1972

PROCEEDINGS

OF THE

FIFTY-FOURTH ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

LAC BEAUPORT, QUEBEC

AUGUST 21st TO AUGUST 25th, 1972

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Attorney-General of Saskatchewan Hon Roy J. Romanow.

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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
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E A. DRIEDGER, Q C , Ottawa	1962-1963
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W. F BOWKER, Q.C., Edmonton	1964-1965
H. P. CARTER, Q.C., St John's	1965-1966
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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 has 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

1972 Aug 21-25, Lac Beauport, P Q

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, governmental law departments, faculties of law schools, law reform bodies, the practising profession and, in recent years, law reform bodies.

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 o Justice, the Attorney-General of any province, or the Canadia Bar Association.

While the primary work of the Conference has been and is t achieve uniformity in respect of subject matters covered by existin legislation, the Conference has nevertheless gone beyond thi field in recent years and has dealt with subjects not yet covere by legislation in Canada which after preparation are recommende for enactment. Examples of this practice are the Survivorship Ac section 39 of the Uniform Evidence Act dealing with photograph records and section 5 of the same Act, the effect of which is abrogate the rule in *Russell v. Russell*, the Uniform Regulatio Act, the Uniform Frustrated Contracts Act, and the Unifor Proceedings Against the Crown Act In these instances t

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.

The Legislative Drafting Workshop, first held in 1968, meets just before the Conference It is attended by legislative draftsmen who are also attending the Conference and concerns itself with matters of common interest in the field of legislative drafting

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

TABLE OF MODEL STATUTES

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

Line	Title of Act	Conference	Adopted Alta	B C	Man	N B	Nfld
1	—Accumulations	1968		1967			
2	—Assignments of Book Debts	1928	'29, '58*		'29, '51*, '57*	1952‡	1950‡
3	—						
4	—Bills of Sale	1928	1929		'29, '57*	——$	1955‡
5	—						
6	—Bulk Sales	1920	1922	1921	'21, '51*	1927	1955‡
7	—Compensation for Victims of Crime	1970	1969$				
8	—Conditional Sales	1922		1922¶		1927	1955‡
9	—Conflict of Laws (Traffic Accidents) Act	1970					
10	—Contributory Negligence	1924	1937*	'25, '70		'25, '62*	1951*
11	—Cornea Transplant	1959	1960‡	——¶	——¶	——$	1960
12	—Corporation Securities Registration	1931	....		..	....	
13	—Defamation	1944	1947	——$	1946	1952‡	
14	—Devolution of Real Property	1927	1928			1934†	
15	—Domicile	1961			...		
16	—Evidence	1941			1960†		
17	—						
18	— Foreign Affidavits	1938	'52, '58*	1953†	1952	1958‡	1954*
19	— Judicial Notice of Statutes and						
20	— Proof of State Documents	1930	....	1932	1933	1931	....
21	— Officers, Affidavits before	1953	1958	——$	1957	...	1954
22	— Photographic Records	1944	1947	1945	1945	1946	1949
23	— *Russell v Russell*	1945	1947	1947	1946	....	
24	—Fatal Accidents	1964	....	....	....	1968	....
25	● Fire Insurance Policy	1924	1926	1925$	1925	1931	1954‡
26	—Foreign Judgments	1933	....		...	1950‡	...
27	—Frustrated Contracts	1948	1949		1949	1949	1956
28	—Highway Traffic and Vehicles—						
29	— Rules of the Road	1955	1958†	1957†	1960‡		
30	—Hotelkeepers	1962	....	....	...		
31	—Human Tissue	1965	1967	1968	1968		....
31a	—Human Tissue Gift Act	1970	....	1972	...		1971
32	—Interpretation	1938	1958*	——$	'39‡, '57*		1951‡
33	—						
34	—Intestate Succession	1925	1928	1925	1927‡	1926	1951
35	—						
36	—Landlord and Tenant	1937				1938	
37	—Legitimation (Legitimacy)	1920	'28, '60*	'22, '60*	'20, '62*	'20, '62*	——$
38	● Life Insurance	1923	1924	1923$¶	1924	1924	1931
39	—Limitation of Actions	1931	1935		'32, '46‡	....	
40	—Married Women's Property	1943	....	...	1945	1951$	....
41	—Partnership	....	1899°	1894°	1897°	1921°	1892°
42	—Partnerships Registration	1938				——$	
43	—Pension Trusts and Plans						
44	— Perpetuities	1954	....	1957‡	1959	1955	1955
45	— Appointment of Beneficiaries	1957	1958	1957‡	1959		1958
46	—Perpetuities	1972	1972	....	....		
47	—Presumption of Death	1960	....	1958$	1968‡	....	
48	—Proceedings Against the Crown	1950	1959‡	.	1951	1952†	
49	—Reciprocal Enforcement of Judgment	1924	'25, '58*	'25, '59*	'50, '61*	1925	
50	—Reciprocal Enforcement of Tax						
51	— Judgments	1965					
52	—Reciprocal Enforcement of Maintenance						
53	— Orders	1946	'47, '58*	'46, '59, '71	'46, '61*	1951‡	'51‡, '61*†
54	—Regulations	1943	1957‡	1958‡	1945‡	1962	....
55	—Sale of Goods	....	1898°	1897°	1896°	1919°	1899°
56	—Service of Process by Mail	1945	——$	1945	——$	....	
57	—Survival of Actions	1963		...		1968	....
58	—Survivorship	1939	'48, '64*	'39, '58*‡	'42, '62*	1940	1951
59	—Testamentary Additions to Trusts	1968					
60	—Testators Family Maintenance	1945	1947‡	——$	1946	1959	
61	—Trustee Investments	1957	...	1959†	1965‡	1970	
62	—Variation of Trusts	1961	1964	1968	1964		
63	—Vital Statistics	1949	1959‡	1962‡	1951‡	....	
64	—Warehousemen's Lien	1921	1922	1922	1923	1923	
65	—Warehouse Receipts	1945	1949	1945‡	1946‡	1947	
66	—Wills	1929	1960‡	1960‡	1964‡	1959‡	
67	—						
68	— Conflict of Laws	1953		1960	1955		1955

* Adopted as revised

° Substantially the same form as Imperial Act (*See* 1942 Proceedings page 18)

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
						1972‡	New
	1934		1957$		1948‡	1954‡	Am. '27, '29, '30, '33, '34 & '42; Rev '47 & '55; Am '59
						1972	New
	1938*		1944*		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
1971							
	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$				
1966$							
....			....		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

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

1972 PROCEEDINGS OF THE LEGISLATIVE DRAFTING WORKSHOP

The following Commissioners and representatives participated in the sessions of the Legislative Drafting Workshop

Alberta	Glen W Acorn Leslie R Meiklejohn
British Columbia	G. Allan Higenbottam
Canada	James W. Ryan, Q.C
Manitoba	Andrew C Balkaran Rae H Tallin
New Brunswick	M M. Hoyt, Q.C
Northwest Territories	Frank G. Smith
Nova Scotia	Graham D. Walker
Ontario	Arthur N. Stone, Q.C.
Quebec	Arthur Curwood Benoit Morin Robert Normand, Q.C.
Saskatchewan	Gordon Doherty
Yukon Territory	Padraig O'Donoghue, Q.C

FIRST DAY

(THURSDAY, AUGUST 17TH, 1972)

First Session

10:15 a.m -12.35 p.m.

The first session of the Drafting Workshop opened at 10·15 a m , J W. Ryan, Q C presiding. Dr. Hugo Fischer's resignation as a Commissioner was noted and after several comments in recognition of the Workshop's indebtedness to his energies since its creation, Arthur N Stone, Q.C , was nominated to be acting Secretary for this meeting

Hours of Sitting

It was agreed that the Legislative Drafting Workshop sit from 9 30 a m to 12 30 p m and from 2:00 p m to 5.00 p m during each day.

Interpretation Act

Clause by clause consideration was given to the July, 1971 draft of the Alberta Commissioners, as re-issued in April, 1972 with interspersed commentary

Second Session

2.00 p.m.-5·15 p m.

Interpretation Act—(continued)

SECOND DAY

(FRIDAY, AUGUST 18TH, 1972)

Third Session

9 00 a m -12 30 p m

Interpretation Act—(continued)

Fourth Session

2 00 p m.-6.15 p m

Interpretation Act—(continued)

THIRD DAY

(SUNDAY, AUGUST 20TH, 1972)

Fifth Session

10:00 a.m.–12·35 p m.

Interpretation Act—(continued)

Sixth Session

2·00 p m.–4:30 p m

Interpretation Act

After concluding clause by clause discussion it was agreed on motion that the draft be referred back to the Alberta Commissioners to incorporate the amendments agreed upon and to redistribute the amended draft for presentation to the Conference in 1973

Statutes Act

It was agreed on motion that the Nova Scotia Commissioners canvass the Statutes Acts of all the jurisdictions and prepare a draft for a Uniform Statutes Act; and that each jurisdiction send to the Nova Scotia Commissioners its own provisions respecting matters to be in Uniform Statutes Act.

Rules of Drafting

It was agreed on motion that the resolution of the 1971 Drafting Workshop referring the matter to the Alberta Commissioners b continued.

1973 Meetings

It was agreed on motion that the Legislative Drafting Workshop meet in 1973 on the Thursday and Friday preceding tl meeting of the Conference.

Officers

Mr. Ryan was again elected chairman for 1973 and Arthur Stone was elected Secretary for 1973.

MINUTES OF THE OPENING PLENARY SESSION

(MONDAY, AUGUST 21ST, 1972)

10·00 a.m –11·30 a m.

1 Opening of Meeting

The fifty-fourth annual meeting of the Conference opened at the Manoir St Castin, Lac Beauport, Quebec at 10.00 a.m. with the President, A. R. Dick, Q.C. in the chair.

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

2 Minutes of the Last Meeting

The following resolution was adopted:

> RESOLVED that the Minutes of the 1971 Annual Meeting as printed in the 1971 Proceedings, which were circulated, be taken as read and adopted

3. President's Address

The President then addressed the meeting and in particular commented on the report of the President which was presented at the 1971 meeting in Mr Brissenden's absence, characterizing it as a "new thrust for change" in the Conference. He discussed the re-organization of the Conference and commended the various jurisdictions for their co-operation in making additional funds available for the operation of the Conference.

The President pointed out that Mr. Crosby was no longer a Commissioner for Nova Scotia and therefor was no longer in the position to act as Treasurer. In addition, Mr. Normand, in view of his promotion to the post of Deputy Minister of Justice for Quebec, had indicated that he would no longer be in the position to continue as Secretary.

The President expressed the thanks of the Conference to both Mr Crosby and Mr. Normand for their excellent work and his remarks were warmly applauded by the meeting.

4. Treasurer's Report and Appointment of Auditors

In the absence of the Treasurer of the Conference, Mr. Crosby, the Treasurer's report was presented by the President (Appendix B, page 87.) It was noted in particular that the cost of the 1971 Proceedings was $11,788.93, a considerable increase from the cost of printing the 1970 Proceedings ($6,141 21) due to the larger size of the 1971 Proceedings

It was approved on motion that Mr. Arthur Curwood be paid an honorarium in the sum of $1,000 for his assistance to the Secretary in the past year.

Messrs McIntyre and MacKay were named as auditors to report at the closing Plenary Session.

5. Secretary's Report

The Secretary, Mr. Normand, presented the Secretary's report (Appendix C, page 89) which, on motion, was adopted The following matters were dealt with in the course of dealing with the Secretary's report

(a) *Consolidation of Model Acts*

The last consolidation was published in 1961 and is now out of print The possibility of a looseleaf volume was mentioned. It was agreed that the matter be referred to the incoming Executive

(b) *Law Reform Commissions*

This matter was referred to the Uniform Law Section and, with respect to the report to be made on behalf of the Canada Law Reform Commission respecting criminal law reform, to the Criminal Law Section. (See U L S Agenda Item 10.)

(c) *International Institute for the Unification of Private Lai (Unidroit)*

It was agreed that this matter be referred to the Uniforr Law Section (See U L.S Agenda Item 12)

(d) *Resolution of the Canadian Bar Association in 1971 o Pleasure Boat Owners' Accident Liability*

This matter was referred to the Uniform Law Sectio (See U.L.S Agenda Item 23)

(e) *Acting Secretary*

It was agreed that Mr Acorn be named as Actii Secretary for the 1972 meeting

6. Appointment of Resolutions Committee

The following persons were named to the Resolutions Co mittee Messrs Bowker, Smethurst and Friedman

7 Appointment of Nominating Committee

The past Presidents in attendance at the Conference were nan as the Nominating Committee, with Mr. Brissenden as Chairm

8 Publication of Proceedings

There was considerable discussion arising from the higher cost of printing the 1971 Proceedings and several suggestions were put forward to reduce the cost.

The following resolution was adopted

RESOLVED that the matter of the publication of the 1972 Proceedings be referred to the new Executive with instructions to print the Proceedings in such manner as they may decide

9. Report of the Executive on the rules governing the Uniform Law Section

At the suggestion of the President, it was agreed that this matter be referred to the Executive and to the past Presidents in attendance who would then meet on the following Wednesday and report back at the closing Plenary Session

10. Report of the Special Committee on International Conventions on Private International Law

At the 1971 meeting the following resolution was adopted

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, pages 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 Chairman of the Special Committee, Mr. Leal gave an oral report to the meeting. In his report Mr. Leal gave a resume of the history of the subject and informed the meeting that regretfully, in spite of two sincere efforts to do so, it has been impossible for the Committee to meet during the course of the past year primarily

due to the inability of the members to arrange a suitable time and place.

There was considerable discussion arising out of the report and the importance of the subject matter was stressed by a number of the Commissioners.

It was agreed on motion that the Special Committee be continued with the same terms of reference as in the 1971 Resolution and with instructions to report again at the 1973 meeting.

11. Next Meeting

It was pointed out that the 1973 convention of the Canadian Bar Association is to be held in Vancouver and the matter of the location of the next meeting of the Conference was set over to the closing Plenary Session.

12. Adjournment

The Plenary Session then stood adjourned until Friday, August 25th.

MINUTES OF THE UNIFORM LAW SECTION

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

Alberta:

Messrs. Glen W Acorn, Wilbur F Bowker, Leslie R Meiklejohn and William E Wilson

British Columbia.

Honourable Davie Fulton and Messrs. P. R Brissenden and G Allen Higenbottam.

Canada·

Messrs. Donald S. Thorson, James W Ryan and William F Ryan

Manitoba.

Messrs. Andrew C Balkaran, Francis C Muldoon, Robert G. Smethurst and Rae H. Tallin

New Brunswick·

Messrs. M. M Hoyt, Q C. and Alan B. Reid

Northwest Territories·

Mr. Frank G Smith.

Nova Scotia·

Messrs William H Charles and Graham D Walker.

Ontario·

Messrs. Warner Alcombrack, H. Allan Leal and Arthur N. Stone

Prince Edward Island·

Mr. James Macnutt.

Quebec:

Messrs. Yves Caron, Emile Colas, Robert J Cowling, Benoit Morin, Robert Normand and Arthur Curwood

Saskatchewan·

Messrs Gordon Doherty and Calvin F Tallis

Yukon Territory.

Mr Padraig O'Donoghue

FIRST DAY

(MONDAY, AUGUST 21ST, 1972)

First Session

11 45 a m.–12 30 p m

The first session of the Uniform Law Section opened at 11 45 a.m with Mr Rae H Tallin presiding

Agenda

The Agenda (see Appendix A) was spoken to and a number of changes and re-arrangements of items were agreed to

Hours of Sitting

It was agreed that the Uniform Law Section sit from 9 30 a m to 12.30 p.m. and from 2·00 p.m to 4.30 p m each day during the meeting

1 Consumer Sales Contract Form

After a brief discussion it was agreed that this matter be referred back to the Manitoba Commissioners for report at the 1973 meeting of the Conference.

2 Contributory Negligence (Tortfeasors)

3 Limitation of Actions

4 Evidence. The Rule in Hollington v Hewthorn

At the request of the Alberta Commissioners it was agreed on motion that these three subjects (agenda items 2, 3 and 4) be referred back to the Alberta Commissioners for report at the 1973 meeting

5 The Interpretation Act

Mr Acorn reported that the Legislative Drafting Workshop had carefully considered and discussed the Alberta Draft dated July, 1971 (1971 Proceedings, pages 27-61) and the commentaries of a number of the jurisdictions during its meetings on the Thursday, Friday and Sunday immediately preceeding the Conference It was agreed on motion that the matter of the Interpretation Act be referred back to the Alberta Commissioners with instructions to prepare a new draft Act incorporating the changes agreed upon at the meeting of the Legislative Drafting Workshop, and that the draft Act so prepared be distributed in advance of the 1973 meeting for consideration then

6 The Statutes Act

It was agreed on motion that this matter be referred to the Nova Scotia Commissioners for a report and draft Act at the 1973 meeting of the Conference.

Second Session

2:00 p m.–4:40 p.m.

7. Amendments to Uniform Acts, 1971-72

The report on Amendments to Uniform Acts was presented by Mr. Tallin (Appendix D, page 92) The report, on motion, was received.

8. The Bills of Sale Act. Rule in Active Petroleum Products Ltd. v. Duggan

The report of the Manitoba Commissioners was presented by Mr. Tallin (Appendix E, page 97).

The meeting defeated a motion that no action should be taken to amend section 9(3) of the Uniform Bills of Sale Act and that the problem be left to future judicial decision.

It was agreed that the matter be deferred until Thursday and that in the meantime Messrs. Thorson and Balkaran were to prepare a revised draft amendment to section 9(3) of the Uniform Bills of Sale Act for consideration at that time. (See minutes for the Friday morning Session.)

9. Wills Act, section 21(2)

The report of the Saskatchewan Commissioners was presented by Mr Doherty (Appendix F, page 99). This matter arose out of the decision in Re A. Neil Mclean Estate, (1969) 1 N.B.R 500. After considerable discussion the following motion was adopted.

> RESOLVED that the Conference concur in the recommendation of the Saskatchewan Commissioners that no change be made in the uniform Wills Act by reason of the decision in Re A Neil Mclean Estate

10. Reports of Law Reform Commissions

The following Commissioners and representatives gave reports to the meeting regarding the work and activities relating to law research and law reform in their respective jurisdictions:

Mr. William F. Ryan, a member of the Law Reform Commission of Canada;

Mr. James Macnutt in respect of Prince Edward Island,

Mr. Graham D Walker in respect of Nova Scotia;

Mr. R. Alan Reid in respect of New Brunswick;

Mr. Yves Caron, Secretary of the Civil Code Revision Office of Quebec;

Mr H. Allan Leal, Chairman of the Ontario Law Reform Commission,

Mr. Frank Muldoon, Chairman of the Manitoba Law Reform Commission;

Mr Gordon Doherty in respect of Saskatchewan;

Mr Wilbur F. Bowker, Director of the Alberta Institute of Law Research and Reform,

Mr. P O'Donoghue in respect of the Yukon Territory.

The report of the Honourable Mr. Fulton in respect of British Columbia was deferred until his arrival at the Conference. (See minutes for the Thursday morning Session.)

SECOND DAY

(TUESDAY, AUGUST 22ND, 1972)

Third Session

9·30 a m.–12:30 p.m.

11. Judicial Decisions affecting Uniform Acts—1971

Mr. Graham D. Walker of the Nova Scotia Commissioners presented the report (Appendix G, page 103.). After discussion the following motions were adopted.

RESOLVED that the report on Judicial Decisions Affecting Uniform Acts be received

AND BE IT FURTHER RESOLVED that the Nova Scotia Commissioners continue to prepare a report on judicial decisions affecting Uniform Acts

12 International Institute for the Unification of Private Law (Unidroit)

This matter had been referred to the Uniform Law Section by the opening Plenary Session. The meeting had under discussion a letter dated March 10, 1972 to the Secretary of the Conference from Mr Mario Matteucci, Secretary General of Unidroit in Rome (The text of the letter and its attachment are reproduced in Appendix H at page 107).

After considerable discussion, the following motion was adopted.

RESOLVED that, of the matters referred to in Mr Matteucci's letter of March 10, 1972, priority be given to the following matters, in this order:

(a) Problems raised by mixed law systems;

(b) Uniform law as a means of technical assistance to developing countries;

(c) The problems arising from the drawing up and translation of these Uniform Law rules in several national languages

AND BE IT FURTHER RESOLVED that, the Executive of the Conference be empowered to respond to any invitation given by Unidroit to attend any of its meetings

13 Interprovincial Subpoenas

Mr Muldoon gave an oral report on this matter on behalf of the Manitoba Commissioners and submitted to the meeting a Draft Act. He stated that the draft had been prepared in somewhat of a hurry and was thus distributed only for the purpose of providing the basis for an initial discussion

Mr Muldoon in his report stated that this matter had been one of some concern in the Civil Justice Section of the Canadian Bar Association. In the course of the discussion on the report there were several expressions of the need for uniform legislation in this area Reference was also made to the note following section 20 of the Ontario Evidence Act, R.S.O. 1970, c 151, which sets out provisions of a pre-Confederation Statute on the subject The note also refers to Rideout v Rideout, [1966] O W N 644.

After discussion the following motion was adopted

RESOLVED that the matter of interprovincial subpoenas be referred to the Manitoba Commissioners for study and report at the 1973 meeting and that the Manitoba Commissioners be requested to consult with the Civil Justice Section of the Canadian Bar Association in order to achieve uniformity of treatment on this subject

(*NOTE At the Canadian Bar Association convention during the week following the Conference meeting, the following resolution* (*No 4*) *was adopted*

"BE IT RESOLVED that the Ministers of Justice and Attorneys General of the various Provinces and Territories of Canada be requested to enact legislation in their respective jurisdictions providing for the reciprocal enforcement of subpoenas in actions in the Superior and County or District Courts of the Provinces and Territories")

14. Minimum Age for Marriage

The report of the Canada Commissioners was presented by Mr Thorson (Appendix I, page 114). A discussion on the report followed.

Fourth Session

2 00 p m.–4:45 p m

14 Minimum Age for Marriage (continued)

After a lengthy and intensive discussion of the report, the following Motion was adopted·

WHEREAS the Canada Commissioners submitted at the 1971 conference a report relating to the establishment of a uniform minimum age for marriage throughout Canada;

WHEREAS at the conclusion of the discussion, the following resolutions were adopted by the Conference:

"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 "

WHEREAS the study referred to in the first of the above two resolutions was carefully studied at the present Conference;

WHEREAS a distinction was clearly made between "free age" and "consent age" to distinguish between the two minimum ages for marriage, "free age" referring to the minimum age at which a person may marry without consent and "consent age" to the minimum age at which a person may marry with consent;

WHEREAS the study submitted by the Canada Commissioners concluded that 18 years should be adopted as the minimum free age and 16 years as the minimum consent age for marriage throughout Canada;

WHEREAS, after much discussion, it was suggested that marriage being one of the most important institutions of society, there should be uniformity on the subject of minimum ages;

WHEREAS the uniformity can best be achieved most simply by the Parliament of Canada dealing with the matter as one relating to capacity to marry, without nevertheless interfering with the power of the provinces to legislate on the question of "solemnization of marriage"

THEREFORE on motion duly proposed by Emile Colas, Q C and seconded by Francis C Muldoon, Q C it is resolved that:

1 The minimum age for marriage should be established at 16 years for both sexes

2 The provinces should try to achieve uniformity by establishing a procedure for granting or denying consent to marry to males and females of 16 or 17 years of age, reflecting both parental and societal conditions in the matter of youthful marriages

3 Pregnancy should not be recognized as a ground for permitting a marriage not otherwise authorized under the above conditions

4 The matter of procedure respecting consent up to the age of 18 should be left to the individual provinces

15 Perpetuities Act

The report of the Alberta Commissioners dated January 24, 1972 was presented by Mr. Bowker (Appendix J, page 167)

In accordance with the 1971 resolution (1971 Proceedings, page 78) the Alberta Commissioners had prepared a new draft of

the Perpetuities Act and had distributed it to the Commissioners in February, 1972.

In the course of the discussion it was agreed on motion that the general *cy près* provision (section 8) be retained

A discussion then began on the matter of the report and draft Act.

THIRD DAY

(WEDNESDAY, AUGUST 23RD, 1972)

Fifth Session

9:30 a m.–12·30 p m.

15. Perpetuities Act (continued from Tuesday afternoon)

After further discussion on the report, Dr. Bowker pointed out that the Alberta Commissioners were not asking that the Conference adopt section 24 of the draft Act (which would make the Accumulations Act 1800 inoperative) inasmuch as the Conference had in 1968 adopted a Uniform Accumulations Act After further discussion the following motion was adopted

> RESOLVED that the Conference adopt the text of the Draft Perpetuities Act as submitted by the Alberta Commissioners and that the Draft be approved as a Uniform Act of the Conference subject to the deletion of 24 of the Draft, the renumbering of section 25 as section 24 and the consequential deletion in the renumbered section 24 of the reference to section 24(4) of the draft

(NOTE: The Uniform Perpetuities Act as adopted is contained in Appendix K at page 144 The changes required by the resolution have been incorporated in it)

16. Offence of possessing, without lawful excuse, any card or certificate of identification of another person

This matter had been referred to the Uniform Law Section by the Criminal Law Section (1971 Proceedings, page 89) but it was pointed out that the information accompanying the request was not complete enough for the Uniform Law Section to deal with it. On motion it was agreed that the Uniform Law Section note the request and that it be referred back to the Criminal Law Section

17 Presumption of Death Act

The report of the Northwest Territories Commissioners previously prepared and distributed by Dr Hugo Fischer was presented by Mr Frank G. Smith (Appendix L, page 154)

A discussion then took place for the remainder of the Session regarding the report.

Sixth Session

2.00 p m –5 00 p m

17 Presumption of Death Act (continued)

The discussion of the report continued and resulted in a number of motions regarding changes and matters of principle involved in the various items in the report. These motions were intended to serve as instructions to those who would be preparing the draft Act for the 1973 meeting. Mr. Doherty assumed the chair from 3.00 p m until 3·30 p.m. during Mr Tallin's absence at a meeting of the Executive and Past Presidents After considerable discussion the following motion was adopted

RESOLVED that the matter of the Presumption of Death Act be referred to the Nova Scotia Commissioners for a report and draft Act to be presented at the 1973 meeting

(NOTE: One of the matters under discussion was the proposal to amend the Divorce Act to enable the obtaining of a divorce on the ground that the other party to the marriage had been judicially presumed dead by a declaration under provincial legislation: See the motion at page 79 of the 1971 Proceedings

A motion on this matter was passed at this Session but was later replaced: see the minutes for the Seventh and Ninth Sessions)

FOURTH DAY

(THURSDAY, AUGUST 24TH, 1972)

Seventh Session

9.30 a m.–12 30 p m

18 International Convention on Travel Agents

Mr. Normand presented an oral report on behalf of the Quebec Commissioners on matters arising from the International Convention on Travel Agents

After a brief discussion it was agreed on motion that the matter of the International Convention on Travel Agents be referred to the Quebec Commissioners with instructions to distribute an interim report during the next year for consideration at the 1973 meeting.

17 Presumption of Death Act (continued from Wednesday afternoon)

There was further discussion on the proposed amendment to the resolution pertaining to the amendment to the Divorce Act to allow for the dissolution of marriage on the basis of a provincially

granted judicial declaration of presumed death. Mr. Muldoon proposed another resolution which provoked considerable discussion. It was then agreed to distribute Mr Muldoon's Draft resolution for consideration on Friday. (See minutes for the Ninth Session.)

11. Reports of Law Reform Commissions (continued from Monday afternoon)

The chairman welcomed the Honourable Davie Fulton, Chairman of the British Columbia Law Reform Commission who then gave a report in respect of the activities of the Commission in the last year.

The following resolution was then adopted.

> RESOLVED that the Conference note with pleasure the co-operation it has received from the law reform bodies in Canada and that the Conference record its desire that it will be a continuing part of our Conference in years to come and that the law reform bodies be encouraged to forward to the Secretary of the Conference reports on matters they have considered for distribution to the Local Secretaries

19 Protection of Privacy (Credit and Personal Data Reporting)

Mr. Stone presented the report of the Ontario Commissioners (Appendix M, page 178).

Mr. Caron then tabled a report of the Civil Code Revision Office entitled "Project de Loi sur les Agences d'Information" written by Ethel Groffier-Atala (Appendix N, page 196). Mr. Caron indicated that his Office's report was similar in aim and intent to the Ontario Commissioners' report

The following motion was adopted.

> RESOLVED that the matter of Protection of Privacy (Credit and Personal Data Reporting) be referred back to the Ontario and Quebec Commissioners with instructions to present a report and Draft Act at the 1973 meeting and that the Commissioners consider the reports presented at the present meeting and forward their comments as soon as possible to the Ontario and Quebec Commissioners

20. Protection of Privacy (Evidence)

After a brief discussion it was agreed on motion that this matter be referred back to the Quebec Commissioners for a report at the 1973 meeting

21 Protection of Privacy (Tort)

In 1971, this matter had been referred to the Manitoba Saskatchewan and British Columbia Commissioners for a report and, if possible, a draft bill.

Mr. Doherty presented the report of the Saskatchewan Commissioners which consisted of a Draft Protection of Privacy Act with interspersed commentary The reports of the British Columbia and the Manitoba Commissioners were also before the meeting and were dealt with and discussed in the course of the presentation by Mr. Doherty

The Manitoba Commissioners report consisted of section by section commentary on the Saskatchewan Draft. For convenience, the Saskatchewan Draft, with the Saskatchewan, Manitoba and British Columbia interspersed, is shown as Appendix O at page 202

The report of the British Columbia Commissioners (except for the attached Saskatchewan Draft with B C.'s interspersed commentary) is shown in Appendix P at page 210.

Eighth Session

2·15 p.m –5:00 p m.

21 Protection of Privacy (Tort) (continued)

There was a long and intensive discussion on the reports and in particular on the matters of fundamental policy in relation to the definition of the tort of invasion of privacy itself. The following resolution was adopted.

> RESOLVED that the Nova Scotia Commissioners be instructed to reconsider the matter of the defining "privacy" in relation to the tort of invasion of privacy and to prepare a Draft Act for presentation at the 1973 meeting which will reflect their definition
>
> AND BE IT FURTHER RESOLVED that the Criminal Law Section be invited to consider a reference to the Government of Canada for an amendment to the Criminal Code to prohibit the invasion of a person's privacy by harassment of that person

22. Protection of Privacy (Collection and Storage of Personalized Data Bank Information)

The report of the Canada Commissioners was presented by Mr. Thorson (Appendix Q, page 217) Mr Thorson suggested that because of the pending report of the Federal Task Force, it might be premature to ask any of the jurisdictions in the Conference to deal with this subject prior to the publication of the report.

The following resolution was adopted:

> RESOLVED that each jurisdiction be prepared to study the Federal Task Force report when it is available and be prepared to discuss it at the 1973 meeting

8. The Bills of Sale Act: Rule in Active Petroleum Products Ltd v Duggan (continued from Monday afternoon)

There was distributed to the meeting a draft amendment prepared by Messrs Thorson and Balkaran to section 9 of the Uniform Bills of Sale Act to remedy the result of the judgment. (Appendix R, page 221)

The following resolution was adopted·

RESOLVED that the amendment to the Uniform Bills of Sale Act in the form presented by Messrs Thorson and Balkaran be approved

FIFTH DAY

(FRIDAY, AUGUST 25TH, 1972)

Ninth Session

9.30 a.m.–12.05 p m.

23 Pleasure Boat Owners' Accident Liability

After a short discussion it was agreed on motion that the Manitoba Commissioners be instructed to prepare a report on the subject of pleasure boat owners accident liability for presentation at the 1973 meeting

24. Reciprocal Enforcement of Custody Orders

This matter had been referred to the Manitoba Commissioners in 1971 but had been omitted from the printed 1972 Agenda

The Manitoba Commissioners had previously distributed their report dated August 3, 1972, but their report was not formally presented to the meeting (Appendix S, page 222)

It was agreed on motion that the matter of reciprocal enforcement of custody orders be retained on the agenda and that the Manitoba Commissioners present their report at the 1973 meeting.

25 Family Relief (Dependants' Relief Act)

Mr Doherty on behalf of the Saskatchewan Commissioners presented a draft Dependants' Relief Act. (Appendix T, page 226).

There was an extensive discussion of the draft Act and a number of motions were passed involving changes in the Saskatchewan Draft which were intended as instructions to those who would prepare the redraft for the 1973 meeting.

The following motion was adopted.

RESOLVED that the draft Dependants' Relief Act before the meeting be referred back to the Saskatchewan Commissioners with instructions to prepare a new draft for presentation at the 1973 meeting having regard to the changes suggested at this meeting

AND BE IT FURTHER RESOLVED that the other jurisdictions be requested to send their comments on the draft Dependants' Relief Act presented at this meeting (and in particular the provisions from section 11 on) to the Saskatchewan Commissioners for the purpose of assisting them in the preparation of the new draft Act

26 Frustrated Contracts

Mr Higenbottam on behalf of the British Columbia Commissioners pointed out that under a letter of April 26th, 1972 he had distributed to the Commissioners copies of the "Report on the Need for Frustrated Contracts Legislation in British Columbia" issued by the Law Reform Commission of British Columbia in 1971 and also copies of Bill 34 for a new Frustrated Contracts Act which had been introduced in the British Columbia Legislature early in 1972 but not proceeded with

Mr. Fulton then gave an oral report to the meeting in which he gave a resume of the Law Reform Commission's report He also stated that the Conference had adopted a Uniform Frustrated Contracts Act in 1943 and that the Law Reform Commission's report had criticisms of the Uniform Act.

The following resolutions were adopted·

RESOLVED that the Conference consider a revision of the Uniform Frustrated Contracts Act

RESOLVED that the various Commissioners be asked to refer their comments on the "Report on the Need for Frustrated Contracts Legislation in British Columbia" to the British Columbia Commissioners on or before November 30, 1972 and that the British Columbia Commissioners be instructed to present a report on this subject at the 1973 meeting having regards to the comments received by that date

17 Presumption of Death Act (continued from Thursday morning)

Mr. Muldoon presented a new resolution on the matter of a provincially granted judicial declaration of presumption of death as a ground for obtaining a divorce under the Divorce Act (Canada) There was an extensive discussion on the resolution and two amendments were agreed to In its final form and as amended, the resolution adopted by the meeting was as follows

"RESOLVED that the Conference recommend that the Government of Canada favourably consider amending the Divorce Act to provide for dissolution of marriage upon a petition by a spouse to the Court for a decree of dissolution of the marriage by reason of presumed death, based upon an order declaring his or her spouse dead:

(a) for all purposes, or

(b) for purposes of remarriage,

and pronounced according to appropriate provincial legislation in that regard

AND BE IT FURTHER RESOLVED that consideration be given to enacting in the Divorce Act such provisions as may be necessary to facilitate, where desired, the granting of the decree of dissolution under the Divorce Act and the declaration of presumption of death under provincial legislation without a duplication of proceedings"

New Business

27. Age of Consent to Medical, Surgical and Dental Treatment

Mr Leal read to the meeting a letter dated July 13, 1972 sent to him by Dr. Glenn Sawyer, General Secretary of the Ontario Medical Association, on this subject. (Appendix U, page 236). The letter referred to the resolution of the Council of the Canadian Medical Association recommending that the age of consent be 16. In his reply, Mr. Leal had undertaken to bring the resolution to the attention of the Conference. In the course of the discussion it was pointed out that the United Kingdom Parliament in its Age of Majority Act had especially provided that the age of consent for medical, surgical and dental treatment be set at 16 rather than 18.

After considerable discussion the following resolution was adopted:

RESOLVED that the matter of the age of consent to medical, surgical and dental treatment be added to the Conference agenda and that the Ontario Commissioners be instructed to present a report on the matter to the 1973 meeting

28. Reciprocal Enforcement of Maintenance Orders Act

Mr Higenbottam of the British Columbia Commissioners made an oral submission to the meeting on this subject. (See also the reference to British Columbia's Family Relations Act in Appendix D.) Mr Higenbottam had during July, 1972 distributed to the Commissioners a memorandum dealing with the new B C legislation and its variations from the Uniform Act

The following resolution was adopted:

RESOLVED that the matter of the Reciprocal Enforcement of Maintenance Orders Act be retained on the Conference Agenda and that the matte be referred to the British Columbia Commissioners for a report at the 197 meeting

BE IT FURTHER RESOLVED that the various jurisdictions be re quested to provide comments to the British Columbia Commissioners i respect of the memorandum previously distributed by Mr Higenbottam s that the British Columbia Commissioners will have the benefit of them i preparing their report

29 Condominium Insurance Provisions

Mr. Smethurst of the Manitoba Commissioners gave an oral report indicating that he had written Mr. Wilson McLean, Q.C., counsel for the All-Canada Insurance Federation on this subject and that Mr McLean had in turn proposed some amendments to the uniform provisions. After discussion the following resolution was adopted.

> RESOLVED that the matter of the Uniform Condominium Insurance Provisions be again placed on the Conference agenda and that the Manitoba Commissioners be instructed to prepare a report at the 1973 meeting

The Uniform Law Section then adjourned.

MINUTES OF THE 1972 MEETING OF THE CRIMINAL LAW SECTION OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

The following members attended·

W. B Common, Q C'........Commissioner, Toronto, Ontario
A R. Dick, Q.C............Deputy Provincial Secretary for Justice, Ontario
J G. McIntyre, Q C.........Private Practice, Saskatchewan
William Henkel, Q.C........Director of Criminal Justice, Alberta.
S A. Friedman, Q C ....Deputy Attorney-General, Alberta
Roy S. Meldrum, Q.C ....Deputy Attorney-General, Saskatchewan
Gil Goodman..............Director of Prosecutions, Manitoba.
Mel Myers.................Private Practice, Manitoba
Gerald Boisvert............Associate Deputy Minister, Quebec
Stephen Cuddihy...........Chief Crown Attorney, Montreal, Quebec
Wendall MacKay...........Deputy Minister of Justice, P.E.I.
Gordon F Gregory.........Deputy Minister of Justice, New Brunswick.
H. Hazen Strange..........Director of Public Prosecutions, New Brunswick
Vincent P McCarthy, Q.C ..Deputy Minister of Justice, Newfoundland
Gilbert D Kennedy, Q C ....Deputy Attorney-General, British Columbia
W Murray Smith..........Director of Public Services, Yellowknife, N W T.
A Lloyd Caldwell..........Private Practice, Nova Scotia
Gordon S Gale.............Director (Criminal), Nova Scotia.
Fred Kaufman.............Private Practice, Quebec
Donald S Maxwell, Q C ....Deputy Attorney-General, Ottawa, Ontario.
Donald H Christie, Q.C.....Assistant Deputy Attorney-General, Ottawa, Ontario
S F Sommerfeld, Q C ... ..Director, Criminal Law Section, Ottawa, Ontario
Robert Normand...........Deputy Attorney-General, Quebec
Gordon E Pilkey, Q C ......Deputy Attorney-General, Manitoba
F W Callaghan, Q C ....Deputy Attorney-General, Ontario
William F Ryan...........Member, Law Reform Commission of Canada, Ottawa, Ontario

The following matters were considered by the Criminal Law Section:

1 and 38 *Sale of Firearm Replicas and Registration of Machine Guns*

These two items on the Agenda were considered together With respect to firearm replicas the consensus of the meeting was that there should be no recommendation for any action with respect to prohibition or regulation of the sale of firearm replicas With regard to machine guns it was moved by Dr Gilbert D. Kennedy and seconded by Mr. Rendall Dick that the Commissioners recommend that fully automatic weapons be classified as prohibited weapons under the Criminal Code. The motion was carried

2 *Bribery of Sports Participants*

The Commissioners recommended that no action be taken at this time with regard to specific legislation covering corruption and bribery in sporting events.

3 *Disposition of Outstanding Charges Against An Incarcerated Person*

The consensus of the Commissioners was that they did not recommend amendments to the Criminal Code to deal specifically with the disposition of charges outstanding against a person in a place other than the place of his incarceration. However, the Commissioners favoured the principle that a person incarcerated and who wishes to have outstanding charges against him disposed of and who does not wish to plead guilty be afforded an opportunity for such disposition at the earliest opportunity.

4 *Special Verdict of Insanity*

The Commissioners recommended that no action be taken with respect to the suggestion that a special verdict of "insane" replace the present verdict of "not guilty on account of insanity"

5 *Proceeding with Trial of the Accused in His Absence Where he Absconds in the Course of His Trial*

The Commissioners recommended that the Criminal Code be amended to enable a trial to proceed to verdict and sentence where the accused absconds in the course of his trial

6. *Defence of Alibi.*

A majority of the Commissioners were opposed to the recommendation that the Criminal Code be amended to provide for pre-trial disclosure of a defence of alibi.

7. *Restitution of Property After Trial.*

The consensus of the Commissioners was that restitution of property to a third party claimant did not appear to create a problem and no action was recommended.

8. *Section 725 of the Criminal Code.*

The Commissioners recommended that Section 725 of the Criminal Code be amended so as to permit an accused to be tried by a summary conviction court other than the court by which his plea has been taken without a waiver pursuant to subsection (4)

9. *Section 465(c) and Section 738(5) of the Criminal Code.*

The Commissioners recommended that these sections of the Criminal Code be amended so as to permit an accused to be remanded to attend before a psychiatrist or out-patient facility as an alternative to being remanded in custody for observation.

10. *Section 629(1) of the Criminal Code.*

The recommendation was placed before the meeting that the Criminal Code be amended to provide that a subpoena may be served by any peace officer or by such other person authorized by the judicial officer issuing the subpoena. However, after discussion, a majority of the Commissioners decided to defer the item to next year's meeting for further consideration.

11. *Section 663, 664 and 666 of the Criminal Code.*

A majority of the Commissioners were opposed to the recommendation that Section 664 of the Criminal Code be amended to permit an accused to be brought back for an additional sentence for the offence of which he was originally convicted where he has breached a probation order made under Section 663(1)(b) as is the case where the probation order was made under Section 663(1)(a).

The Commissioners unanimously recommended that Section 663(1)(b) be extended to permit a probation order to be made where the accused is both fined and imprisoned.

20 *Section 663 of the Criminal Code.*

This item was dealt with in conjunction with Item 11. The Commissioners were not in favour of the recommendation that there be an amendment to the Criminal Code to exclude orders of probation in any case where the accused is sentenced to a penitentiary

12. *Sworn Statements "Permitted, Authorized or Required by Law" Within the Meaning of Section 122 of the Criminal Code.*

A majority of the Commissioners recommended that Section 126 of the Criminal Code be amended to include the offence of making a false affidavit under circumstances not falling within Section 122 of the Criminal Code.

13. *Notices of Appeal by Way of Trial de Novo (Section 750 of the Criminal Code).*

The Commissioners recommended that no action be taken with respect to the proposal that there should be some specific notice to the Crown in the case of an appeal by way of trial de novo by the defendant. However, Messrs Cuddihy and Kaufman will consider whether the problem merits further consideration and if so, the topic will be placed on the agenda for next year's meeting

14. *Jurisdiction of the Court when Court House Closed Unexpectedly by Reason of Public Service Strike.*

The Commissioners recommended that no action be taken on this item.

15 *Section 626 and 627 of the Criminal Code—Discretion of a Justice of the Peace in Issuing Subpoenas.*

The Commissioners did not favour a recommendation that the Criminal Code be amended to make it obligatory for a Justice of the Peace or Magistrate to issue a subpoena for any defence witness requested by counsel for the defence

16. *Provision for Bringing Treaty Indians Resident on Reserves on to the Jurors Roles.*

The Commissioners recommended unanimously that the provinces review the provisions of their Jury Acts in relation to the rights and responsibilities of native persons and report back to the next Conference—such report to be transmitted to the Secretary prior to July 1, 1973

17. *Section 338—Criminal Code*

A majority of the Commissioners recommended that no action be taken to introduce a distinction in this Section between frauds involving less than $200.00 and frauds involving more than $200.00, similar to the distinction that now exists under sections 294, 313 and 320 of the Criminal Code

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

This Item had appeared as Item 27 of the Agenda for the 1971 meeting and had in turn been carried over from Item 50 of the 1970 Agenda. Mr Common was to submit a report on this topic to the 1972 meeting and the report was received and distributed with the Agenda (see Appendix V, page 237)

The report of Mr. Common was gratefully acknowledged and received by the Section. The Commissioners unanimously recommended that having regard to the amendments effected by Bill C-2 in this area, Section 182 of the Criminal Code, which was not affected by Bill C-2 should be further considered and placed on the Agenda for the next meeting of the Criminal Law Section

19. *Amendments to Appeal Procedure with Respect to Indictable Offences: Section 603(1)(a)(iii) or Section 621 Criminal Code.*

It was recommended by Dr G. D Kennedy that the Crown be given the right of an appeal to the Supreme Court of Canada with the leave of that Court where a jury's verdict is set aside by the Court of Appeal on a question of fact. After discussion, Dr. Kennedy withdrew his recommendation.

21 *Bail Reform Act*

The Commissioners were asked to report to the meeting their general experience with the functioning of the Bail Reform Act The following observations were made·

Mr Callaghan (Ontario): The legislation is essentially successful but it is to soon to be able to make any detailed analysis of results He suggested that an accused be required to sign an appearance notice and indicated that the police often adopt this as a policy

Mr Friedman (Alberta). There appears to be no problem in Alberta although it is too soon to make a proper evaluation There does not appear to be an excessive rate of failure to appear.

Mr. MacKay (Prince Edward Island): There is some resistance among Municipal Police Forces but in general there is no problem and no complaints

Mr Boisvert (Quebec) The new legislation was applied easily and rapidly in Montreal Elsewhere it is being applied more slowly There is some resistance from Municipal Police Forces

Mr. Meldrum (Saskatchewan) The legislation seems to be working Mr. MacIntyre observed that the police have accepted it.

Dr. Kennedy (British Columbia): There are no real problems with the legislation and no evidence of any greater rate of failure to appear However, it is too soon to really analyze the situation

Mr. Goodman (Manitoba): There is no complaint from the Winnipeg Police Force. He endorses the idea of the signing of the appearance notice by the accused not only for its persuasive powers but for its identification value as well

Mr. McCarthy (Newfoundland): The Act is working well and arrests have dropped There seems to be little crime while the accused is on appearance notice. There is no problem with the magistrates and the police believe it works well.

Mr Gale (Nova Scotia). The police reaction to the legislation is generally very good although there has been some resistance to the change

Mr Gregory (New Brunswick): There are no problems with the Bail Reform Act

Mr Murray Smith (Northwest Territories) There are no problems with the Bail Reform Act.

Written reports were also received from representatives of Nova Scotia and British Columbia by the Secretary prior to the meeting, copies of which were distributed to the Commissioners at the meeting The reports appear in Appendix W at page 243

22 *Bail Registry*.

Chief Superintendent A C Potter, R.C.M. Police, kindly attended and explained for the benefit of the Commissioners the operation and scope of the Central Computer Service of the Canadian Police Information Centre. Chief Superintendent Potter was thanked by the chair and the Commissioners recorded their appreciation for his trouble

23. *Section 180(3) of the Criminal Code.*

The Commissioners unanimously recommended that the Criminal Code be amended to exempt from the definition of slot machine any machines dispensing entertainment only, including free games, but not wares, merchandise or money.

24 *The Right to Counsel (Item 39. Right to Counsel—Breathalyzer Provisions of the Criminal Code—Regina v. Brownridge was also considered).*

After considerable discussion by the Commissioners it was moved by Mr. Goodman and seconded by Dr. Kennedy that the Commissioners do not agree with the conclusions of the Civil Liberties Association on which their proposals are based, but endorse the principle that all accused persons should have access to counsel, and that the state should provide counsel to all needy persons accused of criminal offences The motion was defeated by a majority of the Commissioners.

It was moved by Mr. Kaufman and seconded by Mr. MacKay that no action be taken on this Item. After some discussion the motion was withdrawn.

It was moved by Mr Rendall Dick and seconded by Mr. Frank Callaghan that the Conference supports the principle that an accused person has the right to contact, retain and instruct counsel and recommends the further development of the services that will make that right effective, including legal aid services for those in need of them. The motion was carried unanimously

It was moved by Mr. Ryan and seconded by Mr. Wendall MacKay that no further recommendations be made with respect to this Item. The motion was carried by a majority of the Commissioners.

25 *Resolutions Passed by the British Columbia Criminal Justice Subsection of the Canadian Bar Association—June, 1972.*

1. Possession of a restricted weapon to be limited to a peace or public officer or under permit limited in time for the purpose of protecting human life in connection with a lawful occupation

It was moved by Mr MacIntyre and seconded by Mr Goodman that no action be taken on this Item. The motion was carried.

2 Possession of any unregistered firearm to be prohibited.

The Commissioners unanimously recommended that no action be taken on this Item.

3. Section 105(5) of the Criminal Code be amended so that the order under subsection (b) may also order that the individual not possess any firearm, etc., as well as that he not be supplied with any such article

It was moved by Dr. Kennedy and seconded by Mr Goodman that the Commissioners endorse this Resolution. The motion was carried.

4. A certificate of competence in the care and use of firearms to be a prerequisite to obtaining registration of a firearm.

It was moved by Mr. MacIntyre and seconded by Mr. Kaufman that no action be recommended on this Resolution The motion was carried.

5. Section 9 of the Criminal Code to be amended so as to provide the same appeal procedure for a conviction for contempt not committed in the face of the court

The Commissioners observed that this Item is covered by the amendment to Section 9(1) of the Criminal Code in Section 4 of Chapter 13, 21 Elizabeth II. No further action was recommended.

6 Certain portions of Section 175 of the Criminal Code relating to vagrancy to be repealed.

Dr. Kennedy observed that this resolution had been tabled by the Criminal Justice Subsection pending the disposition of Bill C-2 which at that time was in the House of Commons. No action was recommended.

26 *Publicity Concerning an Accused Person in Court.*

It was moved by Mr. Kaufman and seconded by Dr. Kennedy that the Commissioners recommend an amendment to the Criminal Code making it mandatory for the Justice acting under Section 457.2(1) of the Criminal Code to order, on the application of the accused, that the evidence, information and representations and reasons if any showing cause why the detention of the accused in custody is justified shall not be published, so as to conform to the procedure taken under Section 467 where an order against publication is made at the commencement of a preliminary inquiry. The motion was carried unanimously.

The Commissioners also recommended that no further action be taken with respect to the general question posed but that it should be replaced on the Agenda at a later time if this becomes necessary

27 *Criminal Code Section 605(1)(a) Crown Appeals.*

The Commissioners unanimously recommended that no action be taken with respect to the suggestion that the Crown be given the right of appeal against a judgment of the Supreme Court of a province quashing an indictment that does not amount to an acquittal of the accused.

28. *Recommendation of the Canadian Automobile Association re Impaired Driving*

Mr Friedman noted that a pilot project similar to that recommended by the Canadian Automobile Association was under way in Edmonton, Calgary and Lethbridge with some indications of success. Mr. Gale noted that in Nova Scotia a similar pilot project is also being considered. Mr MacKay indicated that Prince Edward Island hoped to bring in a similar programme.

The Commissioners noted the discussions and the contents of the brief of the Canadian Automobile Association

29. *Nomenclature for Various Types of Homicide Under the Criminal Code.*

It was moved by Dr Kennedy and seconded by Mr Goodman that the Commissioners recommend that the term "non-capital murder" be dropped and the classification of murder and capital murder be adopted. The motion was carried unanimously.

30 *Transcripts on Preliminary Inquiries—Section 468 of the Criminal Code*

It was moved by Mr Goodman and seconded by Mr Cuddihy that the Commissioners recommend that no action be taken with respect to the recommendation that the requirement under Section 468 of the Criminal Code that a record be taken of the evidence adduced on a preliminary inquiry be dispensed with. The motion was carried.

31 *Extra Provincial Sale of Lottery Tickets*

The Commissioners were unanimously of the view that the solution for any province having a problem with out-of-province lottery tickets is to notify the province of origin of the sale

of such tickets so that appropriate action may be taken to confine sales to the province in which the lottery is licensed.

It was moved by Mr. Meldrum and seconded by Mr. Kaufman that Section 190 of the Criminal Code be amended to provide that a province may agree with another province that the lottery tickets of one province, whether a provincial lottery or one licensed by the province, may be sold in that other province, and to provide that a lottery licensed in one province may also be licensed in another province by that other province with the consent of the first province The motion was carried

32 *Section 23(3) of the Criminal Code.*

A majority of the Commissioners recommended that Section 23(3) of the Criminal Code be repealed.

33. *Section 197(1) of the Criminal Code*

It was moved by Mr. MacIntyre and seconded by Dr. Kennedy that the Commissioners accept the recommendation of the Report of the Royal Commission on the Status of Women that Section 197(1) of the Criminal Code be amended so as to make a wife responsible to buy necessaries of life for her husband in line with the responsibility imposed on the husband under Section 197(1)(b) to provide necessaries of life for his wife. The motion was carried unanimously.

34. *Relationship Between the Criminal Law Section of the Conference and the Law Reform Commission of Canada.*

Mr. Ryan representing the Federal Law Reform Commission was present and there was a discussion concerning exchange of information between this group and the Law Reform Commission.

In general the Commissioners will be kept informed of the proposed recommendations of the Law Reform Commission and will be furnished by the latter with all study papers and Commission working papers leading to the formulation of recommendations. The Commissioners will also keep the Law Reform Commission advised of its views on particular items prior to final reports being prepared by the Law Reform Commission.

The Commissioners also indicated that they would be prepared to meet *ad hoc* if necessary to study or consider particular matters of interest to the Law Reform Commission as they arise.

35. *Weekend Sentences—Section 663(1)(c) of the Criminal Code*

It was moved by Mr Meldrum and seconded by Mr. Myers that Section 646(11) and Section 722(10) of the Criminal Code be amended to provide that on expiration of time to pay a fine the court may order that a default sentence of not more than 90 days, or where that portion of the default sentence remaining is not more than 90 days, be served intermitently, whether on application of the person convicted or on the court's own initiative. The motion was carried unanimously.

36. *Protection of Witnesses at Coroners' Inquests.*

The Commissioners recommended that there be no legislative amendments to the Criminal Code relating to the compellability of suspected persons as witnesses at coroners' inquests.

It was moved by Mr. Goodman and seconded by Mr. Myers that the Commissioners endorse the general principle that coroners' inquests should not be held where the Crown intends to lay a charge in respect of the death of a person. The motion was carried

It was moved by Mr. MacKay and seconded by Dr. Kennedy that a Committee be appointed consisting of representatives of Ontario, Quebec and the Federal Government to study the question of the publication of evidence at coroners' inquests indicating the commission of an offence by an identifiable person and to report back to the Conference next year. The motion was defeated.

It was moved by Mr. Murray Smith and seconded by Mr MacIntyre that the federal representatives at the Conference prepare a study of the procedure affecting coroners inquests including the publication of evidence relating thereto in relation to criminal prosecutions and report to the nex meeting of the Commissioners. The motion was defeated.

It was moved by Mr. Goodman and seconded by Mr Dic that in the light of the general principle adopted that an ir quest should not be held where the Crown intends to la charges in respect of the death of a person, there is no need t deal with the question of the publication of evidence at coroner's inquest indicating the guilt of any particular perso The motion was carried

37 *Cannabis—A Report of the Commission of Inquiry Into the Non-Medical Use of Drugs (LeDain Report).*

Mr. MacKay stated that the only view he could express on the subject was the one presented by his Government to the LeDain Commission and that he had nothing to add to those representations. Mr. Dick asked that there be consultation with the provinces before there is any implementation of recommendations in the LeDain Report. He indicated that his Government gave general support to the policy statements made by the Federal Government concerning cannabis

There were no comments from the other Commissioners

40 *Status of Accused After Committal Where His Appearance has been Completely Voluntary.*

The Commissioners recommended that no action be taken with respect to the question of the status of a person who has been committed for trial but who has appeared voluntarily without having been summonsed, put on an appearance notice or promised to appear, or having been in custody.

41 *Costs—Criminal Cases.*

The Commissioners recommended that no action be taken at this time with respect to whether the Criminal Code should be amended to provide for the award of costs to an accused person acquitted, discharged at a preliminary inquiry or in respect of whom the charge has been withdrawn

42. *Section 457.8(2) of the Criminal Code*

It was moved by Mr. Cuddihy and seconded by Mr. Kaufman that the Commissioners recommend no action with respect to the submission that an order for the release of an accused person in the course of his trial pursuant to this subsection be considered and made by a judge other than the judge presiding at the trial of the accused The motion was carried.

43. *Native People.*

Mr Maxwell expressed the viewpoint of the Federal Government that there should be encouragement for native people to participate in the administration of justice, greater communication between native people and the judicial process, and that the Federal Government would be prepared to offer financial and administrative assistance in this regard. The Commissioners from the various provinces reviewed their own programmes with native people and indicated some of the problems involved.

Mr Maxwell also suggested that the Federal Government would be prepared to convene a meeting of provincial judges selected by the provinces on a national basis similar to conferences of superior and county court judges The Commissioners outlined the extent to which and the manner in which similar conferences take place provincially and were generally favourable to the suggestion.

The consensus was that there was no objection in principle to this approach by the federal authorities.

44 *Pari-Mutuel Betting—Dog Races*

It was moved by Mr. Goodman and seconded by Mr Dick that the Commissioners recommend no action with respect to the suggestion that legislation relating to pari-mutuel betting on horse races should be extended to dog races The motion was carried.

45. *Criminal Records Act.*

The views of the Commissioners were generally favourable to the idea of enacting provincial legislation which would be complementary to Section 8 of the Federal Criminal Records Act dealing with applications for employment under federal jurisdiction.

46 *Off-Track Pari-Mutuel Betting.*

The Commissioners in the course of a lengthy discussion presented their views concerning off-track betting within a province and the Bill introduced in the House of Commons on June 28, 1972

It was moved by Dr. Kennedy and seconded by Mr Dick that the Commissioners reaffirm their opposition to off-track betting subject to a proviso that if any province itself, and not through licensees, wishes to operate an off-track betting scheme it may do so under authority from the Governor-in-Council The motion was defeated.

It was moved by Mr MacIntyre and seconded by Mr Dick that the principle of off-track betting in the Bill be approved. The motion was carried

47 *Section 238 of the Criminal Code.*

It was moved by Mr MacIntyre and seconded by Mr. Henkel that the Commissioners recommend that Section 238(1) relating to orders by a magistrate prohibiting driving be

repealed, and that any consequential amendment also be recommended. The motion was carried

It was moved by Dr Kennedy and seconded by Mr Goodman that the Commissioners recommend no action on Section 238(3) except to repeal subsection (b) which is consequential upon the repeal of Section 238(1). The motion was carried unanimously.

48 *Qualification of Jurors in Criminal Matters*

It was moved by Mr MacKay and seconded by Mr Kaufman that this item be carried over until the 1973 meeting of the Conference and that a draft Uniform Act be prepared by the Federal authorities for the consideration of the Conference and such other action as may be appropriate The motion was carried

49 *Canada—U.S A. Extradition Treaty.*

There was a general discussion of the provisions and effect of the Treaty.

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50. *Committee Report on Suggested Changes to the Criminal Code, Sections 146-158*

The Committee was appointed at the 1971 Conference of Commissioners on Uniformity of Legislation in Canada to study and recommend changes where they deemed it advisable to Sections 146 to 158 of the Criminal Code. The Report was distributed to the Commissioners attending the Conference and the recommendations were considered by the Criminal Law Section. The Report itself appears in Appendix X at page 246 The Committee was made up of Mr Friedman, Doctor Kennedy and Mr. Meldrum

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The Commissioners took the following position with respect to the recommendations:

Section 146:

"146. (1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and

(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life

(2) Every male person who has sexual intercourse with a female person who

(a) is not his wife,

(b) is of previously chaste character, and

(c) is fourteen years of age or more and is under the age of sixteen years,

whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years.

(3) Where an accused is charged with an offence under subsection (2), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person"

Recommendation A re Section 146(1):

"(1) The Committee agrees that the absolute nature of the offence should continue but raises for discussion whether provision should be made that a person no more than two years older than the victim could be found not guilty by a court if the accused established that he reasonably believed that the victim was over fourteen years of age.

(2) We recommend no changes in the maximum term of imprisonment.

(3) Section 146(1) should be extended to protect young boys under fourteen from exploitation and corruption and make females also liable for having sexual intercourse with a boy under fourteen.

(4) The Committee also agrees that section 3(1) defining when a person attains a given age should be amended by deleting "is fully completed" and inserting in appropriate places the words "on the commencement of".

With respect to Recommendation (1) the Commissioners recommended that the absolute nature of the offence should continue. However, they agreed that a person no more than two years older than the victim should have a defence if he has reasonable cause to believe and does believe that the victim is more than 14 years of age and provided there is consent.

With respect to Recommendation (2) a majority of the Commissioners recommended that there be no change in the maximum term of imprisonment

With respect to Recommendation (3) a majority of the Commissioners recommended that the Section be extended to protect males under 14 as well as females and to make females liable for having sexual intercourse with a boy under 14

With respect to Recommendation (4) the Commissioners adopted the Committee's recommendation with respect to the time of attaining a given age be adopted.

Recommendation B re Section 146(2):

> "(1) Combine section 146(2) with section 151 by repealing section 146(2) and by amending section 151 to make it applicable to female persons between the ages of fourteen and eighteen.
>
> If Recommendation #1 is not acceptable, your Committee makes the following recommendations:
>
> (1) Section 146(2) should be changed to relieve males from liability where they reasonably believe the girl is over sixteen. The similar situation with respect to section 146(1) where the accused is no more than two or three years older than the victim is raised for consideration insofar as it is covered in Recommendation (3).
>
> (2) The law should apply equally to males and females
>
> (3) An age limitation should be imposed so that males cannot be liable under section 146(2) if they are under the age of sixteen. The proposed change would also make section 146(2) parallel to section 151 where a male is not liable for seducing a female sixteen to eighteen unless he is eighteen years or more"

With respect to Recommendation (1) the Commissioners were unanimously of the view that the recommendation of the Committee should be adopted.

Recommendation C re Section 146(3):

> "The purpose of section 146(3) is to exonerate the male where he is not more to blame than the female If sections 146(1) and (2) are to be changed to make females also liable, section 146(3) should be changed correspondingly The subsection would disappear if recommendation #1 re section 146(2) were adopted".

With respect to Recommendation C in view of the Committee's recommendation with respect to Section 146(2) the Commissioners noted that no action was required

Section 147.

"147 No male person shall be deemed to commit an offence under section 144, 145, 146 or 150 while is under the age of fourteen years".

Recommendation D.

"This section should be amended to make it apply equally to males and females by deleting the word "male" in line one"

With respect to Recommendation D the Commissioners were of the view that that section should be amended as recommended by the Committee

Section 148:

"148 Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person

(a) who is not his wife, and

(b) who is and who he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile,

is guilty of an indictable offence and is liable to imprisonment for five years"

Recommendation E

"The section should be changed to make females liable also for having sexual intercourse with males who are feeble-minded, insane, or is an idiot or imbecile".

With respect to Recommendation E the Commissioners were unanimously of the opinion that the recommendation of the Committee should be adopted.

Section 149

"149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent, that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act"

Recommendation F

"(1) It was agreed at the 1971 Conference that section 149 and section 156 were to be combined

(2) The section should apply equally to both sexes. At present the legislation does not include a female assault on a male

(3) The maximum sentence of five years in section 149 should be retained rather than that of ten years in section 156"

With respect to Recommendation F the Commissioners were unanimously of the view that the recommendation of the Committee should be adopted

Section 150.

"150. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild as the case may be, has sexual intercourse with that person

(2) Every one who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years, and in the case of a male person is liable, in addition, to be whipped

(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment upon her

(4) In this section, 'brother' and 'sister', respectively, include half-brother and half-sister"

Recommendation G

"(1) All provisions of this section should apply equally to male persons and female persons alike

(2) If a person is successful in raising section 150(3) as a defence, that person should be acquitted.

(3) Consideration should be given to removing this as a separate offence in respect to consenting adults if medical research shows no great problem"

A majority of the Commissioners agreed that the recommendation of the Committee should be adopted

Section 151.

"151. Every male person who, being eighteen years of age or more, seduces a female person of previously chaste character who is sixteen years or more but less than eighteen years of age is guilty of an indictable offence and is liable to imprisonment for two years".

Recommendation H.

"(1) The provision should be left in to show that this type of behavior is not condoned. However, the offence should be changed from an indictable one to one punishable on summary conviction where the maximum sentence is imprisonment for six months plus a $500.00 fine.

(2) To make the law equal, the provision should be changed to make females as well as males liable.

(3) Lower the age from sixteen to fourteen

(4) The section should be moved so that it follows section 146 and reflects the two or three year age differential proposed for that section"

With respect to Recommendation H (1) a majority of the Commissioners agreed that the recommendations of the Committee should be adopted.

With respect to Recommendation H (2) and (3) the Commissioners observed that the principle stated therein had already been approved and agreed that the recommendation should be adopted.

With respect to Recommendation H (4) a majority of the Commissioners agreed that the recommendation of the Committee should be adopted

Section 152.

"152. Every male person, being twenty-one years of age or more, who, under promise of marriage, seduces an unmarried female person of previously chaste character who is less than twenty-one years of age is guilty of an indictable offence and is liable to imprisonment for two years".

Recommendation I.

"This section should be repealed".

A majority of Commissioners agreed that this Section should be repealed as recommended by the Committee

Section 153.

"153 (1) Every male person who,

(a) has illicit sexual intercourse with his step-daughter, foster daughter or female ward, or

(b) has illicit sexual intercourse with a female person of previously chaste character and under the age of twenty-one years who,

(i) is in his employment,

(ii) is in a common, but not necessarily similar, employment with him and is, in respect of her employment or work, under or in any way subject to his control or direction, or

(iii) receives her wages or salary directly or indirectly from him,

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

(2) Where an accused is charged with an offence under paragraph (1)(b), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person".

Recommendations J re Paragraph 153(1)(a).

"(1) The scope of this section should be restricted to apply to persons under the age of eighteen

(2) The definition of step-daughter should be changed to include any daughter of the accused's wife to whom the accused is not the father

(3) The section should be changed to make a female also liable for having sexual intercourse with a step-son, foster son or male ward".

With respect to Recommendation J(1) a majority of the Commissioners agreed that the recommendation of the Committee should be adopted.

With respect to Recommendation J(2) the Commissioners agreed unanimously that the recommendation of the Committee should be adopted

With respect to Recommendation J(3) a majority of the Commissioners agreed that the recommendation of the Committee should be adopted

Recommendations K re Paragraph 153(1)(b).

"(1) This paragraph should be repealed"

If Recommendation #1 is not acceptable, the Committee made the following recommendations.

(1) The section should be so worded that the employer would be liable only if he induced the girl to have sexual intercourse with him under fear of dismissal if she did not.

(2) The age for the male or female victim should be lowered from twenty-one to eighteen.

(3) Female employers should be liable for an equivalent offence

(4) If paragraph 153(1)(b) is changed to make females liable subsection 153(2) should be changed correspondingly.

(5) Paragraph 153(1)(b) should be made a summary conviction offence rather than an indictable offence".

With respect to Recommendation K(1) a majority of the Commissioners agreed that the paragraph should be repealed as recommended by the Committee

Section 154·

"154 Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years"

Recommendation L re Section 154:

"It should be treated as an anomaly and repealed"

A majority of the Commissioners agreed that the Section should be repealed as recommended by the Committee

Section 155:

"155 Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years".

Recommendation M re Buggery

"This section should be repealed"

The Commissioners agreed unanimously that this Section should be repealed as recommended by the Committee

Recommendation M re Bestiality

"(1) Repeal section 155

(2) If the recommendation not agreed with re bestiality, then repeal reference to buggery and reduce the penalty from 14 years to either two years or summary conviction offence

(3) Provide a new offence for a person compelling an act of bestiality This recommendation is independent of recommendations (1) or (2) and contemplates a more serious offence "

With respect to Recommendation M (3) a majority of the Commissioners agreed that the Recommendation of the Committee that provision be made for a new offence of compelling an act of bestiality be adopted The Commissioners also agreed that it should be treated as a more serious offence and carry a maximum penalty of 5 years

Section 156.

"156. Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped".

Recommendation N:

"Repeal section 156".

With respect to Recommendation N the Commissioners agreed unanimously that the Section should be repealed as recommended by the Committee.

Section 157:

"157. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years".

Recommendation N (sic):

"Repeal section 157".

With respect to Recommendation N (sic) the Commissioners agreed unanimously that the Section should be repealed as recommended by the Committee

Section 158:

"158. (1) Sections 155 and 157 do not apply to any act committed in private between,

(a) a husband and his wife, and

(b) any two persons, each of whom is twenty-one years or more of age,

both of whom consent to the commission of the act.

(2) For the purposes of subsection (1),

(a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and

(b) a person shall be deemed not to consent to the commission of an act,

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or

(ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile".

Recommendation O

"(1) Repeal if both sections 155 and 157 are repealed.

(2) The age should be lowered to eighteen if either sections 155 or 157 are not fully repealed".

With respect to Recommendation O a majority of the Commissioners agreed that the recommendations of the Committee should be adopted.

Section 3(6):

"3. . . . .

(6) For the purposes of this Act, sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted"

Recommendation P:

"It is recommended that the definition of intercourse be amended to include oral and anal intercourse".

With respect to Recommendation P the Commissioners agreed that the definition of intercourse should be amended as recommended by the Committee.

Section 142:

> *"142. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 144, 145, subsection 146(1) or (2) or subsection 149(1), the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true"*

Recommendation Q:

> "This section should be amended to apply to male and female persons alike".

The Commissioners agreed unanimously that the Section should be amended as recommended by the Committee

Section 143:

> *"143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,*
>
> *(a) without her consent, or*
>
> *(b) with her consent if the consent,*
>
> *(i) is extorted by threats or fear of bodily harm,*
>
> *(ii) is obtained by personating her husband, or*
>
> *(iii) is obtained by false and fraudulent representations as to the nature and quality of the act".*

Recommendation R:

> "This section should be amended to apply to male and female persons alike".

A majority of the Commissioners agreed that the Recommendation of the Committee should be adopted.

The Commissioners recorded their appreciation of the Committee's work.

Other Business

(*1*) *Lord's Day Act:*

Mr. Goodman observed that at the Conference in 1971 the consensus of the Commissioners was that the Lord's Day Act should be repealed and such legislation should be left to provinces. He asked the provinces what action they were currently taking with respect to prosecutions under the Lord's Day Act Mr Callaghan (Ontario) and Mr Boisvert (Quebec) indicated that some prosecutions were undertaken depending upon the type of store involved where there was a complaint. Mr Henkel (Alberta) indicated the same position as Ontario and stated that the judgment of Mr. Justice Riley which held the Lord's Day Act to be *ultra vires* was being appealed. Mr. Murray Smith (Northwest Territories) indicates that there were no prosecutions in the Northwest Territories. Mr. Meldrum (Saskatchewan) said there had been no prosecutions in Saskatchewan for many years

(*2*) *Criminal Law Revision Committee:*

Dr. Kennedy asked that the Eleventh Report on Evidence of the Criminal Law Revision Committee in Britain be placed on the Agenda for consideration by the 1973 Conference.

(*3*) *Nominating Committee.*

The Nominating Committee presented the names of Mr Vincent McCarthy for Chairman of the Criminal Law Section and Mr S. F. Sommerfeld as Secretary of the Section for 1973. It was moved by Mr Friedman and seconded by Mr MacIntyre that the report of the Nominating Committee be adopted. The motion was carried.

MINUTES OF THE CLOSING PLENARY SESSION

(FRIDAY, AUGUST 25TH, 1972)

12:20 p.m.–12:45 p m.

The Plenary Session resumed with the President, Mr. A R. Dick, Q.C., in the chair

The President introduced to the meeting the Honourable Roy Romanow, Attorney-General for Saskatchewan, and gave him the thanks of the meeting for attending and contributing to the work of the Conference.

13. Report of Auditors

Mr. McIntyre reported that he and Mr. MacKay had examined the statement of the Treasurer and certified that they had found it to be correct

It was agreed on motion that the Treasurer's report be adopted.

It was also agreed that the Conference express its thanks to Mr Howard Crosby for his services as Treasurer of the Conference and for a job well done.

14. Appreciation

Mr. Bowker on behalf of the Resolutions Committee moved the following resolution·

M le président

Au nom des invités à cette conférence, mon comité veut exprimer ses remerciements à nos hôtes, les délégués de la belle province

Nous avons passé cinq jours délicieux au bord du beau lac Beauport, parmi les collines couvertes d'érables, les plus beaux bois du Canada, et qui déjà deviennent rouges

Puis-je vous rappeler M le président, la bonne volonté dont ont fait preuvé nos hôtes, à notre égard Pendant deux jours ils ont démontré le comble de bonté Ils nous ont apporté la brume des Maritimes, le vent d'Ontario, le froid des prairies et la pluie de l'océan pacifique—tout pour nous faire sentir chez nous

RESOLVED THAT the Conference express its sincere thanks

(a) to the Quebec Commissioners for the fine arrangements and accommodation provided for the meetings of the Conference and the Drafting Workshop and for their gracious hospitality to the members, their wives and families, including the sight-seeing tour of the Quebec area on Wednesday afternoon;

(b) to the government of the Province of Quebec for the memorable cruise on the St Lawrence River on Monday evening, and for the reception on the occasion of the banquet on Tuesday evening;

(c) to the Honourable Mr Choquette for his presence and his timely address at the banquet,

(d) to the Bar Association of the Province of Quebec for the reception at the Place Royale on Thursday evening

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

The resolution was adopted unanimously

15. Proceedings of the Uniform Law Section

The President gave an oral report to the meeting and recounted the results of a meeting of the Executive and the past Presidents on the previous Wednesday with respect to this subject In his report the President indicated that Mr Acorn had undertaken to examine the rules of the Conference (as contained in what is commonly called the "Fisher Report" of which copies are now rare) and to reduce them to a concise draft form. Once the new draft rules were prepared, Mr. Acorn would distribute them to the Commissioners. The President expressed the hope that a re-examination of the Conference procedure in this form would prove useful.

The President invited the various jurisdictions to send their comments on the rules to the Secretary as soon as possible.

The President outlined some of the comments and suggestions that had been put forward at the meeting of the Executive and past Presidents·

(a) The Rules of the Conference should be regarded as guidelines and should not be applied rigidly

(b) Background papers and reports should be distributed well in advance of the annual meetings There should be more co-operation with the law reform commissions in Canada and other law reform bodies to prepare background material on any subject matter being considered by the Conference.

(c) There should be a circulation of background papers or other support material well in advance of the annual meeting so that the various jurisdictions might make their comments in sufficient time to allow those preparing the report to have the benefit of the commentary and to allow those comments to be reflected in its final report

(d) It should be the duty of the Assistant Secretary of the Conference to assist Committees of the Conference and to assist in the circulation of reports and the co-ordination of the Conference's activities

(e) There should be a review of the model Acts of the Conference with a view to having a new and updated volume published. It was suggested that the provinces should let the Secretary know which Uniform Acts they have adopted and which they have adopted with variations or in part only In the latter cases, they should indicate what the variations are or what part was adopted Similarly, if they have neglected or declined to adopt a Model Act, they should so indicate and, if possible, with reasons

(f) The Conference's custom of avoiding detailed discussion on points of drafting may have, as its price, a disinclination on the part of some jurisdictions to adopt the Uniform Act It was suggested that the Conference might consider a practice similar to that adopted in the National Conference on Uniform State Laws in the United States of distinguishing between "Uniform Acts" to which their Conference has given full approval, and "Model Acts" which do not have the same endorsement but which are simply published and made available for those States that wish to use them as the basis for their own legislation.

16 Report of the Nominating Committee

Mr. Brissenden, on behalf of the Nominating Committee, submitted the following nominations of offices of the Conference for the year 1972-73

Honorary President....... A R Dick, Q C , Toronto
President................ R H. Tallin, Winnipeg
1st Vice-President......... D S Thorson, Q C , Ottawa
2nd Vice-President........ Robert Normand, Q C , Quebec
Treasurer................ A. N Stone, Q.C , Toronto
Secretary................ Glen W Acorn, Edmonton

The report of the Committee was adopted and those nominated were declared elected

17 Report of the Criminal Law Section

Mr Gordon Pilkey, Chairman of the Criminal Law Section, gave the following report to the meeting·

Twenty-six members of the Conference attended meetings of the Criminal Law Section with representatives from the federal government, all the provinces, and the Northwest Territories from Monday, August 21st to Friday, August 25th Forty-nine topics dealing with substantive and procedural matters relating to Criminal Law were discussed The relation-

ship between the Section and the Law Reform Commission of Canada in relation to our common interests in the continuing review and reform of the Criminal Law was considered Bill Ryan of the Commission attended and participated in these discussions.

The Section elected the following officers for the coming year·

Chairman............Vincent McCarthy, Newfoundland
Secretary............S. F. Sommerfeld, Ottawa

On motion, the report was adopted.

18. The next Annual Meeting

Dr Gilbert Kennedy on behalf of the British Columbia Commissioners extended an invitation to the members to hold the 1973 meeting of the Conference in British Columbia

It was agreed on motion that the Conference accept the kind invitation of the British Columbia Commissioners and that the 1973 meeting of the Conference be held in Victoria

19 Close of Meeting

The President, Mr. Dick, then expressed his thanks to the other members of the outgoing Executive for their co-operation and help during the past year, and also extended the thanks of himself and his colleagues on the Executive to all members of the Conference for their work in the past year and for their contributions in advancing the aims and purposes of the Conference.

The 54th Annual Meeting of the Conference adjourned at 12:45 p.m

STATEMENT TO THE CANADIAN BAR ASSOCIATION OF CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA 1972

La Conference dés Commissaires pour l'Uniformisation des Lois du Canada a conclu sa cinquante-quatrième assemblée la semaine dernière au Lac Beauport Je dois dire dès le départ que les Commissaires ont dû y déployer de grands efforts de volonté pour résister à l'attrait des charmes dont la compagne faisait un si bel étalage Et puisque j'ai déjà failli au ton officiel de ce rapport, permettez-moi de poursuivre en exprimant au nom des participants à cette conférence à quel point nous avons aimé l'accueil chaleureux et plein d'amabilité que nos amis Québecois nous ont réservé à l'ouverture de ces délibérations qui, selon moi, ont été des plus fructueuses.

The Conference was well attended with fifty-six Commissioners representing Canada, all the provinces and the Territories The interesting and changing nature of the Canadian society is reflected in the agenda, which in turn is more challenging to the Conference. In adopting new resources and modified approaches, the Commissioners believe their work will continue to be helpful and constructive to those who are free to take advantage of it.

With general reports from all the Law Reform Commissions in Canada, we recognize the new ways in which efforts may be co-ordinated for both uniformity and law reform throughout our country, the work of all will be of mutual concern and benefit.

The Uniform Laws Section, after somewhat perpetual consideration, has adopted a uniform perpetuities bill It has recommended that Canada adopt a minimum age of 16 for capacity to marry, for both males and females, and that Provinces should attempt to achieve uniformity for the consent to marry for persons aged 16 or 17 in a manner that would reflect parental and societal conditions in the matter of youthful marriages. It is also recommended that Federal laws recognize provincially authorized declarations of death for the purposes of dissolution of marriage

In addition to considering matters related to privacy and family relief laws, existing uniform acts are being reviewed in the light of present conditions while the use of inter-provincial subpoenas in civil matters and civil liability of owners of pleasure

boats are being further studied along with subjects of similar current interest

The Criminal Law Section dealt with an agenda of forty-nine items, most of which related to substantive and procedural aspects of the Criminal Code The Bail Reform Act and its operation throughout Canada was reviewed in substantial detail and we were satisfied that it is working exceedingly well considering its rather complicated nature which is being smoothed out as we progress in its application Certain minor amendments were recommended to further the spirit of the Act

The relationship of native Canadians to law enforcement and the administration of justice was discussed in its very diverse forms—while no complete solutions were developed for some of the problems, the various approaches used by all jurisdictions were analyzed and reviewed so that all governments might have the benefit of comparisons as they work towards new programs and methods in co-operation with the representative groups of native Canadians

In an equally important and sensitive area, the section considered the relationship of women to the criminal law, as recommendations were made to eliminate appearances of discrimination in the sexual offence sections In a true spirit of equality, the men will recognize that they will also derive new protection under the umbrella of the extended application of these laws which were previously restricted to the protection of what still remains, the fairer sex I am pleased to report that we cannot yet find a way to completely eliminate the difference

The Chairman of the Criminal Law Section for 1972-73 will be Vincent McCarthy, the Deputy Attorney-General of Newfoundland, while S F Sommerfeld of Ottawa will be the Secretary

The Conference Executive for 1972-73 is.

Honorary President.........A Rendall Dick, Toronto
President..................Rae H Tallin, Winnipeg
1st Vice-President..........Donald S Thorson, Ottawa
2nd Vice-President.........Robert Normand, Quebec
Treasurer...................Arthur N Stone, Toronto
Secretary............. ....Glen W Acorn, Edmonton

NOTE: The above statement was prepared by the Honourary President, A R Dick, Q C, for delivery at Opening Session of the Canadian Bar Association convention in Montreal on August 28, 1972 For reasons unknown, the Conference statement was not called on the Agenda at the Opening Session The statement was subsequently forwarded to the Executive Secretary of the Canadian Bar Association

APPENDIX A

1972 AGENDA

(as printed and distributed prior to the meeting)

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. Report by Executive on rules Governing Uniform Law Section
10 Report by Special Committee on International Conventions on Private International Law (see 1971 Proceedings, pages 106 to 109)
11 Next Meeting
12 Adjournment

UNIFORM LAW SECTION

1. Amendments to Uniform Acts—(see 1971 Proceedings, page 76)
2. Consumer Protection—Report of Alberta Commissioners (see 1971 Proceedings, page 75)
3 Contributory Negligence (tortfeasors) and Limitation of Actions—Report of Alberta Commissioners (see 1971 Proceedings, page 75)
4 Family Relief—Report of Saskatchewan Commissioners (see 1971 Proceedings, page 75)
5. Frustrated Contracts Act—at the request of the British Columbia and Manitoba Commissioners
6 International Convention on Travel Agents—Report of the Quebec Commissioners (see 1971 Proceedings, page 84)
7 Interpretation Act and Statutes Act—Report by the Legislative Drafting Workshop (see 1971 Proceedings, page 76)
8 Interprovincial Subpoenas—at the request of the Manitoba Commissioners
9 Judicial Decisions affecting Uniform Acts—(see 1971 Proceedings, page 77)

10 Minimum Age for Marriage—Report of Canada Commissioners (see 1971 Proceedings, page 77)

11 Occupiers Liability—Report of British Columbia Commissioners (see 1971 Proceedings, page 80)

12. Offence of possessing, without lawful excuse any card or certificate of identification of another person—at the request of the Criminal Law Section (see 1971 Proceedings, page 89)

13 Perpetuities—Report of Alberta Commissioners (see 1971 Proceedings, page 78)

14 Presumption of Death Act—Report of Northwest Territories Commissioners (see 1971 Proceedings, page 79)

15 Protection of Privacy (Tort)—Report of Manitoba, Saskatchewan and British Columbia Commissioners (see 1971 Proceedings, page 83)

16 Protection of Privacy (Credit and Personal Data)—Report of Ontario and Quebec Commissioners (see 1971 Proceedings, page 83)

17 Protection of Privacy (Evidence)—Report of Quebec Commissioners (see 1971 Proceedings, page 83)

18 Protection of Privacy (General)—Report of Canada Commissioners (see 1971 Proceedings, page 83)

19 Rule in Active Petroleum Ltd v. Duggan—Report of Manitoba Commissioners (see 1971 Proceedings, page 77)

20 Rule in Hollington v Hewthorn—Report of Alberta Commissioners (see 1971 Proceedings, page 85)

21. 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 Sale of Firearm Replicas

2. Bribery of Sports Participants

3 Disposition of Outstanding Charges against an Incarcerated Person

4. Special Verdict of Insanity

5 Proceeding With Trial of the Accused in His Absence Where He Absconds In the Course of His Trial

6. Defence of Alibi

7 Restitution of Property After Trial

8. Section 725 of the Criminal Code

9. Section 465 (*c*) and Section 738 (5) of the Criminal Code

10 Section 629 (1) of the Criminal Code
11 Sections 663, 664 and 666 of the Criminal Code
12. Sworn Statements "Permitted, Authorized or Required by Law" within the meaning of Section 122 of the Criminal Code
13 Notices of Appeal by way of Trial de Novo—Section 750 of the Criminal Code
14 Jurisdiction of the Court When Court House Closed Unexpectedly by Reason of Public Service Strike
15 Sections 626 and 627 of the Criminal Code—Discretion of a Justice of the Peace in Issuing Subpoenas
16 Provision for Bringing Treaty Indians Resident on Reserves on the Jurors' Rolls
17 Section 338—Criminal Code
18. Sentencing for Soliciting for the purpose of prostitution and male prostitution
19. Amendments to Appeal Procedure with respect to indictable offences. Section 603 (1) (*a*) (iii), or Section 621 Criminal Code
20. Section 663 of the Criminal Code
21 Bail Reform Act
22. Bail Registry
23. Section 180 (3) of the Criminal Code
24 The Right to Counsel—(see also Item 39)
25 Resolutions Passed By the British Columbia Criminal Justice Subsection of the Canadian Bar Association—June, 1972
26 Publicity Concerning an Accused Person in Court
27. Criminal Code Section 605 (1) (*a*) Crown Appeals
28. Recommendation of the Canadian Automobile Association re Impaired Driving
29. Nomenclature For Various Types of Homicide Under the Criminal Code
30. Transcripts On Preliminary Inquiries—Section 468 of the Criminal Code
31 Extra Provincial Sale of Lottery Tickets
32 Section 23 (3) of the Criminal Code
33. Section 197 (1) of the Criminal Code
34. Relationship Between the Criminal Law Section of the Conference and the Law Reform Commission of Canada
35. Weekend Sentences—Section 663 (1) (*c*) of the Criminal Code
36 Protection of Witnesses at Coroners' Inquests
37 Cannabis—A Report of the Commission of Inquiry Into the Non-Medical Use of Drugs (Le Dain Report)

38 Registration of Machine Guns
39 Right to Counsel—Breathalyzer Provisions of Criminal Code

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

(*Opening Plenary Session Agenda Item 4; see page 21*)

TREASURER'S REPORT

FOR THE YEAR 1971-72

Balance on hand—August 16, 1971		$ 3,284 30

RECEIPTS

Province of Quebec		
November 2, 1971	$ 400 00	
March 16, 1972	1,500 00	
Northwest Territories		
February 21, 1972	750 00	
Yukon Territory		
February 25, 1972	750 00	
Province of British Columbia		
March 27, 1972	1,500 00	
Province of Alberta		
February 15, 1972	1,500 00	
Province of Manitoba		
May 9, 1972	1,500 00	
Government of Canada		
April 6, 1972	1,500 00	
Province of Prince Edward Island		
May 9, 1972	750 00	
Province of Newfoundland		
May 1, 1972	1,500 00	
Province of New Brunswick		
May 25, 1972	1,500 00	
Province of Nova Scotia		
May 1, 1972	1,500 00	
Province of Ontario		
July 4, 1972	1,500 00	
Province of Saskatchewan		
August 1, 1972	1,500.00	
	$17,650.00	17,650.00
		$20,934 30

Receipts Brought Forward		$20,934.30
Rebate of Ontario Sales Tax for printing 1970 Proceedings		299.66
Bank Interest—October 31, 1971		36.88
Bank Interest—April 30, 1972		38.43
TOTAL RECEIPTS		$21,309.27

DISBURSEMENTS

William E Wilson Printing costs, August 25, 1971		$ 130.50
William E Wilson Printing costs, August 27, 1971		18.00
Woods Flower Shop Ltd, Vancouver, September 8, 1971		16.25
Astoria Motor Inn & Andrew Motor Lodge, Jasper, Conference Rooms, September 23, 1971		637.00
University of Saskatchewan, Printing costs, September 24, 1971		22.58
L'Action Sociale Limitée, New letterhead, November 12, 1971		18.15
Clerical Assistance, Honorarium, January 19, 1972		25 00
TOTAL DISBURSEMENTS		$ 867.48
Cash in Bank (See NOTE)		20,441.79
	$21,309 27	$21,309 27

NOTE: On August 15, 1972, a cheque for $11,788 93, in payment of the account of C C H Canadian Limited for printing the 1971 Proceedings, was issued and on August 16, 1972, two cheques in the respective amounts of $100 00 and $50 00 were issued to Audrey Brady for clerical assistance When these cheques are cashed the "Cash in Bank" will be reduced by $11,938 93 The bank balance as of August 16, 1972, is $8,502 86

Howard E. Crosby
Treasurer
August 16, 1972

APPENDIX C

(*Opening Plenary Session Agenda Item 5, page 22*)

SECRETARY'S REPORT, 1971-72

Proceedings

In accordance with the resolution adopted at the 1971 meeting of the Conference (1971 Proceedings, page 68) 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. I wish to thank those persons who assisted me in bringing the mailing list up to date

The cost of printing the 1971 Proceedings was $11,788 93 including provincial and federal sales tax, a considerable increase over the 1970 costs which were $6,141.21 including tax This increase was occasioned by increased printing costs and an increase in the number of pages of the Proceedings.

Mr J. W. Ryan, past secretary of the Conference, was kind enough to arrange for the printing and distribution of the Proceedings before handing over to me the files and material of the Secretary's office, a kindness for which I am grateful.

Sales Tax

Applications for remission of sales tax paid in respect of printing the 1971 Proceedings were made to the Federal government and the Ontario government.

Appreciations

In accordance with the resolution adopted at the Closing Plenary Session of the 1971 Conference (1971 Proceedings, page 109), letters of appreciation were sent to all concerned.

In Memoriam

Since the last meeting of the Conference, we have lost two former members of the Conference

Harold Dodge, Q.C , who was a Commissioner from 1951 to 1957.

James Runciman, Q.C., who was a Commissioner for many years and treasurer for five years.

I am sure that all members of the Conference join in recording our deep sense of loss occasioned by their deaths.

Status of Women

The secretary was directed at last year's meeting to reply to a letter of Miss F. L Paltiel and a letter of Miss E C MacDonald on the subject of the Status of Women (1971 Proceedings, page 81). This directive has been complied with

Table of Model Acts

At last year's meeting of the Conference, it was agreed that the local secretaries would notify the secretary of any changes to bring the table up to date. I have received no notifications and I therefore assume the table is up to date

Consolidation of Model Acts

The secretary wishes to draw the attention of the Conference to the need for such consolidation and asks the Conference to direct the new secretary to institute that project I have attempted to begin that project but found it difficult to secure help from University professors as they were not too interested in the type of work

Law Reform Commissions

Communication was made recently with the various Law Reform Commissions in Canada, several of whom have sent reports to the Conference whereas the remainder have agreed to report to the Conference through their delegates in the Uniform Law Section as the subject matter relates to that section. A report will probably then be made following the discussions to the Plenary Session

International Institute for the Unification of Private Law (Unidroit)

In March, a letter, a copy of which is appended, was received from Mr Mario Matteucci, Secretary General of Unidroit The report referred to in that letter is also appended The Conference may wish to consider how it can best respond to the letter of Mr Matteucci which is of interest primarily to the Uniform Law Section as it relates to civil law topics which might be put on the Unidroit Agenda. The Conference may refer the letter to the Special Committee on International Conventions on Private International Law or constitute a special committee for the consideration of it or refer it to the Uniform Law Section.

Resolution on pleasure boats accidents

I would like to draw attention to a letter received from Mr. George B. Macauly, Assistant Deputy Minister, Department of Justice, Newfoundland and Labrador, a copy of which is appended

relating to a resolution of the Canadian Bar Association on pleasure boat accidents The subject of this letter directs it to the Uniform Law Section and I recommend that it be so done

General

The gratitude of the Conference is extended to Mr. Arthur Curwood, Legal Counsel, Government of Quebec, who acted as assistant secretary and made arrangements for the holding of annual meeting at Lac Beauport, Quebec

Your secretary would like to inform the Conference that he tried to obtain assistance from the University Sector of the Legal Profession but found little interest It was necessary to rely on internal help of a part-time secretary In view of new burdens placed upon him by his employer, your secretary asks the Conference for his resignation and hopes the Conference will accept such resignation.

Without wishing to reopen the debate of last year on the secretaryship, it is opportune to me to point out the need for a full-time secretary or permanent assistant on a part time basis It is not practical to ask someone holding a full time job to find the time required.

APPENDIX D

(*U.L S Agenda Item 7, see page 28*)

AMENDMENTS TO UNIFORM ACTS, 1971-72

Report of R. H Tallin

Assignment of Book Debts Act

British Columbia enacted an amendment in 1972 which does away with the affidavit of bona fides in the Assignment document and the Renewal Statement

In 1972, Newfoundland amended section 17 of its Act, dealing with fees for registrations, searches, etc.

The Yukon Territory amended section 18 of its Act in 1971. This section, in the Model Bill, deals with inspection of registration records by the public.

Bills of Sale Act

In 1972, British Columbia enacted an amendment to its Act, doing away with the affidavit of bona fides in Bill of Sale document and Renewal Statements

Manitoba amended section 11 of its Act in 1972, making it permissible to omit the engine number of a motor vehicle described in a bill of sale and to use the model number of the vehicle or any other number whereby identification of the vehicle may be facilitated. Use of the serial number remains mandatory.

The Yukon Territory amended section 36 of its Act in 1971; the Yukon Ordinances of 1971 were not readily available to ascertain the nature of the section or of the amendment.

Conflict of Laws (Traffic Accidents) Act

The Yukon Territories in 1972 enacted its "Conflict of Laws (Traffic Accidents) Ordinance", varying only slightly from the Uniform Model Bill adopted by the Uniformity Conference in 1970.

Compensation for Victims of Crime Act

British Columbia enacted its "Criminal Injuries Compensation Act" in 1972, generally following the Uniform Act, except that The Workmen's Compensation Board of that province is substituted for the special tribunal set up in the Uniform Act, as a result of this change, the British Columbia Act also contains provisions corresponding to those in its Workmen's Compensation Act, not found in the Model Act, respecting proceedings before the board, etc.

Manitoba, in 1972, enacted a number of minor amendments, not of a substantive nature, to its Criminal Injuries Compensation Act.

Evidence Act

In 1971, Newfoundland amended its Evidence Act by inserting new sections 2A, 3 and 3A, of which 2A(a) and 3A are similar to, although not identical with, section 5 and section 8(2) and (3) of the Model Act. The sections in question deal with the admissibility of evidence by a husband or wife as to marital intercourse, and the compellability of a witness to give evidence where it may tend to criminate him or establish his liability in another proceeding.

Highway Traffic and Vehicles—Rules of the Road

Manitoba enacted a number of amendments to its Highway Traffic Act in 1972, some of which affect Uniform Rules of the Road provisions.

Human Tissue Act

British Columbia enacted its "Human Tissue Gift Act" in 1972, being almost a direct copy of the 1971 version of the Model Act

In 1971, Newfoundland repealed its 1967 Human Tissue Act and replaced it with another Human Tissue Act similar to but not an adoption of the 1970 revised version of the Model Act. The provisions respecting medical schools contained in Newfoundland's 1967 Act but not forming part of the Model Act were carried over into the province's 1971 Act.

Interpretation Act

The Yukon Territory amended section 35 of its "Interpretation Ordinance" in 1971; the Ordinance was not readily available to ascertain the nature of the section or the amendment.

Age of Majority Act

The Yukon Territory enacted its "Age of Majority Ordinance" in 1972; it is to be noted, however, that the age of majority in that Act is nineteen rather than eighteen as recommended by the Uniformity Conference. The Model Act was not readily available for comparison, but the Ordinance appears to be identical with the Manitoba Act, except for the age of majority and other slight variations.

Reciprocal Enforcement of Maintenance Orders Act

In 1972, British Columbia enacted its new "Family Relations Act", a consolidation of a number of separate Acts relating to family law; British Columbia's former Reciprocal Enforcement of

Maintenance Orders Act is now thus Part VI of the new Act and follows generally the provisions of the Model Act.

The Yukon Territory, in 1970, enacted amendments to its Act similar to the Model Act amendments proposed in 1970

Survivorship Act

Newfoundland, in 1971, amended section 3 of its Act, so that the references therein will correspond with the province's new Accident and Sickness Insurance Act

Trustee Act—Trustee Investments

Manitoba, in 1972, enacted a number of amendments to its Act, updating sections 70 and 72 dealing with trustee investments

Vital Statistics Act

Manitoba enacted a number of updating amendments to section 14(6) of its Act in 1972.

Wills Act

In 1971, Newfoundland amended its Act in the following respects:

(1) Section 9 of the Newfoundland Act became substantially the same as corresponding section 17 of the Model Act, except for changes resulting from local requirements, the amendment consisted of adding the provision that a will is revoked by marriage except where it is stipulated therein that it is made in contemplation of marriage.

(2) Section 18 was made almost identical with corresponding section 33 of the Model Act; the sections deal with provisions relating to a beneficiary who predeceases the testator; prior to the amendment, the Newfoundland section was substantially the same as, but not identical with, the section of the Model Act.

(3) The amendment added new section 18B, identical with corresponding section 34 of the Model Act, providing that, unless a contrary intention appears in the will, an illegitimate child is treated as if it were legitimate.

APPENDIX E

(U L S Agenda Item 8, see page 28)

REPORT OF THE MANITOBA COMMISSIONERS RE THE BILLS OF SALE ACT AND THE RULE IN ACTIVE PETROLEUM PRODUCTS LIMITED v. DUGGAN ET AL

At the 1971 Conference the case of Active Petroleum Ltd v. Duggan (1970) 72 W.W.R 486 was referred to the Manitoba Commissioners for report and recommendation The case was heard in the B.C. Court of Appeal and dealt with the description of a motor vehicle in a chattel mortgage filed under The Bills of Sale Act Section 3(2) of the B.C. Bills of Sale Act provides as follows.

> Where a bill of sale comprises a motor vehicle, the description therein of the motor vehicle shall include the serial number thereof, and the registrar general may disallow or cancel the registration in his office of a bill of sale that does not comply with this subsection

This is similar to subsection (3) of section 9 of the uniform Bills of Sale Act which provides as follows

> (3) The description of a motor vehicle in a bill of sale shall include the serial number of the vehicle

The problem in the case was that in the bill of sale the model number as well as the serial number was set out. It was argued that the vehicle could not be identified by the serial number alone but that the model number joined with the serial number was a specific identifying number. Nevertheless the court held that the serial number alone was what was required by the statute and the bill of sale was therefore void as against third parties.

The Manitoba Commissioners feel that what the provisions of the Bills of Sale Act was attempting to achieve was a more accurate description of the motor vehicle It would appear from the case that it might be very difficult in some instances to determine what was serial number and what was a model number.

We feel that consideration should be given to amending subsection (3) of section 9 of the Bills of Sale Act. Recently, the equivalent section of the Manitoba Act was changed to read as follows:

> The description of a motor vehicle in a bill of sale shall include the serial number of the vehicle and may include the engine number, if any, and any model number or other number by which the identification of the motor vehicle may be facilitated

This amendment stemmed originally from the fact that the Manitoba Act previously required both the serial number and engine number to be set out It was discovered that some manufacturers did not in fact provide an engine number with their vehicles and in other cases the engine number was in a location which made it very difficult to find it It appears clear that all motor vehicles have some sort of serial number, however, it is frequently difficult to distinguish the serial number from the engine number or model number. We do not feel that a bill of sale should be void because additional numbers are given.

We recommend that subsection (3) of section 9 of the Bills of Sale Act be amended to read as follows:

> The description of a motor vehicle in a bill of sale shall include the serial number of the vehicle and may include the engine number, model number or any other number by which the identification of the motor vehicle may be facilitated

August 4, 1972.

APPENDIX F

(U.L S Agenda Item 9; see page 28)

REPORT OF THE SASKATCHEWAN COMMISSIONERS RESPECTING SECTION 21(2) OF THE UNIFORM WILLS ACT

At the 1969 meeting of the Commissioners on Uniformity of Legislation in Canada, the case of RE: A. Neil McLean Estate, 1969, 1 N.B.R., 500, was brought to the attention of the meeting by Mr. Hoyt of New Brunswick. After discussion the matter was referred to the Saskatchewan Commissioners for a report.

This case relates to the interpretation to be placed on subsection (2) of section 21 of the Uniform Wills Act which deals with the matter of subsequent conveyances As a background to a consideration of the McLean case, it may be helpful in reviewing the history of subsection (2) of section 21 of the Uniform Wills Act. The Uniform Wills Act adopted by the Conference in 1929 included the following section respecting subsequent conveyances:

> "19 No conveyance of or other act relating to any real or personal property comprised in a will made or done subsequently to the execution of the will shall prevent the operation of the will with respect to such estate or interest as the testator had power to dispose of by will at the time of his death "

The section respecting conveyances was revised in 1957 as a result of a report of the Special Committee who advised that the revision was designed to meet the following problem·

> "In Church v Hill (1923) S C R 642, the Supreme Court of Canada held with regret that the English cases interpreting section 23 of the English Wills Act, on which Section 21 of this draft act is based, compelled a decision that where a testator in his will makes a specific devise of land but subsequently sells it under agreement for sale, the devise is rendered immediately inoperative, and the devisee is consequently not entitled to any part of the unpaid purchase money, which therefore falls into the residue The Committee agrees that when the ordinary layman makes a will disposing of real property and later agrees to sell it but still retains the legal title, he believes that he still owns the property and that it remains subject to his testamentary disposition until he has actually completed the conveyance of legal title The above interpretation thus clearly defeats the intention of most of such testators "

The subsection respecting subsequent conveyances was revised in 1957 to read as follows:

> "21 (2) Except when a contrary intention appears by the will, where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, real or personal property that was comprised in a

devise or bequest, made or done after the making of a will, the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator "

This is identical to the subsection in the New Brunswick Wills Act that was under review in the McLean case

The testator, Senator McLean, was the owner of 70,478 class A shares and 14,897 class B shares in Connors Bros Limited By a will executed on October 6th, 1966, the testator bequeathed certain shares as follows:

Beneficiary	*Class A*	*Class B*
Hattie, sister	500	
Margaret, daughter	400	7,348 5
James, son-in-law		100
J Neil, grandson		100
Helen, daughter	750	
Frances, daughter	500	7,348 5
Margaret, wife	500	
	2,650	14,897 0

On March 3rd, 1967, Senator McLean agreed to sell all his class A and class B shares to George Weston Limited. At a meeting in Toronto he delivered to the purchaser, George Weston Limited, 37,216 class A shares and 14,885 class B shares and received on account the sum of $100,000 00 The purchaser signed a receipt which read:

"The said shares will be held by me in trust for Senator McLean pending completion of the purchase of these and other shares of Connors Bros Limited held by his family "

The testator agreed to deliver the balance of his shares and those of his family to the purchaser

The class A shares were valued at $7 75 and the class B shares at $37.75 and the agreement was that George Weston Limited would pay for the shares the sum of $1,108,566.25 of which $556,366 25 would be in cash and the balance made up of 25,100 class B shares in George Weston Limited valued at $22 00 a share. Senator McLean died ten days later on March 13th, 1967.

Limerick, J A. in his judgment at page 504 outlines the problem in the McLean case as follows:

"The difficulty which has arisen is that as a result of the testator having entered into an agreement before his death for the sale of all his shares of both classes of stock of Connors Bros Limited, there are none now available to satisfy the bequests under his will respecting the same It was contended by the testator's daughter, Helen Alexandra Earle, to whom none of the more valuable Class B shares were bequeathed, that the bequests of both

classes of shares have been adeemed and that the proceeds from their sale fall into the general residue of the estate in which she shares with her two sisters Frances J Larlee and Margaret M Turnbull"

The decision of the court, as summarized by the headnote, reads

"Court held that bequests of shares of stock in Testator's will were specific legacies Court held that the legacies were adeemed when the Testator shortly before his death made an agreement to sell all of the shares of the company stock which were the subject matter of the bequests

Court held in addition that Sections 20 and 21 of the Wills Act did not abolish the application of the doctrine of ademption but provided for a substitute gift under certain circumstances Court held that the substitution under Section 20 could only be made in circumstances where there was a separate contract or choses in action referable only to the subject matter of a specific bequest Court held that the contract or chose in action to which the Testator was entitled on his death referred to all of his shares of company stock and did not refer to the specific shares in each bequest made in the Testator's will; and accordingly Section 20 did not apply and the bequests were adeemed"

The question for consideration by the Conference is whether the decision in the McLean case is contrary to the intention of the Commissioners in enacting in 1957 the revised subsection on subsequent conveyances The further question is then whether the present subsection in the Uniform Wills Act on subsequent conveyances should be further revised

It would appear that subsection (2) of the present section 21 of the Uniform Wills Act has not been the subject of litigation in any other court since the McLean case in 1969. Further, it does not appear that the McLean case has been judicially considered in any other case.

In the opinion of the Saskatchewan Commissioners a further revision to the provision in the Uniform Wills Act respecting subsequent conveyances is not required at this time According to the Table in the 1971 proceedings at pages 16 and 17 the Uniform Wills Act has been adopted by Alberta, British Columbia, Manitoba, New Brunswick, Saskatchewan, the Northwest Territories and the Yukon. It appears that the wording of the subsequent conveyances section in the Wills Act of British Columbia, Saskatchewan and Manitoba is closer to the wording of the Uniform subsequent conveyance subsection as it appeared in the Uniform Act prior to the revision in 1957.

The Saskatchewan Commissioners, therefore, recommend that no change be made in the present provision in the Uniform Act respecting subsequent conveyances

W. G. Doherty,
Commissioner

APPENDIX G

(*U.L.S Agenda Item 11; see page 29*)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS, 1971

REPORT OF NOVA SCOTIA COMMISSIONERS

This report is made in response to the Resolution adopted at the 1971 Conference (1971 Proceedings, page 77) and consists of a schedule with a list of judicial decisions and a summary note for each case.

The schedule 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 1971 Proceedings The Report covers the calendar year 1971 only

Graham D. Walker,
for the Nova Scotia Commissioners

August, 1972

SCHEDULE

Assignments of Book Debts

1. *Re Jago Plumbing and Heating Supplies Ltd* (1972) 22 D.L.R (3d) 647, Supreme Court of Ontario in Bankruptcy, Houlden, J., Ontario Assignment of Book Debts Act.

A renewal statement filed pursuant to the Ontario Assignment of Book Debts Act subsequent to bankruptcy proceedings is ineffective as against the trustee in bankruptcy Since the trustee in bankruptcy had acquired rights in the accounts receivable by the bankruptcy proceedings before the registration of the renewal statement and these rights have been prejudiced by the order for the renewal, the presumption set forth in Section 19(4) of the Ontario Act operates so that the late registration is presumed not to have been done in conformity with the Act for the purpose of determining the rights that such person acquired before the registration

Defamation

2 *Courchene* v *Marlborough Hotel Co Ltd. et al* (1972) 22 D.L.R (3d) 157, Manitoba Court of Appeal, Freedman, C J.M , Monnin and Hall, JJ A , Manitoba Defamation Act

A memorandum issued by the manager of the hotel to the hotel staff to refuse accommodation to Indians and Metis is not a libel against a race under Section 19(1) of the Manitoba Defamation Act, where the evidence disclosed that there had never been at the hotel a policy or a practice of discrimination against Indians or Metis

Evidence

3 *de Genova* v. *de Genova et al* (1971) 20 D L R (3d) 264, Ontario High Court, Wright, J., Ontario Evidence Act

Section 50*a* of the Ontario Evidence Act as amended by the Evidence Amendment Act, 1966 and 1968, pertaining to the admissibility of hospital records does not exclude relevant medical testimony nor does it authorize such testimony in writing where cross-examination is required. It is not substantive law, it is regulatory and procedural It should not be used to create evidence which would not otherwise exist nor to defeat evidence which is available.

Interpretation

4 *Klutz* v *Massey-Ferguson Finance Co of Canada Ltd* (1971) 19 D.L R (3d) 742, Saskatchewan Queen's Bench, Johnson, J , Saskatchewan Interpretation Act

The Saskatchewan Limitation of Civil Rights Act was amended effective April 18, 1970, in respect of repossessions by creditors The amendment resulted in a change in procedure In applying Section 23 of the Saskatchewan Interpretation Act to the amendments the court determined that accrued rights to possession before the Act was amended were not affected

Limitation of Actions

5 *Carrier* v. *McCowan et al* (1972) 24 D.L.R (3d) 105, Alberta Supreme Court, Trial Division, Riley, J , Alberta Limitation of Actions Act

The Court held that when a patient removes garments, climbs on the operating table and reaches for the covering sheet and is injured as a result thereof, the claim is against the physician in his capacity as physician and thus subject to the one year limitation period applicable to the practice of medicine and not a claim for occupier's liability

Proceedings Against the Crown

6 *Connery et al* v. *Government of Manitoba* (1972) 21 D L R (3d) 234, Manitoba Court of Appeal, Guy, Monnin and Dickson, JJ A , Manitoba Proceedings Against the Crown Act

To succeed in an action in tort against the Government of Manitoba under its Proceedings Against the Crown Act, Section 5 thereof does not require the party bringing the action to identify the officer or agent of the Crown who committed the tort

Reciprocal Enforcement of Judgment

7. *McCormack* v *Starr* (1972) 22 D L.R (3d) 735, Alberta Supreme Court, Appellate Division, Cairns, Kane and Clement, JJ A , Alberta Reciprocal Enforcement of Judgments Act

Both filing and service of a Notice of Motion are required to constitute effectively an application to set aside a registered judgment pursuant to Section 7 of the Alberta Reciprocal Enforcement of Judgments Act It is not sufficient merely to file the Notice of Motion within the one month limitation period

Sale of Goods

8 *Evanchuk Transport Ltd* v *Canadian Trailmobile Ltd.* (1972) 21 D.L.R (3d) 246, Alberta Supreme Court, Appellate Division, Cairns, Kane and Clement, JJ A , Alberta Sale of Goods Act.

A refrigeration trailer unit was purchased for long haul. The Court found that the seller was aware of the purpose for which it was purchased and found that there was an implied condition that the goods were reasonably fit for such purposes, under Section 17(2) of the Alberta Sale of Goods Act. Further it determined that the breach of the implied condition of fitness for purpose must be treated as a breach of warranty The measure of damages thus is found in Section 53 of the said Act Since the defect could not be remedied, the consequence is that there was a complete failure in respect of the fulfillment of the warranty and the damage is *prima facie* the amount of the full purchase price

Testators Family Maintenance

9 *Re Bowe* (1971) 19 D.L R (3d) 338, British Columbia Supreme Court, Wilson, C J S C., B C. Testator's Family Maintenance Act

In determining an application under Section 3 of the B.C Testator's Family Maintenance Act, the Court ruled that the circumstances to be taken into consideration are those existing

and reasonably foreseeable at the date of the testatrix's death, the last chance she had to make a proper will.

10 *Barr* v *Barr et al* [1972] 2 W W.R. 346, Manitoba Court of Appeal, Freedman, C.J M , Guy and Dickson, JJ A , Manitoba The Testators Family Maintenance Act

In determining an application under Section 3(1) of Manitoba's The Testators Family Maintenance Act, the Court applied the broad legal principles stated in *Re Allardice, Allardice* v *Allardice* (1910), 29 N.Z.L R 959 at 969 and further stated that the dominate theme running through the cases is one of ethics even more than economics The Court should not re-write the will of the testator nor restrain a man's right to dispose of his estate as he pleases. The Court should concern itself with correcting a breach of morality on the testator's part.

Variation of Trusts

11 *Re Zekelman* (1971) 19 D L R (3d) 652, Ontario High Court, Osler, J , Ontario Variation of Trusts Act

On an application to vary an *inter vivos* trust the Court determined that the word "benefit" in Section 1(2) of the Ontario Act should be interpreted liberally and that this word did not necessarily mean a financial benefit Although it was obvious that the object of the trust would receive less by way of financial benefit, the Court found that earlier vesting of the fund, elimination of dissension among the members of the family and a saving in taxation because of changes in tax law would be sufficient benefits to enable it to grant the variation requested

APPENDIX H

(U L S Agenda Item 12; see page 29)

The following is the text of a letter to the Conference Secretary from Mr. Mario Matteucci, Secretary General of the International Institute for the Unification of Private Law (UNIDROIT).

Rome, 10th March, 1972.

Preparation of the fifth Meeting of Organisations concerned with the Unification of Law

I have the honour to remind your Organisation of the four Meetings of Organisations concerned with the Unification of Law promoted by UNIDROIT in the past. the first of which meetings was held from the 17th until the 20th September, 1956, in Barcelona and the following three in Rome (11-15 October, 1959; 2-4 October, 1963; 22-24 April, 1968) A record of these Meetings was published by the Institute in Volume II of UNIDROIT's Yearbook for 1956, in the 1959 and 1963 Yearbooks and in Volume II of the 1967-1968 Yearbook respectively.

At the end of the work of the fourth Meeting the participants stressed the usefulness of these meetings and expressed the view that such an initiative was worth following up in the future by further Meetings In accordance with this view, the Governing Council of UNIDROIT decided at its 50th session (Resolution No 2 (1971) I, f) to convene a fifth Meeting in the first half of 1973. It is, therefore, intended to extend this initiative that has met with such a widely favourable reception, while preserving unaltered its general character which, as on previous occasions, amounts in substance to:

(1) An exchange of experiences and views on the progress made in the field of the Unification of Law;

(2) A mutual inquiry into future programmes of work;

(3) A discussion dealing with those particular subjects that reveal common interests and have a bearing on the field of the Unification of Law

With regard to the first two items, so as to give substance to this exchange of experiences and this mutual inter-organisational inquiry, UNIDROIT published, on the occasion of previous Meetings, a "Table of the Legal subjects appearing in the Programmes of Work of Organisations concerned with the Unification of Law".

This work, in the preparation of which UNIDROIT received the valuable co-operation of the various Organisations, thus made it easier to check whether a specific initiative overlapped with another and, furthermore, whether the process towards unification under way in one sector could not usefully be extended to collateral sectors. The success achieved by this Table brought out the expediency of the periodical publication of that information which is useful to all Organisations. The fourth Meeting accorded a favourable reception to the plan for a "Digest of Legal Activities of International Organisations and other institutions" as laid before it by the Secretariat of UNIDROIT, requesting Organisations to send UNIDROIT the necessary information to keep this Digest constantly up to date. The Digest was published in 1970 in the form of a loose-leaf volume and its usefulness has been generally acknowledged. Preparations have been made for the first bring up to date of the Digest and, with this in mind, the Secretariat of UNIDROIT would be pleased to receive from your Organisation news of the results that you have achieved and of the programmes that you have currently under way in the field of the Unification of Law, as concerns the specific sector thereof falling within the scope of your activities

Concerning the selection of specific topics with a bearing upon the Unification of Law to be allotted to the fifth Meeting, UNIDROIT thought it expedient to go straight to the interested Organisations themselves and seek out their opinion first before going on to make a specific choice.

For the reasons shown in the paper annexed hereto, the Governing Council of UNIDROIT decided on the five topics set out hereafter without stating any order of preference:

(A) Uniform Law as a means of technical assistance to developing countries.

(B) Possibilities of applying Uniform Law rules in countries with different social and economic structures.

(C) The problems arising from the drawing up and translation of these Uniform Law rules in several national languages

(D) Methods for coordinating the activities of different international organisations and for organising teamwork among the same.

(E) Problems raised by mixed law systems

(F) The regulation of international legal relations without reference to national laws.

UNIDROIT would be pleased to hear the view of your Organisation on each of these topics and to learn which of them you consider to be worthy of preference as topics specifically to be allotted to the fifth Meeting, while realising that no more than two or three of these topics can be entered on its Agenda. As the above list is merely intended to serve, within certain limits, as a guideline, UNIDROIT would request your Organisation, in the event of it not being able to accept the choice of any of these topics, kindly to specify any other topic that it considers ought to be preferred to these

I am convinced that UNIDROIT will once again be able to count on the contribution of the experience gained by your Organisation and should like particularly, both on behalf of UNIDROIT and on my own account, to express here my deep gratitude for your reply which should reach me at the latest by the 30th April, 1972

Yours faithfully,

Mario Matteucci,
Secretary General.

Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Topics open to examination during the Fifth Meeting of Organisations concerned with the Unification of Law

Rome, December, 1971.

(A) *Uniform Law as a means of technical assistance to developing countries.*

Developing countries, and, in particular, those that have only recently achieved political independence, frequently draw attention to gaps in legislation existing in some sectors. It is here that technical assistance by those organisations with world-wide networks may be put to good use. The uniform law rules stated in the international conventions drawn up under the aegis of the aforesaid organisations can offer an effective way of filling in the gaps existing in legislation as shown above. In the event of these countries not being in a position or not deeming it to be advisable to create links between one another by international agreements, might it not be possible for the Organisations that promote these agreements to endeavour to make use of the uniform rules, with possible adaptations, as the aim of model laws that would be put forward to the countries in question for possible adoption?

Uniform Law rules, the result of a common endeavour by experts responsible for different legal systems, offer much sounder technical guarantees than can be offered by the personal work of one expert used in a programme of technical assistance.

In this optic one sees the way being opened up to an immense horizon of activity for the international organisations responsible for the creation of uniform rules.

(B) *Possibilities of applying uniform law rules in countries with different social and economic structures.*

The clear distinction existing between the social and economic structures of socialist countries and those with a market economy will doubtless place limits on the subjects open to unification at the legal level between these two groupings of countries. The experience gained by international organisations, operating either at world-wide or at regional level, in their efforts at unification can provide valuable pointers with regard to the feasibility of joining countries with different social and economic structures in these efforts and as to the repercussions that this structural difference may have on the outcome of unification

An analysis of the experience gained in this field might enable one to pick out some guidelines for future policy, and also to determine the subjects open to unification within the relations subsisting between countries with different structures.

(C) *The problems arising from the drawing up and translation of uniform rules in several national languages.*

The discussions at previous Meetings that dealt with methodological questions often brought to light the way in which many divergences were shown to have arisen at the stage of applying uniform law rules as a result of the variety of languages into which these rules had to be translated Up to now, various rules of thumb had been followed so as to overcome these difficulties. A few of these may be mentioned: drawing up parallel texts in several languages, making a uniform translation of texts already adopted during translation conferences between countries that speak the same language, the introduction of drafting improvements at Reviewing Conferences, etc. It might be the right moment for organisations to compare practical experiences on this delicate matter and to draw a useful lesson from it for the future.

(D) *Methods of coordinating the activities of the different international organisations and of organising teamwork among them*

It frequently happens that subjects suitable for unification fall within the province of several Organisations at the same time. Overlapping and duplication would be bound to happen if each organisation dealt separately with these subjects So as to avoid such drawbacks, harmful both in substance and economically-speaking, several organisations have already set an example in co-ordinating their activities, in particular by teamwork within organisations or joint committees. Selecting two especially profitable instances of this, one would mention the joint work of FAO and WHO aimed at producing the "Codex alimontarius" and the joint meetings of IMCO and ECE that have reviewed the Draft Convention on the Combined Transport Contract (TCM), drawn up under the auspices of UNIDROIT. This coordination may, moreover, assume various forms, from actual collaboration to the coordinated initiatives mentioned above. Lessons of use to both sides might emerge from such a comparison of methods.

(E) *Problems raised by mixed law systems*

The problems raised by so-called mixed law systems are of particular importance in our age; they have had to be met, at various stages and in respect of very different subject-matter, by most organisations when called upon to finalise uniform rules. They may be raised both in those countries that are part of Western Civilisation (the coexistence of ideas and rules borrowed from the Roman Law systems and from the "Common Law" systems) and

in those countries that are not part thereof (the coexistence of ideas and rules borrowed from traditional law systems and from modern law systems) Is such coexistence possible? How should one reconcile, or indeed balance the two, whether in the case of statutory unification within the country itself, or in the case of unification at the international level?

Such are some of the many questions where the experience of organisations might be expected to reveal practical factors conducive to a solution

(F) *The regulation of international legal relations without reference to national law*

One obstacle that has often been noted by organisations endeavouring to draw-up uniform law rules is the partisan bias of everyone towards his own national legal system, where the basic concepts seem reconcilable with the scheme for unification put forward Everybody becomes entrenched behind his own solution, based on their national law being deemed to be the best and the fairest. a major impediment to the adoption of these rules arises from the clash of such one-sided standpoints, continuing right up to the stage of ratification itself, even after the uniform law rules have been drawn up

Grafted on to this problem, arising from implicit or express reference to existing national legal systems, is that of defining legal relationships and terms, this also being profoundly influenced by such a reference to the concepts of national law Is it possible to achieve a regulation of international legal relations without making reference to national law, not just on the theoretical level but also from the methodological angle?

An exchange of views on the experience gained hitherto by organisations in this field might reveal useful and practical solutions with a view to overcoming this obstacle

APPENDIX I

(*U L S Agenda Item 14; see page 30*)

MINIMUM AGE FOR MARRIAGE

REPORT OF CANADA COMMISSIONERS

This report proceeds directly from the discussion that took place at last year's Conference, based on the Report of the Canada Commissioners (see Appendix L set forth at page 164 of the 1971 Proceedings of the Conference) relating to the establishment of a uniform minimum age for marriage throughout Canada It will be recalled that the desirability of establishing such a uniform minimum age, and the various alternative means of achieving its establishment, first came up for discussion by the Commissioners at the 1970 Conference, as a result of a report made to the Conference at that time by the Canada Commissioners following representations that had been made to the Attorney-General of Canada requesting him to seek the views of the Conference on these questions.

At the conclusion of last year's discussion, the following resolutions were adopted by the Conference.

> "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"

The study referred to in the first of the above two resolutions has now been completed by the Department of Justice and is appended hereto, pursuant to the terms of the resolution, in order that the Conference may, if it sees fit, pursue its earlier discussion of this subject in the light of the information and expressions of view contained in the study.

The study is divided into a number of parts under the following headings, namely:

I The Present Law governing Minimum Ages for Marriage (page 102)

II. Studies and Information relating to Minimum Ages for Marriage (page 104)

III. Proposéd Appropriate Minimum Ages for Marriage (page 108)
IV. The Matter of Consent (page 112)
V. Pregnancy as a ground for Consent (page 115)
VI Conclusions on the Minimum Ages for Marriage (page 118)
VII The Constitution and the Minimum Ages for Marriage (page 119)
VIII. General Conclusions (page 129)

In addition, there are two annexes to the study, the first consisting of a comparative statement of the minimum marriage ages in the several States of the United States and in selected other countries, and the second consisting of a table showing numbers of marriages and percentages of total marriages in Canada, classified according to different ages under twenty-one years.

The material contained in the study was compiled by Mr. F. J. E. Jordan, a member of the Legal Research and Planning Section of the Department of Justice, as a research project. It is not, of course, an expression of official views or policies.

Respectfully submitted,

Canada Commissioners.

Ottawa, August 8, 1972.

DEPARTMENT OF JUSTICE

LEGAL RESEARCH AND PLANNING SECTION

MAY, 1972.

A REPORT ON THE CAPACITY TO MARRY: THE MINIMUM AGES

INTRODUCTION

In 1970 the Royal Commission on the Status of Women in Canada recommended that the federal government introduce legislation establishing 18 years as the minimum age for marriage in Canada. The Legal Research and Planning Section of the Department of Justice was subsequently asked by the Conference of Commissioners on Uniformity of Legislation to examine the question of minimum age for marriage with a view to recommending an appropriate age limit and a means to achieve uniformity in this matter throughout the country.

In carrying out this task, we have made no attempt to analyze or to expound upon the philosophical basis of marriage Rather, we have simply taken notice of the fact that marriage appears to be a generally accepted institution in Canada and proceeded on the basis that, like all institutions, it should be subject to laws that strike the best possible balance between the free choice of the individual and the rights and responsibilities of society. At the same time, we have sought to keep in mind the fact that marriage involves vital human values that cannot be examined in a purely abstract fashion.

While our mandate has confined us in our recommendations to the matter of minimum age for marriage, our studies have reminded us that age is but one of several matters relating to the capacity to marry. It is our tentative conclusion that certain other matters, such as consanguinity, affinity and mental capacity, should equally be the subjects of examination with a view to rationalizing generally the law governing capacity to marry in Canada.

On the specific subject of our study, we have concluded that 18 years should be adopted as the minimum free age[1] and 16 years as the minimum consent age[1] for marriage throughout Canada.

[1] Throughout this paper the terms "free age" and "consent age" are used to distinguish between the two minimum ages for marriage "Free age" refers to the minimum age at which a person may marry without consent; "consent age" is the minimum age at which a person may marry with consent

We have also concluded that, if it is accepted that there should be uniformity on the subject of minimum ages, the objective can be achieved most simply by Parliament dealing with the matter as one relating to capacity to marry The reasons for these conclusions are set out in the following examination of the subject.

I. *THE PRESENT LAW GOVERNING MINIMUM AGES FOR MARRIAGE*

At the federal level there is no legislation governing the minimum age for entering a marriage Thus, to the extent that it was not varied by the colonial legislatures in Canada prior to 1867, the received English common law governing the minimum age for marriage (12 years for females; 14 years for males) as a matter of capacity would appear to prevail.

At the provincial and territorial levels, all legislative bodies have enacted laws dealing with minimum free and consent ages for marriage, and there is considerable variation among these laws relative to both age limits. Set out below in tabular form is a summary of the existing minimum ages for the provinces and territories What these laws do in general is to prohibit the issuance of a marriage licence to or the solemnization of a marriage for persons under the prescribed ages

TABLE I

Jurisdiction	Legislation	Minimum Free Age for Marriage	Minimum Consent Age for Marriage
B C	Marriage Act, R S B C 1960, c 232, ss 29 & 30; Age of Majority Act, S B C 1970, c 2, s 2	M—19 F—19	M—16 F—16
Alta	The Marriage Act, R S A 1970, c 226, ss 16 & 17; The Age of Majority Act, S A 1971, c 1, ss 4 & 18	M—18 F—18	M—16 F—16
Sask	The Marriage Act, R S S 1965, c 338 as am 1966 c 36, ss 31, 38 & 39; The Coming of Age Act, S S 1970, c 8, ss 4 & 28, as am Bill 10, The Age of Majority Act, 1972, ss 2 & 42	M—18 F—18	M—15 F—15
Man	The Marriage Act, R S M 1970, c M50, s 21, The Age of Majority Act, S M 1970, c A7	M—18 F—18	M—16 F—16
Ont	The Marriage Act, R S O 1970, c 261, ss 5, 7 & 8; The Age of Majority and Accountability Act, S O 1971, Bill 122	M—18 F—18	M—14 F—14
Que	Code Civil, Title V, Arts 115 & 119, as am c 85, 1971, s 3	M—18 F—18	M—14 F—12
N B	Marriage Act, R S N B 1952, c 139, ss 14 & 17	M—18 F—18	no minimum age
N S	Solemnization of Marriage Act, R S N S 1967, c 287, ss 14, 17 & 18; Age of Majority Act, S N S 1970/71, c 10, s 3(3)	M—19 F—19	M—16 F—16
P E I	The Marriage Act, S P E I 1969, c 27, ss 17 & 18	M—18 F—18	M—16 F—16
Nfld	The Solemnization of Marriages Act, R S N 1952, c 160, s 4; The Minors (Attainment of Majority) Act, 1971, s 46	M—19 F—19	no minimum age
N W T	Marriage Ordinance, Rev Ord N W T 1956, c 64, ss 22 & 44; Age of Majority Ordinance, 1971 (2d), c 1, s 5	M—19* F—19*	M—15 F—15
Yukon	Marriage Ordinance, Rev Ord Yukon 1958, c 69, ss 22, 44 & 45	M—21* F—21*	M—15 F—15

*Persons may marry at 18 years without consent in certain circumstances

In addition to the variations in the minimum marriage ages (from 21 to 18 years for free age and from 16 years down to consent age), the provincial and territorial laws are at variance in other respects. All of the enactments require some form of consent where one or both of the applicants for a marriage licence are under the free age of marriage, but the source and nature of the consent vary from jurisdiction to jurisdiction. Similarly, some of the laws permit judicial intervention in granting consent; others do not. Some allow an exception to the minimum consent age where the female applicant is pregnant; others do not. More important, perhaps, because of the constitutional implications, is the variation in the laws concerning the consequences for a marriage entered into without the prescribed consent. Some jurisdictions, like Newfoundland, appear to avoid the issue of the validity of a marriage that does not comply with formalities concerning consent. Others, like British Columbia, state expressly that the requirements for consent do not go to affect the validity of a marriage. By contrast, others like Alberta stipulate that consent as prescribed by law is a condition precedent to a valid marriage and non-compliance renders a marriage void Quebec simply states that "there is no marriage where there is no consent" but does not indicate if the consent is that of the parents, of the parties or of both. Some of these matters will be considered at a later point in the paper.

II *STUDIES AND INFORMATION RELATING TO MINIMUM AGES FOR MARRIAGE*

In recent years, several government commissions have addressed themselves to the question of defining appropriate minimum ages for marriage and, not surprisingly when one appreciates the nature of the task, each body arrived at different conclusions

In 1969, the Alberta Institute of Law Research and Reform considered the matter of minimum age for marriage in the context of a general review of the age of majority However, in keeping with the body's view of its role, the Institute made no specific recommendation for a minimum age, this being "essentially a question of social policy on which this body possesses no special competence to advise" [2] The Institute did indicate the growing trend in Alberta to marriages before age 21 and pointed out the various issues to be considered if the government were to contemplate reducing the age below 21 years.[3]

[2] Report No 4 *Age of Majority* (January, 1970) pp 1-2
[3] *Ibid*, see pp 4-14 for the discussions

The Royal Commission on the Status of Women in Canada considered the questions of minimum age and parental consent rather briefly and arrived at the simple solution of establishing a single minimum age of 18 years for both males and females in all cases with no exceptions for parental consent or pregnancy below this age.[4] To say the solution is simple is not to suggest that the recommendation is ill-considered. It is, indeed, a proposal based upon the very realistic view of the commissioners that there is no "right" or "ideal" age for marriage and that any figure selected must be "necessarily arbitrary".[5] The Commission felt that on the scanty evidence available, 18 appeared to be the minimum age at which a successful marriage might reasonably be anticipated.

The Ontario Law Reform Commission delved more deeply into the question of a minimum age for marriage, considering a number of relevant statistics on marriages in Ontario, and concluded that the age of 18 years should be adopted as the minimum free age of marriage for both males and females and that the age of 16 years should be adopted as the minimum consent age of marriage for females only, precluding the solemnization of marriage for males under 18 years.[6] The commissioners believed that these ages best reflected the potential for maturity and economic independence of the spouses to enable them to create a viable family unit wherein care and protection would be afforded their dependents.[7] The Commission advanced the following reasons for drawing the distinction in ages between males and females on the matter of consent age:[8]

> While it appeared initially attractive to recommend the establishment of the same minimum age for solemnization of marriage for both males and females, the Commission has decided otherwise Because males, statistically, tend to marry persons younger than themselves, because it is essential that a young man shall have achieved a degree of emotional and financial independence and self-sufficiency; and because the Commission, in considering related aspects of this question has recommended that the age of majority should be eighteen years,[110] the Commission believes that the minimum age for solemnization of marriage for males should be fixed at eighteen years As has already been shown in this chapter the number of males marrying under the age of eighteen is small In the opinion of the Commission, the interest of accommodating the impatience of this small group is outweighed by the
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> [110] See Ontario Law Reform Commission, *Report on the Age of Majority and Related Matters* (May 12, 1969)

[4] *Report on the Status of Women in Canada* (1970), pp 230-234
[5] *Ibid*, p 232
[6] *Report on Family Law, Part II Marriage* (1970), pp 39-54
[7] *Ibid*, p 39
[8] *Ibid*, pp 44-45

reasons given above Of these factors, the greatest weight is given to the need for financial self-sufficiency and the undertaking of the legal and community responsibilities that are implied by attainment of the age of majority at eighteen

In England in 1967, the Latey Committee, which was considering the question of the age of majority generally, dealt at length with the issue of age for marriage and recognized the fundamental difference between marriage and other contractual relationships that young people enter: "make a wrong contract and you suffer for a year or two . . make a wrong marriage and you suffer for life and spoil the lives of your children after you" [9]

After considering the views of many groups and examining the English statistics, the Committee recommended that the minimum free age for marriage should be set for both sexes at 18 years[10] and that the minimum consent age for marriage be established at 16 years for both sexes [11] In choosing 18 years over 21 or 16 (the two alternatives advanced), the Committee believed 18 to represent the optimum age in youthful maturity where parental judgment should cease being substituted for that of the young adult [12] On the other hand, the Committee chose 16 years as the minimum consent age because they considered it essential to maintain the same age as the minimum age for consent to sexual intercourse [13] The Committee was not impressed enough by the evidence that girls mature at an earlier age than boys to adopt the proposal (accepted by the Ontario Law Reform Commission) that the minimum consent age of 16 be set for females while prohibiting marriage by males under the age of 18 in any circumstances [14]

It is evident from these several efforts to examine and make recommendations on the matter of a minimum age for marriage that complete agreement on the "best" age is impossible to find and the reason is obvious Age is at best a rather rough expression of the various criteria that are relevant to determining when a person is ready for marriage. These criteria are many and we indicate but a few· physical maturity, emotional maturity, level of education, attitudes towards sex, economic potential, social awareness and responsibility. Because we do not possess the means to measure many of these criteria in a person, we relate them to the external standard of measurement, age, in the belief

[9] *Report of the Committee on the Age of Majority*, Cmnd 3342 (1967), pp 42-43
[10] *Ibid* , p 51
[11] *Ibid* , p 53
[12] *Ibid* , see arguments, pp 47-51
[13] *Ibid* , p 53
[14] *Ibid* , p 52

that these human qualities mature as the person grows The problem with this approach is that it simplifies a complex issue, ignoring the facts that all of the necessary human qualities may not "mature" in a person at the same time and that different people will achieve maturity for marriage at different ages

Despite this problem, we cannot suggest a viable alternative to age for measuring maturity to marry and, recognizing its inherent shortcomings, must proceed to consider additional evidence relevant to age of marriage, trusting that, by and large, age is the most reliable guide to human maturity that we now possess

Divorce and marriage-breakdown statistics would no doubt be a useful source of information for attempting to predict the minimum age at which a marriage would have the greatest likelihood of success However, as the Ontario Law Reform Commission indicated in its study, no such data are available in Canada * In the United States, it appears that in excess of 50% of teenage marriages end in divorce or desertion [15] The Ontario Law Reform Commission indicated that a similar situation was likely the case in Ontario [16]

Another source of relevant information is the laws of other jurisdictions establishing minimum ages for marriage [17] Of the ninety-odd jurisdictions surveyed, over one-half set the minimum consent age for marriage of males at 18 years while almost 90% have fixed 16 years or younger as the minimum consent age for females (approximately 50% designate 16 years) The minimum free age for marriage of males is invariably 18 years or over with a substantial majority favouring age 21 For females, the majority of jurisdictions have set 18 years as the minimum free age with most others designating 21 years. While these figures do not tell us what the minimum age for marriage in Canada should be, they do suggest practical limits for us insofar as the recognition of Canadian marriages abroad is concerned.

Perhaps the most significant information for our purposes is the data showing that "young marriages", which we will define as marriages where one of the spouses is under 21 years, do occur in Canada in substantial numbers From 1960 to 1969 inclusive, the percentage of marriages where the bride was under 21 to all marriages fluctuated from a high of 44 2% in 1962 to a low of 39 7%

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[15] See *Report on the Status of Women in Canada* (1970), p 232

[16] *Report on Family Law Part II Marriage* (1970), p 42

[17] See compilation of data in Annex A

*I am advised by Statistics Canada that such data are now being compiled for 1969 and 1970 and should be available in the near future

in 1969, with an average of roughly 43.0% over the period. For grooms under 21 years in the same interval, the figure reached a high of 15.9% in 1969 and a low of 13 8% in 1960. Of these young marriages between 1960 and 1969, 21 4% of the brides were under 18 years in 1960 with a low of 16 3% in 1969 while the percentage of grooms under 18 in this ten year period remained at approximately 3.9%. Compared to the total marriage picture, these under 18 marriages appear statistically insignificant. In absolute terms, however, the percentages represent about 11,000 marriages annually where the bride was under 18 and around 900 a year where the groom was under 18 years. Of these figures, by far the largest number of marriages occurred in the 16-17 year old group, leaving marriages where either party was under 16 years old at 0.17 to 0.2% of all marriages under 21 years.[18]

III *PROPOSED APPROPRIATE MINIMUM AGES FOR MARRIAGE*

Because of the recommendation made by the Royal Commission on the Status of Women in Canada, we initially considered the purpose of this study to be to advise on the selection of a single minimum age for marriage; an age above which persons would be free to marry without consent and below which they could not contract a marriage However, in light of our research we believe that this would be an unwise course of action It is evident from the information we have examined that the human qualities considered necessary to found a viable marriage do not mature in all young people at the same age This fact is recognized in the present legislation of Canada and the foreign jurisdiction by the adoption of a range of ages within which marriage is permitted. While there is disagreement as to the appropriate range of minimum ages for marriage, there is a marked degree of agreement on the need for some flexibility in designating the minimum To point to a single age as *the* minimum age for everyone is to inject an unwarranted degree of arbitrariness into a matter that is already subject to some arbitrary judgment.

Thus, we feel the better course is to adopt two age limits, one above which persons may marry by their own consent (a free age); the other below which they may not marry at all or only in very exceptional circumstances (a consent age). Between these limits they may marry but only under certain conditions. The upper age should be presumed in law to be the age of full maturity for marriage; the lower presumed to be the age of no maturity.

[18] See Annex B for data compiled by Statistics Canada

Between these ages would be a nether region in which the parties would have to establish that they possessed the maturity for marriage, despite lack of age. Only in this way can we attempt to recognize the variation in age at which maturity is attained

The free age, the age of presumed maturity, should be fixed at the point where it appears that most young people have, in the normal course, acquired the degree of education, emotional maturity, independence of mind and social awareness to enable them to make decisions responsibly and to assume the burdens of spouse, provider and parent.

While 21 years has long been the age at which we have assumed a person reached the point of being equipped to make decisions independent of the advice and guidance of "adults", this view is now discredited by many, both generally in relation to the capacity of youth to assume the rights and obligations of adulthood and particularly in relation to maturity for marriage. There has been a pronounced trend in recent years to recognize that in today's society young people "grow up" earlier than in the past and this fact is reflected in a number of legislative changes in Canada, lowering the general "age of majority" from 21 to 19 or 18 years. We have already noted the observations of the several commissions on this subject. Legislatively, Parliament has recently amended the *Canada Elections Act* to extend the franchise to all persons 18 years and over.[19] The federal government now is urged by the Committee on Youth to "establish the age of 18 years for men and women as the standardized age of majority for all legal matters under federal jurisdiction".[20] At the local level, eleven legislatures have now enacted legislation lowering the general age of majority to either 18 or 19 years for purposes including the age at which marriages may be solemnized without third-party consent.[21] Only the Yukon Territory still appears to retain 21 years as the general age of majority[22] Thus, seven jurisdictions now permit a marriage to be solemnized without parental consent at age 18, four permit it at age 19 and one permits it at age 21.

With these facts before us, it seems reasonable to propose that a uniform free age for marriage in Canada should be set at either 19 or 18 years. While 19 might be attractive as a reflection of erring on the side of caution, the marriage statistics set out in

[19] R S C 1970, c 14 (1st Supp), s 14

[20] *It's Your Turn* A Report to the Secretary of State by the Committee on Youth (1971), p 173

[21] B C (19); Alta (18); Sask (18); Man (18); Ont (18); Que (18); N S (19); N B (18); Nfld (19); N W T (19); P E I (18)

[22] See Table 1, *supra*, for relevant legislation

Annex B would indicate that 18 is probably more in conformity with reality. In 1969, there were 16,000 females and 3,400 males who married at age 18, representing 22% and 13% respectively of marriages by persons under 21 years.[23] This is too significant a number to ignore and thus, pragmatically, we opt for 18 years as the minimum free age for marriage in Canada. Eighteen not only better reflects the facts of life but also accords with the views expressed by the government bodies that have studied the question.

Turning now to the lower age, the minimum consent age for marriage, the task of proposing the appropriate figure is considerably more difficult The problem is compounded by the question of whether one should consider providing different age levels for males and females that would reflect the fact that males tend to mature at a later age than females

The Royal Commission on the Status of Women in Canada, in opting for a single minimum age of marriage, apparently rejected, as without merit, the argument that the human qualities for matrimonial maturity do not blossom in all young people at a single age and the fact that a sizable number of marriages do occur before age 18 In its quest for sexual equality the Commission also ignored the evidence that biologically, females do tend to reach maturity about 1½ years earlier than males [24]

On the other hand, the Latey Committee did consider all of these matters and was persuaded to recommend a common minimum consent age of 16 years for both males and females In choosing the same age for both sexes, the Committee rationalized thus.[25]

> However, the evidence that showed that girls mature sooner also showed that boys catch up fast Girls in any case tend to marry boys a year or two older than themselves, and the number of boys marrying at 16 is negligible And we feared that only too often an attempt to save a young man from the premature responsibilities of being a paterfamilias under 18 would succeed only at the cost of making some equally unfortunate young woman assume the responsibilities of being an unmarried mother

The Ontario Law Reform Commission, recognizing the facts that maturity for marriage can occur in some persons at an earlier age than 18, that a considerable number of marriages do occur in the 16-17 age bracket and that males mature later than females, chose to recommend that 16 years be established as the minimum

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[23] See data set out in Annex B

[24] *Report on the Status of Women in Canada* (1970), pp 230-234 See *Report on the Committee on the Age of Majority* Cmnd 3342 (1967), pp 45-46 for discussion on age of maturity

[25] *Report of the Committee on the Age of Majority* Cmnd 3342 (1967), p 52

consent age of marriage for females and 18 years be established for males

We are thus presented with several alternatives, none of which is completely satisfactory The Status of Women proposal is too rigid. The Latey proposal, while flexible, accounts for no differences in males and females The Ontario proposal is flexible in regard to women but inflexible for men If one were fully persuaded by the statistics and by the differential in maturity levels between males and females one might be tempted to propose the adoption of a minimum consent age of 16 years for females and 17 years for males Adopting 16 years for women would recognize the facts of earlier maturity for females and of the sizable number of females (11,000) marrying at ages 16 and 17. Adopting 17 years for men would introduce some flexibility in recognition of the maturing process but would also recognize the differential in maturity age between the sexes Beyond this, 17 might better reflect the potential of the male for marriage maturity than would 16 years while at the same time it would accord with the statistics which show that in 1969, 800 males married at age 17 while only 100 married at 16 years of age

On the other hand, statistics are only an indicator of what is, not what should be And the maturity differential between males and females is based on measurements of persons not in Canada but in England, where it was ultimately discounted by the Latey Commission as a factor in the recommendations made concerning the minimum consent age

Given the fact that we have no substantial evidence on which to draw a distinction between the maturity levels of males and females, it is probably the best course to opt for the principle of sexual equality recommended by the Royal Commission on the Status of Women in Canada and recommend that the minimum consent age for marriage for both males and females be fixed uniformly at 16 years

It may be argued that age 16 years is too low for marriage in any case Here, we can only say that there is no evidence, apart from the reasoning of the Ontario and British commissions, to support the argument one way or the other—perhaps a sad commentary on the efforts of our social scientists However, at this age, most young people have had the benefit of 10 or more years of formal education and many of them will be as mature at that age as they will be at age 18 and not a few of them are now being married at this age How many such marriages survive, we do not

know What is essential in permitting marriages at an age below 18 years, is to provide a system whereby the young people receive adequate counselling to be apprised of the responsibilities they must assume. This matter is considered in the next part of the paper

IV *THE MATTER OF CONSENT*

We have suggested the adoption of a minimum consent age for marriage where permission to marry might be granted under certain conditions It is now necessary to consider the substance of those conditions and the manner in which they might be fulfilled.

All provincial and territorial legislation now provides for consent as a prerequisite to solemnizing a marriage where one or both of the parties is below the free age of marriage. The legislation varies considerably in such provisions, and the consent may be that of one or both parents, of a guardian, of a judicial officer or of a government official, depending upon the jurisdiction and the circumstances Table II attempts to summarize the practice in each jurisdiction In addition to the variations in consent practice, there are, as indicated earlier, variations among the jurisdictions in the legislative provisions dealing with the consequences for a marriage performed without the required consent This matter will be explored later as a constitutional issue.

The practice of requiring consent for marriages where one of the parties is under the free age is thus not new and we believe it to be a requirement that should be retained in all cases where the male or the female is 16 or 17 years of age As we observed earlier, in this age category there is no presumption of marital maturity and thus both the families of the prospective spouses and society generally have an interest in and a responsibility for ascertaining if a viable union is likely.

It is one thing to assert that consent is essential in a proposed "under-age" marriage; it is quite another to determine the best procedure by which to make the requirement effective and meaningful It must be viewed as a matter of more than simple formality since its purpose is to try to ascertain if, despite the minority of either or both of the parties, there is yet an adequate degree of maturity to effect a marriage having a likelihood of success. The important task is thus to select the forum that is best able to exercise an informed and responsible judgment and at the same time will engender in the young people a sense of trust and respect for the judgment made.

On one hand, there is much to be said for choosing the parents (or one of them where appropriate or necessary)* as the persons best equipped to entertain a request for consent to marry, the conclusion reached both by the Latey Committee[26] and by the Ontario Law Reform Commission.[27] Parents generally know their children best and have had the experience of married life themselves. The young people also know their parents and, in most cases, trust their judgment. On the other hand, parents may be the ones least likely to be objective in their judgment and, in some cases, will have the wrong motives for saying "yes" or "no" too hastily

TABLE II

Jurisdiction	Initial Consent in order of precedence	Appellate Consent in order of precedence
B C	Parents /Either Parent /Guardian /Official Guardian S C or C C Judge	S C or C C Judge
Alta	Parents /Either Parent /Guardian /Director of Child Welfare /S C or D C Judge	S C or D C Judge
Sask	Parents /Either Parent /Guardian /Director of Child Welfare	Q B or D C Judge
Man	Parents /Either Parent /Guardian /Family Court Judge	Family Court Judge / C C Judge
Ont	Father /Mother /Guardian /Issuer / Prov Secretary	C C or D C Judge / Provincial Secretary
Que	Either Parent /Tutor. or Curator	None
N B	Father /Mother /Guardian /Issuer	S C or C C Judge
N S	Father /Mother /Guardian /Director of Child Welfare /Issuer	C C or D C Judge
P E I	Parents /Either Parent /Guardian /Director of Child Welfare /C C Judge	C C Judge
Nfld	Parents /Guardians	None
N W T	Parents /Either Parent /Guardian	Judge
Yukon	Parents /Either Parent /Guardian	Judge

NOTE: The appellate power is exercisable in cases where the judge believes consent has been withheld unreasonably and is generally a totally discretionary power

*e g , where there is a marriage separation or dissolution or a death
[26] *Report of the Committee on the Age of Majority* Cmnd 3342 (1967), pp 50-51
[27] *Report on Family Law Part II Marriage* (1970), pp 48-51

In the interests of the prospective spouses and of society, it is probably desirable to have a forum removed from the family, both to monitor the parents' decision and, in those cases where there is no parent, to act as the agency to consider requests for consent. Two possible and very tentative alternatives for this process are suggested

First, qualified marriage counselling groups could be established throughout the country vested with authority to review the decisions of the parent or parents and to consider original requests for consent in other cases The groups could in each case interview the parents and the prospective mates to ascertain the reasons for the parental consent or refusal thereof and to judge for themselves whether the couple appears ready for marriage In cases where there is no parent, the group would entertain the request for consent directly

The counselling group could be empowered to grant consent immediately where it was satisfied that the couple was mature enough to proceed with matrimony or to delay its final judgment for a period of months while the couple received marriage counselling At the end of this period, the group would make a final disposition of the application.

There are several obstacles to implementing this proposal The arrangement would require the services of many trained personnel and it may be difficult, if not impossible, to find such persons in the smaller centers of population The plan would also require thousands of these counselling groups throughout the country, and thus would be expensive to administer

The second alternative is to vest the power to deal with applications for consent in the family court judges who could, where necessary and possible, draw upon the assistance of a marriage counsellor The virtue of this system is that family courts already exist throughout the country, staffed by persons experienced in dealing with family matters.

In the simplest case, that where the parents consent to the marriage, an application could be made to the judge to confirm this consent At an informal interview with the parents and the prospective spouses, the judge would simply inquire into the motives for granting consent and, unless he felt the judgment to be faulty, he would affirm the consent.

In cases where he overruled the parental consent, and in cases where the parents had refused consent or where there were no parents available to grant consent, the judge would refer the application to a marriage counsellor for investigation and recommendations If the marriage counsellor believed that the couple required some guidance before consent was given, this could be arranged Ultimately the judge would hold an informal hearing and determine whether to grant or refuse to grant consent

This proposal also suffers some shortcomings There are questions about the uniform caliber and qualifications of family court judges to deal with this matter and also a problem of finding marriage counsellors in all places to assist the judges However, neither of these difficulties is insurmountable if there is support at both levels of government for this arrangement

Neither proposal is perfect by any means but each offers the advantages of tempering the judgment of whimsical or obstinate parents and of ensuring that society's interests (expressed in a law that seeks to discourage marriages by parties under the free age) as well as those of the parents and children are reflected in the decision to grant or to withhold consent [27a]

V *PREGNANCY AS A GROUND FOR CONSENT*

Whatever the machinery chosen to entertain applications for consent to marry, the most difficult problem it will face is the request for consent to marry where the young girl is pregnant and either wants or feels obliged to marry the putative father This matter has two aspects First, should it be a reason for permitting a marriage where one or both of the parties are below the free age but within the consent age for marriage, i e., where the male or the female is 16 or 17 years old? Second, should it be a ground for waiving the bar to marriage by persons under the minimum consent age for marriage?

Certainly, if precedent is a guide, pregnancy should constitute an exception to the minimum age bars in both cases The common law jurisdictions in Canada, with the exceptions of New Brunswick (which has no statutory minimum age) and Manitoba, expressly provide in their marriage laws for the granting of permission to

[27a]The issues of pre-marital marriage counselling and of the jurisdiction of the family courts in pre-marital matters are very complex and in need of detailed examination It is our understanding that the subjects will be studied by the National Law Reform Commission in its proposed Family Law Project Thus we make no specific recommendation on this subject, pending the completion of the Commission's study

marry to a pregnant female who is under the minimum consent age.[28] In some cases, consent must be obtained from a judge; in most cases the only requirement is the filing of a medical certificate along with parental consent.

The purposes of these provisions are, of course, to ensure the legitimacy of the offspring and to allow the young people, no matter how immature they may be, to assume responsibility for their "foolishness" Years ago, and perhaps until fairly recent times, these reasons were considered by many as very valid grounds for permitting—indeed, for encouraging—a marriage between under-age couples in the "family-way". Pregnancy outside wedlock usually led to social and family ostracism and to a lack of home or other place for the unwed mother to live In addition, it was difficult for the unwed mother to support herself and her child Consequently, marriage to the putative father mitigated the moral indignation, legitimized the offspring and hopefully provided a home and support for the mother and child

Today, however, we believe the situation to be such that the existing policy concerning marriages based on pregnancy should be reconsidered First, the moral attitudes concerning unwed mothers and children born out of wedlock seem to have become more tolerant. Second, social institutions such as counselling services, welfare services, homes for unwed mothers and adoption agencies have been developed to assist in dealing with the problems of children conceived and born out of wedlock Third, the laws governing abortion and child support have become more liberal. All of these developments suggest that the previous pressures for encouraging or forcing a marriage in such circumstances no longer exist to the same extent and lead us to suggest that we should not view marriage as the solution to the problem An individual's personal development and destiny may or may not be fulfilled by the person with whom he or she has become sexually involved at an early age and for that reason marriage is, at best, a dubious

[28] *Marriage Act*, R S B C 1960, c 232, ss 16(4)(b) & 30(2)
The Marriage Act, R S A 1970, c 226, ss 16(2) & 19(2)
The Marriage Act, R S S 1965, c 338, s 31(1)
The Marriage Act, R S O 1970, c 261, ss 8 & 9
Solemnization of Marriage Act, R S N S 1967, c 287, ss 17(5) & 18(2)
The Marriage Act, S P E I 1969, c 27, ss 17(2) & 20
The Solemnization of Marriages Act, R S N c 160, s 4
Marriage Ordinance, Rev Ord N W T 1965, c 64, ss 22(1)(a) & 46(1)
Marriage Ordinance, Rev Ord Yukon 1958, c 69, ss 22(1)(a) & 46(1)

NOTE: Although the Manitoba *Marriage Act* does not deal with the question of pregnancy, ss 21(1) and 22(1) do give the Family Court judge an unlimited discretion to permit a marriage where a party is under 18 years of age

solution. This, we would suggest, is the case whether the conception of a child is a deliberate strategy of the young couple to force consent for marriage or is a genuine mistake of an impassioned romance

In this regard, we are influenced by the views of the Royal Commission on the Status of Women in Canada.[29]

> The Commission believes that the fact of pregnancy should not in itself constitute a sufficient ground to permit marriage when both parties are so young or immature that their future may be jeopardized and there is little hope of the marriage being a success As one brief put it: "We believe it to be of the utmost importance that pregnancy should not be a cause for dispensing with the provision of the law regarding age and consent, because this leads certain people to seek pregnancy as a means of avoiding parental consent or of avoiding the sixteen year age minimum There is widespread concern at the increasing rate of breakdown of marriage, especially of teenage marriages, and experience indicates that this rate of breakdown is even higher in those marriages precipitated by pregnancy" [11] The problem, as it appears to us, does not lie in teenage marriages themselves but rather in the number of such marriages that are precipitated by pregnancy These unions are usually not the result of decisions fully made by responsible individuals Moreover, a girl who marries because she is pregnant will frequently drop out of school and not return And if the husband deserts her, it is usually she who will bear the responsibility or caring for the child or children

On the basis of the foregoing considerations, we feel that pregnancy should not be a basis for permitting marriages where one or both of the parties is under the minimum consent age for marriage Nor do we believe that the fact of pregnancy should constitute a ground for dispensing with the consent requirements in the case of persons between the minimum consent age and the minimum free age for marriage

There may, however, be factors other than pregnancy that could be considered as a basis for granting consent to a marriage where one or both of the parties is under the minimum consent age We think here of attitudes and values of particular religious communities that encourage very early marriages of their young members If this be the case, it may be thought desirable by some to provide for an exception to the general rule whereby the parents and the public authority (the court) might consent to the marriage of a person under the age of 16 years where

> the court finds that the underaged party(ies) is capable of assuming the responsibilities of marriage and marriage would serve their best interests and those of society [28a]

[11] Brief No 212

[28a] Adapted from the provisions of the United States Draft Uniform Marriage and Divorce Act

[29] *Report on the Status of Women in Canada* (1970), p 233

Our preference, however, would be for age 16 being viewed as an absolute minimum in all cases simply because the viability of a marriage by persons below this age is extremely doubtful

VI *CONCLUSIONS ON THE MINIMUM AGES FOR MARRIAGE*

From the foregoing examination of the various issues relating to the matter of age for marriage, we have reached the following conclusions

1 The minimum free age for marriage in Canada should be established at 18 years for both sexes

2 The minimum consent age for marriage in Canada should be established at 16 years for females and for males

3 A procedure for granting or denying consent to marry to males and to females of 16 or 17 years of age should be adopted, reflecting both parental and societal interest in the matter of youthful marriages

4 Pregnancy should not be recognized as a ground for permitting a marriage not otherwise authorized under the above conditions

Before turning to the final matter of how to implement these conclusions legislatively under the constitution, it is necessary to consider briefly the desirability of seeking uniformity in Canada on the laws governing the minimum ages of marriage Up to this point the discussion has assumed that uniformity on this matter is a desirable goal and this appears to be the view of the Uniformity Commissioners In favor of this view one might advance several arguments but only one of them appears to possess any real substance For example, it may be contended that uniformity of the minimum ages for marriage would avoid uncertainty as persons move from one jurisdiction to another, would deter prospective spouses from shopping for the jurisdiction with the lowest age requirements, and would avoid problems involving the recognition of the validity of marriages But it must be admitted that these considerations may be more theoretical than real. Again, from a legalistic point of view, it may be argued that age of marriage is essentially a matter of capacity which constitutionally can be dealt with definitively only by Parliament, presumably in a uniform manner However, subsequent analysis of the question of constitutional jurisdiction will suggest that the matter of minimum ages can also be effectively dealt with by the provinces In the final analysis, perhaps the most compelling argument in favour of

uniform legislation governing the minimum ages for marriage is that it would serve to strengthen the institution of marriage by adopting a uniform minimum age below which marriages would not be permitted at all. As we have earlier noted, the minimum ages for marriage do vary and, in seven jurisdictions, the minimum is below that which we consider the lowest age at which a viable marriage may be effected. In fact in Canada each year, several hundred marriages do occur where at least one of the parties is below the age of sixteen.

On the other hand, it can be argued that a basic goal of federalism is to permit regional diversity in laws and practices in all of those areas of human endeavour where there is no compelling reason for uniformity at the national level By this test, a case can be made for the proposition that the matter of minimum marriage ages should be left to be dealt with locally, by provincial laws which would presumably reflect the differing social values of the various communities within each province

Thus, while our task is to propose common rules for Canada concerning minimum ages of marriage, the question of diversity versus uniformity should be considered as a central issue when measures to deal with the matter are being considered at the policy level

VII *THE CONSTITUTION AND THE MINIMUM AGE FOR MARRIAGE*

It remains to consider the scope and nature of the legislative powers of Parliament and the provincial (and territorial) legislatures to implement the substance of the conclusions reached above on the matter of the minimum ages for marriage As we shall see, the answers offered vary with the viewpoints taken on the meanings of the term "formality" and "capacity"

Under English law, the act of marriage has traditionally been divided, for purposes of the conflict of law rules, into two identifiable parts, one part pertaining to the formalities of the marriage ceremony and the other part relating to the capacity of the parties to contract a marriage The formalities of the marriage include those procedures leading up to the performance of the ceremony—obtaining parental consent, securing a licence, publishing banns—and the rites of solemnization—the qualifications of persons entitled to perform a marriage ceremony, the nature of the ceremony and the recording of the marriage Capacity, on the other hand, goes to the personal status of the parties and includes matters of age, existing marital status, mental and physical con-

ditions and degrees of kinship of the prospective spouses A failure to comply with any of the legal requirements governing either the formalities of the marriage or the capacity of the parties could lead to a voiding of the marriage, under certain conditions [30]

When the *British North America Act* was being drafted, jurisdiction over matters of "marriage and divorce" was initially, and without qualification, proposed to be vested in the central parliament because it was believed by the major political leaders that the differing religious views on matrimonial matters could best be protected for both the Roman Catholics and the Protestants if such matters were not left in the hands of the dominant religious group in each of the local legislatures. This proposal evoked considerable opposition from the representatives of Lower Canada on the ground that the formalities of marriage at least should be within the purview of the local legislatures This argument eventually won the day and the *B N.A. Act* as finally adopted vested Parliament with jurisdiction over "Marriage and Divorce" while empowering the provincial legislatures to deal with the "Solemnization of Marriage in the Province".[31] In construing the meaning of this power granted to the provinces, the courts might have limited "solemnization" to those matters involved in the actual performance of the ceremony. But they did not Rather, they held it to encompass all aspects of the formalities of marriage including the matter of parental consent and, in so doing, gave to the provinces the power to control indirectly the capacity to marry as this related to age, because age and consent are, of course, inextricably related.

The question of the division of legislative jurisdiction over matrimonial matters did not come before the courts as a significant issue until 1912, when the Governor in Council referred to the Supreme Court of Canada, for a determination of its validity, an amendment to the federal *Marriage Act* which purported to declare valid anywhere in Canada a marriage validly performed by the laws of the jurisdiction in which the marriage occurred. Four of the five judges ruled that the federal enactment was *ultra vires* the power of Parliament The decision was then reviewed by the Privy Council and that body affirmed the majority judgment rendered below [32]

[30] See Bromley, Family Law (3d, 1966), pp 32-50 for a discussion of the distinctions outlined above

[31] *British North America Act*, 30 & 31 Victoria, c 3, s 91(26) & s 92(12) For a short discussion of the debates in the Provincial Parliament of Canada in 1865 on the question of marriage jurisdiction, see Jordan, "The Federal Divorce Act (1968) and the Constitution," (1968) 14 *McGill Law Journal*, 209 & 211-215

[32] *Reference re Marriage Legislation in Canada*, [1912] A C 880

This first case did not, because of its nature, go to the question whether provincial law could effectively regulate the capacity of persons to contract a valid marriage but it did establish that the provincial jurisdiction over "solemnization" included the power to stipulate conditions in the formalities of a marriage that could affect the validity of a marriage The views of Viscount Haldane L C. are important to understanding the subsequent pronouncements of the Supreme Court of Canada and hence are set out at length [33]

> In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s 91 If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar The other learned counsel contended that the power conferred by s 92 to deal with the solemnization of marriage within a province had cut down the effect of the words in s 91, and effected a distribution of powers under which the Legislature of the province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage
>
> Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss 91 and 92, cover the whole field of validity They consider that the provision in s 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract There have doubtless been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity But there are at least as many instances where the contrary doctrine has prevailed The common law of England and the law of Quebec before confederation are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute Prima facie these words appear to their Lordships to import that the whole of what solemnization ordinarily meant in the systems of law of the provinces of Canada at the time of confederation is intended to come within them, including conditions which affect validity There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for Both readings of the provision in s 92 are in the nature of limitations of the effect of the words

[33] *Ibid*, pp 886-887

> in s 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural construction of the words "solemnization of marriage," having regard to the law existing in Canada when the *British North America Act* was passed, should not prevail

It must be remembered that this case was not one dealing with the question of Parliament's jurisdiction over matters of the *capacity* to contract a marriage, nor was there a question of the provinces' ability to deal with the matter It related only to the ability of Parliament to legislate on the formalities of a marriage and with the provinces' jurisdiction over the matter. But, as usual, Viscount Haldane cast his net broadly, and the Supreme Court of Canada was not inclined to propose suitable refinements in subsequent cases.

The year 1934 brought before the Supreme Court of Canada two significant cases in which the validity of provincial laws dealing with the requirement of parental consent in the case of minors seeking to marry was challenged In the first case, *Kerr v Kerr and A G Ont* ,[34] the impugned sections of the *Ontario Marriage Act* provided that a person under 18 years intending marriage must obtain the written consent of his father, mother or guardian. Such consent was "deemed to be a condition precedent to a valid marriage" (save in certain circumstances) and a form of marriage entered without the requisite consent was void. The legislation then went on to prescribe the conditions under which the Ontario Supreme Court might pronounce such a marriage void The case was thus significantly different from the 1912 reference in that it dealt not with the form of the marriage ceremony but with a matter preliminary to the ceremony and one that inevitably went to the capacity of a person to marry at a given age

The judges did not, however, choose to explore the difference and concluded unanimously that consent, being a matter falling within the ambit of "solemnization of marriage", was an issue to be dealt with by provincial law in all respects, including provisions governing invalidity of a marriage where consent was not obtained [35] The Chief Justice saw the legislation as dealing solely with solemnities of marriage and not with capacity to marry [36]

> Duff C J —I concur with the view of the Appellate Division that s 17(1) of the *Marriage Act* is *intra vires* of the Provincial Legislature I have no doubt that, in exercise of its jurisdiction in relation to the subject reserved to the provinces by s 92(12), "Solemnization of Marriage", the legislature of a province may lawfully prescribe the consent of the parents or guardian to the marriage of a minor as an essential element in the ceremony of marriage

[34] [1934] S C R 72
[35] The reservations of Crocket J are considered latter
[36] [1934] S C R 72 & 74-75

itself Nor have I any doubt that by s 17(1) the consents required are prescribed as elements in the ceremony These requirements apply to all marriages celebrated in Ontario, and to no marriages but those celebrated in Ontario, whether the parties to the marriage be domiciled in Ontario or elsewhere The legislature is, I think, dealing with the solemnities of marriage and not with the capacity of the parties

It is not suggested that, according to the practice prevailing in the different provinces of Canada at the time of Confederation, the giving of such consents pursuant to the requirements of the law, would not properly have been regarded as belonging to such solemnities The province, therefore, has power to require such consents as a condition of the validity of the solemnization of marriages within the province But, it should be observed that the jurisdiction of the province is not limited to that The authority with regard to the subject "Solemnization of Marriage" is plenary Lord Watson, in *Liquidators of the Maritime Bank of Canada* v *Receiver-General of New Brunswick* (1), said:

> "In so far as regards those matters which, by s 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act

The authority of the provinces, therefore, extends not only to prescribing such formalities as properly fall within the matters designated by "Solemnization of Marriage"; they have the power to enforce the rules laid down by penalty, by attaching the consequence of invalidity, and by attaching such consequences absolutely or conditionally It is within the power of a province to say that a given requirement shall be absolute in marriages of one class of people, while it may be dispensed with in other marriages This, of course, is always subject to the observation that a Province cannot, under the form of dealing with the "solemnization of marriage", enact legislation which, in substance, relates to some part of the subject of "marriage" which is not reserved to the provinces as a subject of legislative jurisdiction

Lamont J was equally satisfied that Viscount Haldane had disposed of the issue in 1912 [37]

Since the decision of the Privy Council in *In re Reference Concerning Marriage* (1), it has been settled law that the exclusive power of the provincial legislatures to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred upon the Dominion Parliament as regards marriage, by section 91 (26), and enables the provincial legislatures to enact conditions as to the solemnization which may affect the validity of the contract

Solemnization of marriage within the meaning of section 92 includes not only the essential ceremony by which the marriage is effected, but also parental consent where such consent is required by law In *Sottomayor* v *De Barros* (2) Cotton, L J , says:

> "It only remains to consider the case of *Simonin* v *Mallac* (3) The objection to the validity of the marriage in that case, which was solemnized in England, was the want of consent of parents required by

[37] *Ibid*, pp 82-83

> the law of France, but not under the circumstances by that of this country In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage
>
> The provincial legislature is, therefore, competent by apt legislation to make the preliminaries, leading up to the marriage ceremony, conditions precedent to the solemnization of the marriage From this it follows, in my opinion, that the legislature is also competent to declare that in the event of these conditions precedent not being complied with no valid marriage has taken place

Crocket J also agreed that consent for a minor to marry was a part of solemnization under provincial jurisdiction and that the province could equally declare a marriage invalid for want of consent and empower its courts to pronounce a decree of nullity in such cases[38] However, his Lordship could not agree that the provincial jurisdiction extended to prescribing the conditions under which a non-consent marriage could be pronounced valid or invalid, in this case conditions relating to consummation, cohabitation and prior carnal knowledge. In his view, these were matters not relating to solemnization of marriage but rather to the status of the parties and hence to be dealt with by Parliament.[39] Crocket J. then set out his view on the distribution of legislative powers relating to marriage[40]

> The provincial legislatures may enact conditions as to solemnization which may affect validity, but such conditions must not go beyond those matters which in reality pertain either to the act or ceremony of solemnization itself or to the preliminary steps leading thereto They cannot, by annexing to a condition which does thus concern the solemnization of marriage, such as the consent of a parent or guardian of one under age, further conditions, which do not themselves pertain to solemnization, but have to do with the capacity of the parties and their conduct as well after as before the performance of the marriage ceremony, as conditions either of validity of the ceremony or of the rights of the parties to obtain judicial declarations of annulment, trench upon that field which the *British North America Act* has exclusively reserved for the Parliament of Canada, viz: Marriage and Divorce, except the Solemnization of Marriage Such further conditions, as I have indicated, either concern or they do not concern the subject matter of the solemnization of marriage If they are to be regarded as concerning that subject matter, the words "marriage and" in enumeration 26 of the classes of subjects with respect to which sec 91 of the *British North America Act* provides that the Parliament of Canada may exclusively make laws, would, in my opinion, be rendered meaningless and of no effect and the provincial legislatures enabled to occupy the entire field of validity of marriage, for, as I have already endeavoured to point out, there would be no condition which

[38] *Ibid*, pp 86-87
[39] *Ibid*, pp 87-89
[40] *Ibid*, pp 90-91

> they could not enact as a prerequisite of the valid solemnization of a marriage, whether such condition concerned the capacity of the parties or not "Solemnization of marriage in the province"; as enumerated in sec 92(12), would not operate "by way of exception" to the powers conferred on the Parliament of Canada by sec 91(26) to make laws in relation to "marriage and divorce", as held by the Judicial Committee on the Reference of 1912 (1), but by way of a complete abrogation of those powers, in so far as "marriage" is concerned

It must be added that the Chief Justice also granted that Parliament's jurisdiction over "marriage" was not without substance, including the prospect of a power to deal with age and consent as a matter of capacity.[41]

> I must not be understood as expressing the view that it would not be competent to the Dominion, in exercise of its authority in relation to the subject of "marriage" in matters which do not fall within the subject of "solemnization of marriage", to deprive minors domiciled in Canada of the capacity to marry without the consent of their parents No such question arises here, and it is quite unnecessary to pass an opinion upon it The authority of the Dominion to impose upon intending spouses an incapacity which is made conditional on the absence of certain nominated consents is not in question

Duff C.J concluded by citing the principle of the double aspect doctrine and noting that the provincial law was effective "in the absence of legislation in the same field by the Dominion".[42]

Having reached the conclusions which it did in the *Kerr* case, it was a simple matter for the Supreme Court of Canada to conclude in the case of *A.G. Alberta and Neilson v Underwood*[43] that similar provisions governing marriage consent in the Alberta *Solemnization of Marriage Act* were equally *intra vires* the provincial legislature However, two points must be noted in relation to this judgment First, it was a reversal of the ruling of Alberta Appellate Division of the Supreme Court which, by a majority, had held the legislation invalidating marriages entered without consent to be a matter not of solemnization but of capacity of minors to marry and hence "an encroachment upon the general power of the Dominion to exclusively make laws upon the subject of marriage, excepting only solemnization of marriage".[44] Second, lest it be thought that the *Kerr* case might be justified on the ground that the Ontario law, though going to capacity, was

[41] *Ibid*, pp 75-76
[42] *Ibid*, p 76
[43] [1934] S C.R 635
[44] *Ibid*, p 638

pre-confederation legislation and hence valid under s 129 of the *B.N A. Act*, the impugned Alberta legislation was enacted only in 1931 *

Rinfret J , for the court, disposed of the appeal summarily without further exploration of the distribution of legislative jurisdiction over marriage, but not without making it clear that the jurisdictional cleavage was governed by the classifications of "formalities" and "capacity" (status) [45]

> The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage Solemnization of marriage is not confined to the ceremony itself It legitimately includes the various steps or preliminaries leading to it The statute of Alberta, in its essence, deals with those steps or preliminaries in that province It is only territorial It applies only to marriages solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in the province (*Brook v Brook* (1)) It does not pretend to deprive minors domiciled in Alberta of the capacity to marry outside the province without the consent of their parents Moreover, it requires that consent only under certain conditions and it is not directed to the question of personal status
>
> Under the circumstances, the parental consent is a requirement similar in quality to the other requirements concerning the banns or the marriage licences It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity
>
> It is a requirement which a provincial legislature may competently prescribe in the exercise of its jurisdiction in relation to the solemnization of marriage in the province and to which it may "attach the consequence of invalidity absolutely or conditionally" (*Kerr v Kerr* (1); *Marriage Reference* (2))
>
> In this case, parental consent was required "as a condition of the validity of the solemnization of the marriage within the province" Such enactment being legislation within the province's authority and the required consent not having been obtained, it follows that the ceremony itself was void *ab initio* and that no valid marriage has taken place The appellant was therefore entitled to the declaration prayed for and her action ought to have been maintained

The court again, as Duff C J had done in the *Kerr* case, reserved its opinion on the power of Parliament to legislate regarding capacity to marry [46]

> It must further be understood that our judgment does not express any view as to the competency of the Dominion, in the exercise of its proper authority, to legislate in relation to the capacity to marry of persons domiciled in Canada In the absence of legislation by the Dominion, that question does not arise here and is fully reserved All that we decide in regard to it is that the Dominion legislation, as it stands, does not affect the present case

[45] *Ibid*, pp 639-640
[46] *Ibid*, p 641
*It might also be noted that the Attorney-General for Canada supported the provincial arguments upholding the validity of the legislation

What conclusions may be drawn on the question of legislative jurisdiction over the minimum age of marriage in light of these judicial pronouncements? To take the most extreme position first, it might be suggested that the Supreme Court of Canada is wrong in its conclusion that consent based upon age is a matter of formalities of marriage and hence within the scope of "solemnization", because age is a matter of capacity to marry and consequently a question to which only Parliament may address itself.[47] To conclude that a province may deal with age as a matter of consent is to suggest the legislature may do indirectly what it may not do directly This is more so the case if the legislature is able to pronounce non-consent marriages void, since it prohibits marriage below a certain age just as effectively as expressly stating that persons under a certain age do not possess the capacity to marry

A second position is to suggest that the Supreme Court of Canada is partially in error in its conclusion, that while a province may, as a matter of solemnization, specify that a marriage may not be performed (or a licence may not issue) without parental consent, the legislature may not go on to provide that a non-consent marriage once performed is void This is indeed the position taken by some jurisdictions, where penalties are imposed on issuers of licences and officiators at a wedding who violate the consent requirements, but where the legislation is either silent on the question of consequences for a non-consent marriage or expressly provides, as in the case of New Brunswick, that "lack of such consent . shall not invalidate a marriage" [48] While this approach removes the power of the province to interfere with the capacity of persons once married and makes the legislative provisions concerning consent based on age merely directory, it still allows the provinces to preclude marriages by persons under a certain age because no one in the province is permitted to issue licences to them or to perform a marriage service for them We are thus led back to the general conclusion concerning consent, expressed so well by Meredith C J O in 1916.[49]

> I should have thought, apart from authority, that the provision requiring consent is *ultra vires* a Provincial Legislature It is in effect a restriction upon the right of a person under the age of 18 years to marry, and therefore a restriction upon his personal capacity to contract marriage; and I should have thought that the provision, therefore, deals with a matter which does not fall within sec 92(12) as being part of what is included in "solemniza-

[47] We shall return later to Parliament's jurisdiction over capacity to marry

[48] *Marriage Act*, R S N B 1952, c 139, s 17(6)

[49] *Peppiatt v Peppiatt* (1916), 36 O L R 427 & 436

tion of marriage", but is one as to which the Parliament of Canada alone has authority to legislate It may be, however, that we would be bound by decided cases to hold otherwise

A third position, and one that offers the comfort of being in distinguished company, is to agree with the Supreme Court of Canada, and in particular with Chief Justice Duff, that consent to marry, even when based upon age, is "for one purpose and from one point of view" within the purview of the legislatures of the provinces as a matter concerning formalities and hence the solemnization of marriage. If we accept the broad construction of "solemnization" it is logical that consent is a part of it, but unless we view "capacity" as having an extremely narrow meaning, we must go on to conclude that Parliament may enact age of marriage legislation (as well as laws governing mental capacity, physical capacity and degrees of kindredship) that may make inoperative provincial laws that conflict or interfere with the application of the federal laws.

What is the authority of Parliament to legislate on the matter of capacity to marry, with particular reference to the question of minimum age of marriage? The nature of Parliament's jurisdiction has never been satisfactorily described by the courts and its power to deal with age has not been tested However, we have already observed in the *Kerr* and *Neilson* cases the somewhat oblique references to Parliament's power to deal with age and consent as matters of capacity and the tendency to delineate the jurisdictions of Parliament and the provincial legislatures in terms of capacity or status and formalities. Other cases have also referred to Parliament's power as relating to capacity to marry *Re Schepull*[50] recognized that the legislative power in respect to prohibited degrees of affinity was within exclusive federal jurisdiction as a matter of capacity *Hellens v. Densmore*[51] viewed legislation restraining remarriage of persons as a matter of status and hence under federal competence. The British Columbia Court of Appeal ruled in 1965 that a provincial law dealing with the right of a divorced party to remarry within the time period stipulated for an appeal should not be construed as depriving such party of her status as an unmarried person because such an interpretation would mean that the legislature was dealing with capacity to marry, a matter which is within federal jurisdiction [52]

[50] [1954] 2 D L R 43
[51] [1957] S C R 768
[52] (1965), 56 D L R (2d) 322

Although the judicial authority is scanty, it is reasonable to assert that Parliament's jurisdiction over "marriage" encompasses all of the traditional matters relating to capacity to marry including, in particular, the minimum age at which persons may marry. In specifying the age or ages, Parliament may also deal with conditions attached to the age, including consent, and with the consequences of a marriage contracted in the absence of compliance with the conditions. Beyond this, it is reasonably arguable that Parliament may also deal with the matter of marriage counselling as something necessarily incidental to defining the capacity to marry. Like consent itself, marriage counselling is made a condition precedent to establishing the capacity to marry. Capacity to marry is not necessarily a static concept based only on the criterion of age. In defining age capacity, Parliament may specify a number of conditions and these conditions go to capacity as clearly as does age itself.

VIII *GENERAL CONCLUSIONS*

Assuming that it is too late to convince the Supreme Court of Canada that it erred in holding consent based on age to be a matter within the provincial jurisdiction over solemnization of marriage, we are faced with the prospect of concluding that the constitution permits two approaches to implementing the four proposals that we have advanced concerning a uniform minimum age for marriage.

It seems clear from the above analysis that the provinces[53] and the territories[54] have the jurisdiction to deal with minimum ages through consent requirements and through provisions establishing nullity of marriage as a consequence of non-consent. They may also deal with marriage counselling as a part of consent and remove the exception of pregnancy from the minimum age

On the other hand, it has been demonstrated, we believe, that Parliament, approaching the matter as one of capacity to marry, may stipulate the minimum free and consent ages at which people possess the capacity to contract marriage It may also decree the conditions under which consent may be granted or withheld and, of course, may provide that no exceptions may be made to the prohibition of marriage under the minimum consent age or specify the nature of and procedure for dealing with exceptions as the case may be.

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[53] Under the *B N A Act*, s 92(12)

[54] Under the *Northwest Territories Act*, R S C 1970, c N-22, s 13(g) and the *Yukon Act*, R S C 1970, c Y-2, s 16(g)

The choice thus comes essentially to deciding whether age of marriage should now be dealt with as a question of capacity to marry or should be left to provincial and territorial law as a question of formalities Uniformity can obviously be accomplished more expeditiously under a single federal enactment and this is probably the preferable course of action, particularly if other matters of capacity—kindredship, mental and physical capacity—are to be dealt with as well. On the other hand, uniformity can be achieved by cooperative action of the twelve local jurisdictions, but the recent changes in the age of majority legislation would suggest that there may be no ready agreement on a minimum age.

F. J. E. Jordan.

ANNEX A

COMPARATIVE SURVEY OF MINIMUM MARRIAGE AGES

Jurisdiction	Minimum Age: With Consent F	M	Without Consent F	M	Comments
Alabama	14	17	18	21	Consent of parent and $200 bond must be provided Lack of Consent does not render marriage void
Alaska	16 18	18 19	18	19	Consent of parents or guardians is required Marriages below the minimum age for consent are voidable at the option of the party suing
Arizona	16	18	18	21	Consent of parents is required Males under eighteen and females under sixteen years of age may not marry
Arkansas	16	18	18	21	Consent of parent or guardian required If either party is under the minimum age, marriage is void except if the female is pregnant; application may be made to the Court with consent of the parents to have a marriage license issued
California			18	21	No minimum age with consent Written consent of parent or guardian must be filed
Colorado	16	16	18	21	Consent of parent or guardian is necessary In marriage of person under 16 is void unless permission is granted by the Court
Connecticut	16	16	21	21	Consents must be filed by parent or guardian if person is under 16
Delaware	16	18	19	19	Consent of parent or guardian required
District of Columbia	16	18	18	21	Consent of parent or guardian required where males under 21 and females under 18 unless previously married
Florida	16	18	21	21	Consent of parents is required unless both parents dead or party previously married
Georgia	16	18	19	19	Consent must be given by parents and persons unless physically impossible
Hawaii	15	17	16	18	Consent is required of the Family Court

Jurisdiction	Minimum Age With Consent F	Minimum Age With Consent M	Minimum Age Without Consent F	Minimum Age Without Consent M	Comments
Idaho	16	18	18	21	An order of Probate Court required
Illinois	16	18	18	21	Consent must be by parent or guardian by Affidavit sworn before a District Court Judge
Indiana	16	18	18	21	Consent of parent or guardian is required
Iowa	16	18	18	21	Consent of parents required, but if one parent divorced, the one having custody may give consent
Kansas	12	14	18	21	Written consent of parent or guardian required and where either parties are under 18, consent of a probate judge
Kentucky	16	18	18	18	Written consent of parents must be filed
Louisiana	16	18	21	21	Marriage under the minimum age of consent may be contracted if satisfactory evidence of extraordinary circumstances is presented to a District judge and parents and guardians consent However, marriage between minors is not void or voidable because of contracting without such consent
Maine	16	16	18	20	Consent of parents and guardians required as well as notification to the judge of the Probate Court in the County where the party resides
Maryland	16	18	18	21	Between 18 and 21 and 16 and 18, males and females must have consent of parents or guardians, if marriage is to be contracted under the minimum age with consent, there must be consent of the parent or guardian and a Certificate of a licensed physician that Female is pregnant or has given birth to a child
Massachusetts	16	18	18	21	Consent of parents or guardians is required In marriages where the male is under 14 and the female under 12 are void
Michigan	16		18	18	Consent of one parent or guardian is required with females under 18 years of age Marriage of females under 16 years of age is void

Jurisdiction	Minimum Age With Consent F	With Consent M	Without Consent F	Without Consent M	Comments
Minnesota	16	18	18	21	With parents' consent and approval of the Court Marriage of male under 18 and female under 16 years old is absolutely void
Mississippi			18	21	With males under the age of 21 and the female under the age of 18 consent of the parents or guardians of the underaged party is necessary
Missouri	15	15	18	21	Consent of parents or guardian is required and with marriages of persons under 15 an order of the Court is required
Montana	15	18	18	21	Consent of parents or guardians is required However, males under 18 and females under 16 may marry if a District Court Judge allows it
Nebraska	16	18	21	21	Consent of parents or guardians except for females pregnant and in this case a County Court Judge's consent is obtained
Nevada	16	18	18	21	
New Hampshire	13	14	18	20	Permission must be granted by a District Court Judge
New Jersey	16	18	18	21	Consent of parents is required Marriage of males under 18 and females under 16 can take place but must be approved by Judge of the Juveniles and Domestic Relations Court
New Mexico	16	18	18	21	Consent of parents or guardians is required No marriages under the minimum ages may take place
New York	14	16	18	21	For females under 16, in addition to parents and guardians consent, consent of the Judge of the District Court must be obtained
North Carolina	16	16	18	18	Consent of parents and guardians or persons standing in loco parentis is required
North Dakota	15	18	18	21	Consent must be by parents of guardians under Oath

Jurisdiction	Minimum Age With Consent F	With Consent M	Without Consent F	Without Consent M	Comments
Ohio	16	18	21	21	Consent of parents or guardians or institution or persons awarded permanent custody must be acquired
Oklahoma	15	18	18	21	Consent of parents or guardians must be obtained and marriages under the minimum ages with consent are prohibited
Oregon	15	18	18	21	Parents or guardians must consent
Pennsylvania	16	16	21	21	Parental consent must be obtained if under 16 approval of Ordinance Court must be obtained
Puerto Rico	16	18	21	21	Persons under minimum ages require the consent of person exercising a patria postestas of a District Court
Rhode Island	12	14	21	21	Consent of parents and guardians must be given in the presence of the Town Clerk and proof shall be submitted that such minor has attained the age of 16 in the case of the female or 18 in the case of the male. No licence may be issued to a female under the age of 16 and to a male under the age of 18 until the family Court after investigation by the Department of Social Welfare directs that such license should be issued
South Carolina					The Common Law Rule that the age of consent is 14 for males and for females 12 is in force in this State A license is required; males must be over 16 females over 14, males between 16 and 18 and females between 14 and 18 must furnish affidavit of consent of parent or guardian; all applications under 21 must have birth certificates of affidavit of parent or guardian as to age; all applicants between 21 and 25 must furnish documentary evidence satisfactory to the Probate Judge Special provisions as to licenses for unmarried females who are pregnant or has born a child
South Dakota	16	18	21	21	Consent of parent or guardian must be filed

Jurisdiction	Minimum Age: With Consent F	With Consent M	Without Consent F	Without Consent M	Comments
Tennessee	(no consent required)		16	16	However, clerk upon receiving application for licenses must send notice to both parents, unless parent or guardian or next of kin joins an application stating under oath, female is over 18 years of age, unless the clerk knows by virtue of her own knowledge both parties are over 21 years of age
Texas	14	16	18	19	Consent of parent or guardian required
Utah	14	16	18	21	Consent of father, mother, or guardian is necessary
Vermont	16	18	18	21	Parent or guardians consent required Marriages may be contracted below these minimum ages, however, certificate of probate judge may be furnished in the alternative
Virginia	16	18	21	21	Parents or guardians consent required
Virgin Islands	14	16	18	21	Father and mother or if there is no father or mother the guardian must consent to the marriage
Washington	17	17	18	18	No marriages may be allowed under the age of 17 unless the court waives minimum age requirement
West Virginia	16	18	21	21	Parent or guardians consent required
Wisconsin	16	18	16 18	21	Parent or guardian having actual care, custody and control must be obtained
Wyoming	16	18	21	21	Consent of parents required when either party is a minor
Argentina	14	16	21	21	Father—if father dead—mother, if mother and father dead—guardian—if there is no guardian—by order of the court Being under the minimum ages of consent is an absolute bar to marriage
Australia	16	18	21	21	Parents or guardians consent
Bermuda	16	16	21	21	Consent of parents or parent having lawful custody must be obtained

Jurisdiction	Minimum Age: With Consent F	With Consent M	Without Consent F	Without Consent M	Comments
Bolivia	12	14	23	25	Marriages below the minimum age limits are void—consent of parents or guardians required
Chile	Puberty		21	21	Parents or guardians consent required
Nationalist China	16	18	21	21	Legal representative's consent required
Columbia	No minimum age		18	21	Parents or guardians consent required
Costa Rica	15	15	21	21	Parents or guardians consent required Marriages without consent are forbidden—marriages under 15 are legally impossible
Denmark	Not Given		18	20	No consent seems to be required
Dominican Republic	15	16	18	18	Below these minimum ages a dispensation from a judge must be obtained
Ecuador	No minimum age		21	21	Consent of parents or guardian required below 21 years
El Salvador	14	16	21	21	Parents or guardians consent required
United Kingdom	16	16	18	18	Parents or guardians consent required
Finland	17	18	21	21	Parents or guardians consent required
France	15	18	21	21	One or both parents—if parents are dead—grandparents
Germany	16	18	21	21	Parents or guardians consent
Greece	14	18	21	21	Parents or guardians consent
Guatemala	18	18	21	21	The age may be lowered if proper consent is obtained
Haiti	15	18	21	25	Parents consent required
Honduras	12	14	21	21	Parents or guardians consent required
India	15	18	15	18	Severe penalties will be imposed if these ages are violated The Indian marriage law is complicated by several and diverse tribal customs

Jurisdiction	Minimum Age With Consent F	Minimum Age With Consent M	Minimum Age Without Consent F	Minimum Age Without Consent M	Comments
Italy	14	16	21	21	Marriages with persons under these minimum ages may be allowed by presidential decree
Japan	16	18	20	20	Parents consent required
Lebanon	17	18	Not Given		
Liechtenstein	..	..	..	..	Minors wishing to marry must secure the consent of their legal representative or in emergencies a decision of the court
Mexico	14	16	18	18	Parent or guardians consent
Netherlands					Males—18—Females—16—not clear whether consent is required before 21, however, if married below these ages a dispensation from the Crown is needed
New Zealand	16	16	21	21	Consent of both parents or guardian or of the court as the case may be required
Nicaragua	14	15	18	21	
Northern Ireland					Minimum age—16—whether or not consent is required is not clear
Norway	Not Given		18	20	
Panama	12	14	21	21	Marriages below this age will be valid if couple live together one day following, without a complaint by either party
Peru	14	17	18	21	Parents consent required
Philippine Republic	18	20	23	25	When under 23 for females and 25 for males parental consent is required
Scotland	16	16			No requirement or consent available
South Africa	16	18	21	21	Consent of both parents required but marriages may be contracted at lower ages with a dispensation from the Minister of the Interior
Sweden	18	18	20	20	Permission may be granted for lower age marriages by provincial government
Switzerland	17	18	18	21	Consent required

Jurisdiction	Minimum Age: With Consent F	With Consent M	Without Consent F	Without Consent M	Comments
Turkey . . .	15	17			Exceptional cases the court will go as low as 15 for males—14 for females—parents and guardians being consulted
U S S R	No ages given				
Uruguay	12	14	23	25	
Venezuela	12	14			
Yugoslavia.	..	..	..	..	Minimum age to get married is 18, however, competent court can grant permission to marry at an earlier age

MARRIAGES FOR BRIDES AND GROOMS UNDER 21 YEARS OF AGE, CANADA 1960-64

	1960		1961		1962		1963		1964	
	No.	Per Cent	No.	Per Cent	No.	Per Cent	No.	Per Cent	No.	Per Cent
BRIDES										
12 years	.		1	*	1	*		...	...	
13 years	7		3	*	3	*	...		.	...
14 years	110	0.2	117	0.2	112	0.2	92	0.2	90	0.2
15 years	812	1.4	777	1.4	898	1.6	735	1.3	741	1.2
16 years	3,609	6.4	3,304	5.8	3,378	5.9	3,592	6.3	3,428	5.7
17 years	7,566	13.4	7,426	13.1	7,161	12.5	7,133	12.5	8,120	13.5
18 years	13,400	23.8	13,522	23.9	13,173	23.0	12,804	22.4	13,796	23.0
19 years	15,775	28.0	15,505	27.4	16,349	28.6	15,905	27.8	15,962	26.6
20 years	15,140	26.8	15,893	28.1	16,101	28.2	17,020	29.7	17,835	29.7
Total—21 years	56,419	100.0	56,548	100.0	57,176	100.0	57,281	100.0	59,972	100.0
GROOMS										
14 years	.		.	.	.		...		.	
15 years	4		2	*	2		2		1	
16 years	88	0.5	81	0.4	93	0.5	96	0.5	92	0.5
17 years	675	3.7	639	3.5	618	3.3	612	3.3	689	3.6
18 years	2,527	14.0	2,465	13.6	2,457	13.1	2,334	12.6	2,570	13.3
19 years	5,649	31.4	5,563	30.7	5,900	31.4	5,472	29.4	5,723	29.5
20 years	9,071	50.4	9,400	51.8	9,743	51.8	10,066	54.2	10,312	53.2
Total—21 years	18,014	100.0	18,150	100.0	18,813	100.0	18,582	100.0	19,387	100.0

*Less than 0.1 per cent

MARRIAGES FOR BRIDES AND GROOMS UNDER 21 YEARS OF AGE, CANADA 1965-69

	1965		1966		1967		1968		1969	
	No.	Per Cent	No.	Per Cent	No.	Per Cent	No.	Per Cent	No.	Per Cent
BRIDES										
12 years	1	*	...	...	...		...		...	
13 years		...	4	*	2	*	6	*	3	*
14 years	75	0.1	72	0.1	59	0.1	83	0.1	77	0.1
15 years	644	1.0	645	1.0	656	0.9	640	0.9	726	1.0
16 years	3,219	5.1	3,164	4.7	3,179	4.4	3,117	4.4	3,360	4.6
17 years	7,879	12.5	7,527	11.1	7,719	10.7	7,705	10.8	7,677	10.6
18 years	15,672	25.0	15,537	22.9	15,591	21.7	15,537	21.7	15,999	22.1
19 years	17,393	27.7	20,753	30.6	20,721	28.8	20,491	28.7	20,830	28.8
20 years	17,902	28.5	20,102	29.6	24,071	33.4	23,856	33.4	23,623	32.7
Total—21 years	62,785	100.0	67,804	100.0	71,998	100.0	71,435	100.0	72,295	100.0
GROOMS										
14 years	...		...	...	1	*	1	*	...	...
15 years	5	*	11	*	2	*	3	*	2	*
16 years	71	0.3	106	0.5	108	0.4	86	0.3	106	0.4
17 years	696	3.3	726	3.1	755	2.9	756	2.9	810	3.1
18 years	3,105	14.9	3,240	13.8	3,331	12.7	3,281	12.7	3,420	13.2
19 years	6,290	30.1	7,577	32.3	7,941	30.2	7,706	29.8	7,718	29.8
20 years	10,697	51.3	11,780	50.3	14,182	53.9	14,015	54.2	13,814	53.4
Total—21 years	20,864	100.0	23,440	100.0	26,320	100.0	25,848	100.0	25,870	100.0

*Less than 0.1 per cent

APPENDIX J

(U.L S Agenda Item 15; page 31)

RULE AGAINST PERPETUITIES

REPORT OF ALBERTA COMMISSIONERS

Attached is a revised draft Act. The only changes from the 1971 draft Act are minimal.

Commissioners may refresh their memories by reading the 1970 report (1970 proceedings, 341) and the 1971 report The 1971 proceedings are not yet out, but our recollection is that the only expression of opinion on any item in the draft report was one of misgiving or rejection of our general *cy près* provision which was section 7 of the 1971 draft and is section 8 of the attached draft.

Parenthetically, the attached draft will probably be introduced in the Alberta Legislature at the session opening in March, 1972

Assuming that the Conference is to adopt a Uniform Act on the general lines of Ontario's or the Alberta draft (each of which owes much to the English Act), there are differences between the Ontario and Alberta versions. The attached draft notes these differences, but it will help to state them again here. The references that follow are to the sections in the Alberta draft

(a) S. 1(b)—"disposition"; cf. Ontario's "limitation".

(b) S. 1(e)—definition of "power of appointment" (not in Ontario Act).

(c) S 4(3)—validity of special power, Alberta omits "option or other right".

(d) S 5—This contains the main difference in policy between the two Acts. Alberta has followed the English scheme specifying in detail the lives in being Ontario on the other hand does not do this, but simply excludes any life that is not a relevant factor that limits the period of vesting

A difference between Alberta on the one hand and Ontario and England on the other is that Alberta has put the "unborn widow" with lives in being in s. 5(2)(e) instead of in a separate section.

(e) S. 6(2)—eliminates any argument that age reduction can be "phased"; not in any other Act we know of.

(f) S. 6(3)—This is the English provision which Ontario omits and which covers, for example, a gift to sons at 25 and daughters at 30

(g) S. 8—This is the general *cy près* section borrowed from New Zealand and to which Ontario objected in 1971, as stated above.

(h) S. 9(4)—Alberta like Ontario deals with legitimation and adoption but omits "other means".

(i) S. 10—Similar to Ontario's provision for applications to court, but wider because of the last twelve words.

(j) S. 11—Designed to eliminate doubt as to the order in which the remedial sections apply. We were induced to include this because of the numerous arguments in the literature as to the order of applying the different provisions.

(k) S 16—Taken from England's s. 10, and embodying *Harris* v. *M.N.R.* [1966] S.C.R. 489; not confined to options as is Ontario's s. 13(3).

(l) S 17(1)—Similar to Ontario's s. 13(1) but extends to options after renewal of a lease, and to personal property.

(m) S. 17(3)—Ontario omits rights of first refusal.

(n) S. 17(4)—Ontario's s. 13(4) does not cover renewals of a lease of real property, also it refers to subsection (3) (set out on page 15) whereas Alberta has no counterpart of Ontario's s. 13(3) because options in gross are covered in s. 18 along with other interests.

(o) S. 18—Designed to cover all future interests including options in gross. Ontario covers the latter in s. 13(3) and easements and profits in s. 14.
Alberta's s. 18(3) removes any question when offer to purchase, etc., is contained in a will Without this provision there might be doubt as to whether the provisions dealing with commercial transactions apply, or whether the basic provisions at the beginning of the Act apply.

(p) S. 19(2)—Possibility of reverter; the limitation period differs from Ontario's s. 15(2) and (3).

(q) S. 19(3)—This applies the *cy près* doctrine where the purpose is charitable.

(r) S. 19(4)—This embraces the well known rule that the rule against perpetuities does not apply where both the gift and the gift over are charitable.

(s) S. 22—Pension plans; Alberta includes plans for the self-employed, as two Australian States do.

(t) S. 23—The Crown; the question is whether we put in a special provision or leave the Interpretation Act to apply as Ontario has done.

(u) S. 24—Does away with Accumulations Act. This of course differs from Ontario whose Accumulations Act is practically the same as the Uniform Accumulations Act.

Respectfully submitted,
W. F. Bowker
S. A. Friedman
W. E. Wilson
G. W. Acorn
L. R. Meiklejohn
Alberta Commissioners.

January 24, 1972.

(NOTE: The Draft Act accompanying the report is not reproduced here because it is identical to the Uniform Perpetuities Act adopted by the Conference (Appendix K, post) apart from the changes required by the 1972 resolution)

APPENDIX K

(U.L S. Agenda Item 15; page 31)

The Perpetuities Act

Definitions

1. In this Act,

(*a*) "court" means the Supreme Court,

(*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.

The rule against perpetuities continues except as varied

2. Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

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 the interest vesting beyond the perpetuity period.

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 is 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, 7 or 8 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.

(2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

(3) A disposition conferring any power other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is 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.

Determination of perpetuity period

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 persons 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 subsection (2), clauses (*b*) or (*c*) 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 clause (*a*) the perpetuity period is 21 years.

(2) The persons referred to in subsection (1) 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 perpetuity 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 paragraphs (i) to (iv) of clause (*b*), or such a person any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent, fall within those 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 perpetuity 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.

Reduction of age

6.—(1) Where a disposition creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding 21 years, and actual events existing at the time the interest was created or at any subsequent time establish,

(*a*) that the interest, but for 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 21 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

(2) One age reduction to embrace all potential beneficiaries shall be made pursuant to subsection (1)

(3) Where in the case of any disposition different ages exceeding 21 years are specified in relation to different persons,

(*a*) the reference in subsection (1), clause (*b*) to the specified age shall be construed as a reference to all the specified ages, and

(*b*) that subsection operates to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

7.—(1) 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 section 6 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 that section has effect accordingly.

Exclusion of class members to avoid remoteness

(2) Where, in the case of a disposition to which subsection (1) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, but for this subsection, the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members 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.

8.—(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 the general intention within the limits of the rule against perpetuities.

General *cypres* provision to save dispositions otherwise offending the rule

(2) Subsection (1) does not apply where the disposition of the property has been settled by a valid compromise

9.—(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,

Presumptions and evidence of future parenthood

(*a*) it shall be presumed,

(i) that a male is able to have a child at the age of 14 years or over, but not under that age, and

(ii) that a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 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.

(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

(3) Where a question is decided by treating a person as unable to have a child at a particular time and that 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 question 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

Application to the court for its opinion, advice or direction

10. An executor or a trustee of any property or any person interested under, or in the validity or invalidity of, an interest in that property may at any time apply for the opinion, advice or direction of the court as 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.

11. The remedial provisions of this Act apply in the following order:

Order of application of remedial provisions

(*a*) section 9; (*capacity to have children*)

(*b*) section 4; (*wait and see*)

(*c*) section 6, (*age reduction*)

(*d*) section 7; (*class splitting*)

(*e*) section 8 (*general cy près*)

12. Pending the treatment or declaration of a presumptively valid interest within the meaning of section 4 as valid or invalid, the income arising from that 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.

Interim Income

13.—(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

Saving provision and acceleration of expectant interests

(2) Where a prior interest is invalid under the rule against perpetuities, 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

14.—(1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless,

Powers of appointment

(*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

(2) A power that satisfies the conditions of subsection (1), clauses (*a*) and (*b*) shall, for the purpose of the rule against perpetuities, be treated as a general power

(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.

Administrative powers of trustees

15.—(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.

(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

Avoidance of contractual rights in cases of remoteness

16. Where a disposition *inter vivos* would 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 lies in contract or otherwise for giving effect to it or making restitution for its lack of effect

Options to acquire reversionary interests

17.—(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, whether the lease or renewal is 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.

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly

(3) Subsection (1) applies to a right of first refusal or pre-emption as it applies to an option.

(4) The rule against perpetuities does not apply to options to renew a lease of real or personal property

Commercial transactions

18.—(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.

(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 à prendre*, easements and restrictive covenants

(3) This section does not apply to any provision in a will or *inter vivos* trust

Possibilities of reverter and conditions subsequent

19.—(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

(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 is 40 years.

(3) Subsection (1) does 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.

Specific non-charitable purpose trusts

20.—(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 21 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

(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 21 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 unexpended income or capital

The rule in Whitby v. Mitchell is abolished

21. 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.

22. 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.

Rules not applicable to employee benefit trusts

23. This Act and the rule against perpetuities binds the Crown except in respect of dispositions of property made by the Crown

Application of Act and rule to the Crown

24. Except as provided in section 15, subsection (2) and 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

Application of Act

APPENDIX L

(U L.S Agenda Item 17, page 32)

Report on an amendment to the Uniform Presumption of Death Act

As I shall no longer participate in the meetings of this Conference, Mr F G. Smith has kindly consented to present this report.

Following the instructions of the Conference I submitted, at the last meeting of the Conference in August, 1971, a report and a draft amendment to the uniform *Presumption of Death Act.* A reprint of the Act in its present form is attached as Schedule I. The draft incorporated, in essence, section 3 of *The Family Relief Act*, R.S.A. 1970, c 134, Schedule II to this report, and *The Absentee Act, 1969*, S.S 1969, C. 1, as amended, Schedule III.

Because of the apparent disagreement among the commissioners on the policy on which the amendment to the uniform Act was based and on which it should be based, the matter was referred back to me for a fresh report to be prepared in the light of the discussions that had taken place The report is to set out the policy issues to be determined by the Conference so that a revised uniform *Presumption of Death Act* may be prepared The present report is based on these instructions

Last year I left the Department of Indian Affairs and Northern Development and since then vacated my position within this Conference as representative for the Northwest Territories and the Yukon Territory. The revised *Presumption of Death Act* will therefore have to be prepared by another commissioner.

For easier identification I have numbered the points on which the views of the Conference are to be ascertained consecutively from 1 to 16 For the benefit of those commissioners who are interested in comparative law, I attached to my interim report a translation of the more important provisions of the Austrian *Declaration of Death Act, 1950*, a re-enactment of a statute of 1883. This statute was intended to give relief to the next of kin of the victims of the fire that destroyed the Vienna Ring theatre in 1882.

1 The first section of the uniform *Presumption of Death Act* gives the short title. Following recent recommendations by the Workshop of this Conference, this provision should be deleted

2 The second section defines the word "Court" This word appears later only in one subsection, namely subsection 3(1) of the uniform Act. There is thus no good purpose in defining it in a separate section. Instead, each jurisdiction should designate, in the operative section, the court that is to be authorized to make an order, under the proposed uniform Act. If this is accepted, the definition section should be deleted

3. Section 3 of the uniform Act requires for the hearing of an application for a declaration of presumed death merely "such notice as the court deems proper" A preferable alternative would be to insert the requirement of an originating notice of motion If this is accepted, the part preceding paragraph (a) of subsection 3(1) of the uniform Act would read as follows:

> **3.**—(1) Upon application to the Court by originating notice of motion and if satisfied that

and the sentence following paragraph (c) would start with the words "the Court may make an order ." Otherwise, I propose that the present section 3 be left unchanged

4. Under the uniform Act the court may make an order declaring a person presumed to be dead when the requirements set out under this and the following three points, that is points 4 to 7, are satisfied.

The first requirement for declaring that a person be presumed dead is that he has been absent This is referred to in paragraph 3(1)(a) of the uniform Act Members of this Conference may wish to express an opinion on the question whether this wording be retained or whether, following paragraph 2(a) of *The Absentee Act, 1969* and subsection 90(1) of the *Canada Pension Plan,* Schedule IV to this report, the requirement should be that that person "has disappeared" Disappearance is, of course, stronger than mere absence

5 The next requirement, referred to also in paragraph 3(1)(a) of the uniform Act, is that the absentee has not been heard of or from by the applicant for an order under the Act, or to the knowledge of the applicant The Conference may wish to retain this requirement

6 The uniform Act requires, in paragraph 3(1)(b), as a subjective test, that the applicant for the declaration has no reason to believe that the absentee is living The Conference may wish to retain this requirement also

7 The uniform Act further requires, in paragraph 3(1)(c), that the court must be satisfied that "reasonable grounds exist for supposing that the person is dead" The test is objective.

What is the standard of proof? Unlike in a criminal prosecution, the applicant for a declaration of presumed death may, under the uniform Act, establish his case by a balance of probabilities. There may, of course, as Denning L.J. said in *Bater* v *Bater*, [1950] 2 All E.R 458, at 459, be degrees of probability within that standard. The degree depends on the subject-matter. In any event, however, a civil court does not normally adopt so high a degree as a criminal court. On the other hand, subsection 90(1) of the *Canada Pension Plan* speaks of the disappearance of an absentee "under circumstances that, in the opinion of the Minister [of National Health and Welfare], raises beyond a reasonable doubt a presumption that [the absentee] is dead" There the standard of proof is that required of the prosecution in a criminal case.

The Conference may wish to consider the question whether, particularly in view of the *Canada Pension Plan* provision that deals with a similar subject, the uniform Act should specify, in a similar manner, the standard of proof required to support a declaration of presumed death

8. Subsection 3(2) of the uniform Act requires that the order declaring a person presumed to be dead "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" The Conference may wish to retain this requirement and this provision unchanged

9. The uniform Act does not specify who may apply for an order under the Act. On the other hand, section 3 of *The Absentee Act, 1969* does so in five paragraphs which the Conference may wish to have incorporated into the proposed uniform Act

10. The uniform Act provides for no remedy against an order made under the Act Section 8 of *The Absentee Act, 1969* provides for an appeal to the Court of Appeal by a "person aggrieved or affected by an order" made under the Act. The Conference may wish to add this provision to the proposed uniform Act

11. In addition, the Conference may wish to add that the same person, namely the person aggrieved or affected by an order made under the Act, shall also have the right to apply for an order superseding, vacating or setting aside an order made under the Act. In this connection I refer to point 15 of this report.

12. In this point and in points 13 and 14 of this report I am dealing with the case where a person has been declared presumed to be dead, and the spouse of that person has gone through a form of marriage with another partner. For convenience sake I am referring to the person who has been declared presumed to be dead as "the actual spouse", to his spouse as "the survivor", and to the person who has gone through a form of marriage with the survivor as "the apparent spouse".

Section 3 of *The Family Relief Act* provides that the survivor, the apparent spouse, and their children are to have the same rights as they would have had, if the actual spouse had been dead when the marriage ceremony between the survivor and the apparent spouse took place. These rights are, by the same section, restricted to those under *The Family Relief Act* They are, in the main, rights to maintenance and support.

The application of this provision of *The Family Relief Act* has, for example, as consequence that the estate of a man (the survivor) whose wife (the actual spouse) has been declared presumed to be dead may be liable for payments for the maintenance and support of the wife who reappears and also of the woman (the apparent spouse) with whom the man, prior to the reappearance, has gone through a form of marriage.

Some of the provisions of *The Family Relief Act* are similar to those of the uniform *The Testators Family Maintenance Act* (page 314 of the *Model Acts*, Schedule V of this report) If it is the wish of the Conference that the apparent spouse and the children of the union between the apparent spouse and the survivor receive, in the proposed uniform Act, no further protection than that provided under the uniform *The Testators Family Maintenance Act*, I suggest that section 3 of *The Family Relief Act* be included in the proposed uniform Act with the substitution of the reference to *The Testators Family Maintenance Act* or its equivalent for the reference, in section 3 of *The Family Relief Act*, to that Act. In this connection I am referring to the point immediately following.

13 Section 3 of *The Family Relief Act* refers to a form of marriage "in accordance with the law in force at the place where the marriage ceremony is performed". For the reasons set out in the report I presented to this Conference last year, I would prefer it if the ceremony were characterized as celebrating a marriage that would be valid had the presumed death actually occurred.

If the suggestions made in point 12 and this point are accepted, the equivalent of section 3 of *The Family Relief Act* to be included in the uniform Act would read as follows·

> When a judge makes a declaration of presumption of death and the spouse of the person presumed to be dead celebrates with another person a marriage that would be valid had the presumed death actually occurred, then notwithstanding that it is later found that the person presumed to be dead was alive when such marriage was celebrated, the parties to such marriage ceremony and their children have the same rights under the Act [i e the equivalent to the uniform *The Testators Family Maintenance Act*] as they would have had if the person presumed to be dead had in fact died prior to such marriage ceremony

14. In section 4 of the first draft I presented last year I attempted to regulate the rights and duties not only of the survivor, but also of the apparent spouse. In particular, a will by the apparent spouse, not made in contemplation of marriage, would have been revoked by the ceremony between the apparent spouse and the survivor. Because the commissioners could not agree on this or other points, I abandoned the plan to include this and related provisions in a future draft

15. I had no instructions on the question what is to happen if the absentee returns after his estate has been distributed The *Canada Pension Plan* does not assist us here. Under section 90 of the *Canada Pension Plan* the Minister of National Health and Welfare may issue a certificate declaring a contributor or beneficiary under the *Canada Pension Plan* presumed to have died on a certain day From this day on this person is, for the purpose of the Act, deemed to have so died. If later it is shown that he had not, in fact, so died, the fiction has no effect in relation to any period after such time as it is made to appear that he did not, in fact, so die

The Conference may wish to consider the following questions.

(1) Should those who benefit from the absentee's estate be treated as trustees and be required to make full or partial restitution in case the absentee returns?

(2) Should they be held to have been unjustly enriched as understood in the civil law, under the rule of *causa data causa non secuta*?

(3) Or should they be excused from returning anything?

(4) What is to happen to the proceeds of a life insurance policy?

In section 5 of the draft I submitted to the Conference last year I provided, as mentioned in point 11 of this report, for the

power of the court to make an order that would supersede, vacate or set aside any previous order made under the Act. I thus would have left it to the court to determine what was just in all the circumstances. My reason for doing so was, and still is, my doubt as to the possibility of forseeing the varied circumstances of individual cases. Perhaps a clause should provide for the power of the court to make an order as is just in the circumstances aiming, as far as possible, at restoring the legal position to what it would have been, had there been no declaration of presumed death.

16. Last year the Conference adopted my suggestion that the Government of Canada be requested to consider placing before Parliament a bill similar in effect to section 14 of the United Kingdom *Matrimonial Causes Act, 1965*, Appendix B to last year's report This suggestion has been noted

The question arises whether there should be an integration of the process whereby a person is declared presumed to be dead with that whereby a marriage is dissolved because of such presumption.

There are three possibilities *The Divorce Act* could make dissolution of a marriage because the presumption of death dependent on a court order made under provincial law. The second possibility is that the making of an order declaring a married person presumed to be dead be made dependent on a decree dissolving the marriage. The third and simplest, but perhaps not the best, solution would be to let the two processes remain independent of each other. On the other hand, the authority of the court, under the uniform *Presumption of Death Act*, to make a declaration of presumed death for limited purposes as well as for all purposes would appear to make it undesirable to integrate the two processes, at least in the case of a declaration for limited purposes.

17. With Mr. Acorn's kind permission I attach, as Schedule VI, the copy of his letter dated November 3, 1971 In the name of the Alberta commissioners he makes valuable suggestions to the points raised in my interim report of September 21, 1971, and in this report.

This being my last report to this Conference I take this opportunity to thank my colleagues for their kindness and co-operation

Hugo Fischer

(NOTE: After the distribution of this report, Mr Higenbottam distributed to the Local Secretaries copies of a memorandum dated April 28, 1972, by Dr Gilbert O Kennedy commenting on the points itemized in the Report This memorandum is attached as Schedule VII to the report)

SCHEDULE I

Presumption of Death Act

(Recommended 1960)

Title

1. This Act may be cited as *"The Presumption of Death Act"*.

Interpretation

2. In this Act, unless the context otherwise requires, "Court" means the   Court or a Judge thereof.

Presumption of death order

3.—(1) Upon application to be heard after such notice as the court deems proper, the court, if satisfied that,

(*a*) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named, and

(*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,

may make an order declaring that the person shall be presumed to be dead for all purposes, 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

Certified copy of order sufficient as evidence

4. An order, or a certified copy thereof, declaring that a person is presumed dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death.

SCHEDULE II

Section 3 of The Family Relief Act of Alberta

(This Schedule consisted of a reproduced copy of The Family Relief Act, R S A 1970, c 134 As section 3 is the only pertinent provision involved, only that section is reproduced here)

3. Where a judge makes a declaration of presumption 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

SCHEDULE III

The Absentee Act, 1969 of Saskatchewan

(S S 1969, c 1 as amended by S S 1970, c 1)

1. This Act may be cited as *The Absentee Act, 1969.*

2. Where upon an *ex parte* application to a judge of the Court of Queen's Bench the judge is satisfied.

(*a*) that a person has disappeared and his whereabouts are unknown;

(*b*) that there is no knowledge as to whether the person is alive or dead,

(*c*) that all reasonable efforts have been made to locate the person;

(*d*) that the person has property in Saskatchewan; and

(*e*) that the person should be declared to be an absentee for the purposes of dealing with his property;

the judge may by order declare the person to be an absentee and may by order with respect to that person·

(*f*) provide for the custody, due care and management of his property;

(*g*) appoint a committee for the purposes of clause (*f*); and

(*h*) authorize the sale, lease or other disposition of his property where in the opinion of the judge it is required in the interests of the absentee or his family.

3. An application under section 2 may be made by.

(*a*) the Attorney General,

(*b*) any one or more of the next of kin of the person alleged to be an absentee,

(*c*) the spouse of the person alleged to be an absentee;

(*d*) a creditor of the person alleged to be an absentee; or

(*e*) anyone interested in the affairs of the person alleged to be an absentee

4. Any person may be appointed by the judge of the Court of Queen's Bench to act alone or with one or more persons as the committee of the estate of a person declared to be an absentee

5. The powers and duties of a judge of the Court of Queen's Bench and a committee with respect to the estate of a person declared to be an absentee are the same, *mutatis mutandis*, as those of a court and of a committee respectively under *The Lunacy Act*.

6. Subject to the direction of the judge of the Court of Queen's Bench, a committee appointed under this Act has authority to expend moneys out of the estate of a person declared to be an absentee for the purpose of endeavouring to trace his whereabouts and in endeavouring to ascertain whether he is alive or dead.

7.—(1) Subject to subsection (2), a judge of the Court of Queen's Bench may upon *ex parte* application make an order superseding, vacating or setting aside any order declaring a person to be an absentee except as to acts or things done in respect of the estate of that person while the order was in force.

(2) An application under subsection (1) may be made by one or more of the persons mentioned in section 3 or by the person declared to be an absentee.

"**7*A*.** A judge may refuse to proceed with an application under section 2 or 7 until he is satisfied that sufficient notice of the application has been given by the applicant

(*a*) to the Official Guardian where it appears to the judge that a person under the age of nineteen years may be interested in the estate of the person in respect of whom the application is made;

(*b*) to the committee of the estate of a lunatic where it appears to the judge that the lunatic may be interested in the estate of the person in respect of whom the application is made,

(*c*) to the Administrator of Estates where it appears to the judge that a person who is a lunatic or person of unsound mind and who has no committee may be interested in the estate of the person in respect of whom the application is made;

(*d*) to any other person where it appears to the judge that the person may be interested in the estate of the person in respect of whom the application is made.

"**7***B***.** A judge may make an interim order where in the opinion of the judge an interim order is required in the interests of the absentee or his family".

8. A person aggrieved or affected by an order made under this Act may appeal the order to the Court of Appeal.

9. This Act comes into force on the first day of July, 1969.

SCHEDULE IV

Section 90 of the Canada Pension Plan

90.—(1) Where a contributor or beneficiary has disappeared under circumstances that, in the opinion of the Minister, raise beyond a reasonable doubt a presumption that he is dead, the Minister may issue a certificate declaring that the contributor or beneficiary is presumed to be dead and stating the date upon which his death is presumed to have occurred, and thereupon the contributor or beneficiary shall be deemed for all purposes of this Act to have died on the date so stated in the certificate

90.—(1) Lorsqu'un cotisant ou un bénéficiaire est disparu dans des circonstances qui, de l'avis du Ministre, font présumer au-delà d'un doute raisonnable qu'il est décédé, le Ministre peut délivrer un certificat déclarant que le cotisant ou le bénéficiaire est présumé décédé et indiquant la date à laquelle son décès est présumé être survenu; le cotisant ou le bénéficiaire est dès lors considéré, à toutes les fins de la présente loi, comme décédé à la date ainsi indiquée au certificat.

SCHEDULE V

Testators Family Maintenance Act

AN ACT TO AUTHORIZE PROVISION FOR THE MAINTENANCE OF CERTAIN DEPENDANTS OF TESTATORS

(Recommended 1945, amended 1957)

Short title

1. This Act may be cited as *"The Testators Family Maintenance Act"*.

Interpretation

2. In this Act,

(*a*) "child" includes a child lawfully adopted by the testator, and also a child of the testator *en ventre sa mere* at the date of the testator's death,

(*b*) "dependant" means the wife, husband or child of the testator;

(*c*) "executor" includes an administrator with the will annexed;

(*d*) "judge" means a judge of................;

(*e*) "order" includes suspensory order,

(*f*) "will" includes a codicil.

(NOTE: Paragraph (*f*) will be required only in provinces in which this does not appear in the provincial Interpretation Act)

Orders

3.—(1) Where a person (hereinafter called the testator) dies leaving a will, and without making therein adequate provision for the proper maintenance and support of his dependants, or any of them, a judge on application by or on behalf of such dependants, or any of them, may, in his discretion and taking into consideration all the circumstances of the case, order that such provision as he deems adequate shall be made out of the estate of the testator for the proper maintenance and support of the dependants, or any of them.

(2) The judge may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the testator's estate, to the end that application

may be made at any subsequent date for an order making specific provision for maintenance and support.

(3) The judge may refuse to make an order in favour of any person if his character or conduct is such as, in the opinion of the judge, to disentitle him to the benefit of an order under this Act.

(4) Notwithstanding the provisions of *The Devolution of Estates Act* (*Manitoba*), where a testator dies intestate as to part of his estate, a judge may make an order affecting that part of his estate in respect of which he died intestate in the same manner as if the will had provided for distribution of that part as on an intestacy.

Application

4. An application under this Act may be made by originating notice of motion (*or summons*).

Conditions and restrictions

5. The judge in making an order for maintenance and support of a dependant, may impose such conditions and restrictions as he deems fit; and may, in his discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as to him seems proper, with payment of an allowance sufficient to provide such maintenance and support

Conditions and restrictions

6.—(1) The judge in any order making provision for maintenance and support of a dependant may impose such conditions and restrictions as he deems fit

(2) The judge may in his discretion order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper

(3) Such provision may be made out of income or corpus or both and may be made in one or more of the following ways, as the judge deems fit.

(*a*) an amount payable annually or otherwise;

(*b*) a lump sum to be paid or held in trust;

(*c*) any specified property to be transferred or assigned, absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant

(4) Where a transfer or assignment of property is ordered, the judge

(*a*) may give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the judge may direct; or

(*b*) may grant a vesting order

Enquiries and further orders

7. Where an order has been made under this Act a judge at any subsequent date may,

(*a*) enquire whether the party benefited by the order has become possessed of, or entitled to, any other provision for his proper maintenance or support,

(*b*) enquire into the adequacy of the provision ordered, and

(*c*) discharge, vary, or suspend the order, or make such other order as he deems fit in the circumstances.

Fixing payment from portion of estate

8. A judge at any time may,

(*a*) fix a periodic payment or lump sum to be paid by any legatee or devisee to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested,

(*b*) relieve such portion from further liability, and

(*c*) direct,

(i) in what manner such periodic payment shall be secured, and

(ii) to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable

Distribution stayed

9. Where an application is made and notice thereof is served on the executor or trustee of the estate of the testator, he shall not, after service of the notice upon him, proceed with the distribution of the estate until the judge has disposed of the application.

10.—(1) The judge may accept such evidence as he deems proper of the testator's reasons as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision as the case may be, for a dependant, including any statement in writing signed by the testator

Evidence

(2) In estimating the weight, if any, to be attached to the statement, the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

11. The incidence of any provision for maintenance and support ordered shall,

Incidence of provision ordered

(*a*) unless the judge otherwise determined, fall rateably upon the whole estate of the testator, or,

(*b*) in cases where the jurisdiction of the judge does not extend to the whole estate, then to that part to which the jurisdiction of the judge extends,

and the judge may relieve any part of the testator's estate from the incidence of the order.

12. For the purposes of enactments relating to succession duties, where an order is made under this Act, the will shall be deemed to have had effect from the testator's death as if it had been executed with such variations as may be necessary to give effect to the provisions of the order and Her Majesty is bound by the provisions of this section.

Will deemed to be varied

13. A judge may give such further directions as he deems fit for the purpose of giving effect to an order.

Further directions

14. A certified copy of every order made under this Act shall be filed with the registrar of the court out of which the letters probate or letters of administration with the will annexed issued, and a memorandum of the order shall be endorsed on or annexed to the copy of the original letters probate or letters of administration with the will annexed in the custody of the registrar

Filing and endorsement of order

15.—(1) Subject to subsection (2), no application for an order under section 3 may be made except within six months from the grant of probate of the will or of administration with the will annexed.

Limitation period

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application

Application deemed to be by all claimants

16. Where an application for an order under section 3 is made by or on behalf of any dependant,

(*a*) it may be dealt with by the judge as; and

(*b*) in so far as the question of limitation is concerned, it shall be deemed to be,

an application on behalf of all persons who might apply

Property devised or bequeathed under contract

17. Where a testator, in his lifetime *bona fide* and for valuable consideration,

(*a*) has entered into a contract to devise and bequeath any property real or personal; and

(*b*) has by his will devised or bequeathed the property in accordance with the provisions of the contract,

the property is not liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator therefor.

Anticipation

18. No mortgage, assignment, or charge of any kind of or upon an anticipated provision shall be of any force, validity or effect.

Appeal

19. An appeal shall lie to the Court of Appeal (*Manitoba*) from any order made under this Act.

Enforcement

20. An order or direction made under this Act may be enforced against the estate of the testator in the same way and by the same means as any other judgment or order of the court against the estate may be enforced; and a judge may make such order or direction or interim order or direction as may be necessary to secure to the dependant out of the estate the benefit to which he is found to be entitled.

(NOTE: Provinces proposing to adopt this Act should consider the inclusion of a provision to ensure that any order made under the Act is co-ordinated with any legislation respecting the rights of a spouse of a deceased person)

SCHEDULE VI

(The following is the text of a letter dated November 3, 1971, from Mr. Glen W. Acorn, Legislative Counsel for Alberta, to Dr. Hugo Fischer.)

RE: Presumption of Death Act

Mr Bowker, Mr Meiklejohn and I had a discussion earlier this week on the points you raised in your report of September 21, 1971 Accordingly, we would like to offer the following comments The numbering of the comments corresponds to the paragraphs in your report

1 Agreed

2 Agreed

3 We are agreed that the proceedings should be by way of Originating Notice of Motion This is on the assumption of course that there will be somebody who will be named as a respondent in the application Everyone who is entitled to get notice would presumably be named respondent in the originating Notice

4 We prefer "absent", particularly if you intend to define or refer to "absentee"

5 Agreed

6 Agreed

7 We are in favour of having the normal standard of proof in civil proceedings apply here, that is, the balance of probabilities On this point you might be interested in reading a recent judgment of the Saskatchewan Court of Appeal in Re Schnell Estate (1971) 4 W W R 449

8 Agreed

9 We are generally agreeable to a section equivalent to section 3 of The Absentee Act, 1969 except that we think it should include anyone who would be a beneficiary under the will of the absentee in the event that a declaration is made We are concerned here because section 3(b) of the Act allows any of the next of kin to apply, including one who would not be entitled to any share of the estate, whether the absentee was testate or intestate For example, the father of an intestate absentee leaving a spouse and children could apply even though he had no personal interest in the absentee's estate
Our concern arose here because we are not certain that under clause (e) a beneficiary in the absentee's will was a person "interested in the affairs" of the absentee Can the beneficiary be said to be actually "interested" until a declaration is made? We also discussed the point as to whether the word "affairs" was broad enough to include property or whether it should read "property or affairs"

10 We agree that there should be an appeal from the order to the Court of Appeal At the same time we wondered whether it would be necessary to say so because the statute law in a province or its Rules of Court likely provide for an appeal from any order made on an originating notice of

motion Specifically, section 8 of The Absentee Act, 1969 might be a redundant provision in Saskatchewan

In any event we feel that the persons entitled to appear should consist of anyone who was a party to or entitled to be heard on the original notice of motion and also, with leave of a judge of the Court of Appeal, any other person who is interested but who was never a party to the original proceedings or entitled to be notified of them

11 We are concerned about the wording here It is possible that the words "superseding, vacating and setting aside" are synonymous At least, "vacating and setting aside" are synonymous "Superseding" might be intended to mean "replacing" We feel that the Court should be empowered to "replace, vary, amend, or terminate" the original order As to termination, there will be an ancillary point involved as to when the termination could be effective Did you intend that in some circumstances the termination or vacating or setting aside be retroactive as far back as the date of the original order itself?

12 We are of course agreed that the equivalent of section 3 of Alberta's Family Relief Act should be included We assume that you intend this provision to be included in the Uniform Presumption of Death Act If so, this is satisfactory to us It could of course be included in the Uniform Family Relief Act

13 We have no objection to the wording of your proposed section

14 This was the subject of some considerable discussion If there is in fact a hiatus we feel the gap should be bridged However, it is our feeling that if a declaration is made then all the consequences that flow from an actual death would flow from the judicial declaration without more I had the same type of problem in The Effects of Adoption Act In general, an adoption order makes the adoptive child the child of the adoptive parents for all purposes and thus all relationships are changed accordingly Similarly, a declaration of death for all purposes should presumably effect all other relationships without more

15 As to the absentee returning after the declaration is made, we feel that even though this is a rare case it must be dealt with nevertheless One must acknowledge that it would be impossible to try to foresee the variety of circumstances that might exist in one of these rare cases Thus, while one normally wishes to give the Courts some guidance in difficult cases, it seems that it is impossible to lay out any specific guide lines here About all that one can do is permit the Court to do whatever is just under the circumstances If we have that, then the Court should be specifically armed with broad powers to do just that In other words, we think the Act should empower the Court to make whatever orders are necessary to return matters as far as possible to the status quo in existence at the time of the declaration of death Insofar as this can be done without prejudicing unduly the rights of others which have accrued in reliance on the declaration This could involve making specific declarations as to the rights of individuals concerned and the validity of documents that came into existence as a direct or indirect result of the declaration, and directions to a surrogate Court that has already granted letters probate or letters of administration in the absentee's estate

We specifically feel that there should be no power for the returned absentee to trace assets that have been distributed to beneficiaries on the strength of the declaration of death That includes life insurance proceeds

16 We agree with your third solution, that is, to let the two processes remain independent of each other

17 Noted

If you want us to elaborate on any of these points, please let us know

SCHEDULE VII

(Text of a memorandum dated April 28, 1972, written by Dr. G. D. Kennedy, Deputy Attorney-General for British Columbia, to Mr. G. A Higenbottam, Legislative Counsel)

Re: Draft Uniform Presumption of Death Act—Report of the Commissioner for Northwest Territories.

I have examined Hugo Fischer's report of September 21st last and note that he would prefer to have comments before the next meeting if possible The schedules have not been readily available to me but I doubt that that makes any difference

I comment on Mr Fischer's sixteen points as follows:

ITEMS 1 AND 2 I agree with

ITEM 3 The problem here is not so much the length of notice but the type of proceeding by which this matter gets into court I concur with Mr Fischer's recommendation that there be added a description of whatever document is appropriate in the province or other jurisdiction where the uniform Act is enacted In this province, I concur with the actual suggestion, namely, the use of an originating notice of motion The problem of length of notice is not then a problem, because the Rules of Court applying to originating notices of motion apply In effect, I concur with the suggested change and with the recommendation that the section be otherwise unchanged in substance

ITEM 4 Deals with the first of four points upon which the court must be satisfied before an order is made, namely, that the person has been "absent" The recommendation is that the requirement be changed from absence to disappearance, with the statement that disappearance is, of course, stronger than mere absence [Top of page 4] I am not entirely sure why we want this condition to be stronger I have, however, a more serious objection to the change, because I am not entirely satisfied about the meaning of the word "disappear" This section is used in air crashes into snow and ice where the bodies may be buried for some time, possibly destroyed, or a crash into the ocean off the coast It is difficult to say that a person known to be aboard the plane has "disappeared" where the plane is known to have crashed in these circumstances, that is, into a particular area Similarly, in some drowning cases all of the bodies may not be recovered For example, in the summer of 1947 there was a collision between a small boat carrying three persons and the C P R barge in Okanagan Lake One of the three persons survived The bodies of the other two have never been found to this date The survivor would use provisions of this sort (not then enacted) as a preliminary to obtaining letters of administration to her drowned husband's estate In these circumstances it is difficult to say that the husband and the third person "had disappeared"

ITEMS 5 AND 6 Propose no change and I concur

ITEM 7 Deals with the fourth requirement, namely, that reasonable grounds exist for supposing that the person is dead Dr Fischer asks what is the standard of proof and invites comments on the question whether, in view of a particular federal Act dealing with pensions which, with respect, I think is not relevant, we should specify in a similar manner the standard of proof That federal Act requires the criminal standard I am quite content, if the Commissioners so wished, to specify a standard but I do not believe that the criminal standard or the Canada Pension Plan standard, which is the criminal standard, should be brought into matters of this sort It is a fair and interesting comparison to see what is done in other legislation such as the Canada Pension Plan Act but, with respect, I do not think it appropriate that a uniform piece of legislation such as this for general adoption throughout Canada should depart from the normal standard of proof in relation to the matters with which it is normally dealing—the balance of probabilities

ITEM 8 No change is proposed and I concur

ITEM 9 Proposes to spell out who may apply or make an application under the Act, on the basis of five paragraphs contained in a statute from one of the provinces on a related subject Frankly, I am not entirely sure why we should try to limit ourselves Dr Fischer rightly observes in one of the later sections, that it is difficult to conceive or foresee all the varied circumstances of individual cases I think we would be unduly limiting ourselves if we spelled out who should and should not be applicants Surely anyone with an appropriate interest can be an applicant and if he hasn't any appropriate interest, the court will toss him out

ITEM 10 Proposes to add a provision from the Act of the other province just referred to, the Absentee Act of Saskatchewan providing an appeal to the Court of Appeal With respect, I must differ and strongly object It seems to me that a matter of appeal from courts is a matter for legislation dealing with the Court of Appeal under whatever name it is known in each of the provinces For example, in British Columbia, our Court of Appeal Act does provide in section 7(a) for an appeal from any order of the Supreme Court, and the Supreme Court would be the court making the order under this Act I believe appeals should continue to exist but I do not believe we should clutter up legislation on one subject with what is really legislation on another subject This is a problem with a number of the succeeding items in Dr Fischer's report, where he has properly raised the matters for our consideration but where I believe the proper disposition is in other legislation, even if we wish to recommend a uniform provision for that other legislation

ITEM 11 I have grave reservations about the proposal to give any person "affected" an opportunity to apply to a court to have an order set aside, an order that was made years before There may be a problem which someday we will need to solve but I am not convinced that the courts do not have power to solve the situation where the missing

person returns That is one point but to give any person aggrieved a right to apply to have the order set aside on any one of a thousand different bases is an entirely different suggestion and, I think, dangerous That leaves us only then the question of setting the order aside if the missing person, presumed to be dead, is found alive or to have been alive at some period after the date of the order, even though no longer alive I would prefer to leave this to the court initially to see how the courts deal with it

ITEM 12 This and Items 13, 14 and 15 deal with new family relations arising out of a marriage following an order under the Act On page 7 there is reference to rights to maintenance and support and giving the new spouse and their children the same rights as they would have had if the first spouse had actually been dead when the marriage ceremony took place First there is nothing to suggest in the opening two paragraphs of Item 12 that the person presumed dead, the first spouse, has been found to be alive In this case I see no need for other action in respect of maintenance and support The third paragraph of Item 12 (bottom of page 7) does deal with a situation where the first spouse re-appears and whether provision should be made for maintenance by the spouse who has lived throughout to maintain if male presumably although in this day and age female also, both his families On the policy question, I concur with the suggestion that there should be provision for maintenance of both families However, for reasons already expressed, I believe this is a matter for the maintenance legislation and not for the Presumption of Death Act Apart altogether from the Presumption of Death Act or any order made under it, this Province's Family Relations Act would take the double family responsibilities into account and allow maintenance for both, assuming the person against whom the order was sought had the ability to pay In effect, I agree with the policy proposal but believe the matter should not be contained in the presumption of death legislation

ITEM 13 Deals further with maintenance and with the wording of one of the province's Family Relief Acts I do not think it necessary for us in this report and recommendation on the presumption of death to get into this question of the wording of maintenance or relief legislation and therefore I am reserving any comments on that subject

ITEM 14 Reports abandonment of a proposal made last year I concur in the abandonment

ITEM 15 Discusses what is to be done if the absentee returns and finds his estate has been distributed Dr Fischer notes on page 11 his doubt about anticipating varied circumstances of individual cases I concur and suggest that this is a very fundamental reason why we should leave it open at the present time and let's not try to guess

ITEM 16 Is one that I don't really understand because, for the moment, I don't have before me last year's minutes Dr Fischer says the question arises whether there should be some integration process between presumption of death legislation and dissolution of marriage I think

the answer is clearly in the negative and I would concur with his own third solution which he suggests is the simplest, let the two processes remain independent of each other

Will you arrange to add any comments of your own and other Commissioners and see that they get back to Hugo Fischer

Gilbert D Kennedy,
Deputy Attorney-General

APPENDIX M

(*U L.S. Agenda Item 19; page 34*)

PROTECTION OF PRIVACY CREDIT AND PERSONAL DATA REPORTING

REPORT OF THE ONTARIO COMMISSIONERS

At the 1971 Conference of Commissioners, D. S. Thorson, Esq., Q.C., Chairman of the Ad Hoc Committee on the Protection of Privacy, presented the Preliminary Report on Privacy and the Law (1971 Proceedings, Appendix T. page 260).

It was agreed that there were so many aspects to the protection of privacy that the subject-matter should be divided amongst the Commissioners for study and report. Accordingly, it was resolved, *inter alia,* "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" (1971 Proceedings, pages 82-83).

The Quebec and Ontario Commissioners, because of pressure of work, did not succeed in meeting together to combine their views into one report. The Ontario Commissioners feel that uniformity of legislation in the field of credit and personal data reporting is desirable from the point of view both of the citizen and of commerce and recommend that uniform legislation be proceeded with.

In general, legislation regulating consumer reporting should be aimed at,

1. equalizing the power imbalance between the individual and institutions anonymously using the vast, interconnected information storage and retrieval systems developed in recent years;
2. guarding against the use of carelessly recorded, out of date, irrelevant, incomplete or erroneous information;
3. preserving a practical information reporting system for valid commercial purposes.

To accomplish these aims, legislation should contain the following elements:

1. Registration of consumer reporting agencies. This has three purposes: clearly identifying those engaged in the activity;

enforcement of controls; and central disclosure of necessary information to government and the public.

2. Notification to the consumer where reports are being resorted to.
3. Access by the consumer to examine information stored about him on demand.
4. Methods of correcting or supplementing erroneous or incomplete information.
5. Standards of relevancy, accuracy, corroboration, and recency imposed on reporting agencies and enforced by governmental supervision and inspection.

Attached as a schedule to this report is a draft Act that the Ontario Commissioners feel contains the elements for reasonably effective safeguards while not being unduly onerous for compliance, and recommend that the matter again be referred to the Commissioners of one or more jurisdictions for the purpose of considering and combining all material coming before this meeting of the Conference and further reporting one draft Act.

The Ontario Commissioners.

The Consumer Reporting Act

Interpretation

1.—(1) In this Act,

(*a*) "consumer" means a natural person,

(*b*) "consumer report" means a written, oral or other communication by a consumer reporting agency of credit information or personal information, or both, pertaining to a consumer for consideration in connection with a purpose set out in clause *c* of subsection 1 of section 9,

(*c*) "consumer reporting agency" means a person who for gain or profit furnishes consumer reports;

(*d*) "credit information" means information, other than personal information, about a consumer's borrowing and repayment history, assets or credit worthiness;

(*e*) "Director" means the (insert title of appropriate provincial official);

(*f*) "employment purposes" means the purposes of taking into employment, granting promotion, reassigning employment duties or retaining as an employee;

(*g*) "file", when used as a noun, means all of the information pertaining to a consumer that is recorded and retained by a consumer reporting agency, regardless of the manner or form in which the information is stored;

(*h*) "Minister" means the Minister of (insert title of appropriate provincial minister);

(*i*) "person" means a natural person, an association of natural persons, a partnership or a corporation;

(*j*) "personal information" means information about a consumer's character, reputation, health, physical or personal characteristics or mode of living;

(*k*) "Registrar" means the Registrar of Consumer Reporting Agencies;

(*l*) "regulations" means the regulations made under this Act;

(*m*) "Tribunal" means (insert appropriate provincial body for holding quasi-judicial hearings).

(2) This Act applies notwithstanding any agreement or waiver to the contrary. **Agreements to waive**

2.—(1) There shall be a Registrar of Consumer Reporting Agencies who shall be appointed by the Lieutenant Governor in Council. **Registrar**

(2) The Registrar may exercise the powers and shall perform the duties conferred or imposed upon him by or under this Act under the supervision of the Director. **Duties**

3. No person shall conduct or act as a consumer reporting agency unless he is registered by the Registrar under this Act **Registration of credit reporting agencies**

4.—(1) An applicant is entitled to registration or renewal of registration by the Registrar except where, **Registration**

(*a*) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(*b*) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

(*c*) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, or

(*d*) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Conditions of registration

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Not transferable

(3) A registration is not transferable.

Refusal to register

5.—(1) Subject to section 6, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 4.

Revocation and refusal to renew

(2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he were an applicant, or where the registrant is in breach of a term or condition of the registration.

Notice of proposal to refuse or revoke

6.—(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.

Notice requiring hearing

(2) A notice under subsection 1 shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection 1 is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing

Powers of Registrar where no hearing

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection 2, the Registrar may carry out the proposal stated in his notice under subsection 1

Powers of Tribunal

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Conditions of order

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

(6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Parties

(7) Notwithstanding subsection 1, the Registrar may cancel a registration upon the request in writing of the registrant in the prescribed form surrendering his registration

Voluntary cancellation

(8) Where, within the time prescribed therefor or, if no time is prescribed, before expiry of his registration, a registrant has applied for renewal of his registration and paid the prescribed fee, his registration shall be deemed to continue,

Continuance pending renewal

(*a*) until the renewal is granted; or

(*b*) where he is served with notice that the Registrar proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its order.

(9) The oral evidence taken before the Tribunal at a hearing shall be recorded and, if so required, copies or a transcript thereof shall be furnished upon the payment of such fees therefor as the Lieutenant Governor in Council may prescribe by regulation.

Recording of evidence

7.—(1) Any party to proceedings before the Tribunal may appeal from its decision or order to the High Court in accordance with the rules of court.

Appeal from decision of Tribunal

(2) Where any party appeals from a decision of the Tribunal, the Tribunal shall forthwith file in the High Court the record of the proceedings before it in which the decision was made, which, together with the transcript of the evidence if it is not part of the Tribunal's record, shall constitute the record in the appeal.

Record to be filed in court

(3) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

Minister entitled to be heard

(4) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Powers of court on appeal

Further applications

8. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

To whom reports may be given

9.—(1) No consumer reporting agency and no officer or employee thereof shall knowingly furnish any information from the files of the consumer reporting agency except in a consumer report given,

(*a*) in response to the order of a court having jurisdiction to issue such an order;

(*b*) in accordance with the written instructions of the consumer to whom the information relates, or

(*c*) to a person who it has reason to believe,

(i) intends to use the information in connection with the extension of credit to or the collection of a debt of the consumer to whom the information pertains,

(ii) intends to use the information in connection with the entering into or renewal of a tenancy agreement,

(iii) intends to use the information for employment purposes,

(iv) intends to use the information in connection with the underwriting of insurance involving the consumer,

(v) intends to use the information to determine the consumer's eligibility for any matter under a statute or regulation where the information is relevant to the requirement prescribed by law,

(vi) otherwise has a direct business need for the information in connection with a business transaction involving the consumer.

Idem

(2) No person shall knowingly obtain any information from the files of a consumer reporting agency respecting a consumer except for the purposes referred to in subsection 1.

Information as to identities

(3) Notwithstanding subsections 1 and 2, 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 any department of the Government of (jurisdiction) or of Canada or any province thereof.

Sale of files

(4) A consumer reporting agency shall not sell, lease or transfer title to its files or any of them except to another consumer reporting agency registered under this Act.

Procedures of agencies

10.—(1) Every consumer reporting agency shall adopt all procedures reasonable for ensuring the greatest possible accuracy and fairness in the contents of its consumer reports.

Information included in consumer report

(2) A consumer reporting agency shall not report,

(*a*) any information that is not stored in a form capable of being produced under section 12 ,

(*b*) any information that is not extracted from information appearing in files stored or collected in a repository located in Canada

Idem

(3) A consumer reporting agency shall not include in a consumer report,

(*a*) any information based on evidence that is not corroborated unless the lack of corroboration is noted with and accompanies the information;

(*b*) any personal information unless it has made reasonable efforts to corroborate the evidence on which the personal information is based;

(*c*) information as to judgments after seven years after the judgment was given, unless the creditor confirms in writing that it remains unpaid in whole or in part, and such confirmation appears in the file, or information in respect of a judgment fully paid;

(*d*) information as to any judgment against the consumer 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;

(*e*) information as to bankruptcies after fourteen years from the date of assignment or petition in the most recent bankruptcy;

(*f*) information regarding any writs, judgments, collections or debts that are statute barred unless it is accompanied by evidence appearing in the file that recovery is not barred by the expiration of a limitation period;

(*g*) information as to the payment or non-payment of taxes or lawfully imposed fines after seven years;

(*h*) information as to convictions for crimes, after seven years from the date of conviction, provided information as to convictions for crimes shall not be reported if at any time it is learned that after a conviction a full pardon has been granted;

(*i*) information regarding writs that are more than seven years old or writs that were issued against the consumer more than twelve months prior to the making of the report unless the consumer reporting agency has ascertained the current status of the action and has a record of this on file;

(*j*) information regarding any criminal charges against the consumer where the charges have been dismissed, set aside or not proceeded with,

(*k*) any other adverse item of information that is more than seven years old unless it is voluntarily supplied by the consumer to the consumer reporting agency;

(*l*) information as to race, creed, colour, ancestry, ethnic origin, or political affiliation;

(*m*) any information given orally unless the content of the oral report is noted in writing in the file; or

(*n*) any other information prescribed by the regulations.

Sources of information

(4) A consumer reporting agency shall not maintain in its files or report any information unless the source of the information also appears on the file including the identity of the originator of the information and the identity of all persons by whom the information was collected or through whom it was disclosed to the consumer reporting agency.

Maintenance of information in file

(5) Every consumer reporting agency shall maintain in its file respecting a consumer all the information of which the consumer is entitled to disclosure under subsection 1 of section 12.

11.—(1) Every person shall, upon the request of a consumer, inform the consumer whether or not a consumer report respecting him is being referred to in connection with any specified transaction or matter in which such person is engaged, and, if so, of the name and address of the consumer reporting agency supplying the report

Disclosure of report on demand

(2) No person shall procure or cause to be prepared a consumer report containing personal information respecting a consumer unless he notifies the consumer of the fact and the name and address of the consumer reporting agency in writing, delivered not later than five days after the report is requested.

Notice of intention to procure consumer report

(3) Where a person proposes to extend credit to a consumer and has obtained or proposes to obtain a consumer report containing credit information only, he shall give notice of the fact to the consumer in writing at the time of the application for credit, or if the application is made orally, orally at the time of the application for credit.

Idem

(4) No person extending credit to a consumer shall divulge to other credit grantors any information as to transactions or experiences between himself and the consumer unless he notifies the consumer in writing at the time of the application for credit that he intends to do so.

Notice of passing on credit information

(5) Any notice referred to in this section may be contained in the application for credit if it is clearly set forth in bold type not less than ten point in size above the signature of the consumer.

Form of notice

(6) Where credit involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information received from a consumer reporting agency or a person other than a consumer reporting agency, the user of such information shall deliver to the consumer at the time such action is communicated to the consumer notice of the fact and,

Adverse action

(*a*) of the nature of the information where the information is furnished by a person other than a consumer reporting agency; or

(*b*) of the name and address of the consumer reporting agency, where the information is furnished by a consumer reporting agency.

12.—(1) Every consumer reporting agency shall, at the written request of a consumer and during normal business

Right of consumer to disclosure

hours clearly and accurately disclose to the consumer, without charge,

(*a*) the nature and substance of all information in its files pertaining to the consumer at the time of the request;

(*b*) the sources of credit information;

(*c*) the names of the recipients of any consumer report pertaining to the consumer that it has furnished,

(i) for employment purposes, within the two year period preceding the request, and

(ii) for any other purpose, within the six month period preceding the request;

(*d*) copies of any written report made pertaining to the consumer to any other person or, where the report was oral, particulars of the content of such oral report,

and shall inform the consumer of his right to protest any information contained in the file under sections 13 and 14 and the manner in which a protest may be made

Method of disclosure

(2) The disclosures required under this section shall be made to the consumer,

(*a*) in person if he appears in person and furnishes proper identification;

(*b*) by telephone if he has made a written request, with sufficient identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

Idem

(3) Every consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him under this section

Consumer's adviser

(4) The consumer shall be permitted to be accompanied by one other person of his choosing to whom the consumer reporting agency may be required by the consumer to disclose his file

Abstract

(5) The consumer reporting agency shall permit the consumer to whom information is disclosed under this section to make an abstract thereof.

(6) A consumer reporting agency shall require reasonable identification of the consumer and a person accompanying him before making disclosures under this section.

Identification

(7) A consumer reporting agency shall not require a consumer to give any undertaking or waive or release any right or chose in action as a condition precedent to his access to his file under this section

No conditions

(8) A consumer may deliver to a consumer reporting agency in writing of not more than 100 words an explanation or additional information respecting the circumstances surrounding any item of information about him in his file, and the consumer reporting agency shall maintain such explanation or additional information in the file accompanying the item and include it in any report given containing the item

Consumer's explanation

13.—(1) Where a consumer disputes the accuracy or completeness of any item of information contained in his file, the consumer reporting agency shall use its best endeavours to confirm or complete the information and shall correct, supplement or delete the information in accordance with good practice.

Correction of errors

(2) Where a consumer reporting agency corrects, supplements or deletes information under subsection 1, the consumer reporting agency shall, at the request of the consumer, furnish notification of the correction, supplement or deletion to any person specifically designated by the consumer who received a consumer report based on the unamended file within two years before the correction, supplement or deletion is made.

Idem

14.—(1) The Registrar may order a consumer reporting agency to amend or delete any information, or by order restrict or prohibit the use of any information, that in his opinion is inaccurate or incomplete or that does not comply with the provisions of this Act or the regulations.

Order by Registrar re credit information

(2) The Registrar may order a consumer reporting agency to furnish notification to any person who has received a consumer report of any amendments, deletions, restrictions or prohibitions imposed by the Registrar.

Enforcement of order

(3) Where the consumer or consumer reporting agency considers himself aggrieved by a decision of the Registrar under this section, he may apply to the Tribunal for a hearing and section 6 applies, *mutatis mutandis*, to the decision in the same manner as to a proposal by the Registrar under section 6 and as if the consumer and the consumer reporting agency

Hearing by Tribunal

each were an applicant or registrant, except that an order of the Registrar may be issued and take effect immediately, but the Tribunal may grant a stay until the order becomes final.

Disclosure of sources

(4) At a hearing before the Tribunal for the purposes of subsection 3, the consumer may require the consumer reporting agency to disclose the source of any information contained in its files.

Notice of material changes

15. Every consumer reporting agency shall, within five days after the event, notify the Registrar in writing of,

(*a*) any change in its address for service;

(*b*) any change in the officers in the case of a corporation or of the members in the case of a partnership; and

(*c*) in the case of a corporation, any change in the ownership of its shares.

Investigation of complaints

16.—(1) Where the Registrar receives a complaint in respect of a consumer reporting agency and so requests in writing, the consumer reporting agency shall, where it has received the consumer's consent in writing, furnish the Registrar with such information respecting the matter complained of as the Registrar requires.

Idem

(2) The request under subsection 1 shall indicate the nature of the inquiry involved.

Idem

(3) For the purposes of subsection 1, the Registrar or any person designated in writing by him may on notice at any reasonable time enter upon the business premises of the consumer reporting agency to make an inspection in relation to the complaint.

Investigation on order of Minister

17. The Minister may by order appoint a person to make an investigation into any matter to which this Act applies as may be specified in the Minister's order and the person appointed shall report the result of his investigation to the Minister, and for the purposes of the investigation, the person making it has the powers of a commission under *The Public Inquiries Act*, which Act applies to such investigation as if it were an inquiry under that Act.

Investigation by Director

18.—(1) Where, upon a statement made under oath, the Director believes on reasonable and probable grounds that any person has,

(*a*) contravened any of the provisions of this Act or the regulations; or

(*b*) committed an offence under the *Criminal Code* (Canada) or under the law of any jurisdiction that is relevant to his fitness for registration under this Act,

R.S.C. 1970, c. C-34

the Director may by order appoint one or more persons to make an investigation to ascertain whether such a contravention of the Act or regulation or the commission of such an offence has occurred and the person appointed shall report the result of his investigation to the Director.

Powers of investigator

(2) For purposes relevant to the subject-matter of an investigation under this section and, notwithstanding section 9, the person appointed to make the investigation may inquire into and examine the affairs of the person in respect of whom the investigation is being made and may,

(*a*) upon production of his appointment, enter at any reasonable time the business premises of such person and examine books, papers, documents, consumer files and things relevant to the subject-matter of the investigation; and

(*b*) inquire into negotiations, transactions, loans, borrowings made by or on behalf of or in relation to such person and into property, assets or things owned, acquired or alienated in whole or in part by him or any person acting on his behalf that are relevant to the subject-matter of the investigation,

and for the purposes of the inquiry, the person making the investigation has the powers of a commission under *The Public Inquiries Act*, which Act applies to such inquiry as if it were an inquiry under that Act.

Obstruction of investigator

(3) No person shall obstruct a person appointed to make an investigation under this section or withold from him or conceal or destroy any books, papers, documents or things relevant to the subject-matter of the investigation.

Entry and search

(4) Where a magistrate is satisfied, upon an *ex parte* application by the person making an investigation under this section, that the investigation has been ordered and that such person has been appointed to make it and that there is reasonable ground for believing there are in any building, dwelling, receptacle or place any books, papers, documents or things relating to the person whose affairs are being investigated

and to the subject-matter of the investigation, the magistrate may, whether or not an inspection has been made or attempted under clause *a* of subsection 2, issue an order authorizing the person making the investigation, together with such police officer or officers as he calls upon to assist him, to enter and search, if necessary by force, such building, dwelling, receptacle or place for such books, papers, documents or things and to examine them, but every such entry and search shall be made between sunrise and sunset unless the magistrate, by the order, authorizes the person making the investigation to make the search at night.

Removal of books, etc

(5) Any person making an investigation under this section may, upon giving a receipt therefor, remove any books, papers, documents or things examined under clause *a* of subsection 2 or subsection 4 relating to the person whose affairs are being investigated and to the subject-matter of the investigation for the purpose of making copies of such books, papers or documents, but such copying shall be carried out with reasonable dispatch and the books, papers or documents in question shall be promptly thereafter returned to the person whose affairs are being investigated.

Certified copies

(6) Any copy made as provided in subsection 5 and certified to be a true copy by the person making the investigation is admissible in evidence in any action, proceeding or prosecution as *prima facie* proof of the original book, paper or document and its contents.

Appointment of expert

(7) The Minister or Director may appoint any expert to examine books, papers, documents or things examined under clause *a* of subsection 2 or under subsection 4.

Matters confidential

19.—(1) Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under section 16, 17 or 18 shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person except,

(*a*) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations; or

(*b*) to his counsel, or

(*c*) with the consent of the person to whom the information relates.

(2) No person to whom subsection 1 applies shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry, inspection or investigation except in a proceeding under this Act or the regulations.

Testimony in civil suit

20.—(1) Any notice or order required to be given, delivered or served under this Act or the regulations is sufficiently given, delivered or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at his last-known address.

Service

(2) Where service is made by registered mail, the service shall be deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the notice or order until a later date

Idem

21.—(1) Where it appears to the Director that any person does not comply with any provision of this Act, the regulations or an order made under this Act, notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights he may have, the Director may apply to a judge of the High Court for an order directing such person to comply with such provision, and upon the application, the judge may make such order or such other order as the judge thinks fit.

Restraining order

(2) An appeal lies to the Court of Appeal from an order made under subsection 1.

Appeal

22. No person shall knowingly supply false or misleading information to another who is engaged in making a consumer report

False information

23.—(1) Every person who,

Offences

(*a*) knowingly, furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;

(*b*) fails to comply with any order, direction or other requirement made under this Act; or

(*c*) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on summary conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both.

Corporations

(2) Where a corporation is convicted of an offence under subsection 1, the maximum penalty that may be imposed upon the corporation is $25,000 and not as provided therein.

Limitation

(3) No proceeding under clause *a* of subsection 1 shall be commenced more than one year after the facts upon which the proceeding is based first came to the knowledge of the Director

Idem

(4) No proceeding under clause *b* or *c* of subsection 1 shall be commenced more than two years after the time when the subject-matter of the proceeding arose.

Certificate as evidence

24.—(1) A statement as to,

(*a*) the registration or non-registration of any person;

(*b*) the filing or non-filing of any document or material required or permitted to be filed with the Registrar;

(*c*) the time when the facts upon which proceedings are based first came to the knowledge of the Director; or

(*d*) any other matter pertaining to such registration, non-registration, filing or non-filing,

purporting to be certified by the Director is, without proof of the office or signature of the Director, receivable in evidence as *prima facie* proof of the facts stated therein for all purposes in any action, proceeding or prosecution.

Proof of Minister's signature

(2) Any document under this Act purporting to be signed by the Minister, or any certified copy thereof, is receivable in evidence in any action, prosecution or other proceeding as *prima facie* proof that the document is signed by the Minister without proof of the office or signature of the Minister.

Regulations

25. The Lieutenant Governor in Council may make regulations,

(*a*) exempting any class of persons from this Act or the regulations or any provision thereof,

(*b*) governing applications for registration or renewal of registration and prescribing terms and conditions of registration;

(*c*) requiring the payment of fees on application for registration or renewal of registration, and prescribing the amounts thereof;

(*d*) requiring registered consumer reporting agencies to be bonded in such form and terms and with such collateral security as are prescribed, and providing for the forfeiture of bonds and the disposition of the proceeds,

(*e*) prescribing further procedures respecting the conduct of matters coming before the Tribunal,

(*f*) requiring and governing the books, accounts and records that shall be kept by consumer reporting agencies;

(*g*) prescribing information that may not be reported by a consumer reporting agency,

(*h*) prescribing information that must be contained in a consumer report,

(*i*) requiring consumer reporting agencies to make returns and furnish information to the Registrar;

(*j*) prescribing forms for the purposes of this Act and providing for their use;

(*k*) requiring any information required to be furnished or contained in any form or return to be verified by affidavit.

APPENDIX N

(*U L S Agenda Item 19; page 34*)

Protection of Privacy (Credit and Personal Data Reporting)

OFFICE DE REVISION DU CODE CIVIL

COMITE SPECIAL DE L'ENREGISTREMENT

PROJECT DE LOI

sur les

AGENCES D'INFORMATION

SECTION I — DEFINITIONS

ARTICLE 1.

"Toute personne ou compagnie qui prépare et distribue des rapports concernant le caractère, la réputation, la solvabilité ou l'assurabilité d'une personne est présumée être une "agence d'information" pour les fins de la présente loi."

ARTICLE 2:

"L'ensemble des informations rassemblées par l'agence au sujet d'une personne constitue le dossier de cette dernière."

SECTION II — PERMIS

ARTICLE 3:

"Nul ne peut exploiter une agence d'information s'il n'a obtenu un permis délivré par le directeur de l'Office de la protection du consommateur et fourni une caution dont le montant est fixé par le Lieutenant-Gouverneur en conseil."

ARTICLE 4:

"Toute personne qui sollicite un permis doit transmettre sa demande par écrit au directeur, dans la forme et accompagnée des documents et du cautionnement prescrits par la loi et les règlements.

Le directeur délivre le permis si, après enquête, il juge que le requérant possède les qualités requises et remplit les conditions prescrites."

ARTICLE 5:

"Pour obtenir un permis, le requérant doit

(a) être le véritable propriétaire de l'agence;

(b) résider au Québec;

(c) faire la preuve de sa solvabilité;

(d) produire tout document que l'Office peut exiger dans les délais fixés par la loi.

Il doit en outre, s'il est une personne physique,

(a) être majeur;

(b) être exempt de toute condamnation pour acte criminel punissable par voie de mise en accusation seulement;

s'il s'agit d'une compagnie,

(a) être incorporée en vertu de la Loi des compagnies (S.R.Q. 1964, c 271);

(b) fournir à l'Office les noms et les adresses des administrateurs."

ARTICLE 6:

"La demande de permis se fait au moyen d'une formule que l'Office fournit."

ARTICLE 7:

"Le permis est valable pour une durée de 4 ans et est facturable annuellement; il peut être renouvelé aux conditions prescrites par la loi et les règlements."

ARTICLE 8.

"Le directeur, sur réception de toute demande pour la délivrance d'un permis, doit inscrire cette demande dans un registre tenu à cette fin dans les bureaux de l'Office.

Le public peut avoir accès à ce registre aux heures et aux jours où les bureaux de l'Office sont ouverts."

ARTICLE 9

"L'Office doit publier chaque année dans la Gazette Officielle du Québec la liste des agences en activité dans la province avec leurs adresses."

ARTICLE 10:

"Le directeur de l'Office peut, après avoir donné à l'intéressé l'occasion de se faire entendre, annuler, suspendre ou refuser de renouveler tout permis

lorsque le détenteur a cessé de remplir les conditions prévues par la loi et les règlements pour l'obtention du permis;

lorsqu'il refuse ou néglige de se soumettre aux prescriptions de la présente loi ou des réglements après en avoir été requis par écrit par le directeur ou un inspecteur."

ARTICLE 11:

"La décision de suspension, de non renouvellement ou d'annulation d'un permis doit être notifiée par écrit et motivée."

ARTICLE 12:

"L'annulation d'un permis comporte la perte du privilège qu'il conférait et des droits payés pour sa délivrance ainsi que la saisie et la confiscation des dossiers de l'agence."

ARTICLE 13:

"Toute personne dont la demande de permis est refusée ou dont le permis est refusé ou annulé peut interjeter appel de la décision du directeur devant un juge de la Cour provinciale

Celui-ci peut confirmer ou annuler la décision ou rendre la décision qui aurait dû être prise."

ARTICLE 14:

"L'appel est interjeté par requête signifiée au directeur. Cette requête doit être produite au greffe de la Cour provinciale au chef-lieu du district judiciaire où l'agence a son siège social dans les trente jours de la mise à la poste de la notification prévue à l'article 11

Dès réception de l'avis d'appel, le directeur transmet au greffe de la Cour provinciale le dossier relatif à la décision dont il est fait appel."

ARTICLE 15:

"L'Office demeure toujours propriétaire des permis. Les détenteurs ne peuvent les considérer ni les inclure comme partie de leur patrimoine "

ARTICLE 16:

"Un permis ne peut être cédé ou transporté sans l'autorisation écrite du Directeur.

L'acquéreur du permis doit remplir les conditions et fournir la caution prévues aux articles 3 et suivants."

ARTICLE 17:

"Les dossiers d'une agence qui cesse ses activités ou qui s'est vue refuser le renouvellement de son permis doivent être déposés à l'Office qui en disposera."

SECTION III — FONCTIONNEMENT DES AGENCES

ARTICLE 18.

"Une agence d'information ne peut effectuer d'investigation concernant une personne sans avoir reçu son consentement exprès et écrit ou l'avoir immédiatement avisée par écrit qu'un telle investigation était effectuée. L'agence doit également avertir immédiatement toute personne au sujet de laquelle elle détient un dossier de toute demande d'information à son sujet."

ARTICLE 19:

"Ces avis doivent mentionner le droit du sujet de l'enquête de consulter son dossier et d'y formuler des commentaires"

ARTICLE 20:

"Une agence d'information ne peut recourir à des sources de renseignement situées hors du Québec"

ARTICLE 21:

"Toute personne qui, ayant sollicité du crédit, de l'assurance, de l'emploi ou un bail, a fait l'objet d'une enquête a le droit d'être mise au courant par la personne qui l'a fait effectuer du nom et de l'adresse de l'agence d'information."

ARTICLE 22:

"Toute agence d'information a l'obligation de révéler ses sources si la personne qui a fait l'objet de l'enquête le lui demande."

ARTICLE 23:

"Toute personne a le droit d'examiner gratuitement l'intégralité de tout dossier la concernant détenu par une agence d'information et de formuler des commentaires écrits qui seront consignés dans ce dossier.

L'agence doit en conséquence:

(a) vérifier l'information et la faire disparaître si elle ne peut être vérifiée; ou
(b) corriger le dossier lorsque les commentaires du sujet de l'enquête s'avèrent exacts; et
(c) communiquer ces modifications ou corrections à l'intéressé et à toute personne à qui son dossier a été fourni au cours des deux mosi précédant les modifications et corrections."

ARTICLE 24.

"Toute personne a le droit de prendre copie de son dossier moyennant le payement de droits n'excédant pas le normal de la photocopie du dossier."

ARTICLE 25:

"Aucun rapport effectué par une agence d'information ne peut contenir:

(a) des mentions concernant la race, la religion, l'origine ethnique ou l'affiliation politique du sujet de l'enquête;
(b) la mention de toute faillite dont le sujet de l'enquête aurait été libéré plus de cinq ans avant que l'enquête n'ait été effectuée;
(c) la mention de sommation, condamnation ou recouvrement au sujet de dettes dont il y a eu prescription;
(d) la mention d'une assignation datant de plus de deux ans lorsque l'état de l'action en justice n'est pas connu;
(e) la mention d'un jugement si le nom et l'adresse du créancier ne sont pas mentionnés de même que la date de l'enregistrement du jugement et le montant de la dette, s'il y a lieu;
(f) toute information de fait défavorable au sujet antérieur à cinq ans;
(g) toute information concernant le sujet qui n'a pas été corroborée de façon suffisante."

ARTICLE 26:

"L'information contenue dans les dossiers de toute agence ne peut être utilisée que pour des fins conformes aux activités d'une agence d'information "

ARTICLE 27

"Le Lieutenant-Gouverneur en conseil peut édicter des règlements concernant:

(a) le contenu des formules de demande de permis des agences d'information ainsi que des formules de renouvellement ou de transfert de permis;
(b) le montant de la caution à fournir par les agences d'information "

ARTICLE 28:

"Dans l'exercice de leurs fonctions, les inspecteurs et enquêteurs de l'Office de la protection du consommateur peuvent, pendant les heurs ordinaires de travail, pénétrer dans les locaux des agences d'information et exiger la production des livres, registres et dossiers de ces agences."

ARTICLE 29:

"Tout directeur, administrateur ou employé d'une agence d'information et tout inspecteur et enquêteur de l'Office de la protection du consommateur qui utilise des informations contenues dans le dossier d'une personne à d'autres fins que celles pour lesquelles elles ont été rassemblées est passible d'une amende de . . . pour une première infraction et de . . . pour une deuxième infraction."

ARTICLE 30:

"Tout directeur, administrateur ou employé d'une agence d'information qui refuse de donner accès aux dossiers de l'agence à un inspecteur ou un enquêteur de l'Office est passible d'une amende de . . . pour une première infraction et de . . . pour une deuxième infraction"

ARTICLE 31:

"Tout directeur, administrateur et employé d'une agence d'information qui refuse à une personne l'accès à un dossier la concernant, dans les conditions prévues par la loi, est passible d'une amende de . . . pour une première infraction et de . . . pour une deuxième infraction."

APPENDIX O

(U.L.S Agenda Item 21; page 34)

THE PROTECTION OF PRIVACY ACT

Draft prepared by the Saskatchewan Commissioners with interspersed commentary by the Saskatchewan, British Columbia and Manitoba Commissioners.

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 person.

SASKATCHEWAN:

This in essence is the same as the B C Act The Manitoba Act uses the words "substantially" and "unreasonably" instead of the word "wilfully"

BRITISH COLUMBIA:

We agree with this section Manitoba in s 2(1) has inserted the words "substantially and unreasonably" violated the privacy, etc This is similar to the wording in the American Restatement of the Law of Torts, 1939 Vol 4, p 867 "unreasonably and seriously" interferes with privacy, etc We consider that any violation of privacy however slight or reasonable should constitute a tort, the seriousness and unreasonableness of the violation will be taken into account in assessing damages (see section 5) Manitoba has omitted the word "wilful" in their s 2(1) However, this opens the way for tortious action for unintentional violations of privacy, and resulted in Manitoba having to insert in s 5(b) a defence based on unintentional violation This is the technique used in Lord Mancroft's Right of Privacy Bill, 1961 However, the American Restatement suggests that only intentional violations should sound in damages We, therefore, think it simpler to use the word "wilful" and eliminate the special defence

MANITOBA:

Section 1 of the Saskatchewan draft creates a tort of violation of privacy of a person The violation must be wilful and without claim of right The Manitoba Commissioners feel that the Manitoba description of a substantial and unreasonable violation of privacy is more suitable in describing a tort It would be almost impossible to prove the wilfullness and it would therefore be necessary for the courts to presume that an allegated tortfeasor intended to violate privacy if the evidence indicated that he had in fact violated privacy of another person We feel that the violation of privacy should only become a tort when the violation is both substantial and unreasonable as well as being without claim of right We don't anticipate that there will be any difficulty in the courts determining what is substantial and unreasonable in this connection

2. Without limiting the generality of section 1, proof that there has been,

(a) surveillance, auditory or visual, whether or not accomplished by trespass, of a person, by any means including eavesdropping, watching, spying, besetting or following;

(b) listening to or recording of a conversation in which a person participates, or messages to or from that person, passing by means of telecommunications otherwise than as a lawful party thereto;

(c) use of the name or likeness or voice of a 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, the person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

(d) use of the letters, diaries or other personal documents of a person,

without the consent, expressed or implied, of the person or some other person who has the lawful authority to give the consent, is *prima facie* evidence of a violation of the privacy of the person first mentioned.

SASKATCHEWAN:

The enumerations in (a) to (d) are based on the Manitoba Act Both Manitoba and B C prescribe certain activities or publications that may constitute violation of privacy We feel that is preferable to say that proof of these activities or publications is *prima facie* evidence of a violation of privacy This will provide more certainty than the word may and we feel it will achieve much the same effect We have also taken out the places mentioned in clause (a) of the Manitoba Act, as we feel it would restrict the operation of that clause The B C Act does not restrict the provision relating to surveillance to any particular place

BRITISH COLUMBIA:

We agree with this section It is a considerable expansion of s 2(3) of the B C Act and copies exactly the enumeration of violations in the Manitoba Act (s 3) Moreover, it declares each one of these violations is *prima facie* proof of a breach of privacy This answers the criticism of Prof Ryan described in para 11 of this report and provides something of a code of violations of privacy This section also includes a violation of privacy caused by unauthorized use of a name or likeness for purposes of gain (clause (c)) which is dealt with as a separate tort and in considerably more detail in section 4 of the B C Act On examination it appears preferable and simpler to include this in the one tort of breach of privacy as in this draft

MANITOBA:

Section 2(a) In describing examples of invasion of privacy the Saskatchewan draft omits surveillance of a person's home or other place of residence, or of any vehicle We feel that such surveillance should be a violation of privacy even although the person whose privacy is being violated may not be in his home or place of residence, or vehicle, at the time of the surveillance We don't think that including these references to places and vehicles there is any restriction on the operation of the clause with respect to the surveillance of the person himself

Section 2(b) We question the inclusion of such a broad concept as telecommunications in this clause In certain forms of telecommunications it is the policy of the telecommunications company to make a recording of every message sent We don't think that this should ever constitute a violation of privacy

Section 2(d) We think that the word "use" in this clause is perhaps somewhat broad Perhaps "publication" might be a better description of what is being attempted Also, there is a question of publication of letters, diaries or other personal documents that belong to a person but which do not involve his privacy Should a publication or use of these documents constitute a violation of property Perhaps what we are trying to get at is the letters, diaries or other personal documents prepared or written by the person

2 If the description of the tort remains as set out in the Saskatchewan draft we question making proof of certain facts *prima facie* proof of a violation of privacy It may be very difficult to overcome a presumption that a person intended the results of his acts It might also be difficult to prove some claim of right Therefore, even the most reasonable and insubstantial violation described in section 2 would be *prima facie* proof of a violation of privacy and there would be almost no defence

We think that it is better to describe the examples as set out in section 3 of the Manitoba Act which provides as follows:

"Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, etc "

3. (1) An act, conduct or publication is not a violation of privacy where,

(a) it is consented to, either expressly or impliedly, by some person entitled to consent thereto;

(b) it was incidental to the exercise of a lawful right of defence of person or property,

(c) it 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) it was that of,

(i) a peace officer acting in the course and within the scope of his duty; or

(ii) a public officer engaged in an investigation in the course and within the scope of his duty under a law in force in the province;

and was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of a trespass.

(2) A publication of any matter is not a violation of privacy where,

(a) there were reasonable grounds for belief that 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

SASKATCHEWAN:

This section is a combination of the provisions of the B C and Manitoba Acts relating to defences in actions for violation of privacy

BRITISH COLUMBIA

We prefer here the wording of section 5 of the Manitoba Act over the draft which is substantially the B C Act (s 3) Manitoba (s 5) opens with the words "In an action for violation of privacy of a person, it is a defence for the defendant to show" rather than declaring certain enumerated acts not to be a violation of privacy as in the B C Act (s 3) The facts enumerated in the clauses of the section are not really material in defining whether a violation of privacy, hence a tort, has been committed, and therefore it is not strictly correct to say, when those facts are present, that there is no invasion of privacy It is more accurate to say, as this draft does, that even though there may be an invasion of privacy, certain defences are available as enumerated in this section

We then prefer the wording of the enumerated clauses of the Manitoba Act (s 5) but we would recommend that clause (b) be deleted (as it is in this draft) Clause (b) as previously explained in relation to section 1 above, is only necessary where violation of privacy is declared a tort without proof of wilful intent as in the present Manitoba Act (s 2) and provides a defence for an unintentional violation This is not necessary if the draft's section 1 is used

In dealing with defences as set out in this section, we think that they also are sufficient to cover those additional defences for breach of name and likeness privacy as are set out in subsections (2), (3) and (4) of the B C Act

Therefore, for subsections (1) and (2) of the draft section 3 we would substitute the Manitoba section 5 (except clause (b)), and add at the end subsection (3) of this draft, defining "court"

MANITOBA:

3(1)(a) We feel that only the person whose privacy is being violated should be able to consent to a violation of privacy and thereby providing a defence The one exception to this might be in connection with the publication of letters, diaries, etc , which might be in the possession of a person other than the person who prepared or wrote them

3(1)(c) We question the necessity of providing a defence that the violation of privacy was authorized or required by or under a law We realize that a similar type of provision appears in both the Manitoba and the B C Acts but surely it is a defence to any tort that the action was authorized or required under some law in force in the jurisdiction in which the act took place

3(1)(d) We wonder whether this particular clause should be expanded by addition of such words as "or was, if committed in the course of a trespass, reasonably necessary in the public interest" Frequently, police officers do trespass unwittingly in the course of an investigation and perhaps they should be given more protection than is set out in clause (d)

3(1) In Manitoba a further defence is offered, i e the defendant having acted reasonably in regard to the violation of privacy, neither knew nor should reasonably have known that the act, conduct or publication constituting the violation would have violated the privacy of any person If wilfullness is left out of the description of the tort, then we feel that some defence should be available where the defendant was completely ignorant that he was violating the privacy of any person

3(2)(a) We believe that the publication should not violate the privacy only where the comment on the matter is "in the 'public interest' " not whether it is a matter of "public interest" The public might be very interested in a number of matters which would invade the privacy of people

4. Notwithstanding anything in any other Act, an action for violation of privacy shall be commenced, tried and determined in the Court of Queen's Bench.

SASKATCHEWAN:

This is the B C approach The Manitoba Act defines "court" and the effect is the same

BRITISH COLUMBIA:

We agree

5. 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 without limiting the generality of the foregoing in determining whether an act, conduct or publication constitutes a violation of the privacy of a person, regard shall be given to,

(a) the nature, incidence and occasion of the act, conduct or publication;

(b) the effect of the act, conduct or publication on the health or welfare of the social, business or financial position of the person or his family or relatives;

(c) any relationship, whether domestic or otherwise, between the parties to the action; and

(d) the conduct of the person and of the defendant both before and after the act, conduct or publication, including any apology or offer of amends made by the defendant.

SASKATCHEWAN:

This section is a combination of the B C provision and the Manitoba provision We prefer the B C approach but we have used the Manitoba enumeration of considerations to be taken into account by a court The Manitoba provision requires that the court take certain things into account in awarding damages The defect here is that there may have been a violation of privacy but the court is not asked to award damages The prayer may be for an injunction or a return of profits or goods obtained by the defendant as a result of the violation of privacy If this were the case, the Manitoba provision would not operate in that the court would not be awarding damages We feel that the considerations enumerated by Manitoba should be general considerations which apply to two areas, i e ,

(a) was there a violation of privacy, and

(b) if there was a violation of privacy, what damage did it cause?

BRITISH COLUMBIA:

Although the first seven lines of this draft are a copy of s 2(2) of the B C Act, we now acknowledge that a consideration of the degree of privacy to which a person is entitled based on these factors makes it very difficult for a court to determine that a tort has in fact been committed; witness the *Davis* v *McArthur* case Prof Ryan at page 69 says "substantial justification can be mustered in support of almost every means by which privacy is invaded" It would, as he suggests, be more beneficial to create the tort on a *prima facie* basis by outlining a code of violations of privacy Then, considerations of the nature and degree of privacy become relevant in determining to what compensation, if any, the person is entitled to If we are going to adopt the *prima facie* code of privacy, as in section 2, then the factors set out in the beginning of this draft section 5 should not be relevant to undermine the determination that a tort of privacy has taken place, they should only be relevant to determine the damages suffered

Therefore we recommend that the Manitoba Act s 4(2) be used instead We are particularly pleased with clause (d) as Lord Mancroft's Bill included "distress or embarrassment" as an item of injury, as does the American Restatement 1948 Supplement, page 612 Therefore for section 5 of this draft, section 4(2) of the Manitoba Act should be substituted, but in response to the comment in the Saskatchewan draft, the words "or any other remedy" should be inserted after the word "damages" in the first line to make it clear that the enumerated factors apply equally to other remedies than damages We also recommend that a new subsection be added defining "family" as it is defined in s 1(c) of the Manitoba Act

MANITOBA:

We think that section 5 of the draft should be divided into two sections The first four lines deal with the question of what an individual can reasonably expect in the way of privacy The latter part of the section we feel should relate to the type of remedy or amount of damages We therefore feel that it should commence as follows:

> In assessing damages or awarding relief for a violation of privacy of a person, the court shall have regard to all the circumstances of the case including
>
> (a) the nature, incidence, etc

The Manitoba Act also has a further consideration that is not listed in the Saskatchewan draft, i e , any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy We feel that this matter should be considered for inclusion in this provision

6. In an action for violation of privacy the court may as it deems just

(a) award damages;

(b) grant an injunction,

(c) order the defendant to account for any profits that have accrued or that may subsequently accrue to the defendant by reason or in consequence of the violation;

(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) grant any other relief to the plaintiff that appears necessary under the circumstances.

SASKATCHEWAN:

Essentially this is the same as the Manitoba Act The B C Act does not set out what the court may do by way of granting relief in any action for violation of privacy

BRITISH COLUMBIA:

We agree

7. 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.

SASKATCHEWAN:

This is a Manitoba provision which we feel is desirable The B C Act does not contain this provision

BRITISH COLUMBIA:

We agree

8. An action for violation of privacy shall be commenced within two years after the cause of action arose.

(NOTE: B C has a provision similar to this but Manitoba does not The provision is not required if it is provided in a general Act relating to limitation of actions)

BRITISH COLUMBIA:

We agree

9 A right of action for violation of privacy is extinguished by the death of the person whose privacy is alleged to have been violated.

SASKATCHEWAN:

B C has a provision similar to this but Manitoba does not

BRITISH COLUMBIA:

We agree

MANITOBA:

We are doubtful as to whether the right of action should die with the person whose privacy has been violated We feel that, certainly in respect of claims for damages relating to economic loss to the person whose privacy was violated or any claim for an accounting or return of articles or documents, the right should remain alive after the death of the person whose privacy was violated

In the Manitoba Act, there is a section which provides that no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action could be brought is admissible in any civil proceedings We feel this section should be considered by the Commissioners We also feel that section 8 of the Manitoba Act should be considered for inclusion Section 8 of the Manitoba Act reads as follows:

> 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
>
> 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

ADDITIONAL COMMENT BY MANITOBA:

We also feel that consideration should be given as to whether or not this Act should bind the Crown There might be some instances where the government itself could perhaps be sued for invasion of privacy and in those instances perhaps should be construed as distinct from the employees of the Crown

APPENDIX P
(*U.L S Agenda Item 21, page 35*)

REPORT ON THE TORT OF INVASION OF PRIVACY

BY THE BRITISH COLUMBIA COMMISSIONERS

1. The Report of the Special Committee in 1971 in its background study indicated that only two Provinces had enacted legislation creating the tort of invasion of privacy, namely, British Columbia and Manitoba Here is reproduced for convenience an extract from the background study which neatly summarized the situation.

"(a) British Columbia: British Columbia was the first Province to enact a Privacy Act (S B C , 1968, c 39) 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 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 "

"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 (*Davis* v *McArthur* (1970), 72 W W R 69, 10 D L R (3d) 250) However, on appeal it was decided that the defendant was not in breach of the Act (*Ibid* (1971), 17 D L R (3d) 760)"

"(b) Manitoba: Manitoba also has a Privacy Act (S M , 1970, c 74), 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 "

(Copies of the British Columbia and Manitoba Acts are reproduced in the 1971 Proceedings at pages 309 and 312)

2 The only change since is that Bill No. 60 has been introduced in Nova Scotia, An Act Respecting the Protection of Personal Privacy, and may be enacted this year. The Bill is attached to this report It is obviously an exact copy of the British Columbia Act.

3 As indicated in the background study, there is but one reported decision on these statutes, that of *Davis* v. *McArthur*, (*supra*) construing the British Columbia Act. The Court of Appeal of British Columbia held that, in the particular circumstances of that case, surveillance by a private detective in a matrimonial case was not a tortious invasion of privacy as it was "reasonable in the circumstances, due regard being given to the lawful interests of others, and to the relationship, whether domestic or other, between the parties", within the meaning of section 2(2) of the Act A copy of the Court of Appeal judgment is attached. The plaintiff was refused leave to appeal to the Supreme Court of Canada.

However, it is important to note that the judgment did establish that such surveillance as is described in that case was "without claim of right" under section 2(1) and that private investigators could not rely on this as an absolute defence. Both the British Columbia and the Manitoba Acts and the Nova Scotia Bill use this phrase

4 There has been no judicial criticism of these Acts as they now stand.

5 However, the question remains as posed in the background study (see para 1 above) are the Acts effective to protect violations of privacy?

6. This question has also been raised by Professor Edward F. Ryan of the Faculty of Law, University of Western Ontario, in his study on Protection of Privacy in Ontario prepared at the direction of the Ontario Law Reform Commission and published as an appendix to the Ontario Law Reform Commission Report on that subject in 1968.

The following is his analysis of the Privacy Act of British Columbia (Manitoba's Act was not passed until 1970) which appears at page 67 following:

"The Privacy Act, British Columbia"

"This statute creates a statutory tort, actionable without proof of damage, for the act of violating the privacy of another person, wilfully and without claim of right The statute does not make violation of privacy a statutory offence, and therefore skirts most of the areas of constitutional difficulty that have been discussed in this report"

"The statute creates a second statutory tort, also actionable without proof of damage, for using the name or portrait of another person for advertising or promotional purposes without his consent"

"The Privacy Act can be said to be a legislative implementation of the United States rule set out in the Restatement of the Law of Torts:

> 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"

"Generally, this British Columbia statute is a desirable step forward in the field of protection of privacy Its prohibition against commercial use of a person's name or likeness without consent has reasonably definitive standards and should not give the courts too much difficulty The problem will arise when litigation occurs under the first tort described above—the invasion of privacy pure and simple The statute states:

> 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"

"As was pointed out earlier in this report, substantial justification can be mustered in support of almost every means by which privacy is invaded This statute represents a girding of the legal loins in British Columbia against an invading army, whereas the greatest threat to privacy may be posed by guerrilla warfare It is the totality of hundreds of individually reasonable small assaults upon privacy, as much as the hidden tape recorder or wiretap, that adds up to the modern danger Litigation under this statute will fight over the ground of what is reasonable in each case—a situation which, under our legal process, renders any reference to the general problem of protection of privacy faced by the plaintiff irrelevant, prejudicial to the defendant, and not something which should properly be considered by the court This legislation is fine as far as it goes, but, absent what would amount to a comprehensive code of privacy, setting definitive norms for information trafficking, control of the means and physical implements for invading privacy, control of psychological in-depth testing, input and disclosure standards for school, medical, and governmental records, and all of the rest—in the absence of clear legislative policy in relation to the larger problem of privacy, in short—then this statute standing alone could easily become a well-intentioned dead letter The statute not only is not backed up by any such code of privacy, but also creates significant exceptions by specifying certain activities which cannot be invasions of privacy These include the conduct of a peace officer acting in the course of his duty for the prevention,

investigation or discovery of crime, any act authorized or required by any provincial law, and the conduct of any public officer engaged in an investigation under provincial law, so long as his actions are proportionate to the gravity of the crime or matter subject to investigation, and were not committed in the course of a trespass "

"The statute, then, creates an almost blanket exception in favour of what may be termed "duly constituted authority" Unless the statutory bases of these authorities are reviewed and revised with the problem of privacy in mind, as has been recommended by the Ontario Royal Commission on Civil Rights in the area of investigatory powers, the Privacy Act amounts to a virtual license for governmental invasion of privacy, case in the form of a protection "

7 Professor Ryan at page 97 of his study proposes improvements in the statutory tort legislation in the following words:

"Of the fact that such a tort should be placed in the statutes of Ontario, there can be no doubt The writer suggests that consideration be given to going farther than has been done in British Columbia by using the *prima facie* invasion of privacy and the reverse onus devices suggested above as means of controlling privacy-invading activities which in their totality pose a serious threat to privacy, but which may not be unreasonable vis-a-vis any particular individual This would amount to a legislative declaration of the fact that certain activities of personal data collectors and information traffickers are contrary to the public policy of Ontario A parallel can be found in United States, where, under the antitrust laws, any person injured by illegal corporate price-fixing may recover treble damages Even though the injury to any given individual may be small, this device has proved to be a very effective way to control the larger aspects of an undoubted social and economic evil "

8. The fact is that the British Columbia Act was specifically intended to cure a particular problem, that of electronic eavesdropping and surveillance (see s. 2(3)) mainly in the field of labour union jurisdictional disputes which had been the subject of an inquiry under the Public Inquiries Act and resulted in the Sargent report on Invasion of Privacy of August, 1967. The Manitoba Act of 1970 may, on the other hand, have gone some way toward extending the tort, answering some of these questions and advancing some of these recommendations outlined in the Ryan study.

9. Essentially the main philosophical difference between the British Columbia Act and the Manitoba Act is expressed in section 2(2) of the British Columbia Act and section 4 of the Manitoba Act. Section 2 of the British Columbia Act declares a tort to consist in the violation of privacy, and in subsection (2) declares the nature and degree of privacy to which a person is entitled. The subsection reads:

"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 "

Thus the nature and degree of privacy to which a person is entitled may be severely limited by any of the considerations set out in subsection (2) and, in fact, may result in a declaration that, in view of all these factors, the person was not entitled to that specific kind of privacy that was violated in a particular case, as in the *Davis* v *McArthur* decision Then in fact no tort has been committed Thus the statute may, in practice, as Professor Ryan has pointed out, (para 6) "easily become a well-intentioned dead letter" because substantial justification can be mustered in support of almost every means by which privacy is invaded "

10 Manitoba's approach, on the other hand, is simply to declare a tort to consist in the violation of privacy (section 2) and a violation of privacy may consist of any of those acts enumerated in section 3. The statute in declaring the tort does not attempt to define the nature and degree of privacy the violation of which constitutes the tort, but simply gives examples of such violation. It is only after the tort of violation of privacy has been established that the Court shall have regard to all those circumstances similar to those set out in the British Columbia section 2(2), in awarding damages (Manitoba s. 4(2)). Thus the Manitoba approach seems to meet the criticism of Professor Ryan on page 69 (para 6) by establishing a tort and a code of violations of privacy, unaffected by the circumstances under which the invasion has taken place, those ameliorating circumstances only being taken into account in mitigation of damages.

11. However, a further step in the direction advocated by Professor Ryan in strengthening the tort of privacy could be achieved by declaring that the occurrence of any one of those things enumerated in section 3 of the Manitoba Act is *prima facie* a violation of privacy, rather than the present wording saying that such occurrence "may be" a violation of privacy. This is recommended on page 97 of Professor Ryan's report in the following words:

"The writer suggests that consideration be given to going farther than has been done in British Columbia by using the *prima facie* invasion of privacy and the reverse onus devices suggested above as means of controlling privacy-invading activities which in their totality pose a serious threat to privacy, but which may not be unreasonable vis-a-vis any particular individual "

12. Professor Ryan's further criticism (page 69) is that section 3(d) of the British Columbia Act (s. 5(e) Manitoba) which is part of the exemption section, provided too substantial an exemption to police and governmental surveillance. Although British Columbia

and Manitoba wording is almost identical on this point, Manitoba has added at the end the words "and was reasonably necessary in the public interest" which may make the exemption more difficult to maintain and go some way in meeting the criticism. However, as Professor Ryan himself says at page 98, "Some of the measures suggested in this report may be too draconian, and may create presently unpredictable social ills of a greater magnitude than the situation which they propose to correct. Others may not go far enough, or may prove to be unworkable as a practical matter. Designing a legislative programme that will correctly anticipate and regulate all of the evils inherent in the invasion of privacy without choking off the legitimate communication of information or unduly hampering valid social and economic mechanisms or inhibiting man's vital quest for scientific inquiry into the human condition may prove to be an almost impossible task" At this stage therefore, perhaps we should be content with the Manitoba wording as it now stands.

13. Bearing the foregoing principles in mind, the attached draft Act is the proposed Saskatchewan draft with commentary, to which is appended the comments of the British Columbia Commissioners.

14. We should mention Lord Mancroft's Right of Privacy Bill in England introduced in the House of Lords in 1961. That Bill was limited in its extent to publication and broadcasting but sought to create a tort of privacy in those areas. The Bill was talked out of the House of Lords. For those interested, it is described in an article on "The Protection of Privacy" by Brian Neill in Vol. 25 Modern Law Review at page 393 who bewails the fact that English law should have failed to evolve any general concept of privacy and submits that legislation on the lines of Lord Mancroft's Bill is desirable.

15. To illustrate the difficulties the Courts are facing without a Privacy Act, we note the case of *Krause* v. *Chrysler Canada Ltd.* 1972, 20R. 133 in which Mr. Justice Haines of the High Court of Justice in Ontario declined to rule on the issue as to whether there is a common law right to privacy in Ontario. In a case involving Bobby Krause of the Hamilton Tiger Cats and the corporation who used an unauthorized picture of Krause in their automobile advertising, the only way the learned judge could

award damages was to hold that Krause had a right of property, a proprietary commercial right, in his picture, which proprietary right the defendant had violated. A Privacy Act would have solved the problem.

(NOTE: The report before the meeting had two attachments that are not reproduced here One was a copy of Nova Scotia Bill 60, which is stated in the report to be an exact copy of the British Columbia Act The other is the B C Court of Appeal judgment in *Davis* v *McArthur*, cited in paragraph 1 of the report The report also included the Saskatchewan Draft Act with the British Columbia comments interspersed; these comments are found in Appendix O)

G A. Higenbottam for
British Columbia Commissioners.

APPENDIX Q

(U L.S Agenda Item 22, page 35)

PROTECTION OF PRIVACY: COLLECTION AND STORAGE OF PERSONALIZED DATA BANK INFORMATION

REPORT OF CANADA COMMISSIONERS

I. *Resolution*

At the August, 1971 meeting of the Conference it was resolved that.

> "the matter of 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"

II *Federal Task Force*

Since last August, work has continued on the studies and investigations being carried out by the Federal Task Force on Privacy and Computers, jointly established by the Department of Justice and the Department of Communications. The terms of reference of the Task Force, which bear directly on the subject matter of the above resolution, are set out for the information of Commissioners as follows

> "In general, to consider rights, and related values, both present and emergent, 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:
>
> (a) to examine the types of personal information collected for, stored in, processed by and distributed by automated information systems whether governmental, institutional or private, today and in the future;
>
> (b) to examine, in terms of their implications for these rights and related values, the procedures and mechanisms for the collection, storage, processing and distribution of personal data in automated information systems;
>
> (c) to examine and evaluate security procedures and mechanisms employed to prevent unauthorized access to automated information systems,
>
> (d) to examine and evaluate possible measures, whether juridical, regulatory, technical or professional, which might ensure observance of these rights and values, and to evaluate potential constraints, whether commercial, legal or constitutional, against the application of these measures"

Our information is that the Report of the Task Force will likely be published within the next few weeks, and that copies will be sent to the Provincial Attorneys General and to the Com-

missioners. We understand that the Task Force Report does not deal specifically with the ways in which information is collected, partly because of the magnitude of the problem involved in finding out the facts. Instead, the Report is more concerned with defining the problem, and with existing and potential security arrangements with particular reference to electronic data banks. However, the invasions of privacy that may arise in the process of collecting data are referred to in the more general chapters of the Report, and in any event a number of the possible remedies that the Report explores deal with problems that arise in the process of both data collection and data storage.

In these circumstances, it did not seem sensible to attempt, in this present report, a separate and detailed study of available remedies, particularly when a consideration of the merits of one particular remedy as opposed to another may be affected by the light that, hopefully, the Report will shed on the nature of the problem. On the other hand, it might be useful, at this time, to outline very briefly a number of possible strategies for coping with the issues involved which almost certainly will face us in the years ahead.

III. *Possible Lines of Action*

A. Government Data Banks

Both the federal and the provincial governments are, of course, in a position to regulate their own data bank operations. Since government data banks are by far the largest in the country, it is possible that the heightened public awareness of potential invasions of privacy may lead to increased questioning of the mode of operation of government data banks. Moreover, it can be argued that by setting their own houses in order, governments can serve as a conspicuous example of what behaviour is or is not generally acceptable in relation to individual privacy.

The simplest and most obvious response to the problem of this kind of governmental invasion of privacy is to establish internal guidelines, either by regulations of general application, such as government contract regulations or Cabinet directives applicable to all government data banks, or by regulations established by individual departments and agencies relating to their own areas of operation.

If a greater degree of visible public accountability should be thought desirable by any particular government, that government could, presumably, provide for the appointment

of some sort of person or authority whose task it would be to protect individuals from departmental invasions of privacy, for example by supervising forms of government questionnaires and investigations as well as exchanges of information between government departments. Alternatively, this function might be allocated to some kind of specialized commission or to an "ombudsman", if the law of the jurisdiction in question provides for such

B. PRIVATE DATA BANKS

The present ability of the common law to provide adequate safeguards against invasion of individual privacy is uncertain, as was pointed out in the paper entitled "The Protection of Privacy" presented to the Conference last year (see 1971 Proceedings of the Conference, Appendix T at page 260). While the situation may have been improved in Manitoba and British Columbia as a result of the privacy statutes enacted in those provinces, the difficulty of providing an effective remedy even in those cases where a clear right of action exists is that a person may not know that his privacy has been invaded Moreover, the cost of bringing an action makes the common law an inappropriate vehicle for dealing with many kinds of invasions of privacy that are of a relatively minor nature. Legislative rules, such as those requiring data bank operators to grant access to the information stored, may assist, particularly where the rules are mainly enforceable through relatively well-understood administrative structures, e.g., those relating to the school system. Furthermore, it is possible that the mere fact of the existence of some legislative rules, however imperfect or incomplete, may serve to promote improved standards of private conduct. However, where judicial enforcement is necessary, legislative remedies can be expected to suffer from some, if not many, of the defects of common law remedies, above all that people are often ignorant of invasions of their privacy or are unable as a practical matter to do much about them in any case

Certainly there are some actions that could be taken at both federal and provincial levels. For example, criminal prohibitions could be enacted for failure to comply with certain minimum standards of behaviour as regards both the collection and storage of information in private data banks As far as the possibility of direct regulation is concerned, the approach to be followed might best be left to depend on the

subject matter. In the present state of the industry, it would seem more appropriate for the provinces to deal with such matters as information collected and stored in course of the administration of justice or by health or educational institutions, for example. In some other areas, the problems might more appropriately be dealt with by federal regulatory provisions. In still other areas, responsibility for regulation might have to be divided between jurisdictions.

Another approach to the private data bank problem might be the imposition of administrative controls, by way of compulsory registration or licensing of data bank operators. The principal advantages of administrative controls are that they are more likely to be able to function preventively, that their basically discretionary character allows for some flexibility of application to particular or novel situations, and that delays in dealing with complaints are likely to be less lengthy than those encountered in the courts However, such administrative controls could increase the ultimate cost to the public of the particular services whose data bank operations are subject to regulation, and could adversely affect the efficiency and ultimately the utility of those operations, especially where confidentiality of the data collected and stored is of paramount concern.

Still another approach is to provide for a type of complaint and investigatory mechanism. Such a function could, for example, be assigned to a specialized commission or perhaps even to an "ombudsman", although this would admittedly involve extending the traditionally-conceived role of the ombudsman, which is to protect members of the public against abuses of public authority, to abuses occasioned by private persons.

IV. *General*

The foregoing appear to be the main approaches that will have to be weighed and considered in devising our future responses to the problem of safeguarding individual privacy in the matter of collecting and storing information It is our hope that we will be in a better position to assess these different approaches when the Task Force on Computers and Privacy has completed its work and has made known its findings and conclusions.

Respectfully submitted,
Canada Commissioners.

Ottawa, August 9, 1972.

APPENDIX R

(U.L S Agenda Item 8; page 28)

An Act to amend The Bills of Sale Act

Subsection (3) of section 9 of the Bills of Sale Act is struck out and the following subsections are substituted therefor: s 9, amended

(3) The description of a motor vehicle in a bill of sale shall include the serial number of the vehicle, consisting of such sequence of numbers, or of numbers and letters in combination, as is impressed upon or affixed to the vehicle by the maker thereof in order permanently to identify the vehicle. Description of motor vehicle

(4) For the purposes of subsection (1), the description of the serial number of a vehicle shall be deemed not to be insufficient or defective by reason only that the model number and engine number of the vehicle, or either of them, are shown as part of, or in conjunction with or in addition to such serial number. Description deemed not to be defective

APPENDIX S

(U L.S Agenda Item 24, page 36)

Report of Manitoba Commissioners on the Reciprocal Enforcement of Custody Orders

At the 1971 meeting of the Commissioners, the item of Reciprocal Enforcement of Custody Orders Act was on the Agenda. The matter was not considered but the Manitoba Commissioners undertook to prepare a report with a draft Act. The draft Act is attached hereto.

Previously, the Manitoba subsection of the Canadian Bar Association had proposed a Reciprocal Enforcement of Custody Orders Act. Our discussions began with a study of that proposal. The draft Act, however, bears no resemblance to the proposal of the Manitoba section of the Canadian Bar.

To begin with, the Canadian Bar proposal was based on reciprocity. The Manitoba Commissioners assumed that for jurisdictions in Canada the prime concern would be the welfare of the particular child affected. We could not see how the welfare of a particular child who was the subject of a custody order being considered by a court in a Canadian province could be related to the question of whether or not the law of the jurisdiction from which the child came provided for reciprocal enforcement of custody orders We therefore eliminated the necessity of any reciprocity for the purposes of enforcement of custody orders.

We assumed, that throughout the world the concern of the lawmakers would be primarily directed towards the welfare of a child. We realize that the basis of custody orders might vary from state to state and in some instances might, to our way of thinking, be considered not to be in the best interests of the child Nevertheless, we feel the assumption should be maintained as the basis for enforcement of out of province custody orders.

The draft Act is based on the presumption that the extra-provincial tribunal had jurisdiction to grant the custody order. The presumption may be rebutted by satisfying the child did not have a real and substantial connection with jurisdiction of the extra-provincial tribunal granting the custody order. This standard of jurisdiction stems from the language of Lord Morris in *Indyka* vs. *Indyka,* (1967) 2 All E. R 689 at page 708. That case related to divorce jurisdiction but we feel the language is suitable

for application to custody orders as well. It is left to the courts to determine what constitutes a "real and substantial connection".

We considered providing that the presumption might be rebutted by satisfying the court that the extra-provincial tribunal had not authority under the law of its province, state or country to grant a custody order, but we feel that the definition of "extra-provincial tribunal" is sufficient to deal with this problem.

The draft Act also provides authority to vary extra-provincial custody orders. The basis of the authority is set out in section 6 of the draft Act. We draw your attention to section 7 of the draft Act which touches on questions of social policy which might give rise to discussion

We think the last few lines of section 8 deserve careful consideration as they might make it too easy to mislead a court. The concept appears in various pieces of legislation. However, to a large extent the other legislation deals with property rights rather than matters as closely related to life as custody orders.

Custody Orders Enforcement Act

1. In this Act,

(*a*) "child" means a person under the age of eighteen years;

(*b*) "court" means a court established in (Manitoba) with authority to make an order granting custody of a child to any person;

(*c*) "custody order" means,

(i) an order of an extra-provincial tribunal granting custody of a child to any person whether or not the order includes provisions granting to another person a right of access or visitation to the child, or

(ii) that part of an order of an extra-provincial tribunal that grants custody of a child to any person including provision, if any, granting to another person a right of access or visitation to the child;

(*d*) "extra-provincial tribunal" means a court or tribunal established in a province, state or country outside (Manitoba) with authority under the laws of that province, state or country to make an order granting custody of a child to any person

2. A person shall be deemed not to be resident in (Manitoba) if he is within (Manitoba) solely for the purposes of making or opposing an application under this Act

3. Subject to section 4, a court, on application, shall enforce, and may make such orders as it deems necessary to give effect to, a custody order made by an extra-provincial tribunal as though the custody order had been made by a court in (Manitoba).

4. The court shall not enforce, or make an order under section 3 to give effect to, a custody order made by an extra-provincial tribunal if it is satisfied on evidence adduced that the child affected by the custody order did not, at the time the custody order was made, have a real and substantial connection with the province, state or country in which the extra-provincial tribunal had jurisdiction

5. Subject to section 6, a court, on application, may vary a custody order made by an extra-provincial tribunal as though the custody order had been made by a court in (Manitoba)

6. The court shall not vary a custody order made by an extra-provincial tribunal unless it is satisfied, on evidence adduced,

(*a*) that the child affected by the custody order does not, at the time of the application for the variation was made, have a real and substantial connection with the province, state or country in which the extra-provincial tribunal has jurisdiction; and

(*b*) that the child affected by the custody order has a real and substantial connection with (Manitoba), or all the parties affected by the custody order are resident in (Manitoba)

7. In varying a custody order under section 5, the court shall,

(*a*) give first consideration to the welfare of the child and not to the welfare of any person seeking or opposing the variation; and

(*b*) treat the question of custody as of paramount importance and the question of access or visitation of a parent or other person to the child as of secondary importance.

8. An application made under this Act shall be accompanied by a copy of the custody order of the extra-provincial tribunal to which the application refers certified as a true copy of the custody order by a judge or other presiding officer of the extra-provincial tribunal or by the registrar or other official of the extra-provincial tribunal charged with the keeping of records and orders of the extra-provincial tribunal; and no proof is required of the signature or official position of any judge, presiding officer, registrar or other official of an extra-provincial tribunal in respect of any certificate produced as evidence under this section.

APPENDIX T

(*U L S Agenda Item 25; page 36*)

DRAFT

prepared by the Saskatchewan Commissioners of the

Dependants' Relief Act

Short title

1. This Act may be cited as *The Dependants' Relief Act*.

Interpretation

2. In this Act:

"child"

(*a*) "child" includes:

*(i) a child adopted by the deceased;

(ii) a child of the deceased *en ventre sa mere* at the date of the deceased's death; or

(iii) an illegitimate child of the deceased;

*(NOTE: (*a*) (i) is not required in those jurisdictions in which legislation is in force providing that an adopted child has all the rights of a natural child See page 135 of 1969 Proceedings)

"deceased"

(*b*) "deceased" means a testator or a person dying intestate;

"dependant"

(*c*) "dependant" means:

(i) the widow or widower of the deceased;

(ii) a child of the deceased who is under the age of .... years at the time of the deceased's death;

(iii) a child of the deceased who is .... years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood;

(iv) a grandparent, parent or descendant of the deceased who, at the time of the death of the deceased, was dependent upon him for maintenance and support;

(v) a woman who was divorced from the deceased and who, after his death, was receiving or was entitled to receive alimony, maintenance or other support from the estate of the deceased; or

(vi) a woman who was not legally married to the deceased but lived and cohabited with him as his wife for a period of at least three years immediately preceding his death and, at the time of his death, was dependent upon him for maintenance and support;

(*d*) "judge" means a judge of ....; "judge"

(*e*) "order" includes a suspensory order; "order"

*(*f*) "will" includes a codicil "will"

*(NOTE: (*f*) is not required where the term is defined in the jurisdiction's *Interpretation Act*)

3.—(1) Where a person dies without making adequate provision for the proper maintenance and support of his dependants or any of them, a judge, on application by or on behalf of the dependants or any of them, may order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

Order for maintenance and support

(2) A judge, on application by or on behalf of the dependants or any of them, may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the deceased's estate, in order that application may be made at any subsequent date for an order making specific provision for maintenance and support

4. An application under this Act may be made by originating notice of motion (*or* summons) in the matter of the estate of the deceased.

Application

5.—(1) The judge, upon the hearing of an application under this Act, may:

Certain powers of judge

(*a*) inquire into and consider all matters that he deems should be fairly taken into account in deciding upon the application,

(*b*) in addition to the evidence adduced by the parties appearing, direct such other evidence to be given as he deems necessary or proper;

(*c*) accept such evidence as he deems proper of the deceased's reasons, so far as ascertainable:

(i) for making the dispositions made by his will; or

(ii) for not making adequate provision for a dependant,

including any statement in writing signed by the deceased, and

(*d*) refuse to make an order in favour of any dependant whose character or conduct is such as, in the opinion of the judge, disentitles the dependant to the benefit of an order under this Act.

(2) In estimating the weight to be given to a statement referred to in clause (*c*) of subsection (1), the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

Conditions and restrictions

6.—(1) The judge, in any order making provision for maintenance and support of a dependant, may impose such conditions and restrictions as he deems fit

(2) Provision may be made out of income or capital or both and may be made in one or more of the following ways, as the judge deems fit:

(*a*) an amount payable annually or otherwise;

(*b*) a lump sum to be paid or held in trust;

(*c*) any specified property to be transferred or assigned, absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant.

(3) Where a transfer or assignment of property is ordered, the judge may:

(*a*) give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the judge may direct; or

(*b*) grant a vesting order

7. Where an order has been made under this Act, a judge at any subsequent date may.

Inquiries and further orders

(*a*) inquire whether the dependant benefited by the order has become entitled to the benefit of any other provision for his proper maintenance or support,

(*b*) inquire into the adequacy of the provision ordered; and

(*c*) discharge, vary or suspend the order, or make such other order as he deems fit in the circumstances.

8. A judge at any time may.

Further powers of judge

(*a*) fix a periodic payment or lump sum to be paid by a legatee, devisee or a beneficiary under an intestacy to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested,

(*b*) relieve such portion of the estate from further liability; and

(*c*) direct:

(i) the manner in which such periodic payment is to be secured; or

(ii) to whom such lump sum is to be paid and the manner in which it is to be dealt with for the benefit of the person to whom the commuted payment is payable.

9.—(1) Where an application is made and notice thereof is served on the executor, administrator or trustee of the estate of the deceased, he shall not, unless the judge otherwise orders, after service of the notice upon him, proceed with the distribution of the estate until the judge has disposed of the application

Distribution stayed

(2) Nothing in this Act prevents an executor, administrator or trustee from making reasonable advances for maintenance and support to dependants who are beneficiaries.

(3) Where an executor, administrator or trustee distributes any portion of the estate in violation of subsection (1), if any provision for maintenance and support is ordered by a judge

to be made out of the estate, the executor or trustee is personally liable to pay the amount of the distribution to the extent that such provision or any part thereof ought, pursuant to the order or this Act, to be made out of the proportion of the estate distributed

Incidence of provisions ordered

10.—(1) The incidence of any provision for maintenance and support ordered shall fall rateably upon that part of the deceased's estate to which the jurisdiction of the judge extends.

(2) The judge may order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper.

Effect of order

11. For the purposes of enactments relating to succession duties, where an order, other than an order under section 21, is made under this Act the will, if any, shall be deemed to have had effect from the date of the deceased's death as if it had been executed with such variations as are necessary to give effect to the order

Further directions

12. A judge may give such further directions as he deems necessary for the purpose of giving effect to an order.

Certified copy of order filed with the clerk of the court

13.—(1) A certified copy of every order made under this Act, other than an order made under section 21, shall be filed with the clerk of the court out of which the letters probate or letters of administration issued.

(2) A memorandum of the order shall be endorsed on or annexed to the copy, in the custody of the clerk, of the original letters probate or letters of administration, as the case may be

Limitation period

14.—(1) Subject to subsection (2), no application for an order under section 3 may be made except within six months from the grant of probate of the will or of administration.

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

Property devised or bequeathed under contract

15. Where a deceased:

(*a*) has, in his lifetime, *bona fide* and for valuable consideration, entered into a contract to devise and bequeath any property real or personal; and

(*b*) has by his will devised and bequeathed that property in accordance with the provisions of the contract,

the property is not liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the deceased therefor

16. Where provision for the maintenance and support of a dependant is ordered pursuant to this Act, a mortgage, charge or assignment of or with respect to such provision, made before the order of the judge making such provision is entered, is invalid.

Validity of mortgage, etc.

17. An agreement by or on behalf of a dependant that this Act does not apply or that any benefit or remedy provided by this Act is not to be available is invalid.

Agreements to waive Act invalid

18. An appeal lies to the (court) from any order made under this Act.

Appeal

19.—(1) An order, other than an order under section 21, or direction made under this Act may be enforced against the estate of the deceased in the same way and by the same means as any other judgment or order of the court against the estate may be enforced.

Enforcement

(2) A judge may make such order or direction or interim order or direction as may be necessary to secure to the dependant out of the estate the benefit to which he is found entitled.

20.—(1) Subject to section 15, for the purpose of this Act, the capital value of the following transactions effected by a deceased before his death, whether benefiting his dependants or any other person, shall be treated as testamentary dispositions as of the date of the death of the deceased and be included in his net estate·

Value of certain transactions deemed part of estate

(*a*) gifts *mortis causa*;

(*b*) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased,

(*c*) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(*d*) any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants with right of survivorship or as tenants by the entireties;

(*e*) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof; but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(*f*) any amount payable under a policy of insurance effected on the life of the deceased and owned by him

(2) The capital value of the transactions referred to in clauses (*b*), (*c*) and (*d*) of subsection (1) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entireties was furnished by the deceased; and the dependants claiming under this Act shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased; and where the other party to a transaction described in clause (*c*) or (*d*) is a dependant, such dependant shall have the burden of establishing the amount of his contribution, if any

(3) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on such corporation or

person a certified copy of a suspensory order under subsection (2) of section 3 enjoining such payment or transfer; and personal service upon the corporation or person holding any such fund or property of a certified copy of such suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period such order is in force and effect.

(4) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

Donee of gift may be required to pay maintenance and support

21.—(1) Where, upon an application for an order under section 3, it appears to the judge that:

(*a*) the deceased has within one year prior to his death made an unreasonably large disposition of real or personal property:

(i) as an immediate gift *inter vivos*, whether by transfer, delivery, declaration or revokable or irrevocable trust or otherwise; or

(ii) the value of which at the date of the disposition exceeded the consideration received by the deceased therefor; and

(*b*) there are insufficient assets in the estate of the deceased to provide adequate maintenance and support for the dependants or any of them,

the judge may, subject to subsection (2), order that any person who benefited, or who will benefit, by the disposition pay to the executor, administrator or trustee of the estate of the deceased or to the dependants or any of them, as the judge may direct, such amount as the judge deems adequate for the proper maintenance and support of the dependants or any of them.

(2) The amount that a person may be ordered to pay under subsection (1) shall be determined in accordance with the following rules

1 No person to whom property was disposed of is liable to contribute more than an amount equal to the extent to which the disposition was unreasonably large;

2. If the deceased made several dispositions of property that were unreasonably large, no person to whom property was disposed of shall be ordered to pay more than his *pro rata* share based on the extent to which the disposition was unreasonably large;

3 The judge shall consider the injurious effect on a person to whom property was disposed of from an order to pay in view of any circumstances occurring between the date of the disposition of the property and the date on which the transferee received notice of the application under section 3;

4 If the person to whom the property was disposed of has retained the property he shall not be liable to contribute more than the value of his beneficial interest in the property;

5. If the person to whom property was disposed of has disposed of or exchanged the property, in whole or in part, he shall not be liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property;

6 For the purposes of paragraphs 4 and 5 "value" is the fair market value as at the date of the application under section 3

(3) In determining whether a disposition of property is a disposition of an unreasonably large amount of property within the meaning of subsection (1), the judge shall consider:

(*a*) the ratio of value of the property disposed of to the value of the property determined under this Act to comprise the estate of the deceased at the time of his death;

(*b*) the aggregate value of any property disposed of under prior and simultaneous dispositions and for this purpose the judge shall consider all dispositions drawn to his attention whether made prior or subsequent to one year prior to the death of the deceased,

(*c*) any moral or legal obligation of the deceased to make the disposition;

(*d*) the amount, in money or moneys worth, of any consideration paid by the person to whom the property was disposed;

(*e*) any other circumstance that the judge considers relevant

22. The Crown is bound by this Act.

Crown bound

APPENDIX U

(*U L S Agenda Item 27; page 38*)

Age of Consent to Medical, Surgical and Dental Treatment

The following is the text of the letter dated July 13, 1972, from Dr Glenn Sawyer, General Secretary of the Ontario Medical Association, to Mr. Leal, Chairman of the Ontario Law Reform Commission:

It is our understanding that a Conference of Commissioners on Uniformity of Legislation in Canada will be held in August, 1972 We believe that "Age of Consent" will be one of the topics discussed at that conference

You are aware that in Ontario our Committee on Child Welfare has been interested in this subject You are also aware that a committee has been established by the Medico-Legal Society of Toronto, and it was our hope that there might be a joint meeting of these two bodies sometime this year in order to make definite recommendations relating to this subject I thought you would be interested in the resolution which was passed at the Council of the Canadian Medical Association in June, 1972:

"Whereas the age of consent and the age of majority are the same in law in the provinces and territories, and

Whereas current social problems and changing life styles present non-emergency situations where treatment, without permission of parent or guardian, is indicated for a minor, and

Whereas concern over this problem has been expressed by both the C M A and the C M P A during the past year, the C M A recommends:

That the age of consent for any medical, surgical and dental treatment be 16 years of age in all provinces and territories, and that each provincial division be asked to make representation to the appropriate provincial authority so that, as planned, the subject can be fully discussed at the Conference of Commissioners on Uniformity of Legislation in Canada in August, 1972 "

This resolution had the support of the delegates from the Ontario Medical Association

I hope that this will be helpful to you in discussion of the subject

APPENDIX V

(C.L S Agenda Item 18, page 44)

REPORT ON SENTENCING FOR SOLICITING FOR THE PURPOSE OF PROSTITUTION, AND MALE PROSTITUTION

PRESENTED BY
MR WILLIAM B. COMMON, Q.C.

(a) Problems relating to the imposition of sentences for soliciting for the purpose of prostitution,

and

(b) Whether all offences in the Criminal Code relating to prostitution should relate to both male and female prostitutes

(NOTE: Section numbers of the Criminal Code referred to are those found in the Criminal Code R S C 1970, chapter C-34)

In dealing with paragraph (a), it is somewhat difficult to quite understand just what is contemplated by the term "Problems" in relation to the imposition of sentences for soliciting.

At common law, prostitution per se, was not an offence, furthermore it is most unlikely that soliciting for such a purpose was an offence.

Under the provisions of the Criminal Code of Canada, neither prostitution nor soliciting per se are activities punishable as offences Furthermore, it is pointed out that the client or customer of the prostitute was not liable to criminal sanctions at common law, nor is such person contravening any provision of the Criminal Code.

To convict a prostitute for soliciting, resort must be had, vicariously, to the provisions of Sec. 175 (1), (c), formerly Sec. 164 (1), (c), whereby a female is a *vagrant* (not a prostitute), who

(c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself

"Vagrancy" is a summary conviction offence and the penalty is found in Sec. 722 (1)

It is to be noted that for a violation of the above provision, the following penalties are available:

(a) a fine only

(b) imprisonment in default of payment of fine

(c) imprisonment without option of fine

(d) fine plus imprisonment

Under Sec. 722 s.s. (3) *et seq.*, provision for time payment of any fine is provided for.

The punishment for vagrancy under our law therefore provides the tribunal of trial with a wide discretion due to the flexibility of the penalty, and it would seem that no special *prima facie* problem exists in applying appropriate penalties or other disposition.

It is historic almost, that prostitution per se, including soliciting, has not been viewed by various Legislatures as demanding drastic repressive penalties.

The provisions of Sec 722 and the relative provisions of The Prisons and Reformatories Act afford sufficient latitude to the Judiciary to impose appropriate sentences and any increase at this time would not seem to be warranted.

Certain "problems" might exist when the imposition of sentence for soliciting is being considered by the tribunal of trial, i.e.

(1) Prevention of spread of Venereal Disease

(2) Rehabilitation of the accused

With regard to the first, existing Provincial legislation can assist in preventing the spread of this disease, moreover compulsory medical examinations of a person in custody is equally helpful.

With regard to rehabilitation however, research has indicated efforts by social agencies to effect satisfactory rehabilitation of the prostitute have been very discouraging due to various factors, including mental and economic conditions. In many cases the income is incredibly high and the fear of punishment apparently is no deterrent, and she is unwilling to give up such a lucrative occupation, and if she did she would not be qualified to engage in any legitimate and gainful vocation.

It must be concluded, therefore, that there does not appear to be any serious problems involved in sentencing for soliciting beyond those ordinarily encountered by the Judiciary in the imposition of sentences for more serious offences

The real "problem" it is submitted, does not lie so much in the area of sentencing as it does in establishing that a known prostitute is indeed a "vagrant" under our Criminal law Judicial determination as to the requirements of the offence are legion.

If it is decided that, as a matter of policy, prostitution as such and soliciting for that purpose should form part of the substantive law in our Criminal Code, appropriate legislation must be passed to accomplish that end rather than continue a provision in our law which is not only anachronistic but indeed completely confusing and unrealistic

THE WOLFENDEN REPORT 1957, AND THE STREET OFFENCES ACT, 1959

Prior to The Street Offences Act, 1959 (Eng.), the large numbers of prostitutes on the streets of London and a few large provincial cities was a source of great embarrassment to the public. The situation deteriorated so badly that the Government, in appointing the Wolfenden Committee, included in its terms of reference the subject of prostitution and soliciting for immoral purposes with the avowed purpose of "cleaning the streets".

As a result of the Report of the Committee, The Street Offences Act, 1959 was enacted, aimed specifically against soliciting for purposes of prostitution in public places.

The Committee recommended heavier penalties for soliciting. Formerly, the maximum fine was normally 40 shillings in London, imprisonment was not provided for, although in the provinces the same maximum fine existed but imprisonment could be imposed for not more than fourteen days.

The increased penalties in The Street Offences Act, 1959 are as follows:—

1st conviction, fine not exceeding £10,
2nd conviction, fine not exceeding £25,
3rd conviction, fine not exceeding £25, or
imprisonment not exceeding 3 months or
both fine and imprisonment.

The Act has succeeded in its main objects of clearing the streets of prostitutes to an unexpected degree and have abated a social nuisance offensive to the public at large.

Social workers and criminologists in England have questioned the wisdom sending this type of offender to short terms of imprisonment, as no *special* form of detention was provided for. However, if results mean anything, the increase in monetary penalties has had the desired effect

It will be seen that the penalties provided for soliciting notwithstanding the increase are considerably lower than those provided for a breach of Sec 722 of our Criminal Code

The Street Offences Act, 1959 prohibits soliciting by females. Prostitution per se is not prohibited.

It must not be overlooked that soliciting for the purpose of prostitution in Canada has never reached the scale that unfortunately existed in the large metropolitan centres in England. This is not to say that "it could not happen here", but it is submitted that the proposed substantive amendments and existing penalties would adequately meet any situation.

Soliciting by third Persons

Under our law, soliciting by third persons sometimes known as procurers, panderers or pimps, can usually be the subject of a successful prosecution only if the evidence supports a charge of living on the avails of prostitution under Sec 195 (1) (j) or (k) which offences, being indictable, are punishable with severe penalties, i.e. maximum of ten years

In England the amendments to The Sexual Offences Act consensual homosexuality between adults is not an offence, however, it would appear by Sec 32, soliciting for homosexual purposes is an offence. Under the amendment, the penalties for living on *immoral* earnings was increased from 2 to 7 years, a dramatic increase relating to earnings from prostitution male or female.

In rare instances, i.e U S A (none in Europe) penal statutes create offences for the client or customer of the prostitute To become effective, prostitution per se must be an offence before the client or customer can be convicted. One speculates that the philosophy behind a penal law of this character may be "no customers, no prostitutes". However, this area of the problem of prostitution has found little favour due to the apparent complexities involved in framing suitable legislation, including aiding or abetting

(b) WHETHER ALL OFFENCES IN THE CRIMINAL CODE RELATING TO PROSTITUTION SHOULD RELATE TO BOTH MALE AND FEMALE PROSTITUTES.

The offences relating to Prostitution under the Criminal Code and their applicability are as follows:—

Section		
175 (1)(c)	Vagrancy	Females only
179 (1)(a) and (b)	Definition of common Bawdy House	Male and Female
	(a) Kept or occupied	Male and Female
	(b) Resorting to Bawdy House	Male and Female
182	Search for women in Bawdy House (Procedure)	Female
183	Transporting persons to Bawdy House	Male and Female
193 (1)	Keeping Bawdy House	Male and Female
(2)	(a) Inmates	Male and Female
	(b) Found in's	Male and Female
195	Procuring Offences	
	Subsec 1, paras (a) to (i)	Male and Female
	Para (j) (living on avails)	Male
	(k) (living on avail of female)	Female

It will be seen that most offences relating to prostitution in the Criminal Code apply equally to men and women.

If soliciting for purposes of prostitution is made as a substantive offence, it should apply to both men and women who solicit for male or female prostitution respectively.

This suggestion is identical with recommendation #150 in the Report of Interdepartmental Committee on the Status of Women

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There is no doubt that the offences in the Criminal Code relating to prostitution should be carefully reviewed It does not appear that any realistic or philosophical legislative consideration has been given to the area of *male and female* prostitution for many years and it would seem that the time has now arrived therefore to revise the law in this area, especially in light of the recent experience in other jurisdictions.

The contents of bibliography forming Schedule "A" to this report has been most helpful in the two areas reported upon—all papers have been studied carefully and it is a matter of regret that time and space do not permit an analysis of each article, but it is felt that the suggestions in this report are reflected in many respects by the researched material

William B. Common

Toronto, February 9th, 1972

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APPENDIX W

(*C L S. Agenda Item 21, page 44*)

BAIL REFORM ACT

1.

Report of British Columbia Commissioners

RE: BAIL REFORM ACT—EXPERIENCE PROVINCE OF BRITISH COLUMBIA

We have been asked by the Secretary of the Conference to prepare a memorandum on the experience had in this Province with the new bail reform provisions of the Criminal Code.

Generally speaking, we have had no major difficulties in implementing these new provisions It is equally true that the measures have created an additional administrative workload, particularly for Court staffs and for our Department generally.

The only area of concern which remains and which will not be known until more experience has been gained is set out in the minutes of the B C. Association of Chiefs of Police held in Abbotsford on March 24th, 1972. At that meeting, the following Minute was taken·

> "A discussion took place on the problems being encountered in applying this Bill within this Province Apparently considerable difficulty is being experienced in some of the Eastern cities with identification and failure to appear It appeared that no great difficulty was being experienced in B C, and the membership was generally in agreement that the implementation of the new Bill had reduced the amount of work in their respective Departments However, it was agreed that the membership should be prepared to present to the next meeting accurate comparison figures regarding the amount of "no show" incidents between the old and new systems, and any other difficulties being experienced"

2

Report of Nova Scotia Commissioners

(*The following is the text of a letter from Mr. Gale to Mr. Sommerfeld dated August 10, 1972*)

In reply to your letter of June 8th and Mr Christie's letter of May 16th, I wish to report that the Bail Reform Act does not seem to be causing any particular problem in this Province. The

police in the main seem to be satisfied with the new procedures under the Bail Reform Act and do not have any major objections to that legislation. It would appear that the main objection, which is of a minor nature, is the additional paper work involved in the matter through the issuance of appearances, notices and at times the failure of the person issued with a notice to appear at the proper time and place. It would appear that the police had been conditioned to the basic aspects of the Bail Reform Act since before its enactment this Province had issued instructions to the police to refrain as much as possible from incarcerating persons on charges when they were satisfied that those persons would be available to stand trial. I am attaching a report received from the Inspector of Penal Institutions covering the period of January 1st to July 22nd of this year indicating the number of persons released to Court from the jails in this Province and the number of persons admitted to bail from the jails in this Province. The Inspector has included the column "Released to Court" because these persons were not brought back to jail and either have the charge against them dismissed or on the appearance before the Court were granted bail or released on their own recognizance.

There is no doubt that the introduction of the Bail Reform Act has decreased the number of persons held pending trial in this Province. These are the only statistics currently available in regard to this matter although statistics have been forwarded to Statistics Canada and it is hoped that once these are compiled by Statistics Canada that they will be made available fairly soon to this Province since this method of doing the statistics is a pilot project by Statistics Canada. As indicated I have only given general impressions concerning the Bail Reform Act and the limited statistics that are currently available. Most law enforcement agencies are still in the process of assessing the changes brought about by the Act I trust that you will look after distribution of this to the Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada.

DEPARTMENT OF THE ATTORNEY GENERAL, NOVA SCOTIA
INSPECTOR OF PENAL INSTITUTIONS

Return showing the number of prisoners who were held under Warrants, who were Released to Court or Released on Bail from the jails in the Province during this period

Period January 1st, 1972 to July 22nd, 1972

Jail	*Released to Court*	*Bail*
Annapolis County	—	—
Antigonish County	—	2
Cape Breton County	64	21
Colchester County	15	1
Cumberland County	—	5
Digby County	2	3
Guysborough County	2	2
Halifax County Correction Centre	100	23
Hants County	4	2
Inverness County	5	1
Kings County	5	18
Lunenburg County	11	4
Queens County	—	—
Richmond County	1	—
Shelburne County	4	2
Victoria County	12	3
Yarmouth County	9	4
TOTAL	234	91

APPENDIX X

(*C.L S Agenda Item 50, page 53*)

COMMITTEE REPORT ON SUGGESTED CHANGES TO THE CRIMINAL CODE SECTIONS 146-158

The Committee was appointed at the 1971 Conference of Commissioners on Uniformity of Legislation to study and recommend changes where they deemed it advisable to sections 146 to 158 of the Criminal Code. Sections 146 to 158 constitute most of the sexual offence provisions.

NECESSITY FOR REVIEW

The necessity for reviewing these sections has been brought about by many considerations including the following:

(a) The fact that many of the provisions have existed since the mid-19th century and must be brought up to date with modern day conditions.

(b) Changes in attitude regarding equality of the sexes.

(c) The need to examine the meaning of sexual intercourse.

(d) By the lowering of the age of majority in many of the Provinces.

Age is an important factor in three respects.

(1) In the case of offences against young children (s. 146) and of seduction the age of the victim determines the criminal liability and severity of penalty for the offender.

(2) In the case of the same offences, as well as rape and incest, the age of the offender, if he is under 14 will exonerate him from criminal liability.

(3) In the cases of seduction under sections 151 and 152 and in the case of section 158, the age of the offender will determine his liability.

The lowering of the age of majority in many of the Provinces shows a tendency to give youth more responsibility at an earlier age The federal age of majority and the ages of majority in all the Provinces were formerly 21 but this has been changed in some of the Provinces as follows:

(Statistics accurate as of January, 1972)

Alberta	18
British Columbia	19
Manitoba	18
New Brunswick	21
Newfoundland (except for the purposes of the Alcoholic Beverages Act and the Highway Traffic Act)	19
Northwest Territories	19
Nova Scotia	19
Ontario	18
Prince Edward Island	21
Quebec	21
Saskatchewan (effective June 1, 1972)	18
Yukon Territory	21

The federal age of majority is still 21 although there has been talk of lowering it. The sexual offences are still based on the concept that a person becomes an adult at age 21, and become anomalous in a province like Alberta where the age of majority is 18. For example, section 152 makes a male 21 years or more guilty of an offence if he seduces under promise of marriage, an unmarried female of previously chaste character who is under the age of 21. In Alberta, if the girl was between 18 and 21 he would be liable despite the fact that she is considered an adult

Views of sex and morality have been modified in some respects·

(a) there is an increasing tolerance towards a variety of sexual behavior. This was reflected in the recent enactment of section 158 which made buggery and acts of gross indecency lawful between consenting spouses or two consenting adults of 21 years or more in private. Some of the penalties, such as 14 years maximum for buggery or bestiality may be somewhat severe when viewed against this background;

(b) whereas it was formerly thought that females were incapable of initiating sexual advances and hence of ever sexually assaulting a male or another female, the modern view is that females are equally capable of these acts. The law should apply equally to both males and females.

FORMAT OF THE STUDY

This study will examine each section of the Criminal Code from section 146 to 158 and roughly follow a five step analysis·

(1) state the provision as it presently stands,

(2) define the purposes of the provision. (Many ideas have been advanced on the topic of what is the purpose of sexual or morals legislation. However, perhaps the best statement is contained in an article by Alan W Mewett in Vol. 2 of the Criminal Law Quarterly, page 21 where he says at page 28 that the four grounds upon which the law is justified in interfering with the sexual activities of private individuals are.

(a) violence or fraud,

(b) corruption of youth,

(c) exploitation of the weak,

(d) violation of the rights of others.

These four points will be kept in mind when discussing the purposes of the Code provisions.

(3) discuss the hardships and injustices which may occur as a result of the present provisions;

(4) make suggestions as to what change should be made in the nature of the crime itself;

(5) make suggestions as to what changes should be made in the penalties.

In its deliberations, the Committee examined four areas of policy and agreed that so far as possible, four rules should apply·

(1) protect those who need protecting,

(a) absolutely under a given age (e.g 14), mentally ill or defective,

(b) conditional· over the given age to adulthood;

(2) with the exception of incest for genetic reasons, consenting adults may do what they like in private—not a matter for the criminal law;

(3) the same rules should apply to males and females whether the victim or aggressor;

(4) recognize an expanded meaning for "sexual intercourse" by including anal and oral intercourse.

In reading the report, it is important to remember the proposed enlarged meaning for sexual intercourse arising out of experience with the present Code. A man who brutally rapes a woman or violates a girl under 14 can receive (and has received) a life sentence. But one who attacks her, in oral or anal intercourse or both, but omits an act of sexual intercourse as it is presently

known and described in section 3(6), cannot be sentenced to more than five years (oral intercourse) or fourteen years (anal) The Committee believes that the form of intercourse is immaterial. Anyone of the three should be treated on the same basis. Sexual intercourse without consent should in the Committee's view, be rape whether it be in the traditional sense or fellatio (oral) or buggery (anal) Similarly, intercourse with consent in respect of girls under 14 should cover all three forms.

Recommendation P at the end of the report formally brings this matter forward under Code section 3(6)

EXAMINATION OF SECTIONS 146 TO 158 OF THE CRIMINAL CODE

Section 146

"146 (1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and

(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life

(2) Every male person who has sexual intercourse with a female person who

(a) is not his wife,

(b) is of previously chaste character, and

(c) is fourteen years of age or more and is under the age of sixteen years,

whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years

(3) Where an accused is charged with an offence under subsection (2), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person"

Section 146(1) was aimed at the moral health of female children who were not sufficiently mature to assume the burdens and responsibilities of sexual relationships. Applying Mewett's criteria, the section serves a dual purpose—to stop exploitation of the weak and to prevent corruption of the young. It was necessary to draw an arbitrary line as to age at a particular point and the age of 14 was chosen because most girls have started to mature sexually at that age.

The offence is committed regardless of consent or of the accused's belief about the girl's age. Reasonable belief that she is over 14 is no excuse.

The present provision has not given rise to too much hardship or injustice except perhaps where the girl is an overly aggressive, mature thirteen year old and induces or encourages the act or the male person is not aware that the girl is under fourteen. Consent is irrelevant because a girl under fourteen cannot consent (*R. v. Beamish* (1965) 4 C.C C. 64).

Section 140 of the Code also provides that where an accused is charged with an offence under section 146, 149 or 156 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge. However, where the girl appears over fourteen or encourages the accused, the court may give a lighter sentence (*R. v. Hurd* (1972) 6 C.C.C. (2d) 180).

An unusual situation took place in *R v. Balabeda and four others* where five young teenagers participated in a sexual adventure with a consenting female on her fourteenth birthday at 10:00 p.m. The five were convicted under section 138(1) (now section 146(1)) because the girl was deemed to be under fourteen until after midnight on her fourteenth birthday. Two hours made the difference between a maximum of life plus whipping and a maximum of five years. However, the judge took into account the circumstances and gave suspended sentences of two years.

At present a female who has sexual intercourse with a boy under fourteen is free from criminal liability under the Code. Young boys have as much a right to protection as young girls

The sentences given for convictions under section 146(1) have varied. Life imprisonment was given for a vicious, inhuman attack on a six year old girl in *R v. Head* (1971) 1 C.C.C (2d) 436. More usually a sentence of ten years or under is given. The courts now exercise a wide discretion in imposing sentences.

Recommendation A re Section 146(1)

(1) The Committee agrees that the absolute nature of the offence should continue but raises for discussion whether provision should be made that a person no more than two years older than the victim could be found not guilty by a court if the accused established that he reasonably believed that the victim was over fourteen years of age

(2) We recommend no changes in the maximum term of imprisonment

(3) Section 146(1) should be extended to protect young boys under fourteen from exploitation and corruption and make females also liable for having sexual intercourse with a boy under fourteen

(4) The Committee also agrees that section 3(1) defining when a person attains a given age should be amended by deleting "is fully completed" and inserting in appropriate places the words "on the commencement of"

Section 146(2) is aimed at preventing corruption of girls of previously chaste character between the ages of fourteen and sixteen. "Previously chaste character" is not synonymous with virginity but is concerned with the state of mind of the girl which constitutes her virtue or morals. Thus, a virgin can be of unchaste character and conversely a girl with previous sexual experience can be of chaste character if she honestly sets out to rehabilitate or reform herself. "Previously chaste character" is a provision unique to Canada In England the law only distinguishes between intercourse with consent and without consent

The injustices and hardships which may result from this provision are the fact that the crime is based on the moral character of the victim rather than the circumstances of the crime and the fact that the male person is guilty, regardless of whether or not he believes the girl to be over sixteen.

The Royal Commission on the Status of Women recommended that the provision of "previously chaste character" be dropped from all provisions of the Code in which it appears. It is an element in section 146(2), section 151, section 152 and section 153(1)(b). The reasoning behind this is that chaste as well as unchaste girls should be entitled to the protection of the law. In the Committee's view, however, the purpose of section 146(2) read with subsection (3) is to prevent corruption of chaste girls between fourteen and sixteen or to protect them from corruption. If section 146(2) is to be retained at all the provision as to chastity should be left in. To delete it would make the males more strictly liable and the change would create more injustice than it cured.

Recommendation B re Section 146(2)

(1) Combine section 146(2) with section 151 by repealing section 146(2) and by amending section 151 to make it applicable to female persons between the ages of fourteen and eighteen

If Recommendation #1 is not acceptable, your Committee makes the following recommendations:

(1) Section 146(2) should be changed to relieve males from liability where they reasonably believe the girl is over sixteen The similar situation with respect to section 146(1) where the accused is no more than two or three years older than the victim is raised for consideration insofar as it is not covered in Recommendation (3)

(2) The law should apply equally to males and females

(3) An age limitation should be imposed so that males cannot be liable under section 146(2) if they are under the age of sixteen The proposed change would also make section 146(2) parallel to section 151 where a male is not liable for seducing a female sixteen to eighteen unless he is eighteen years or more

Recommendation C re Section 146(3)

The purpose of section 146(3) is to exonerate the male where he is not more to blame than the female If sections 146(1) and (2) are to be changed to make females also liable, section 146(3) should be changed correspondingly The subsection would disappear if recommendation #1 re section 146(2) were adopted

Section 147

"147 No male person shall be deemed to commit an offence under section 144, 145, 146 or 150 while is under the age of fourteen years"

This section releases boys under fourteen from criminal liability for rape, attempted rape, sexual intercourse with a female under fourteen or a chaste female between fourteen and sixteen and incest.

Because of the section, a male cannot be guilty of incest if he is under fourteen, however, there is no corresponding provision for females, so theoretically a female under fourteen can be guilty of incest. This defect should be remedied.

Recommendation D

This section should be amended to make it apply equally to males and females by deleting the word "male" in line one

Section 148

"148 Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person,

(a) who is not his wife, and

(b) who is and who he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile,

is guilty of an indictable offence and is liable to imprisonment for five years"

This section covers situations where the female consents and the consent is not invalidated or nullified by her tender age. Its purpose is to prevent sexual exploitation of females who are weak in a mental sense and may not be able to understand fully what they are doing. The only hardship which might result from the provision is that it hinders mentally defective females from enjoying the rewards of a sexual relationship outside of marriage. However, this does not justify taking the provision out of the Code.

Recommendation E

The section should be changed to make females liable also for having sexual intercourse with males who are feeble-minded, insane, idiot or imbecile

Section 149

"149 (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent, that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act "

Any physical contact in the circumstances of indecency is sufficient for indecent assault. Consent is no defence where the victim is under the age of fourteen (*R v. Jones* (1964) 2 C.C.C 123) There must be some kind of force or threats used In *R. v McCallum* (1970) 2 C.C.C. 366, the accused appeared nude before the complainant and asked her to handle his private parts He was acquitted of indecent assault

The concept of consent being obtained by false and fraudulent representations as to the nature and quality of the act is a loose one. In *Reg. v. Maurantonio* (1968) 2 C.C.C. 115 the accused held himself out to be a doctor and conducted vaginal examinations of female patients. He was convicted of indecent assault. The women had consented to the examination but the court held it was the type of consent which fell within section 149(2) Laskin, J , dissenting, did not think that there were false or fraudulent representations as to the accused's qualifications as a doctor.

The purpose of the section is to protect females of all ages from violation of the rights of their own private physical person

Recommendation F

(1) It was agreed at the 1971 Conference that section 149 and section 156 were to be combined

(2) The section should apply equally to both sexes At present the legislation does not include a female assault on a male

(3) The maximum sentence of five years in section 149 should be retained rather than that of ten years in section 156

Section 150

"150 (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person

(2) Every one who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years, and in the case of a male person is liable, in addition, to be whipped

(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the

sexual intercourse, the court is not required to impose any punishment upon her

(4) In this section, 'brother' and 'sister', respectively, include half-brother and half-sister "

The purpose of this section is to discourage sexual relations between members of the same family. Such a practice was condemned by the church and members of the same family were not permitted to marry. Incest was freely practised in many ancient and primitive cultures, but is looked upon as offensive by many persons today

These provisions may seem unjust if the incest is committed between two consenting adults in private. Buggery and gross indecency are not crimes between two consenting adults in private and it could be argued that incest is no more reprehensible than buggery or acts of gross indecency. There might be genetic deficiencies if two members of the same family produce a child, but other than this, it is merely a value judgment as to which forms of sexual behavior are to be tolerated and which are not.

Mewett, in his article in Vol. 2 of the Criminal Law Quarterly, recommends that incest be made a crime only if the victim is under twenty-one. Following his four bases for the interference of the law in sexual matters, incest is only justifiably a crime if it occurs between persons under the age of twenty-one because one could then argue that the Code is preventing corruption of youth.

Mewett's approach causes problems in view of the discrepancies in the ages of majority between the various Provinces In some areas we would be convicting persons who committed incest with adults, whereas in other areas, the incest would have been committed with a minor. However, the main reason for not following Mewett and retaining some incest provisions is that public opinion would be against such a change

Recommendation G

(1) All provisions of this section should apply equally to male persons and female persons alike

(2) If a person is successful in raising section 150(3) as a defence, that person should be acquitted

(3) Consideration should be given to removing this as a separate offence in respect of consenting adults if medical research shows no great problem

Section 151

"151 Every male person who, being eighteen years of age or more, seduces a female person of previously chaste character who is sixteen years or more but less than eighteen years of age is guilty of an indictable offence and is liable to imprisonment for two years "

The purpose of this section is to prevent corruption of young girls between the ages of sixteen and eighteen. However, the section as it now stands is too harsh for modern day conditions. In many Provinces the age of majority has been reduced to eighteen or nineteen and this indicates that young people are assumed to be more responsible at an earlier age. There is less possibility that persons between the ages of sixteen and eighteen are innocent and unsuspecting and capable of being corrupted Persons of this age group are in less need of protection than it was once thought.

Recommendations H

(1) The provision should be left in to show that this type of behavior is not condoned However, the offence should be changed from an indictable one to one punishable on summary conviction where the maximum sentence is imprisonment for six months plus a $500 00 fine

(2) To make the law equal, the provision should be changed to make females as well as males liable

(3) Lower the age from sixteen to fourteen

(4) The section should be moved so that it follows section 146 and reflects the two or three year age differential proposed for that section

Section 152

"152 Every male person, being twenty-one years of age or more, who, under promise of marriage, seduces an unmarried female person of previously chaste character who is less than twenty-one years of age is guilty of an indictable offence and is liable to imprisonment for two years"

The purpose of this section is to protect young unsuspecting females who may be led into losing their virtue on the faith of a promise to marry them. The provision causes a certain amount of injustice in a Province like Alberta where persons are considered adults at age eighteen.

In the first place, males between eighteen and twenty-one even though they should be capable of accepting adult responsibility and along with it criminal responsibility are not liable under section 152 Secondly, where the male is over twenty-one and the female is eighteen, he will be liable even though she is considered an adult and presumed to know what she is doing

In any event, the type of seduction dealt with in this section does not appear to be a matter in which the state should become involved.

As for girls under eighteen, the criminal law has already provided for them as follows: girls sixteen to eighteen are covered

by section 151; girls fourteen to sixteen by section 146(2); and girls under fourteen by section 146(1).

Recommendation I

This section should be repealed

Section 153

"153 (1) Every male person who,

(a) has illicit sexual intercourse with his step-daughter, foster daughter or female ward, or

(b) has illicit sexual intercourse with a female person of previously chaste character and under the age of twenty-one years who,

(i) is in his employment,

(ii) is in a common, but not necessarily similar, employment with him and is, in respect of her employment or work, under or in any way subject to his control or direction, or

(iii) receives her wages or salary directly or indirectly from him,

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

(2) Where an accused is charged with an offence under paragraph (1)(b), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person "

"Illicit" means "unlawful" or not permitted or allowed—its presence in paragraph (a) is unnecessary.

The purpose of these provisions is to prevent males who have some authority or control over females from using that authority or control to take sexual advantage of or to corrupt the females.

"Step-daughter" in section 153(1)(a) has been defined as the daughter of the accused's wife by a previous marriage—*R. v Goening* (1953) 9 W.W.R. 49. In that case the accused cohabited with the illegitimate daughter of his wife before her marriage to him. The accused was acquitted because the girl was not his step-daughter within the legal meaning of the term. There is no viable reason why a male should be relieved from liability merely because the step-daughter is illegitimate. A man may have as much authority and control over an illegitimate daughter of his wife as a daughter from a previous marriage.

Recommendations J re Paragraph 153(1)(a)

(1) The scope of this section should be restricted to apply to persons under the age of eighteen.

(2) The definition of step-daughter should be changed to include any daughter of the accused's wife to whom the accused is not the father

(3) The section should be changed to make a female also liable for having sexual intercourse with a step-son, foster son or male ward

There has been very little reported case law on paragraph 153(1)(b). It is probably safe to assume that the section is very rarely used. It was probably enacted back in the days when domestic servants and other female employees were considered easy prey for their employers. The females would usually submit for fear of losing their jobs and their livelihood Now, however, females are in a better position to protect their own interests

Recommendations K re Paragraph 153(1)(b)

(1) This paragraph should be repealed

If Recommendation #1 is not acceptable, your Committee makes the following recommendations:

(1) The section should be so worded that the employer would be liable only if he induced the girl to have sexual intercourse with him under fear of dismissal if she did not

(2) The age for the male or female victim should be lowered from twenty-one to eighteen

(3) Female employers should be liable for an equivalent offence

(4) If paragraph 153(1)(b) is changed to make females liable subsection 153(2) should be changed correspondingly

(5) Paragraph 153(1)(b) should be made a summary conviction offence rather than an indictable offence

Section 154

"154 Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years"

Captains and crews on ships had fairly extensive control and authority over the passengers on board. This section was enacted to prevent them from using their control and authority to take sexual advantage of female passengers. The provision was originally part of the Immigration Act and was probably passed at a time when there were a large number of female immigrants coming over to Canada, many of whom were poor and ignorant and susceptible to being taken advantage of. Part of the section is duplicated in section 143 (rape—threats). There are virtually no reported cases under this section. Its applicability to modern day conditions is questionable

Recommendation L re Section 154

It should be treated as an anomaly and repealed

Section 155

"155 Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years"

The purpose of this section was to prohibit the forms of sexual behavior known as buggery and bestiality Buggery is now lawful under section 158 if done in private by consenting spouses or by two consenting persons over the age of twenty-one.

Where the accused has committed buggery it is possible to charge him also under section 157 for an act of gross indecency. The maximum sentence for gross indecency is five years which is much less than that for buggery and bestiality.

The recommendation that section 3(6) widened to include anal intercourse will have meant that that portion of this section left undisturbed by section 158 and dealing with buggery has already been dealt with except to the extent of consensual conduct—(a) in public, or (b) in private by more than two persons. The public portion should be covered by the same sections that bar normal sexual intercourse in public Sexual activity in private by adults by consent does not appear to be a matter for the criminal law.

Recommendation M re Buggery

This section should be repealed

The bestiality portion of this section appears to be more a mental aberration than a crime and, if so, should be dealt with by the provinces under their mental health legislation. It would, of course, be criminal, as it is today in another aspect—indecent shows, etc. (There is a question whether the exemption section 158, referring to acts *between* certain persons includes bestiality)

It is proper and consistent with the recommendations on sexual intercourse as enlarged, that where an act of bestiality is committed under threats or other compulsion, the person compelling the act should be guilty of a criminal offence of a serious nature.

Recommendation M re Bestiality

(1) Repeal section 155

(2) If the recommendation not agreed with re bestiality, then repeal reference to buggery and reduce the penalty from 14 years to either two years or summary conviction offence

(3) Provide a new offence for a person compelling an act of bestiality This recommendation is independent of recommendations (1) or (2) and contemplates a more serious offence

Section 156

"156 Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped"

Buggery can be committed with a female and the offence of assault with intent to commit buggery can be done to a female as well as a male.

We have already dealt with buggery in the enlarged definition of sexual intercourse. Attempted rape now would include attempted buggery. Acts not amounting to an attempt would be an indecent assault under section 149.

The other portion of the section, indecent assault on a male, was dealt with last year when the Commissioners agreed to combine with section 149.

In Canada the charge lies against a "male person" but the equivalent provision in the United Kingdom lies against a "person" and a woman can be prosecuted also

Recommendation N

Repeal section 156

Section 157

"157 Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years"

Acts of gross indecency are not crimes if committed with consent in private *between* a husband and wife or any two persons each of whom is twenty-one years of age or more.

Any natural act such as urination may become an indecent act or even an act of gross indecency depending upon the time, the place, the circumstances and the facts under which it was committed—*R. v. J.* (1957) 21 W.W R 248. However, in *R. v. K. and H* (1957) 22 W.W.R. 86, it was held that an act which is inherently grossly indecent according to the concepts and morals of our times (e.g. buggery) cannot become decent by reason of the circumstances surrounding its performance

Buggery and bestiality as such has been dealt with elsewhere; indecent acts, shows and exhibitions are dealt with in sections 169, 159(2) and 171 and obscene shows in section 163. Your Committee believes the criminal law as proposed in this report and in the other sections referred to sufficiently deals with acts which might come within this problem area.

Recommendation N

Repeal section 157

Section 158

"158 (1) Sections 155 and 157 do not apply to any act committed in private between,

(a) a husband and his wife, and

(b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act

(2) For the purposes of subsection (1),

(a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and

(b) a person shall be deemed not to consent to the commission of an act

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or

(ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile"

The purpose of section 158 is to permit any form of sexual behavior between consenting spouses or, other than incest, between two consenting adults in private without attaching criminal liability. The only problem with this section is that the consenting adults must be over twenty-one. The same considerations with respect to the seduction sections apply here.

Recommendations O

(1) Repeal if both sections 155 and 157 are repealed

(2) The age should be lowered to eighteen if either sections 155 or 157 are not fully repealed

The examination of sections 146 to 158 caused your Committee to examine in addition to section 3(6) already discussed at the beginning of this report, sections 142 and 143.

Section 3(6)

"3

(6) For the purposes of this Act, sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted"

Recommendation P

It is recommended that the definition of intercourse be amended to include oral and anal intercourse

Section 142

"142 Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 144, 145, subsection 146(1) or (2) or subsection 149(1), the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true"

Recommendation Q

This section should be amended to apply to male and female persons alike

Section 143

"143 A male person commits rape when he has sexual intercourse with a female person who is not his wife,

(a) without her consent, or

(b) with her consent if the consent

(i) is extorted by threats or fear of bodily harm,

(ii) is obtained by personating her husband, or

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act"

Recommendation R

This section should be amended to apply to male and female persons alike

All of which is respectfully submitted,

Samuel A. Friedman, Q.C (Chairman)
Gilbert D. Kennedy, Q C (Member)
Roy S. Meldrum, Q.C. (Member)

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