knowing that he was being watched and followed. It was held in the first instance that this surveillance and the use of a "bumper beeper" was an actionable tort under the Act.[111] However, on appeal it was decided that the defendant was not in breach of the Act.[112]

(b) *Manitoba*: Manitoba also has a *Privacy Act*[113] (attached), which came into force in 1970. Like the British Columbia legislation (although the different phraseology is worth noting) the Act makes it a tort, actionable without proof of damage, "substantially, unreasonably, and without claim of right" to violate the privacy of another (s. 2). Section 3 provides non-exclusive examples: surveillance of any kind, intercepting telephone conversations, unauthorized use of name, likeness of voice for purposes of gain, unauthorized use of personal documents. These examples suggest that the Act may go further than the British Columbia Act towards protecting the individual in situations where the common law has failed to offer relief. The defences prescribed are: consent, ignorance of the violation, defence of the person or of property, legal duty, public interest and fair comment. It will be interesting to see how often "ignorance of the violation" is raised as a defence.

A bill recently introduced by the Government of Manitoba also deserves mention. Bill 27, *The Personal Investigations Act* (attached), seeks to regulate (with the exception of federal, provincial and municipal agencies) the type of information an individual may be required to disclose in applying for any kind of service or employment, the use to which such information may be put and the right of the individual to inspect and verify files referring to him. The

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[111] *Davis v McArthur* (1970), 72 W.W.R 69, 10 D.L.R. (3d) 250.
[112] *Ibid*, (1970), 17 D.L.R. (3d) 760.
[113] S M, 1970, c. 74.

intention of this legislation would appear to be to protect individual privacy in those areas that are currently of considerable concern.

(c) *Ontario*: In Ontario, legislation imposing strict licensing requirements on private investigators was enacted in 1965,[114] but this legislation exempts "persons who search for and furnish information, (i) as to the financial credit rating of persons, (ii) to employers as to the qualifications and suitability of their employees or prospective employees, or (iii) as to the qualifications and suitability of applicants for insurance and indemnity bonds, and who do not otherwise act as private investigators". (s. 2)

In addition, the Ontario Legislature has before it Bill 46, introduced by Mr. Reid (for the second time), proposing *An Act to provide for Data Surveillance and Privacy* which would require registration of computer installations containing personally identifiable information and regulate their use.

C. *United States*

The first, and probably the best known, United States legislation in respect of privacy was the New York Civil Rights Law of 1903[115] which, as a result of the decision in the *Roberson* case, made it both actionable as a tort and punishable as a misdemeanour to use a person's name or likeness for "advertising or trade purposes". This statute, which was copied by Utah,[116] has been subject to strict interpretation because it is a penal statute.[117]

Since then a welter of legislation relating to various aspects of privacy has been introduced, sometimes adopted, occasionally annulled. To take a random sample, a 1963 Indiana law making school "counsellors" immune from disclosing information received in the course of their duties; a 1969 Connecticut law prohibiting the disclosure of communications or records of mental patients; and general criminal law provisions relating to the interception of private communications. In particular, many states have attempted to control the activities of credit bureaus and related agencies, but that field has now been dealt with to a substantial extent by the

[114] S.O., 1965, c. 102.

[115] Ss. 50-51. See p. 278.

[116] Utah Rev. Stat. (1933), ss. 103-4-7 to 103-4-9. This statute goes beyond the New York statute in two important particulars: it protects the privacy of deceased as well as living persons and it extends the right of privacy to public institutions.

[117] See, for example, *Humiston v. Universal Film Mfg. Co.*, cited at p 281 above.

Federal *Fair Credit Reporting Act*[118] and the *Consumer Protection Act*.[119] Both are reproduced at the end of this report.

Arthur Miller has thus summarized the position in the United States:

> Although the United States is the most advanced nation . . . in the field of computer science, we must look elsewhere to find comprehensive legislative proposals for solving the computer-privacy problem—in particular to Canada, Great Britain and Germany.[120]

D. *England*

Although a number of Bills relating to privacy have recently been introduced in the House of Commons and in the House of Lords, none has received government support, and it seems unlikely that any such support will be forthcoming, at least until the publication of the findings of the Younger Committee. This Committee was set up by the Home Secretary in 1970 to "consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons or organizations or by companies, and to make recommendations."

The most controversial of these Bills (perhaps because it was the first) was that introduced in the House of Lords by Lord Mancroft in 1961: "An Act to protect a person from any unjustifiable publication relating to his private affairs and to give him rights at law in the event of such publication". In spite of the support it received in Parliament (notably from Lords Denning and Goddard) the Bill was opposed by the Lord Chancellor, Lord Kilmuir, who favoured development of the law in this area through judicial decision, and was withdrawn by consent. The Bill referred only to publication by means of newspapers, radio, television and film, and was strongly opposed by the press.

A broader approach was subsequently adopted by a Private Member, Mr. Alexander Lyon, in 1967, who introduced a Bill "to protect a person from any unreasonable and serious interference with his seclusion of himself, his family or his property from the public" (adopting Professor Winfield's definition[121]). The Bill, which was designed to cover all forms of intrusion, from indecent

[118] Pub. Law 91-508, October 26, 1970

[119] U.S C. Ann 1970, Title 15, ch. 41.

[120] *Assault on Privacy*, Michigan, 1971. The reference to Canada may seem surprising

[121] Winfield, Percy H., "Privacy", (1931), 185 L.Q.R. 23 at p. 24.

behaviour by the press to industrial espionage, lapsed before its second reading.

Another Private Member, Mr. Peter Bessell, introduced a Bill a few days later "To prohibit monitoring of private telephone conversations by unauthorized persons", but it, too, disappeared before second reading.

Early in 1969, Mr. Kenneth Baker introduced a Private Member's Bill "To prevent the invasion of privacy through the misuse of computer information". This Bill, which appears to have lapsed before second reading, provided for registration of data banks under the control of the Registrar of Restrictive Trading Agreements. An identical proposal, the Personal Records (Computers) Bill, was introduced at the same time in the House of Lords by Lord Windlesham, but withdrawn by leave in December, 1969.

Finally, in 1970, Mr. Brian Walden introduced a Bill to "Establish a right of privacy, to make consequential amendments to the law of evidence, and for connected purposes". This Bill received wide support in the press and in Parliament during the debate on the order for second reading. It was, however, the victim of the dissolution of Parliament later that year.

In the same year a Draft Right of Privacy Bill was published by Justice, the British branch of the International Commission of Jurists. It provides for a personal action arising out of "Any substantial and unreasonable infringement of a right of privacy" and defines the right of privacy as "the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs".

## IV PRIVACY V. TECHNOLOGY

### A. *The electronic spies*

The various electronic spying devices and the ways in which they can and are being used were discussed by the Minister of Justice in September, 1969, in a speech to the annual meeting of the Canadian Bar Association in Ottawa. As he pointed out, the increased versatility of the electronic ear, as well as its reduction in size, have made it an object of mass production. United States surveys show that it is being sold in vast quantities to government agencies, private corporations and individuals, in that country at

least. Similarly, cameras capable of photographing still or moving pictures automatically at great distances, around corners and even in the dark are now easily available. And the polygraph ("lie-detector") has long since moved out of the police station into the company (or government) personnel office, the school and the mental hospital.

In Canada the potential spread of some of these devices may be nipped in the bud by the *Protection of Privacy Act* now before Parliament.[122] Others may be equally amenable to similar treatment if and when the need arises. However, apart from Manitoba's *Personal Investigations Act*[123] and Ontario's *Private Investigators and Security Guards Act*,[124] there is as yet scant control over the more human means of acquiring confidendial information.

B. *The computer*

There is growing apprehension in many areas about the impact of the computer on society as a whole. There is some cause for wondering whether immediate, apparent improvements in efficiency outweigh the obvious risks to social and individual well-being. Serious concern has been expressed, particularly in the United States, where the use of computers is more prevalent than in other countries, that unreliable and often illegal methods are used to obtain information which is then made available to a degree that makes any claim to confidentiality derisory.[125] Furthermore, it has been demonstrated that a computer will not only digest masses of inaccurate information and multiply it, but can actually create errors itself.

The sociological arguments against the uncontrolled use of the computer are basically three: that the machine's enormous capacity will encourage its users to acquire more information than they need; that the awareness of the individual that every detail of his life from birth has been recorded will induce a deadening prevalence of conformism (because the computer does not forget the errors of youth and has not the imagination to contemplate changes in personality); and that the possession by a few of the amount of

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[122] This strictly controls the use, possession or sale of any "electromagnetic, acoustic, mechanical or other" device or apparatus that "is used or is capable of being used to intercept a private communication" See pp. 282-285 above

[123] See p. 286 above

[124] See p 287 above

[125] See, for example, the evidence submitted to the Senate Subcommittee on Administrative Practice and Procedure (Invasions of Privacy).

information that computers can contain will inevitably lead to a totalitarian state.

Some authorities, it is true, feel that there has been undue alarm about the computer.[126] They point out that it will be a decade or more before these machines are capable or numerous enough to perpetrate the evils foreseen. But even they concede that in the interval many people are already becoming immunised to practices that are potential threats to individual privacy, such as computerised medicine and education. However, there may be some merit in their argument that it would be unwise to act in panic.

In Canada, these various attitudes to the problem of privacy have led to a joint study now being carried out by the Departments of Justice and Communications. The study will, in general, consider the rights and values appurtenant to the individual, and the issues raised by possible non-observance or invasion of these rights or values through the collection, storage, processing and use of data contained in automated information and filing systems. In particular, information will be gathered relating to the types of personal information collected for, stored in, processed by and distributed by automated information systems, whether governmental, institutional or private, the procedures and mechanisms applied for the collection, storage, processing and distribution of this data, and the security procedures employed to prevent unauthorized access to automated information systems. In addition, the study will examine and evaluate possible measures, whether juridical, regulatory, technical or professional, which might ensure observance of the rights and values contemplated, and evaluate potential constraints, whether commercial, legal or constitutional, which might be available to safeguard them.

In sum, the study is concerned with collecting and evaluating information as to the existing and projected use of computers in Canada in order to assess their impact on individual privacy and the possible means, whether legal or other, by which this impact might be rendered innocuous.

## IV CONCLUSION

One school of thought is of the view that no legislation is necessary at this time. In the words of one author, the common law "is still capable of rebutting the presumption that it is past the age

[126] E g., Arthur Miller, *op cit* at p 40.

of child-bearing" and although it has yet to face squarely the problem of privacy as such, many authorities argue that it can and should do so and that legislation except in relation to marginal matters (e.g., wiretapping) should not be attempted in this field. Obviously, areas of possible extension exist in the laws governing passing-off, defamation, breach of confidence, breach of trust, unjust enrichment, nuisance, trespass, breach of contract and the infliction of foreseeable damage, as well as in the use of equitable remedies, although clearly none of these are available to the individual who does not know that he has been injured or cannot afford the expensive litigation that may be involved.

Those favouring legislation argue that judicial law moves too slowly, and while great care would have to be exercised in drafting appropriate legislation so as to avoid impeding the development of the law in areas which the draftsman cannot contemplate, it is hard to rebut the argument that legislation is the only solution to at least one of the underlying problems: that the average individual may be unaware that his privacy has been invaded.

3rd Session, 28th Parliament, 19-20 Elizabeth II, 1970-71

THE HOUSE OF COMMONS OF CANADA

# BILL C-252

An Act to amend the Criminal Code, the Crown Liability Act and the Official Secrets Act

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

**1.** This Act may be cited as the *Protection of Privacy Act.* Short title

CRIMINAL CODE

**2.** The *Criminal Code* is amended by adding thereto, immediately after section 167 thereof, the following Part: 1953-54, c 51

"PART IVA

INVASION OF PRIVACY

*Interception of Communications*

**167A.** In this Part, Definitions

(a) "authorization" means an authorization to intercept a private communication given under section 167D; "Authorization"

(b) "electromagnetic, acoustic, mechanical or other device" means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing; "Electromagnetic, acoustic mechanical or other device"

(c) "intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof; "Intercept"

(d) "offence" means an offence created by an Act of the Parliament of Canada for which an offender may be prosecuted by indictment and includes any such offence that is alleged or suspected or that there are reasonable grounds to believe may be committed; "Offence"

"Private communication"

(e) "private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it; and

"Sell"

(f) "sell" includes offer for sale, expose for sale, have in posession for sale, distribute or advertise for sale.

Interception

**167B.** (1) Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years.

Saving provision

(2) Subsection (1) does not apply to

(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

(b) a person who intercepts a private communication in accordance with an authorization or a permit given under subsection (1) of section 167F;

(c) a person engaged in providing a telephone, telegraph or other communication service to the public in respect of a private communication intercepted by him in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks or necessary to protect his rights or property directly related to providing a telephone, telegraph or other communication service; or

(d) an officer or servant of Her Majesty in right of Canada in respect of a private communication intercepted by him in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

Consent to interception

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (a) of subsection (2), subsection (1) of section 167G and subsection (1) of section 167K.

Application for authorization

**167C.** An application for an authorization shall be made in writing to a judge of a superior court of criminal jurisdiction, shall be signed by a peace officer or public officer specially designated in writing for the purposes of this Part by

(a) the Solicitor General of Canada, personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province personally, in respect of any other offence in that province.

and shall be accompanied by a statutory declaration of a peace officer or public officer deposing to the following matters, namely:

(c) the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence;

(d) the type of private communication proposed to be intercepted;

(e) the names and addresses, if known, of all persons, the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence, and if not known, a general description of the place at which or the manner in which private communications are proposed to be intercepted;

(f) the period for which the authorization is requested; and

(g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Grounds on which judge must be satisfied

**167D.** (1) An authorization may be given if the judge to whom the application is made is satisfied that it would be in the best interests of the administration of justice to do so and that

(a) other investigative procedures have been tried and have failed;

(b) other investigative procedures are unlikely to succeed; or

(c) the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Content and limitation of authorization

(2) An authorization shall

(a) permit the Solicitor General of Canada or the Attorney General, as the case may be, to designate the person or persons who may intercept private communications thereunder;

(b) state the offence in respect of which private communications may be intercepted;

(c) state the type of private communication that may be intercepted;

(d) state the identity of the persons, if known, whose private communications are to be intercepted and where the identity of such persons is not known, the place at which or the method by which private communications may be intercepted;

(e) contain such terms and conditions as the judge considers advisable in the public interest; and

(f) be valid for the period, not exceeding thirty days, set forth therein.

Renewal of authorization

(3) Renewals of an authorization may be given from time to time by a judge of a superior court of criminal jurisdiction upon receipt by him of a written application signed by a peace officer or public officer specially designated in writing for the purposes of this Part by the Solicitor General of Canada or the Attorney General, as the case may be, accompanied by a statutory declaration of a peace officer or public officer deposing to the following matters, namely:

(a) the reason and period for which the renewal is required, and

(b) full particulars, together with times and dates, when interceptions, if any, were made or attempted under the authorization, and any information that has been obtained by any interception,

and supported by such other information as the judge may require.

Grounds on which renewal granted

(4) A renewal of an authorization may be given if the judge to whom the application is made is satisfied that any of the circumstances described in subsection (1) still obtain, but no such renewal shall be for a period exceeding thirty days.

**167E.** (1) All documents relating to an application made pursuant to section 167C or subsection (3) of section 167D are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be

Manner in which authorizations to be kept secret

(a) opened or the contents thereof removed except

(i) for the purpose of dealing with an application for renewal of the authorization, or

(ii) pursuant to an order of a judge of a superior court of criminal jurisdiction; and

(b) destroyed except pursuant to an order of a judge of a superior court of criminal jurisdiction.

(2) An order under subsection (1) may only be made after the applicant for the authorization to which the order relates has been given an opportunity to be heard.

Order of judge

**167F.** (1) Where a peace officer or public officer specially designated in writing for the purposes of this Part by an Attorney General or the Solicitor General of Canada is satisfied that

Emergency permits

(a) conspiratorial activities are being or will be carried on involving persons suspected of being engaged in organized crime,

(b) interception of private communications between particular persons, at a particular place or in a particular manner would be likely to provide evidence of an offence related to such conspiratorial activities, and

(c) circumstances exist which would justify the giving of an authorization for interception of private communications between such persons, at such place or in such manner but the urgency of the situation requires that the interceptions commence before an authorization could, with reasonable diligence, be obtained,

he may give a permit for the interception of private communications between such persons, at such place or in such manner.

(2) Where a permit for the interception of private communications is given under subsection (1), the person giving it shall forthwith report thereon to the Attorney General by whom he was

Report to Attorney General or Solicitor General of Canada

designated for the purposes of this Part or to the Solicitor General of Canada, as the case may be, who shall thereupon

(a) apply for an authorization to intercept private communications in the circumstances to which the permit relates, or

(b) revoke the permit.

Term for which permit remains valid

(3) A permit for the interception of private communications given under subsection (1) remains valid, unless sooner revoked pursuant to subsection (2),

(a) for thirty-six hours from the time when it is given, or

(b) if, within that time an application for authorization to intercept private communications in the circumstances to which the permit relates is made, until that application is finally disposed of.

Inadmissibility of private communication

**167G.** (1) A private communication that has been intercepted is inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(a) the interception was lawfully made, or

(b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof,

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

Application of subs (1)

(2) Subsection (1) applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction.

Certain interceptions deemed not lawfully made

(3) For the purposes of this section only, an interception of a private communication in accordance with a permit given under subsection (1) of section 167F shall be deemed not to have been lawfully made where

(a) no application for an authorization to intercept private communications in the circumstances to which the permit relates is made under subsection (2) of section 167F; or

(b) such an application is made and is refused.

Notice of intention to produce evidence

(4) A private communication that has been intercepted in accordance with an authorization shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of his intention together with

(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and

(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

Privileged evidence

(5) Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

Further particulars

**167H.** Where an accused has been given notice pursuant to subsection (4) of section 167G, any judge of the court in which the trial of the accused is being or is to be held may at any time order that further particulars be given of the private communication that is intended to be adduced in evidence.

Possession, etc.

**167I.** (1) Every one who possesses, sells or purchases any electromagnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence and liable to imprisonment for two years.

Exemptions

(2) Subsection (1) does not apply to

(a) a police officer or police constable in possession of a device or component described in subsection (1) in the course of his employment;

(b) a person in possession of such a device or component for the purpose of using it in an interception made or to be made in accordance with an authorization or a permit given under subsection (1) of section 167F;

(c) an officer or servant of Her Majesty in right of Canada or a member of the Canadian Forces in possession of such a device or component in the course of his duties as such an officer, servant or member, as the case may be; and

(d) any other person in possession of such a device or component under the authority of a licence issued by the Solicitor General of Canada.

Terms and conditions of licence

(3) A licence issued for the purpose of paragraph (d) of subsection (2) may contain such terms and conditions relating to the possession, sale or purchase of a device or component described in subsection (1) as the Solicitor General of Canada may prescribe.

Forfeiture

**167J.** (1) Where a person is convicted of an offence under section 167B or 167I, any electromagnetic, acoustic, mechanical or other device by means of which the offence was committed or the possession of which constituted the offence, upon such conviction, in addition to any punishment that is imposed, may be ordered forfeited to Her Majesty whereupon it may be disposed of as the Attorney General directs.

Limitations

(2) No order for forfeiture shall be made under subsection (1) in respect of telephone, telegraph or other communication facilities or equipment owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of such a person by means of which an offence under section 167B has been committed if such person was not a party to the offence.

Disclosure of information

**167K.** (1) Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for two years.

Exemptions

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath where the private communication is admissible as evidence under section 167G or would be admissible under that section if it applied in respect of the proceedings;

(b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(c) in giving notice under section 167G or furnishing further particulars pursuant to an order under section 167H;

(d) in the course of the normal operation of

(i) a telephone, telegraph or other communication service to the public, or

(ii) a department or agency of the Government of Canada,

if the disclosure is necessarily incidental to an interception described in paragraphs (c) and (d) of subsection (2) of section 167B; or

(e) where disclosure is made to a peace officer and is intended to be in the interests of the administration of justice.

Damages

**167L.** (1) Subject to subsection (2), a court that convicts an accused of an offence under section 167B or 167K may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount not exceeding $5,000 as punitive damages.

No damages where civil proceedings commenced

(2) No amount shall be ordered to be paid under subsection (1) to a person who has commenced an action under Part IA of the *Crown Liability Act*.

Judgment may be registered

(3) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

Moneys in possession of accused may be taken

(4) All or any part of an amount that is ordered to be paid under subsection (1) may be taken out of moneys found in the possession of the accused at the time of his arrest, except where

there is a dispute as to ownership of or right of possession to those moneys by claimants other than the accused.

Annual report

**167M.** (1) The Solicitor General of Canada shall, as soon as possible after the end of each year, prepare a report relating to authorizations for which peace officers or public officers specially designated in writing by him for the purposes of this Part made application and interceptions made thereunder in the immediately preceding year setting forth

(a) the number of applications for authorizations made by such persons and the number of such applications that were made after a permit was given under subsection (1) of section 167F;

(b) the number of applications for renewal of authorizations made by such persons;

(c) the number of applications referred to in paragraphs (a) and (b) that were granted, the number of such applications that were refused and the number of applications referred to in paragraph (a) that were granted subject to terms and conditions;

(d) the number of persons identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of

(i) an offence specified in the authorization,

(ii) an offence other than an offence specified in the authorization but in respect of which an authorization may be given, and

(iii) an offence in respect of which an authorization may not be given;

(e) the number of persons not identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of

(i) an offence specified in such an authorization,

(ii) an offence other than an offence specified in such an authorization but in respect of which an authorization may be given, and

(iii) an offence other than an offence specified in such an authorization and for which no such authorization may be given,

and whose commission or alleged commission of the offence became known to a peace officer as a result of an interception of a private communication under an authorization or a permit given under subsection (1) of section 167F;

(f) the average period for which authorizations were given and for which renewals thereof were granted;

(g) the number of authorizations that, by virtue of one or more renewals thereof, were valid for more than thirty days, for more than sixty days, for more than ninety days and for more than one hundred and eighty days;

(h) the offences in respect of which authorizations were given, specifying the number of authorizations given in respect of each such offence;

(i) a description of all classes of places specified in authorizations and the number of authorizations in which each such class of place was specified;

(j) a general description of the methods of interception involved in each interception under an authorization;

(k) the number of persons arrested whose identity became known to a peace officer as a result of an interception under an authorization or a permit given under subsection (1) of section 167F;

(l) the number of criminal proceedings commenced at the instance of the Attorney General of Canada in which private communications obtained by interception were adduced in evidence and the number of such proceedings that resulted in a conviction;

(m) the number of criminal investigations in which information obtained as a result of the interception of a private communication was used although the private communication was not adduced in evidence in criminal proceedings commenced at the instance of the Attorney General of Canada as a result of the investigations;

(n) the number of prosecutions commenced against officers or servants of Her Majesty in right of Canada or members of the Canadian Forces for offences under section 167B or section 167K; and

(o) a general assessment of the importance of interception of private communications for the investigation, detection, prevention and prosecution of offences in Canada.

Report to be laid before Parliament

(2) The Solicitor General of Canada shall cause a copy of each report prepared by him under subsection (1) to be laid before Parliament forthwith upon completion thereof, or if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

Report by Attorneys General

(3) The Attorney General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to authorizations for which he made application in the immediately preceding year setting forth, with such modifications as the circumstances require, the information described in paragraphs (a) to (o) of subsection (1)."

CROWN LIABILITY ACT

1952-53, c. 30

**3.** The *Crown Liability Act* is amended by adding thereto, immediately after section 7 thereof, the following Part:

"PART IA

INVASION OF PRIVACY

Definitions

**7A.** In this Part,

"Authorization"

(a) "authorization" means an authorization to intercept a private communication given under section 167D of the *Criminal Code;*

"Electromagnetic, acoustic, mechanical or other device"

(b) "electromagnetic, acoustic, mechanical or other device" means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;

"Intercept"

(c) "intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof; and

"Private communication"

(d) "private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it.

Crown liable for interception

**7B.** (1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in

the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.

Saving provision

(2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of

(a) was lawfully made;

(b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or

(c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

Consent to interception

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (b) of subsection (2) and of subsection (2) of section 7c.

Crown liable for disclosure

**7c.** (1) Subject to subsection (2), where a servant of the Crown who has obtained, in the course of his employment, any information respecting a private communication that has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, intentionally

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

the Crown is liable for all loss or damage caused thereby, and for punitive damages in an amount not exceeding $5,000, to each person who incurred such loss or damage.

Saving provision

(2) The Crown is not liable for loss or damage or punitive damages referred to in subsection (1) where a servant of the Crown discloses a private communication or any part thereof or the sub-

stance, meaning or purport thereof or of any part thereof or the existence of a private communication

(a) with the express consent of the originator of the private communication or of the person intended by the originator thereof to receive it;

(b) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath;

(c) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(d) in giving notice under section 167C of the *Criminal Code* or furnishing further particulars pursuant to an order under section 167H of that Act;

(e) in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada; or

(f) where disclosure is made to a peace officer and is intended to be in the interest of the administration of justice.

No punitive damages

**7D.** No award for punitive damages shall be made under section 7B or 7C where punitive damages have been ordered to be paid to the person claiming such damages pursuant to subsection (1) of section 167J of the *Criminal Code*.

Indemnity

**7E.** Where a judgment has been given against the Crown by reason of its liability under this Part, the servant in respect of whose conduct the Crown has been found liable is accountable to the Crown for the amount of such judgment and the Crown may recover such amount from him."

OFFICIAL SECRETS ACT

R.S., c. 198; 1966-67, c. 96, s. 64

**4.** The *Official Secrets Act* is amended by adding thereto, immediately after paragraph (b) of section 2 thereof, the following paragraph:

"Intercept"

"(ba) "intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;"

**5.** The said Act is further amended by adding thereto, immediately after section 15 thereof, the following section:

*Criminal Code* and *Crown Liability Act* not applicable

"**16.** (1) Part IVA of the *Criminal Code* does not apply to any person who makes an interception pursuant to a warrant or affect the admissibility of any evidence obtained thereby and no action lies under Part IA of the *Crown Liability Act* in respect of such an interception.

Warrant issued by Solicitor General of Canada

(2) The Solicitor General of Canada may issue a warrant authorizing the interception or seizure of any communication if he is satisfied by evidence on oath that

(a) the purpose of such interception or seizure is related to the prevention or detection of espionage, sabotage or any other subversive activity directed against Canada or detrimental to the security of Canada; and

(b) such interception or seizure is necessary in the public interest.

Contents of warrant

(3) A warrant issued pursuant to subsection (2) shall specify

(a) the type of communication to be intercepted or seized;

(b) the person or persons who may make the interception or seizure; and

(c) the length of time for which the warrant is in force.

Report

(4) The Commissioner of the Royal Canadian Mounted Police shall from time to time make a report to the Solicitor General of Canada with respect to each warrant issued pursuant to subsection (2) setting forth particulars of the manner in which the warrant was used and the results, if any, obtained from such use."

REVISED STATUTES OF CANADA, 1970

Interpretation

**6.** (1) In this section,

"Old law"

(a) "old law" means the statutes in force prior to the coming into force of the Revised Statutes of Canada, 1970 that are repealed and replaced by the Revised Statutes of Canada, 1970; and

"New law"

(b) "new law" means the Revised Statutes of Canada, 1970.

Application to new law

(2) The amendments made by this Act to or in terms of the old law shall be deemed to have been made correspondingly to or in

terms of the new law, effective on the day the new law comes into force or the day this Act comes into force, whichever is the later day; and, without limiting the powers of the Statute Revision Commission under *An Act respecting the Revised Statutes of Canada*, the Statute Revision Commission shall, in selecting Acts for inclusion in the supplement of the consolidation referred to in section 3 of that Act, include therein the amendments so made by this Act in the form in which those amendments are deemed by this section to have been made.

COMMENCEMENT

Coming into force

**7.** This Act shall come into force on a day to be fixed by proclamation.

# CHAPTER 39

## An Act for the Protection of Personal Privacy

[*Assented to 6th April, 1968.*]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Short title

**1.** This Act may be cited as the *Privacy Act.*

Violation of privacy actionable

**2.** (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

(3) Privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass; but nothing in this subsection shall be construed as restricting the generality of subsections (1) and (2).

Exceptions

**3.** (1) An act or conduct is not a violation of privacy where

(a) it is consented to by some person entitled to consent;

(b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(c) the act or conduct was authorized or required by or under a law in force in the Province or by a Court or any process of a Court; or

(d) the act or conduct was that of

(i) a peace officer acting in the course of his duty for the prevention, discovery, or investigation of crime or of the discovery or apprehension of the perpetrators of a crime; or

(ii) a public officer engaged in an investigation in the course of his duty under a law in force in the Province,

and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

(2) A publication of any matter is not a violation of privacy if

(a) the matter published was of public interest or was fair comment on a matter of public interest; or

(b) the publication was, in accordance with the rules of law relating to defamation, privileged;

but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy.

(3) In this section,

"Court" includes any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence; and

"crime" includes any offence against a law of the Province.

Unauthorized use of name or portrait of another for advertising property or services actionable

**4.** (1) It is a tort, actionable without proof of damage, for a person to make use of the name or portrait of another for the purpose of advertising or promoting the sale of, or any other trading in, any property or services unless that other, or a person entitled to consent on his behalf, consents to such use for that purpose.

(2) A person is not liable to another for the use, for the purposes aforesaid, of a name identical with, or so similar as to be capable of being mistaken for, that of the other, unless the Court is satisfied

(a) that the defendant specifically intended to refer to the plaintiff or to exploit his name or reputation; or

(b) that, either on the same occasion or on some other occasion in the course of a programme of advertisement or promotion, the name was connected, expressly or impliedly, with other material or details sufficient to distinguish the plaintiff, to the public at large or to the members of the community in which he lives or works, from others of the same name.

(3) A person is not liable to another for the use, for the purposes aforesaid, of his portrait in a picture of a group or gathering, unless

(a) the plaintiff is identified by name or description, or his presence is emphasized, whether by the composition of the picture or otherwise; or

(b) the plaintiff is recognizable and the defendant, by using the picture, intended to exploit the name or reputation of the plaintiff.

(4) Without prejudice to the requirements of any other case,

(a) in order to render another liable for using his name or portrait for the purposes of advertising or promoting the sale of a newspaper or other publication, or the services of a broadcasting undertaking, it is necessary for the plaintiff to establish that his name or portrait was used specifically in connection with material relating to the readership, circulation, or other qualities of the newspaper or other publication, or to the audience, services, or other qualities of the broadcasting undertaking, as the case may be; and

(b) in order to render another liable for using his name or portrait for the purposes of advertising or promoting the sale of any goods or services on account of the use of the name or portrait of the other in a radio or television programme relating to current or historical events or affairs, or other matters of public interest, which is sponsored or promoted by or on behalf of the makers, distributors, vendors, or suppliers of the goods or services, it is necessary for the plaintiff to establish that his name or portrait was used specifically in connection with material relating to the goods or services, or to the manufacturers, distributors, vendors, or suppliers thereof.

(5) In this section, "portrait" means any likeness, still or moving, and includes a likeness of another deliberately disguised to resemble the plaintiff, and a caricature.

Jurisdiction

**5.** Notwithstanding anything contained in any other Act, an action pursuant to this Act shall be heard and determined by the Supreme Court.

Limitation

**6.** An action pursuant to this Act shall be commenced within two years next after the cause of action, and not after.

Action does not survive death

**7.** A right of action for a violation of privacy, or the unauthorized use of the name or portrait of another for the purposes aforesaid, and any such action, is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

# CHAPTER P 125

## THE PRIVACY ACT

(Assented to July 21st, 1970)

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

**Definitions**

**1.** In this Act

(a) "court" means the Court of Queen's Bench except in section 5 where it means any court and includes a person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence;

(b) "defamation" means libel or slander;

(c) "family" means the husband, wife, child, step-child, parent, step-parent, brother, sister, half-brother, half-sister, step-brother, step-sister, in each case whether legitimate or illegitimate, of a person.

S.M., 1970, c. 74, s. 1.

**Violation of privacy**

**2.** (1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

**Action without proof of damage**

**2.** (2) An action for violation of privacy may be brought without proof of damage.

S.M., 1970, c. 74, s. 2

**Examples of violation of privacy**

**3.** Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following; or

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines,

otherwise than as a lawful party thereto or under lawful authority conferred to that end; or

(c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

(d) by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.

S.M., 1970, c. 74, s. 3.

**emedies**

**4.** (1) In any action for violation of privacy the court may

(a) award damages; or

(b) grant an injunction if it appears just and reasonable; or

(c) order the defendant to account to the plaintiff for any profits that have accrued, or that may subsequently accrue, to the defendant by reason or in consequence of the violation; or

(d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation; or

(e) do any one or more of those things.

**onsiderations in awarding damages**

**4.** (2) In awarding damages in an action for a violation of rivacy of a person, the court shall have regard to all the circumances of the case including

(a) the nature, incidence and occasion of the act, conduct or publication constituting the violation of privacy of that person;

(b) the effect of the violation of privacy on the health, welfare, social, business or financial position of that person or his family;

(c) any relationship, whether domestic or otherwise, between the parties to the action;

(d) any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy; and

(e) the conduct of that person and the defendant, both before and after the commission of the violation of privacy, including any apology or offer of amends made by the defendant.

Accounting not considered in awarding damages

**4.** (3) Notwithstanding anything in subsection (2), in awarding damages in an action for violation of privacy of a person, the court shall not have regard to any order made under clause (c) of subsection (1) in respect of the violation of privacy.

S.M., 1970, c 74, s. 4.

Defences

**5.** In an action for violation of privacy of a person, it is a defence for the defendant to show

(a) that the person expressly or by implication consented to the act, conduct or publication constituting the violation; or

(b) that the defendant, having acted reasonably in that regard, neither knew or should reasonably have known that the act, conduct or publication constituting the violation would have violated the privacy of any person; or

(c) that the act, conduct or publication in issue was reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of person, property, or other interest of the defendant or any other person by whom the defendant was instructed or for whose benefit the defendant committed the act, conduct or publication constituting the violation; or

(d) that the defendant acted under authority conferred upon him by a law in force in the province or by a court or any process of a court; or

(e) where the act, conduct or publication constituting the violation was

(i) that of a peace officer acting in the course of his duties; or

(ii) that of a public officer engaged in an investigation in the course of his duty under a law in force in the province;

that it was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of a trespass, and was within the scope of his duties or

within the scope of the investigation, as the case may be, and was reasonably necessary in the public interest;

(f) where the alleged violation was constituted by the publication of any matter

(i) that there were reasonable grounds for the belief that the publication was in the public interest; or

(ii) that the publication was, in accordance with the rules of law in force in the province relating to defamation, privileged; or

(iii) that the matter was fair comment on a matter of public interest.

S.M., 1970, c. 74, s. 5.

**Right of action in addition to other rights**

**6.** The right of action for violation of privacy under this Act and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act; but this section shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

S.M., 1970, c. 74, s 6.

**Effect on law of evidence**

**7.** From and after the coming into force of this Act, no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

S.M., 1970, c. 74, s. 7.

**Application of Act**

**8.** (1) Notwithstanding any other Act of the Legislature, whether special or general, this Act applies where there is any violation of the privacy of any person.

**Conflict with other Acts**

**8.** (2) Where there is a conflict between a provision of this Act and a provision of any other Act of the Legislature, whether general or special, the provision of this Act prevails.

S.M., 1970, c. 74, s. 8.

**Place in continuing consolidation of statutes**

**9.** This Act may be referred to as chapter P125 in the continuing consolidation of Manitoba Statutes.

S.M., 1970, c. 74, s. 9.

## BILL 27

## THE PERSONAL INVESTIGATIONS ACT.

(Assented to 1971)

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

**Definitions**

**1.** In this Act

(a) "director" means the person employed by the government under the minister to supervise the administration of this Act;

(b) "factual information" means information on a subject as to name, age, place of residence, previous places of residence, marital status, spouse's name and age, number of dependents, places of employment, previous places of employment, estimated income, paying habits, outstanding credit obligations, cost of living obligations, matters of public record and any information voluntarily supplied by the subject of a personal investigation;

(c) "investigative information" means any information in respect of the subject of a personal investigation that does not come within the definition of factual or medical information;

(d) "medical information" means any information obtained with the consent of a subject from licensed physicians, medical practitioners, chiropractors, qualified psychologists, or psychiatrists in respect of the physical or mental health and attitude of the subject;

(e) "minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act;

(f) "personal file" means any collection or repository of information obtained from others in the course of making a personal investigation whether the information is stored in written, photographic, electronic or any other form;

(g) "personal investigation" means any inquiry by any person to obtain factual or investigative information from others for the purpose of assisting a user in making a decision in

respect of a subject's application for credit, insurance, employment or tenancy whether the information is transmitted immediately in a personal report or compiled in a personal file;

(h) "personal report" means any report, whether written or oral, of information obtained from others in the course of making a personal investigation;

(i) "personal reporter" means any person who conducts a personal investigation but where the personal investigation is conducted by an employee of a user, or an employee of a personal reporting agency, in the course of his duties, the employer shall be deemed to be the personal reporter;

(j) "personal reporting agency" means any person whose main business is to regularly conduct personal investigations for the purpose of supplying personal reports or the contents of personal files to others for gain;

(k) "subject" means the person on whom a personal investigation is carried out or is being carried out;

(l) "user" means a person who conducts a personal investigation or causes another to conduct a personal investigation for the purpose of making a decision in respect of a subject's application for credit, insurance, employment or tenancy and includes the successors and assigns of a user.

**Exemptions**

**2.** This Act does not apply to

(a) federal, provincial or municipal governments or their agencies; or

(b) federal, provincial or municipal police officers acting in their official capacities; or

(c) persons licensed under The Private Investigators and Security Guards Act, acting in that capacity; or

(d) reports on corporations that contain no information on any individual other than factual information regarding the officers or employees of the corporation; or

(e) investigations conducted

(i) by a user without the knowledge of the subject, with a view to offering employment to the subject at an annual salary in excess of eighteen thousand dollars per year; or

(ii) by a user without the knowledge of the subject, with a view to inviting the subject to participate in the ownership of a private company or in a professional or business partnership for gain; or

(iii) by a user, for the purpose of making a decision in respect of an application for insurance on the life of a subject if the face amount of coverage is in excess of fifty thousand dollars and the beneficiary is the employer of the subject.

**Written consent required**

**3.** (1) No person shall conduct, or cause to be conducted, a personal investigation

(a) without the express written consent of the subject of the investigation; or

(b) unless the subject is given written notice by the user that a personal investigation was conducted and such notice is given within ten days of the granting or denial of the benefit for which the subject has applied.

**Consent may form part of application**

**3.** (2) The consent referred to above may be contained in an application for credit, insurance, employment or tenancy if it is clearly set forth in type not less than ten point in size above the subject's signature and the consent shall be deemed to be a continuing consent during the term of any agreement for credit, insurance, employment or tenancy; but if the user refuses any application for increase of any benefits under any such agreement, the user shall give notice of any partial or complete denial of such application as required under sections 6 and 7.

**Exclusion of certain information**

**4.** No personal report shall contain

(a) any reference to race, religion, ethnic origin, or political affiliation of the subject unless this information is voluntarily supplied by the subject; or

(b) information regarding any bankruptcy of the subject which occurred fourteen years or more prior to the making of the report; or

(c) information regarding any writs, judgments, collections or debts that are statute barred; or

(d) information regarding writs issued against the subject more than twelve months prior to the making of the report if the present status of the action is not ascertained; or

(e) information as to any judgment against the subject unless mention is made of the name and address of the judgment creditor as given at the date of entry of the judgment and the amount of the judgment; or

(f) any adverse factual or investigative information that is more than seven years old unless otherwise provided in this Act; or

(g) any investigative information regarding the subject unless it has been reasonably corroborated.

No divulging of contents of personal report

**5.** No personal reporter, user or personal reporting agency, or any of their employees, shall knowingly divulge the contents of any personal report or personal file to any person other than to

(a) a user or his agent, who requires the information for purposes of a decision in respect of a subject's application for credit, insurance, employment or tenancy or any other legitimate business purpose; or

(b) the assignee of an agreement for credit, insurance or tenancy; or

(c) any federal, provincial or municipal government or any agencies thereof, or any police officer acting in that capacity;

and any failure to comply with this provision is an offence under this Act.

Subject to be advised of refusal of benefit

**6.** Where a personal investigation has been conducted and the subject is subsequently denied a benefit, in whole or in part, in respect of an application for credit, insurance, employment or tenancy, the user shall, within three days, advise the subject in writing of the denial and of the right of the subject to be advised as to any information contained in the report in accordance with section 7.

Information to be furnished to subject

**7.** (1) When a subject is notified of a denial, in whole or in part, of an application for a benefit, he has the right at any time

within thirty days after the notification is given under section 6 to be informed by the user

(a) of the name and address of any personal reporting agency from which information was obtained;

(b) as to the source and detail of all factual information obtained elsewhere than from a personal reporting agency;

(c) as to the nature of all investigative information obtained elsewhere than from a personal reporting agency; and

(d) as to his right to protest any information contained in the personal report or the personal file and the manner in which a protest may be made.

**Source of information to be supplied**

**7.** (2) Where a subject is notified as to the name and address of any personal reporting agency in accordance with clause (a) of subsection (1), the personal reporting agency shall disclose to the subject, within twenty-four hours of a demand by the subject

(a) the source and detail of all factual information contained in the personal report made by the personal reporting agency to the user;

(b) the nature of any investigative information contained in the personal report made by the personal reporting agency to the user; and

(c) the subject's right to protest any information contained in the personal report and the manner in which a protest may be made.

**Disclosure of personal file information**

**8.** (1) Any person may enquire of a personal reporting agency at any time, but not more frequently than at intervals of six months, unless a notification has been received under section 7, as to whether the personal reporting agency maintains a personal file on him and if the personal reporting agency maintains such a file, the personal reporting agency shall disclose to that person the information as required under subsection (2) of section 7.

**Right to protest information**

**8.** (2) A person who receives information under subsection (1) has the right to protest the information in accordance with section 10 and the personal reporting agency is subject to the obligations set out in section 11.

Manner of obtaining information

**9.** Where a person has the right to obtain information under section 7 or 8 or under this section he may obtain the information by

(a) properly identifying himself by personally attending at the office of the user or the personal investigation agency and, accompanied by a witness if he so wishes; or

(b) by written request to the user or personal reporting agency if his identity is verified in the writing by a commissioner for oaths.

Statement of protest

**10.** Where the subject of a report protests any information contained in a personal report or in a personal file, he has the right to file a statement of protest with the user or the personal reporter or both.

Verification of information

**11.** (1) Where the subject files a protest with a user or a personal reporter, or any person files a protest with a personal reporting agency, the user, personal reporter or personal investigation agency shall immediately

(a) attempt to verify the information and where the factual or investigative information cannot be verified, expunge the information from the personal file; or

(b) where the veracity of the information is sustained, record the protest in the personal file;

and report the action taken

(c) to the subject of the personal report or personal file; and

(d) to any person to whom the personal report may have been furnished within the previous sixty days.

Personal reporting agency outside Manitoba

**11.** (2) Where a personal report is made by a personal reporting agency to a user in Manitoba and the office of the personal reporting agency is not located in the Province of Manitoba, the user is responsible for complying with subsection (1).

**User outside Manitoba**

**11.** (3) Where a personal reporting agency makes a report to a user whose office is located outside Manitoba, the personal reporting agency is responsible for complying with subsection (1).

**Appeal to director**

**12.** Where the subject of a personal report is dissatisfied by the action under section 11 he may appeal the matter to the director who shall investigate the matter and

(a) either confirm the action taken by the user, personal reporter or personal reporting agency as the case may be; or

(b) direct such other action as he considers necessary and reasonable under the circumstances to be taken by the user, personal reporter or personal reporting agency.

**Offence**

**13.** Where the user or personal reporter fails or refuses to comply with any of the requirements they shall be guilty of an offence under this Act.

**Agreement not to disclose information void**

**14.** Any contract, agreement or understanding entered into between a personal reporter and any user whereby either party binds himself to refuse to disclose any information to the subject of a personal report is void and the making of such an agreement or understanding is an offence against this Act; but a user may refer the subject of a report to the personal reporting agency for discussion of the content of any report supplied by the said agency.

**False information**

**15.** (1) No person shall knowingly supply false or misleading information to another who is engaged in making a personal investigation or personal report.

**Offence**

**15.** (2) Any person who contravenes subsection (1) is guilty of an offence under the Act.

**Exemption from civil liability**

**16.** No user, personal reporter or personal reporting agency is civilly liable to the subject of a personal report or personal file,

unless the user, reporter or agency, as the case may be is or ought to be reasonably aware that part or all of the information in the report or personal file is false, or misleading, or was obtained negligently.

**Duties of director**

**17.** (1) The duties of the director include

(a) the receiving, recording and investigation of complaints by any person of breaches of this Act, and the taking of such action thereon as may appear appropriate, including the prosecution of offenders, and

(b) generally, the supervision of this Act.

**Access to documents, etc.**

**17.** (2) In carrying out the powers conferred, and the duties imposed, on the director under this Act, the director, or any person authorized by him for the purpose, shall have access to the business premises, documents, personal files, correspondence and other pertinent records, of any person carrying on business to which this Act applies, and to remove them or make copies thereof or to take extracts therefrom.

**Access to information**

**17.** (3) No person shall refuse access or withhold, conceal, falsify or refuse to produce any information required under subsection (2).

**Void agreements**

**18.** No agreement, oral or written shall provide or contain any provision, express or implied whereby the parties to the agreement agree that this Act or any provision thereof shall not apply to the agreement or to the parties; and any agreement so made is void and the making of such an agreement is an offence.

**Penalty**

**19.** (1) Any person who violates any provision of this Act is guilty of an offence and on summary conviction is liable, subject to subsection (2), in the case of an individual to a fine of not less than fifty dollars or more than two hundred dollars and in the case of a corporation to a fine of not less than five hundred dollars or more than one thousand dollars.

**Penalty**

**19.** (2) Where an individual or a corporation within one year of the date of a previous conviction for an offence under this Act is again convicted of an offence under this Act the fine in the case of an individual shall be not less than two hundred dollars or more than five hundred dollars; and in the case of a corporation, not less than one thousand dollars or more than two thousand five hundred dollars.

**Regulation**

**20.** For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make such regulations and orders as are ancillary thereto and are not inconsistent therewith; and every regulation or order made under, and in accordance with the authority granted by, this section has the force of law; and, without restricting the generality of the foregoing, the Lieutenant Governor in Council may make such regulations and orders, not inconsistent with any other provision of this Act

(a) prescribing forms of notices and such other forms for use under this Act;

(b) prescribing the time within which and the procedure for making an appeal under section 12;

(c) respecting such other matters as he deems necessary for the carrying out of the intent and purposes of this Act.

**Reference in continuing consolidation**

**21.** This Act may be referred to as chapter P33 in the continuing consolidation of the Statutes of Manitoba.

**Commencement of Act**

**22.** This Act comes into force on a date to be fixed by proclamation.

Public Law 91-508
91st Congress, H. R. 15073
October 26, 1970

## AN ACT

To amend the Federal Deposit Insurance Act to require insured banks to maintain certain records, to require that certain transactions in United States currency be reported to the Department of the Treasury, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Federal Deposit Insurance Act, amendments

## TITLE I—FINANCIAL RECORDKEEPING



### Chapter 1.—INSURED BANKS AND INSURED INSTITUTIONS



### § 101. Retention of records by insured banks

The Federal Deposit Insurance Act is amended (1) by redesignating sections 21 and 22 as 22 and 23, respectively, and (2) by inserting the following new section immediately after section 20:

64 Stat. 873
12 USC 1811 note

"Sec. 21. (a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

81 Stat. 610
12 USC 1830, 1831

84 STAT. 1114

"(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

84 STAT. 1115

"(b) Where the Secretary of the Treasury (referred to in this section as the 'Secretary') determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

"(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

"(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

"(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

"(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c).

"(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

*Post*, p. 1118

"(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

"(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

"(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law." Report to Congress

84 STAT. 1115

84 STAT. 1116

### § 102. Retention of records by insured institutions

Title IV of the National Housing Act is amended by adding at the end thereof the following new section: 48 Stat. 1255; 81 Stat. 611

"Sec. 411. The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in section 21 of the Federal Deposit Insurance Act with respect to insured banks." 12 USC 1724-1730c

*Ante*, p 1114

## Chapter 2.—OTHER FINANCIAL INSTITUTIONS

Sec.
121. Congressional findings and purpose.
122. Authority of Secretary with respect to reports on ownership and control.
123. Authority of Secretary with respect to recordkeeping and procedures.
124. Injunctions.
125. Civil penalties.
126 Criminal penalty.
127. Additional criminal penalty in certain cases
128. Compliance.
129. Administrative procedure.

### § 121. Congressional findings and purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

### § 122. Authority of Secretary with respect to reports on ownership and control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type

with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

**§ 123. Authority of Secretary with respect to recordkeeping and procedures**

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

84 STAT. 1116

84 STAT. 1117

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b), any records or evidence of any type which the Secretary is authorized under section 21 of the Federal Deposit Insurance Act to require insured banks to require, retain, or maintain; and

*Ante*, p. 1114

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

### § 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

### § 125. Civil penalties

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

### § 126. Criminal penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

### § 127. Additional criminal penalty in certain cases

Whoever willfully violates any regulation under this chapter, section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act, where the violation is committed in furtherance of the commission of any violation of Federal law pun-

*Ante*, p. 1114
*Ante*, p. 1116

ishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

### § 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

### § 129. Administrative procedure

80 Stat. 381
5 USC 551-559, 701-706

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 5, United States Code, shall apply to all proceedings under this chapter, section 21 of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

## TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS



## Chapter 1.—GENERAL PROVISIONS



### § 201. Short title

Citation of title

This title may be cited as the "Currency and Foreign Transaction Reporting Act".

§ 202. Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this title generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act; 64 Stat. 873 12 USC 1813

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act; 48 Stat. 1255 12 USC 1724

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934; 48 Stat. 881 15 USC 78a

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this title or the provision thereof in question.

(j) All reports required under this title and all records of any such reports are specifically exempted from disclosure under section 552 of title 5, United States Code.

81 Stat. 54
62 Stat. 749

(k) For the purposes of section 1001 of title 18, United States Code, the contents of reports required under any provision of this

title are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

**§ 204. Regulations**

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

**§ 205. Compliance**

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violation of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

**§ 206. Exemptions**

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

**§ 207. Civil penalty**

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any part-

ner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

### § 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

### § 209. Criminal penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

### § 210. Additional criminal penalty in certain cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

### § 211. Immunity of witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a pro-

ceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

### § 212. Availability of information to other Federal agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this title to any other department or agency of the Federal Government on the request of the head of such department or agency.

### § 213. Administrative procedure

Subject to section 203(j), the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 5, United States Code, shall apply to all proceedings under this title.

*Ante*, p 1118

## Chapter 2.—DOMESTIC CURRENCY TRANSACTIONS

80 Stat. 381
5 USC 551-559, 701-706

Sec.

221 Reports of currency transactions required.

222. Persons required to file reports.

223. Reporting procedure.

### § 221. Reports of currency transactions required

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons required to file reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

*Ante*, pp. 1114, 1116

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except that (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

## Chapter 3.—REPORTS OF EXPORTS AND IMPORTS OF MONETARY INSTRUMENTS

Sec.

**§ 231. Reports required**

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

**§ 232. Forfeiture**

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed

under section 231(1) either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

### § 233. Civil liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 232.

### § 234. Remission by the Secretary

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

### § 235. Enforcement authority

Search warrant

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 231 has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

## Chapter 4.—FOREIGN TRANSACTIONS



### § 241. Records and reports required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

### § 242. Classifications and requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

## TITLE III—MARGIN REQUIREMENTS

### § 301. Amendment of section 7 of the Securities Exchange Act of 1934

48 Stat. 886; 82 Stat. 452

(a) Section 7 of the Securities Exchange Act of 1934 (15 U.S.C. 78g) is amended by adding at the end thereof the following new subsection:

"(f) (1) It is unlawful for any United States person, or any foreign person controlled by a United States person or acting on behalf of or in conjunction with such person, to obtain, receive, or enjoy the beneficial use of a loan or other extension of credit from any lender (without regard to whether the lender's office or place of business is in a State or the transaction occurred in whole or in part within a State) for the purpose of (A) purchasing or carrying United States securities, or (B) purchasing or carrying within the United States of any other securities, if, under this section or rules and regulations prescribed thereunder, the loan or other credit transaction is prohibited or would be prohibited if it had been made or the transaction had otherwise occurred in a lender's office or other place of business in a State.

"(2) For the purposes of this subsection—

"United States person"

"(A) The term 'United States person' includes a person which is organized or exists under the laws of any State or, in the case of a natural person, a citizen or resident of the United States; a domestic estate; or a trust in which one or more of the foregoing persons has a cumulative direct or indirect beneficial interest in excess of 50 per centum of the value of the trust.

"(B) The term 'United States security' means a security (other than an exempted security) issued by a person incorporated under the laws of any State, or whose principal place of business is within a State. "United States security"

"(C) The term 'foreign person controlled by a United States person' includes any noncorporate entity in which United States persons directly or indirectly have more than a 50 per centum beneficial interest, and any corporation in which one or more United States persons, directly or indirectly, own stock possessing more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock. "Foreign person controlled by a United States person"

"(3) The Board of Governors of the Federal Reserve System may, in its discretion and with due regard for the purposes of this section, by rule or regulation exempt any class of United States persons or foreign persons controlled by a United States person from the application of this subsection."

(b) The amendment made by subsection (a) of this section does not affect the continuing validity of any rule or regulation under section 7 of the Securities Exchange Act of 1934 in effect prior to the effective date of the amendment. *Ante*, p. 1124

## TITLE IV—EFFECTIVE DATES

### § 401. Effective dates

(a) Except as otherwise provided in this section, titles I, II, and III of this Act and the amendments made thereby take effect on the first day of the seventh calendar month which begins after the date of enactment. *Ante*, pp. 1114, 1118, 1124

(b) The Secretary of the Treasury may by regulation provide that any provision of title I or II of any amendment made thereby shall be effective on any date not earlier than the publication of the regulation in the Federal Register and not later than the first day of the thirteenth calendar month which begins after the date of enactment. Publication in Federal Register

(c) The Board of Governors of the Federal Reserve System may by regulation provide that the amendment made by title III shall be effective on any date not earlier than the publication of the regulation in the Federal Register and not later than the first day of the thirteenth calendar month which begins after the date of enactment. Publication in Federal Register

## TITLE V—PROVISIONS RELATING TO CREDIT CARDS

15 USC 1602

SEC. 501. Section 103 of the Truth in Lending Act (82 Stat. 146) is amended by redesignating subsections (j), (k), and (l) as subsections (p), (q), and (r), respectively, and by adding after subsection (i) the following:

"Adequate notice" *Infra*

"(j) The term 'adequate notice', as used in section 133, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

"Credit card"

"(k) The term 'credit card' means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

"Accepted credit card"

"(l) The term 'accepted credit card' means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

"Cardholder"

"(m) The term 'cardholder' means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

"Card issuer"

"(n) The term 'card issuer' means any person who issues a credit card, or the agent of such person with respect to such card.

"Unauthorized use"

"(o) The term 'unauthorized use', as used in section 133, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit."

15 USC 1601 note

SEC. 502. (a) The Truth in Lending Act (82 Stat. 146) is amended by adding after section 131 the following sections:

15 USC 1641

**"§ 132. Issuance of credit cards**

Prohibition

"No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

"§ 133. Liability of holder of credit card

"(a) A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card, the liability is not in excess of $50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, and the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. Notwithstanding the foregoing, no cardholder shall be liable for the unauthorized use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable for the unauthorized use of any credit card regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it. For the purposes of this section, a cardholder notifies a card issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

"(b) In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a), have been met.

"(c) Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.

"(d) Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

"§ 134. Fraudulent use of credit card

"Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or

Penalty

both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

85 Stat. 152
15 USC 1631-1641

(b) The table of contents of chapter 2 of the Truth in Lending Act is amended by adding at the end thereof the following:

"132. Issuance of credit cards.
"133. Liability of holder of credit card.
"134. Fraudulent use of credit card."

Effective dates

SEC. 503. The amendments to the Truth in Lending Act made by this title become effective as follows:

(1) Section 132 of such Act takes effect upon the date of enactment of this title.

(2) Section 133 of such Act takes effect upon the expiration of 90 days after such date of enactment.

(3) Section 134 of such Act applies to offenses committed on or after such date of enactment.

## TITLE VI—PROVISIONS RELATING TO CREDIT REPORTING AGENCIES

### AMENDMENT OF CONSUMER CREDIT PROTECTION ACT

82 Stat. 146
15 USC 1601 note

SEC. 601. The Consumer Credit Protection Act is amended by adding at the end thereof the following new title:

### "TITLE VI—CONSUMER CREDIT REPORTING

"Sec.
"601. Short title.
"602. Findings and purpose.
"603. Definitions and rules of construction.
"604. Permissible purposes of reports.
"605. Obsolete information.
"606. Disclosure of investigative consumer reports.
"607. Compliance procedures.
"608. Disclosures to governmental agencies.
"609. Disclosure to consumers.
"610. Conditions of disclosure to consumers.
"611. Procedure in case of disputed accuracy.
"612. Charges for certain disclosures.
"613. Public record information for employment purposes.
"614. Restrictions on investigative consumer reports.
"615. Requirements on users of consumer reports.
"616. Civil liability for willful noncompliance.
"617. Civil liability for negligent noncompliance.
"618. Jurisdiction of courts; limitation of actions.

"§ 601. Short title

Citation of title

"This title may be cited as the Fair Credit Reporting Act.

"§ 602. Findings and purpose

"(a) The Congress makes the following findings:

"(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

"(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

"(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

"(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

"(b) It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

"§ 603. Definitions and rules of construction

"(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this title.

"(b) The term 'person' means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

"(c) The term 'consumer' means an individual.

"(d) The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing,

credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 615.

*Post*, p. 1188

"(e) The term 'investigative consumer report' means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

"(f) The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

"(g) The term 'file' when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

"(h) The term 'employment purposes' when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion reassignment or retention as an employee.

"(i) The term 'medical information' means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

**"§604. Permissible purposes of reports**

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

"(1) In response to the order of a court having jurisdiction to issue such an order.

"(2) In accordance with the written instructions of the consumer to whom it relates.

"(3) To a person which it has reason to believe—

"(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

"(B) intends to use the information for employment purposes; or

"(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

"(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

"(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

**"§ 605. Obsolete information**

"(a) Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information:

"(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years.

"(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

"(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

"(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

"(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

"(6) Any other adverse item of information which antedates the report by more than seven years.

"(b) The provisions of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

"(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

"(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more; or

"(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $20,000, or more.

**"§ 606. Disclosure of investigative consumer reports**

"(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

"(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

"(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

"(b) Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written

request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1), shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

"(c) No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b).

**"§ 607. Compliance procedures**

"(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prosepective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604.

"(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

**"§ 608. Disclosures to governmental agencies**

"Notwithstanding the provisions of section 604, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

**"§ 609. Disclosures to consumers**

"(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

"(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

"(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided*, That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

"(3) The recipients of any consumer report on the consumer which it has furnished—

"(A) for employment purposes within the two-year period preceding the request, and

"(B) for any other purpose within the six-month period preceding the request.

"(b) The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

**"§ 610. Conditions of disclosure to consumers**

"(a) A consumer reporting agency shall make the disclosures required under section 609 during normal business hours and on reasonable notice.

"(b) The disclosure required under section 609 shall be made to the consumer—

"(1) in person if he appears in person and furnishes proper identification; or

"(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

"(c) Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 609.

"(d) The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable

identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

"(e) Except as provided in sections 616 and 617, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615, except as to false information furnished with malice or willful intent to injure such consumer.

**"§ 611. Procedure in case of disputed accuracy**

"(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be innaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

"(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

"(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrevelant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

"(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the

item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other pupose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

**"§ 612. Charges for certain disclosures**

"A consumer reporting agency shall make all disclosures pursuant to section 609 and furnish all consumer reports pursuant to section 611(d) without charge to the consumer if, within thirty days after receipt by such consumer of a notification pursuant to section 615 or notification from a debt collection agency affiliated with such consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 609 or 611(d). Otherwise, the consumer reporting agency may impose a reasonable charge on the consumer for making disclosure to such consumer pursuant to section 609, the charge for which shall be indicated to the consumer prior to making disclosure; and for furnishing notifications, statements, summaries, or codifications to person designated by the consumer pursuant to section 611(d), the charge for which shall be indicated to the consumer prior to furnishing such information and shall not exceed the charge that the consumer reporting agency would impose on each designated recipient for a consumer report except that no charge may be made for notifying such persons of the deletion of information which is found to be inaccurate or which can no longer be verified.

**"§ 613. Public record information for employment purposes**

"A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

"(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the

fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

"(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

**"§ 614. Restrictions on investigative consumer reports**

"Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

**"§ 615. Requirements on users of consumer reports**

"(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

"(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately

disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

"(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b).

**"§ 616. Civil liability for willful noncompliance**

"Any consumer reporting agency or user of information which wilfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—

"(1) any actual damages sustained by the consumer as a result of the failure;

"(2) such amount of punitive damages as the court may allow; and

"(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

**"§ 617. Civil liability for negligent noncompliance**

"Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—

"(1) any actual damages sustained by the consumer as a result of the failure;

"(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

**"§ 618. Jurisdiction of courts; limitation of actions**

"An action to enforce any liability created under this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this title to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability

to that individual under this title, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

**"§ 619. Obtaining information under false pretenses**

"Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

**"§ 620. Unauthorized disclosures by officers or employees**

"Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined not more than $5,000 or imprisoned not more than one year, or both.

**"§ 621. Administrative enforcement**

"(a) Compliance with the requirements imposed under this title shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.

38 Stat. 717; 52 Stat. 114 15 USC 58

66 Stat. 632 15 USC 45 52 Stat. 112

Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this title.

"(b) Compliance with the requirements imposed under this title with respect to consumer reporting agencies and persons who use consumer reports from such agencies shall be enforced under—

64 Stat. 879; 80 Stat. 1046, 1054 12 USC 1818

"(1) section 8 of the Federal Deposit Insurance Act, in the case of:

"(A) national banks, by the Comptroller of the Currency;

"(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and

"(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

80 Stat. 1028 12 USC 1464 80 Stat. 1036 12 USC 1730 47 Stat. 727; 69 Stat. 640 12 USC 1426, 1437

"(2) section 5(d) of the Home Owners Loan Act of 1933, section 407 of the National Housing Act, and section 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;

73 Stat. 628; *Ante*, pp. 49, 994

"(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

12 USC 1751 49 USC 1 *et seq.*

"(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts;

72 Stat. 731 49 USC 1301 note

"(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act; and

42 Stat. 159 7 USC 181, 226, 227

"(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

"(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under

that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law.

"§ 622. Relation to State laws

"This title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency."

EFFECTIVE DATE

SEC. 602. Section 504 of the Consumer Credit Protection Act is amended by adding at the end thereof the following new subsection: 82 Stat. 167

"(d) Title VI takes effect upon the expiration of one hundred and eighty days following the date of its enactment."

Approved October 26, 1970.

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LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 91-975 (Comm. on Banking and Currency) and No. 91-1587 (Comm. of Conference).

SENATE REPORT No. 91-1139 accompanying S. 3678 (Comm. on Banking and Currency).

CONGRESSIONAL RECORD, Vol. 116 (1970):

May 25, considered and passed House.
Sept. 18, considered and passed Senate, amended.
Oct. 9, Senate agreed to conference report.
Oct. 13, House agreed to conference report.

# CONSUMER CREDIT PROTECTION

United States Code Annotated — Title 15
1970 Pocket Part (Supplement)

## Chapter 41.—CONSUMER CREDIT PROTECTION [New]

### SUBCHAPTER I.—CONSUMER CREDIT COST DISCLOSURE

#### PART A —GENERAL PROVISIONS



#### PART B —CREDIT TRANSACTIONS

# SUBCHAPTER I.—CONSUMER CREDIT COST DISCLOSURE

## PART A.—GENERAL PROVISIONS

### § 1601. Congressional findings and declaration of purpose

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

Pub.L. 90—321, Title I, § 102, May 29, 1968, 82 Stat. 146.

**Effective Date.** Section 504(a) of Pub. L. 90-321 provided that this part and sections 891-896 of Title 18, Crimes and Criminal Procedure, shall take effect May 29, 1968.

**Short Title.** Section 1 of Pub L 90-321 provided that: "This Act [enacting this chapter, sections 891-896 of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under this section, sections 1631 and 1671 of this title, and section 891 of Title 18] may be cited as the Consumer Credit Protection Act."

Section 101 of Pub.L. 90-321 provided that: "This title [enacting this subchapter] may be cited as the Truth in Lending Act."

**Severability of Provisions.** Section 501 of Pub.L. 90-321 provided that: "If a provision enacted by this Act [which enacted this chapter, sectians 891-896 of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under this section, sections 1631 and 1671 of this title, and section 891 of Title 18] is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision enacted by this Act is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications."

**National Commission on Consumer Finance.** Title IV, §§ 401-407 of Pub. L. 90-321, as amended by Pub L. 91-344, July 20, 1970, 84 Stat. 440, provided:

**"§ 401. Establishment**

"There is established a bipartisan National Commission on Consumer Finance, referred to in this title as the 'Commission'.

**"§ 402. Membership of the Commission**

"(a) The Commission shall be composed of nine members, of whom

"(1) three are Members of the Senate appointed by the President of the Senate;

"(2) three are Members of the House of Representatives appointed by the Speaker of the House of Representatives; and

"(3) three are persons not employed in a full-time capacity by the United States appointed by the President, one of whom he shall designate as Chairman

"(b) A vacancy in the Commission does not affect its powers and may be filled in the same manner as the original appointment.

"(c) Five members of the Commission constitute a quorum.

**"§ 403. Compensation of members**

"(a) Members of Congress who are members of the Commission shall serve without compensation in addition to that received for their services as Members of Congress; but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

"(b) Each member of the Commission who is appointed by the President may receive compensation at a rate of $100 for each day he is engaged upon work of the Commission, and shall be reimbursed for travel expenses, including per diem in lieu of subsistence as authorized by law (5 U.S.C. 5703) [section 5703 of Title 5] for persons in the Government service employed intermittently.

**"§ 404. Duties of the Commission**

"(a) The Commission shall study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally The Commission, in its report and recommendations to the Congress, shall include treatment of the following topics:

"(1) The adequacy of existing arrangements to provide consumer credit at reasonable rates

"(2) The adequacy of existing supervisory and regulatory mechanisms to protect the public from unfair practices, and insure the informed use of consumer credit.

"(3) The desirability of Federal chartering of consumer finance companies, or other Federal regulatory measures.

"(b) The Commission may make interim reports and shall make a final report of its findings, recommendations, and conclusions to the President and to the Congress by July 1, 1972

**"§ 405. Powers of the Commission**

"(a) The Commission, or any three members thereof as authorized by the Commission, may conduct hearings anywhere in the United States or otherwise secure data and expressions of opinion pertinent to the study In connection therewith the Commission is authorized by majority vote

"(1) to require, by special or general orders, corporations, business firms, and individuals to submit in writing such reports and answers to questions as the Commission may prescribe; such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine.

"(2) to administer oaths.

"(3) to require by subpena the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties

"(4) in the case of disobedience to a subpena or order issued under paragraph (a) of this section to invoke the aid of any district court of the United States in requiring compliance with such subpena or order

"(5) in any proceeding or investigation to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths, and in such instances to compel testimony and the production of evidence in the same manner as authorized under subparagraphs (3) and (4) above

"(6) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States.

"(b) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in case of refusal to obey a subpena or order of the Commission issued under paragraph (a) of this section, issue an order requiring compliance therewith; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(c) The Commission may require directly from the head of any Federal executive department or independent agency available information which the Commission deems useful in the discharge of its duties. All departments and independent agencies of the Government shall cooperate with the Commission and furnish all information requested by the Commission to the extent permitted by law.

"(d) The Commission may enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties

"(e) When the Commission finds that publication of any information obtained by it is in the public interest and would not give an unfair competitive advantage to any person, it may publish the information in the form and manner deemed best adapted for public use, except that data and information which would separately disclose the business transactions of any persons, trade secrets, or names of customers shall be held confidential and shall not be disclosed by the Commission or its staff. The Commission shall permit business firms or individuals reasonable access to documents furnished by them for the purpose of obtaining or copying those documents as need may arise.

"(f) The Commission may delegate any of its functions to individual members of the Commission or to designated individuals on its staff and to make such rules and regulations as are necessary for the conduct of its business, except as otherwise provided in this title.

**"§ 406. Administrative arrangements**

"(a) The Commission may, without regard to the provisions of title 5, United States Code [Title 5, Government Organization and Employees], relating to appointments in the competitive service or to classification and General Schedule pay rates, appoint and fix the compensation of an executive director. The executive director, with the approval of the Commission, shall employ and fix the compensation of such additional personnel as may be necessary to carry out the functions of the Commission, but no individual so appointed may receive compensation in excess of the rate authorized for GS-18 under the General Schedule.

"(b) The executive director, with the approval of the Commission, may obtain services in accordance with section 3109 of title 5 of the United States Code [section 3109 of Title 5], but at rates for individuals not to exceed $100 per diem

"(c) The head of any executive department or independent agency of the Federal Government may detail, on a reimbursable basis, any of its personnel to assist the Commission in carrying out its work.

"(d) Financial and administrative services (including those related to budgeting and accounting, financial reporting, personnel, and procurement) shall be provided the Commission by the General Services Administration, for which payment shall be made in advance, or by reimbursement, from funds of the Commission in such amounts as may be agreed upon by the Chairman of the Commission and the Administrator of General Services The regulations of the General Services Administration for the collection of indebtedness of personnel resulting from erroneous payments apply to the collection of erroneous payments made to or on behalf of a Commission employee, and regulations of that Administration for the administrative control of funds apply to appropriations of the Commission

"(e) Ninety days after submission of its final report, as provided in section 404(b), the Commission shall cease to exist.

**"§ 407. Authorization of appropriations**

"There are authorized to be appropriated such sums not in excess of $1,500,000 as may be necessary to carry out the provisions of this title. Any money so appropriated shall remain available to the Commission until the date of its expiration, as fixed by section 406(e)."

**Inference of Legislative Intent in Section Captions and Catchlines.** Section 502 of Pub L 90-321 provided that: "Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the legislative intent with respect to any provision enacted by this Act [which enacted this chapter, sections 891-896 of Title 18, Crimes and Criminal Procedure, and material set out as notes under this section, sections 1631 and 1671 of this title, and section 891 of Title 18] may be drawn from them."

**Grammatical Usages.** Section 503 of Pub L 90-321 provided that: "In this Act [which enacted this chapter, sections 891-896 of Title 18 Crimes and Criminal Procedure, and material set out as notes under this section, sections 1631 and 1671 of this title, and section 891 of Title 18]:

"(1) The word 'may' is used to indicate that an action either is authorized or is permitted.

"(2) The word 'shall' is used to indicate that an action is both authorized and required

"(3) The phrase 'may not' is used to indicate that an action is both unauthorized and forbidden

"(4) Rules of law are stated in the indicative mood"

**Legislative History.** For legislative history and purpose of Pub L. 90-321, see 1968 U.S Code Cong and Adm.News, p 1962

## § 1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(c) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the pay-

ment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with references to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

(i) The term "open end credit plan" refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

(j) The term "adequate notice", as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(l) The term "accepted credit card" means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

(o) The term "unauthorized use", as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

(p) The term "State" refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(q) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question.

(r) The disclosure of an amount or percentage which is greater than the amount of percentage required to be disclosed under this subchapter does not in itself constitute a violation of this subchapter.

Pub.L. 90–321, Title I, § 103, May 29, 1968, 82 Stat. 147, amended Pub.L. 91–508, Title V, § 501, Oct. 26, 1970, 84 Stat. 1126.

**1970 Amendments.** Subsecs. (j) to (o). Pub L 91-508 added subsecs. (j) to (o) Former subsecs (j) to (l) redesignated as subsecs. (p) to (r)

Subsecs. (p) to (r) Pub L. 91-508 redesignated former subsecs. (j) to (l) as subsecs. (p) to (r)

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title.

**Legislative History.** For legislative history and purpose of Pub L. 91-508, see 1970 U.S Code Cong and Adm News, p —

INDEX TO NOTES



**1. Generally**

Where questions of law presented not only concerned defendant bank and other member banks of federal reserve system, but would bear on other institutions extending open line of credit to their customers and Board did not directly regulate those other creditors, in interests of uniformity in interpretation of this chapter and to best carry out its objectives, it was desirable to have District Court pass upon questions of law involved as soon as possible without a prior determination of Board Ratner v. Chemical Bank New York Trust Co, D.C. N.Y.1970, 309 F Supp 983.

## § 1603. Exempted transactions

This subchapter does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

Pub.L. 90–321, Title I, § 104, May 29, 1968, 82 Stat. 147.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L 90-321, set out as a note under section 1601 of this title

### § 1604. Rules and regulations

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Pub.L. 90–321, Title I, § 105, May 29, 1968, 82 Stat. 148.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title

### § 1605. Determination of finance charge—Definition

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

**Life, accident, or health insurance premiums included in finance charge**

(b) Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

**Property damage and liability insurance premiums included in finance charge**

(c) Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

**Items exempted from computation of finance charge in all credit transactions**

(d) If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charge with respect to that transaction:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise be payable.

(3) Taxes.

(4) Any other type of charge which is not for credit and the exclusion of which from the finance charge is approved by the Board by regulation.

**Items exempted from computation of finance charge in extensions of credit secured by an interest in real property**

(e) The following items, when charged in connection with any extension of credit secured by an interest in real property, shall not be included in the computation of the finance charge with respect to that transaction:

(1) Fees of premiums for title examination, title insurance, or similar purposes.

(2) Fees for preparation of a deed, settlement statement, or other documents.

(3) Escrows for future payments of taxes and insurance.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

Publ.L. 90–321, Title I, § 106, May 29, 1968, 82 Stat. 148.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title

**§ 1606. Determination of annual percentage rate—Definition**

(a) The annual percentage rate applicable to any extension of consumer credit shall be determined, in accordance with the regulations of the Board,

(1) in the case of any extension of credit other than under an open end credit plan, as

(A) that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and

the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed; or

(B) the rate determined by any method prescribed by the Board as a method which materially simplifies computation while retaining reasonable accuracy as compared with the rate determined under subparagraph (A).

(2) in the case of any extension of credit under an open end credit plan, as the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year.

**Computation of rate of finance charges for balances within a specified range**

(b) Where a creditor imposes the same finance charge for balances within a specified range, the annual percentage rate shall be computed on the median balance within the range, except that if the Board determines that a rate so computed would not be meaningful, or would be materially misleading, the annual percentage rate shall be computed on such other basis as the Board may by regulation require.

**Rounding off of annual percentage rates which are converted from single add-on or other rates**

(c) The annual percentage rate may be rounded to the nearest quarter of 1 per centum for credit transactions payable in substantially equal installments when a creditor determines the total finance charge on the basis of a single add-on, discount, periodic, or other rate, and the rate is converted into an annual percentage rate under procedures prescribed by the Board.

**Use of rate tables or charts having allowable variance from determined rates**

(d) The Board may authorize the use of rate tables or charts which may provide for the disclosure of annual percentage rates which vary from the rate determined in accordance with subsection (a) (1) (A) of this section by not more than such tolerances as the Board may allow. The Board may not allow a tolerance greater than 8 per centum of that rate except to simplify compliance where irregular payments are involved.

Authorization of tolerances in determining annual percentage rates

(e) In the case of creditors determining the annual percentage rate in a manner other than as described in subsection (c) or (d) of this section, the Board may authorize other reasonable tolerances.

Form of expressing percentage rates

(f) Prior to January 1, 1971, any rate required under this subchapter to be disclosed as a percentage rate may, at the option of the creditor, be expressed in the form of the corresponding ratio of dollars per hundred dollars.

Pub.L. 90–321, Title I, § 107, May 29, 1968, 82 Stat. 149.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L 90-321, set out as a note under section 1601 of this title

§ 1607. Administrative enforcement—Enforcing agencies

(a) Compliance with the requirements imposed under this subchapter shall be enforced under

(1) section 1818 of Title 12, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) sections 1426(i), 1437, 1464(d), and 1730 of Title 12, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) the Federal Aviation Act of 1958, by the Civil Areonautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

**Violations of this chapter deemed violations of pre-existing statutory requirements; additional agency powers**

(b) For the purpose of the exercise by any agency referred to in subsection (a) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter, any other authority conferred on it by law.

**Federal Trade Commission as overall enforcing agency**

(c) Except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

**Rules and regulations**

(d) The authority of the Board to issue regulations under this subchapter does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subchapter.

Pub.L. 90–321, Title I, § 108, May 29, 1968, 82 Stat. 150.

**References in Text.** The Federal Credit Union Act, referred to in subsec (a) (3), is Act June 26, 1934, c 750, 48 Stat 1216, which is classified to section 1751 et seq. of Title 12, Banks and Banking.

The Acts to regulate commerce, referred to in subsec. (a) (4), are classified generally to Title 49, Transportation. See section 12 of Title 49

The Federal Aviation Act of 1958, referred to in subsec. (a) (5), is Pub.L 85-726, Aug. 23, 1958, 72 Stat. 737, which is classified to section 1301 et seq. of Title 49, Transportation.

The Packers and Stockyards Act, 1921, referred to in subsec (a) (6), is Act Aug. 15, 1921, c. 64, 42 Stat 159, which is classified to section 181 et seq. of Title 7, Agriculture. Section 406 of the Act is classified to sections 226 and 227 of Title 7

The Federal Trade Commission Act, referred to in subsec (c), is Act Sept 26, 1914, c. 311, 38 Stat 717, as amended, which is classified to section 41 et seq. of this title. See section 58 of this title

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title

**Transfer of Functions.** Transfer of functions of Bureau of Federal Credit Unions and the Director thereof under the jurisdiction of the Department of Health, Education and Welfare to the National Credit Union Administration and the Administrator thereof, an independent agency, by Pub.L 91-206, Mar 10, 1970, 84 Stat 49, see section 1752a of this title and notes thereunder

**INDEX TO NOTES**



**1 Purpose**

Provision for administrative enforcement of this chapter was intended to give various administrative agencies power to act on their own initiative in hope that they would protect the unsophisticated consumer; but such provision does not give Board concurrent jurisdiction with court over private plaintiff's action seeking damages for failure of bank to comply with the Act Ratner v. Chemical Bank New York Trust Co, D C N.Y 1970, 309 F Supp 983

**2. Jurisdiction**

Board did not have primary jurisdiction of action brought by private plaintiff against bank for violation of this chapter in regard to its billing practices under credit plan. Ratner v Chemical Bank New York Trust Co, D C N Y 1970, 309 F Supp 983

Inasmuch as position of Board was known with respect to its interpretation of its regulation under this chapter, there could be no justification for operation of primary jurisdiction doctrine with respect to private plaintiff's claim for damages for bank's failure to comply with the regulation Id.

Where only question involved was whether bank has complied with this chapter and regulations thereunder, even if Board had had concurrent jurisdiction with District Court, District Court would retain jurisdiction since the administrative agency's expertise in the particular field was not required. Id

## § 1608. Views of other agencies

In the exercise of its functions under this subchapter, the Board may obtain upon request the views of any other Federal agency which, in the judgment of the Board, exercises regulatory or supervisory functions with respect to any class of creditors subject to this subchapter.

Pub.L. 90–321, Title I, § 109, May 29, 1968, 82 Stat. 150.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L 90-321, set out as a note under section 1601 of this title

## § 1609. Advisory committee

The Board shall establish an advisory committee to advise and consult with it in the exercise of its functions under this subchapter. In appointing the members of the committee, the Board shall seek

to achieve a fair representation of the interests of sellers of merchandise on credit, lenders, and the public. The committee shall meet from time to time at the call of the Board, and members thereof shall be paid transportation expenses and not to exceed $10 per diem.

Pub.L. 90–321, Title I, § 110, May 29, 1968, 82 Stat. 151.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title

### § 1610. Effect on other laws—Inconsistent provisions

(a) This subchapter does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter or regulations thereunder, and then only to the extent of the inconsistency.

#### State credit charge statutes

(b) This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

#### Disclosure as evidence

(c) In any action or proceeding in any court involving a consumer credit sale, the disclosure of the annual percentage rate as required under this subchapter in connection with that sale may not be received as evidence that the sale was a loan or any type of transaction other than a credit sale.

#### Contract or other obligations under State or Federal law

(d) Except as specified in sections 1635 and 1640 of this title, this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

Pub.L. 90–321, Title I, § 111, May 29, 1968, 82 Stat. 151.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title.

### § 1611. Criminal liability for willful and knowing violation

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulations issued thereunder.

(2) uses any chart or table authorized by the Board under section 1606 of this title in such a manner as to consistently understate the annual percentage rate determined under section 1606(a) (1) (A) of this title, or

(3) otherwise fails to comply with any requirement imposed under this subchapter,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Pub.L. 90–321, Title I, § 112, May 29, 1968, 82 Stat. 151.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub.L. 90-321, set out as a note under section 1601 of this title

### § 1612. Penalties inapplicable to governmental agencies

No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision.

Pub.L. 90–321, Title I, § 113, May 29, 1968, 82 Stat. 151.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub L. 90-321, set out as a note under section 1601 of this title.

### § 1613. Annual reports to Congress by Board and Attorney General

Not later than January 3 of each year after 1969, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this subchapter, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements imposed under this subchapter is being achieved.

Pub.L. 90–321, Title I, § 114, May 29, 1968, 82 Stat. 151.

**Effective Date.** Section effective May 29, 1968, see section 504(a) of Pub.L. 90-321, set out as a note under section 1601 of this title.

## § 1631. General requirement of disclosure

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part to more than one of them.

Pub.L. 90—321, Title I, § 121, May 29, 1968, 82 Stat. 152.

**Effective Date.** Section 504(b) of Pub. L. 90-321 provided that: "Chapter 2 and 4 of title I [enacting this 'section and sections 1632-1641 and 1661-1665 of this title] take effect on July 1, 1969."

**Legislative History.** For legislative history and purpose of Pub L 90-321, see 1968 U S Code Cong. and Adm News, p 1962

## § 1632. Form of disclosure; additional information

(a) Regulations of the Board need not require that disclosures pursuant to this part be made in the order set forth in this part, and may permit the use of terminology different from that employed in this part if it conveys substantially the same meaning.

(b) Any creditor may supply additional information or explanations with any disclosures required under this part.

Pub.L. 90—321, Title I, § 122, May 29, 1968, 82 Stat. 152.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title

## § 1633. Exemption for State-regulated transactions

The Board shall by regulation exempt from the requirements of this part any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement.

Pub.L. 90—321, Title I, § 123, May 29, 1968, 82 Stat. 152.

**Effective Date.** Section effective July 1, 1968, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title

## § 1634. Effect of subsequent occurrence

If information disclosed in accordance with this part is subsequently rendered inaccurate as the result of any act, occurrence, or

agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this part.

Pub.L. 90—321, Title I, § 124, May 29, 1968, 82 Stat. 152.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title.

### § 1635. Right of rescission as to certain transactions—Disclosure of obligator's right to rescind

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later by notifying the creditor, in accordance with regulations of the Board of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

#### Return of money or property following rescission

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at

the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

**Rebuttable presumption of delivery of required disclosures**

(c) Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

**Modification and waiver of rights**

(d) The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

**Exemption for first liens against dwellings to finance acquisition**

(e) This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling.

Pub.L. 90–321, Title I, § 125, May 29, 1968, 82 Stat. 152.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L. 90-321, set out as a note under section 1631 of this title

## § 1636. Periodic statements; contents

If a creditor transmits periodic statements in connection with any extension of consumer credit other than under an open end consumer credit plan, then each of those statements shall set forth each of the following items:

(1) The annual percentage rate of the total finance charge.

(2) The date by which, or the period (if any) within which, payment must be made in order to avoid additional finance charges or other charges.

(3) Such of the items set forth in section 1637(b) of this title as the Board may by regulation require as appropriate to the terms and conditions under which the extension of credit in question is made.

Pub.L. 90–321, Title I, § 126, May 29, 1968, 82 Stat. 153.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L. 90-321, set out as a note under section 1631 of this title.

## § 1637. Open end consumer credit plans—Required disclosures by creditor

(a) Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances in which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects.

(A) the average effective annual percentage rate of return received from accounts under the plan for a representative period of time; or

(B) whenever circumstances are such that the computation of a rate under subparagraph (A) would not be feasible or practical, or would be misleading or meaningless, a projected rate of return to be received from accounts under the plan.

The Board shall prescribe regulations, consistent with commonly accepted standards for accounting or statistical procedures, to carry out the purposes of this paragraph.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the pay-

ment of any credit extended under the plan, and a description of the interest or interests which may be so retained or acquired.

Statement required with each billing cycle

(b) The creditor of any account under an open and consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the statement period.

(2) The amount and date of each extension of credit during the period, and, if a purchase was involved, a brief identification (unless previously furnished) of the goods or services purchased.

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and, unless the annual percentage rate (determined under section 1606(a) (2) of this title) is required to be disclosed pursuant to paragraph (6), the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, the total finance charge expressed as an annual percentage rate (determined under section 1606(a) (2) of this title), except that if the finance charge is the sum of two or more products of a rate times a portion of the balance, the creditor may, in lieu of disclosing a single rate for the total charge, disclose each such rate expressed as an annual percentage rate, and the part of the balance to which it is applicable.

(7) At the election of the creditor, the average effective annual percentage rate of return (or the projected rate) under the plan as prescribed in subsection (a) (5) of this section.

(8) The balance on which the finance charge was computed and a statement of how the balance was determined. If the balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(9) The outstanding balance in the account at the end of the period.

(10) The date by which, or the period (if any) within which, payment must be made to avoid additional finance charges.

**Retroactive effect**

(c) In the case of any open end consumer credit plan in existence on July 1, 1969, the items described in subsection (a) of this section, to the extent applicable, shall be disclosed in a notice mailed or delivered to the obligor not later than thirty days after that date.

Pub.L. 90–321, Title I, § 127, May 29, 1968, 82 Stat. 153.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title.

INDEX TO NOTES

1. Jurisdiction

Board did not have primary jurisdiction of action brought by private plaintiff against bank for violation of this chapter in regard to its billing practices under credit plan Ratner v. Chemical Bank New York Trust Co., D.C N Y.1970, 309 F Supp. 983

Where only question involved was whether bank has complied with this chapter and regulations thereunder, even if Board had had concurrent jurisdiction with District Court, District Court would retain jurisdiction since the administrative agency's expertise in the particular field was not required Id

## § 1638. Sales not under open end credit plans—Required disclosures by creditor

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge.

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay, the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

**Form and timing of disclosure**

(b) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser.

**Timing of disclosure on mailed or telephoned orders**

(c) If a creditor receives a purchase order by mail or telephone without personal solicitation, and the cash price and the deferred payment price and the terms of financing, including the annual percentage rate, are set forth in the creditor's catalog or other printed material distributed to the public, then the disclosures required under subsection (a) of this section may be made at any time not later than the date the first payment is due.

**Timing of disclosure in cases of an addition of a deferred payment price to an existing outstanding balance**

(d) If a consumer credit sale is one of a series of consumer credit sales transactions made pursuant to an agreement providing for the addition of the deferred payment price of that sale to an existing outstanding balance, and the person to whom the credit is extended has approved in writing both the annual percentage rate or rates and the method of computing the finance charge or charges, and the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto, then the disclosure required under subsection (a) of this section for the particular sale may be made at any time not later than the date the first payment for that sale is due. For the purposes of this subsection, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

Pub.L. 90–321, Title 1, § 128, May 29, 1968, 82 Stat. 155.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L. 90-321, set out as a note under section 1631 of this title

**§ 1639. Consumer loans not under open end credit plans—Required disclosures by creditor**

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge.

(A) which does not exceed $5 and is applicable to an extension of consumer credit not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

(7) The default, delinqency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

**Form and timing of disclosure**

(b) Except as otherwise provided in this part, the disclosures required by subsection (a) of this section shall be made before the credit is extended, and may be made by disclosing the information in the note or other evidence of indebtedness to be signed by the obligor.

**Timing of disclosure on mailed or telephoned requests for an extension of credit**

(c) If a creditor receives a request for an extension of credit by mail or telephone without personal solicitation and the terms of financing, including the annual percentage rate for representative amounts of credit, are set forth in the creditor's printed material distributed to the public, or in the contract of loan or other printed material delivered to the obligor, then the disclosures required under subsection (a) of this section may be made at any time not later than the date the first payment is due.

Pub.L. 90–321, Title 1, § 129, May 29, 1968, 82 Stat. 156.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L 90-321, set out as a note under section 1631 of this title.

§ 1640. Civil liability—Failure to disclose

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

**Correction of error within fifteen days**

(b) A creditor has no liability under this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

**Unintentional violations; bona fide errors**

(c) A creditor may not be held liable in any action brought under this section for a violation of this part if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

**Liability of subsequent assignees of original creditor**

(d) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in real property may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assigness shows by a preponderance of evidence that it did

not have reasonable grounds to believe that the original creditor was engaged in violations of this part, and that it maintained procedures reasonably adapted to apprise it of the existence of any such violations.

**Jurisdiction of courts**

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Pub.L. 90–321, Title I, § 130, May 29, 1968, 82 Stat. 157.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L. 90-321, set out as a note under section 1631 of this title

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**INDEX TO NOTES**

**1. Jurisdiction**

This chapter provides separate jurisdiction for separate remedies consisting of Board acting on its own initiative to seek redress or injunctive relief for violation of this chapter by member banks and civil remedy for private persons. Ratner v. Chemical Bank New York Trust Co., D C N Y.1970, 309 F. Supp. 983

## § 1641. Written acknowledgment as proof of receipt

Except as provided in section 1635(c) of this title and except in the case of actions brought under section 1640(d) of this title, in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part. This section does not affect the rights of the obligor in any action against the original creditor.

Pub.L. 90–321, Title I, § 131, May 29, 1968, 82 Stat. 157.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title.

## § 1642. Issuance of credit cards

No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

Pub.L. 90–321, Title I, § 132, as added Pub.L. 91–508, Title V, § 502(a), Oct. 26, 1970, 84 Stat. 1126.

**Effective Date.** Section 503(1) of Pub. L. 91-508 provided that: "Section 132 of such Act [this section] takes effect upon the date of enactment of this title [Oct. 26, 1970] "

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S.Code Cong and Adm.News, p ——.

### § 1643. Liability of holder of credit card—Limits on liability

(a) A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card, the liability is not in excess of $50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, and the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. Notwithstanding the foregoing, no cardholder shall be liable for the unauthorized use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable for the unauthorized use of any credit card regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it. For the purposes of this section, a cardholder notifies a card issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

**Burden of proof**

(b) In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a) of this section, have been met.

**Liability imposed by other laws or by agreement with issuer**

(c) Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability

for such use under other applicable law or under any agreement with the card issuer.

**Exclusiveness of liability**

(d) Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

Pub.L. 90–321, Title 1, § 133, as added Pub.L. 91–508, Title V, § 502(a), Oct. 26, 1970, 84 Stat. 1126.

**References in Text.** For effective date of this section, referred to in text, see Effective Date note below.

**Effective Date.** Section 503(2) of Pub. L. 91-508 provided that "Section 133 of such [this section] Act takes effect upon the expiration of 90 days after such date of enactment [Oct 26, 1970]."

**Legislative History.** For legislative history and purpose of Pub.L. 90-508, see 1970 U S Code Cong. and Adm News, p ——

## § 1644. Fraudulent use of credit card

Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub.L. 90–321, Title 1, § 134, as added Pub.L. 91–508, Title V, § 502(a), Oct. 26, 1970, 84 Stat. 1127.

**Effective Date.** Section 503(3) of Pub. L. 91-508 provided that: "Section 134 of such Act [this section] applies to offenses committed on or after such date of enactment [Oct. 26, 1970]."

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U S Code Cong and Adm.News, p ——.

# PART C—CREDIT ADVERTISING

## § 1661. Catalogs and multiple-page advertisements

For the purposes of this part, a catalog or other multiple-page advertisement shall be considered a single advertisement if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this part is clearly set forth.

Pub.L. 90–321, Title I, § 141, May 29, 1968, 82 Stat. 158.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L 90-321, set out as a note under section 1631 of this title.

**Legislative History.** For legislative history and purpose of Pub L. 90-321, see 1968 U S Code Cong. and Adm News, p 1962

## § 1662. Advertising of downpayments and installments

No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state

(1) that a specific periodic consumer credit amount or installment amount can be arranged, unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount.

(2) that a specified downpayment is required in connection with any extension of consumer credit, unless the creditor usually and customarily arranges downpayments in that amount.

Pub.L. 90–321, Title I, § 142, May 29, 1968, 82 Stat. 158.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub.L 90-321 set out as a note under section 1631 of this title

### § 1663. Advertising of open end credit plans

No advertisement to aid, promote, or assist, directly or indirectly the extension of consumer credit under an open end credit plan may set forth any of the specific terms of that plan or the appropriate rate determined under section 1637(a)(5) of this title unless it also clearly and conspicuously sets forth all of the following items:

(1) The time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates.

(5) Such other or additional information for the advertising of open end credit plans as the Board may by regulation require to provide for adequate comparison of credit costs as between different types of open end credit plans.

Pub.L. 90–321, Title I, § 143, May 29, 1968, 82 Stat. 158.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title

### § 1664. Advertising of credit other than open end plans—Exclusion of open end credit plans

(a) Except as provided in subsection (b) of this section, this section applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of this subchapter, other than an open end credit plan.

Advertisements of residential real estate

(b) The provisions of this section do not apply to advertisements of residential real estate except to the extent that the Board may by regulation require.

Rate of finance charge expressd as annual percentage rate

(c) If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.

Requisite disclosures in advertisement

(d) If any advertisement to which this section applies states the amount of the downpayment, if any, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement shall state all of the following items:

(1) The cash price or the amount of the loan as applicable.

(2) The downpayment, if any.

(3) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended.

(4) The rate of the finance charge expressed as an annual percentage rate.

Pub.L. 90–321, Title I, § 144, May 29, 1968, 82 Stat. 158.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L. 90-321, set out as a note under section 1631 of this title

## § 1665. Nonliability of advertising media

There is no liability under this part on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

Pub.L. 90–321, Title I, § 145, May 29, 1968, 82 Stat. 159.

**Effective Date.** Section effective July 1, 1969, see section 504(b) of Pub L 90-321, set out as a note under section 1631 of this title

## SUBCHAPTER II.—RESTRICTIONS ON GARNISHMENT

## § 1671. Congressional findings and declaration of purpose

(a) The Congress finds:

(1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive

credit payments and thereby hinder the production and flow of goods in interstate commerce.

(2) The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.

(3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of this subchapter are necessary and proper for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws.

Pub.L. 90–321, Title III, § 301, May 29, 1968, 82 Stat. 163.

**Effective Date.** Section 504(c) of Pub. L. 90-321 provided that "Title III [which enacted this section and sections 1672-1677 of this title] takes effect on July 1, 1970."

**Legislative History.** For legislative history and purpose of Pub.L. 90-321, see 1968 U S.Code Cong. and Adm News, p. 1962

## § 1672. Definitions

For the purposes of this subchapter:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

Pub.L. 90–321, Title III, § 302, May 29, 1968, 82 Stat. 163.

**Effective Date.** Section effective July 1, 1970, see section 504(c) of Pub.L. 90-321, set out as a note under section 1671 of this title.

## § 1673. Restriction on garnishment—Maximum allowable garnishment

(a) Except as provided in subsection (b) of this section and section 1675 of this title, the maximum part of the aggregate dis-

posable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

**Exceptions**

(b) The restrictions of subsection (a) of this section do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax.

**Execution or enforcement of garnishment order or process prohibited**

(c) No court of the United States or any State may make, execute, or enforce any order or process in violation of this section.

Pub.L. 90-321, Title III, § 303, May 29, 1968, 82 Stat. 163.

**References in Text.** Chapter XIII of the Bankruptcy Act, referred to in subsec. (b)(2), is classified to section 1001 et seq of Title 11, Bankruptcy

**Effective Date.** Section effective July 1, 1970, see section 504(c) of Pub L 90-321, set out as a note under section 1671 of this title.

## § 1674. Restriction on discharge from employment by reason of garnishment

(a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

(b) Whoever willfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Pub.L. 90–321, Title III, § 304, May 29, 1968, 82 Stat. 163.

**Effective Date.** Section effective July 1, 1970, see section 504(c) of Pub.L 90-321, set out as a note under section 1671 of this title.

### § 1675. Exemption for State-regulated garnishments

The Secretary of Labor may by regulation exempt from the provisions of section 1673(a) of this title garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 1673(a) of this title.

Pub.L. 90–321, Title III, § 305, May 29, 1968, 82 Stat. 164.

**Effective Date.** Section effective July 1, 1970, see section 504(c) of Pub L. 90-321, set out as a note under section 1671 of this title

### § 1676. Enforcement by Secretary of Labor

The Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter.

Pub.L. 90–321, Title III, § 306, May 29, 1968, 82 Stat. 163.

**Effective Date.** Section effective July 1, 1970, see section 504(c) of Pub L 90-321, set out as a note under section 1671 of this title

### § 1677. Effect on State laws

This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State

(1) prohibiting garnishments or providing for more limited garnishments than are allowed under this subchapter, or

(2) prohibiting the discharge of any employee by reason of the fact that his earnings have been subjected to garnishment for more than one indebtedness.

Pub.L. 90–321, Title III, § 307, May 29, 1968, 82 Stat. 164.

**Effective Date.** Section effective July 1, 1970, see section 504(c) of Pub.L 90-321, set out as a note under section 1671 of this title.

## SUBCHAPTER III.—CREDIT REPORTING AGENCIES

### § 1681. Congressional findings and statement of purpose

(a) The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods

undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

Pub.L. 90–321, Title VI, § 602, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1128.

**Effective Date.** Section 504(d) of Pub L. 90-321, as added by Pub.L. 91-508. Title VI, § 602, Oct 26, 1970, 84 Stat. 1136, provided that. "Title VI [enacting this sub-chapter] takes effect upon the expiration of one hundred and eighty days following the date of its enactment [Oct. 26, 1970]"

**Short Title.** Section 601 of Pub.L. 90-321, as added by Pub.L. 91-508, Title VI, § 601, Oct 26, 1970, 84 Stat. 1127, provided that: "This title [this subchapter] may be cited as the Fair Credit Reporting Act."

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S.Code Cong and Adm.News, p ——.

## § 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor

in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of

evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

Pub.L.90–321, Title VI, § 603, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1128.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub.L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub L 91-508, see 1970 U S Code Cong and Adm News, p ——

## § 1681b. Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instruction of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Pub.L. 90–321, Title VI, § 604, as added Pub.L. 97–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1129.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub L 91-508, see 1970 U S Code Cong. and Adm.News, p. ——

### § 1681c. Reporting of obsolete information prohibited

(a) Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years.

(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

(6) Any other adverse item of information which antedates the report by more than seven years.

(b) The provisions of subsection (a) of this section, are not applicable in the case of any consumer credit report to be used in connection with—

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $20,000, or more.

Pub.L. 90–321, Title VI, § 605, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1129.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L. 91-508, which was approved on Oct. 26, 1970, see section 504 (d) of Pub L 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U S Code Cong and Adm News, p. ——.

### §1681d. Disclosure of investigative consumer reports

(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

(b) Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section.

Pub.L. 90–321, Title VI, § 606, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub.L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S.Code Cong. and Adm.News, p. ——.

### § 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Pub.L. 90–321, Title VI, § 607, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub L. 91-508, see 1970 U S Code Cong. and Adm.News, p ——

### § 1681f. Disclosures to governmental agencies

Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

Pub.L. 90–321, Title VI, § 608, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub.L 91-508, see 1970 U S.Code Cong and Adm News, p ——

§ 1681g. Disclosures to consumers

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided,* That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished—

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

Pub.L. 90–321, Title VI, § 609, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.

**References in Text.** For the effective date of this subchapter, referred to in subsec. (b), see Effective Date note below

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S Code Cong and Adm.News, p ——.

§ 1681h. **Conditions of disclosure to consumers—Times and notice**

(a) A consumer reporting agency shall make the disclosures required under section 1681g of this title during normal business hours and on reasonable notice.

**Identification of consumer**

(b) The disclosures required under section 1681g of this title shall be made to the consumer—

(1) in person if he appears in person and furnishes proper identification; or

(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

**Trained personnel**

(c) Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

**Persons accompanying consumer**

(d) The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

**Limitation of liability**

(e) Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, except as to false information furnished with malice or willful intent to injure such consumer.

Pub.L. 90–321, Title VI, § 610, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub.L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S Code Cong and Adm.News, p ——

### § 1681i. Procedure in case of disputed accuracy—Dispute; reinvestigation

(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

#### Statement of dispute

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

#### Notification of consumer dispute in subsequent consumer reports

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

#### Notification of deletion of disputed information

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall,

at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

Pub.L. 90–321, Title VI, § 611, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1132.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub L. 91-508, see 1970 U.S Code Cong. and Adm.News, p ——

### § 1681j. Charge for disclosures

A consumer reporting agency shall make all disclosures pursuant to section 1681g of this title and furnish all consumer reports pursuant to section 1681i(d) of this title without charge to the consumer if, within thirty days after receipt by such consumer of a notification pursuant to section 1681m of this title or notification from a debt collection agency affiliated with such consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 1681g or 1681i(d) of this title. Otherwise, the consumer reporting agency may impose a reasonable charge on the consumer for making disclosure to such consumer pursuant to section 1681g of this title, the charge for which shall be indicated to the consumer prior to making disclosure; and for furnishing notifications, statements, summaries, or codifications to person designated by the consumer pursuant to section 1681i(d) of this title, the charge for which shall be indicated to the consumer prior to furnishing such information and shall not exceed the charge that the consumer reporting agency would impose on each designated recipient for a consumer report except that no charge may be made for notifying such persons of the deletion of information which is found to be inaccurate or which can no longer be verified.

Pub.L. 90–321, Title VI, § 612, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1132.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S.Code Cong. and Adm.News, p. ——.

§ 1681k. Public record information for employment purposes

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

Pub.L. 90–321, Title VI, § 613, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub.L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U S Code Cong. and Adm.News, p ——

§ 1681l. Restrictions on investigative consumer reports

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received

within the three-month period preceding the date the subsequent report is furnished.

Pub.L. 90–321, Title VI, § 614, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct 26, 1970, see section 504(d) of Pub.L 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub L. 91-508, see 1970 U.S Code Cong. and Adm News, p ——

### § 1681m. Requirements on users of consumer reports—Adverse action based on reports of consumer reporting agencies

(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

#### Adverse action based on reports of persons other than consumer reporting agencies

(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

#### Reasonable procedures to assure compliance

(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures

to assure compliance with the provisions of subsections (a) and (b) of this section.

Pub.L. 90–321, Title VI, § 615, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U S Code Cong. and Adm.News, p ——.

### § 1681n. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of–

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Pub.L. 90–321, Title VI, § 616, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub L. 91-508, see 1970 U.S Code Cong. and Adm.News, p. ——.

### § 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer is an amount equal to the sum of–

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Pub.L. 90–321, Title VI, § 617, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L 91-508, see 1970 U S.Code Cong. and Adm.News, p. ——.

## § 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

Pub.L. 90–321, Title VI, § 618, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct 26, 1970, see section 504(d) of Pub L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U S Code Cong and Adm News, p ——.

## § 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Pub.L. 90–321, Title VI, § 619, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S.Code Cong. and Adm News, p. ——.

### § 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Pub. L. 90–321, Title VI, § 620, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub L. 91-508, which was approved on Oct 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub L 91-508, see 1970 U S Code Cong and Adm News, p ——

### § 1681s. Administrative enforcement—Federal Trade Commission; powers

(a) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 45(a) of this title and shall be subject to enforcement by the Federal Trade Commission under section 45(b) of this title with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be

subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

**Other administrative bodies**

(b) Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies and persons who use consumer reports from such agencies shall be enforced under—

(1) section 1818 of Title 12, in the case of:

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 1464(d) of Title 12, section 1730 of Title 12, and sections 1426(i) and 1437 of Title 12, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts;

(5) the Federal Aviation Act of 1958, by the Civil Areonautics Board with respect to any air carrier or foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 226 of Title 7), by the Secretary of Agriculture with respect to any activities subject to that Act.

**Enforcement under other authority**

(c) For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed

under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

Pub.L. 90–321, Title VI, § 621, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

**References in Text.** The Federal Trade Commission Act, referred to in subsec. (a), is Act Sept. 26, 1914, c. 311, 38 Stat. 717, which is classified to section 41 et seq. of this title.

The Federal Credit Union Act, referred to in subsec. (b) (3), is Act June 26, 1934, c. 750, 48 Stat. 1216, which is classified to section 1751 et seq of Title 12, Banks and Banking.

The Acts relating to commerce, referred to in subsec. (b) (4), are classified generally to section 1 et seq. of Title 49, Transportation.

The Federal Aviation Act of 1958, referred to in subsec. (b) (5), is Pub.L. 85-726, Aug. 23, 1958, 72 Stat. 737, which is classified to section 1301 et seq. of Title 49.

The Packers and Stockyards Act, 1921, referred to in subsec. (b) (6), is Act Aug. 15, 1921, c. 64, 42 Stat. 159, which is classified to section 181 et seq. of Title 7, Agriculture.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub.L. 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S Code Cong. and Adm.News, p. ——.

## § 1681t. Relation to State laws

This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

Pub.L. 90–321, Title VI, § 622, as added Pub.L. 91–508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1136.

**Effective Date.** Section effective upon the expiration of 180 days following the date of enactment of Pub.L 91-508, which was approved on Oct. 26, 1970, see section 504(d) of Pub.L. 90-321, set out as a note under section 1681 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-508, see 1970 U.S.Code Cong and Adm News, p ——.

# APPENDIX U

(*See page 83*)

## UNIFORM SURVIVORSHIP ACT and Survivorship Provisions of INSURANCE ACT

### Report of British Columbia Commissioners

At the 1969 Conference the Alberta Commissioners presented a report on the problem of whether the Uniform Survivorship Act applies to life insurance. The report appears as Appendix O of the 1969 Proceedings, page 171. The report recommended that the Uniform Survivorship Act be amended to make clear that it does not apply to insurance proceeds. Following discussion by the Commissioners of this recommendation, the following resolution was adopted (Proceedings, page 28):

> "RESOLVED that the matter be referred to the British Columbia Commissioners to review the whole matter of disposition of property under the Uniform Survivorship Act and, in particular,
>
> "(1) what policy should be adopted;
>
> "(2) whether or not there should be a separate policy re insurance proceeds and, if so, how should it be effected,
>
> and report their recommendations at the next meeting."

The British Columbia Commissioners have reviewed this problem in the light of the questions raised by the 1969 Alberta report and the commentaries attached thereto, and the discussion at the last meeting. We have also considered the whole matter of the policy of the Uniform Survivorship Act as set out in the resolution and report as follows:—

1. At present the rules of devolution and distribution of property where sequence of death is unknown are inconsistent under the Survivorship Act and the Insurance Act. The rule of the Survivorship Act in these circumstances causes the property to be distributed as if the younger survived the older, while the rule of the Insurance Act causes the proceeds of insurance to be paid to the insured. As the beneficiary in an estate is usually the younger, the effect is that, depending on whether the property is insurance proceeds or other property, totally opposite rules apply.

As a further complication, as pointed out in the 1969 report, some of the cases have held that not only does the Insurance Act

provision govern to whom the proceeds are payable, but the provision also governs the manner of distribution of those proceeds to the ultimate beneficiary. Other cases have held the opposite view. In view of the conflict in policy between these two Acts and the divergence of views of the Commissioners as to which statutory rule should prevail, the British Columbia Commissioners recommend that the present Uniform Survivorship Act be repealed and that a new Uniform Act be adopted which would substitute a rule that under the circumstances set out in the Survivorship Act the property of each person be distributed as if he had survived all other persons who might otherwise have been entitled to an interest in that property. We attach a draft of a proposed new Uniform Survivorship Act for this purpose. This policy also carries out a recommendation of the Ontario Civil Justice Section of the Canadian Bar Association in 1955 and the Alberta Commissioners in 1956, (see 1969 Proceedings, page 178) and is considered to represent a public policy with which the Commissioners might agree. It also permits the insurance rule to operate pretty well in the same manner it now does up to the point of payment of insurance proceeds to a beneficiary. Whether the asset of the estate so created by payment of the insurance proceeds is then distributed under the Survivorship rule or the Insurance rule is of no consequence as they are both the same and achieve the same result. We favour the view that the asset is no longer insurance proceeds and should be administered as any other property under the Survivorship Act, and we have accordingly removed the old subsection (2) of section 2, making the Survivorship Act subject to the Insurance Act. Thus the Insurance section applies only as a rule for payment of the proceeds and not for subsequent administration of the asset.

We have added a new subsection (3) to clarify the position of joint tenancy of property under the proposed new rule in subsection (1).

We further recommend that the survivorship rule in the Insurance Act be made uniform with that in the new Uniform Survivorship Act. This entails simply a rewording of the present Insurance Act provision.

We attach a draft of the new provision of the Uniform Insurance Act.

*Proposed new Uniform Survivorship Act*

2. (1) Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, subject to subsections (2) and (3), for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, each person whose property is affected shall be deemed to have survived the other.

2. (2) Where a testator and a person who, if he had survived the testator, would have been a beneficiary of property under the Will, die in circumstances rendering it uncertain which of them survived the other; and the Will contains further provisions for the disposition of property in case that person had not survived the testator, or died at the same time as the testator, or in circumstances rendering it uncertain which survived the other, then for the purpose of that disposition the Will shall take effect as if that person had not survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the other.

2. (3) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or in a joint account, with each other, and all of them die in circumstances rendering it uncertain which of them survived the other or others, each person shall, for the purposes of subsection(1), be deemed to hold legal title to an equal share with the other or others in that property.

*Proposed New Section of Uniform Insurance Act*

Where a person whose life is insured and any one or more of the beneficiaries die in circumstances rendering it uncertain which of them survived the other or others, for the purpose only of paying out the proceeds of the policy, the insured shall be deemed to have survived the beneficiary or beneficiaries.

## APPENDIX V

(*See page 84*)

## SURVIVORSHIP ACT

1. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator; or

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

*Note*:—

The Uniform survivorship provision in the respective Insurance Acts of the Provinces reads as follows:

> Unless a contract or a declaration otherwise provides, where the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survive the other, the insurance money is payable in accordance with subsection—of section—as if the beneficiary had predeceased the person whose life is insured.

It is suggested that, to complement the new Uniform Survivorship Act and make clear that the insurance provisions only apply for the purpose of paying out the proceeds of the policy and not for the distribution of property, the Uniform insurance provision in the respective Insurance Acts be amended as follows:

> Unless a contract or a declaration otherwise provides where the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survive the other, for the purpose only of paying out the proceeds of the policy, the insurance money is payable in accordance with subsection — of section — as if the beneficiary had predeceased the person whose life is insured.

# APPENDIX W

(*See page 85*)

## THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA*

Readers of Unification of Law will be familiar with the Conference of Commissioners on Uniformity of Legislation in Canada from the report compiled by the then Secretary, Mr. Henry F. Muggah, and printed in the UNIDROIT Yearbook for 1956. Rather than cover the same ground, the reader is referred to that report, which the present material is intended to complement. Mr. Muggah sketched in broad outline the separation of powers in Canada and the operation procedures of the Conference, and he then presented a summation of the activities of the latter from its inception in 1918 up to 1955.

This article will dwell somewhat more at length than that report on the complex environment in which the Conference organization functions, and briefly state the main unifying and diversifying factors confronting it. The outline of Conference proceedings given in the appendix hereto can be better understood if one takes into account that such an organization must of necessity reckon with these factors if it is to produce practical results. Various observations on the problems of re-orientation now confronting the Conference will conclude the report and attempt to assess the future for uniformity in Canadian law.

### THE CANADIAN SITUATION

*Diversifying Factors*

Canada is a federation uniting ten provinces and two territories that do not yet have provincial status. The legislature in each province is sovereign within limits laid down by the Constitution; the Territories are administered by councils to which the Federal Government, which has direct authority for the Territories, has delegated the power to legislate in some areas, mainly in private law. When we include the Parliament of Canada, we find there are

*Prepared for publication in UNIDROIT Yearbook by J. W Ryan in collaboration with G. Lehoux

thirteen legislative bodies in Canada; and this, as will be apparent, makes for a heterogeneous system of law. A further aspect of the problem is that the provinces regard each other as foreign jurisdictions, so far as the interprovincial application of provincial laws is concerned; such laws must be formally introduced in evidence.[1]

In addition to its constitutional division into provinces and territories, Canada supports two principal cultural communities, each with its own language, outlook and system of law: an English-speaking majority making up approximately seventy per cent of the total population, and a French-speaking minority which is nevertheless the majority group (eighty per cent) in one province, Quebec. While the Territories and the other nine provinces adhere strictly to the common law system, Quebec is governed by a civil law Code patterned after the French Code of 1804. At this point it is well to note that section 92 of the Canadian Constitution (The British North America Act, 1867) gives the provinces the sole right to legislate in matters of property and civil rights, and that Section 94, which provides specifically for a method of achieving unification of the law on these subjects, refer to uniformity of the laws of the common law jurisdictions, not Quebec.[2]

Surrounded as they were by many millions of English-speaking people who adopted or inherited the common law, French Canadians have had to devote a large part of their energies to the preservation of their culture, the cornerstones of which were language, legal system and religion. In these circumstances, the Quebec civil law has not been regarded purely as an instrument for the realization of economic interests, but rather as a moral, political and social structure designed to fulfil the aspirations of individual, family and society in Quebec as much as to express them. The law having served as a focal point to assist the survival of the French-speaking cultural group, it is not surprising to note that the model statutes of the Conference on Uniformity have not enjoyed widespread acceptance in Quebec.

Legal and linguistic duality is moreover itself a significant obstacle to adoption of uniform statutes in all provinces. The fundamental principles and characteristic features which differentiate civil from common law make particularly difficult the adoption by

[1] E. E. Palmer, Federalism and Uniformity of Laws: The Canadian Experience, (1965) XXX Law and Contemporary Problems, pp. 267-268 (250-269)

[2] Palmer says: "and it is far from clear whether it only covers the three named provinces or all provinces except Quebec." P. 257

Quebec of draft legislation brought forth by the Conference. On the one hand, these statutes are drawn up according to the English legislative practice whereby the legislator has to anticipate the interpretation that the courts will apply to "statutory" law, whereas under the Quebec system, barring exceptions, the "loi ecrite" constitutes the first and normal source of law. On the other hand, the Conference has attempted to ensure that every uniform Act will be interpreted and construed to effect the general purpose of making uniform the law of the provinces that enact it. This has two consequences. First, general principles of law being among the chief factors affecting the interpretation of a statute, it is essential, in order to eliminate contradictory decisions, that the proposed rule be applied to one, and only one, group of general principles; and this, for the sake of the greatest possible uniformity, could only be the common law.[3] Secondly, as the common law provinces only adopt the uniform statute in English (it has been the practice of the Conference to draft in English only), and refer exclusively to this text in interpreting it, Quebec could only regard the English text as authoritative; hence the French version, instead of being of equal weight, would become a mere translation devoid of legal standing in terms of uniformity of interpretation.

We have stressed the fundamental duality that emerges from a realistic appraisal of the situation in Canada; but there are other, less striking, factors that also conflict with the objective of a standardized system. Geographically, Canada is made up of five large economic regions which often compete along similar lines but whose bases are quite dissimilar. Each of these regions corresponds to a province or group of provinces, as follows: The Atlantic Provinces, Quebec, Ontario, the Western Provinces and British Columbia. Moreover, the natural trading patterns for these regions tend to run north and south much more than east and west. The notably different standards of living in different provinces, together with the feeling that unequal benefits are derived, or can be derived, from federation, may often promote defensive reactions instead of a positive effort to accept uniformity for the general benefit of Canada.

The various political objectives that receive popular support from time to time may also result in legislative divergences. In the past and even today the provincial governments have drawn their

[3] Cf. S-ph Pigeon, A propos d'uniformité législative, (1942) 2 R. du B, 381-387. Also: J. A. A. Pigeon, S'élaboration des lois (1945) 5 R. du B., 365-379.

strength from a variety of sources, ranging from a modified form of socialism to far right policies. The experience of the Conference shows that it would be a mistake to overlook the effect that policy considerations have on the content of legislation; this is true also for the economic considerations alluded to above. In fact, even after a hundred years of Confederation, one must allow for a measure of parochialism as a result of which legislatures may often still give too little thought to the effect that their actions have outside their respective boundaries.[4]

*Unifying Factors*

The situation in Canada is not wholly made up of contrasts and diversifing elements. On the contrary, many forces contribute to unification and much uniformity has already been achieved. To begin with, the wide powers conferred on the federal Parliament have resulted in uniform legislation in significant areas of Canadian life. We may mention among others the regulations of trade and commerce (as to which jurisdiction seems to be limited to inter-provincial and international commerce), bills of exchange and promissory notes, bankruptcy and insolvency, marriage and divorce, the criminal law, etc.

The common law applicable in all provinces but Quebec has been grounded upon and patterned after the English common law, a unifying tendency that is supported generally by the Canadian courts. Moreover, although Quebec has retained the French civil law as its basic legal system, there are several spheres partly or entirely a matter for provincial competence, such as constitutional, administrative and municipal law—in fact, the whole of public law—that are based on English law.[5] There are even certain provisions in the Quebec Civil Code taken from English law, namely, trusts, "liberté de tester", rules of evidence in civil and commercial matters, and certain parts of the maritime law.[6]

Creation of the Supreme Court of Canada, a federal body, as the court of last resort for all domestic litigation has been said to have restricted the scope for legal diversification, as one of the effects of this Court has been the securing of uniformity in matters affecting

[4] Cf. Pierre Letarte, La Vente à tempérament au Canada, trois essais d'uniformisation, in *Rapports*—p. 30.

[5] J. A. Pigeon, l'élaboration des lois, (1945) 5 R du B 372.

[6] Cf. Specially Louis Baudouin, *Les apports du Code civil du Québec* in Canadian Jurisprudence, the Civil Law and Common Law in Canada, U. of T. Comparative series, vol. 4, Ed E. McWhinney, Toronto, The Carswell Company Ltd., 1958, 393p ; pp. 70-89.

the whole of Canada.[7] While the Supreme Court has, as a general rule, acted wisely in this regard, it has been accused in some quarters of acquiescing in a less praiseworthy form of unification. As it is made up of a majority of common law judges, who are normally called on to decide according to common law practices and rules of law, it has appeared to some to have altered to some extent various civil law institutions to correspond more closely with common law institutions; it has been asserted by some that the Court has, on occasion, in appeals from Quebec, disregarded the remedies provided in the civil law in favour of a common law interpretation.[8] However, it would be far from true to say that the proceedings of the Supreme Court have invariably been detrimental to Quebec civil law; among other things, it has actively participated in the development of a quite impressive body of law governing conflicts which arise largely from the dualism in legal thinking within the country.[9]

Also worth noting is a practice used to remove, or at least lessen, the effects of legislative divergences in Canada, but which has not yet, so far as we know, been fully examined. This involves adoption, by the nation's mercantile and business community, of various standard forms of contracts that they could seek to establish throughout the country; contracting parties are often free to choose their place of domicile for purposes of interpretation and implementation of commercial contracts.[10]

In summary, the prospects for producing a fair degree of uniformity in the common law provinces continue to be excellent in spite of the divergences and obstacles referred to above. These can neither be overlooked nor minimized; they are facts of life that reappear immediately they are discarded, but they are obstacles that can be overcome. On the other hand, the basic prerequisites to any process of unification that do exist encourage optimism in the future of the process of unification of law in Canada, namely: a common body of legal traditions, systems and principles, more or less closely aligned with each other; a shared economy; and a well-defined set of policy objectives.[10]

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[7] Palmer says: "The Supreme Court of Canada regards it as its function 'not to aid the litigant, or to correct the errors of provincial courts, but to secure uniformity in matters that concern the whole of Canada' ". P. 266.

[8] Palmer, p. 268-269 J. L. Baudouin, (1966) 44 R. du B, pp. 406-408. Albert Maynard, *Le Droit comparé et la pensée juridique canadienne*, (1957) 17 R. du B. p. 2.

[9] Azard, 43 R. du B. Can. pp. 555-556. . . . etc.

[10] Garson, *Harmonieuse coexistence du droit civil et du Common Law au Canada*, (1957) 17 R. du B., pp. 13-14.

## OUTLINE OF CONFERENCE PROCEEDINGS

It would clearly be impossible to report in a few words on the lasting achievements of an organization whose functions comprise an area with as many ramifications as uniformity of legislation in Canada. The brief comments above on certain aspects of the Canadian environment may help toward a more exact understanding, but they only amount to a summary. To evaluate correctly the efforts expended by the Commissioners over more than fifty years, one would have to be able to assess, for each model statute in use, a number of factors:[11] the situation prevailing in the legislation of each province before adoption of the statute; the nature and extent of the variations introduced by the various legislators in the texts presented to them; the comparative importance of the province concerned (its population and the volume of business carried on); the real reasons behind the decision of legislators to adopt the text of the uniform statute; the relative importance of the subject dealt with in the statute; and the role played by other organized groups whose efforts may have been added to those of the Commissioners to promote uniform legislation on a particular subject.

This article is concerned only with sketching the accomplishments of the Conference, and the summary table appended to the report will supply more detailed information to the interested reader. We might recall here that to promote uniformity of legislation in Canada, the Conference adopted the technique of model statutes, as the most likely to produce good results in the Canadian context. Each province remains quite free either to reject its recommendations or to adopt them outright, or with modifications made necessary by the local situation. Since its founding, the Conference has drawn up and recommended for adoption fifty-two model statutes on various topics which fall into five categories: commercial law, torts, wills and trusts, family law, procedure and miscellaneous topics. A list of matters dealt with by statutes drawn up prior to 1954 will be found in the Report by Mr. Muggah. Since that time the Commissioners have dealt with forty model statutes including:

"Rules of the Road" (1955)
"Pension Plans — Appointment of Beneficiaries" (1957)
"An Act to amend the Trustee Act (Trustee Investments — 1957)"
"Cornea Transplant Act" (1959)

[11] See Palmer, Op. Cit. p. 259; and René David, Annuaire UNIDROIT 1967-68, Tome II, p. 85.

"Presumption of Death Act" (1960)
"Domicile Code" (1961)
"Variation of Trusts Act" (1961)
"Hotelkeepers Act" (1962)
"The Survival of Actions Act" (1963)
"The Fatal Accidents Act" (1964)
"Human Tissue Act" (1965) (1970)
"The Tax Laws Reciprocal Enforcement Act" (1965)
"Accumulations Act" (1968)
"Testamentary additions to Trusts Act" (1968)

A cursory calculation enables one to affirm that at the present time substantially uniform legislative texts exist in the ten provinces regarding legitimation and the reciprocal enforcement of maintenance orders; in nine provinces (Quebec being the exception) on photographic records, partnership, sale of goods, and survivorship; in eight provinces—on assignment of book debts, foreign affidavits, appointment of beneficiaries, and warehousemen's liens; in seven provinces—on bulk sales, bills of sale, contributory negligence, the rule in *Russell v. Russell*, intestate succession, perpetuities, variation of trusts, and vital statistics; in six provinces—on defamation, frustrated contracts, interpretation, proceedings against the Crown, reciprocal enforcement of judgments, regulations, testators' family maintenance, and warehouse receipts; and in five provinces—on affidavits before officers, cornea transplants, human tissue, wills, and conditional sales; and so forth. Moreover, of the fifty-two statutes recommended by the Conference, twenty-eight have been promulgated by the Council of the Northwest Territories and thirty-three by that of the Yukon. It will be noted that thirty-one of the fifty-two proposed statutes have been adopted by five or more provinces.

While the above calculation has some merit, it does not indicate the real extent of uniformity in each case where a model statute has been adopted. It must be stated at this point that the Commissioners do not regard a statute recommended by an annual meeting as having thereby assumed a final form. Rather, during the years following their recommendation, most of the statutes have been amended or revised, some through several versions (e.g., the conditional sale statute, rules governing judicial evidence). By this means the legislatures have in effect adopted "different" model statutes on the same topic. Moreover, we must take into account the fact that certain statutes have been either partially promulgated or enacted with modification. The reader has only to refer to the table in the appendix for an exact picture of the extent of uniformity achieved in each area covered by a model statute.

This task of revision and amendment, the frequency of which has sometimes been blamed on the Commissioners,[12] is part of a procedure that involves checking the development of various recommended statutes to ensure that the desired goal of uniformity is in fact realized or in the process of being realized. To this end, at the time of each annual meeting of the Conference, the Commissioners study a comparatively detailed report setting out for each legislative jurisdiction: model statutes adopted *in toto*; modifications that have been introduced; new provisions that promote or retard achievement of uniform legislation on a given topic, etc. In addition, since 1950, the Commissioners examine a report of decisions in which the courts have interpreted and applied various uniform statutes that have been enacted by any province. The Commissioners have assumed this function in the belief that those who are likely to furnish the best understanding of the extent to which the courts have been able to depart from the purpose or principle of a statute are those responsible for drafting it. It is as a result of this that the Commissioners, in the light of promulgated legislation and judicial decisions, deem it advisable or necessary to amend or even revise completely a previously recommended statute.

To attain the goal entrusted to them, the Commissioners have realized they cannot work in isolation; thus they are ready to work with, and have benefited from, other organized groups concerned with unification of the law. The Conference has at various times worked with the Association of Superintendents of Insurance in drawing up model statutes in the field of insurance; adoption of comparatively uniform statutes on fire insurance policies, and on life insurance, is the product of this co-ordinated action. It may be noted that the most recent statutes in this area were put forward by the Association itself. The conference in 1970 adopted a Human Tissue Act as a result of the labours of the Committee on human organ transplant of the Medical Rights Legal Society of Toronto. That Committee had members on it who were also members of the Conference and the reports and recommendations of the Committee were brought to the Conference by the Commissioners for Ontario and the new draft uniform Act resulted therefrom. Mention may also be made of the Dominion-Provincial Committee on Uniform Company Law, set up in 1935 and referred to in Mr. Muggah's report, which unfortunately has not lived up to expectations. In 1962 it produced a second uniform statute draft which so far has

[12] Cf. Palmer, Op. Cit. pp. 262-4, also Ziegel, *Uniformity of Legislation in Canada*, 39 Can. Bar Rev. p 182.

not been adopted by any legislative body; this draft of necessity sought less than the desired unification in light of the difficulty at that time of securing general agreement on a uniform method of incorporation.

Since 1944, the Conference has had a section working on criminal law and procedure. The task of this group, which includes representatives of all provinces and the Federal Government, is to study and compile amendments to the Criminal Code and related statutes. The Conference took this step because no other organization in Canada had the personnel needed to carry out such a project. Criminal law is a matter of federal jurisdictional competency, but each province is responsible for the administration of justice within its boundaries. The provincial authorities, who are directly affected by new types of problems and the swiftly changing conditions of their social environment, can thus usefully discuss matters pertaining to the criminal law with officials of the Federal Department of Justice. The workload of this group has grown considerably; at the 1969 meeting of the Conference one of its members even suggested setting up a separate body that, by meeting several times a year, might cover the same ground with more despatch.[13]

The Conference has not so far been especially productive in the area of theoretical publications: outside of a few such monographs as "Uniformity of Legislation in Canada—An Outline and Rules of Drafting" (1949), and "Rules Respecting the Organization and Procedure of the Uniform Law Section" (1957), it has limited itself to the yearly publication of the "Proceedings of the (. . . . .) Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada". This annual issue contains a report of the various sessions, with an appendix for texts of laws adopted or amended, as well as reports by the treasurer, secretary and various committees set up by the Commissioners.

The reader will undoubtedly have noticed that the appended table shows that no model statute has been adopted in full in Quebec. Indeed, the table shows only two areas where legislative provisions would produce similar results: legitimation, and the reciprocal enforcement of maintenance orders. Nevertheless it is not unreasonable to expect that, in spite of the basic divergence between

[13] Proceedings of the 51st Annual Meeting of the Conference p. 52

Quebec civil law and the common law of the other provinces, similar results may be arrived at in other instances. In lieu of a comprehensive study of this topic, a few cases are noted in which examination of the two systems would reveal interesting analogies, if nothing more: the uniform statute on reciprocal enforcement of judgments and article 1220(1) of the *Civil Code*, as well as articles 90 and 178 to 180 of the *Quebec Code of Civil Procedure*; the uniform statute on survivorship and articles 603 and 605 of the *Civil Code*; the 1955 uniform statute on conditional sales and article 1561 (a-j) of the *Civil Code*.[14]

*Indirect Uniformity*

Since its inception the Conference has had among the Commissioners from the Provinces the Legislative Draftsmen of the various jurisdictions in Canada represented at the Conference. For many years the interchange of information amongst those members of the Conference had the effect of attaining a high degree of uniformity for the formal expression of statutes in Canada. The Conference was the only body in Canada where the provincial and federal legislative draftsmen met. As the work of the Conference increased the opportunity for draftsmen to exchange views during the regular proceedings of the Conference became more limited and the procedures laid down in 1954-55 by the Conference virtually excluded this opportunity for interchange of drafting ideas by the draftsmen during the regular meetings of the Conference.

In 1967 the legislative draftsmen were able to obtain the consent of the Conference to the establishment of a legislative Drafting Workshop to precede the annual meeting of the Conference each year. In the past three years this Drafting Workshop has given the draftsmen an opportunity to exchange ideas and to undertake uniformity proposals related to their professional activities. At the moment this Workshop is engaged in revising the drafting rules of the Conference to accord with the present drafting conventions to which they subscribe.

The extent to which the Conference has contributed to the uniformity of formal expression of statutes should not be disregarded. Another result of this association of draftsmen provided by the Conference is the willingness of legislative draftsmen, from time to time, to accept legislation from another jurisdiction in the form in which

[14] Viz: Conditional sales—cf. 12 R. du B. pp. 147-151; Letarte, *La vente à Temperament*, p. 37; Survivorship—cf. (1942) R. du B. vol. 2, p. 368; Enforcement of Judgments—cf. (1945) R. du B. p. 547, (1942) R. du B. vol 2, p. 368.

it is found there, since the expression of that legislation accords substantially with their own drafting conventions and if the policy objectives required by their governments accord with that of the other province it is not too difficult to achieve formal uniformity in the statutes. A current example of this type of uniformity is the Securities Acts of the provinces of Ontario, Alberta, Saskatchewan and Manitoba.

The participation of the Federal Government at the Conference has resulted in a large measure of uniformity between some Federal and Provincial legislation in the fields of company law, Interpretation statutes, and other areas where similar legislation is enacted by both the Federal and Provincial jurisdictions. This type of formal uniformity is not extensive but where it does exist it is to a certain extent the result of the association of legislative draftsmen, provided over the years by the Conference.

## OUTLOOK

### *Adaptation and Reorientation*

During the present year the Conference proposed to re-examine its function in view of new developments on the Canadian scene, and decide on future plans. It is seeking, in short, to make the adjustments that must inevitably come to an organization benefiting from fifty years' experience, which must come to terms with rapidly changing present-day conditions. There are several notable aspects of this process.

Several provinces—in particular Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Quebec—have recently established bodies whose purpose is to recommend reforms in the law; and the Federal Parliament has recently established a similar institution. The role of the Conference with regard to these various law reform bodies is still to be defined. It goes without saying that one of the easiest and most natural ways of bringing uniformity to the law would be to provide assistance and co-ordinating facilities to these vital movements for reform and modernization, and a system of genuine uniform model statutes is a most appropriate means of doing this. To serve as a model, a statute must constitute a clear gain to the law, and supply the legal problem at issue with the remedy that is, and is seen to be, most just; only then can it hope to win acceptance by the different legislative bodies. In essence, the method of formulating model statutes is simply the systematization

of an age-old practice in the evolution of laws, which do not develop in strict isolation. In many cases, rules and institutions have been accepted in countries other than those in which they first appeared or were enunciated.

During the last decade, the work and methods of the Conference have been brought into question by a number of critics. Their pertinent comments inevitably point up and re-emphasize the timeliness of many issues now being looked into by the Commissioners. All are agreed that the degree of uniformity achieved is still short of expectations, especially in the common law provinces, where, as has been seen, there is so much to recommend unification. As a result, some have questioned whether the need for unification had not been exaggerated. To this the answer must be no. The differences existing in many areas have a tendency to be related to details. Be that as it may, it seems that a means must be found to involve the various provincial governments more effectively in this essential joint undertaking.

Canada has been a member since 1968 of two bodies working for unification of the law at the international level: the International Institute for Unification of Private Law and The Hague Conference on Private International Law. The Commissioners have heartily supported this move by the Canadian Government. The conditions for participation by the Canadian federation in the work of these organizations apparently have not yet been definitely settled, but the Conference may be asked to lend its assistance. The Commissioners could furnish information based on their long experience in the area of domestic unification, and it is also to be expected that they would have much to gain from the experience and activities of these two international bodies. There is little doubt that active involvement in the undertakings and projects developed there would be a means of promoting a greater effort to bring uniformity to domestic legislation.

*Civil and Common Law*

The wide differences separating continental legal systems from those of the common law have proven to be a substantial barrier to the progress of legal unification within the framework of UNIDROIT. As an example, to date no attempt at achieving uniformity with the common law countries with respect to bills of exchange, cheques and promissory notes seems to have met with

success.[15] A new approach seems to be called for in this respect and someone has suggested "harmonization".

Considering the experience of UNIDROIT, it is to be expected that the Conference will no longer simply take note of the fact that Quebec has not adopted the model statutes. Moreover, in accordance with the recent recommendations of the Royal Commission on Bilingualism and Biculturalism, the Conference will almost certainly strive to formulate a suitable policy—the effect of which will be to treat the Quebec legal system as a basic component of the French culture, whose growth Canada seems determined to foster within its boundaries to the same extent as the English culture.

The harmonization of civil law and common law systems at which UNDROIT may shortly aim, seems appropriate in the Canadian context. Doubtless because it is accomplished by degrees and by widely varied means, harmonization as a concept is far from being fully defined. In general, however, it may be said to take two chief forms: either it is directed to the establishment of relationships between the subject matter of the rules applicable in different legal systems, or it follows from adoption by different legal systems of common principles, in which case harmonization coincides with the application of such principles.[16]

Harmonization has to a certain extent already taken place in Canada between the common law and Quebec civil law, and the Conference can take credit for a share in this accomplishment. Each system has borrowed various institutions or remedies from the other, and successfully incorporated them into its legal fabric without thereby altering the latter's basic precepts. Great ingenuity is then required to absorb the legal theory that one seeks to introduce without also adopting the text in which it is expressed. Several instances could be given of these reciprocal exchanges, which are logical, yet quite in keeping, with each retaining its own institutions and fundamental characteristics. We need only mention two: the civil law theory of "common fault" has been adopted in nine common law provinces in preference to the English rule of contributory negligence; and in Quebec law, dealing with the responsibility of the employer for his employees, the phrase "in the performance of the work for which they are employed" has been interpreted in a manner much closer to the common law theory on the subject, than to

[15] Antonio Malintoppi, *Annuaire UNIDROIT 1967-68*, Tome II Rome Ed. UNIDROIT, 1969, p 58.
[16] Antonio Malintoppi, *Annuaire UNIDROIT 1967-68*, Tome II, p 54

the interpretation given by the French courts. The Conference could act as the impartial forum for exchange of information and opinion between teachers and practising lawyers of the two legal systems—thus enhancing mutual benefits to the two systems.

It may be noted here that, alongside an accidental "harmonization" process, a type of unification does occur which consists in a disorderly blending together at the expense of the minority system, and without benefiting the majority system in any way. Several writers have on various occasions pointed to the introduction into Quebec legislation and into the *Civil Code* itself of extraneous texts, confused in substance and clumsy in form, and often in conflict with the basic principles of Quebec law, or at least not in keeping with them.[17] If one also takes account of the hybridization brought about by judicial interpretations, one may obtain an idea of the proliferating alien grafts that encumber Quebec civil law. This practice, which has tended to remain quite restricted, is surely not the way to develop a rational and workable body of law.

Is harmonization the first step toward effective unification?—toward a Canadian law of the future whose component parts, derived from civil and common law, will work together to uncover the most constructive remedies? Especially these days, when the pace of development is so rapid, this is conceivable; but such progress could only be made in an atmosphere of mutual respect, and as the result of enlightened comparative analysis and a spirit of free inquiry which, rather than seeking to gloss over the basic institutions and characteristics of each system, delineates them and re-enforces their contribution at the outset.

September, 1970.

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[17] Cf. Pierre Azard, *Contribution francaise à la défense de l'autonomie du droit québecois*, (1961) 38 Themis, pp. 122-130.

NOTE: This article was prepared for the Yearbook of the International Institute for the Unification of Private Law and is published here with the permission of that Institute.

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# L'UNIFORMITE DE LA LEGISLATION AU CANADA

## *La Conférence des Commissaires pour l'uniformité de la législation au Canada*

Les lecteurs de l'*Unification du droit* connaissent déjà la *Conférence des Commissaires pour l'uniformité de la législation au Canada* pour avoir lu le rapport rédigé par M. Henry F. Muggah, alors son secrétaire, et publié dans l'*Annuaire* de l'UNIDROIT de 1956. Jugeant inutile de redire les mêmes choses, nous référons le lecteur à ce rapport dont le présent texte se veut un complément. Après avoir exposé les grandes lignes de la séparation des pouvoirs au Canada de même que la méthode de travail de la Conférence, M. Muggah y présentait une synthése des travaux de cette dernière depuis sa fondation en 1918 jusqu'à l'année 1955.

Nous estimons devoir insister un peu plus longuement que ne l'a fait l'ancien secrétaire de la Conférence sur les données du milieu composite au sein duquel opére ledit organisme en esquissant les principaux facteurs d'uniformité et de diversité qui s'y opposent. L'on pourra mieux évaluer l'aperçu des travaux de la Conférence que nous présenterons par la suite, compte tenu du fait qu'un tel organisme doit nécessairement composer avec ces divers facteurs s'il veut obtenir quelque résultat concret. Certaines considérations sur les problèmes de réorientation auxquels la Conférence doit faire face présentement, termineront ce compte rendu et illustreront en quelque sorte l'importance d'une action intégrée.

## LE MILIEU CANADIEN

### *Les facteurs de diversité*

Le Canada est une fédération regroupant dix provinces et deux territoires non encore organisés en province. Chaque province a sa législature qui est souveraine dans la sphère que la Constitution lui attribue tandis que les territoires sont administrés par des conseils auxquels l'Etat central, de qui relèvent les Territoires, a conféré le pouvoir de légiférer en certaines matières, principalement en droit privé. Ajoutons le Parlement central et nous avons treize corps législatifs au Canada. Qu'il en résulte un droit hétérogène apparaît quasi inévitable. Le problème revêt une dimension spéciale du fait que les provinces se considèrent mutuellement comme des pays

étrangers lorsqu'il s'agit d'appliquer la loi d'une province dans une autre: cette loi doit être prouvée:[1]

En plus d'être divisé constitutionnellement en provinces et territoires, le Canada comporte deux communautés culturelles de langue, de mentalité et de système juridique différents: une majorité anglophone comportant soixante-dix pour-cent de la population totale et une minorité francophone qui forme cependant la majorité de la population (quatre-vingt pour-cent) dans une province, le Québec. Alors que les territoires et les neuf autres provinces adhèrent fermement au système du Common Law, le Québec est régi par un Code civil rédigé sur le modèle du Code français de 1804. Rappelons ici que l'article 92 de la Constitution canadienne confère aux provinces la compétence exclusive pour légiférer en matière de propriété et de droits civils et que l'article 94 qui traite précisément de l'uniformisation des lois relatives à ces sujets ne concerne pas le Québec.[2]

Entouré par plusieurs millions d'anglophones régis par le Common Law, le peuple canadien-français a dû consacrer une grande part de ses énergies à la préservation de sa culture dont la langue, le système juridique et jadis la religion constituèrent les principaux piliers. Dans ce contexte, le droit civil québecois ne fut pas considéré seulement comme une technique au service d'intérêts économiques. Il constitua bien plus un système moral, politique et social édifié tant pour répondre aux aspirations de la personne, de la famille et de la société québécoises que pour les particulariser. Le droit ayant servi d'élément de résistance pour assurer la survie du groupe culturel francophone, il ne faudra pas s'étonner de constater que les lois-modèles de la Conférence de l'uniformité n'ont pas été largement adoptées au Québec.

Le dualisme juridique et linguistique constitue par ailleurs en soi une entrave très sérieuse à l'adoption de lois uniformes par toutes les provinces. Les principes de base et les caractéristiques essentielles qui distinguent le droit civil du Common Law rendent particulièrement difficile l'adoption par le Québec des projets de lois issus de la Conférence de l'uniformité. D'une part ces lois sont rédigées selon la méthode législative anglaise où le législateur doit prévoir l'interprétation restrictive que les tribunaux ne manqueront

[1] E. E. Palmer, Federalism and Uniformity of Laws: The Canadian Experience (1965) XXX Law and Contemporary Problems, pages 267 et 268 (250-269).

[2] Palmer déclare qu' "il est difficile à dire s'il ne s'applique qu'aux trois provinces mentionnées ou s'il s'applique à toutes les provinces à l'exception du Québec." p 257.

pas d'essayer de donner de la loi "statuaire" alors que dans le système québécois, loin d'être exceptionnelle, la loi écrite constitue la source première et normale du droit. D'autre part, la Conférence cherche à assurer que toute loi uniforme soit interprétée at appliquée de façon à atteindre son but principal qui est de rendre uniforme la législation des provinces qui l'édictent, ce qui amène deux conséquences: en premier lieu, les principes généraux du droit étant l'un des principaux facteurs qui influent sur l'interprétation d'une loi, il faudra, pour éliminer les solutions contradictoires, que la règle proposée se rapporte à un seul et même corps de principes généraux qui, dans l'uniformité législative, ne saurait être autre que celui du Common Law.[3] En second lieu, comme les provinces de Common Law adoptent la loi uniforme en anglais seulement (elle n'est rédigée qu'en cette langue par la Conférence) et n'ont recours qu'à ce seul texte pour l'interpréter, il faudrait au Québec, pour mettre en oeuvre la règle précitée, ne considérer que le texte anglais, la version française devenant donc, au lieu d'un double original, une simple traduction dépourvue de valeur juridique.

Nous avons insisté sur le dualisme fondamental de la réalité canadienne mais il existe d'autres facteurs, moins importants sans doute, qui militent également contre l'uniformisation. Géographiquement, le Canada se subdivise en cinq grandes régions économiques qui se font souvent concurrence mais dont les fondements diffèrent. Chaque région correspond soit à une province, soit à un groupe de provinces: Provinces Maritimes, Québec, Ontario, Provinces de l'Ouest et Colombie-Britannique. En outre, l'orientation naturelle des échanges de ces régions s'inscrit beaucoup plus dans l'axe nord-sud que dans le sens est-ouest. La disparité significative des niveaux de vie des différentes provinces, jointe au sentiment d'un profit inégal retiré ou à retirer de la fédération, engendrent trop souvent des réactions de défense là où il faudrait une féconde réceptivité.

Les différentes idéologies politiques qui reçoivent leur part de l'appui populaire ne contribuent pas peu à la disparité législative. Dans le passé, et encore actuellement, les gouvernements provinciaux se sont réclamés de diverses allégeances dont la gamme part d'un socialisme mitigé pour aboutir au Crédit social d'extrême droite. L'expérience de la Conférence révèle qu'on aurait tort de négliger l'influence des considérations politiques, sinon partisanes,

[3] Cf. S-ph. Pigeon: A propos d'uniformité législative (1942) 2 R. du B., 381-387. Aussi: J. A. A. Pigeon: L'élaboration des lois (1945) 5 R. du B., 365-379.

sur le contenu des lois—il en va de même pour les considérations d'ordre économique dont il fut question plus haut. Enfin, même après plus de cent ans de régime fédératif, il faut faire la part d'un certain particularisme provincial qui fait que les Législatures se soucient encore trop peu des répercussions que peuvent avoir leurs lois en dehors de leur territoire respectif.[4]

*Les facteurs d'uniformité*

Tout n'est pas que contraste et diversité au Canada; bien au contraire. Diverses forces incitent à l'uniformisation et déjà un bon degré d'uniformité est acquis. En tout premier lieu, l'attribution de larges pouvoirs au Parlement central a procuré une législation unique dans des secteurs importants de la vie canadienne. Mentionnons entre autres la réglementation des échanges et du commerce (compétence qui fut restreinte au commerce interprovincial et international), les lettres de change et les billets à ordre, la faillite et l'insolvabilité, le mariage et le divorce, le droit criminel, etc.

Le Common Law en vigueur dans les provinces autres que le Québec a été développé sur la base et sur le modèle de Common Law d'Angleterre, tendance unifiante qui est adoptée en général par les tribunaux canadiens. En outre, même si le Québec a conservé comme système juridique fondamental, le droit civil français, dans plusieurs matières entièrement ou partiellement de compétence provinciale comme le droit constitutionnel, le droit administratif, le droit municipal, en somme tout le droit public, le droit fondamental est le Common Law.[5] Il y a même quelques dispositions du Code civil québécois qui viennent d'Angleterre, v.g. la fiducie, la liberté de tester, les règles de preuve en matière civile et commerciale et certains éléments du droit maritime.[6]

L'établissement de la Cour suprême du Canada, une cour fédérale, comme cour de dernière instance pour tout litige ayant pris naissance au pays, a contribué grandement à réduire le potentiel de diversité juridique au pays. Cette Cour considère comme une de ses fonctions d'assurer l'uniformité dans les matières qui concernent l'ensemble du Canada.[7] Si la Cour suprême a ainsi, en règle

[4] Cf. Pierre Letarte, La Vente à tempérament au Canada, trois essais d'uniformisation, dans Rapports, p. 30.

[5] J. A. Pigeon, l'élaboration des lois, (1945) 5 R du B 372

[6] Cf. Louis Baudoin, Les Apports du Code civil du Québec dans la jurisprudence canadienne, le Droit civil et le Common Law au Canada, Série d'études comparées de l'U. d'O., vol. 4, Ed E. McWhinney, Toronto, The Carswell Company Ltd., 1958, 393p.; pages 70 à 89

[7] Voici ce que dit Palmer: "La Cour suprême du Canada estime avoir la fonction 'non d'aider les plaideurs ou de corriger les erreurs des cours provinciales, mais de réaliser l'uniformité dans les domaines qui concernent l'ensemble du Canada' "

générale, fait oeuvre pertinente, elle a par ailleurs concouru, dans le passé, à un type d'uniformisation moins louable: composée d'une majorité (six sur neuf) de juristes formés à l'école du Common Law et appelés le plus souvent à juger selon la technique et les principes de ce système, elle a plus ou moins déformé certaines institutions du droit civil pour les rapprocher du Common Law; parfois même, dans des affaires québécoises, elle a écarté les solutions qu'offrait le droit civil pour leur préférer celles du Common Law.[8] Ceci dit, l'oeuvre de la Cour suprême n'a pas été que préjudiciable au droit civil québécois, loin de là. Entre autres, elle a collaboré éminemment à l'élaboration d'une jurisprudence assez imposante qui sert à régler les conflits surgissant du chef de cette dualité de pensée juridique au sein du pays.[9]

Il faut noter en outre une pratique qu'on a utilisée pour éliminer ou au moins minimiser les effets de la disparité législative au Canada mais sur laquelle, à notre connaissance, aucune étude sérieuse n'a encore été réalisée. Il s'agit de l'adoption par les marchands et hommes d'affaires du pays de certains contrats-types qu'ils ont voulu faire uniformes par tout le pays. Bien souvent d'ailleurs, les parties contractantes peuvent choisir leur lieu de domicile pour toutes fins d'interprétation et d'exécution de leurs contrats.[10]

En somme, les chances d'aboutir à un degré avancé d'uniformisation dans les provinces de Common Law demeurent excellentes en dépit des éléments de disparité mentionnés précédemment. On ne peut ignorer ni même minimiser ces derniers éléments car ce sont des réalités bien vivantes qui "chassées par la porte rentrent immédiatement par la fenêtre" mais il faut reconnaître qu'il n'existe là aucun obstacle insurmontable. Les facteurs fondamentaux, prérequis de toute opération d'uniformisation, sont là au contraire pour inciter à l'optimisme: présence de traditions, de systèmes et de principes communs, tout au moins très proches les uns des autres; participation à un même ensemble économique; volonté politique déterminée.

## APERÇU DES TRAVAUX DE LA CONFERENCE

Donner en quelques mots un compte rendu des réalisations véritables d'un organisme qui oeuvre dans un domaine comportant

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[8] Palmer, p. 268-269 J. L. Baudoin, (1966) 44 R. du B, pages 406-408. Albert Maynard, *Le Droit comparé et la pensée juridique canadienne*, (1957) 17 R. du B

[9] Azard, 43 R. du B Can. pp. 555-556. . etc.

[10] Garson, Harmonieuse coexistence du droit civil et du Common Law au Canada, (1957) 17 R du B, pp. 13-14.

autant de ramifications que l'uniformisation de la législation au Canada s'avère manifestement impossible. Les quelques données du contexte canadien, telles qu'exposées brièvement plus haut, permettent sans doute une plus juste appréciation mais il ne s'agit encore là que d'un aperçu certainement trop sommaire. Pour évaluer à sa juste mesure le résultat des efforts déployés par les Commissaires depuis plus de cinquante ans, il faudrait pouvoir mesurer, pour chaque loi-modèle adoptée, une série de variables:[11] la situation qui prévalait dans chaque législation provinciale avant l'adoption de la loi; la nature et l'ampleur des variantes apportées par les différents législateurs aux textes qui leur ont été proposés; l'importance relative des provinces concernées (population et volume des échanges qui s'y effectuent); les véritables motifs qui poussent les législatures à voter les textes de loi uniforme; l'importance de la matière faisant l'objet d'un texte de loi uniforme; le rôle qu'ont pu jouer d'autres groupes organisés dont les efforts se seraient joints à ceux des Commissiaires pour promouvoir une législation uniforme sur tel ou tel sujet.

Aussi nous contenterons-nous de peindre à grand traits les réalisations de la Conférence, estimant que le tableau synoptique annexé à la fin du compte rendu fournira une information plus détaillée au lecteur intéressé. Rappelons ici que pour promouvoir l'uniformité de la législation au Canada, la Conférence a adopté le système des lois-modèles comme étant celui qui était susceptible de produire les meilleurs résultats dans le context canadien. Chaque province demeure totalement libre soit de rejeter ses recommandations soit de les adopter intégralement ou avec les modifications qui peuvent s'imposer en vue des conditions locales. Depuis son institution, la Conférence a élaboré et recommandé pour adoption cinquante-deux lois-modèles sur différents sujets qu'on peut regrouper en cinq catégories: droit commercial, responsabilité, testament et fiducie, droit de famille, procédure, sujets divers. On retrouvera la liste des matières traitées par les lois rédigées antérieurement à 1954 dans le rapport de M. Muggah. Depuis lors les Commissaires ont parachevé quatorze lois-modèles:

"Rules of the Road" (1955)
"Pension Plans — Appointment of Beneficiaries" (1957)
"An Act to amend The Trustee Act (Trustee Investments — 1957)"
"Cornea Transplant Act" (1959)
"Presumption of Death Act" (1960)

[11] Voir Palmer, Op. Cit. p. 259; et René David, Annuaire UNIDROIT, 1967-68, Tome II, p. 85.

"Domicile Code" (1961)
"Variation of Trusts Act" (1961)
"Hotelkeepers Act" (1962)
"The Survival of Actions Act" (1963)
"The Fatal Accidents Act" (1964)
"Human Tissue Act" (1965) (1970)
"The Tax Laws Reciprocal Enforcement Act" (1965)
"Accumulation Act" (1968)
"Testamentary additions to Trusts Act" (1968.)

Une opération sommaire de calcul nous permet d'affirmer qu'il existe présentement des textes législatifs substantiellement uniformes dans les dix provinces sur la légitimation et l'exécution réciproque des décisions en matière d'aliments; dans neuf provinces (le Québec faisant exception), sur la valeur probante des photocopies, l'association en nom collectif, la vente de marchandises et les co-mourants, dans huit provinces sur le transfert de créances, les dépositions sous serment recueillies à l'étranger, la désignation des bénéficiaires de rentes, les droit de garantie des entrepositaires; dans sept provinces sur la vente en bloc, le gage (Bills of Sale), la faute commune, la règle établie dans *Russel v. Russel,* la successions *ab intestat,* la rente constituée en perpétuel, l'amendement judiciaire des fidéicommis, les statistiques démographiques; dans six provinces sur la diffamation, les droits des parties au cas où l'exécution d'un contrat est impossible, l'interprétation des lois, les poursuites contre la Couronne, l'exécution réciproque des décisions judiciaires, la publication des règlements, l'obligation du testateur de pourvoir à l'entretien de ses dépendants, les cédules d'entrepôt; dans cinq provinces sur les personnes habilitées à recueillir les dépositions sous serment, la greffe de la cornée, l'utilisation des dépouilles mortelles à des fins médicales, les testaments, les ventes à tempérament, et ainsi de suite. En outre, des cinquante-deux lois recommandées par la Conférence, vingt-huit ont été promulguées par le Conseil des Territoires du Nord-Ouest et trentetrois par celui du Yukon. On remarquera que trente-et-une des cinquantes-deux lois proposées ont été adoptées par cinq provinces ou plus.

L'énumération qui précède a sans doute son mérite, mais elle est loin de rendre compte du degré exact d'uniformité acquis dans chaque cas d'adoption d'une loi-modèle. Il faut préciser ici que les Commissaires ne considèrent pas que la loi recommandée à l'occasion d'une session annuelle a dès lors acquis une forme définitive. Au contraire, dans les années qui ont suivi leur recommandation, la plupart des lois ont été amendées et revisées, certaines à plusieurs

reprises (v.g. loi sur les ventes à tempérament, les règles sur l'administration de la preuve judiciaire). C'est ainsi que les législatures ont pu effectivement adopter des lois-modèles "différentes" sur un même sujet. De plus, nous devons tenir compte du fait que certaines lois ont été soit partiellement promulguées, soit édictées avec des modifications. Le lecteur n'a qu'à se reporter au tableau en annexe pour avoir une idée plus juste du degré d'uniformisation réalisé dans chaque sujet traité par une loi-modèle.

Ce travail de révision et d'amendements, dont la fréquence a parfois été reprochée aux Commissaires,[12] s'inscrit dans le cours d'une opération qui consiste à surveiller l'évolution des différentes lois recommandées afin de s'assurer que le but désiré, l'uniformité, est bien ce qui est obtenu ou en voie d'obtention. A cette fin, lors de chaque session annuelle de la Conférence, les Commissaires prennent connaissance d'un rapport relativement détaillé spécifiant pour chaque législature, quelles lois-modèles ont été adoptées intégralement, quelles modifications ont été apportées, quelles nouvelles dispositions édictées avancent ou retardent l'avènement d'une législation uniforme pour tel ou tel sujet . . . etc. Egalement, et ceci depuis 1950, les Commissaires analysent un compte rendu des décisions où les tribunaux ont interprété et appliqué les différentes lois de droit uniforme qui ont été adoptées par les législatures. Les Commissaires s'imposent cette tâche, estimant que ceux qui sont susceptibles de fournir la plus juste appréciation du degré selon lequel les tribunaux ont pu s'écarter du but on du principe d'une loi sont précisément ceux qui ont été chargés de la rédiger. Il arrive ainsi que les Commissaires, à la lumière des législations promulguées et des décisions judiciaires rendues, jugent opportun ou nécessaire d'amender ou même de reviser complètement la loi antérieurement proposée.

Pour atteindre l'objectif qui leur fut assigné, les Commissaires réalisent qu'ils ne doivent pas travailler isolément. Aussi acceptent-ils de collaborer et savent-ils profiter des travaux d'autres groupes organisés qui sont intéressés dans l'uniformisation du droit. A diverses reprises, la Conférence a coopéré avec l'"Association of Superintendents of Insurance" pour l'élaboration de lois-modèles dans le domaine des assurances. L'adoption de lois substantiellement uniformes sur les polices d'assurance-incendie (par neuf provinces) et sur l'assurance-vie (par huit provinces) est le fruit de cette

[12] Cf. Palmer, Op. Cit. pages 262-264, et Ziegel, *Uniformity of Legislation in Canada*, 39 Can. Bar Rev. p. 182.

action conjointe. Notons ici que des lois plus récentes dans ces deux matières ont été recommandées par l'Association en question. La Conférence a adopté en 1970 une Loi sur les greffes d'organes humains qui résulte des traveaux du "Committee on Human Organ Transplants" de la "Medico-Legal Society of Toronto" dont certains membres faisaient aussi partie de la Conférence. Les Comissaires de l'Ontario ont transmis à la Conférence les rapports et recommandations du Comité sur lesquels repose le nouveau projet de loi-modèle. Il convient de mentionner ici que le Comité fédéral-provincial pour l'uniformisation du droit des compagnies institué en 1935 et dont il était question dans le rapport de M. Muggah, n'a malheureusement pas produit les résultats escomptés. Ce comité parachevait en 1962 un second projet de loi uniforme qu'aucun corps législatif n'a encore adopté. Ce projet avait dû restreindre l'étendue de l'uniformisation recherchée devant l'impossibilité d'en arriver à une entente quant à un mode uniforme d'incorporation et à un système d'amendement du texte de loi uniforme.

Depuis 1944, une section de droit pénal et de procédure pénale opère à l'intérieur des structures de la Conférence. Cette section, regroupant des délégués de toutes les provinces et de l'Etat central, a pour tâche d'étudier et de préparer des amendements au Code pénal et aux lois connexes. La Conférence a pris cette initiative parce qu'il n'existait au Canada aucun organisme avec le personnel approprié pour s'acquitter de cette tâche. Le droit pénal est de compétence fédérale mais chaque province est chargée de l'administration de la justice à l'intérieur de ses frontières. Les autorités provinciales, directement concernées par les problèmes nouveaux et les conditions rapidement changeantes de leur milieu sociologique, peuvent donc pertinemment discuter des matières reliées au droit criminel avec les fonctionnaires du ministère fédéral de la Justice. Le volume des travaux de cette section s'est accru continuellement. L'un de ses membres a même suggéré lors de la session de 1969 de la Conférence de constituer un organisme distinct qui pourrait se réunir plus d'une fois l'an afin d'accomplir le même travail mais avec plus de célérité.[13]

Jusqu'à aujourd'hui, la Conférence n'a pas été particulièrement prolifique dans le domaine de la publication. Outre une couple de brochures telles "Uniformity of Legislation in Canada—An Outline and Rules of Drafting" (1949) et "Rules Respecting the Organization and Procedure of the Uniform Law Section (1957)", l'organisme

[13] Délibérations de la 51e réunion annuelle de la Conférence, p. 52

s'est limité à la publication annuelle des "Proceedings of the (. . .) Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada". Dans cette annuaire l'on trouve le compte rendu des différentes séances avec en appendice les textes de lois adoptés ou amendés de même que les rapports du trésorier, du secrétaire et des différentes commissions constituées par les Commissaires.

Le Lecteur aura sans doute noté que le tableau annexé indique qu'aucune loi-modèle n'a été édictée intégralement au Québec. Au fait, il n'existerait, selon ce tableau, que deux matières où des dispositions législatives produiraient des effets similaires: la légitimation et l'exécution réciproque des décisions en matière d'aliments. Nous estimons cependant qu'en dépit des différences fondamentales entre droit civil du Québec et Common Law des autres provinces l'on pourrait retrouver ces effets similaires dans bien d'autres cas. Faute d'une étude exhaustive en ce domaine, nous nous bornerons à citer quelques cas où l'analyse des deux systèmes révélerait, sans aucun doute, au moins des analogies intéressantes: la loi sur l'exécution réciproque des décisions judiciaires et l'article 1220(1) du Code civil de même que les articles 90 et 178 à 180 du Code de procédure civile du Québec; la loi sur les co-mourants et les articles 603 à 605 du Code civil; la loi de 1955 sur les ventes à tempérament et l'article 1561(a-j) du Code civil.[14]

*Uniformité indirecte*

Depuis son établissement, la Conférence compte, parmi ses commissaires provinciaux, les rédacteurs de lois des diverses juridictions canadiennes qui y sont représentées. Pendant nombre d'années, l'échange d'informations que favorisait ainsi la Conférence, seul organisme canadien où pouvaient se rencontrer les rédacteurs des lois fédérales et provinciales, a engendré une bonne mesure d'uniformité dans le libellé des lois du Canada. Cependant, à mesure que les activités de la Conférence ont pris de l'ampleur, les rédacteurs ont eu de moins en moins l'occasion d'échanger leurs vues sur la formulation des lois au cours des délibérations régulières de la Conférence et depuis 1954-55, les nouvelles règles les en empêchent virtuellement.

[14] Ventes à tempérament—Cf. 12 R. du B. pages 147-151; Letarte, *La vente à Tempérament*, p. 37; comourants—Cf. (1942] R. du B., vol. 2, p. 368; exécution des décisions judiciaires—Cf. (1945) R. du B. p. 547, (1942) R. du B., vol. 2, p. 368.

En 1967, la Conférence a autorisé les rédacteurs à établir une commission d'étude sur la rédaction des lois qui devait se réunir chaque année avant sa propre assemblée annuelle. Ces trois dernières années, les rédacteurs ont donc pu échanger des idées et étudier des propositions d'uniformisation se rattachant à leurs activités professionnelles, et en ce moment, ils révisent les règles de rédaction de la Conférence en fonction des conventions actuelles auxquelles elle souscrit.

La Conférence a certes contribué effectivement à l'uniformisation de la rédaction officielle des lois. En réunissant ainsi les rédacteurs, elle amène quelque-fois ces derniers à accepter, telles quelles, les lois d'une autre juridiction, étant donné que le libellé se conforme en substance à leurs propres conventions de rédaction. Si les principes directeurs de leurs gouvernements sont compatibles avec les objectifs des autres porvinces, l'uniformité des lois ne constitue pas une tâche insurmontable, et c'est le cas, par exemple, des lois sur les valeurs de l'Ontario, de l'Alberta, de la Saskatchewan et du Manitoba.

En participant à la Conférence, le gouvernement fédéral a contribué dans une large mesure à l'uniformisation de certaines lois fédérales et provinciales dans le domaine du droit des compagnies, des lois sur l'interprétation et dans d'autres domaines de compétence fédérale-provinciale. Ce genre d'uniformité formelle n'est peut-être pas très répandu, mais là où on le retrouve, on peut l'attribuer jusqu'à un certain point à ces rencontres des rédacteurs qui se tiennent sous les auspices de la Conférence.

## PERSPECTIVES

### *Adaptation et réorientation*

Au cours de la présente année la Conférence entend réexaminer son rôle à la lumière de nouvelles données du contexte canadien et préciser ses objectifs pour l'avenir. Elle désire en somme effectuer un ajustement nécessaire à tout organisme qui supporte le poids de plus de cinquante ans d'expérience et qui doit faire face aux conditions actuelles qui changent rapidement. Divers éléments influenceront notablement cette opération.

Récemment plusieurs provinces ont constitué différents organismes dont le but est de recommander des réformes dans le domaine du droit; il s'agit l'Alberta de la Colombie-Britannique, du

Manitoba, de la Nouvelle-Ecosse, de l'Ontario et du Québec; en outre, le fédéral vient de créer un corps analogue. La position de la Conférence vis-à-vis de ces divers offices de revision reste à définir. L'on sait qu'une des façons les plus simples et les plus naturelles d'uniformiser le droit consiste à orienter et à guider ces mouvements essentiels de réforme et de modernisation. Dans ce contexte, un système de véritables lois-modèles est tout à fait approprié. Pour revêtir le caractère de modèle, une loi doit marquer un net progrès du droit et fournir au problème juridique envisagé la solution qui est et apparaît la plus juste; c'est à ce titre qu'elle a des chances de gagner l'adhésion des divers corps législatifs. En somme, la méthode des lois-modèles ne constitue que la systématisation d'une pratique immémoriale dans le développement du droit où le strict compartimentage n'existe pas: de multiples règles et institutions ont été acceptées par des pays ou systèmes autres que ceux où elles avaient pris naissance ou avaient été affirmées.

Au cours de la dernière décennie, les travaux et les méthodes de la Conférence ont été mis en question par divers critiques. Leurs observations pertinentes n'ont pas manqué de révéler l'à-propos de nombreuses questions qui préoccupaient déjà les Commissaires. Tous s'accordent en effet pour reconnaître que le degré d'uniformité acquis est loin d'avoir dépassé les prévisions les plus conservatrices, surtout en ce qui concerne les provinces de Common Law où, on l'a vue, tant d'éléments militent en faveur de l'uniformisation. A tel point qu'on a pu se demander parfois si le besoin d'uniformité n'avait pas été exagéré. A cette dernière question, il faut évidemment répondre par la négative, quoique dans bien des domaines les différences ont tendance à ne se situer qu'au niveau du détail. Il faudra néanmoins trouver un moyen d'intéresser plus directement les divers gouvernements provinciaux à cette oeuvre collective essentielle.

Depuis 1968, le Canada est membre de deux organismes travaillant à l'unification du droit au niveau international: l'Institut international pour l'unification du droit privé et la Conférence de La Haye de droit international privé. Les Commissaires ont chaleureusement appuyé cette initiative du Gouvernement canadien. Les modalités de la participation de la fédération canadienne aux travaux de ces organismes n'ont pas encore été arrêtées de façon définitive semble-t-il mais il n'est pas impossible que le Conférence soit

invitée à y apporter sa collaboration. Les Commissaires pourraient communiquer les enseignements de leur longue pratique dans le domaine de l'unification interne et par ailleurs on peut escompter qu'ils auraient beaucoup à retirer de l'expérience et des travaux de ces deux corps internationaux. Nul doute enfin que leur participation aux travaux et aux projets qui y sont élaborés pourrait servir d'incitation à un plus grand effort d'uniformisation interne.

*Droit civil et Common Law*

Les divergences profondes qui séparent les systèmes de droit continental des systèmes de Common Law se sont avérées un obstacle quasi insurmontable pour la poursuite de l'uniformisation du droit dans le cadre de l'UNIDROIT. Par exemple, en matière de lettres de change, chèques et billets à ordre, jusqu'ici il semble qu'aucune tentative d'uniformisation avec les pays de Common Law n'ait été couronnée de succès.[15] Il faudra sans doute envisager une nouvelle approche et l'UNIDROIT considère "l'harmonisation".

A la lumière de l'expérience de l'UNIDROIT, il est à prévoir que la Conférence de l'uniformité ne se contentera plus de constater que le Québec n'adopte pas ses lois-modèles. Par ailleurs, à la suite des recommendations de la récente Commission royale d'enquête sur le bilinguisme et le biculturalisme au Canada, la Conférence cherchera sans doute à élaborer une politique adéquate qui aurait véritablement pour effet de traiter le système juridique québécois comme une composante fondamentale de la culture française que le Canada veut voir s'épanouir à l'intérieur de ses frontières au mêmes titre que la culture anglaise.

L'harmonisation considérée par l'UNIDROIT semble appropriée dans le contexte canadien. L'harmonisation se révèle une notion qui est loin d'être complètement définie, sans doute parce qu'on la réalise à des degrés et par des procédés très divers. Disons cependant qu'en gros elle se présente sous deux formes principales: soit qu'elle vise directement l'instauration de relations entre le contenu matériel des règles appartenant à des ordres juridiques différents, soit qu'elle résulte de l'adoption de principes communs de la part de ces divers ordres juridiques où l'harmonisation suit l'application de ces principes.[16]

[15] Antonio Malintoppi, *Annuaire UNIDROIT 1967-68,* Tome II, Rome ed. UNIDROIT, 1969, p. 58.

[16] Antonio Malintoppi, Annuaire UNIDROIT 1967-68, Tome II, p. 54

Au Canada, un certain degré d'harmonisation est déjà réalisé entre le Common Law et le Droit civil québécois, et la Conférence peut revendiquer une part de cette oeuvre. Chaque système a emprunté à l'autre certaines institutions ou solutions qu'il a réussi à intégrer dans la structure de son droit sans que les principes de base de celui-ci ne s'en trouvent modifiés. L'ingéniosité consiste alors à assimiler la théorie juridique que l'on veut introduire dans son système et non pas à reproduire le texte qui l'exprime dans l'autre. On pourrait donner divers exemples de ces emprunts rationnels réciproques parfaitement conciliables avec le fait que chacun retient sa personnalité et ses caractéristiques essentielles. Mentionnons deux cas seulement: la théorie civiliste de la faute commune a été adopté par les neuf provinces de Common Law, de préférence à la doctrine anglaise du "contributory negligence"; dans le droit québécois de la responsabilité du patron pour ses employés, l'expression "dans l'exécution des fonctions auxquelles ces derniers sont employés" a été interprétée dans un sens qui est beaucoup plus près de la théorie du Common Law en la matière que de l'interprétation donnée par les tribunaux français. La Conférence pourrait être ce forum privilégié ou les études et les échanges de vues des professeurs et praticiens de deux ordres juridiques contribueraient à l'enrichissement mutuel des deux systèmes.

Précisons ici que parallèlement à une oeuvre de véritable harmonisation il s'est pratiqué au pays une forme d'unification qui s'apparente à du vulgaire métissage et qui s'est faite aux dépens du système juridique de la minorité, sans profit pour celui de la majorité. Plusieurs auteurs ont noté l'introduction à diverses reprises dans la législation québécoise et dans le code civil lui-même, de textes étrangers, d'un esprit confus et d'une forme lourde, en désaccord souvent avec les principes fondamentaux du droit québécois ou mal en harmonie avec ceux-ci, à tout le moins.[17] L'hybridation opérée par voie d'interprétation judiciaire nous donne une idée des excroissances et des proliférations étrangères dont le droit civil québécois s'est encombré. Cette pratique qui est fort heureusement demeurée assez limitée n'est manifestement pas la voie à suivre pour qui veut faire oeuvre rationnelle et féconde.

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[17] Cf. Pierre Azard, *Contribution française à la défense de l'autonomie du droit québécois*, (1961) 58 Themis, pages 122-130.