1976

PROCEEDINGS

of the

FIFTY-EIGHTH ANNUAL MEETING

of the

UNIFORM LAW CONFERENCE OF CANADA

HELD AT

YELLOWKNIFE
NORTHWEST TERRITORIES

August 19th to August 27th, 1976

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All reports should be dated.

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UNIFORM LAW CONFERENCE OF CANADA

OFFICERS

1976-77

Honorary President	Glen Acorn, Q.C., Edmonton
President	Wendall MacKay, Charlottetown
1st Vice-President	H. Allan Leal, Q.C., LL.D., Toronto
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Chairman	Gordon F. Coles, Q.C., Halifax
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LOCAL SECRETARIES

Alberta	Glen Acorn, Q.C., Edmonton
British Columbia	G. Allan Higenbottam, Victoria
Canada	F. E. Gibson, Q.C., Ottawa
Manitoba	R. H. Tallin, Winnipeg
New Brunswick	M. M. Hoyt, Q.C., Fredericton
Newfoundland	Vincent McCarthy, Q.C., St. John's
Northwest Territories	Patricia W. Flieger, Yellowknife
Nova Scotia	Graham D. Walker, Q.C., Halifax
Ontario	Arthur N. Stone, Q.C., Toronto
Prince Edward Island	Wendall MacKay, Charlottetown
Quebec	Yves Caron, Montreal
Saskatchewan	Claire Young, Regina
Yukon Territory	Padraig O'Donoghue, Q.C., Whitehorse

(For Local addresses, etc., see list of delegates, pages 7-11)

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Lachlan MacTavish, Q.C.
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DELEGATES

(August 1976)

The Following were Designated to Attend the Conference by Order in Council, Letter or Otherwise by their Respective Governments. Some were unable to attend the 1976 Annual Meeting.

Alberta:

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British Columbia:

R. D. ADAMSON, Legal Officer, Attorney General's Department, Victoria.

CECIL O. D. BRANSON, P.O. Box 1690, Victoria.

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NEIL A. MCDIARMID, Q.C., Director, Criminal Law, Attorney General's Department, Victoria.

FRAN PROVOST, Director, Court Planning and Facilities, Victoria.

ALLAN R. ROGER, Assistant Legislative Counsel, Legislative Bldg., Victoria.

ROBERT SIMSON, Legal Officer, Criminal Division, Attorney General's Department, Victoria.

DAVID H. VICKERS, Deputy Attorney General, Victoria.

Canada:

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JOANNA MCFADYEN, Law Reform Commission of Canada, Ottawa.

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ROGER TASSÉ, Q.C., Deputy Solicitor General of Canada, Ottawa.

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VINCENT P. MCCARTHY, Q.C., Deputy Minister of Justice, St. John's.

JAMES W. RYAN, Q.C., Chief Legislative Counsel, Department of Justice, St. John's.

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D. W. PERRAS, Director of Criminal Justice, Department of the Attorney General, Legislative Bldg., Regina.

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August, 1976

Attorney General of Alberta: HON. JAMES L. FOSTER, Q.C.
Attorney General of British Columbia: HON. GARDE B. GARDOM, Q.C.
Minister of Justice and Attorney General of Canada: HON. RONALD BASFORD, P.C., Q.C.
Attorney General of Manitoba: HON. HOWARD PAWLEY, Q.C.
Minister of Justice of New Brunswick: HON. PAUL C. CREAGHAN, Q.C.
Minister of Justice of Newfoundland: HON. T. A. HICKMAN, Q.C.
Attorney General of Nova Scotia: HON. L. L. PACE, Q.C.
Attorney General of Ontario: HON. ROY R. MCMURTRY, Q.C.
Minister of Justice of Prince Edward Island: ALEXANDER B. CAMPBELL, Q.C.
Minister of Justice of Quebec: HON. GÉRARD D. LÉVESQUE, Q.C.
Attorney General of Saskatchewan: HON. ROY J. ROMANOW, Q.C.

PAST PRESIDENTS

SIR JAMES AIKINS, K.C., Winnipeg (five terms)	1918-1923
MARINER G. TEED, K.C., Saint John	1923-1924
ISAAC PITBLADO, K.C., Winnipeg (five terms)	1925-1930
JOHN D. FALCONBRIDGE, K.C., Toronto (four terms)	1930-1934
DOUGLAS J. THOM, K.C., Regina (two terms)	1935-1937
I. A. HUMPHRIES, K.C., Toronto	1937-1938
R. MURRAY FISHER, K.C., Winnipeg (three terms)	1938-1941
F. H. BARLOW, K.C., Toronto (two terms)	1941-1943
PETER J. HUGHES, K.C., Fredericton	1943-1944
W. P. FILLMORE, K.C., Winnipeg (two terms)	1944-1946
W. P. J. O'MEARA, K.C., Ottawa (two terms)	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
LACHLAN MACTAVISH, Q.C., Toronto (two terms)	1953-1955
H. J. WILSON, Q.C., Edmonton (two terms)	1955-1957
HORACE E. READ, O.B.E., Q.C., Halifax	1957-1958
E. C. LESLIE, Q.C., Regina	1958-1959
G. R. FOURNIER, Q.C., Quebec	1959-1960
J. A. Y. MACDONALD, Q.C., Halifax	1960-1961
J. F. H. TEED, Q.C., Saint John	1961-1962
E. A. DRIEDGER, Q.C., Ottawa	1962-1963
O. M. M. KAY, C.B.E., Q.C., Winnipeg	1963-1964
W. F. BOWKER, Q.C., LL.D., Edmonton	1964-1965
H. P. CARTER, Q.C., St. John's	1965-1966
GILBERT D. KENNEDY, Q.C., S.J.D., Victoria	1966-1967
M. M. HOYT, Q.C., B.C.L., Fredericton	1967-1968
R. S. MELDRUM, Q.C., Regina	1968-1969
EMILE COLAS, C.R., Montreal	1969-1970
P. R. BRISSENDEN, Q.C., Vancouver	1970-1971
A. R. DICK, Q.C., Toronto	1971-1972
R. H. TALLIN, Winnipeg	1972-1973
D. S. THORSON, Q.C., Ottawa	1973-1974
ROBERT NORMAND, Q.C., Quebec	1974-1975
GLEN ACORN, Q.C., Edmonton	1975-1976

HISTORICAL NOTE

Nearly sixty 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.

The recommendation of the Canadian Bar Association was based upon, first, the realization that it was not organized in a way that it could prepare proposals in a legislative form that would be attractive to provincial governments, and second, observation of the National Conference of Commissioners on Uniform State Laws, which had met annually in the United States since 1892 (and still does) to prepare model and uniform statutes. The subsequent adoption by many of the state legislatures of these Acts has resulted in a substantial degree of uniformity of legislation throughout the United States, particularly in the field of commercial law.

The Canadian Bar Association's idea was soon implemented by most provincial governments and later by the others. The first meeting of commissioners appointed under the authority of provincial statutes or by executive action in those provinces where no provision was 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 changed its name to the Conference of Commissioners on Uniformity of Legislation in Canada and in 1974 adopted its present name.

Although work was done on the preparation of a constitution for the Conference in 1918-19 and in 1944 and was discussed in 1960-61 and again in 1974, the decision on each occasion was to carry on without the strictures and limitations that would have been the inevitable result of the adoption of a formal written constitution.

Since the organization meeting in 1918 the Conference has met during the week preceding the annual meeting of the Canadian Bar Association, and, with a few exceptions, 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. Aug. 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.
1973. Aug. 20-24, Victoria.
1974. Aug. 19-23, Minaki.
1975. Aug 18-22, Halifax.
1976. Aug. 19-27, Yellowknife.

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.

While it is quite true that the Conference is a completely independent organization that is answerable to no government or other authority, it does recognize and in fact fosters its kinship with the Canadian Bar Association. For example, one of the ways of getting a subject on the Conference's agenda is a request from the Association. Second, the Conference names two of its executives annually to represent the Conference on the Council of the Bar Association. And third, the honorary president of the Conference each year makes a statement on its current activities to the Bar Association's annual meeting.

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, however, representatives of the Bar of Quebec have attended each year, with the addition since 1946 of one or more delegates appointed by the Government of Quebec.

In 1950 the then newly-formed Province of Newfoundland joined the Conference and named delegates to take part in the work of the Conference.

Since the 1963 meeting the representation has been further enlarged by the 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 the expenses of the delegates. In the case of those jurisdictions where no legislative action has been taken, 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 are representative of the bench, governmental law departments, faculties of law schools, the practising profession and, in recent years, law reform commissions and similar bodies.

The appointment of delegates 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 possible and advantageous. 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, the Local Secretaries and the Executive Secretary, and, among the members of *ad hoc* committees. Matters for the consideration of the Conference may be brought forward by the delegates from any jurisdiction or by the Canadian Bar Association.

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

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

Another innovation in the work of the Conference was the establishment of a section on criminal law and procedure, following a recommendation of the Criminal Law Section of the Canadian Bar Association in 1943. It was pointed out that no body existed in Canada with the proper personnel to study and prepare in legislative form recommendations for amendments to the *Criminal Code* and relevant statutes for submission to the Minister of Justice of Canada. This resulted in a resolution of the Canadian Bar Association urging the Conference to enlarge the scope of its work to encompass this field. At the 1944 meeting of the Conference a criminal law section was constituted, to which all provinces and Canada appointed representatives.

In 1950, the Canadian Bar Association held a joint annual meeting with the American Bar Association in Washington, D.C. The Conference also met in Washington which gave the members a second opportunity of observing the proceedings of the National Conference of Commissioners on Uniform State Laws which was meeting in Washington at the same time. It also gave the Americans an opportunity to attend sessions of the Canadian Conference which they did from time to time.

The interest of the Canadians in the work of the Americans and *vice versa* has since been manifested on several occasions, notably in 1965 when the president of the Canadian Conference attended the annual meeting of the United States Conference, in 1975 when the Americans held their annual meeting in Quebec, and in 1976 when the presidents of the two Conferences exchanged visits to their respective annual meetings.

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 is to work for the unification of private international law, particularly in the fields of commercial law and family law.

In short, The Hague Conference has the same general objectives at the international level as this Conference has within Canada.

The Government of Canada in appointing six delegates to attend the 1968 meeting of The Hague Conference greatly honoured this Conference by requesting the latter to nominate one of its members as a member of the Canadian delegation. This pattern was again followed when this Conference was asked to nominate one of its members to attend the 1972 meeting of The Hague Conference as a member of the Canadian delegation.

A relatively new feature of the Conference was the Legislative Drafting Workshop which was organized in 1968 and which is now known as the Legislative Drafting Section of the Conference. It meets for the three days immediately preceding the annual meeting of the Conference and at the same place. It is attended by legislative draftsmen who as a rule also attend the annual meeting. The section concerns itself with matters of general interest in the field of parliamentary draftsmanship. The section also deals with drafting matters that are referred to it by the Uniform Law Section or by the Criminal Law Section.

One of the handicaps under which the Conference has laboured since its inception has been the lack of funds for legal research, the delegates being too busy with their regular work to undertake research in depth. Happily, however, this want has been met by most welcome grants in 1974, 1975 and 1976 from the Government of Canada.

BIBLIOGRAPHY

(arranged chronologically)

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Notes and Comments. E. H. Silk, K.C., Hon. Valmore Bienvenue, K.C., W. P. M. Kennedy. 1943-44 U. of Toronto L.J., pp. 161, 164, 168.

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See also Consolidated Index. Can. Bar Rev. Vols. 1-50 (1923-1972).

LEGISLATIVE DRAFTING SECTION

MINUTES

The following attended (19):

Alberta: Messrs. Acorn and Meiklejohn.

British Columbia: Messrs. Kennedy, Maddaford and Roger.

Canada: Messrs. Johnson and Pepper.

Manitoba: Messrs. Balkaran and Tallin.

New Brunswick: Mr. Hoyt.

Newfoundland: Mr. Ryan.

Northwest Territories: Mr. Leach and Ms. Flieger.

Nova Scotia: Mr. Walker.

Ontario: Messrs. Stone and Tucker.

Prince Edward Island: Messrs. MacIntosh and MacNutt.

Saskatchewan: Ms. Young.

Sittings

The chairman, Mr. Stone, took the chair and the secretary, Mr. MacNutt, took the minutes.

Five sessions were held, two on the Thursday, two on the Friday, 9:30 a.m. to 12:30 p.m. in the mornings and 2:00 p.m. to 5:00 p.m. in the afternoons, and one session on Saturday morning from 10:00 a.m. to noon.

As a matter of convenience of reference, adjourned items are reported without reference to the adjournment and all substantive matters are arranged alphabetically.

Minutes of Last Meeting

RESOLVED that the minutes of the 1975 annual meeting of the Section be adopted as printed in the 1975 Proceedings.

Canadian Legislative Drafting Conventions
(1975 Proceedings, page 20)

Mr. Acorn presented the report of the Special Committee (Messrs. Acorn (chairman), Hoyt and Tallin).

After consideration of the draft Conventions, the following resolutions were adopted:

RESOLVED that the Conventions as presented and amended be approved (Appendix A, page 59).

RESOLVED that Messrs. Ryan and Stone be requested to draft (1) comments on each Convention as approved and (2) such introduction to the Conventions as they consider appropriate, for consideration at the 1977 meeting.

RESOLVED that there be added to the Alberta draft of the Conventions, as approved, a convention to the effect that a mathematical formula should not be avoided where its use would convey the intent clearly.

Consolidation of Uniform Acts

Mr. MacTavish, in his capacity as researcher and editor of the planned publication of an up to date consolidation of the Uniform Acts prepared over the years by the Conference, outlined his problems with regard to matters of style and asked for guidance.

The following views were expressed:

1. The word "Uniform" should form part of the title of every Uniform Act.
2. The definite article should not form part of the title of any Uniform Act.
3. The title of the Uniform Act sometimes called *"Domicile Code"* should be *"Uniform Domicile Act"*.
4. The title of the Uniform Act sometimes called *"Reciprocal Enforcement of Custody Orders Act"* should be *"Uniform Extra-Provincial Custody Orders Enforcement Act"*.
5. Uniform Acts should not contain an enacting formula.
6. Interpretation sections should not include the phrase "unless the context otherwise requires".
7. The clauses of interpretation sections should not be joined with "and" or "or".
8. Only the final two clauses of a series of clauses, other than in interpretation sections, should be joined with "and" or "or".
9. Every subsection of every section should have a marginal note.
10. Uniform Acts should conform with the *Uniform Interpretation Act* and the *Canadian Legislative Drafting Conventions* and in matters not covered, the style of the Statutes of Canada should be followed.

11. Compound section references should follow the style of the British Columbia statutes.

Computerization and Retrieval of Statutes (1975 Proceedings, page 20)

Mr. Stephen Skelly, Director, Jurimetrics Section, Department of Justice, Ottawa, delivered a slide picture and oral presentation of the current and potential uses of the computer in the printing, storage, updating and retrieval of statutes.

RESOLVED that thanks be extended to Mr. Skelly for his instructive address and to the Department of Justice of Canada for making Mr. Skelly's attendance possible.

Education, Training and Retention of Legislative Draftsmen in Canada (1975 Proceedings, page 20)

The report (Appendix B, page 64) of the Special Committee, Messrs. Walker (chairman), Hoyt, MacNutt, Ryan, was presented by Mr. Walker.

A general discussion was followed by a canvass of jurisdictions to determine the nature and extent of current problems. The report was adopted and the following resolution passed:

RESOLVED that the Special Committee be continued to report in detail at the 1977 meeting upon Mr. Hoyt's background paper, Mr. Ryan's report on legislative drafting in Trinidad and Tobago and the British Renton Report.

Interpretation Act — Section 1 (1975 Proceedings, page 19)

Mr. Roger presented his report (Appendix C, page 66).

RESOLVED that the British Columbia delegates report to the 1977 meeting on the experience of British Columbia and other jurisdictions in connection with the adoption or otherwise of the provisions of the *Uniform Interpretation Act.*

Jurors: Qualifications, Exemptions (1975 Proceedings, page 33)

The Manitoba Report (Appendix D, page 68) was presented by Mr. Tallin. The draft provisions were considered and the following resolution adopted:

RESOLVED that the draft be referred back to Manitoba to incorporate therein the changes agreed upon; that the redraft entitled *"Provisions respecting Qualifications of Jurors"* be reported back to the Uniform Law Section.

Metric Conversion (1975 Proceedings, page 19, sub nom. Statutes Act)

The Report of Messrs. Stone and Ryan (Appendix E, page 71) was presented by Mr. Tucker.

RESOLVED that the Report be adopted with thanks to Mr. Tucker for his work.

RESOLVED that Schedules A, B and C to the Report be not published, leaving only the Report and Appendix D to be published in the Proceedings (Appendix D is now Schedule 1 to the Report).

RESOLVED that Metric Conversion be placed on the agenda of the 1977 meeting for a report from a special committee composed of Messrs. Tucker (chairman) and Mr. Ryan.

1977 Meeting

It was agreed that the Section would meet on Thursday, 18 August, 1977 at 9:30 a.m. at the same place as is determined for the meeting of the Conference as a whole.

Officers

Mr. Stone was elected as chairman and Mr. MacNutt as secretary for 1976-77.

OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting was convened at 10:00 a.m. on Monday, 23 August, in the Explorer Hotel with Mr. Acorn in the chair and Mr. MacTavish as secretary.

The President, after opening the meeting, introduced the new members and then asked the others to identify themselves.

Minutes of Last Meeting

RESOLVED that the minutes of the 57th annual meeting as printed in the 1975 Proceedings be taken as read and adopted.

President's Address

Mr. Acorn then addressed the meeting (Appendix F, page 78).

Treasurer's Report

Mr. Stone presented his report in the form of a financial statement of the year ending August 16, 1976 (Appendix G, page 85).

RESOLVED that the Treasurer's Report be received.

Appointment of Auditors

RESOLVED that the Treasurer's Report be referred to Mr. Pepper and Ms. Flieger for audit and that they report to the Closing Plenary Session.

Secretary's Report

Mr. Smethurst presented his report for 1975-1976 (Appendix H, page 87).

RESOLVED that the report be received.

Executive Secretary's Report

Mr. MacTavish presented his report (Appendix I, page 88).

RESOLVED that the report be received.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Messrs. Ryan, Walker and MacNutt, to report to the Closing Plenary Session.

Appointment of Nominating Committee

RESOLVED that a Nominating Committee be constituted, composed of the past presidents of the Conference who are present, with the most recent president as chairman, to report to the Closing Plenary Session.

Printing of Proceedings

RESOLVED that all matters relative to the printing, publication and distribution of the 1976 Proceedings be referred by the Executive Secretary to the Executive, or its nominee or nominees, for approval.

Next Annual Meeting

This item was deferred for consideration at the Closing Plenary Session.

Report on the Executive Meeting

The President reported upon a number of items that had been considered by the Executive at its meeting on Sunday, August 22nd, 1976, as follows:

1. The planned publication of a Consolidation of Uniform Acts was proceeding satisfactorily so far as the research and editorial aspects of the project were concerned. However, the financing of the project had so far been unsuccessful. Efforts would continue to be made to arrange the necessary funding.

2. It was thought that a Co-ordinator of Research was unnecessary.

3. It was recommended that the two representatives of the Conference to the Council of the Canadian Bar Association for the year 1976-77 be the president and the first vice-president of the Conference.

4. The change in position of the Honorary President's Statement on the agenda of the annual meeting of the Canadian Bar Association was explained.

5. It was recommended that the representative of the Conference to the 1977 annual meeting of the National Conference of Commissioners on Uniform State Laws to be held in Phoenix, Arizona, next July, be the president of this Conference or, failing him, his nominee.

6. The dates of the annual meeting of the Conference will henceforth include the days of meeting of the Legislative Drafting Section.

7. The promotional work done by Mr. Acorn towards improving the number of Uniform Acts adopted was noted and the points reiterated and emphasized.

8. A special invitation will be extended each year by the president of the Conference to the local attorney general to attend our annual meeting.

9. The delegates were again asked to check Table IV at the back of the Proceedings with a view to improving its accuracy.

The actions and recommendations of the Executive were approved.

Adjournment

The meeting adjourned at noon to meet again in the Closing Plenary Session (Friday next at a place and hour to be announced by the President).

UNIFORM LAW SECTION

MINUTES

The following delegates attended (34):

Alberta: Messrs. Acorn, Greer, Hurlburt, Wilson, and Mrs. Donnelly.

British Columbia: Messrs. Adamson, Farquhar, Kennedy, Maddaford and Roger.

Canada: Messrs. Gibson and Pepper.

Manitoba: Messrs. Balkaran, Muldoon, Smethurst and Tallin.

New Brunswick: Mr. Hoyt.

Newfoundland: Mr. Ryan.

Northwest Territories: Ms. Flieger.

Nova Scotia: Mr. Walker.

Ontario: Messrs. Leal, Shipley, Stone, Tucker, and Mrs. Weiler.

Prince Edward Island: Messrs. Carver, MacIntosh and MacNutt.

Quebec: Messrs. Caron, Colas and Philippon.

Saskatchewan: Messrs. Grosman and Meldrum.

Yukon Territory: Mr. O'Donoghue.

Sessions

The Section held eight sessions, one on the Monday afternoon, two on the Tuesday, Wednesday and Thursday and one on the Friday morning.

A few of the matters discussed were opened on one day, adjourned, and concluded on another day. For convenience, the minutes are put together as though no adjournments had occurred and the subjects discussed are arranged alphabetically.

Opening

The sessions opened with Mr. Acorn as chairman and Mr. MacTavish as secretary.

Hours of Sitting

RESOLVED that the Section sit from 9.30 a.m. to. 12.30 p.m. and from 2.00 p.m. to 5.00 p.m. daily, subject to change from time to time as circumstances might require.

Agenda

The revised agenda of 10 July 1976 was considered and the order of business for the week agreed upon.

Children Born Outside Marriage (1975 Proceedings, page 31)

The report of British Columbia (Appendix J, page 90) was presented by Keith B. Farquhar, former Director of Research of the Law Reform Commission of British Columbia, who did the research and prepared the report on behalf of the British Columbia delegates.

After discussion the following resolutions were adopted:

RESOLVED that this subject, other than questions 9 and 18 of the report, be referred back to British Columbia to prepare a draft of a uniform act in accordance with the decisions and instructions of this meeting and this draft be placed on the agenda for consideration at the 1977 meeting.

RESOLVED that question 9 be not considered at this meeting but that it be referred to the Ontario and Quebec delegates for report at the 1977 meeting.

RESOLVED that question 18 be referred to Nova Scotia for report at the 1977 meeting

RESOLVED that copies of the British Columbia draft uniform act and the Nova Scotia report be prepared and circulated for study as soon as possible

RESOLVED that British Columbia report on questions of policy.

RESOLVED that Mr. Farquhar's Notes of Decisions taken in 1976 be published in the Proceedings.

Company Law (1975 Proceedings, page 25)

Mr. Ryan on behalf of the Newfoundland, Nova Scotia and Quebec delegates presented the annual report on the Promotion of Uniformity of Company Law in Canada (Appendix K, page 127).

After discussion, the following resolutions were adopted:

RESOLVED that the first recommendation of the report be amended so that it reads:

> "Your committee therefore recommends that this Conference now bring to the attention of the federal and provincial governments the desire of this body and the Canadian Bar Association for uniformity in Canadian corporation law, and urge upon those governments the need to create an association of federal-provincial officials responsible for the administration of corporation law and those groups within Canada most directly affected by those laws (namely, the legal profession, chartered and public accountants, security brokers, and commercial and industrial entrepreneurs)."

RESOLVED that the report, as so amended, be adopted.

Contributory Negligence and Tortfeasors (1975 Proceedings, page 26)

At the request of Alberta this subject was put over until the 1977 meeting.

Convention on the Limitation Period in the International Sale of Goods (1975 Proceedings, page 29)

The chairman of the Special Committee on this subject, Mr. Leal, made a report (Appendix L I, page 146).

During the meeting a fresh draft of the proposed provision was considered.

RESOLVED that the fresh draft be referred back to the Special Committee to bring it into line with the decisions taken at this meeting; that copies of the provision as so revised be sent to each Local Secretary for distribution by him to the delegates of his jurisdiction who normally attend the sittings of the Uniform Law Section and one copy to the Executive Secretary; and that if the provision as so revised and distributed is not disapproved by two or more jurisdictions by notice to Mr. Ryan, the Secretary of the Conference, on or before 30 November 1976, it is adopted by the Conference and recommended for enactment in that form.

The draft Uniform Act was revised and distributed in accordance with the above resolution.

No disapprovals were received.

The Act as so revised and distributed (Appendix L II, page 147) is therefor adopted and recommended for adoption in that form.

Domicile

Mr. Acorn referred to a letter he had received as president of the Conference from Paul A. Crépeau, president of the Civil Code Revision Office of Quebec (Appendix M, page 161).

RESOLVED that no action be taken at this time, subject to the right of the Quebec delegates to re-open the subject in any way at any time.

Enactment of and Amendments to Uniform Acts — Report of Mr. Tallin

Mr. Tallin presented his annual report (Appendix N, page 162) which was received with thanks. The Schedule to the report is a new feature supplied by Mr. Caron; it is a list which indicates the provisions of Quebec legislation which are equivalent in substance, but not in form, to Uniform Acts.

Evidence: The Rule in Hollington v. Hewthorn — Alberta's Report (1975 Proceedings, page 29)

Mr. Wilson presented the Alberta report (Appendix O I, page 165). After the draft provisions attached to the report were considered in detail, the following resolution was adopted:

RESOLVED that the draft provisions attached to the report, as amended at this meeting, be adopted and recommended for enactment.

The provisions as so adopted and recommended are set out as Appendix O II, page 168).

Evidence: Use of Self-Criminating Evidence Before Military Boards of Inquiry (1975 Proceedings, page 32)

Mr. Meldrum, for the Saskatchewan delegates, reviewed the subject, following which this resolution was adopted:

RESOLVED that subsection 3 of section 8 of the *Uniform Evidence Act* be amended,

(*a*) by deleting the word "or" at the end of clause *c*;

(*b*) by adding the word "or" at the end of clause *d*; and

(*c*) by adding the following clause, "(*e*) in any other action".

For convenience of reference, section 8 as so amended is set out as (Appendix P, page 170). *The Uniform Evidence Act* is in the 1962 Consideration of Acts at page 97.

Extra-Provincial Custody Orders Enforcement

The British Columbia delegates submitted a memorandum which outlined two potential problems under the Uniform Act and asked that the matter be put on the agenda for 1977.

RESOLVED that this matter be placed on the agenda for consideration at the 1977 annual meeting.

RESOLVED that the memorandum supporting the request be not printed in the 1976 Proceedings but that British Columbia prepare a fresh report for consideration at the 1977 meeting.

RESOLVED that in preparing its report British Columbia give consideration to (1) enlarging the scope of the Uniform Act to deal with the removal of a child from the jurisdiction in which it was ordinarily resident before the order for custody was made; and (2) amending the Uniform Act to provide for the making or varying of a support order of a child in cases where its custody is varied pursuant to the Act.

International Conventions on Private International Law (1975 Proceedings, page 33)

Mr. Leal, for the Special Committee, in an oral report reviewed the situation at The Hague Conference on Private International Law pointing out that there is now pending before the plenary session three preliminary draft conventions: Matrimonial Property Regimes; Law of Marriage; Agency.

He mentioned that a Canadian delegation of five will be attending the thirteenth plenary session of the Conference (which meets every four years) next month at The Hague.

Mr. Leal said that the Special Committee will have a progress report to make next year, including a report on the International Administration of Estates of Deceased Persons, and perhaps some

subjects for the Uniform Law Section to take on as projects.

Interpretation Act (1975 Proceedings, page 32)

RESOLVED that this matter be referred to Newfoundland and Nova Scotia for a report upon the Nova Scotia report (1975 Proceedings, page 218) and upon the Alberta comments thereon (1975 Proceedings, page 249) for consideration at the 1977 meeting.

Judicial Decisions Affecting Uniform Acts

Mr. MacNutt presented the report of Prince Edward Island Appendix Q, page 172).

RESOLVED that the report be received with thanks.

RESOLVED that the Prince Edward Island Commissioners prepare a similar report for presentation at the 1977 annual meeting.

Jurors (Qualifications, Disqualifications and Exemptions) — Manitoba Report (1975 Proceedings, page 33)

The Manitoba report was presented but not read by Mr. Tallin. Instead the draft Uniform Act as revised and reported back by the Legislative Drafting Section was considered.

RESOLVED that the draft Uniform Act as revised and reported back by the Legislative Drafting Section and as amended at this meeting be referred back to Manitoba to incorporate the amendments so made and that the Uniform Act in that form (Appendix R, page 182) be adopted and recommended for enactment.

Limitation of Actions — Alberta Report (1975 Proceedings, page 25)

Mr. Hurlburt presented the Alberta report (Appendix S, page 184) but as time was short he referred only to a number of highlights of the report, particularly the material under the heading "Claims within the Two Year Period" and the letter dated 11 August 1976 to Mr. Gibson from the Deputy President of the Canadian Medical Association.

After discussion, the following resolutions were adopted:

RESOLVED that the Canadian Medical Association be advised that the whole subject of limitations is under consideration by the Uniform Law Section of this Conference but the Section on general principle does not think that anyone should be deprived of his right to sue before he could reasonably know that he has it.

RESOLVED that the Alberta report be placed on the agenda for consideration at the 1977 meeting.

Pleasure Boat Owners' Accident Liability (1975 Proceedings, page 31)

Mr. Gibson presented a report on behalf of the Canada delegates in which he pointed out that no significant changes had occurred in this area during the past year.

RESOLVED that this subject be dropped from the agenda on the understanding that the Canada delegates would report upon any important changes that might occur in the future.

Powers of Attorney — Legal Incapacity
(1975 Proceedings, page 34)

The report of the Ontario delegates (Appendix T, page 204) was presented and summarized by Mr. Leal.

Considerable discussion ensued and decisions were taken on many substantive points.

RESOLVED that the Ontario delegates be asked to prepare draft uniform provisions having regard to the decisions and comments of this meeting; and that the subject be placed on the agenda of the 1977 annual meeting.

Prejudgment Interest

Mr. Roger presented the British Columbia report (Appendix U, page 216) but did not proceed further due to lack of time.

RESOLVED that the report be printed in the 1976 Proceedings and that it be put on the agenda for consideration at the 1977 meeting.

Presumption of Death — Report of Alberta, Nova Scotia and Ontario
(1975 Proceedings, page 32)

Mr. Stone presented a fresh draft of the proposed Uniform Act which was discussed clause by clause.

RESOLVED that the current draft Uniform Act be referred back to Alberta, Nova Scotia and Ontario to incorporate therein the amendments made at this meeting

RESOLVED that the Uniform Act as so amended (Appendix V, page 225) be adopted and recommended for enactment in that form.

RESOLVED that the draft Uniform Act considered clause by clause at this meeting be not printed in the Proceedings because of its tentative nature.

Protection of Privacy: Collection and Storage of Personalized Data Bank Information (1975 Proceedings, pages 31, 32)

Mr. Gibson presented a report in which he reviewed the situation, particularly with respect to Bill C-72, its parliamentary history, contents and proposed regulations.

RESOLVED that Mr. Gibson be asked to distribute copies of any successor to Bill C-72 to the members of this Section and that he report on developments to the 1977 meeting.

On 2 December 1976 Mr. Gibson distributed copies of Bill C-25, the *Canadian Human Rights Act*, which received 1st Reading on 29 November 1976.

Protection of Privacy: Credit and Personal Data Reporting
(1975 Proceedings, page 27)

Mr. Stone presented the Ontario report (Appendix W, page 227) which was followed by a consideration of the questions contained in the Schedule to the report.

RESOLVED that a committee, composed of Mr. Stone, chairman, and the Nova Scotia, Quebec and the Ontario delegates, prepare a fresh draft of a Uniform Act for consideration at the 1977 meeting of the Section.

RESOLVED that the committee is authorized to refer the fresh draft to the Legislative Drafting Section for consideration of the drafting questions before presenting the draft to this Section.

Protection of Privacy: Evidence (1975 Proceedings, page 25)

Mr. Leal presented the Ontario report (Appendix X, page 230).

After considerable discussion, the following resolutions were adopted:

RESOLVED that the report be received, published in the Proceedings and that the matter be put on the agenda for next year's meeting.

RESOLVED that Messrs. Muldoon and Grosman each prepare and circulate before the 1977 annual meeting a memorandum outlining the various points of view that emerge from a study of the principles involved.

Protection of Privacy: Tort (1975 Proceedings, page 25)

Mr. Walker, on behalf of the Nova Scotia delegates, presented a report (Appendix Y, page 240).

RESOLVED that the Nova Scotia and Quebec delegates prepare a draft Uniform Act respecting the tort of invasion of privacy for consideration at the 1977 meeting.

Support Obligations between Husband and Wife and between Parent and Child (1975 Proceedings, page 29)

1. At last year's meeting British Columbia was requested to review the present Uniform Reciprocal Enforcement of Maintenance Orders Act (1973 Proceedings, page 347) and to prepare a fresh draft Uniform Act for consideration at this meeting.

RESOLVED that the British Columbia report (Appendix Z I, page 245) be printed in the Proceedings omitting the present *Uniform Reciprocal Enforcement of Maintenance Orders Act*, but that the consideration of the report be deferred until the 1977 meeting.

2. At last year's meeting Ontario was requested to prepare a report respecting the factors and elements relevant to the remedies and enforcement techniques of maintenance orders.

Mr. Leal presented the Ontario report (Appendix Z II, page 266) and digested its content. A general discussion took place as to the advisability of undertaking the preparation of a *Uniform Support Obligations Act.*

RESOLVED that a policy survey be made under the aegis of Alberta supported by the research funds of the Conference as a precursor of a draft Uniform Act, such survey to be the feature of Alberta's report to next year's meeting.

Trades and Businesses Licensing (1975 Proceedings, page 25)

The report of Newfoundland and Prince Edward Island (Appendix ZA, page 285) was presented and discussed.

RESOLVED that this subject be dropped from the agenda.

Uniform Law Section: Purposes and Procedures

RESOLVED that a Committee composed of Messrs. Acorn, Muldoon, Ryan, Stone and Walker be constituted to review the purposes and procedures of this Section and to report thereon to the 1977 meeting.

Vital Statistics

The British Columbia delegates asked that this twenty-five year old Uniform Act (1962 Consideration of Acts, page 328) be reviewed and revised from the point of view of today's problems but also to bring the language and form of the Act up to date and submitted a report in support of this request.

RESOLVED that the matter be placed on the agenda for consideration at the 1977 annual meeting.

RESOLVED that this year's report of the British Columbia delegates be not printed in the 1976 Proceedings but that they prepare a fresh report and, if possible, a revised *Uniform Vital Statistics Act* for consideration at the 1977 meeting.

CRIMINAL LAW SECTION

MINUTES

The following attended (28):

Alberta: Messrs. Paisley and Roslak.

British Columbia: Messrs. Branson, McDiarmid, Simson and Vickers.

Canada: Messrs. Chasse, Christie, Ewaschuk, Landry, Tassé and Thorson.

Manitoba: Messrs. Goodman, Myers and Pilkey.

New Brunswick: Messrs. Gregory and Strange.

Newfoundland: Mr. McCarthy.

Nova Scotia: Messrs. Coles and Gale.

Ontario: Messrs. Greenwood and Scott.

Prince Edward Island: Mr. MacKay.

Quebec: Messrs. Girouard, Normand and Tremblay.

Saskatchewan: Messrs. Perras and Logan.

The matters considered by the Criminal Law Section were discussed in the following order:

Item 1 —

Voir Dire Prior to Empanelling the Jury

The Commissioners recommended that an amendment to the *Criminal Code* be allowed for the holding of voir dire the admissibility of statements, prior to the empanelling of the jury.

Item 2 —

Maximum Fine for Summary Conviction Offences — Section 722 Criminal Code

The Commissioners recommended that the maximum fine for summary conviction offences be raised from $500 to $2,000, subject to a review of other relevant summary conviction provisions of the *Criminal Code* by federal officials.

Item 9 —

Proof of Authorization to Intercept Private Communications and Section 23 of the Canada Evidence Act.

The Commissioners were asked to consider whether an amendment is necessary to provide for proof of an authorization to intercept

private communications without proof of the authenticity of the signature of the judge.

The Commissioners approved the idea of amending section 23 of the *Canada Evidence Act* along the lines of a recent amendment of the British Columbia *Evidence Act* found in section 20 of the *Attorney General Statutes Amendment Act, 1976,* and which reads:

> "29A. A document purporting to bear the signature of a judge of any court in the Province, either in his capacity as a judge or as a personna designata, is admissible in evidence without proof of the signature, authority, or official capacity of the judge appearing to have signed the document."

Item 10 —

Unlawfully at Large "within Canada" — Criminal Code Section 133(1)(b)

The Commissioners were asked to consider whether the words, "within Canada", should be removed from section 133(1)(b) of the *Criminal Code* so as to remove the following areas of uncertainty and difficulty:

1. whether one can avoid violating section 133(1)(b) by escaping to another country;
2. whether this offence would be inapplicable if an escaped prisoner returned to Canada after the expiration of his term of imprisonment;
3. the difficulty of proving that an escaped prisoner was unlawfully at large in Canada rather than in another country.

Also, the Quebec delegates cited the problem of the prisoner serving an intermittent sentence who can't be arrested until Saturday when he fails to surrender himself but at which time he is already in the United States.

It was agreed by the Commissioners that there is a problem as set out above and that there is a need for re-drafting in regard to the words, "in Canada".

Item 11 —

Possession of a Weapon for a Purpose Dangerous to the Public Peace — Criminal Code Section 83.

The Commissioners recommended that no action be taken.

Item 12 —

Default in Payment of Fines and Extension of Time for Payment — Criminal Code Section 646(10)(11), 727(9)(10).

The Commissioners recommended that the *Criminal Code* be amended so as to allow any judge of a concurrent jurisdiction, as well as a judge that imposed the sentence, to extend the time for payment of a fine.

With respect to *Criminal Code* Sections 722(9) and 646(10) the Commissioners recommended that these sections be abolished.

Item 15 —

Compellability of a Spouse re Offences against Children — Canada Evidence Act, Section 4.

The Commissioners recommended that the *Canada Evidence Act* be amended so as to make the husband or wife of an accused a compellable witness against the other in the case of childbeating or the murder of a child. This would include all children under the age of eighteen years and would be immaterial as to whether or not the child is living with the family at the time.

A proposal was made that an onus be placed on the parents living in the same home as a beaten or murdered child to establish that each of them was not a party to the offence, or to at least give an explanation as to what occurred. The motion was defeated.

Item 16 —

Admissibility of Wiretap Evidence on a Show Cause Hearing — Criminal Code Section 457.3 (1) (e).

The Commissioners recommended unanimously that the words "in evidence at trial", be added to section 178.16(4) to allow for the admissibility of wiretap evidence at a show cause bail hearing.

Item 17 —

Transfer of Remnant of Sentence between Provinces.

The Commissioners recommended that the *Criminal Code* be amended to allow for the transfer of a remnant of a sentence between provinces.

Item 20 —

Removal of the word "Magistrate" in the election as to mode of trial in Criminal Code Section 484 (2).

It was agreed by the Commissioners that no action should be taken on this matter.

Item 21 —

Removal of the Conditional Discharge Provision for Curative Treatment in regard to the Offence of Failure or Refusal to Provide a Breath Sample.

It was agreed by the Commissioners that no action should be taken on item 21.

It was proposed that in regard to *Criminal Code* Section 234 and 236 the conditional discharge provisions for curative treatment should be removed. The Commissioners recommended that no action be taken.

Item —

Volume III — The Report on Evidence.

The Commissioners discussed the Law Reform Commission of Canada's *Report on Evidence*, after hearing opening remarks by the Commission's Chairman, Mr. Justice Lamer.

The Commissioners, by a majority vote, passed a motion which stated: "The principle of codification of the rules of evidence is acceptable to this group".

It was agreed by the Commissioners that the new chairman of the *Criminal Law Section* would decide whether to call a mid-year meeting on the topics of pre-trial procedures and the Evidence Code.

Item —

Volume III — Report on Dispositions and Sentences in the Criminal Process — Guidelines.

The Commissioners discussed the Law Reform Commission of Canada's Report on *Dispositions and Sentences in the Criminal Process — Guidelines*, after hearing an introduction to the Report by Mr. Justice Lamer.

Item 5—

Search Warrants and the Solicitor-Client Privilege.

The Commissioners recommended that the provisions of the *Income Tax Act* be adopted with respect to documents seized from a lawyer's office, with the modification that section 232(5) be amended so that the hearing shall be in camera before a court of criminal jurisdiction or a superior court of criminal jurisdiction and that the judge shall examine the documents along with counsel.

There was agreement among the Commissioners that such application not be able to be brought before a Justice of the Peace.

Items 3 and 4 —

Community Work Service Order and Alternatives to Imprisonment for Default in Payment of Fines.

It was recommended by the Commissioners that community work programs and community service orders be looked at by the federal Department of Justice so that provisions can be enacted in the *Criminal Code* to make these dispositions possible.

There were comments by some of the Commissioners that intermittent sentences are very costly, that they result in large bills from the R.C.M.P. and municipal jails in some provinces.

It was agreed by the Commissioners in principle that there be amendments to the *Criminal Code* that judges be required to give written reasons in explanation of a sentence of imprisonment and the length of the sentence.

Item 6 —

Supervision of Persons found to be Mentally Ill — Interprovincial Transfers, Criminal Code Section 545.

It was agreed by the Commissioners that in regard to the signing of warrants under section 545, that the federal Department of the Solicitor General should be informed by each province as to who is the provincial "officer authorized for that purpose".

It was agreed by the Commissioners that a warrant for transfer be made pursuant to a prior agreement made in the receiving province and that the warrant for transfer be to a place of safe custody.

It was agreed by the Commissioners that there should be an amendment making it clear that the officer would be able to return the prisoner to the province from which he came or the place.

Item 7 —

Resolutions adopted by the Canadian Bar Association at its 1975 Annual Meeting in Quebec City.

(Resolutions 1 and 4 were not dealt with. Resolution 1 concerned the "Morgentaler Amendment" to section 614 of the *Criminal Code* and Resolution 4 concerned open panel prepaid legal service plans.)

Resolution No. 2: Amendment to *Identification of Criminals Act* and *Criminal Code* to Restrict Photographing and Finger-printing by Police.

WHEREAS a practice has arisen whereby many Police Departments are photographing and finger-printing all arrested persons contrary to the intent of the *Identification of Criminals Act.*

BE IT RESOLVED THAT The Canadian Bar Association recommends an amendment to the *Identification of Criminals Act* and the *Criminal Code* to provide that it apply only

a) after conviction for an indictable offence; or

b) before trial for an indictable offence if a judge is satisfied after notice to the accused, that on a balance of probabilities the photographing or finger-printing of an accused is necessary for the proper administration of justice and that finger-prints and photographs so taken be destroyed if the accused is not convicted of an indictable offence.

The Commissioners recommended that no action be taken on this resolution. The reasons given by the Commissioners were the identification problems in regard to bail, sentencing and similar fact evidence and in regard to summary/indictable election offences where the Crown proceeds summarily.

Resolution No. 3: Repeal of Legislation respecting Venereal Diseases.

WHEREAS the Canadian Bar Association feels compelled to express its great concern regarding the alarming increase in the incidence of venereal disease and in particular, Gonorrhea;

AND WHEREAS this Association is convinced, after reviewing the inadequacy and ineffectiveness of present or possible legislation, that the incidence of venereal disease and contact tracing is not and cannot be affected by legislation;

BE IT RESOLVED that the Canadian Bar Association recommends

i) that legislation that requires the reporting of the name of those seeking treatment for V.D. be repealed.

ii) Section 253 of the *Criminal Code* of Canada be repealed.

iii) Mandatory incident reporting, without patient name, be instituted in order to provide statistical analysis.

The Commissioners recommended the repeal of section 253 of the *Criminal Code* but rejected the other two parts of the resolution.

Resolution No. 5: Greater Use of Mental Health Facilities for Incarceration and Treatment of Criminals.

RESOLVED that Government be encouraged to make more use of the facilities of mental hospitals for persons convicted of crime and in need of psychiatric treatment and for those persons found not guilty by reason of insanity.

This resolution was noted by the Commissioners.

Resolution No. 6: Amendment to make section 295 (joy-riding) an Included Offence under section 294 (theft of automobile)

RESOLVED that joy-riding (section 295 of the *Criminal Code*) be an included offence with theft of automobile (section 294 of the *Code*) and the distinction between joy-riding and automobile theft be more clearly defined.

The Commissioners recommended that "joy-riding" be made expressly an included offence within a charge of auto-theft.

Resolution No. 7: Right of accused to Re-elect for Mode of Trial.

BE IT RESOLVED that the *Criminal Code* be amended to enable an accused who has elected to be tried by a magistrate without a jury to re-elect up to 14 days prior to his trial, upon notice, to be tried by any other mode of trial without the consent of the Attorney General or at any time before commencement of trial with the consent of the Attorney General.

The Commissioners recommended that no action be taken because the area of pre-trial procedures is presently under study.

Resolution No. 8: Restricting Use of Preliminary Inquiry Transcript by Trial Judge

THAT a judge sitting without a jury should not be provided with the transcript from the preliminary inquiry except where it is required at trial for purposes of examination or cross-examination.

A motion that no action be taken was defeated. The Commissioners recommended that the trial judge not have access to the transcript of the preliminary inquiry unless an issue arises making it relevant or unless the trial judge is required to look at the transcript by law.

Resolution No. 9: Requiring Consent of Attorney General for Obscenity Prosecutions.

WHEREAS a number of prosecutions have been launched privately in the last three years under the obscenity provisions of the *Criminal Code* against films which had been approved by provincial censor boards; and

WHEREAS in the interests of freedom of speech and in the uniform application of the law, prosecutions for breaches of a "community standard" should not be initiated without the consent of the Attorney General of the province concerned;

BE IT RESOLVED that the Canadian Bar Association recommend that the *Criminal Code* be amended to provide that no prosecution be instituted under section 159 without the consent of the Attorney General of the province in which the proceedings are to be taken.

The Commissioners recommended that no action be taken on this resolution. The reason given by the Commissioners was the difficulty in determining community standards.

Resolution No. 10: Amendment of *Canada Evidence Act* respecting Protection Against Self-Incrimination.

RESOLVED it be recommended that *Canada Evidence Act* section 5 be amended to enable a witness to obtain the protection presently provided for specific questions, to all evidence given by the witness by means of a general request.

The Commissioners recommended the acceptance of this resolution but with the addition that the word "inculpatory" be added before the word "evidence".

Item 8 —

Right to Appearance at Appeal.

The Commissioners were asked to consider what points of clarification were needed in regard to the right of an appellant in custody, to be present at the hearing of the appeal.

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

Item 13 —

Removing Children for Foreign Adoption and Kidnapping — Criminal Code Section 247.

The Commissioners were asked to consider whether the kidnapping provisions of the *Criminal Code* should be amended to deal with occurrences of removing Canadian born children out of Canada for purposes of adoption, contrary to provincial law. And the Commissioners were asked to consider whether the replacement of the words, "against his will", in *Criminal Code* s. 247(1)(b) in accordance with the following amendment, would serve such purpose:

"247. (1) Every one who kidnaps a person with intent

(b) to cause him to be unlawfully sent or transported out of Canada *contrary to any federal or provincial law* or,"

The Commissioners recommended that this matter be referred to the Justice Department of Quebec to report back.

Item 14 —

Inherent Jurisdiction — Election for Trial — Doyle v. The Queen (SCC, June 29, 1976).

It was agreed by the Commissioners that there is a need to clear up the uncertainty as to the inherent jurisdiction of the inferior courts to deal with matters of procedure not specifically dealt with by the *Criminal Code.* It was agreed by the Commissioners that there is a need to clear up the uncertainty that the accused is not required to make his election as to mode of trial on the first appearance.

It was agreed by the Commissioners that the 8 day rule (as to adjournments) not apply once a date to proceed has been set.

Item 18 —

Jurisdiction of Court of Appeal to Substitute Verdict.

The Commissioners were asked to consider whether it was necessary to amend the jurisdiction of the court of appeal in regard to situations where the accused was improperly convicted of an offence but should have been convicted of another offence. Specifically the Commissioners were asked to consider whether either of the following amendments to section 613 of the *Criminal Code* was appropriate:

"613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(b) may dismiss where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted *or should have been convicted* on another count or part of the indictment,"

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(c) *substitute the verdict that in its opinion should have been found and impose a sentence that is warranted in law."*

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

Item 19 —

Compensation for Loss of Property to a "person aggrieved" — Criminal Code s. 653.

The Commissioners were asked to consider whether a suggestion made by Judges attending a seminar of Western Provincial Court Judges in Banff in April 1976, that *Criminal Code* s. 653 be clarified as to the following points.

1. whether the Court may initiate such application on behalf of a "person aggrieved";

2. whether the Court should make victims of crime aware that there is power to make such an order.

A motion that the words, "upon the application of the person aggrieved" in s. 653(1) be deleted, was defeated.

The Commissioners agreed that this item was to be carried over to next year's agenda with British Columbia to be responsible for preparing any necessary material.

Item 22 —

Breaking and Entering into Shipping Containers — Criminal Code s. 306(4).

The Commissioners were asked to consider whether the breaking and entering section of the *Criminal Code* should be amended so that the word "place" would include a shipping container.

The Commissioners recommended that this amendment not be accepted as there are other remedies available.

Item 23 —

Raising the Amount of Wilful Damage under $50 — Criminal Code s. 388.

The Commissioners were asked to consider whether the monetary jurisdiction of the offence in *Criminal Code* s. 388 should be raised from the present $50.

The Commissioners recommended that $50 be raised to $200 and that the offence be made a hybrid offence.

Item 24 —

Jury Selection — Challenge for Cause — Instructing the Triers — Criminal Code s. 567 (1) (b).

The Commissioners were asked to consider whether *Criminal Code* s. 567(1)(b) should be amended to read as follows:

> "(b) the juror is not acceptable by reason of not being indifferent between the Queen and the accused."

The Commissioners agreed that the point made in the supporting material was well taken but recommended that more appropriate language be sought to effect the necessary change.

Item 25 —

Percentage Retained from Pari-mutuel Pool — Criminal Code s. 188 (4).

The Commissioners were asked to consider whether *Criminal Code* s. 188(4) should be amended to allow the Lieutenant-Governor in Council or the Attorney General to regulate the percentage that may be retained from a pari-mutuel pool.

A motion was made to recommend the following amendment to the *Criminal Code:*

> Section 188 of the *Criminal Code* is amended by adding thereto immediately after subsection 188(7) the following subsection: "(7.1) The Minister of Agriculture upon the request of the Lieutenant Governor in Council (Attorney General?) of a province, may make regulations increasing the percentage referred to in paragraph 188(4)(f) with respect to all or any race courses in that province."

The motion was defeated.

Item 26 —

Res Judicata — Refusal to Provide Breath Sample, Impaired Driving and 'Over 80 mg'.

The Commissioners were asked to consider whether the prosecution should seek to secure a conviction under *Criminal Code* s. 234 in addition to a conviction under s. 235 now that there is a mandatory minimum penalty for subsequent offences under both sections and now that prior convictions are interchangeable by virtue of s. 236.1.

The Commissioners noted the different procedures used in the provinces:

B.C.	seek convictions on both offences;
Sask.	lay only one charge and proceed on only one;
Alta.	seek convictions on both offences;
Man.	lay both charges but seek a conviction on only one;
Ontario	seek convictions on both offences;
Quebec	seek convictions on both offences;
N.B.	lay only one charge and proceed on only one;
N.S.	lay both charges but seek a conviction on only one;
P.E.I.	lay only one charge and proceed on only one;
Nfld.	lay both charges but seek a conviction on only one.

Item 27 —

Fees and Allowances — Criminal Code, Part XXIV, s. 772.

The Commissioners were asked to consider whether there was a need to amend the fees and allowances provided for by section 772 of the *Criminal Code.* The Commissioners recommended that the resolutions on this matter adopted at Minaki in 1974 and Halifax in 1975 be reaffirmed.

Other Business

The nominating committee consisting of Mr. Robert Normand and Mr. Neil McDiarmid expressed the thanks of the Commissioners to the Chairman and Secretary.

Mr. Coles was elected Chairman of the Criminal Law Section for the year 1976/77 and Mr. K. Chasse was elected Secretary, or if Mr. Chasse was not available, someone was to be appointed by the Federal Department of Justice to act as Secretary.

Mr. Thorson informed the Commissioners that the federal government would be reporting back at each successive meeting as to the federal government's action or reaction to the resolutions passed at the Uniformity meeting of the previous year.

It was understood that there might be a mid-year meeting of the Commissioners to be called by the new Chairman Gordon Coles.

Procedures to be used during deliberations of the Commissioners —

It was agreed by the Commissioners that Mr. Wendall MacKay and the Secretary would meet to suggest minimum rules of procedure, including the method of adding items to the agenda, and the voting rights of delegates and deliver a report next year.

CLOSING PLENARY SESSION

(FRIDAY, AUGUST 27TH, 1976)

MINUTES

The Closing Plenary Session opened with the President, Mr. Acorn, in the chair and the Executive Secretary, Mr. MacTavish, acting as secretary.

Legislative Drafting Section

The chairman of the Section, Mr. Stone, reported upon its activities.

> The matters considered included: 1) A continuing survey of the progress of metric conversion. 2) A detailed consideration of the provisions respecting the qualification of jurors as requested by the Uniform Law Section. 3) A discussion of the computerization and retrieval of statutes. 4) A continuing study of the education, training and retention of legislative draftsmen in Canada. 5) Advising Mr. MacTavish on matters of style in uniform acts. 6) The preparation of new legislative drafting conventions was completed.

Mr. Stone was re-elected as chairman and Mr. MacNutt as secretary of the Section for 1976-1977.

Uniform Law Section

The chairman, Mr. Acorn, reported upon the activities of the Section. He said:

> During the past year approval has been given to both the *Uniform Medical Consent of Minors Act* and the *Uniform Retirement Plan Beneficiaries Act*. At the meeting just ended, we adopted a revised *Uniform Presumption of Death Act* and an amendment to the *Uniform Evidence Act* which would allow for the admission in evidence of proof of convictions and findings of guilt and of findings of adultery or paternity, and thus in effect reverse the rule in *Hollington v. Hewthorn.*

Our section completed work on a Uniform Act relating to juror disqualifications and exemptions.

Substantial progress was made with respect to:

—The proposed *Uniform Personal Information Reporting Act.*

—An amendment to the *Uniform Evidence Act* dealing with the admissibility of evidence illegally obtained and evidence

obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute.

—The Status of Children Born Outside Marriage. (This item took up all of Wednesday in an extended session. We were pleased to have with us Professor Farquhar of British Columbia, who had previously done a research paper on the subject for the Conference.)

—Powers of Attorney and Legal Incapacity.

—Proposed revision of the *Uniform Reciprocal Enforcement of Maintenance Orders Act.*

—The Factors and Elements Relevant to the Remedies and Enforcement Techniques of Maintenance Orders.

A start was made on a report dealing with the revision of the *Uniform Limitation of Actions Act.* Time did not permit us to deal with the report in detail but we did, however, pass a resolution as follows:

> RESOLVED that the Canadian Medical Association be advised that the whole subject of limitation of actions is under consideration in the Uniform Law Section of this Conference but the Section on general principal does not think that anyone should be deprived of his right to sue before he could reasonably know he has it.

Among other matters that were discussed briefly and carried over until next year were the following:

—Protection of Privacy: Tort.

—Promotion of Uniform Company Law in Canada.

—Contributory Negligence and Tortfeasors.

—Convention on the Limitation of Actions in the International Sale of Goods.

—Section 9 of the *Uniform Interpretation Act* Relating to Extrinsic Aids to Interpretation of Statutes.

The following new items were added to the agenda of the Section:

—A Review of the *Uniform Vital Statistics Act.*

—A Review of Section 39 of the *Uniform Evidence Act* which deals with the Admissibility in Evidence of Microfilmed Documents.

The length of our agenda did not permit us to even start dealing with a report on the proposed *Uniform Prejudgment Interest Act*, and as mentioned above, we were unable to do any substantial work on the report dealing with the revised *Uniform Limitation of Actions Act*. This is the first time in many years that our Section has not been able to complete its agenda in one way or the other and the matter has caused considerable concern among our members. As a consequence, a resolution was passed establishing a five-member special committee to examine the purposes and procedures of the Section and directing it to bring in a report and recommendations at the 1977 meeting.

Criminal Law Section

The chairman, Mr. Gregory, reported upon the work of the Section. He said:

> The agenda consisted of twenty-seven items proposed for discussion by the delegates, attorneys general, ministers of justice and others concerned with the criminal law. In addition, the chairman of the Law Reform Commission of Canada, the Honourable Mr. Justice Antonio Lamer, attended on Tuesday and Wednesday while the Section discussed the reports of the Commission relating to evidence and sentences and dispositions.
>
> Due to the real possibility that legislation may be proposed in the near future to amend the *Criminal Code* with regard to procedures at trial and elections as to mode of trial as well as codification of the law of evidence, the Section agreed that a mid-winter meeting may be desirable in order to give full consideration to these matters. Such a meeting will be held at the call of the chairman of the Section after consultation with a committee consisting of Messrs. Girouard, Greenwood and Christie.
>
> In addition the need was recognized for certain minimum rules of procedure for the Section to deal with such matters as sponsorship of agenda items and the permissible number of delegates from each jurisdiction. A committee composed of Messrs. MacKay and Chasse was appointed to make proposals for such rules to be circulated prior to the 1977 meeting of the Section and to be considered at that meeting.

The Section elected Gordon F. Coles, Q.C., of Halifax as chairman and Kenneth L. Chasse of Ottawa as secretary for 1976-1977.

Report of the Executive

The President made a report of the results of the work of the Executive at its second meeting which was held at noon on Thursday.

1. The matter of the disposition of the interest that was accumulating of the moneys in the Research Fund was the subject of discussion. It was decided to have the auditors (Mr. Pepper and Ms. Flieger) prepare and submit an opinion and to leave future action to be determined by the Executive having regard to the opinion.

2. It was recommended that the planned publication of the Consolidation of Uniform Acts should contain as a matter of convenience the Rules of Procedure of the Uniform Law Section.

3. The problem of accreditation and status of persons attending the Conference was again considered. It was recommended that all such persons be called simply "delegates" and, for the time being at least, to leave the number of delegates from each jurisdiction to be decided by the respective governments in the expectation that reasonable restraint will be exercised.

4. The fees of the Executive Secretary were reviewed in accordance with Federal guidelines and settled with mutual satisfaction.

These actions and recommendations of the Executive were approved.

Auditors' Report

Mr. Pepper, on behalf of Ms. Flieger and himself, presented the following report:

> We have examined the Treasurer's report as received at the Opening Plenary Session and the books and records of receipts and disbursements and wish to report that, subject to the comments that follow, the report correctly reflects the transactions of the Conference.
>
> Your auditors are concerned that the Treasurer's report does not attribute the interest earned on securities in which the Research Fund is invested to that Fund nor does it attribute that interest to the General Account. The interest earned is in the bank account of the Research Fund but it is not indicated to be part of that Fund. The auditors recommend that the question of applying the interest either to the Research Fund or to the General Account should be resolved by the Executive of the Conference after confirmation by the auditors that there is no law of Canada that requires the interest to remain with the Research Fund.

RESOLVED that the report of the auditors be adopted.

Next Meeting

Having regard to the possibilities open and the plans of the Canadian Bar Association, the following resolutions were adopted:

RESOLVED that the Conference should fix the location of its annual meetings two or three years in advance in the same way as is now done by the Canadian Bar Association in order to secure suitable locations and adequate accommodations.

RESOLVED that the Executive be authorized and directed to fix the place of the 1977 and 1978 annual meetings having regard to the following choices:

First—St. Andrews by the Sea.
Second—North of Montreal.
Third—Outside Ottawa.

New Business

A lengthy discussion took place as to ways of improving the overall programming of our annual meetings, the consensus being that there should be five full days available for the sessions of the Uniform Law and Criminal Law Sections. To accomplish this it would, of course, be necessary to hold the Opening Plenary Session late on the Sunday afternoon or on Sunday evening and the Closing Plenary Session on the following Friday evening or Saturday morning.

RESOLVED that the Executive be authorized and directed to decide the details necessary to implement the above consensus.

Resolutions Committee Report

The Resolutions Committee presented its report in the form of a motion which was carried unanimously.

RESOLVED that the Conference express its sincere appreciation:

1. To the Government of the Northwest Territories and to the Northwest Territories delegates to the Conference for the excellent arrangements and fine accommodation provided for the meetings of the three Sections of the Conference and its plenary sessions, for the dinner provided the delegates and their guests on Thursday evening and for the many interesting activities throughout the ten-day period the Conference met in Yellowknife.
2. To Deputy Commissioner of the N.W.T., John H. Parker, for his special interest in the invitation extended to the Conference on behalf of the Government of the Northwest Territories and for his interesting speech at the Government's dinner.
3. To the Deputy Minister of Justice of Canada and the Federal Department of Justice's Regional Director, Orval Troy, Q.C., and his wife, Sheila, for sponsoring and making the excellent arrangements for the Tuesday night barbecue. A special note of appreciation is extended to the Chef, Xavier Mercredi, Deputy Clerk of the Supreme Court of the N.W.T., and his wife Peggy, for treating us to the new taste experience of reindeer burgers, caribou stew and bannock; and to the able and entertaining musicians led by Wilf Shidlowski.
4. To the Bar of the N.W.T., for their welcoming wine and cheese party on the Sunday evening and to the Alberta Government for its reception for the delegates and guests on Thursday.
5. To His Worship, Fred Henne, Mayor of Yellowknife, for the many bus and boat trips which gave us the opportunity to appreciate Yellowknife

and the Territories better than we would otherwise have been able to do on our own; to Mrs. Reimers for the bus tours, which in addition to being informative, were delightfully entertaining; and to Walter England for ensuring that those of us who went fishing were properly licensed.

6. To Dave Emery, Manager of the Giant Yellowknife Gold Mine, Chuck Randall, who guided the underground tour, and Marion Wylie, who guided the surface tour, for making a special effort to enable so many of us to experience a unique adventure one-fifth of a mile below the City of Yellowknife.
7. To the Management and Staff of the Explorer Hotel for their excellent accommodation and service.
8. To the National Conference of Commissioners on Uniform State Laws for its generous courtesy to our President and Mrs. Acorn during their attendance at the American Conference in Atlanta, Georgia, recently, and also for enabling our Conference to meet and receive in our midst the President of their Conference and his charming wife, Jim and Jean Bush of Phoenix, Arizona.
9. To his Worship, Magistrate Jim Slaven, and his hard-working assistant, Ray James, Inspector of Legal Offices, and to their ladies, for making this Conference, both with respect to its business and social activities, so successful and enjoyable. The patience and care taken with respect to the daily arrangements was outstanding and greatly appreciated by all. Mention too must be made to the presentation of Nanook of the North, a movie classic. The delegates were privileged to see depicted on the screen a way of life now gone.
10. To the Honourable Mr. Justice Berger, who is sitting throughout the Northwest Territories as a Royal Commission investigating the social, environmental and economic aspects of the proposed Mackenzie Valley Pipeline, for his courtesy in inviting the members of the Conference and their wives to a most interesting and informative talk, accompanied by coloured slides, on the work of his inquiry.
11. To Mr. Justice M. D. Kirby, Chairman of the Law Reform Commission of Australia, for his kindness in sending us a cable which read:

    "On the occasion of the 58th annual meeting of the Uniform Law Conference of Canada the Australian Law Reform Commission conveys to all participants its best wishes for the success of the Conference".

AND FURTHER BE IT RESOLVED that the Secretary convey the thanks of the Conference to those referred to above and to all others who contributed to the success of this Fifty-eighth Annual Meeting of the Conference.

Nominating Committee's Report

Mr. Normand, for the Committee, submitted the following nominations for 1976-1977:

Honorary President	Glen Acorn, Q.C., Edmonton
President	Wendall MacKay, Charlottetown
First Vice-President	H. Allan Leal, Q.C., LL.D., Toronto
Second Vice-President	Robert G. Smethurst, Q.C., Winnipeg
Treasurer	Arthur N. Stone, Q.C., Toronto
Secretary	James W. Ryan, Q.C., St. John's

RESOLVED that the nominations be closed, that the report of the Nominating Committee be adopted, and that those nominated be declared to be duly elected.

Close of Meeting

Mr. Acorn expressed his thanks to the other members of the Executive and to Mr. MacTavish for their unfailing co-operation and help on all occasions throughout the year.

He also thanked all delegates for their hard work in the preparation of reports, thus making a very real contribution in the life of the Conference.

Mr. Acorn then invited Mr. MacKay to take the chair.

Mr. MacKay thanked the delegates for elevating him to the office of president which he considered to be a great honour. He then expressed, on behalf of everyone present, sincere thanks to Mr. Acorn for his most valuable and excellent work as the presiding officer of the Conference for the past year.

STATEMENT TO THE CANADIAN BAR ASSOCIATION

by

Glen Acorn, Q.C.

Mr. President, honoured guests, ladies and gentlemen.

As Honorary President of the Uniform Law Conference of Canada, I am honoured to report to you on the activities of the Conference in the past year and in particular the work achieved in our 58th annual meeting held last week, for the first time in our history, in the Northwest Territories at Yellowknife. The Northwest Territories Government did an extraordinary job in making the arrangements for the meetings and the warmth and sincerity of their welcome and their hospitality left a deep impression on all of us. I heartily recommend Yellowknife as a location for any meeting and our Conference hopes that it will not be too many years before we have the honour of being invited back.

As a result of an arrangement worked out last year, my wife and I were privileged to attend the annual meeting of the National Conference of Commissioners on Uniform State Laws in Atlanta, Georgia a month ago. Our Conference was honoured to have with us in Yellowknife the President of the American Conference, James E. Bush of Phoenix, Arizona, and Mrs. Bush. This arrangement is expected to continue. It has now been shown to be mutually beneficial for both Conferences and has created immeasurable goodwill and understanding.

The Conference now has three sections. The new Legislative Drafting Section (formerly the Legislative Drafting Workshop) was created in the last year and held its first meeting in Yellowknife, just prior to the meeting of the Conference proper. The members consist primarily of professional legislative counsel and among the topics discussed was the enormous job facing all legislative bodies in Canada in bringing about "metric conversion" in the statutes, regulations and municipal by-laws. Another was the advancement of computerization of statutes and regulations as part of what eventually is hoped to be a computerized system of legal information that will serve all of Canada. The section re-elected Arthur Stone, Q.C. of Ontario as chairman and James MacNutt of Prince Edward Island as secretary.

The Criminal Law Section, chaired by Gordon Gregory, Q.C., of New Brunswick, consists largely of Deputy Attorneys General, senior

government lawyers involved in criminal law and a number of prominent defence counsel. This section dealt with a heavy agenda covering a wide variety of matters primarily involving the *Criminal Code.* The chairman of the Law Reform Commission of Canada, the Honourable Mr. Justice Antonio Lamer was in attendance for a part of the meeting and his participation proved to be of valuable assistance in the work of that section. Among the topics dealt with that are of particular interest to the legal profession are the following:

—Delay in the Criminal Justice system, especially in achieving speedy trials.

—Sentencing alternatives to imprisonment.

—Safeguarding the rights of the accused in the course of trial.

—Compellability of spouses to testify in battered child cases.

—Codification of the laws of evidence.

—Compensation for victims of crime.

The Criminal Law Section elected Gordon Coles, Q.C. of Halifax as its chairman for next year and Ken Chasse of Ottawa as its secretary.

The Uniform Law Section tackled an agenda that was also lengthy and, as well, very interesting. I am pleased to report that some progress was made toward the formulation of a revised *Uniform Limitation of Actions Act* which, of course, involves the matter of uniform limitation periods for actions against medical practitioners and hospitals, a matter that was referred to our Conference by the Canadian Bar Association. Your Association also referred to us the matter of Support Obligations between Husband and Wife and Parent and Child.

In 1975 this was divided into two projects. One is a revision of the present *Uniform Reciprocal Enforcement of Maintenance Orders Act.* The other relates to the factors and elements relevant to the remedies and enforcement techniques of maintenance orders. Work is well under way in both.

Substantial progress was also made on our projects on the following:

—The proposed *Uniform Personal Information Reporting Act.*

—An amendment to the *Uniform Evidence Act* dealing with the admissibility of evidence illegally obtained and evidence obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute.

—The Status of Children Born Outside Marriage.

—Powers of Attorney and Legal Incapacity.

The Conference adopted a revised *Uniform Presumption of Death Act* and an amendment to the *Uniform Evidence Act* which would allow for the admission in evidence of proof of convictions and findings of guilt and of findings of adultery or paternity and thus in effect reverse the rule in *Hollington v. Hewthorn.* By next December it will be known whether the proposed *Uniform Jurors Disqualification Act* will be finally adopted. Since the 1975 meeting, the Conference also adopted a new *Uniform Medical Consent of Minors Act* and a new *Uniform Retirement Plan Beneficiaries Act.*

At the close of its meetings, the Conference elected the following officers for the coming year:

Honorary President	Glen Acorn, Q.C., Edmonton
President	Wendall MacKay, Charlottetown
1st Vice-President	H. Allan Leal, Q.C., Toronto
2nd Vice-President	Robert G. Smethurst, Q.C., Winnipeg
Treasurer	Arthur N. Stone, Q.C., Toronto
Secretary	James W. Ryan, Q.C., St. John's

Lachlan R. MacTavish, Q.C., of Toronto has kindly consented to continue as our Executive Secretary.

Our Conference is still mindful of our beginnings in 1918 as a result of the action of the Canadian Bar Association. We are anxious that our ties with your Association should be made stronger and more varied than is the case today. It is my personal hope that our Conference will in future become much more visible to the legal profession in Canada. I am hopeful that private practitioners will assume a more active role in the Conference and in its work. It may be that when your Association requests our Conference to prepare a Uniform Act on a particular subject, a representative of your Association could participate in the work of bringing such an Act into being. I am sure the Conference would welcome ties of that kind with your Association

and that it would welcome any other ideas for greater interrelationship between us. The pressures for more uniform legislation in more and more areas of the law will surely increase with time, as our population increases in size and mobility. We welcome the help of the Canadian Bar Association in the work of making more uniform legislation become a reality in Canada in the future.

APPENDIX A

(See page 20)

UNIFORM LAW CONFERENCE OF CANADA

Legislative Drafting Section

CANADIAN LEGISLATIVE DRAFTING CONVENTIONS

(as Adopted and Recommended)

1. (1) An Act should have only one title. — One title

(2) The title should be as short as possible. — Title to be short

(3) The name of the province or the word "Government" or "Provincial" should be avoided as the first word of the title. — Words to be avoided

(4) The first word of the title should be chosen with a view to enabling it to be found easily in an index or table of contents. — First word

2. (1) Definitions that are not restricted in their application to a Part, Division or other portion of an Act should be at the beginning of the Act. — Definitions

(2) Definitions that are restricted in their application to a Part, Division or other portion of an Act should be at the beginning of that Part, Division or portion. — Idem

3. (1) Provisions respecting the application or interpretation of an Act should follow the definition section. — Application and Interpretation

(2) An Act may be divided into "Parts" to enhance its readability but should not be so divided unless the subject matter of each Part is sufficiently different from the other Parts. — Parts

(3) A special case or an exception to a general principle or statement should follow the general principle or statement. — Special cases

(4) Transitional or temporary provisions should follow the subject matter to which they relate. — Transitional provisions

(5) Provisions repealing or amending other Acts should be placed at the end of the Act but preceding the commencement section. — Repealing provisions

Commencement provisions

(6) The section dealing with the commencement or coming into force of an Act should be the last section of the Act.

Sections

4. (1) The provisions of an Act should be divided into sections numbered consecutively by Arabic numerals throughout the Act, whether or not the Act is divided into Parts.

Idem

(2) A section may be composed of either

(a) one sentence only, or

(b) two or more sentences having closely related subject matters, each called a subsection.

Subsections

(3) Subsections of a section should be numbered consecutively by Arabic numerals in brackets commencing with (1).

Clauses

(4) A sentence may contain two or more clauses indented and lettered consecutively with lower case letters in brackets commencing with (a) where the clauses are preceded by general words applicable to both or all of them.

Subclauses

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

Paragraphs

(6) A subclause may contain two or more paragraphs, further indented and lettered consecutively with upper case letters in brackets commencing with (A), where the paragraphs are preceded by general words, within the subclause, applicable to both or all of them.

Warning

(7) Clauses, subclauses and paragraphs should not be used unless it is necessary to enhance the readability of the provision containing them or to ensure grammatical precision.

Enumeration of new sections, etc.

5. Where it is necessary to add a new section, subsection, clause, subclause or paragraph to an Act, the decimal system of numbering adopted by the Conference [1968 Proceedings, pp. 76-89] should be used to designate the addition.

Internal references

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

Idem

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

Marginal notes

7. Marginal notes should be short and should describe but not summarize the provisions to which they relate.

Voice

8. In general, the active voice should be used for the enacting verb in preference to the passive voice.

Tense and mood

9. The present tense and the indicative mood should be used wherever possible.

Expressions

10. (1) An expression should be defined only where

(a) it is not being used in its dictionary meaning or is being used in one of several dictionary meanings,

(b) it is used as an abbreviation of a longer one,

(c) defining it will avoid repetition of words, or

(d) the definition is intended to limit or extend the provisions of the Act.

Idem

(2) An expression should not be defined in such a way that it is given an artificial or unnatural sense.

Idem

(3) The expression "means and includes" should not be used in a definition.

Definitions

(4) A definition should be a bare definition and should not include any rule of law or conduct.

Objects

11. (1) The objects or purposes of an Act should be capable of being ascertained from the Act as a whole.

Idem

(2) Where a separate statement enunciating the objects or purposes of an Act is used, it should be drafted with great care and should not be in the form of a preamble.

Words

12. (1) Needless words should be avoided.

Idem

(2) Where a word has the same meaning as a phrase, the word should be used.

Sentences

(3) Long, unsubdivided sentences should be avoided.

Punctuation

(4) Punctuation should be done carefully and a provision should be rewritten if a change in punctuation might change its meaning.

Words and phrases

13. (1) Short, familiar words and phrases should be used that best express the intended meaning in accordance with common and approved usage.

Idem

(2) Different words should not be used to express the same meaning.

Idem

(3) The same word should not be used in an Act in different meanings.

Pronouns

(4) Pronouns should be used only if their antecedents are clear from the context.

Possessive nouns

(5) Possessive nouns and pronouns may be used but with care.

Words to avoid

(6) The words "said", "aforesaid", "same", "beforementioned", "whatever", "whatsoever", "whomsoever" and similar words of reference or emphasis should not be used.

Idem

(7) The word "such" should be avoided where an article could be used.

Idem

(8) The device "and/or" should not be used.

Provisoes

(9) The expression "provided that" in its various forms to denote a proviso should not be used.

Unnecessary adjectives

(10) Unnecessary adjectives and adverbs should be avoided.

Latin

(11) Latin expressions should be avoided wherever practicable.

Formulae

(12) Formulae to describe mathematical processes should not be avoided.

"May"

14. (1) The word "may" should be used as permissive or to confer a power or privilege.

"Shall"

(2) The word "shall" should be used to impose a duty or express a prohibition.

Cases and conditions

15. (1) Where the operation of a provision is limited to a particular circumstance or by a particular condition, the circumstance or condition should be set out at the beginning of the provision.

Idem

(2) Where the operation of a provision is limited to a particular circumstance and by a particular condition, the circumstance should be set out before the condition and both should be set out at the beginning of the provision.

APPENDIX B

(See page 21)

EDUCATION, TRAINING AND RETENTION OF LEGISLATIVE DRAFTSMEN IN CANADA

REPORT OF SPECIAL COMMITTEE

At its meeting in August 1975, the Legislative Drafting Section, then the Legislative Drafting Workshop, adopted the following resolution:

> RESOLVED that Messrs. Walker, MacNutt, Macaulay and Hoyt form a committee, with Mr. Walker as chairman, to prepare a report for the next meeting upon the education, training, and retention of legislative draftsmen in Canada
>
> RESOLVED that the Executive invite Dr. Driedger to attend the next meeting for a discussion of education available for legislative drafting and problems involved.

The Committee made progress rapidly and by the middle of January 1976 had succeeded in reducing itself to three members as Mr. George B. Macaulay ceased to be responsible for legislation in Newfoundland. Mr. Hoyt and myself, exercising what little prerogative we thought we might have, added to the Committee Mr. James W. Ryan, Q.C., who has been engaged to prepare legislation for the Province of Newfoundland and Labrador.

The reconstituted Committee discussed the matter by telephone on several occasions and succeeded in having a meeting in Halifax on March 9 of this year. At that time the Committee reviewed two documents, namely, a "Report on Legislative Drafting Services in Trinidad and Tobago—1960-1961" prepared by J. W. Ryan, then Legislative Counsel for the Province of Alberta and "The Preparation of Legislation" being a report of a committee appointed by the Lord President of the Council presented to the British Parliament in May of 1975.

It is the view of your Committee that although more recent information is required to prepare a final report, that many of the matters with which the Committee will be dealing are set forth in the Report prepared by Mr. Ryan at pages 44-60.

Your Committee makes the following recommendations:

(1) That the Committee continue to be constituted so that it may prepare a final report for the meeting in 1977;

(2) That consideration be given to the suggestions, recommendations and comments made by Mr. Ryan in his report on Trinidad and Tobago to determine their relevance to the Canadian situation;

(3) That more recent information be acquired concerning matters relevant to the study; and

(4) That the President of the Uniform Law Conference of Canada be authorized at the request of the Chairman of the Legislative Drafting Section to invite Dr. Elmer A. Driedger, Q.C., to attend the 1977 meeting for a discussion of the final report.

Material attached for reference:

(1) Pages 44-60 inclusive of Ryan Report on Trinidad and Tobago;

(2) Copy of letter dated July 8, 1976, addressed to Dr. Elmer A. Driedger, Q.C., concerning this matter; and

(3) Copy of Dr. Driedger's reply of July 19, 1976.

August 1976

Graham D. Walker
Mel M. Hoyt
James W. Ryan
James MacNutt

NOTE: As the material attached to the above report is on file in the office of the Executive Secretary, it is not reproduced in these Proceedings.

1976

APPENDIX C

(See page 21)

UNIFORM INTERPRETATION ACT, SECTION 1

REPORT OF MR. ROGER

While the Uniform Law Section of the Conference was considering the adoption of the *Uniform Statutes Act* at last year's meeting in Halifax, a question arose about the applicability of the definitions in section 1 of the *Uniform Interpretation Act* (page 276 of the 1973 Proceedings) to other Acts of the province.

The particular point at issue was whether in the opening words of the *Uniform Statutes Act* it was necessary to modify the word "Act" by the words "of the Legislature" in view of the fact that "Act" is defined in the *Uniform Interpretation Act* to mean an Act of the Legislature. It was argued that the words "In this Act," preceding the definitions in section 1 constitute "a contrary intention" referred to in section 3(1) respecting the applicability of the section 1 definitions to other enactments.

When British Columbia enacted the *Uniform Interpretation Act* in 1974 we were sufficiently in doubt about the general application of section 1 definitions to clarify the matter by expanding the opening words: "In this Act, or in an enactment,". Thus there is no doubt in British Columbia that the section 1 definitions of the *Interpretation Act* apply to all enactments.

Having worked under the *Uniform Interpretation Act* for the last two years we know that we have relied extensively on the section 1 definitions of "enactment" and "regulation", and to a lesser extent on the definitions of "Act", "enact" and "public officer".

It may well be that the original intention of the Conference was that the section 1 definitions would be restricted in their application to the *Interpretation Act* itself, but because of their usefulness for purposes of general application we think that the section 1 definitions should have a wider application. One is tempted to argue that if the definitions in section 1 and in section 26 are to have general application then they should be contained in the same section. On the other hand, it is true that the section 1 definitions are of particular significance to the interpretation of the *Interpretation Act* itself and their placement in a separate section, at the beginning of the Act, serves a useful function.

In any event, if the Legislative Drafting Section agrees with the B.C. Commissioners that there is value in having the section 1 definitions apply generally, we recommend an amendment to the *Uniform Interpretation Act* so that the opening words read "In this Act, or in an enactment," or, more simply, "In an enactment,". The latter version is the same as in section 26 of the Act.

12 July 1976

Allan R. Roger
B.C. Commissioner

APPENDIX D

(See page 21)

Jurors: Qualifications, Disqualifications and Exemptions

I

MANITOBA REPORT

At the 1975 Conference this matter was referred to Manitoba to prepare a draft uniform Act for consideration at the 1976 annual meeting. At the 1975 Conference it was also resolved that the matter should be referred to the Legislative Drafting Section of the Conference.

Each province has an Act dealing with jurors and juries. The provisions relating to qualifications, disqualifications and exemptions for jury duty are confined to a few sections of those Acts. The majority of the provisions in the Acts deal with procedures for selection of jurors and impanelling of juries. Therefore the matter which was referred to Manitoba was primarily the preparation of draft provisions which might be included in a Jury Act containing many other provisions not affecting the qualifications, or disqualifications or exemptions from jury duty. The attached draft is submitted on that basis.

Section 1 of the draft sets forth the basic qualifications. Last year there was unanimity on the requirement of residence in the province concerned and citizenship. There was some discussion as to the age qualification. The minimum age should of course be the age of majority in the province concerned. At the present time some provinces have no maximum age. In other provinces the ages of 65 and 69 are mentioned as maximum age. Alberta provides that a person over 60 years may claim a right of exemption from service on a jury. The consensus at last year's meeting was that by placing an age restriction of 65, a great many active people who are capable of serving as jurors in their early years of retirement would be excluded. The age of 75 is suggested as a maximum age.

The grounds for disqualification follow very closely what was suggested last year. There was some discussion on the grounds of disqualification but generally what was recommended was approved.

The disqualification based on inability to understand the language in which the trial will be conducted is set out in a separate provision. This was done because the nature of the reason of disqualification is different from the reasons set out in section 2 of the attached draft.

The grounds for exemption from jury duty are those suggested in last year's report with one further ground — incapacity by reason of ill health. Some further amendment may be required to the various Juries Acts to provide for nature of proof for any grounds of exemption and the procedure for claiming exemption.

One further ground of exemption is suggested for consideration — candidacy in an election for members of Parliament or the Legislative Assembly between the date of the issue of the writ of election and the date of the return of the writ of election.

R. H. Tallin
for the Manitoba Commissioners

July 1976

NOTE: The draft Act attached to the above report, which was the draft Act considered in the Legislative Drafting Section is not reproduced in these Proceedings by direction of the Uniform Law Section.

What follows as II is the draft Act reported back by the Legislative Drafting Section to the Uniform Law Section as amended and then adopted and recommended for enactment by the latter.

II

UNIFORM JURORS ACT

(Qualifications and Exemptions)

(As Adopted and Recommended for Enactment)

Jury duty

1. Every person has the right and duty to serve as a juror unless disqualified or exempted under this Act.

Disqualification

2. A person is disqualified from serving as a juror who is

(a) not a Canadian citizen;

(b) not resident in the province;

(c) under the age of majority;

(d) a member or officer of the Parliament of Canada or of the Privy Council of Canada;

(e) a member or officer of the Legislature or of the Executive Council;

(f) a judge, magistrate or justice of the peace;

(g) an officer or employee of the Department of Justice or of the Solicitor General of the Government of Canada;

(h) an officer or employee of the Department of the Attorney General of the Government of the Province;

(i) a barrister or solicitor;

(j) a court official;

(k) a sheriff or sheriff's officer;

(l) a peace officer (*or* member of a police force);

(m) a warden, correctional officer or person employed in a penitentiary, prison or correctional institution;

(n) a spouse of a person mentioned in clause (f), (g), (h), (i), (j), (k), (l) or (m);

(o) afflicted with blindness or deafness or a mental or physical infirmity incompatible with the discharge of the duties of a juror;

(p) a person convicted within the previous five years of an offence for which the punishment could be a fine of one thousand dollars or more or imprisonment for one year or more, unless he has been pardoned; or

(q) charged with an offence for which the punishment could be a fine of one thousand dollars or more or imprisonment for one year or more.

Language difficulty

3. Where the language in which a trial is to be conducted is one that a person is unable to understand, speak or read, he is disqualified from serving as a juror in the trial.

Grounds for exemption

4. A person may apply to be exempted from serving as a juror on the grounds that

(a) he belongs to a religion or a religious order that makes service as a juror incompatible with the beliefs or practices of the religion or order;

(b) serving as a juror may cause serious hardships or loss to him or others.

Exemption for person over 75

5. A person over the age of seventy-five years shall, on application, be exempted from serving as a juror.

***NOTE:** The Act should provide procedures by which persons may claim and be granted exemption.*

APPENDIX E

(See page 22)

METRIC CONVERSION

REPORT OF MESSRS. STONE AND TUCKER

At the 1975 meeting of the Legislative Drafting Section, the Metric Conversion Committee (Messrs. Ryan and Stone) was continued with instructions to report on developments in metric conversion in the various jurisdictions.

The committee requested information from all jurisdictions and has the following to report:

1. The Alberta Department of Government Services has a Metric Branch which has been identifying measurement provisions in statutes and regulations. This Branch also advises government departments with respect to metric conversion. The head of the Metric Branch has discussed the metric conversion program with the Office of the Legislative Counsel.

   There are now some highway signs in Alberta that indicate distances in kilometres.

   The Office of Legislative Counsel was recently advised that the first of a series of metric conversion bills may be introduced into the Alberta Legislative Assembly this fall.

2. In British Columbia, the *Land Registry Act,* the *Municipal Act* and the *Vancouver Charter Act* were amended during the spring session this year to allow the Lieutenant Governor in Council by regulation to authorize the substitution of metric measure for measurement provisions in those Acts on the basis of either the numeric equivalent or of a rationalization of the measurement for practical use.

3. Canada is proceeding with conversion of measurement provisions in statutes and regulations under authority of a Cabinet Directive which calls for an annual metric conversion bill in each of the four years commencing with this year. The first conversion bill is expected to be introduced in the autumn.

   This program was announced in a press release issued in March of this year by the Minister of Industry, Trade and Commerce.

4. Manitoba's Legislative Counsel has attended several meetings of the Manitoba Provincial Committee on Metric Conversion.

   Manitoba's *Interpretation Act* has been amended to provide a definition of "International System of Units (SI)".

   The *Real Property Act* was amended to give authority to the Registrar General to require that any measurement on a plan or instrument presented for registration or filing be expressed in the International System of Units.

   The *Crop Insurance Act* was amended to delete references to "acreage" and substitute "area" and "land" and to replace "bushels" with "kilogram or other specified quantity".

   There have also been some changes in regulations to convert measurement references to the International System of Units.

   The preparation of some form of general legislation to change from the present measurements to the International System of Units is being considered for the next session of the Manitoba Legislature.

5. New Brunswick reports that it is organized for metric conversion and is apparently ready for implementation.

6. Newfoundland's Director of Metric Conversion has completed an inventory of legislation in connection with metric conversion and a member of the staff of the Ministry of Justice will be meeting with the Director to discuss preparation of the legislative program to accomplish metric conversion in the next several years.

7. Northwest Territories reports completion of a computer search of all N.W.T. legislation to identify all measurement provisions that may require conversion into metric units.

   N.W.T. has a metric conversion co-ordinator and heads of departments and agencies have been asked to recommend amendments for metric conversion and the timing of the amendments.

8. Nova Scotia reports attendance of a member of the Office of Legislative Counsel at the Intergovernmental Metric Conversion Committee meeting held in St. John's, Newfoundland on July 6th and 7th of this year.

9. In Ontario, the regulations under *The Land Titles Act, The Certification of Titles Act, The Registry Act* and *The Condominium Act* have been amended to provide for the use of metric measurements.

   The Education Subcommittee of the Ontario Interministerial Metric Committee has produced a "Metric Practice Guide" for use in the Ontario Public Service.

   The Ministry of the Attorney General is represented on the Interministerial Metric Committee by a member of the Office of the Legislative Counsel. This representative is also chairman of the Interministerial Committee's Subcommittee on Legislation. A report by the Subcommittee on the conversion of references to measurements and standards in legislation and subordinate legislation was accepted by the Interministerial Metric Committee in June, 1975. In June, 1976 a commentary paper was prepared by the Subcommittee chairman and it and the report upon which the commentary were based were submitted as position papers by the Ontario Provincial Co-ordinator of Metric Conversion to the Intergovernmental meeting mentioned in item 14 of this report.

10. Quebec supplied material to the committee indicating that the ministries of the Government of Quebec are proceeding with the four-phase program of metric conversion, i.e. Investigation, Planning, Scheduling and Implementation, recommended by the Metric Commission.

11. In Saskatchewan an interdepartmental committee has been established and the Legislative Counsel has been discussing with the committee the preparation of legislation for metric conversion.

12. Yukon Territory sends representatives to intergovernmental meetings on metric conversion.

    The ordinances that will require amendment for metric purposes have been identified.

    The timing of amendments to ordinances involves input from the private sector and the pace of metric conversion in the provinces. The Council meets twice a year and legislative time should not be a problem.

13. Prince Edward Island has established an Interdepartmental Committee on Metric Conversion and responsibility for co-

ordinating government activity rests with the Department of Education.

Most of the activity has been within the departments of Public Works, Highways and Education. A large number of highway signs have been converted to indicate distances in kilometres and some highway surveying and construction is being conducted in metric units. The mathematics program for grades 4 through 9 is in metres.

None of the changes implemented to date in P.E.I. have required any legislative amendments.

14. On July 6th and 7th, 1976, the Intergovernmental Metric Conversion Committee met in St. John's, Newfoundland. A number of the committee members were accompanied by lawyers and these lawyers were appointed as an *ad hoc* subcommittee to meet and report back to the committee. Schedule 1 is the report of this subcommittee.

Toronto
30 July 1976

A. N. Stone
Sidney Tucker

SCHEDULE 1

Report to: The Twelfth Meeting of The Intergovernmental Metric Conversion Committee.

By: The *Ad Hoc* Subcommittee on Legislation.

At its meeting on July 7th, 1976 the Intergovernmental Metric Committee appointed the lawyers present as an *ad hoc* subcommittee on legislation with Sidney Tucker of Ontario as chairman. The subcommittee was directed by the chairman of I.M.C.C. to meet apart from the Committee, to discuss and to report on the following as they relate to metric conversion:

1. Input.
2. Uniformity.
3. Terminology.
4. Drafting technique.
5. Advance notice.

The subcommittee was composed of:

Sidney Tucker of Ontario (chairman).

Richard Larson of Alberta.

Dennis Pratt of Canada; Industry, Trade and Commerce.

Bob Cosman of New Brunswick.

Ron Penney of Newfoundland; Justice.

Bill Macdonald of Nova Scotia.

The subcommittee met and deliberated as instructed and reported as follows:

1. Input

The subcommittee was of the opinion that the procedure for legislative change is not generally understood by those not involved in the legislative process.

The subcommittee recommended that the metric co-ordinator in each jurisdiction should communicate to those involved with metric conversion in his jurisdiction a procedure to be followed in initiating a legislative change for metric conversion.

The subcommittee also recommended that communication with sector committees should be stressed.

2. Uniformity

The subcommittee was of the opinion that uniformity is a matter of co-ordination and co-ordination can be achieved through communication. The subcommittee recommended that there be communication between jurisdictions before legislation is prepared, so that in any given jurisdiction both those making the decisions and those carrying out the decisions will be aware of what is taking place in the other jurisdictions.

3. Terminology

The subcommittee noted that terminology is based on the *Weights and Measures Act* (Canada) and the style guides.

The subcommittee was of the opinion that, while there may be minor variations from jurisdiction to jurisdiction, the legislative draftsmen will rely on the law and the style guides.

4. Drafting techniques

The subcommittee was of the opinion that a general statute providing for an overall soft conversion of all references to measurements in the statutes of any jurisdiction is not practical.

The subcommittee noted that the Uniform Law Conference of Canada has a committee to keep the legislative draftsmen in Canada aware of progress in metric conversion.

The subcommittee was of the opinion that each reference should be looked at separately and that each jurisdiction should choose the legislative conversion technique best suited to the needs of that jurisdiction.

5. Advance notice

The subcommittee was of the opinion that rather than advance notice of regulations, what is needed is advance consultation before the decisions are made for legislative changes.

The subcommittee recommended that metric co-ordinators stress that departments of governments should encourage input from sector committees.

6. Municipal by-laws

This subject was discussed briefly by the subcommittee at the request of one of the members of the subcommittee.

It was suggested that municipalities might wish to take the opportunity to update or consolidate by-laws that are amended for the purpose of metric conversion.

The subcommittee noted that the cost of metric conversion of by-laws might be of major importance to some municipalities.

The subcommittee decided to report to the Committee that the metric conversion of municipal by-laws is a subject that still remains to be examined in depth.

APPENDIX F

(See page 23)

ADDRESS OF GLEN ACORN, Q.C.

President of the Uniform Law Conference of Canada to the Opening Plenary Session of the 58th annual meeting of the Conference in Yellowknife, Northwest Territories on August 23, 1976

It is a great honour to address you on the occasion of our first meeting in the Northwest Territories in our fifty-eight years of existence. When I assumed the office of president just before the close of our meeting last year in Halifax, the fact that I had to catch a taxi to the airport within ten minutes forced me to be brief, so brief that I felt I did not really do justice to Robert Normand, the retiring president, in congratulating him for the excellent work he did during his term of office. I want to remedy that now.

Robert Normand a été un membre de la Conférence depuis 1963 et comme peu parmi nous a substantialement contribué a la section des lois uniform lorsqu'il était conseil législatif et la section des lois criminels dans son capacité de sous-ministre, ministère de la justice, gouvernement du Québec. Comme membre du comité exécutif pendant cinq ans et comprennent un terme de président, il a grandement contribué a la Conférence en général. C'étais un très grand plaisir de travaillier avec lui sur le comité, especialement durant son terme de président, par son enthusiasme et son désire pour le succès et le progrès de la Conférence. Il c'est acquitter de son devoir de président avec énergie et imagination. Il manquait jamais d'idées.

Pendant les sept dernieres années, deux de nos présidents étaient de la province de Québec (Emile Colas en 1970). C'est un indication positif du support que Québec a donne a la Conférence, mais surtout par la reconnaissance des membres de la Conférence que Québec, avec sa code civile, a un très grand role a jouer pour accomplir les aspirations de notre Conférence.

In particular, I must thank Robert for taking the initiative last year in setting up the new reciprocal arrangement under which our Conference and our counterpart organization in the United States, the National Conference of Commissioners on Uniform State Laws, will send a representative to each others annual meetings. I was the first beneficiary of this arrangement and accordingly I attended the meeting of the American Conference in Atlanta, Georgia earlier this month

along with my wife June and my daughter Annalise. It is a great honour for us to have with us in Yellowknife the president of the American Conference, James E. Bush of Phoenix, Arizona, and his wife Jean. From my experience in Atlanta, there is no question in my mind that this exchange will be of great benefit to our Conference and it is our hope that the American Conference will find it to be a positive gain as well. My family and I were given a warm and sincere welcome in Atlanta and were treated by everyone with the utmost kindness and courtesy. Our hope is that Mr. and Mrs. Bush will leave here with the feeling that they have been among good friends who have treated them graciously, as graciously, I hope, as my family and I were in Atlanta.

In 1950 our Conference and the American Conference held their respective annual meetings in Washington, D.C. at the same time and in close proximity to one another. It is my earnest hope that we can work out a similar arrangement again.

My experience in Atlanta was highly enlightening, as I was told it would be both by Lachlan MacTavish and Mel Hoyt, who attended their meetings on past occasions and by Wilbur Bowker who attended in 1965. In his 1965 presidential address Wilbur Bowker said of the American Conference "One must admire the good organization, the businesslike and intensive plenary sessions, the hardworking sections and special committees, and the procedures in moving from initial proposals to Uniform Acts. And one must envy their access to outside organizations and individuals to help on specific projects, and also the availability of large sums of money to further their work." That statement holds true today. Naturally, their organization is much larger than ours (some 280 commissioners, associate members and advisory members, of whom 180 or so attended in Atlanta) which necessitates a more structured setup and more formalized procedures than we are used to. The budgeted contributions from the states totals more than $370,000, ranging from contributions of $2,200 by Alaska and Wyoming to $28,700 by California. Their 1975 Reference Book showed they have special committees for 34 separate projects. Some are more active than others and some projects have been dropped. Special committees meet in the course of the year, often several times. The expenses of committee members are paid by the Conference funds, but in some cases a project can only be taken on if they are able to raise money gifts from outside sources. Their Executive Committee determines what will be put on the program for the annual meeting. Thus, out of their large number of projects only seven were on

the program for the meeting which covered seven days, including night sessions on at least two occasions. I was impressed not just by the size of their Conference and its intricate organization, but with the enormous energy and time that their members voluntarily give to its work, not only in their sessions at the annual meeting but during the course of the year. By way of illustration, the first three days at Atlanta were devoted to consideration of a draft of the *Uniform Class Actions Act.* The 13-member special committee had worked on the draft for over two years before it was put on the program for the annual meeting in 1975. The Committee met several times in the past year. The special committee's draft had in turn been studied by a Review Committee which reported to the 1976 meeting. When a draft Act comes before the annual meeting, the session resolves itself into committee of the whole and the special committee sits on the platform to explain and defend their draft and to note suggestions for changes. There were sharp, philosophical differences of opinion that became apparent in the debate, which was marked by frequent votes and points of order. These same differences of opinion had arisen in the committee's previous deliberations to such an extent that at least one of its members chose to sit with his delegation on the floor rather than with the committee on the platform. After clause-by-clause consideration was concluded, the special committee met to consider the changes made or suggested during the committee of the whole, reported back with the changes and a redraft incorporating them. On the second last day, there was a vote by states on the Act. It was adopted by a substantial majority.

The members of the Criminal Section particularly might be interested to know that the American Conference also had on its program the draft *Uniform Corrections Code* which, I am told, contains a markedly innovative approach to prisoner's rights.

We can benefit a great deal by emulating the American Conference in some ways as my following remarks will indicate. You may ask what their Conference can learn from ours and my answer, based on my conversations with a number of people in Atlanta, would be that their Uniform Acts would be that much better if experienced professional legislative draftsmen were involved in their preparation from the earliest stages.

I would like to now turn to the state of our own Conference. In past years, much concern was expressed over the direction the Conference was taking, its underlying validity and whether it was or was not succeeding in its objectives. These feelings came to a head in

1971, I believe, but since then there has been a noticeable change. We have ceased to engage in navel-gazing and soul-searching and have started looking outward. In my view, this has been due to a number of factors. The appointment of Lachlan MacTavish as our first Executive Secretary was an important one. The generous gift of research funds by the Federal Government to our Conference was another, because it was a vote of confidence in our Conference. A most significant factor in my view, has been tied to the dramatic rise in the advancement of law reform in Canada starting in the mid-1960's. Since then, representatives of most, if not all, of the provincial law reform bodies have become members of our Conference. They have given it new life. As well, the work of the Law Reform Commission of Canada may eventually result in the change of the face of our criminal law in a way that would have been thought incredible ten years ago. Our Conference is, thankfully, now a part — a key part, I suggest — in the advancement of law reform in Canada. As well, our Conference is more and more involved in the work of preparing Uniform Acts that will implement conventions in private international law to which Canada is a party. The Conference is in a unique position to advance that work effectively. These are positive indications that this Conference has important reasons to exist and important purposes to carry out. The necessity and desirability of uniform laws in this country is important to the people of Canada. My own reading of things indicates to me that our Conference has picked up momentum and in doing so has found new health and a positive direction.

The question now is: how can we best maintain that momentum, improve the way we operate and advance our aims? Let me put forward some ideas on the subject for your consideration.

I am convinced that this Conference has maintained a "low profile" for too long. It needs to be more visible to the legal profession, the judiciary and legislators. It needs to make them more aware of its past achievements and its current projects. To do this, we must increase our stature in their eyes.

The Conference has for most of its life taken the attitude that it should not actively promote the enactment of its Uniform Acts, that it should simply produce its handiwork and leave it to others to do the work of seeing that they become enacted. The achievement of uniform laws in Canada has apparently suffered from that attitude because those "others" who were supposed to promote the enactment of Uniform Acts too often either were not there or did not bestir them-

selves to do it. If we had actively promoted the enactment of our products over the years, the Tables of Uniform Acts in the Proceedings would look much different today. The American Conference takes an active role in this area and has a Standing Legislative Committee of 59 members, including 52 liaison members from each jurisdiction, whose main job is to endeavour to secure the enactment of their Uniform Acts.

As a start in this direction, I have in recent months written to the Attorneys General and Ministers of Justice of all provinces and to the Commissioners of the Yukon and Northwest Territories to ask them to review those Uniform Acts that have not been enacted in their jurisdictions with a view to recommending them to their respective governments for enactment. I hope this produces some results. It is, however, only a start and must be followed up.

A few years ago we agreed to promote the inclusion of an editorial note after each statute based on a Uniform Act. I hope this practice has been adopted throughout Canada. If it hasn't, it should. There is no point in our being anonymous. If those notes do not appear in the statutes, how is the legal profession to appreciate the fact that the law is intended to be uniform with other jurisdictions in Canada and that the proceedings of our Conference could be a useful source of research material?

We must also be more assiduous in seeking ways to make use of the research funds that were given to us. We have barely touched them. It is my hope that the Federal Government will not interpret this as an indication that we do not appreciate the gift or that we did not need the money that badly in the first place.

We should also be concerned with how the legal profession generally regards our Conference and of their awareness of what we are trying to achieve. If private practitioners and corporation staff lawyers do not show any special interest in uniformity of legislation, we have to seriously ask ourselves why. At least as regards private practitioners and staff lawyers serving corporate clients doing business in all or most jurisdictions in Canada, are they willing to tolerate the jungle of dissimilar statutes in so many fields of law or are they not willing to promote uniformity even though they might desire it? On the other hand, what fault can we attribute to ourselves? Does the composition of our Conference make it appear to others to be a government-dominated body? The American Conference is dominated by private practitioners who make up two-thirds of its Commissioners. (The remaining third consist mostly of law teachers and judges. Some Com-

missioners are also members of state legislatures. Government lawyers, especially, legislative draftsmen are usually appointed as associate members, without voting rights.) The composition of our Conference is quite different. The 1975 Proceedings show that over two-thirds of the members and observers are employees of the governments, 10% are with law reform bodies and 16% are private practitioners. Of course, the Criminal Law Section is composed mostly of Government lawyers but even then, the persons attending the Uniform Law Section last year consisted of 63% government lawyers and 15% private practitioners. Let me hasten to point out that the government lawyers come here as individuals free to act on their own without any political direction, but nevertheless my concern is what our Conference *appears* to be to outsiders and there would be a greater interest by the legal profession in our Conference if more private practitioners were members of it.

Apart from that, there may be other ways to involve private practitioners in our work. This could come about by increased contacts with the Canadian Bar Association. The American Conference appears to me to have somewhat closer ties, comparatively speaking, with the American Bar Association. Representatives of the American Bar Association attend meetings of the American Conference and often sit as advisory members on a special committee for a Uniform Act. In some cases a Uniform Act is sent to the House of Delegates of the American Bar Association for approval. The approval, while it is not necessary, helps to "sell" the Uniform Act to the various states. It may be that, when the Canadian Bar Association shows a desire for uniform laws in a particular area that we should have their representatives involved in the preparation of the draft Uniform Act and in the discussion of it at our annual meetings. If there are other ways of involving practitioners, they should be explored.

In summary, then, our Conference is a healthy, vigorous organization that needs to maintain its momentum and increase its stature if the work of achieving more uniform laws in Canada is to be advanced. This work needs to be taken more seriously than it is. The pressures for more uniform legislation in more and more fields of law will surely become greater as time goes on. These pressures stem from the increased mobility of our population in Canada and the increase in business activity between jurisdictions. If Canada had 50 provinces instead of ten, the work of achieving uniform legislation would be taken as seriously as it is in the United States. I am satisfied that, given the amount of time and energy that we presently

devote to this Conference, we would produce good results. To improve those results we must be prepared to devote more time and energy between our annual meetings. As the pressure mounts for more uniform legislation in Canada, it is our Conference that must provide that additional time and energy and, most importantly for the benefit of the people of Canada, the leadership needed to see that more uniform legislation throughout Canada becomes a reality.

APPENDIX G

(See page 23)

TREASURER'S REPORT
for the year ending August 16, 1976

GENERAL ACCOUNT

BALANCE ON HAND August 12, 1975			$19,907.26
RECEIPTS			
Annual contributions (including Alberta's for 1976-1977)			18,750.00
Bank interest			1,421.27
DISBURSEMENTS			
1975 Proceedings		$ 9,940.40	
1975-76 Letterhead		129.65	
Binding for set of Proceedings		233.00	
President — advance on expenses re NCCUSL Meeting		320.00	
Treasurer and Secretary telephone calls		34.12	
Executive Secretary			
Expenses attending 1975 Meeting	$ 586.28		
Petty Cash	250.00		
Typewriter	109.20		
Secretarial Services	2,600.00		
Honorarium	8,000.00		
	$11,545.48	$11,545.48	
TOTAL RECEIPTS AND DISBURSEMENTS		$22,202.65	$40,078.53
BALANCE ON HAND August 16, 1976		$17,875.88	
		$40,078.53	$40,078.53

UNIFORM LAW CONFERENCE OF CANADA

RESEARCH FUND

RECEIVED IN GRANTS

1974-75-76		$75,000.00

DISBURSEMENTS

1974-75	$3,152.00	
1975-76	700.00	
	$3,852.00	3,852.00
BALANCE IN FUND		$71,148.00
FUND HELD		
1-year term deposit		$26,885.27
30-day term deposit		40,271.23
Bank account		
Grant portion ...	$3,991.50	3,991.50
Accrued interest ..	5,769.04	
	$9,760.54	$71,148.00

Arthur N. Stone
Treasurer

E. & O.E
ANS: KE
August 16, 1976

APPENDIX H

(See page 23)

SECRETARY'S REPORT

Reports on the work of the Conference have been submitted during the past year to the Canadian Bar Association publication, "The National", and to CBA Provincial Chairmen.

In accordance with the Resolution passed at last year's meeting your Treasurer, Arthur Stone, and I, considered one request for research funds from the B.C. Commissioners. This was for the sum of $700 so that they could retain Mr. Keith Farquhar to perform research in connection with their study on Children Born Outside Marriage. The expenditure was approved.

I might say in passing that it is apparent that the Conference's research funds are not being used as anticipated. These funds are available for worthwhile research in order to improve the quality of research and to enable it to be expedited, thus helping to further the work of the Conference.

Other matters of a secretarial nature will be reported to you by our hardworking and diligent Executive Secretary, Lachlan MacTavish.

Robert E. Smethurst

Winnipeg
22 August 1976

APPENDIX I

(See page 23)

EXECUTIVE SECRETARY'S REPORT

This report covers my third year as your Executive Secretary. As was the case of its predecessors, the past year has been both interesting and busy.

The four tables that were substituted in last year's Proceedings for the old Table of Model Statutes have been well received. However, I hope to discuss ways of improving the presentation with some of you Commissioners and with the Executive during the week here in Yellowknife. I would appreciate comments and suggestions from any of you. The target is, of course, to make the material as complete and as accurate as possible and presented in a way that is quickly understandable.

The several pleas of the President and myself for each jurisdiction to check Table IV has, I am sorry to say, largely fallen on deaf ears as only British Columbia, Newfoundland and Ontario have done their homework and responded. Again I urge the Local Secretaries to get cracking and arrange to get this job done — after all, it is only a few minutes work for anyone familiar with the statutes of his particular jurisdiction.

So far as improving the Cumulative Index is concerned, some progress has been made during the year, but a great deal more remains to be done. I have some ideas for changing the format which I have discussed with the Executive; these will be introduced in the 1976 Proceedings.

A great deal of time-consuming research and editorial work of a preliminary kind has been done in connection with the publication of an up to date collection of our Uniform Acts. The copy runs to some 500 pages which, of course, means a book of some 250 pages. This work has been made difficult and slow by reason of the fact that heretofore, believe it or not, the Conference has not had a comprehensive style code for its own product, thus each uniform act has been prepared and adopted in the style of the jurisdiction that did the drafting. The Legislative Drafting Section has been most helpful to me in an attempt to remove these anomalies.

A new feature of the 1975 Proceedings was the addition, following the Historical Note, of a list of articles and so on that have appeared in legal literature on the Conference and its work. This inovation has been well received and will be extended. Please let me have any additions that you may know of as obviously this feature should be as complete as possible.

The Mailing List is more active these days than one would expect and it is increasing in length; it now contains some 300 names. Additions have come from Africa, Australia, West Germany and the United States with a half dozen or so in Canada. Requests for back numbers of the Proceedings come in frequently and cannot always be filled, but we do our best. Should you come across copies of Proceedings of any year, please send them in to the office.

Let me again draw to your attention the great job the Attorney General of Ontario and his Deputy and the Legislative Counsel's Office are doing for this Conference in the many ways that I have particularized in previous annual reports. I am happy to say that accommodations, supplies and services are continuing at no cost to the Conference.

Once again I thank each of you for your forbearance of my faults, for your compassionate attitude towards my errors of commission and omission, and for your co-operation, all of which has made the doing of the chores of the Conference an enjoyable task for your hired man.

Lachlan MacTavish

Toronto
1 August 1976

APPENDIX J

(See page 28)

CHILDREN BORN OUTSIDE MARRIAGE

I

BRITISH COLUMBIA REPORT

INTRODUCTION

In 1973, the following item appeared on the agenda of the Conference of Commissioners on Uniformity of Legislation in Canada (as it then was), under the heading of "New Business."[1]

> 25.(b) Submission by Mrs. W. L. Porteous, Ottawa on "Need for Reform in Laws regarding Illegitimates in Canada."

After a consideration of this item the Conference resolved:[2]

> THAT this matter be referred to the Ontario Commissioners to submit a report at the 1974 meeting. . . .

At the 1974 meeting Mr. Leal presented the Report of the Ontario Commissioners,[3] and it was:[4]

> RESOLVED that the British Columbia and Ontario Commissioners jointly analyse the various law reform commission reports on this subject as they become available and report to the 1975 meeting as to each principle covered in these reports and as to the disposition or solution offered for each such matter and to report thereon to the 1975 meeting.

As a result of this resolution Mr. Keith B. Farquhar, Director of Research of the Law Reform Commission of British Columbia, was asked by Mr. Leal to prepare a report for the British Columbia and Ontario delegates,[5] and at the 1975 meeting it was:[6]

> RESOLVED that the report be received with thanks and published in the Proceedings.
>
> RESOLVED that the matter be referred back to the British Columbia delegates to prepare a report for consideration at the 1976 annual meeting setting out therein the questions of policy involved and their recommendations with respect thereto.

The British Columbia delegates asked Mr. Farquhar to undertake the task of setting out the policy questions, and the following is submitted in compliance with that request.

POLICY CONSIDERATIONS

A. *Introduction*

Readers may recall that the report submitted at the 1975 meeting summarised in some detail the recommendations and proposals for

change advanced in British Columbia, New Brunswick, Newfoundland, Ontario and Quebec. For the purpose of reducing the length of the document here presented it will be assumed that the Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference (1975) are to hand and that it is not necessary to restate all the positions taken by all five provinces on the various issues at stake. Instead, references will be made, where appropriate, to the page or pages of the 1975 Proceedings where the various provincial positions appear.[7]

At the outset the *caveat* should be entered that this is a difficult area in which to present policy questions in a strictly logical order, as there are many issues to be decided, and many of them are closely interrelated. It may be, therefore, that the response to an early question may change as the result of a response to a later question. Every effort has been made to eliminate the necessity for this by making the line of questions as logical as possible, by cross-referencing and by making the text surrounding each question as full as is consistent with producing a document of manageable size, but in the end no guarantee can be offered that some readers will not want, or be obliged, to change their responses to an early question as a result of considering later questions.

B. *Any Reform At All?*

The first question which must be asked is whether the Conference is in favour of any reform at all. The writer has been able to discover no actual statement by the Conference as a whole that it is in favour of change, although the presence of the matter on the Conference's agenda, together with subsequent requests for reports, may indicate a predisposition towards change.

It should be pointed out, however, that the *legal* disabilities suffered by children born outside marriage have been considerably reduced over the years, and are now concentrated in the law relating to inheritance, particularly in the matter in intestate succession. In the areas of guardianship, custody and adoption children born outside marriage are generally treated differently from children born inside marriage, inasmuch as the father has less control over events and the mother is the focus of the law's attention, but some might say that change here would be more for the benefit of the father than for the child.

Arguments commonly advanced against change are:

(i) that it will tend to remove respect for legitimacy and therefore for marriage and family life;

(ii) that it will lead to increased promiscuity; and

(iii) that an intestacy is a voluntary act by which parents consciously decide to benefit children born to them in marriage and to exclude their other children.

Arguments in favour of change generally centre on the view that the present law is discriminatory, and that this discrimination is particularly pernicious because the child is not responsible for his position.

It should also be pointed out that in the four provinces where law reform agencies have made what may be described as sweeping proposals for change, these proposals have to date remained unimplemented. This may indicate something of the nature of the "politics" of change and may influence some in arriving at a decision on whether the delegates to the Conference believe the formulation of a Uniform Act to be a useful exercise.

Question 1. Do the Commissioners believe that the formulation of proposals for change is:

(a) useful; and

(b) desirable?

C. *Sweeping or Piecemeal Reform?*

The next most fundamental question is whether an attempt should be made at abolishing the status of illegitimacy, or whether it is sufficient merely to retain the status but minimise or abolish the disabilities attaching to it.

It is notable in this connection that law reform agencies in British Columbia,[8] New Brunswick,[9] Ontario[10] and Quebec[11] have recommended that the status of illegitimacy be abolished, although Newfoundland has not.[12] Elsewhere the abolition of status approach has been taken in New Zealand[13] and the Australian States of Tasmania[14] and Victoria,[15] while law reform agencies in both South Australia[16] and Queensland[17] have recommended similar legislation. By contrast, England[18] and Western Australia,[19] acting on the advice of law reform agencies,[20] have preferred simply to improve the lot of the child born outside marriage in relation to the laws of inheritance.

The proponents of the abolition of status approach have tended on the whole to align themselves with the schools of jurisprudence which believe that a change in the law may possibly bring about

changes in moral attitudes. Believing that "the stigma of illegitimacy" is undeserved, discriminatory, punitive and wrong, they have sought to remove the basis for it by making illegitimacy unknown to the law. The disadvantage, if such it can be called, of this approach is that the process of statutory adjustment is more complicated, and yet it does not, because it cannot in the nature of things, remove the necessity for certain children to establish their paternity by invoking a legal process.

Those who might describe themselves as more pragmatic like, perhaps, the members of the Russell Committee,[21] might argue that the abolitionists can secure no more *tangible* benefits for the child born outside marriage than the piecemeal reformers, and that the approach of the abolitionists is casuistical and based on a denial of reality or, at best, merely optimistic, with the optimism reinforced only by premises which are highly speculative.

The abolitionist approach involves primarily a declaration in a provincial statute along the following lines:[22]

> For all the purposes of the law of the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

What then normally follows are a series of provisions which, in essence, acknowledge that, despite the above declaration, it is a wise child that knows its own father and an unwise executor who distributes part of an estate to someone who merely asserts an unsubstantiated claim to a filial relationship. In brief outline these provisions are concerned with:

(i) Where paternity may be *presumed*;

(ii) Where paternity must be *established* by reference either to an administrative or judicial procedure;

(iii) The abolition or retention of the existing affiliation proceeding;

(iv) What evidence is appropriate for the establishment of paternity for all, or for particular, purposes;

(v) The abolition of the common law rules of construction;

(vi) The amendment of various statutes relating to succession which expressly discriminate against the child born outside marriage;

(vii) The amendment, where necessary, of various statutes relating to maintenance, adoption, the protection of children, and guardianship and custody, in order that the positions of the parents of the child born outside marriage, and of the child itself, are made as similar as possible to those of married parents and their children;

(viii) The amendment of various miscellaneous statutes which may, expressly or by implication, discriminate against the child born outside marriage;

(ix) Certain savings, transitional and limitation provisions relating to the duties of executors and trustees, the violability or inviolability of interests which become vested before a claim to filiation is recognised, and the prevention of fraud or the possibility of a child or father, or those claiming through them, making claims or more than one estate.

To an extent, those who would favour the piecemeal approach are relieved of the obligation to advance all of the above changes at the same time. For example, those who believe that the only changes necessary lie in the law of succession need address themselves only to (v), (vi) and (ix), leaving the existing common and statute law in each provincial jurisdiction to provide doctrine on the remaining matters.

Question 2. Do the Commissioners recommend:

(a) an attempt at abolishing the status of illegitimacy; or simply

(b) an amelioration, in particular areas, of the position of the child born outside marriage?

D. *Presumptions of Legitimacy/Paternity*

Regardless of whether the abolitionist or piecemeal approach is adopted towards change, there is room to manoeuvre on the question of presumptions of legitimacy or paternity.

Obviously the piecemeal reformers would want to retain the concept of the presumption of *legitimacy,* although they might want to expand or contract the extent of the presumptions now contained,

at least in the common law provinces, in the common law and various *Legitimacy/Legitimation Acts.*

The abolitionists, *ex hypothesi,* would not want to retain the concept of the presumption of legitimacy, but would instead wish to substitute a concept of a presumption of *paternity.*

The real question at issue is the extent of the presumption, be it one of legitimacy or paternity. In other words, under what circumstances ought it to be presumed, both biologically and legally, that a child is either legitimate or the child of an identifiable man. The positions of the various law reform agencies on this matter have already been set out in a previous report,[23] but in a nutshell, New Brunswick, Ontario and Quebec have more or less translated the extent of the existing presumption of legitimacy into a presumption of paternity. British Columbia has also done this, but at the same time has modified and extended the presumption and in Proposals (e) and (f) has advanced propositions which are consistent only with a presumption of paternity rather than a presumption of legitimacy.

The virtue of retaining or maintaining presumptions of legitimacy or paternity is that they relieve children, parents, courts, executors and trustees and others of the burden of establishing filiation by a legal or administrative process in most situations. They are rules of convenience, based on legislative perceptions of when a child is likely to be the child of a particular man and woman. In the case of the presumption of legitimacy, the rules are based on legislative perceptions of when a child is likely to be the child of a particular man and woman who have been, are, or will be married to each other.

The question for the Commissioners, assuming the presumptions are to be retained, is whether they do, in fact, accord with what is biologically and socially likely.

Question 3

(a) Assuming that the status of illegitimacy is to be retained, should the presumptions of legitimacy be framed in accordance with the guidelines set out by:

(i) the British Columbia Royal Commission on Family and Children's Law (excepting Proposals (e) and (f)); or

(ii) the common law and the existing *Legitimacy* or *Legitimation Acts* in most provinces;

or should any of the above be expanded or contracted in accordance with what might now be perceived as situations

where a child is biologically and socially likely to be the child of a particular man and woman who have been, are or will be married to each other?

(b) Assuming that the status of illegitimacy is to be abolished, should the presumptions of paternity be framed in accordance with the guidelines set out by:

(i) the British Columbia Royal Commission on Family and Children's Law; or

(ii) the law reform agencies of New Brunswick, Ontario and Quebec;

or should any of the above be expanded or contracted in accordance with what might now be perceived as situations where a child is biologically and socially likely to be the child of a particular man and woman?

E. *Acknowledgments of Paternity*

The force to be accorded to an acknowledgment of paternity is of interest both to those who would retain the status of illegitimacy and those who would abolish it.[24] For the retentionists there are now situations (and might be more in the ftuure) where specific benefits are conferred on illegitimate children and their fathers e.g. the right to inherit, the right to be heard and become involved in guardianship, custody and adoption matters. For the abolitionists, the acknowledgment may be used as probative or conclusive evidence that the acknowledging father is in fact the father of a particular child, bringing with it all the rights and duties which accrue upon the establishment of paternity.

The positions of the various law reform agencies on acknowledgments have already been set out in a previous report,[25] although they vary both in the kinds of acknowledgment which have legal effect, and in whether the acknowledgments have any effect at all. It must be borne in mind however, that except for Newfoundland, all the law reform agencies fall into the "abolitionist" camp.

In according conclusive effect to a formal acknowledgment procedure, to be operated through the birth registry, British Columbia is unclear whether the acknowledgment need be consensual (i.e. whether both father and mother must agree) and whether it should be permitted even where it conflicts with a *presumption* of paternity. British Columbia does, however, concede that an acknowledgment ought to give way before a *judicial* finding of paternity. Informal acts of

acknowledgment (such as gratuitously contributing to the maintenance of a child) are to be regarded as probative in judicial proceedings involving filiation.[26]

New Brunswick also believes that a formal act of acknowledgment ought to have a conclusive effect, but concedes that it ought to be consensual, ought not to negate the effect of a presumption of paternity, and ought to give way before a judicial finding of paternity.[27]

Quebec's position is set out in some detail on p. 185 of the 1975 Proceedings, and incorporates elements of consensuality, together with the notion that an acknowledgment is conclusive only in some circumstances.

Ontario is not willing to concede anything more than a probative effect to an acknowledgment, be it formal or informal, on the basis that acknowledgments may be induced by fraud.[28]

No law reform agency, except for the British Columbia Royal Commission in a wider context,[29] seems to have considered the possibility that an act of formal acknowledgment might be considered conclusive for some purposes where the rights of third parties are not at stake (e.g. guardianship, custody, adoption) but not for others where third parties are involved (e.g. rights of succession). It may have been thought wise not to consider this alternative, on the basis that it would be complicated and confusing for all concerned to open the way to the concept of "a father for some, but not all, seasons;" but on the other hand, British Columbia, New Brunswick and Quebec have already done so indirectly by admitting that an act of acknowledgment, with conclusive effect, should be vacated by a subsequent, contradictory, judicial finding. Ontario, in another context, has also done the same by retaining the law and procedure of the existing affiliation proceeding for the purpose of allowing a mother to obtain maintenance for her child comparatively cheaply and speedily.[30] It may still, however, be thought that because the possibility of multiple legal paternities is already raised by the stances of the various law reform agencies, this by itself does not justify manufacturing yet another occasion for a tentative legal paternity.

Question 4

Regardless of whether the status of illegitimacy is to be retained or abolished:

(a) should an act of acknowledgment of paternity ever have a conclusive, as opposed to a probative, effect?

(b) assuming that the answer to (a) is yes, should the act

(i) be formal, in the sense that it involves a pubic register of some kind,

(ii) be consensual, inasmuch as both the father and the mother ought to agree that the acknowledgment represents the facts as they believe them to be,

(iii) ever rebut a presumption of legitimacy or paternity, and

(iv) be subject to upset by a subsequent contradictory finding of paternity by a court?

(c) assuming that an act of acknowledgment should have a conclusive effect, should it operate

(i) in all circumstances, or

(ii) in circumstances where the acknowledgment is against the interest of the person or persons who made it, or

(iii) in circumstances where it affects only the interests of the persons who made it in their dealings with the child, or

(iv) in some circumstances where interests other than those of the mother, the father or the child are affected?

(d) assuming that the answer to (c)(iv) is yes, in what circumstances should the acknowledgment be regarded as conclusive as against persons other than the mother, the father and the child?

F. *Judicial Declarations of Paternity*

All the law reform agencies appear to be in agreement that the existing law is deficient inasmuch as there is now no procedure by which the courts may make a declaration *in rem* that a particular man is the father of a particular child.[31] It is also of significance that those who would retain the status of illegitimacy may yet be in favour of giving the courts such a power in order, for example, that the man upon whose estate the child born outside marriage is to have a claim may be identified (assuming that this sort of claim is ultimately thought to be desirable).[32] It is perhaps most significant of all that those who favour retention of the status of illegitimacy may be

in favour of the judicial declaration yet remain selective in those rights and duties which the declaration would bring into existence.

The principal advantage of the declaration *in rem* procedure is, perhaps, obvious inasmuch as it removes the necessity for a separate determination of paternity to be made in every proceedings in which the question happens to be relevant but in which the parties do not remain the same.[33]

The principal disadvantage is that, assuming that the position of the child born outside marriage is to be made equal with that of the child born inside marriage on the matter of succession rights, it will frequently be impossible to identify all those persons who may be adversely affected by a finding that a particular man is the father of a particular child. Without identification there can, at best, be only inadequate representation at the hearing, and at worst, no representation at all.

Newfoundland, New Brunswick and Quebec do not appear to consider this disadvantage of particular practical consequence,[34] but British Columbia and Ontario recognise it in slightly differing ways. British Columbia would give conclusive *in rem* effect to a declaration, but would nonetheless give a judge "the discretion to re-open his paternity judgment in the rare case where 'fresh evidence' is produced or where fraud has contributed to the original result."[35] British Columbia is not, however, entirely clear on what the effect of this re-opening would be on rights and duties which might have been exercised and observed, and interests which might have vested, as a consequence of the original decree. Ontario is fully cognizant of the difficulties of a declaration *in rem* which is conclusive, and has attempted to find a middle ground by allowing an interested person who did not have an opportunity to participate in the original proceedings to commence further proceedings. Nonetheless, anything done, or any interest which vested, as a result of the original decree would remain undisturbed.

There are two further major issues on which the recommendations of the law reform agencies diverge. One is the issue of standing to initiate proceedings for a declaration, and the other is the kind of court which may issue the declaration.

British Columbia, New Brunswick, and Newfoundland appear to accord standing only to the mother, the child, and the putative father.[36] It is not clear to the writer whether the effect of the Quebec proposals[37] is so limiting, but Ontario accords standing to any

interested person. With respect, Ontario's formula would seem to be the right one if succession rights are to be in issue, as the beneficiaries of an estate to which a child born outside marriage may have a claim would be vitally affected by the outcome of the declaration proceedings, and executors and trustees may wish to initiate such proceedings in order to determine the extent of their obligations.

British Columbia and New Brunswick are of the opinion that judges appointed by the provinces under section 92 of the *British North America Act* have the power to make declarations on paternity which will operate *in rem,* but Newfoundland would confer the jurisdiction only on the Supreme Court of Newfoundland, and Ontario is of the opinion that section 92 judges do not have the power to make declarations which will affect inheritance rights. The granting of declaratory relief was in 1852 the preserve of the Court of Chancery in England,[38] and because of its equitable origins it has been traditionally associated with superior courts. It now seems established that county courts may grant declaratory relief,[39] but only within the confines of the jurisdiction in substantive matters conferred on them.[40] It might be contended that the power to grant declarations of paternity could be conferred on section 92 judges if the declaration affected only guardianship, custody and adoption matters — because of the arguable connection of provincial tribunals with these matters prior to 1867.[41] The writer has not, however, been able to discover any instance prior to 1867 in which provincial tribunals were able to affect rights of succession by their decisions, and it is therefore submitted that there is some danger in conferring on section 92 judges the power to make declarations of paternity which will alter rights of succession.

It should be pointed out, however, that the Ontario view that only section 96 judges may grant declarations of paternity, led the Ontario Commission to recommend retention of the affiliation proceeding (in addition to the institution of the declaration proceeding). The Ontario Commission's reasoning was that any proceeding involving a section 96 judge would be complicated and expensive, and that the existing affiliation proceeding ought to remain available to a mother in order that she might obtain maintenance for her child cheaply and quickly.[42]

Question 5

Regardless of whether the status of illegitimacy is to be retained or abolished:

(a) should there be a procedure by which a court may be asked to declare the paternity of a child?

(b) should the declaration be *in rem* and

(i) conclusive, or

(ii) subject to later upset?

(c) if the answer to (b)(ii) is yes, what should be the effect of the upset on rights and duties which have been exercised and observed, and interests which have vested, as a result of the previous declaration?

(d) who should have standing to ask for a declaration of paternity?

(e) on what court should the power to grant a declaration be conferred?

G. *The Affiliation Proceeding*

British Columbia and New Brunswick would assimilate the existing affiliation proceeding into the proceeding for a declaration of paternity, while Ontario would not,[43] for reasons which have already been set out in the preceding section.

The issue would seem to turn primarily on the kind of court which would, if the desirability of a declaration proceeding is accepted, be empowered to grant the declaration. Yet it remains open to the Commissioners, of course, to opt for conferring jurisdiction to grant declarations of paternity on section 96 judges without retaining the affiliation proceedings. This might have the effect of inducing mothers who might otherwise content themselves with the affiliation proceeding, to bring proceedings for a declaration. This in turn might be thought salutary, because the declaration would be of a much more far-reaching nature, and would have the potential for giving guidance in a greater number of situations to a greater number of people.

There is yet another matter which might be considered in this context. Assuming for the moment that the Commissioners and the Conference are in favour of according the putative father a greater role in matters relating to the guardianship, custody and adoption of the child, the existing affiliation proceeding might be thought sufficient to establish a connection between father and child for these limited purposes. Here again, however, the issue of "a father for some, but not all, seasons" must be confronted.

Question 6

Assuming that the desirability is accepted of instituting a proceeding by which a court may be asked to declare the paternity of a child, should a separate affiliation proceeding be retained for the purpose of identifying a possible father so that:

(a) maintenance obligations may be determined quickly and cheaply; or

(b) he may play a role in matters affecting the guardianship, custody and adoption of a child?

It should be noted in answering (b) that Questions 13, 14 and 15 suggest policies concerning adoption, custody and guardianship of the child born outside marriage which involve the "sufficiently interested" father. There are many tests for the "sufficiently interested" father, only one of which involves the making of an affiliation order, and it may be, depending on the responses to Questions 13, 14 and 15, that it is not necessary to retain the affiliation order simply to allow a father to play a greater role in adoption, custody and guardianship matters.

H. *Evidence of Paternity*

The law reform agencies made a number of suggestions for evidentiary reform in determining paternity which may be of interest both to those who favour abolition of the status of illegitimacy and to those who would retain it. These suggestions have already been summarised in the previous report,[44] and may conveniently be subdivided into matters relating to general evidentiary reform and those relating to blood tests.

1. *General*

Because the various suggestions for reform have already been summarised, it remains only to put them in question form for the consideration of the Commissioners and the Conference.

Question 7

(a) Should informal acts of acknowledgment of paternity have the status of *prima facie* evidence of paternity, as British Columbia suggests?[45]

(b) Should the civil standard of proof apply in all cases where paternity is in dispute? This suggestion is endorsed by all five law reform agencies.

(c) Should the evidence of a mother as to the paternity of her child continue to be corroborated (as Ontario suggests) or not (as British Columbia suggests)?

(d) Should evidence of paternity contained in public records be made expressly admissible (as British Columbia and Quebec suggest)?

(e) British Columbia suggests that the Cabinet should be empowered to specify, by Order in Council, the extra-provincial declarations and formal acknowledgments of paternity that will be recognised by British Columbia courts. The courts should, nonetheless, have the discretion to review these declarations and acknowledgments because they should only be *prima facie* evidence of actual paternity.[46] Assuming that the Commissioners and the Conference attach value to formal acts of acknowledgment and to judicial declarations, should the British Columbia suggestion be accepted?

(f) Should the rule in *Russell* v. *Russell* [1924] A.C. 687, which prohibits a mother and her husband from giving evidence to prove non-access if such evidence would result in a finding of illegitimacy (in force, it would seem, only in New Brunswick) continue to be abrogated in all provinces, as New Brunswick suggests?

(g) Should the making of an affiliation order (if the separate existence of the order is maintained) be *prima facie* evidence of paternity, as Newfoundland and Ontario (indirectly[47]) suggest?

2. *Blood Tests*

British Columbia, New Brunswick and Ontario all make specific recommendations relating to blood tests.[48] Quebec may have covered some or all of the ground by two of its recommendations, i.e., that (i) any evidence which can establish that the husband is not the father of the child is admissible, and (ii) any evidence is admissible to contest an action concerning filiation.[49] British Columbia's recommendations are the most detailed, and they are here set out in question form. (The writer is aware that the Conference is also considering the matter of the age of consent to medical treatment, but as he is unfamiliar with the precise nature of the Conference's debates on the matter, it will be assumed that the Commissioners and the Conference will make any cross-references which may be necessary.)

Question 8

(a) Should the results of blood tests and anthropological examinations undertaken voluntarily continue to be admissible in evidence in disputed paternity proceedings?

(b) Should, upon the application of any party to a civil proceeding where paternity is in issue, the court have the power to direct that the parties to the action, the child and its mother submit to blood tests?

(c) Should the following propositions be accepted? No sample of blood should be taken from a person under a direction of the court unless that person consents to its being taken or, if he is incapable of consenting, unless consent is given accordance with the following:

(i) A child aged 16 or over should be capable of giving a valid consent to giving a sample of blood unless, if at full age, he would not have the capacity to consent;

(ii) Where a child is under the age of 16, the consent of the person having care and control of him should be required.

(iii) If a person is mentally incapable of giving a valid consent it should be in order to take a blood sample from him if the person in whose care and control he is consents and the medical practitioner under whose care he is certifies that giving a sample will not be prejudicial to his proper care or treatment.

(d) Where a person refuses to comply with the court's direction, should the court be entitled to draw whatever inferences it thinks appropriate from the refusal?

(e) Should the court be entitled to draw whatever inferences it thinks appropriate from a refusal of consent by a child's guardian or representative, notwithstanding the fact that the refusal was made in the child's best interests?

(f) Where a person applying for relief is relying on a presumption of paternity/legitimacy, should the court, if he refuses to comply with the court's direction to submit to a blood test, have the power to adjourn or dismiss the application?

(g) Should the following propositions be accepted? Both exclusion and non-exclusion results in blood tests should be admissible in evidence. These results should be fully shown and explained in a certificate provided by the serologist responsible for the tests. The serologist should be available for examination and cross-examination upon the request of any party to the proceedings.

(h) Should there be a regulation-making power invested in the Lieutenant-Governor in Council or a Minister of the Crown to promulgate standards and procedures for the taking of blood tests and their admission in evidence?

I. *Artificial Insemination*

British Columbia and Quebec made specific recommendations concerning artificial insemination, but New Brunswick, Newfoundland and Ontario did not.[50]

Question 9[51]

(a) Should the following propositions be accepted? Legislation should state that a donor of semen used in artificial insemination has no legally recognised relationship with a resulting child. An existing relationship between the parents who sought artificial insemination would not be affected, nor would their legal parent-child relationship.

(b) Should a man and woman who are married or living together, and who consent to artificial insemination of the woman, be the only legally recognised parents of the resulting child? If this proposition, because it embraces a couple who are living together, conflicts with a presumption of paternity/legitimacy, which should take precedence?

(c) When a paternity proceeding involves blood testing of a person who has consented to artificial insemination, should evidence of that fact and evidence of the blood type of the donor be heard in the judge's chambers?

J. *The Substance of Change*

It is convenient to deal with the substance of change under seven separate sub-headings: abolition of the common law rules of construction; inheritance; maintenance; adoption; protection; custody and guardianship; and miscellaneous statutes. In fact, all of the changes which have been proposed under these headings flow naturally and inevitably for those who would abolish the status of illegitimacy. For those who are in favour of retaining the status of illegitimacy it may be that not all of the changes are attractive, although it remains, of course, possible to approve of all the changes yet retain the status, on the ground that to do otherwise would deny reality.

The changes which have been proposed by the various law reform agencies have been summarised in the previous report,[52] and for the most part it is necessary for the purpose of presenting policy questions, only to change those propositions into interrogative form. It is

worth noting at this point, however, the position of Quebec. As was pointed out in the previous report,[53] while the common law provinces, to effect substantive change, must engage in fairly intricate drafting, Quebec appears to be in the happy position of effecting all change by implementation of the following:[54]

> *Art. 130:*
>
> All children, whose filiation is established, have the same rights and obligations with regard to their parents and to the families of their parents.

1. *Abolition of the Common Law Rules of Construction*

Question 10

(a) Should there be a reversal of the common law rule of construction that any reference to "child," "children," or "issue" in an instrument or a statute should be taken to exclude children born outside marriage?

(b) Should the words "child," "children" or "issue" or other term having a similar meaning in a statute be specifically stated (in statutory form) to include all children, regardless of whether their parents have been married or not; and should this rule of construction apply unless there is a clear indication that the Legislature had in mind, in any particular case, a more limited class of children?

2. *Inheritance*

To a large extent the policy question posed under this heading will have been answered be the response to the last question. In many provinces, however, intestacy legislation specifically prohibits a child born outside marriage from inheriting upon his father's intestacy, and similarly, a father is specifically prohibited from inheriting upon the intestacy of his child born outside marriage. It may be necessary, therefore, in a Uniform Act, to confront the following questions.

Question 11

(a) Should a child born outside marriage, and those claiming through him, be accorded a positive right to inherit an appropriate share of the estate of the child's father upon the father's intestacy?

(b) Should the father of a child born outside marriage, and those claiming through him, be accorded a positive right to inherit an appropriate share of the child's estate upon the child's intestacy?

(c) Should the same principles apply to dependant's relief/ testator's family maintenance legislation?

3. *Maintenance*

British Columbia and Newfoundland, in formulating proposals for change in the law relating to the maintenance of children born outside marriage, have made a number of detailed proposals which are, to a large extent, related to local circumstances.[55] The only question which, in the opinion of the writer, ought to be posed to the Commissioners and the Conference is:

Question 12

Should the present law, which requires parents to support their children, and children to support their dependent parents, continue to apply (or be made to apply if it does not already do so) to children born outside marriage?

4. *Adoption*

New Brunswick and Quebec have both taken the position that where paternity is established, the father of the child should have an automatic right to give or withhold his consent to the child's adoption.[56] British Columbia[57] and Ontario[58] have not been prepared to be quite so thorough-going, and have to a greater (in the case of British Columbia) or lesser (in the case of Ontario) extent suggested that the father ought to have done more than merely have paternity established against him before having the power to withhold consent to an adoption. Because British Columbia's position refines the issues to the greatest extent, its position is here posed in interrogative form for the consideration of the Commissioners and the Conference. (It should be noted, however, that the British Columbia position accords some importance to the "formal acknowledgment" procedure, which may or may not be accepted as valuable by the Commissioners and the Conference for this situation or other relevant situations.)

Question 13

Should the following propositions be accepted?

(a) A father should have the right to consent or refuse consent to his child's adoption if:

(i) he is or has been married to the child's mother unless,

(a) he and the mother have been living separate and apart for 300 days prior to the birth of the child and there is evidence of non-access, or

(b) another man has been acknowledged or declared (by declaration or affiliation order) to be the child's father;

(ii) the father was living with the mother at the time of the child's birth provided that the father's paternity has been formally acknowledged or declared (by declaration or affiliation order);

(iii) the father is living with and maintaining the child.

(b) Legislation on adoption should give a right to notice and an opportunity to be heard in adoption proceedings to fathers who have shown "sufficient interest" in their children. Guidelines in the legislation should indicate examples of "sufficient interest." The guidelines recommended are:

(i) where paternity has been declared (by declaration or affiliation order) by a court (Ontario adopts the position that the father has no more than the right to notice if the proceedings have been brought *against*, rather than *by*, him);

(ii) where paternity has been acknowledged formally by registration;

(iii) where paternity is presumed;

(iv) where paternity has been informally acknowledged by one or more of the following acts:

(a) the father is voluntarily supporting the child, or

(b) the father is a party to an agreement to pay support for the child, or

(c) the father is subject to a court order for maintenance, custody, or access to his child, or

(d) the father has registered his interest in writing with child welfare authorities.

(c) Courts dealing with the adoption of a child born outside marriage should have the traditional power to dispense with the consent and right to be heard of, and notice to, the father, if it appears to be in the best interests of the child.

5. *Protection*

Question 14

Should child welfare/protection legislation give a right to notice and an opportunity to be heard in all child welfare/protection proceedings to fathers who have shown "sufficient interest" in their children?

For a definition of a "sufficiently interested" father, see Question 13(b) above.

6. *Custody and Guardianship*

Question 15

Should legislation on child custody, access and guardianship place all "sufficiently interested" fathers on an equal footing.

For a definition of a "sufficiently interested" father see Question 13(b) above.

7. *Miscellaneous Statutes*

In formulating their proposals for change the British Columbia and Ontario agencies identified a number of miscellaneous statutes in which changes, consequent upon the basic (abolitionist) proposal of principle, ought to be effected. These changes consist for the most part of either removing words such as "legitimate" and "illegitimate," or expressly stating that the statutes apply to children born outside marriage.[59] New Brunswick also proposes that:[60]

> Words such as "legitimate," "illegitimate," "in lawful wedlock" and "lawful lineal descendants," which pervade legislation should be insolated and removed. If it is necessary to differentiate in certain cases between children born within and outside marriage, factual and inoffensive language should be used to describe the children.

For the sake of completeness, the following question is posed.

Question 16

Should a Uniform Act make provision for a statute-by-statute examination of the statutes of each province in order that, in the light of decisions already reached, any distinctions made between children born inside marriage and those born outside marriage are conscious and deliberate.

K. *Savings and Transitional*

In last year's report the following statement appeared:[61]

> Although it has been agreed in most of the jurisdictions under review that it is desirable that all children be accorded equal

status, it has also been agreed that the realities of the situation do not permit the consequences of that change to take effect without certain reservations. Principal among these, of course, is the necessity for a child who is not presumed to have been born within marriage to be acknowledge as, or declared to be, the child of a particular father. There are, however, other recommendations of a similar nature.

Under this heading a number of savings and transitional questions are considered, all of which are relevant if any change at all is to be brought about, regardless of whether the status of illegitimacy is preserved or abolished.

British Columbia and New Brunswick state expressly, and Ontario implies, that subject to a number of qualifications, any change should apply to all children, whether born before or after the change is implemented.

Question 17

Subject to a number of qualifications (proposed in following questions), should any change in the law apply to all children, whether born before or after the change is implemented?

Question 18

Should all instruments executed, and all intestacies taking place, before the implementation of any change in the law relating to succession, be expressly stated to be subject to the law as it was before the change is implemented?

British Columbia, New Brunswick and Ontario all agree that beyond a certain point the onus of ensuring that an estate is properly distributed should pass from trustees and executors to the father or child, as the case may be, and those claiming through them. British Columbia would, however, impose a slightly more extensive duty on trustees and executors than New Brunswick or Ontario.

Question 19

Assuming that there will be a change in the law relating to succession and children born outside marriage, should the duty of trustees and executors in distributing an estate be:

(a) (as British Columbia suggests) to make a reasonable inquiry into the existence of children born outside marriage whose paternity is presumed or has been registered or declared (coupled with the assumption that if no father is thereby determined, the child should be taken to have survived the father unless the contrary is shown); or

(b) (as New Brunswick and Ontario suggest) to

(i) make a reasonable inquiry into the existence of children born outside marriage whose paternity is presumed, and

(ii) search only through a provincial registry, specially set up for the purpose, which would record acknowledgments (New Brunswick only) and judicial declarations of paternity.

Question 20

Assuming that the Commissioners and the Conference adopt (b) rather than (a) in Question 20, should executors and trustees have a duty to search

(a) only the registry of the provinces(s) where probate is issued, or

(b) the registries of all provinces where registries exist.

Questions 19 and 20, as well as Question 7(e), do, of course, point the way towards potentially difficult situations involving conflicts of laws. For present purposes, however, it is assumed that one of the points of the exercise in formulating a Uniform Act is to avoid conflict of laws issues. It is the writer's opinion that even if it is accepted as a practical matter that some provinces would adopt a Uniform Act before others, it would only confuse matters if an attempt were made in the Act itself to resolve conflicts issues beyond Questions 7(e), 19 and 20. The common law relating to conflicts of laws, for all its faults, is at least in a broad sense "uniform," and it would seem the better course to allow the common law to solve the difficulties which would arise if some provinces, say, abolished illegitimacy, and others did not, and the difficulties which *will* arise if illegitimacy is abolished in some parts or all of Canada while the status remains recognised in other countries and jurisdictions.

L. *Limitations*

To prevent the possibility of parents and children making multiple claims on estates, to prevent fraud, and to prevent the disturbing of interests which have vested, some jurisdictions have recommended provisions which limit the circumstances in which claims of paternity may be asserted, and in which the consequences of that assertion have full effect.

The proposals of the various law reform agencies have already been summarised in the previous report,[62] and all appear to agree

with the basic proposition that, ideally, there should be no limitation period in matters relating to the establishment of paternity and the consequences flowing from that. On the other hand, the agencies diverge on whether the broad proposition should be subject to qualifications.

British Columbia and New Brunswick, while wishing to preserve the sanctity of interests which have vested before the establishment of paternity, do not otherwise qualify their view on the limitation question (although New Brunswick would not permit a mother to recover birth expenses beyond a maximum of two years from the birth of the child). The British Columbia and New Brunswick positions may be attributable to their view that formal acknowledgments and judicial declarations of paternity ought to be more or less conclusive and binding *in rem,* although the writer feels bound to point out that in both cases it is proposed that the acknowledgment be subject to displacement by a contradictory judicial declaration, and British Columbia also proposes that a judicial declaration might be set aside upon the grounds of its having been procured by fraud, or fresh evidence subsequently coming to light.

Newfoundland proposes that for the purpose of allowing a child born outside marriage to take upon his father's intestacy, paternity must be established against the father in the father's lifetime.[63] The Family Law Study did not, however, give a reason for advancing this proposal.

Ontario and Quebec, on the other hand, have proposed quite elaborate qualifications to the basic proposal that there should be no limitation periods in matters relating to paternity.

Ontario proposes that:[64]

> Neither the paternal relationship in the case of a child born outside marriage or any other relationship traced through the paternal relationship should be recognized for *any purpose relating to the disposition of property by will or by way of trust* unless:
>
> (a) the relationship has been established by or against the father in his lifetime; or
>
> (b) if the purpose is for the benefit of the father, paternity has been established by or against him during the life of the child.
>
> Exceptions should be made where:

(a) an affiliation order has been made between the father and the child during their respective lifetimes; or

(b) a court thinks it just, in its discretion, to allow the relationship between a father and child to be established and recognized after the death of either of them [Emphasis added].

The reasons for these proposals are quite detailed and lengthy, and therefore excerpts from the Ontario Report explaining the matter are set out in the Schedule to this paper.

Quebec recommends that:[65]

1. Unless expressly provided by law, no action relating to any person's status may be prescribed.[66]
2. If a child dies without establishing his status, his heirs may establish it within one year after the death.[67]
3. Every action for repudiation or contestation of paternity is prescribed by six months after the birth of the child. However this delay begins to run against the husband on the day when he learns of the birth.[68]
4. The death of the child extinguishes the right of action for repudiation or contestation. Any action instituted before such death is continued against the heirs.[69]
5. If the husband or the mother dies, the right of action is not extinguished provided such death occurs before expiry of the delay for repudiation or for contestation of paternity. Every heir must exercise this right within six months after such death.[70]

The writer does not find himself able properly to evaluate what appear, despite Proposal 1, to be quite stringent limitation provisions. Proposal 3 is justified by the Committee by the statement that there must be certainty in filiation matters,[71] but this, to the common lawyer, would appear to be the justification for Proposals 2, 4 and 5 as well, although this is not stated by the Committee.

Question 21

On the matter of limiting the circumstances in which assertions of paternity may take legal effect, should the Commissioners and the Conference adopt:

(a) the British Columbia and New Brunswick model; or

(b) the Ontario model; or

(c) the Quebec model.

SCHEDULE

Excerpts from Ontario Law Reform Commission, *Children* 21-24 (Report on Family Law, Part III), September 1973.

Explanation of Limitation Proposals

The scheme of reform which we have set up is based upon presumptions as to paternity, both in the case where a child is born to a wife during or just after her marriage, and in the case of a paternity decree. Out of these presumptions may arise circumstances which may be thought to be inequitable. Hypothetical fact situations will illustrate what we mean.

(i) M, having had sexual relations with a number of men, gives birth to a child, Z. M brings proceedings for a declaration of paternity against A, and on the balance of probabilities he is found to be the putative father. A maintains Z throughout his minority and provides him with other gratuitous benefits. When he is sixteen, Z finds out that B is his actual father. Z does not act on this information until both A and B have died. Both die intestate, A predeceasing B. Z benefits from A's estate by virtue of the presumption set up by the declaration, and then asserts B's paternity in an action against the administrator of B's estate.

(ii) M, having had sexual relations with a number of men, gives birth to a child, Z. One of the men, A, obtains a declaration of paternity and maintains Z throughout his minority. B is aware that he is the actual father, but does not act on this knowledge until Z dies intestate. At that point he rebuts the presumption set up by the declaration in favour of A by introducing M as a witness in an action against the administrator of Z's estate. M gives evidence that B is indeed the actual father, and by virtue of this excludes A from participation in the distribution of Z's estate and includes himself.

We therefore are of the opinion that our recommendations ought to be modified in order to prevent the assertion of paternity in circumstances giving rise to inequities. To this end we propose that neither the paternal relationship in the case of a child born outside marriage or any other relationship traced through the paternal relationship, should be recognized for any purpose relating to the disposition of property by will or by way of trust unless:

(i) The relationship has been established by or against the father in his lifetime; or

(ii) If the purpose is for the benefit of the father, paternity has been established by or against him during the life of the child.

There may be some situations, however, where these limitations will work hardship upon those who might otherwise have a claim through a relationship arising outside marriage. A common enough situation might be that in which a couple live together as man and wife without marrying, and bring their children up in the belief that a marriage has in fact taken place. In such a situation the facts might not be revealed until the time of death of the father, by which time it would be too late for the children to bring proceedings for a judicial declaration of paternity.

To cover situations where it may be inequitable to apply stringently the foregoing rules of limitation, we recommend that they be modified by a provision similar in principle to that appearing in section 4(2) of *The Dependants' Relief Act*. This section provides that:

> Where letters probate have been or are applied for . . . an application for an allowance . . . shall be made at the time of applying for letters probate and in every other case the application shall be made within three months after the death of the testator, *but the judge, if he considers it just, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application* [emphasis added] . . .

V. THE AFFILIATION ORDER

In the light of the recommendations which we make relating to judicial declarations of paternity, it is necessary to explain our position regarding the existing law relating to affiliation orders.

We considered the possibility that affiliation proceedings under *The Child Welfare Act* ought to be abolished. The principal argument in support of this step is that the continuance of affiliation proceedings might deflect the institution of proceedings leading to a judicial declaration of paternity. Mothers, for instance, may content themselves with bringing affiliation proceedings, for the purpose of obtaining immediate maintenance payments, rather than bringing declaration proceedings, which would be of more value to the child.

On the other hand, however, it is likely that declaration proceedings will be more lengthy, complicated and costly than the present affiliation proceedings, and we are reluctant to adopt a position which would force applicants to sacrifice what is now a relatively simple procedure in favour of a more complex one. Indeed, we would be content if we could recommend that the existing affiliation proceeding could serve instead of, and have the same consequences as, the judicial declaration of paternity which we propose. We do not, however, think it constitutionally proper to accord a decree made by a judge appointed under section 92 of the *British North America Act* the status of a declaration which may alter inheritance rights.

As an alternative solution we propose that the limitations which we have recommended relating to the bringing of declaration proceedings during the lifetime of the father of the child be modified where an affiliation order has been made and has not later been set aside by virtue of the making of a declaration of paternity. For example:

(i) M, having had sexual relations with a number of men, gives birth to a child, Z. M brings successful affiliation proceedings against one of the men, A. Five years after Z's birth, A dies intestate. Under our unmodified proposal, Z would at that point be precluded from making an application for a declaration that A was his father and would therefore not be in a position to benefit from A's estate. Under our modified proposal Z, upon attaining his majority, would be able to bring an application for a declaration that A was his father, and thereby benefit from the intestacies of A's relatives (although not, probably, from A's intestacy, because his estate would in all probability have been wound up).

(ii) M, having had sexual relations with a number of men, gives birth to a child, Z. M. brings successful affiliation proceedings against one of the men, A. A maintains Z. Z later receives a substantial legacy from M's father but dies before A brings an application for a declaration that Z was his son. Our modified proposals would allow A to pursue this claim.

It may, initially, be thought that this modification might emasculate the original limitations and give rise to the very inequities which the limitations were designed to prevent. This, however, need not be so. In the two examples which we cited earlier, the inequities came about in both cases because there were two sets of declaration pro-

ceedings, one during the life of the deceased and the other after his death. Our modification would not allow these situations to be perpetuated, because the declaration proceeding during the lifetime of the deceased would vacate the affiliation decree and therefore remove the situation from the ambit of the modification, which is based on the assumption that the decree has not been vacated at the date of death of the deceased. The following hypothetical fact situation will serve to illustrate our point.

> M, having had sexual relations with a number of men, gives birth to a child, Z. M brings successful affiliation proceedings against B. A later is successful in applying for a declaration that he is the father of Z. A dies intestate. Z may not, merely because of the original affiliation order, apply for a declaration that B was his father and thereby inherit from two estates. The affiliation order against B would have become a nullity upon the making of the declaration involving A.

In making this recommendation relating to affiliation orders we are fully cognizant of the fact that such orders expire upon a child's attaining sixteen or eighteen years of age. The expiry of an affiliation order should, however, have no effect on the ability of a person to found upon it an application for a declaration of paternity after the death of the person through whom he is claiming.

FOOTNOTES

1. Proceedings of the Fifty-Fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada 87 (1973). Further references to the proceedings will be cited as "Proceedings" together with the year and page number.
2. *Ibid.* 30.
3 Proceedings, 1974, Appendix Q, p. 145.
4. Proceedings, 1974, p. 31.
5. Proceedings, 1975, Appendix Q, p. 180.
6. Proceedings, 1975, p. 31.
7. Citations will be thus: "1975 Proceedings, p. ."
8. 1975 Proceedings, p. 181.
9 *Ibid.*
10. *Ibid.* p. 182.
11. *Ibid*
12. *Ibid.*
13 *Status of Children Act 1969*, 1 Statutes of New Zealand, 1969.
14. *Status of Children Act 1974.*
15. *Status of Children Act 1974.*
16. South Australian Law Reform Committee, *Report Relating to Illegitimate Children* (1972).
17. Queensland Law Reform Commission, *Report on the Law of Succession and Other Allied Considerations in Relation to Illegitimate Persons* (Q.L.R.C. 20, 1976).

18. *Family Law Reform Act 1969*, ss. 14-19.
19. *Property Law Amendment Act 1971; Wills Act Amendment Act 1971.*
20. *Report on the Law of Succession in Relation to Illegitimate Persons* (Cmnd. 3051, 1966)—"the Russell Committee"; Law Reform Committee of Western Australia, *Illegitimate Succession* (1970).
21. *Ibid.*
22. *Status of Children Act 1969*, s. 3(1), 1 Statutes of New Zealand, 1969.
23. 1975 Proceedings, pp. 182-184.
24. Quebec has concerned itself also with an acknowledgment of maternity (1975 Proceedings, p. 185), but the common law provinces have tended to take the view that there is rarely, if ever, likely to be a situation where the maternity of a child is in doubt.
25. 1975 Proceedings, pp. 184-185.
26. Royal Commission on Family and Children's Law, *The Status of Children Born to Unmarried Parents* 15-18, Fifth Report (Part II), March 1975.
27. Law Reform Division, Department of Justice, *Status of Children Born Outside Marriage; Their Rights and Obligations and the Rights and Obligations of their Parents* 36-40, September 1974.
28. Ontario Law Reform Commission, *Children* 18 (Report on Family Law, Part III), September 1973.
29. *See* pp. 68-75, where the concept of the "sufficiently interested father" is introduced in connection with adoption, child protection/welfare, custody, access and guardianship. One among the many hallmarks of the "sufficiently interested father" is one who has been formally acknowledged as the father.
30. *Ibid.* 22-24.
31. 1975 Proceedings, pp. 185-187.
32. *See*, for example, the position of Newfoundland as expressed in Family Law Study, *Property Rights in the Family* 70-72 (Project VIII, February 1970) and *Some Aspects of Conflicts in Family Law* 51-52 (Project XI, May 1970). The Newfoundland Family Law Study favoured retention of the status of illegitimacy, but also favoured conferring rights of inheritance on illegitimate children.
33. *See*, for example, the hypothetical situations proposed in the Ontario Report at pp. 18-19.
34. 1975 Proceedings, pp. 186-187.
35. n. 26 *supra*, 19.
36. 1975 Proceedings, pp. 185-186.
37. *Ibid.* 186-187.
38. *Chancery Procedure Act*, 1852, 15 & 16 Vict., c. 86, s. 50.
39. *Rice Lake Fur Co. Ltd.* v. *McAllister* (1925), 56 O.L.R. 440 (App. Div.).
40. *Ibid.*
41. *Reference Re Adoption*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497.
42. n. 28 *supra*, 22-24.
43. 1975 Proceedings, p. 187.
44. *Ibid.* pp. 187-191.
45. n. 26 *supra*, 18.
46. *Ibid.* 95.
47. n. 28 *supra*, 22-24.
48. 1975 Proceedings, pp. 189-191.
49. *Ibid.* p. 189.
50. *Ibid.* p. 191.
51. This question is derived from the propositions of the British Columbia Royal Commission, n. 26 *supra*, 44-45.
52. 1975 Proceedings, pp. 192-200.
53. *Ibid.* 192.
54. Comité du Droit Des Personnes et de la Famille, *Rapport Sur La Famille* 347 (Première partie, mai 1974).

55. 1975 Proceedings, pp. 194-196.
56. *Ibid.* p. 197.
57. *Ibid.* pp. 196-197.
58. *Ibid.* p. 197.
59. *Ibid.* pp. 199-200.
60. n. 27 *supra*, 105.
61. 1975 Proceedings, p. 200.
62. *Ibid.* pp. 202-204.
63. Family Law Study, *Property Rights in the Family* 71, 85 (Project VIII, February 1970).
64. n. 28 *supra*, 21-24, 32.
65. n. 54 *supra.*
66. *Ibid.* Art. 128.
67. *Ibid.* Art. 129.
68. *Ibid.* Art. 118.
69. *Ibid.* Art. 120.
70. *Ibid.* Art. 121.
71. *Ibid.* p. 328.

CHILDREN BORN OUTSIDE MARRIAGE

II

Note of Decisions Taken in 1976

Introduction

On Wednesday 25 August 1976 the Conference considered: (i) a paper presented by Professor Keith B. Farquhar of the Faculty of Law, University of British Columbia, in which various questions of policy were posed concerning a uniform or model Act relating to children born outside marriage; and (ii) a memorandum of responses by the British Columbia Commissioners to those questions.

The Conference used the questions posed by Professor Farquhar as an agenda, and what follows is a note, taken by Professor Farquhar during the meeting, of the decisions reached by the Conference on those questions.

Decisions

Question 1

The Conference considered that the formulation of policy upon which a uniform or model Act could be based was both useful and desirable.

Question 2

The Conference resolved that legislation should embrace the principle of abolishing the status of illegitimacy rather than that of merely ameliorating the position of the child born outside marriage.

Question 3

There should be presumptions of paternity which may be acted on without the necessity for those who wish or ought to act on them to apply to a court for a determination of paternity. Those presumptions should embrace the following situations:

(a) A man should be presumed to be the father of a child if, at the time of the child's birth, he and the child's mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, a decree nisi of divorce, an order for judicial separation or a declaration of nullity.

This presumption should be rebuttable by evidence which proves, on a balance of probabilities, that the man and woman were living separate and apart under circumstances

which made access to sexual intercourse unlikely, and that the child was born more than 300 days after the commencement of the period of living separate and apart.

(b) A man should be presumed to be the father of a child if, before the child's birth, he and the child's mother have attempted to marry each other by a marriage solemnized in apparent compliance with the law of the place it was entered into.

This presumption should apply whether the attempted marriage is void *ab initio* or could be declared a nullity by a court, and:

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, a decree nisi of divorce, or a declaration of nullity;

(ii) if the attempted marriage is void without a court order (void *ab initio*), the child is born within 300 days after the man and the woman commence living separate and apart.

(c) Presumption (b) should apply to a father and his attempted marriage notwithstanding the requirement of "apparent compliance with the law of the place it was entered into" where the mother or father has a prior subsisting marriage to a spouse who:

(i) is presumed dead by an order that is made effective with respect to remarriage; or

(ii) was a member of the Canadian forces in respect of whom notification of death or presumed death has been given under the laws of Canada.

N.B. The Conference at this point made two further decisions, the second of which may require alteration in the principles and formulation of Presumptions (a), (b) and (c).

1. An attempt should be made to state (i) and (ii) of Presumption (b) as a unified principle.

2. Where any of the presumptions turns on marriage, the term "marriage" should include any situation in which one of the partners believes that any form of marriage has been celebrated.

(d) A presumption of paternity should arise where a man and a woman cohabit, to the exclusion of others, in circumstances in which they have continuous opportunity for sexual mating and the woman bears a child.

Question 4

(a) An act of acknowledgment of paternity should in some cases have a presumptive effect, and should always have a probative effect.

(b) For an act of acknowledgment of paternity to have a presumptive effect, it should meet the following criteria:

(i) It should be formal in the sense that it involves a public register of some kind.

(ii) It should also be consensual, inasmuch as both the father and mother ought to agree that the acknowledgment represents the facts as they believe them to be.

The acknowledgment of the father, however, need not be given at the same time as the mother asserts that the child is his. It may be made within a certain period after the mother's assertion.

Notwithstanding the foregoing, if the mother dies in childbirth or within a certain limited time after the birth of the child, presumptive effect may be given to the act of acknowledgment of the father. *Quaere* Should the father's acknowledgment in this situation, in order to have a presumptive effect, also be made within a certain time after either the birth of the child or the death of the mother?

(c) The presumptive effect of an act of acknowledgment should always be rebuttable by a subsequent, contradictory finding of paternity by a court.

Question 5

(a) There should be a procedure by which a court may be asked to declare the paternity of a child.

(b) The effect of the declaration ought to be final and conclusive against those who were parties to the proceeding, but it should be possible for other interested persons to seek and obtain a later declaration which would name another person as the father of the child.

(c) Where one declaration is vacated and replaced by another, rights and duties which have been exercised and observed, and interests which have vested, as a result of the earlier declaration should not be affected.

(d) Any person with sufficient interest in the determination of the matter should have standing to apply for a declaration concerning the paternity of a child.

(e) Each province should come to its own conclusion on the matter of the court in which such declarations should be heard. In any commentary accompanying any Uniform or Model Act, however, there should be a reference to the desirability of having these determinations made in a Unified Family Court.

Question 6

There should be a summary proceeding, involving if necessary a determination of paternity of a child, for the sole purpose of deciding whether a particular man is responsible for the child's maintenance on the basis that he is probably the biological father of the child. It should be possible to bring such a proceeding at any time during which a man is ordinarily responsible, under provincial law, for the maintenance of his children.

Question 7

(a) It was agreed that it was unnecessary to answer this question.

(b) The civil standard of proof should apply in any proceeding where the paternity of a child is in dispute.

(c) A court should not be permitted to decide the issue of paternity on the evidence of one witness.

(d) It was agreed that it was unnecessary to answer this question.

(e) It was agreed that the Ontario Commissioners should study further:

(i) the effect of the making of a declaration of paternity, or a paternity order, by a court, on the public records of the province where the declaration or order is made, and on the public records of the other provinces; and

(ii) the general extra-provincial effect of the making of declarations of paternity or paternity orders by courts.

(f) The effect of the rule in *Russell v. Russell*, [1924] A.C. 687 should be abrogated where it still applies.

(g) It was agreed that it was unnecessary to answer this question.

Questions 8 & 9

It was agreed that the evidentiary value of, and rules concerning, blood tests and anthropoligical examinations should be the subject of further study. Similarly, it was agreed that the formulation of rules concerning the effect of artificial insemination should also be the subject of further study. Large areas of these subjects transcend the principles which should be encompassed by a Uniform or Model Act on children born outside marriage.

Question 10

There should be a reversal of the common law rule of construction that any reference to "child", "children" or "issue" in an instrument or a statute should be taken to exclude children born outside marriage. It should also be made clear that where any right or duty turns the relationship of a child born outside marriage to ascendents, laterals or descendents, those rights and duties should be the same as those accruing to, or to be observed by, a child born within marriage and his or her ascendents, laterals or descendents.

Question 11

It was agreed that the questions posed under this heading should be answered in the affirmative, but that any statutory formulation of those principles should encompass the breadth of the principles affirmed under Question 10.

Question 12

The present law, which requires parents to support their children, and children to support their dependent parents, should be extended to encompass children born outside marriage.

Question 13

Legislation on adoption should give the right to notice of proceedings concerning, an opportunity to be heard on, and the right to give or withhold consent to, the adoption of a child, to a man in respect of whom a declaration of paternity of the child has been made or a presumption of paternity of the child has arisen.

It should be made clear that the Conference does not regard this as exhausting the classes of person upon whom rights of

notice, an opportunity to be heard and the giving or withholding of consent should be conferred.

Courts should retain their traditional powers to dispense with the consent and right to be heard of, and notice to, the father, if it appears to be in the best interests of the child.

Question 14

Child welfare/protection legislation should encompass the same principles in respect of fathers of children born outside marriage as those set out in relation to adoption legislation in Question 13.

Question 15

All declared and presumed fathers should have equal rights to guardianship and custody of, and access to, their children.

Question 16

It was agreed that it was unnecessary to answer this question.

Question 17

Subject to certain qualifications, any change in the law should apply to all children, whether born before or after the change is implemented.

Question 18

It was agreed in principle that any change in the law should apply to all property remaining undistributed under any instrument at the time the change becomes effective. It was also agreed, however, that there ought, perhaps, to be exceptions to this principle, and that one such exception should encompass a situation where the person who executed the instrument is incapacitated or dead at the time the change becomes effective.

It was further agreed that Mr. Walker, of Nova Scotia, should give consideration to the ramifications of implementing the basic principle, and to formulating other possible exceptions to it.

Question 19

In distributing an estate the duty of trustees and executors ought to be to:

(i) make a reasonable inquiry into the existence of children born outside marriage whose paternity is presumed, and

(ii) search a provincial registry specially set up for the purpose, which would record judicial declarations of paternity.

Question 20

Trustees and executors should have a duty to search only the registries of provinces where probate has been issued or re-sealed.

Question 21

It was agreed that because of the complexity of the issues presented by a decision on whether to limit the circumstances in which claims of paternity may be asserted, and in which the consequences of that assertion should have full effect, the Conference should adjourn consideration of this question until 1977. This adjournment will give members of the Conference an opportunity to study the alternatives presented in Professor Farquhar's paper and any others which may be available.

APPENDIX K

(See page 28)

Promotion of Uniformity of Company Law in Canada

REPORT OF NEWFOUNDLAND, NOVA SCOTIA AND QUEBEC

At the 1975 Conference it was decided that there would be a third report made annually to the Uniform Law Section of the Conference, which would be on the promotion of uniformity of company law in Canada. The report was to be made by the Canada Commissioners, the Nova Scotia Commissioners and the Quebec Commissioners (1975 Pro. p. 25).

Subsequently, the Canada Commissioners suggested in the Spring of 1976 that they be replaced by the Newfoundland Commissioners. (This substitution was acceptable to the Newfoundland Commissioners one of whom had been associated in the promotion of uniform company law as a Commissioner from Alberta and Canada, successively, in the decades of the 'fifties and 'seventies).

Sixty-one years ago, in 1915, "it was suggested" that the "Western group of representatives" of the Canadian Bar Association (at its first annual meeting in Montreal (CBA Pro. (1915) Vol. 1, p. 14) consider the subject of joint stock companies.

Fifty-seven years ago, this Conference took the matter of uniform company law in hand when, at its 1919 Conference, the Manitoba Commissioners were requested to consider a Uniform Companies Act and report in 1920 on principles to be decided before a Uniform Act was undertaken.

The chronicle of the promotion of uniform company law by this Conference is more appreciated if details are set out. Since 1919 the Conference reports indicate that to 1976, the matter has been reported upon to the Conference in 36 out of 57 years. For that reason a historical background has been prepared and is attached as an appendix to this report. That background material illustrates better than anything else the difficulty in achieving any uniformity in a matter so important to the legal profession and business as corporation or company law; yet, more than in other areas, it is an area of law that was particularly in mind when this Conference was first suggested by the Canadian Bar Association.

It is to be noted with relief that the two greatest "hang-ups" to uniformity in company law in the early years are being abolished

rather quietly; namely, incorporation by letters patent, and the doctrine of *ultra vires* as it applied to companies incorporated pursuant to statute.

For a summing up of the present situation one need only refer to Schedule II of the attached schedule. The two biggest events in corporation law in Canada in the last decade has been the enactment of the Ontario *Business Corporations Act* (OBCA) followed this year by the commencement of the Canada *Business Corporations Act* (CBCA).

Although there are numerous minor technical differences between the CBCA and the OBCA, the two laws are conceptually very similar. But three basic differences remain:

1. The corporate finance provisions of CBCA do not permit par value shares, do not place limits on the designation of shares such as "special" shares, and set out tighter standards with respect to re-acquisition by a corporation of its own shares.

2. The CBCA grants broader regulation-making power than does OBCA, particularly in respect of corporate names and financial disclosure, that is, details of the contents of financial statements.

3. The OBCA does not contain a counterpart of CBCA, s. 234, the oppression remedy (U.K. *Companies Act,* s. 210), which is in the view of some a necessary cornerstone of any modern corporation law.

Both the federal and Ontario Acts provide for incorporation by way of a certificate of incorporation based on articles of association. The table in Schedule II of the Appendix indicates the jurisdictions that are still incorporating business companies by letters patent and those that still incorporate by memorandum of association and articles. But in this, it should be noted that the instrument of incorporation, (the certificate of incorporation) and the right to be incorporated of a memorandum jurisdiction are more similar to the method of incorporation of the OBCA and CBCA than to the letters patent method.

Comments on the present situation in each of the provinces, so far as it can be known at this time by your Committee follows, from East to West:

1. *Newfoundland:*—The government has retained a lawyer to prepare a revision of the present *Companies Act,* but it is not known what

method of incorporation he will prepare or when his report will be available.

2. *Nova Scotia:*—In keeping with the agreement of the Council of Maritime Premiers, the Province of Nova Scotia through the Nova Scotia Law Reform Advisory Commission is preparing for the consideration of the Attorney General a new Companies Act. The new Companies Act will be modeled upon the Canada *Business Corporations Act* and will be modeled to the extent that the sections of the Nova Scotia Act will contain exactly the same subject matter and the same section numbers as the Federal Act. It is the intention of the Nova Scotia Law Reform Advisory Commission to carry this section reference to the extent that it will leave sections missing in order to preserve equivalent section content. In this way it is hoped that a reference to either the Nova Scotia Act or the Federal Act will convey a uniformity of concept and content. Further it is the hope of the Law Reform Advisory Commission that this legislation will be available for presentation to the Attorney General by the first of January, 1977. If the recommendations of the Commission are acceptable, the Province of Nova Scotia will have legislation that will be as nearly equivalent to the Federal provisions as possible.

3. *Prince Edward Island:*—There was a first reading of a new Business Corporations Act at the last session to allow comment. Upon its reintroduction next session, the bill may be enacted. It is based on the OBCA/CBCA models. The bill would permit a request for financial disclosure and provides for only no par value shares.

4. *New Brunswick:*—A report on company law has been prepared by Mr. Richard Bird but it does not appear that it has been adopted by the government.

5. *Quebec:*—Not much activity evidenced here. Mr. Yves Caron is preparing a report and draft bill for use in Quebec.

6. *Ontario:*—(see earlier comments)

7. *Manitoba:*—While your Committee has not yet seen the Bill, it is understood that Manitoba has enacted a new *Business Corporations Act* along the OBCA/CBCA models, with certain modifications.

8. *Saskatchewan:*—There has been a "white paper" circulated in respect of company law in this province, but your committee has not been able to review it as yet. It is possible that a bill may be placed before the Legislature next year.

9. *Alberta:*—It is understood that there may be work being done on a revision of the company law, but, so far as your Committee could determine, no bill is being prepared.

10. *British Columbia:*—The new *Companies Act* of this province seems to continue the formalities of the U.K. Act of 1948 but the substantive provisions of its legislation generally parallel the CBCA, particularly regarding remedies such as the derivative action and the oppression remedy, which latter B.C. has had since about 1950. Some recent amendments have been made in this province to its companies law but no details were available at the time this report was prepared.

11. *Yukon and Northwest Territories:*—No information available at this time in respect of these jurisdictions.

With regard to specific matters in which uniformity, in the view of your Committee might be expected to be a matter of convenience to the business and legal community, the uniformity situation appears to be as follows:

(a) Annual reports—no uniformity.

(b) Financial disclosure—CBCA and presumably the Manitoba law, which is virutally identical to CBCA.

(c) Director and officer liability—uniform provisions in CBCA, OBCA, Manitoba *Corporations Act* and *B.C. Companies Act.*

(d) Corporate names—parallel in CBCA and Manitoba. It is understood that some other provinces have indicated interest in adopting similar name regulations as a matter of policy, by exercising the discretionary powers under the several companies acts.

So far as inter-jurisdictional co-operation for the promotion of uniformity is concerned, the information available to your Committee suggests that all is not as well as it might be.

At a conference of the federal and provincial Ministers of Consumer and Corporate Affairs in May, 1973, the Ministers set up a Committee of Directors of the Company Branches (the federal director had observer status only) to seek greater uniformity of policy and administrative practice under the corporation laws. That Committee apparently met once or twice late in 1973, accomplished little and effectively gave up the task. It is understood, however, that

several weeks ago, the Deputy Minister of Consumer and Commercial Reations in Ontario, suggested to the federal officials that they should try again at the officials' level to set up a like committee to act as a co-ordinating mechanism to work toward greater uniformity in the technical areas where there are no major policy conflicts. No steps have yet been taken to set up such a committee, so far as your Committee is aware.

Not since before 1932 has the dialogue between officials of the federal corporate affairs administration and officials of the provincial administration of company law, been so little and so unorganized. The difficulty might be described by the observation that if one must sup with the Devil one must needs use a long spoon; (as Chaucer put it in *The Squire's Tale*: "therefore bihoveth hire a ful long spoon that shall ete with a feend.") or, as in the case with meetings of the Superintendents of Insurance, keep the federal "feend" in the audience with the other "interests", and not on the executive.

While this attitude on the part of the provincial officials is understandable in the case of insurance law and securities legislation, it does not now appear to be justified in relation to company or corporation law. Indeed, the record of the Federal-Provincial Committee on Uniform Company Law from 1933 to 1963 is against that attitude. It may be that in the mid-sixties the important federal officials of the day were less than enthusiastic for such an inter-jurisdictional body; but that does not appear to be the case today.

Your Committee agrees with the principle of the resolution of the Canadian Bar Association at Montreal on September 4, 1964:

> RESOLVED that this Association recommend to the Secretary of State of Canada and to the Provincial Secretary or other appropriate Minister of each of the provinces, that the Federal-Provincial Conference on Uniform Law, composed of the Deputy Provincial Secretaries, Directors of the Companies Branches, Registrars of Companies or other appropriate Departmental officials in the federal and each of the provincial jurisdictions, be reactivated and that annual meetings of the Conference be held following the annual meetings of this Association, (with a suggestion that the first meeting be held in the Province of Quebec), for the following amongst other purposes:
>
> 1. Exchanging information and, where desirable, rendering Departmental practices uniform across Canada and facilitating the operations in any jurisdiction of a company incorporated in another jurisdiction.
> 2. Assisting in the interpretation of new legislation when enacted in any jurisdiction pursuant to the Draft Uniform Companies Act.

Recommendations

Your Committee therefore recommends that this Conference now bring to the attention of the federal and provincial governments the

desire of this body and the Canadian Bar Association for uniformity in Canadian corporation law, and urge upon those governments the need to create an association of federal-provincial officials responsible for the administration of corporation law and those groups within Canada most directly affected by those laws (namely, the legal profession, chartered and public accountants, security brokers and commercial and industrial entrepreneurs).

Your Committee is of the view that this objective will only be obtained if it is initiated by the First Ministers of the governments concerned as was done in 1932. Therefore, the Conference might well recommend that its proposal be implemented by agreement of First Ministers.

Further, your Committee recommends that this Conference express its willingness to be of assistance in any useful way to any such organization that might be established nationally to advance uniformity of corporation law in Canada.

Appreciation

Your Committee wishes to express its appreciation to John Howard, Assistant Deputy Minister (Corporate Affairs), Department of Consumer and Corporate Affairs, and to Frederick H. Sparling, Director, of the same department, for their kindness in supplying your Committee with information at some inconvenience to themselves. These gentlemen can in no way be held responsible for the views expressed in this report.

All of which is respectfully submitted.

August 1976

J. W. Ryan
for Newfoundland Commissioners
Graham Walker
for Nova Scotia Commissioners
Yves Caron
for Quebec Commissioners

SCHEDULE

The Story of Uniformity in Company Law in Canada. (1915-1976)

The subject of uniform company law appeared in the proceedings of the Conference in 1919, and in the fifty-seven intervening years it has appeared in those proceedings no less than thirty-six times. For convenience, therefore, this summary of its history of the Conference is divided into the following periods:

Pre-War (to 1940)
Post-War (to 1963)
Modern (1963-1976)

PRE-WAR PERIOD (TO 1940)

1. *Canadian Bar Association Initiatives*

At the first annual meeting of the Canadian Bar Association held at Montreal in 1915 no action was taken with regard to company law but "it was suggested" that the "Western group of representatives" consider the subject of joint stock companies (CBA Pro. Vol. I, p. 14). In the address delivered at that meeting by Mr. Eugene Lafleur attention was called to the unsatisfactory condition of Canadian company law (CBA Pro. Vol. I, p. 26). At the second meeting of the Canadian Bar Association more time and attention was devoted to the subject of company law. A paper was read (CBA Pro. Vol. II, p. 88); a lengthy report was later prepared by Mr. Robson (CBA Pro. Vol. II, 185) and presented by Mr. C. P. Wilson (CBA Pro. Vol. II, p. 19). A resolution followed instructing that a committee prepare a draft Act for submission at the next meeting of the Canadian Bar Association that would recognize the principle of the doctrine of *ultra vires,* as suggested by Mr. Robson's paper, and that would provide for distinguishing between public and private companies. This was carried by the meeting (CBA Pro. Vol. II, pp. 19, 22, 97).

The third annual meeting of the Canadian Bar Association was not held until 1918. During the interval between the second and third meetings the subject was in the hands of the Manitoba members of the Council of the Canadian Bar.

A draft provincial Companies Act prepared about 1913 by Judge Robson was, at the instance of the General Manitoba Committee, introduced in Parliament in April, 1917, with slight modifications as Bill #43, but was never considered by Parliament or its committees.

That Bill was under consideration for some time by the General Committee of the Canadian Bar but as no satisfactory progress was being made the matter was finally referred to a subcommittee for the purpose of considering the broad general principles to be settled by the General Committee before the draft of a model Act could be proceeded with. This subcommittee was appointed on June 18, 1918 with a request for a report at the earliest possible date so that the report could be dealt with by the General Committee before a meeting of the Canadian Bar Association. This subcommittee provided its report in July, 1918, there being a majority report concurred in by three of its members and a minority report by one member.

It was too late for the General Committee to deal properly with the matter and no further action was taken. The majority and minority reports were presented as a report of the Committee on Company Law at the third annual meeting of the Canadian Bar in 1918. (See CBA Pro. Vol. III, pp. 202-219. The introductory remarks on presentation of the report are found at pages 71 and 74.)

A motion was made and carried that the report be referred to the Committee on Uniform Laws of the Association to be dealt with by them.

When the standing committees of the Canadian Bar for 1918-1919 were set up, the Convener of the Committee on Uniform Legislation and Law Reform was also made the Convener of the Committee on Company Law (CBA Pro. Vol. III, p. 106). The Law Committee consisted of the Manitoba members of the Council. No meeting of either of these two committees was held between the third annual meeting of the Canadian Bar Association and the fourth annual meeting in 1919. No report on company law was presented at the 1919 meeting. However, the subject of *ultra vires* in company law was on the program. (The discussion thereon is found at CBA Pro. Vol. IV, pp. 38, 47.)

In 1919 when the standing committees of the Canadian Bar were made no provision was made for a Committee on Company Law, and no action (beyond that taken on the subject of *ultra vires*) was taken in 1919 by that Association with regard to company law.

2. *Uniform Law Conference Initiatives*

The record as far as this Conference is concerned begins in 1919 when at the meeting in that year it was resolved that the Manitoba Commissioners be requested to consider a Uniform Companies Act and report at the next meeting upon any matters of principle that

should be decided before a Uniform Act was undertaken. It was suggested that they should confer with the Committee of the Canadian Bar on Uniform Legislation.

In 1920 the Manitoba Commissioners reported to the Conference and in their report noted and commented on the differences in procedure between the memorandum jurisdictions and the letters patent jurisdictions and sought direction from the Conference. They felt that it would be very difficult to obtain uniformity in all respects in the various provinces but that it should be possible to have provisions governing management, procedure, holding of meetings, borrowing powers, etc., made uniform and felt that there was no valid reason why the language of these different sections should differ in the different provinces. After considerable discussion as to the abolition of the doctrine of *ultra vires* and also as to whether incorporation should be by memorandum of association or by letters patent, the Conference adjourned without any motion or resolution (1920 Pro. pp. 11, 65).

At the 1921 Conference the matter was shortly dealt with by a resolution that the subject of company law be again referred to the Commissioners for Manitoba (1921 Pro. p. 18).

(a) *Draft Act No. 1*

At the 1922 Conference Mr. Symington, on behalf of the Manitoba Commissioners, presented a report and a draft Companies Act. The report was received and adopted and it was ordered that the report and section 15A and 15B of the draft Act should be printed in the proceedings. The draft Act presented by the Manitoba Commissioners was itself omitted. The clauses that were printed related in the one case to the doctrine of *ultra vires* and in the other case to the extra-territorial capacity of provincial companies. The draft Act was then referred to the British Columbia Commissioners for a report, especially on sections 15A and 15B.

The draft Act submitted by the Manitoba Commissioners recommended incorporation by memorandum of association instead of letters patent, the use of by-laws instead of articles of association, the use of supplementary letters patent for increasing the power of the company at the wish of the shareholders, as well as the *ultra vires* doctrine. (1922 Pro. pp. 18, 19, 75).

At the 1923 Conference the British Columbia Commissioners presented a report, but discussion thereon was postponed until 1925. The draft Act prepared by the Manitoba Commissioners did not

appeal to the British Columbia Commissioners as a satisfactory foundation for constructing the Uniform Act (1923 Pro. p. 68). They commented in their report on several aspects of the earlier draft and made recommendations or suggestions thereon. They concluded by recommending that a "better" draft be prepared (1923 Pro. p. 78).

(b) *British Columbia Act of 1921*

The B.C. Commissioners proposed the British Columbia Act of 1921. It appealed to them as being better arranged than other Acts, as being the latest one in Canada, as adhering to the Imperial Act as far as principles permitted, and as being the fullest in its variety of provisions, and went on to suggest that an interleafed copy of that Act be prepared for the Conference showing after each section the applicable provisions of the company laws of the other provinces (1923 Pro. pp. 9, 15, 68).

The 1924 Conference approved the suggestion of the British Columbia Commissioners for an interleafing of the new British Columbia Act (1924 Pro. pp. 15, 16). At the 1925 Conference the preparation of a draft Act was permitted to stand over a year upon the report of no progress by the British Columbia Commissioners. And the matter was left as stood-over in 1925 at the 1926 Conference. The same action, or lack of it, was taken at the 1927 Conference. At the 1928 Conference it was resolved that the subject should stand for future consideration (1925 Pro. p. 11; 1926 Pro. p. 18; 1928 Pro. p. 18).

At the 1932 Conference the topic of company law was again discussed and it was recommended that the subject should be considered by the Conference if a request for uniform legislation on the subject was received from at least three attorney generals of the provinces. If such a request were received the President was authorized to take such steps before the next meeting of the Conference as he might deem necessary to further the consideration of the subject matter of company law (1932 Pro. pp. 19, 20).

At the 1933 Conference it was resolved that the Conference express itself willing to undertake consideration of a uniform Act dealing with company law upon receiving a request to do so from the Canadian Bar Association or at least three attorney generals of the provinces. It was suggested that if such a request were received, it should be made possible for the Conference to consult those provincial officers responsible for the administration of company law.

The report to the Conference in 1933 noted that in December, 1932, an Interprovincial Conference of premiers and attorney generals had been held in Ottawa and that some steps had been taken toward uniform company legislation not only between the provinces but between the provinces and Canada. It was also noted that no substantial progress had been made following that Conference of premiers, etc., and suggested that the Uniformity Conference mark time on the matter.

(c) *Federal-Provincial Uniform Act*

By 1938 the Dominion representatives had been at the Conference for about four years and at that Conference Mr. O'Meara, Assistant Under-Secretary of State, reported on the draft Uniform Companies Act prepared for the Dominion-Provincial Committee on Company Law (Federal-Provincial Committee) and distributed copies of the same for information to the members of the Conference (1938 Pro. p. 14). This was the draft Act prepared by the Alberta Commissioner, Mr. R. Andrew Smith, then Legislative Counsel for Alberta.

However, it then appears that a decision was taken to await the report of a commission on company law that had been established in England. The war intervened and matters stood there.

POST-WAR PERIOD (1940-1962)

Nothing was again heard of the subject until the Uniformity Conference of 1942 when the Hon. Mr. Maitland addressed the Conference regarding the provision of representation upon boards of directors of companies of substantial minority groups of stockholders, whereupon it was resolved that Mr. O'Meara be requested to place before the Federal-Provincial Committee the matter brought to the attention of the Conference by Mr. Maitland (1942 Pro. pp. 24, 165).

At the 1943 Conference Mr. O'Meara reported back on the subject of minority shareholders and recommended that the matter be reserved for the next meeting of the Federal-Provincial Committee. This recommendation was approved by the Conference. Mr. O'Meara's report noted that the first draft of the Federal-Provincial Committee's Uniform Act had been circulated to the Canadian Bar Association at its meeting in Vancouver in 1938. He reported that in the intervening years the Federal-Provincial Committee had not met due to war-time conditions. He also brought to the attention of the Conference the fact that the United Kingdom was preparing an extensive study of its Companies Act (1943 Pro. pp. 25, 121).

The 1946 Conference resolved:

> "that the Conference express its conviction that uniformity of company law in Canada is much to be desired and its hope that the Dominion-Provincial Committee on Uniform Company Law whose studies were interrupted by wartime exigencies may in the very near future resume its undertaking to the end that a Uniform Companies Act for Canada and for each of the provinces may at the earliest possible date be prepared for submission to Parliament and the Legislatures".

At the 1947 Conference Mr. O'Meara reported on the resolution of 1946. He stated that the Federal-Provincial Committee would be reconvened by the Secretary of State in the very near future and that he had every hope that the Committee would proceed in due course to prepare a model Companies Act acceptable to all jurisdictions in Canada. And there the matter stood until 1950.

In 1950 on instruction from the Attorney General of New Brunswick Mr. McLatchy moved the following resolution, which was adopted (1950 Pro. p. 28):

> RESOLVED that the Federal representatives prepare a draft of a Uniform Companies Act and report thereon to the next meeting of the Conference unless they are assured that this work will be proceeded with forthwith by the special Federal-Provincial Committee on Uniform Company Law.

At the 1951 Conference Mr. O'Meara made a verbal report on behalf of the Federal representatives as to the work being carried on by various bodies towards a Uniform Companies Act.

It was subsequently resolved that having regard to the desire expressed on behalf of several of the provinces for an early preparation of a draft Uniform Companies Act, the Federal representatives be directed to take appropriate steps toward co-relation of the projects now under consideration by the Federal-Provincial Committee and the Commercial Law Section of the Canadian Bar Association on amendment of the *Companies Act* (Canada), to the end that a draft Uniform Companies Act might be completed as promptly as possible and presented for the scrutiny of the Conference at its 1952 meeting (1951 Pro. pp. 17, 24).

In the following year, that is at the 1952 Conference, Mr. O'Meara, on behalf of the Federal representatives, gave a verbal report on the progress made in the matter of the proposed Uniform Companies Act. He stated that a meeting to consider a Uniform Act had been arranged for a date in October, to be selected, at which he expected all provinces would be represented. He advised that the chairman of the subcommittee appointed by the Commercial Law Section of the Canadian Bar had submitted a report containing

specific suggestions and that the Canadian Institute of Chartered Accountants and some of the provincial bar associations had also produced some recommendations. He promised that a progress report on the work of the Federal-Provincial Committee would be made to the next Conference (1952 Pro. pp. 18, 19).

A verbal report was again given by Mr. O'Meara at the Conference of 1953. He reported that a meeting of the Federal-Provincial Committee had been held in Ottawa in 1952 and that all provinces but Quebec had been represented. At this meeting the provincial members of that Conference had of course met with the Federal members of the Committee. Representatives had been received from the Commercial Law Section of the Canadian Bar, from the Canadian Institute of Chartered Accountants and other sources and steady progress was being made. It seemed likely at that point that uniformity would be possible without interference with the established methods of procedure for incorporating in the different jurisdictions (1953 Pro. p. 20).

At the Conference in 1954 Mr. O'Meara reported verbally that considerable progress was being made. The members of the eight subcommittees appointed at the last plenary Conference of the Federal-Provincial Committee had held numerous meetings and their reports were practically completed. It was hoped that the actual work of drafting would soon be undertaken with respect to some at least of the proposed uniform provisions (1954 Pro. p. 17).

Mr. O'Meara reported again to the Conference in 1955. The Federal-Provincial Committee had met in Ottawa for five days in June of 1955. All the provinces were represented at that meeting except Quebec and British Columbia. The illness of the British Columbia Registrar of Companies had prevented his attendance; Quebec had expressed its interest in the work of the Committee and its desire to receive copies of the minutes of the meetings.

As a result Mr. O'Meara was able to report gratifying progress and that uniformity of recommendations was being recorded. Further meetings were to be held and portions of a draft Act prepared on those matters in which uniformity had been recorded. (1955 Pro. pp. 18, 19).

At the 1957 Conference Mr. O'Meara again reported. The most recent meeting of the Federal-Provincial Committee had been held at Toronto in November, 1956, at which Quebec was represented for the first time. Agreement had been reached on a wide variety of

points on which uniformity was considered desirable. Two separate drafts would be required—a letters patent Act and a memorandum Act. The Manitoba and Ontario representatives on the Federal-Provincial Committee were to prepare the letters patent Act while the Alberta representatives were to prepare the draft memorandum Act. The first letters patent draft had been completed and would be printed for distribution to the members of the Conference on Uniformity of Legislation in Canada, to bar associations of the provinces concerned and to associations of accountants and the boards of trade, etc., from whom comments were to be invited.

The subcommittee that had prepared the draft letters patent Act would welcome comments by the Conference. Mr. O'Meara asked that the Manitoba, Ontario and Federal Commissioners on the Conference be designated to prepare a report on the draft letters patent Companies Act for submission at the next meeting of the Conference, that is, 1958 meeting. This was suggested in order that close co-operation with the draftsmen might be facilitated. This report was adopted and a resolution followed in the terms of Mr. O'Meara's recommendation (1957 Pro. pp. 21-23, 40).

In 1958 Mr. O'Meara reported back to the Conference. By resolution of the Conference his report was received and recommendations adopted. Committees were then appointed pursuant to the resolution to examine the draft Uniform Acts and to collaborate with the Federal-Provincial Committee on such revision of them as might be found necessary. The following Commissioners were named to the Committee of the Conference: For the letters patent Act: Messrs. MacTavish, Rutherford and Driedger; for the memorandum Act: Messrs. Brissenden, Ryan and Janzen (1958 Pro. pp. 24, 25, 37).

At the 1959 Conference a letter from Mr. R. J. Cudney, Q.C., Deputy Provincial Secretary for Ontario, on the activities of the Federal-Provincial Committee was read. In his letter Mr. Cudney asked that the Conference assist the Federal-Provincial Committee in the drafting of a Uniform Act for letters patent and for the memorandum jurisdictions.

Mr. J. W. Ryan, who had worked on the drafts both as a member of the Federal-Provincial Committee and as a representative from Alberta on the Committee of the Conference established in 1958, reported on the meetings and on the work that had been done during the previous year on the preparation of draft Acts.

Some discussion then took place concerning the method by which the Conference should assist the Federal-Provincial Committee in the drafting of the proposed Acts, and it was agreed that the committees that had been established in 1958 would meet together and report to the Conference later with recommendations for dealing with the problem.

Mr. MacTavish reported for those committees at a later session. It was thought feasible for at least a majority of the two subcommittees to meet in Ottawa for five days during the first week of November, 1959 to do the job assigned to the Conference by the Federal-Provincial Committee. It seemed desirable for those members of the Conference's Committee who were attending the Canadian Bar Convention in Vancouver to meet with Mr. Cudney (who would be at that Convention) to ensure that the proposed program of the Conference's Committee would meet the situation. The Conference adopted the report of its Committee and Mr. Ryan was substituted for Mr. MacTavish as the Convener of the committees. As Convener he was authorized by the Conference to make appointments of substitutes to the committees or to request the appropriate authorities to do so. (1959 Pro. pp. 22, 25, 26).

At the 1960 Conference Mr. Rutherford of Manitoba (in the absence of Mr. Ryan) reported verbally. The Conference was told that progress in drafting was being made by the Committee of the Conference working with the Federal-Provincial Committee and that another meeting was expected later in 1960. It was agreed that the Conference should continue to co-operate with the Federal-Provincial Committee in preparing the drafts of the Uniform Acts (1960 Pro. pp. 23, 48).

Fourth Uniform Acts (memorandum; letters patent) (1960 Drafts)

At the 1961 Conference Mr. Rutherford reported that the job of drafting both Acts had been completed and that Mr. Cudney, Chairman of the Federal-Provincial Committee, was to arrange for the printing of the completed drafts. It was not likely that the print of the drafts would be ready until the fall of 1961. Mr. Rutherford's report was received on motion (1961 Pro. pp. 21, 76).

MODERN PERIOD (1963 TO 1976)

In 1962, a forty-four year effort to obtain uniformity ended in a misunderstanding. Through all the years of the Federal-Provincial Committee on Uniform Company Law some members of that committee from the administrative branches of government in Western

Canada were under the impression that the project was primarily one of the Uniformity Conference and that the Federal-Provincial Company Law Committee was convened by the Secretary of State (Canada) and did its work always having in mind that the final product would be recommended for enactment in the provinces only after it had been considered, redrafted as necessary, and approved by the Uniformity Conference.

As it turned out, by 1962 the Uniformity Conference saw themselves in the role of draftsmen from the Conference on a project of the Federal-Provincial Committee. This nice distinction didn't appear from the title given the draft Acts. The draft Acts received fairly extensive criticism at the Canadian Bar Association meeting in Halifax in 1962. It seems that prior to the panel discussion on the draft uniform Acts at the Canadian Bar Association in Halifax, Mr. Rutherford, then Chairman of the Committee appointed by the Conference, asked leave to make a statement from the floor and, in explaining the distinction in the roles of the Uniformity Conference and Federal Provincial Committee in the project, left the impression that the draft Acts were in effect primarily Acts prepared by the Federal-Provincial Committee on Company Law and that he was not recommending them. This left the impression in some areas that this Conference was rejecting the Uniform Draft Acts of 1960.

In 1963 the history of the uniform company law project was reviewed by W. F. Bowker; and Mr. Elborne Hughes (Deputy Provincial Secretary of Alberta), who had been invited to attend the Conference, gave details of the Federal-Provincial Committee participation in the project (1963 Pro. p. 29).

A further committee of the Conference was then set up (Messrs. Brissenden, Bowker, Hughes) to

(a) inquire of the Federal-Provincial Committee on Uniform Company Law about the present status of the draft Uniform Companies Acts;

(b) consult with such persons and make such inquiries as it considers desirable to ascertain the attitude of the Bar and other interested groups towards the draft Acts and towards Uniform Companies Acts generally; and

(c) consider the draft Acts and other material and information on the subject that is collected by the committee and to report on the matter at the next meeting of the Conference.

That committee reported to the Conference in 1964 (1964 Pro. p. 25, Report at pp. 98-105). This report had all the earmarks of an epitaph to a dear departed; but, nevertheless, the Conference didn't give up and passed a resolution approving the proposal of the Deputy Registrar General for Canada that the Federal-Provincial Conferences on Uniformity of Company Law be continued and that the Federal and Provincial governments be requested by their respective commissioners to participate in such conferences (1964 Pro. p. 25).

The matter wouldn't go away; it was again on the agenda in 1965. Mr. Brissenden reported verbally to the Conference that a Federal-Provincial Conference had been held in Quebec but that he had no information from it. He did, however, read into the proceedings the resolution passed by the Canadian Bar Association in September 1964, whereby that body proposed the re-activation of the federal-provincial organization that had been functioning through the fifties and that annual meetings thereof be held for the following purpose, *inter alia*:

1. exchanging information and, where desirable, rendering Departmental practices uniform across Canada and facilitating the operations in any jurisdiction of a company incorporated in another jurisdiction; and

2. assisting in the interpretation of new legislation when enacted in any jurisdiction pursuant to the Draft Uniform Companies Act.

The Conference put the subject on its agenda and agreed that the Canada commissioners make a progress report at the next Conference (1965 Pro. pp. 32, 33).

Mr. MacIntosh on behalf of the Canada commissioners reported in 1966 that the Federal-Provincial Conference had decided to await the report of the Federal Commission appointed to look into securities and company shares (1966 Pro. p. 20). There is little doubt that this was a "cop out" for nothing more is heard from the Uniformity Conference (or the Federal-Provincial Conference, which did not exist in fact by this time), until 1973 when the matter was once again brought to this Conference by Mr. Caron, one of the Quebec commissioners, (1973 Pro. p. 30).

The Interregnum

Meanwhile, "back at the ranch" as it were, things were happening that a decade earlier would have been unthinkable.

In Ontario the Interim Report of the Select Committee on Company Law appeared in 1967 and was followed in 1970 (Ont. Statutes 1970, c. 25) by the enactment of the Ontario *Business Corporations Act.* So far as this story is concerned that Act must be accepted as a *tour de force*; it did away with the letters patent approach to incorporation in favour of a certificate of incorporation available as of right on the filing of articles of association. This approach to incorporation is compatible with the certificate of incorporation in the memorandum of association method of incorporation.

After fifty years the philosophical barrier between Ontario (a letters patent jurisdiction) and the memorandum jurisdictions (Newfoundland, Nova Scotia, Saskatchewan, Alberta and British Columbia), no longer existed.

It is fair to assume that Ontario's Act was influenced to some extent by developments in the United States in the same decade; particularly New York's comprehensive revision of its corporation law in 1963. And there is no doubt that Ontario's experience had some effect on subsequent events in the federal scene.

In the late 1960's the federal government through the newly formed Department of Consumer and Corporate Affairs, which took over the administration of the *Canada Corporations Act,* established a task force to look into the federal corporation law. That task force eventually melted away to a small group who reported with proposals for a new Business Corporation Law for Canada. That report was presented in mid-year 1971 and resulted in a bill being presented to Parliament which was subsequently, in a later parliament, re-introduced and enacted in the session of 1974-75-76 as chapter 33. That Act came into force on the 1st of January of this year, 1976.

It, too, opted for articles of association and incorporation by certificate. Another barrier to uniformity in the past had fallen.

Of these provinces, Manitoba had enacted a new *Companies Act* in the late 1960's which adopted a considerable amount of the 1960 uniform draft Act for letters patent jurisdiction. Prince Edward Island at the 1976 session of its legislature introduced a bill modelled on the *Canada Business Corporations Act.* It, too, is leaving the letters patent fold.

When the federal Act was enacted it contained a provision that stated that one of the purposes of that Act was to advance "the

cause of uniformity of business corporation law in Canada". It was that statement that brought the matter back to the Conference in 1973 when it was noted in the bill by Mr. Yves Caron, a Quebec commissioner and one of the earlier members of the federal task force set up by the Hon. John N. Turner when he was Minister of Consumer and Corporate Affairs.

In respect of the last few years and the other jurisdictions involved, particularly to memorandum jurisdictions, this history is not complete in its details — but some indication of the influence the draft uniform Acts of 1960 have had on events may be obtained from the report attached as Schedule I hereof (*omitted*).

Schedule II attached (*omitted*) is a table of the present situation of corporation law in Canada, and the latest report available at this time on proposed plans for changes in corporation law in the various jurisdictions.

It is meet and fitting that this summary of the uniform company law story close with the comments of the British Columbia Commissioners in 1923:

> "Company law is not in the same category as most subjects which have been or are being dealt with by our Conference. It is not in the same sense "pure law", more or less static, but is continually liable to change owing to its ramifications and the ever-increasing use of corporate machinery. Then again a Companies Act does not work automatically like a Wills Act, but in large part is administered, and it is a trite observation that the success of a law more often depends on that factor than its actual provisions. The legal profession, accountants, and business men generally are more conversant with and intimately affected by laws of this kind, and your Committee entertains some doubt whether the Conference can or ought to settle big changes without taking some pains to ascertain the views of the classes indicated."

Everything that has occurred through the years since 1923 has only emphasized the wisdom of those comments.

James W. Ryan
For the Commissioners
for Newfoundland,
Nova Scotia, and Quebec

St. John's
15 July 1976

APPENDIX L

(See page 29)

CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

I

REPORT OF THE SPECIAL COMMITTEE

At the 1975 Annual Meeting of the Conference, M. M. Hoyt, Esq., Q.C. a member of the Advisory Group on Private International Law and Unification of Law, Government of Canada, submitted a report on the Convention on the Limitation Period in the International Sale of Goods. The Conference resolved that the report be received and that it be referred to the Special Committee of the Conference on Private International Law for study and a report of its recommendations to the 1976 annual meeting (1975 Pro., p. 29 and App. M, p. 160).

Your Special Committee draws attention to the fact that the report of a year ago contained a schedule which was the proposed text of a Uniform Act to enact the provisions of the Convention as part of the provincial law (1975 Pro., p. 161).

After having studied the report, your Special Committee is of the view that the proposed Uniform Act is deficient in some respects, and more particularly with regard to the date upon which it is to come into force. The effective date of the legislation must be such as to allow the Government of Canada to honour its international commitments when ratifying or acceding to an international convention on behalf of one or more of the provinces.

H. Allan Leal
on behalf of the Special Committee

Toronto
1 August 1976

Note

The draft Act attached to the report is omitted from these Proceedings because of its tentative nature.

The Uniform Act as finally settled, adopted and recommended for enactment follows.

II

An Act to amend the Uniform Limitation of Actions Act

(As Adopted and Recommended)

1962 Con. p. 199, amended

1. The *Uniform Limitations of Actions Act* is amended by adding thereto the following section and schedule:

International Sale of Goods

Interpretation

39a.—(1) In this section,

(a) "Convention" means the convention set out in the schedule;

(b) "effective date" means the latest of,

(i) the day on which, in accordance with paragraph 1 of Article 44 of the Convention, the Convention enters into force,

(ii) where, at the time of accession to the Convention, the Government of Canada has declared that the Convention extends to the Province, the first day of the month following the expiration of six months after the date on which the Government of Canada deposits with the Secretary General of the United Nations under the Convention the instrument of accession, or

(iii) the first day of the month following the expiration of six months after the date on which the Government of Canada submits to the Secretary General of the United Nations under the Convention a declaration that the Convention extends to the Province.

When Convention rules in force

(2) On, from and after the effective date the Convention is in force in the Province and the rules governing the limitation period in the international sale of goods set out in the Convention are law in the Province.

Notice to United Nations

(3) The (*Provincial Secretary or other Minister*) shall request the Government of Canada to submit a declaration to the Secretary General of the United Nations declaring that the Convention extends to the Province.

Notice in *Gazette*

(4) As soon as the effective date is determined, the (*Provincial Secretary or other Minister*) shall publish in the *Gazette* a notice indicating the date that is the effective date for the purposes of this section.

Crown bound

(5) The Crown is bound by this section.

SCHEDULE

Convention on the Limitation Period in the International Sale of Goods

PREAMBLE

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

PART I. SUBSTANTIVE PROVISIONS

Sphere of application

Article 1

1. This Convention shall determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such period of time is hereinafter referred to as "the limitation period".

2. This Convention shall not affect a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

3. In this Convention:

(a) "buyer", "seller", and "party" mean persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or obligations under the contract of sale;

(b) "creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) "debtor" means a party against whom a creditor asserts a claim;

(d) "breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) "legal proceedings" includes judicial, arbitral and administrative proceedings;

(f) "person" includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(g) "writing" includes telegram and telex;

(h) "year" means a year according to the Gregorian calendar.

Article 2

For the purposes of this Convention:

(a) a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

(b) the fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(c) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and

its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(d) where a party does not have a place of business, reference shall be made to his habitual residence;

(e) neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 3

1. This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

2. Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have expressly excluded its application.

Article 4

This Convention shall not apply to sales:

(a) of goods bought for personal, family or household use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels or aircraft;

(f) of electricity.

Article 5

This Convention shall not apply to claims based upon:

(a) death of, or personal injury to, any person;

(b) nuclear damage caused by the goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

(e) a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) a bill of exchange, cheque or promissory note.

Article 6

1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 7

In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.

The duration and commencement of the limitation period

Article 8

The limitation period shall be four years.

Article 9

1. Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date on which the claim accrues.

2. The commencement of the limitation period shall not be postponed by:

(a) a requirement that the party be given a notice as described in paragraph 2 of article 1, or

(b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

Article 10

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

2. A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

Article 11

If the seller has given an express undertaking relating to the goods which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking shall commence on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

Article 12

1. If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

2. The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

Cessation and extension of the limitation period

Article 13

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

Article 14

1. Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings.

2. In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business.

Article 15

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence of:

(a) the death or incapacity of the debtor;

(b) the bankruptcy or any state of insolvency affecting the whole of the property of the debtor; or

(c) the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor;

the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings.

Article 16

For the purposes of articles 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

Article 17

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with article 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

2. If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended.

Article 18

1. Where legal proceedings have been commenced against one debtor, the limitation period prescribed in this Convention shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

2. Where legal proceedings have been commenced by a sub-purchaser against the buyer, the limitation period prescribed in this Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

3. Where the legal proceedings referred to in paragraphs 1 and 2 of this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

Article 19

Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommending a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

Article 20

1. Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgment.

2. Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgment under

paragraph (1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Article 21

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

Modification of the limitation period by the parties

Article 22

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

General limit of the limitation period

Article 23

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than 10 years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

Consequences of the expiration of the limitation period

Article 24

Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings.

Article 25

1. Subject to the provisions of paragraph (2) of this article and of article 24, no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period.

2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) if both claims relate to the same contract or to several contracts concluded in the course of the same transaction; or

(b) if the claims could have been set-off at any time before the expiration of the limitation period.

Article 26

Where the debtor performs his obligations after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his obligation that the limitation period had expired.

Article 27

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

Calculation of the period

Article 28

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which correspondence to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last month of the limitation period.

2. The limitation period shall be calculated by reference to the date of the place where the legal proceedings are instituted.

Article 29

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in article 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

International effect

Article 30

The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

PART II. IMPLEMENTATION

Article 31

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

Article 32

Where in this Convention reference is made to the law of a State in which different systems of law apply, such reference shall be construed to mean the law of the particular legal system concerned.

Article 33

Each Contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention.

PART III. DECLARATIONS AND RESERVATIONS

Article 34

Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of

these States and a buyer having a place of business in another of these States shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.

Article 35

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

Article 36

Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it shall not be compelled to apply the provisions of article 24 of this Convention.

Article 37

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.

Article 38

1. A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

2. Such declaration shall cease to be effective on the first day of the month following the expiration of 12 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force.

Article 39

No reservation other than those made in accordance with articles 34, 35, 36 and 38 shall be permitted.

Article 40

1. Declarations made under this Convention shall be addressed to the Secretary-General of the United Nations and shall take effect simultaneously with the entry of this Convention into force in respect of the State concerned, except declarations made thereafter. The latter

declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the Secretary-General of the United Nations.

2. Any State which has made a declaration under this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Secretary-General of the United Nations. In the case of a declaration made under article 34 of this Convention, such withdrawal shall also render inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

PART IV. FINAL CLAUSES

Article 41

This Convention shall be open until 31 December 1975 for signature by all States at the Headquarters of the United Nations.

Article 42

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 43

This Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 44

1. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, this Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or accession.

Article 45

1. Any Contracting State may denounce this Convention by notifying the Secretary-General of the United Nations to that effect.

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after receipt of the notification by the Secretary-General of the United Nations.

Article 46

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

APPENDIX M

(See page 29)

Office de revision du Code civil — Civil Code Revision Office

360, rue McGill, chambre 402
Montreal

July 14, 1976

Glen W. Acorn, Q.C., Esq.
President
Uniform Law Conference of Canada
Department of Attorney General
Legislative Building
Edmonton, Alberta

Dear Confrère:

I wish to acknowledge receipt of your letter of 22 June concerning the report by the Office on the Domicile of Human Persons.

There is no doubt that there is some merit in having a unified concept of domicile throughout Canada, but at the same time, I am firmly of the opinion that in these times of mobility only the concept of habitual residence can provide, both in the internal and conflicts areas, a suitable solution to present day problems. I would certainly be very pleased if the Quebec report were the occasion for a reassessment of the concept of domicile at the Uniform Law Conference of Canada.

I am taking the liberty of sending this letter to Me Robert Normand; he might well wish to take further steps in this matter.

Yours sincerely,
Paul-A. Crépeau
President

cc: Me Robert Normand, c.r.
Sous-Ministre de la Justice

APPENDIX N

(See page 29)

Enactment of and Amendments to Uniform Acts, 1975-76

REPORT OF MR. TALLIN

Bills of Sale Act

Alberta added a new section to its Act (13.1) to provide inter alia that a mortgaged chattel which becomes affixed to realty after registration of the mortgage, remains a chattel for purposes of the mortgage.

Condominium Act

Manitoba enacted new fire insurance provisions similar to the insurance provisions of the Uniform Act.

Extra-Provincial Custody Orders Enforcement Act

British Columbia and Newfoundland each enacted the Uniform Act.

Nova Scotia enacted a *Reciprocal Enforcement of Custody Orders Act* which is similar in many respects to the Uniform Act. The chief difference is that the Nova Scotia Act depends on reciprocity whereas the Uniform Act does not.

Fatal Accidents Act

Manitoba increased the limitation period under its Act from 1 to 2 years.

Interpretation Act

British Columbia enacted a variety of amendments to its Act.

Manitoba enacted a definition of "international systems of units (si)".

Interprovincial Subpoenas Act

British Columbia enacted the Uniform Act.

Newfoundland enacted the Uniform Act with minor variations.

The Northwest Territories enacted an interprovincial subpoenas ordinance based on, but containing a number of variations from, the Uniform Act. Included in the variations are a broader definition of "court" and a provision authorizing regulations.

Medical Consent of Minors Act

New Brunswick enacted the Uniform Act, but reworded subsection 3(2).

Partnerships Registration Act

New Brunswick repealed subsection 10(5) of its Act, the provision which exempted corporations from the registration requirements of section 10.

Retirement Plan Beneficiaries Act

Manitoba enacted the Uniform Act.

Vital Statistics Act

Saskatchewan enacted a number of new provisions respecting coroner's statements and changes of recorded names.

Wills

Newfoundland enacted the Conflict of Laws provisions of the *Uniform Wills Act.*

Newfoundland enacted the International Wills provisions of the *Uniform Wills Act.*

General

M. Yves Caron provided me with a list which indicates the provisions in Quebec legislation which are equivalent in substance, but not in form, to Uniform Acts. The list is set out as a Schedule to this report.

Winnipeg — Rae Tallin
1 August 1976

SCHEDULE

UNIFORM ACTS AND THEIR QUEBEC EQUIVALENTS

1. *Assignment of Book Debts Act*
   See a. 1570 to 1578 C.C. (S.Q. 1950-51, c. 42, s. 3) — remote similarity.

2. *Bulk Sales Act*
   See a. 1569a and s. C.C. (S.Q. 1910, c. 39, mod. 1914, c. 63 and 1971, c. 85, s. 13) — similar.

3. *Conditional Sales Act*
   See *Consumer Protection Act* (S.Q. 1970, c. 71, s. 29-42).

4. *Criminal Injuries Compensation Act*
   See *Loi de l'indemnisation des victimes d'actes criminels,* L.Q. 1971, c. 18 — quite similar.

5. *Evidence Act*
   Affirmation in lieu of oath: see a. 299 C.P.C. — similar.
   Judicial Notice of Acts, Proof of State Documents; see a. 1207 C.C. — similar to "Proof of State Documents".

6. *Human Tissue Gift Act*
   See a. 20, 21, 22 C.C. — similar.

7. *Interpretation Act*
   See *Loi d'interprétation*, S.R.Q. 1964, c. 1, particularly, a. 49: cf. a 6(1) of the Uniform Act; a. 40: cf. a. 9 of the Uniform Act; a. 39 para. 1: cf. a. 7 of the Uniform Act; a. 41: cf. a. 11 of the Uniform Act; a. 42 para. 1: cf. a. 13 of the Uniform Act — these provisions are similar in both Acts.

8. *Partnerships Registration Act*
   See *Loi des déclarations des compagnies et sociétés,* S.R.Q. 1964, c. 272, mod. L.Q. 1966-67, c. 72 — similar.

9. *Presumption of Death Act*
   See a. 70, 71 and 72 C.C. — somewhat similar.

10. *Service of Process by Mail Act*
    See a. 138 and 140 C.P.C. — s. 2 of the Uniform Act is identical.

11. *Trustee Investments*
    See a. 981o C.C. — very similar.

12. *Warehouse Receipts Act*
    See Bills of Lading Act, S.R.Q. 1964, c. 318 — s. 23 of the Uniform Act is vaguely similar.

13. *Wills Act*
    See Civil Code. a. 842 para. 2: cf. s. 7 of the Uniform Act; a. 864 para. 2: cf. s. 15 of the Uniform Act; a. 849: cf. s. 6(1) of the Uniform Act; a. 854 para. 1: cf. s. 8(3) of the Uniform Act — which are similar.

Note: Many other provisions of the Quebec Civil Code or of other statutes bear resemblance to the Uniform Acts, but are not sufficiently identical to justify a reference. Obviously, most of these subject matters are covered one way or another in the laws of Quebec.

APPENDIX O

(See page 29)

EVIDENCE

(Rule in Hollington v. Hewthorn)

I

REPORT OF THE ALBERTA COMMISSIONERS

At the 1975 meeting, the discussion on the Alberta Commissioner's draft Act as followed by this resolution:

> RESOLVED that the matter be referred back to the Alberta Commissioners to prepare a fresh draft having regard to the decisions taken at this meeting and that the new draft be circulated in the usual way and considered at the 1976 annual meeting (1975 Pro. p. 29 and Appendix L at p. 157).

The Alberta Commissioners have prepared the attached draft for the consideration of the Conference. As to the draft, we wish to make the following comments:

1. The definition of "conviction" is rewritten to reflect the decision regarding it made at the 1975 meeting.

2. Changes have been made in this draft on our own to include cases where an absolute or conditional discharge is given to an accused pursuant to section 234(2) or 662.1 of the *Criminal Code* instead of convicting him. A discharge is given where the accused has pleaded guilty or is found guilty of an offence. To achieve this we have added a definition of "finding of guilt" and have altered the text of section 28.1 and 28.3 accordingly.

   Our feeling was that the rule in *Hollington* might be applied by analogy to cases where it was sought to tender in evidence proof of a finding of guilt alone where the accused was discharged. Thus we want to be sure that section 28.1 will be remedial both with respect to proof of convictions and of findings of guilt.

   It may be that we should be speaking in the draft of proof of the discharge order instead of the finding of guilt, but we leave that to the Conference to decide.

3. The definition of "offence" has been omitted. We have come to the view, after attempting to redraft the definition in the 1975 draft, that it is not needed. We feel that the words in section 28.1(2) reading "Where . . . a person has been convicted of

an offence anywhere in Canada" are in this context sufficiently clear without the need to elaborate on what is meant by the word "offence".

The definition in the 1975 draft read:

(b) "offence" means an offence under any law of Canada or of any province or under any by-law of any municipality in Canada.

If the Conference takes the view that a definition is needed, we offer these additional comments.

The definition in the 1975 draft has a possible flaw. The reference to "any law of . . . any province" is intended to embrace all subordinate legislation made pursuant to the statutes of a province. Municipal by-laws are surely as much a kind of subordinate legislation as any other. To include in the definition a specific reference to "any by-law of any municipality in Canada" gives rise to the inference that the Legislature did not consider it to fall within the description of a "law of any province". This in turn casts doubt on what the expression "law of any province" includes. If a definition is desired, we would prefer to recast it in the broadest terms along these lines:

(b) "offence" means an offence under any law in force in Canada or any part of Canada.

4. In section 28.1(2) and section 28.3 we changed the words "civil proceeding" to "action" so as to extend those provisions to all proceedings coming within the definition of "action" in the *Uniform Evidence Act* which reads:

(a) "action" includes any
  (i) civil proceeding,
  (ii) inquiry,
  (iii) arbitration,
  (iv) prosecution for an offence committed against a statute of the Province or against a by-law or regulation made under the authority of any such statute, and
  (v) any other prosecution or proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of the Province;

5. A new subsection (3) has been added to section 28.1 because we felt that provision should be made regarding the form of proof of a conviction or finding of guilt after the fashion of section 27(2) of the *Uniform Evidence Act*. Section 27 reads:

27. (1) A witness may be asked whether he has been convicted of any offence, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved.

(2) A certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by

(a) the officer having the custody of the records of the Court in which the offender was convicted, or

(b) the deputy of the officer,

is upon proof of the identity of the witness as the offender, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Section 27(2) deals with the case where the offender is a witness, but section 28.1(2) indicates that the offender may not be a party to the action and in any case he may not even be a witness. In short, our feeling is that, since section 27 provides for the form of proof, so should section 28.1.

6. At the 1975 meeting, it was decided to remove all references to acquittals.

7. Subsection (3) of section 28.2 as it appeared in our 1975 draft is removed from our new draft. Leaving out the references to acquittals, it read:

(3) Where proof of the conviction of a person is tendered in evidence pursuant to subsection (2) in an action for defamation, the conviction of that person is conclusive evidence that he [committed] the offence.

It may be that the Conference may wish to reconsider the deletion of this provision.

8. Section 28.3 as it appeared in our 1975 draft is removed from our new draft. It read:

28.3 For the purposes of section 28.1 and 28.2 it is irrelevant to the admission of a conviction of a finding of adultery or paternity that no defence was offered.

9. Section 28.4 as it appeared in our 1975 draft is recast as section 28.3 in our new draft and is edited to remove the cross-reference to the former subsection (3) of section 28.1.

Glen Acorn
William T. Hurlburt
William E. Wilson
Alberta Commissioners

30 July 1976

NOTE: The draft provisions attached to the report were considered clause by clause by the Uniform Law Section but are not reproduced in these Proceedings because of their tentative nature.

The provisions which were adopted and recommended for enactment by the Section follow.

II

AN ACT TO AMEND THE UNIFORM EVIDENCE ACT

(as Adopted and Recommended for Enactment)

1. The *Uniform Evidence Act* is amended by adding the following heading and sections after section 28:

ADMISSIBILITY OF PREVIOUS COURT PROCEEDINGS

Interpretation

28.1 (1) In this section and section 28.3,

(a) "conviction" means a conviction

(i) which is not subject to appeal or further appeal, or

(ii) in respect of which no appeal is taken;

(b) "finding of guilt" means the plea of guilty by an accused to an offence or the finding that an accused is guilty of an offence made before or by a court that makes an order directing that the accused be discharged for the offence either absolutely or upon the conditions prescribed in a probation order, where

(i) the order directing the discharge is not subject to further appeal, or

(ii) no appeal is taken in respect of the order directing the discharge,

and "found guilty" has a coresponding meaning.

Proof of conviction admissible in evidence

(2) Where

(a) a person has been convicted of or is found guilty of an offence anywhere in Canada, and

(b) the commission of the offence is relevant to any issue in an action, then, whether or not that person is a party to the action, proof of the conviction or the finding of guilt, as the case may be, is admissible in evidence for the purpose of proving that the person committed the offence.

(3) A certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or finding of guilt, as the case may be, purporting to be signed by Form of certificate of proof

(a) the officer having the custody of the records of the court in which the offender was convicted or found guilty, or

(b) the deputy of the officer,

is upon proof of the identity of a person as the offender, sufficient evidence of the conviction of that person or the finding of guilt against him, without proof of the signature or of the official character of the person appearing to have signed the certificate.

(4) Where proof of a conviction or a finding of guilt is admitted in evidence under this section, the contents of the information, complaint or indictment relating to the offence for which the person was convicted or found guilty is admissible in evidence. Where information admissible in evidence

28.2 Where Proof of adultery or paternity admissible in evidence

(a) a person has been found to have committed adultery in any matrimonial proceedings, or

(b) a person has been adjudged to be the father of a child in an affiliation proceeding,

by any court in Canada and the fact of the adultery or paternity is relevant to any issue in an action, then whether or not that person is a party to the action, proof of the finding of adultery or paternity, as the case may be, is admissible in evidence for the purpose of proving that the person committed the adultery to which the finding relates or that he is the father of the child.

28.3 The weight to be given the conviction or finding of guilt or the finding of adultery or paternity shall be determined by the judge or jury, as the case may be. Weight to be given to conviction

APPENDIX P

(See page 30)

SECTION 8 OF THE UNIFORM EVIDENCE ACT

(as amended)

(as Adopted and Recommended for Enactment)

"witness" defined

8. (1) In this section, "witness" includes a person who, in the course of an action

(a) is examined *viva voce* on discovery,

(b) is cross-examined upon an affidavit made by him, or

(c) answers any interrogatories or makes an affidavit as to documents.

Incriminating questions

(2) A witness shall not be excused from answering any question or producing any document upon the ground that the answer to the question or the production of the document

(a) may tend to criminate him, or

(b) may tend to establish his liability to an action at the instance of the Crown or of any person.

Answer not receivable against witness

(3) If, with respect to any question, or the production of any document,

(a) a witness objects to answer or to produce upon any of the grounds mentioned in subsection (2), and,

(b) but for this section or any Act of the Parliament of Canada, he would have been excused from answering the question, or from producing the document

then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer or produce, the answer so given or the document so produced shall not be used and is not receivable in evidence against him

(c) in any proceeding to enforce any Act of the Province by the imposition of punishment by fine, imprisonment or other penalty,

(d) in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence, or

(e) in any other action.

APPENDIX Q

(See page 31)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

PRINCE EDWARD ISLAND REPORT

The Prince Edward Island delegates submit their report on the judicial decisions made in Canada reported and published during the 1975 calendar year that affect the Uniform Acts of the Conference. This report was prepared pursuant to resolution (1975 Proceedings, page 27).

The decisions are listed in the annexed schedule Act by Act in alphabetical order.

James W. MacNutt
Horace Carver
of the Commissioners for P.E.I.

Charlottetown
August 1976

SCHEDULE

BILLS OF SALE ACT

Re Canadian Imperial Bank of Commerce v. *Matevi et al.* (1974) Craig J. (B.C. Supreme Court).

At p. 404 Craig J. "The second aspect of the plaintiff's argument with regard to the applicability of s. 22A is that the promissory note was meant to be primary security, not collateral security, therefore s. 22A is not applicable. He submits that this contention is evidenced by the fact that the defendant made the promissory note on April 30, 1971 and later received the funds, but that he did not execute the chattel mortgage until June 2, 1971.

"The literal meaning of 'collateral' is additional, or parallel. It does not mean auxiliary or secondary, unless this interpretation is justified in the circumstances. In my opinion, the object of this legislation is that a mortgagee must elect whether he is going to recover the debt by suing on a covenant or by seizing the goods. He may not attempt to recover the total amount owing to him by relying on various remedies."

"It could be argued that the word "thereto' in s. 22A indicates that 'collateral' is used in the auxiliary or secondary sense because the Legislature would have used the word "therewith" if it had meant that 'collateral' was to be additional or parallel security."

"However, having regard to the legislation, I think that the word 'collateral' in s. 22A means additional or parallel security."

"Perhaps it is more appropriate to say that the word 'collateral' relates to any security other than the personal covenant to pay, whether this be considered as primary or secondary security."

Re First National Bank and Schofield et al. (1975) 60 D.L.R. (3d) 751, s. 13 of the *Bills of Sale Act* (Saskatchewan C.A.).

A motor vehicle subject to a Nebraska chattel mortgage was taken to Saskatchewan and sold in Saskatchewan within thirty days of its removal into the province, to a bona fide purchaser for value who had no notice of the encumbrance, a new chattel mortgage not having been registered in Saskatchewan at the time of the sale.

Bayda, J.A. at p. 756 "The critical question . . . is: given the circumstances of non-registration, does the bank's common law right of seizure during that thirty day period override any interest acquired by Mr. Siebold (the purchaser) during that same thirty day period but prior to the seizure?

Summarizing the law on the point, Bayda J.A. stated at p. 758: "Two principles are extractable from (Klimove vs General Motors Acceptance Corporation and Dubuc [1955] 2 D.L.R. 215 (1) that during the three-week statutory time limit for registration, the mortgagee's common law rights are preserved and prevail; (2) that after the three-week statutory period, the mortgagee's common law rights prevail over the rights of an intervening purchaser who acquired his purchaser's rights during the three-week period (he is not a 'subsequent purchaser within the meaning of the ordinance')."

"When applied to the current *Bills of Sale Act* of Saskatchewan, we find that the second principle is no longer applicable by virtue of the definition of a 'subsequent purchaser' contained in s. 2(h) of the present Act, but the first principle remains undisturbed." The interests of the bank as mortgagee were therefore held to override any interest held in the motor vehicle by the subsequent purchaser.

ADDITIONAL CASE

The following case involved the application of the *Bills of Sale Act* but does not appear to involve a substantive review or interpretation of the Act:

Desborough v. *Associates Finance Co., Ltd.* (1974) 50 D.L.R. (3d) 206 (B.C.C.A.).

COMPENSATION FOR VICTIMS OF CRIME ACT

Re Minister of Justice for New Brunswick and Lewis 57 D.L.R. (3d) 638, s. 17(1) of the *Compensation for Victims of Crime Act* (N.B.C.A.).

In an appeal from a compensation order made by the Chief Justice of the County Court of New Brunswick under the *Compensation for Victims of Crime Act,* the issue on appeal was an allowance of $938 which the victim claimed as a loss of income from February 24, to June 1, 1974, which she alleged she would have received as benefits under the *Unemployment Insurance Act* had she not suffered the injury.

Hughes C.J.M.B. at p. 640 "I do not think s. 17(1)(b) restricts the pecuniary loss for which an award may be made to the loss of wages or salary. Had that been the purpose of the section, I think it is doubtful that the words 'pecuniary loss' would have been used. The object and purpose of the Act is to compensate victims of crime as well as the victims of certain acts and omissions which are deemed to be crimes notwithstanding the person committing the act causing damage may be legally incapable of forming a guilty intent. The Act being remedial in nature should be given a liberal construction and where uncertainty is found to exist in a provision, the provision should be construed to advance the remedy. In my opinion any pecuniary loss resulting from physical disability affecting the victim's capacity to work is subject to certain limitations compensable under the Act. Loss of unemployment insurance benefits in my opinion, if shown to be the direct result of an injury by an Act or omission during or resulting from the Commission of an offence as defined by s. 3 of the Act, constitutes a pecuniary loss within the meaning of s. 17(1)(b)."

CONDITIONAL SALES ACT

Hawker Siddeley Canada Ltd. et al. v. Sigwedson (1974) 52 D.L.R. (3d) 116 (B.C. C.A.).

A conditional sales agreement was amended with the consent of both parties after delivery of the goods had passed to the purchaser; the amendment inaccurately described the vehicle by mistake. The lower court held that the defective conditional sales agreement not complying with the Act was ineffective as against a trustee in bankruptcy.

It was held that s. 15 applied to an agreement after possession of goods had been delivered under the agreement. In this case the goods were already in the buyer's possession at the time of the second agreement, and consequently possession was not delivered under that agreement and s. 15 did not apply.

CONTRIBUTORY NEGLIGENCE ACT

Chernesky v. Armadale Publishers Ltd. et al. Hunt (1975) 53 D.L.R. (3d) 79 (Sask. C.A.).

The third party wrote a letter to a newspaper who in fact published the letter. A libel action was commenced against the newspaper and the newspaper added the author of the letter as a third party for the purposes of contribution under section 10 of the *Contributory Negligence Act* R.S.S. 1965, c. 91.

The issue which the Saskatchewan Court of Appeal had to determine was whether the *Contributory Negligence Act* has any application to an action for libel.

Mr. Justice Brownridge held that in Saskatchewan, the common law rule, that there is no right to contribution or indemnity between joint tortfeasors, still applies, except in negligence where the rule has been changed. Brownridge J.A. held that there was nothing in section 10 of the *Contributory Negligence Act* which enlarged the category of tort beyond negligence. The court noted that the publication of the letter did not arise as a result of any relations between the defendant newspaper and the third party writer.

Wade v. *Canadian National Railway Co.* (1976) 14 N.S.R. (2d) 541 (N.S.S.C., App. Div. appealed to S.C.C.?).

S. 1(1) of the *Contributory Negligence Act,* R.S.N.S. 1967, c. 54 ". . . if having regard to all the circumstances of the case it is not possible to establish different degrees of fault, the liability shall be apportioned equally"

Applied on grounds that the infant's negligence and that of the defendant railway were alike "two strong forces joining fully in causing . . . (the) fail" *per* MacKeigan, C.J.N.S.

Martin v. *McNealy* (1975) 10 N.B.R. (2d) 273.

Cause of action for contribution not arising until liability of tortfeasor claiming contribution determined.
(*Tortfeasors Act* or *Contributory Negligence Act*? in N.B.)

ADDITIONAL CASE

Stein et al. v. *The Ship "Kathy K" et al.* (1976) 62.

Briefly referred to *Contributory Negligence Act,* R.S.B.C. 1960, c. 74, s. 2.

DEPENDANTS' RELIEF ACT

See *Speers* v. *Hagemeister et al.* 52 D.L.R. (3d) 109.

DEVOLUTION OF REAL PROPERTY ACT

Foth v. *Kancz* (1975) 54 D.L.R. (3d) 144, s. 13.

The wife of the deceased executed a release of interest in a house in favour of the deceased's girl friend; the house was bought by the deceased but lived in by both the deceased and the plaintiff. The deceased attempted, shortly before his death, to amend his purchase agreement from tenancy in common with his girl friend to a joint tenancy: this was contrary to the *Homesteads Act*.

MacPherson J. at p. 149 held that "at the time of this alleged transaction, at least three of Mrs. Kancz's children were under 18 and it is common ground that there was no consent or approval of the official guardian or an order of the court. Nor was there any possibility of obtaining such consent or order because of the inadequate consideration. Understandably in part because she intended no sale. Mrs. Kancz did not apply for either and the estate should not be penalized for that. Therefore the sale was not valid."

EMPLOYMENT STANDARDS ACT

Re Campeau Corporation and Provincial Bank of Canada (1975) 7 O.R. (2d) 173 (Ont. D.C.).

Assignment of Book Debts takes priority over subsequent wage claims under *Employment Standards Act* R.S.O. 1970, c. 147.

FATAL ACCIDENTS ACT

Chiasson v. *Paul* (1975) 10 N.B.R. (2d) 616 (Leger, J.).

LIMITATION OF ACTIONS ACT

Goldberg et al v. *McKelvey* (1976) 61 D.L.R. (3d) 574 (Man. C.A.).

Section 4(1) of *The Limitation of Actions Act* R.S.M. 1970, c. L150 (since repealed 1974, c. 30 s. 1) provided that no action shall be brought by a person for the recovery of damages occasioned by a motor vehicle as defined in the *Highway Traffic Act* after the expiration of one year.

An infant plaintiff sustained injuries at an amusement park while riding in a "go-kart" which had four wheels, a motor, a seat, a foot-operated throttle called an accelerator, a foot-operated brake and a steering wheel. The "go-kart" had no headlights, tail lights or reflectors and was not registered with the Registrar of Motor Vehicles.

The court held that definition of vehicle as being "a device in, upon, or by which a person is transported upon a highway" had not

been met in the instant case because the accident did not occur on a highway; therefore, the "go-kart" is not a motor vehicle. In short, the limitation period of one year did not apply.

Kaszyk v. Klowtstra et al. (1976) 62 D.L.R. (3d) 735 (Alta. Supreme Court).

Section 51(h) of the *Limitation of Actions Act* R.S.A. 1970, c. 209 provides for a two-year limitation period for bringing an action for negligence. Section 59(1) provides that a person who is under disability at the time the cause of action arises may commence the action at any time within two years from the date that he ceases to be under disability. Section 59(2)(h) of the Act provided that section 59(1) does not apply where the affairs of the person under the disability are in the custody of the Public Trustee.

The accident occurred on October 28, 1967, at which time the plaintiff suffered serious brain injury. The plaintiff was under the jurisdiction of the Public Trustee from January 22, 1968 until September 16, 1969. The action was not commenced until March 9, 1973. The Counsel for the plaintiff contended that the plaintiff's disability continued until July 15, 1975.

Mr. Justice Moore held that the section is designed to protect individuals from losing a cause of action through delay caused by their inability to manage their affairs. The Alta. Supreme Court held that the section ought not to be read in such a way that one must be disabled at the time of the accident in order for the provisions of the Act to operate.

Moore J. further held that the limitation period commenced to run when the affairs of the plaintiff were placed under the jurisdiction of the Public Trustee from January, 1968 to September, 1969. Moore J. further held that time would not start to run again until such time as it is clearly established that the plaintiff was no longer under a disability.

St. Vladimir College and Minor Seminary v. *Champs Take Home Ltd.* (1975) 51 D.L.R. (3d) 155 (Man. Q.B.).

Defendant Wiley Mercury purchased plaintiff's motor vehicle on August 13, 1969, and sold it on or about August 28, 1969. The action was brought on January 19, 1972.

The question which had to be determined by the Manitoba Queen's Bench was whether the action was statute barred.

Section 3(1) of the Statute provided that actions for conversion must be commenced within two years after the cause of action arose.

Section 55(1) provided that in respect to a cause of action of conversion, there occurs a further conversion, that the action must be commenced within six years from the accrual of the original conversion.

Mr. Justice Nitikman held that the end result of the two sections is that "where such conversions occur, the period within which action can be brought runs for six years from the time when the cause of action arose, namely, the date of the first conversion: but just as the action against the original wrongdoer must be brought within two years of that conversion under s. 3(1), so too must the action in respect of a subsequent wrongful conversion be brought within two years of that subsequent conversion.

MARRIED WOMEN'S PROPERTY ACT

Manning v. *Howard* (1976) 59 D L.R. (3d) 176 (Ont. C A.).

Section 7 of the *Married Women's Property Act* R.S.O. 1970, c. 262, provided as follows: "Every married woman has in her own name against all persons, including her husband, the same remedies for the protection and security of her own separate property as if such property belonged to her as a *femme sole*, but, except as aforesaid no husband or wife is entitled to sue the other for a tort."

The parties were married on November 19, 1971. On August 28, 1972, the wife was a passenger in a motor vehicle owned and operated by the husband. The motor vehicle was involved in an accident and as a result the wife sustained damages. On December 22, 1972, the marriage between the parties was annulled by reason of the impotency of the husband.

The Ontario Court of Appeal's decision was delivered by Mr. Justice Jessop who held that on a proper interpretation of section 7 of the Ontario statute, a former wife whose marriage is terminated by divorce or annulment may sue her former husband for damages sustained as a result of his tort committed during coverture.

Jessop J.A. adopted the reasoning of Lord Denning who stated that the words amount to "a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability."

PROCEEDINGS AGAINST THE CROWN ACT

Central Canada Potash Co. Ltd. et al. v. *Attorney-General for Saskatchewan et al.* (1975) 57 D.L.R. (3d) 7, s. 5(7) Disbery, J. (Sask. Q.B.).

Pursuant to the *Mineral Resources Act* of Saskatchewan, the Lieutenant Governor in Council was empowered to make certain

regulations. Under the regulations licenses were issued and a condition of issuing the licenses was that licensees obey all orders and directives governing, for example, the disposal, marketing and transporting of potash. Under the scheme the Minister and Deputy Minister published a number of directives and orders establishing a minimum floor price for potash for use inside and outside Saskatchewan. The plaintiff company objected to the scheme and applied for a license that would enable it to meet its additional production quotas but was refused the license. The Deputy Minister by letter threatened to cancel the plaintiff's current license if the company did not comply with the Deputy Minister's directives. *Inter Alia* the plaintiff company sued the Government of Saskatchewan for intimidation; the latter brought into issue the application of the *Proceedings Against the Crown Act.*

Quoting the headnote: "In the instant case there was unquestionably a threat contained in the letter of the Deputy Minister to the plaintiff company in which it was informed that its producing license and its Crown lease would be cancelled unless the company complied with the Minister's directive regarding its production quota. The letter constituted more than a mere warning; it was coercive. The plaintiff company however, had no legal right to disobey that directive until the court ruled it to be *ultra vires.* Having held that the directive was indeed *ultra vires* it was so *ab initio* and thus the threat to cancel the producing license was tortious as was the threat to cancel the Crown lease, there being no default under the lease."

"The cause of action for the tort was not rendered inoperative by the *Proceedings Against the Crown Act,* R.S.S. 1965, c. 87. Section 5(1) of that Act renders the Crown liable for actions in tort. Section 5(3) applies the doctrine of respondiat superior between the Crown and its officers so that the Crown is liable for the Acts of the Minister and his deputy. Section 5(7) of the Act, which gives the Crown immunity in respect of anything done under "a statute or statutory provision" which was beyond the legislative competence of the Legislature to enact does not assist the defendants, since the actions of the Minister and his deputy were not done under a statute or a statutory provision (i.e. a regulation) but pursuant to ministerial directives and orders which are not legislative but administrative in nature."

MacNeil v. *N.S. Board of Censors* (1974) 9 N.S.R. (2d) 483 (N.S.C.S., App. Div.) (affirmed on other grounds in S.C.C.) *sub nom. McNeil* v. *N.S. Board of Censors* 5 N.R. 43.

An action for a declaration respecting the constitutional validity of a provincial statute is not a "proceeding" against the Crown

under the *Proceedings Against the Crown Act* on the grounds that such an action deals with the rights of the public generally.

RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT

Ling v. *Yip* (1975) 54 D.L.R. (3d) Alta. Supreme Court, Trial Division.

As payment for gambling tokens, the defendant gave the plaintiff three cheques that the defendant subsequently stopped payment on. The defendant was convicted under the Criminal Code and was ordered to pay the money. The Criminal Court order was registered in British Columbia as a judgment to secure payment of the debt. The judgment was later transferred under the *Reciprocal Enforcement of Judgments Act* to Alberta and registered there.

In issue was whether the judgment could be set aside.

The *Gaming Act* of 1710 rendered debts arising from illegal purposes void. MacDonald J. at p. 320 stated "since the moneys for the cheques were given were advanced 'at the time and place of such play (*vide Gaming Act*)' to a person 'so gaming or betting' it follows that the cheques so given must be deemed to be given for an illegal consideration."

The *Reciprocal Enforcement of Judgments Act* provides that the court may set aside the registration of the judgment on any of the grounds mentioned in s. 3(6) and upon such terms as the court thinks fit. Section 3(6)(g) provides the ground that the judgment debtor would have a good defence if an action were brought on the original judgment . . ." The registration of the judgment in Alberta is therefore set aside on the ground that the judgment debtor would have a good defence if the action were brought against him in Alberta.

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

MacEachern v. *Pfaff* (1974) 19 R.F.L. 123 (Ont. Egener Prov. J.).

Application under S. 5 *Reciprocal Enforcement of Maintenance Orders Act* (Ont.) to confirm provisional order under *Wives and Children's Maintenance Act* (N.S.) for benefit of woman applicant with whom respondent had lived and for their child. Nova Scotia but not Ontario recognized such a right. The parties had never lived in N.S. and the woman obtained the N.S. order after their separation.

Held, Order for woman applicant not confirmed; Order for child confirmed.

While the intent of the *Reciprocal Enforcement of Maintenance Orders Act* was that the confirming jurisdiction adopt the law of the jurisdiction making the provisional order, it should be proper to assume that N.S. law would not impose an obligation on a person not domiciled or resident in N.S. When the couple separated, Ont. law imposed no support obligation in favour of woman applicant. With respect to the child, N.S. law did not impose an obligation different from that under Ont. law.

TESTATORS FAMILY MAINTENANCE ACT DEPENDANTS' RELIEF ACT

Gilles v. Althouse et al. (1975) 53 D.L.R. (3d) 410 (Can. Sup. Ct.).

On July 31, 1971, Michael Gilles died leaving surviving a widow, from whom he had been separated for 19 years, and two married daughters. Under his will, Gilles devised and bequeathed his entire estate amounting to approximately $18,000 to the two married daughters whom he named as executrices. Letters Probate were granted on August 18, 1971. On August 24, 1971, the executrices distributed the entire estate pursuant to the will of the deceased. On September 3, 1971, the widow made an application pursuant to the *Dependants' Relief Act* and Johnson J. exercised his discretion in favour of the widow and directed that the widow receive the entire estate after payment of proper expenses and costs.

The Court of Appeal for Saskatchewan allowed an appeal by the executrices on the ground that an order for maintenance could not be made as the estate had been fully administered and, therefore, there was no estate against which an order for maintenance could attach.

Mr. Justice Dickson allowed the appeal and set aside the order of the Court of Appeal and reinstated the order of Johnson J.

The Supreme Court of Canada concluded "that the true meaning and effect of the section is to afford an applicant a period of six months after probate within which to obtain an order as to the entire estate, but if he or she delays and makes application after expiry of the six month period the claim can only be against the portion of the estate then remaining undistributed . . . If executrices have distributed the estate in a manner contrary to the terms of the will as so barred they will be under a duty to account."

APPENDIX R

(See page 31)

UNIFORM JURORS ACT

(QUALIFICATIONS AND EXEMPTIONS)

as Adopted and Recommended for Enactment

Jury duty

1. Every person has the right and duty to serve as a juror unless disqualified or exempted under this Act.

Disqualification

2. A person is disqualified from serving as a juror who is

(a) not a Canadian citizen;

(b) not resident in the province;

(c) under the age of majority;

(d) a member or officer of the Parliament of Canada or of the Privy Council of Canada;

(e) a member or officer of the Legislature or of (*the Executive Council*);

(f) a judge, magistrate or justice of the peace;

(g) an officer or employee of the Department of Justice or of the Solicitor-General of the Government of Canada;

(h) an officer or employee of the (*Department of the Attorney General*) of the Government of the Province;

(i) a barrister or solicitor;

(j) a court official;

(k) a sheriff or sheriff's officer;

(l) a peace officer (or member of a police force);

(m) a warden, correctional officer or person employed in a penitentiary, prison or correctional institution;

(n) a spouse of a person mentioned in clause (f), (g), (h), (i), (j), (k), (l) or (m);

(o) afflicted with blindness or deafness or a mental or physical infirmity incompatible with the discharge of the duties of a juror;

(p) a person convicted within the previous five years of an offence for which the punishment could be a fine of one thousand dollars or more or imprisonment for one year or more, unless he has been pardoned; or

(q) charged with an offence for which the punishment could be a fine of one thousand dollars or more or imprisonment for one year or more.

Language difficulty

3. Where the language in which a trial is to be conducted is one that a person is unable to understand, speak or read, he is disqualified from serving as a juror in the trial.

Grounds for exemption

4. A person may apply to be exempted from serving as a juror on the grounds that

(a) he belongs to a religion or a religious order that makes service as a juror incompatible with the beliefs or practices of the religion or order;

(b) serving as a juror may cause serious hardships or loss to him or others.

Exemption for person over 75

5. A person over the age of seventy-five years shall, on application, be exempted from serving as a juror.

Note: The Act should provide procedures by which persons may claim and be granted exemption.

APPENDIX S

(See page 31)

LIMITATION OF ACTIONS

ALBERTA REPORT

Members should have before them the *Uniform Limitation of Actions Act*, set out in Model Acts, 1918-1961 at page 199. In 1966 the Conference referred the Act to the Alberta Commissioners for re-examination. They made an interim report in 1967 (Pro. p. 172) and again in 1968 (Pro. p. 68). These interim reports deal mainly with actions in tort. We suggest that members peruse them.

The Alberta Commissioners regret that they were unable until this year to make a further report. In the meantime the Ontario Law Reform Commission recommended new legislation in a 1969 report. The British Columbia Law Reform Commission in 1974 made a Report on Limitations: Part II General. The British Columbia Legislature enacted a new *Limitations Act* based on the recommendations (1975 chapter 37). Neither Ontario nor British Columbia had ever enacted the Uniform Act. These reports make considerable use of a 1967 report of the Law Reform Commission of New South Wales. That report uses England's 1939 Act as amended as a starting point but recommends a number of important changes. The legislature passed a *Limitation of Actions Act* in 1969 (No. 31) which enacts the recommendations.

This report will use the Uniform Act as the basis of discussion, though we think it can be modernized and simplified. It has eight parts, as follows:

Part I: General. This is a descendant of the 1623 Act in that it deals with actions ranging through torts and debts and contracts unrelated to land. It has several periods, the shortest being one year for actions for certain penalties to ten years for judgments.

Part II: Charges on Land, Rent, Etc. This deals with actions to recover money charged on land — not the land itself — and money owing under agreements for sale. In each case the period is ten years while the period for recovery of rent is six years.

Part III: Land. The period for proceedings to recover land is ten years. Much of Part III is taken from the English Real Property Limitations Acts 1833 and 1874.

Part IV: Mortgages of Real and Personal Property. This deals with actions for redemption of mortgages and for foreclosure and sale. The period is ten years.

Part V: Agreements for Sale of Land. This deals with actions by purchaser and vendor to recover the land. The period is ten years.

Part VI: Conditional Sales. This has a ten year period for proceedings by the seller for sale or recovery of the goods.

Part VII: Trust and Trustees. There is no time limit in actions against a trustee for fraud or in connection with trust property. The general period in other cases is six years or else the same period that would apply were there no trust.

Part VIII: General (Note the same title as Part I). This consists of a number of miscellaneous provisions.

GENERAL SCHEME OF STATUTE

The Uniform Act deals separately with different types of action, as the above summary shows. There is some virtue in this but we prefer the scheme proposed in Ontario and adopted in British Columbia whereby causes of action are grouped in accordance with the time period. Thus actions with a two-year period, these being principally tort actions, would be put together, and those with a ten year period, such as actions connected with land, would be put together. Then there would be a residual six year period for all other actions.

In general time should begin to run "when the cause of action accrued" as it does under the Uniform Act. In general we do not think it necessary to spell out the event that makes a cause of action accrue, though we will deal with this problem where special situations require it.

CLAIMS WITHIN THE TWO-YEAR PERIOD

In general we recommend the retention of the two-year period where it now exists. The most important category is that of actions for damages for injury to person or property whether arising from tort or breach of contract or breach of statutory duty. This embraces most negligence actions. There is a difficult problem in connection with negligent breach of contract. If the claim is treated as breach of contract the time is six years but it runs from breach not damage. If it is treated as a claim in negligence the time is two years but it runs

from damage. We are aware that the English Court of Appeal has recently held that the plaintiff may have an option to sue in contract or tort: *Esso Petroleum Company* v. *Mardon* [1976] 2 All E.R. 5 per Lord Denning at 14-15. This is not a limitations case. Then in *Sparham-Souter* v. *T. & C. Developments* [1976] 2 All E.R. 65 Lord Denning rejected *Bagot* v. *Stevens,* cited in our 1968 report and which holds that time begins to run in a claim for professional negligence when the breach occurred.

In Canada as in England there has been uncertainty as to whether an action for negligent breach of contract is to be treated as an action in negligence or in breach of contract. Actions against a solicitor and architect have been held to be in breach of contract. This has usually operated to the detriment of the plaintiff for the damage may occur long after the breach. In building contracts, contracts to install equipment and the like there are cases both ways.

Farmer v. *Chambers* (1973) 31 D.L.R. (3d) 147 (Ont. C.A.) negligent construction of retaining wall—cause of action arises when wall is completed—collapse more than six years later—action is for breach of contract and is barred.

Lemesurier v. *Union Gas Co.* (1976) 57 D.L.R. (3d) 344 (trial) 152—defective piping—explosion long after—action held to be in tort and in time. *Farmer* not cited.

We think that the best way to remove the unfairness to plaintiffs is to provide that in actions for damages for injury to person or property and economic loss, and whether based on contracts, tort or statutory duty, time should run from the occurrence of damage. Whether the period should be two years in all these cases may be debatable. The important point is to prevent the running of time before damage has been done.

In making these recommendations we have been assisted by the Ontario report. There remains the situation where damage is hidden, and we propose to deal with that under the heading, The Hidden Cause of Action.

Apart from negligence, specific torts to be included in the two year period are malicious prosecution, false imprisonment, seduction, actions under the *Fatal Accidents Act* and under the *Survival of Actions Act.* This involves the repeal of the limitation provision in each of these uniform Acts.

We do not recommend a special provision for malpractice actions. We recall that the Canadian Bar Association passed a resolution in 1974 and again in 1975 appealing for uniformity in the limitation period for malpractice actions. This will of course be achieved by

repeal of the special provision that many provinces have, and by enacting the Uniform Act.

There are of course torts in addition to those named above. We have considered whether to provide a two year period for "other torts." We think it better not to but to leave them to the residual six year period, though we recognize that logically torts such as conspiracy should not have a longer period than other torts.

CLAIMS WITHIN THE TEN-YEAR PERIOD

As a matter of form we think the relevant sections (sections 12 and 13) from Part II dealing with recovery of money secured on land, including money owing under an Agreement for Sale, can be combined with the relevant section from Part IV (Mortgages) and Part V (Agreements for Sale). We think that the period should be ten years both in respect to the action on the covenant and with respect to sale, foreclosure or determination. This is of course the position now but we do not think that the provisions need to be separated as they are at present. We note that British Columbia has reduced the period for taking action on a secured debt to conform to the six year period for debts not related to land. We think however that there is no justification for reducing the period that has been in the Uniform Act from the beginning.

The next point has to do with actions to recover land as distinct from actions on mortgages, agreements for sale and the like. Part III provides a ten-year period. Then section 44 provides that at the expiration of that period the title is extinguished in favor of the person against whom action for possession might have been brought. The important question of policy is whether this provision should remain. It can be argued, especially where there is a land registry system, that the holder of the paper title should be protected against loss of his title because someone else has been in possession. Some Land Titles Acts so provide, though in Alberta the title can be extinguished. Ontario recommended the retention of the present law while British Columbia has provided that there be no extinction of title. We recommend retention. The owner may have abandoned the land or may have sold it and disappeared after receiving most or all of the purchase price without having given a transfer. In connection with estates it is frequently found convenient, at least in Alberta, to proceed under the *Limitations Act*. Where the possessor is a pure trespasser there is a stronger argument for abolition of title by prescription but even here we think that if the owner has sat on his

rights for ten years, it is proper to give title to the possessor. The hardest case is that of the inaccurate boundary line. One could argue that title should not be lost in these circumstances but the cases hold that it can. We note however that in some provinces the Land Titles Act provides for adjusting the title, subject to compensation where the wrongful possessor has made improvements.

One point that is not covered by the Uniform Act but that was included in the 1833 Act has to do with the running of time in favor of a co-tenant against another co-tenant. Co-owner A may oust co-owner B, or may keep the rents and profits. Under section 12 of the 1833 Act the possession of A in these circumstances is not the possession of B, so time runs against B. (*Paradise Beach Ltd.* v. *Price Robinson* [1968] AC 107). In a recent Alberta case, *Deal* v. *Deal* (1975), 19 R.F.L. 28 the husband and wife were joint tenants. The wife simply left. The Court refused to find that she had lost her interest in the land after 10 years. It is hard to tell from the judgment whether it holds that time never runs against a co-tenant or merely that it only runs against a co-tenant who has been ousted. We think that the law should be made clear and that time should run against a co-tenant in cases of ouster or a retention of the rents and profits by another co-tenant.

The last point has to do with the possession of minerals. Cases in Alberta recognize that title to minerals can be extinguished in favour of another who acquires possession. These cases hold, however, that adverse possession of minerals is very hard to prove.Certainly possession of the surface does not include possession of the minerals.

ACTIONS AGAINST TRUSTEES

Sections 40 and 41 are taken from England's 1939 Act. As Professor Waters points out in his book on Trusts in Canada this is a great improvement over earlier legislation. Uniform Section 42 is taken from the 1833 Act.

We put forward for consideration the recommendations made by Ontario which have been adopted in British Columbia. Under the Uniform Act time never runs against a beneficiary where his claim is based on fraud or for recovery of trust property or for its conversion. We agree with Ontario that for all purposes "trustee" should include all types of trustees and personal representatives. (This is largely but not completely achieved in the Uniform Act.)

Ontario would abolish the old rule of equity that time never runs against a fraudulent trustee or one who has retained trust property,

and would provide a ten year period. While the matter is debatable we favour the Ontario recommendation and its ten year period. Care will be needed to ensure that time does not run against a beneficiary merely because he has refrained from demanding his property.

There are two points we think should be considered:

(1) When does time begin to run against a personal representative? Is it on death or at the end of the executor's year? What of the case of an intestacy where there is no administrator? Some statutes use the language of Uniform section 12 which is not under the heading Trustees. Time begins to run where there is someone capable of giving a discharge or release. Section 41 in connection with claims to the personal estate of a deceased person says that actions must be brought within ten years "from the date when the right to receive the share or interest accrued". We are not sure that this means the date of death. In England the right to recover land runs from death but in the case of personalty it seems that there must be "competent parties" on each side. (Franks Limitation of Actions, pp. 12 and 126).

We are not sure whether time should always run from death or whether there should be a distinction like that in England. We seek guidance.

(2) This has to do with future interests. The Uniform Act like most limitation acts, makes it clear that time runs against the holder of a future interest only when it has fallen into possession (Section 21). This provision must be preserved.

THE RESIDUAL PERIOD

We think it should be six years as it now is under section 3(1)(*j*). We think, however, that it would be better to list the main actions in the six year category such as actions on a contract unrelated to land or action on a debt unrelated to land. We think, too, there should be special mention of the action for conversion of chattels. It now has a six year period under section 45. That section provides for extinction of title when the period has expired. We recommend retention, though we do have misgivings, for example, where the person who converted the property is a thief.

We consider now the question of proceedings on chattel mortgages and conditional sale agreements. The former are coupled with

land mortgages in Part IV and the latter are in Part V. The period is 10 years for both.

We raise the question whether the 10 year period should be retained or whether these proceedings should be under the residual period. We lean in favour of retention, as long as the period for land mortgages remains at 10 years. We seek guidance.

Whatever the period it might be well to replace the references to chattel mortgages and conditional sale agreements by some such phrase as "goods that are subject to a security interest," especially in view of the *Uniform Personal Property Security Act*.

EXTINCTION OF RIGHTS IN GENERAL

Although we have recommended extinction of title to chattels and retention of the provisions for extinction of title to land, there is a wider question — should all rights including choses in action such as an ordinary debt be extinguished at the expiration of the limitation period? The present position under the Uniform Act is that claims to possession of land, mortgage claims and similar charges and claims for rent are so extinguished. Part payment or acknowledgment extends the time but only if made within the limitation period. On the other hand, claims in debt under Part I are not extinguished when the statutory period has expired. They become imperfect debts, and acknowledgment or part payment made at any time starts time running again.

Ontario recommended and British Columbia has enacted that in all cases a part payment or acknowledgment must be made within the limitation period, and that after the expiration of the period the right is extinguished.

If all rights are extinguished there will be no such thing as an imperfect debt. The New South Wales Report gave detailed reasons why the imperfect debt should be abolished, and Ontario adopted those reasons. In view of the centuries old rule, now embodied in Part I of the Uniform Act, we would like to be satisfied that it should be changed. We seek guidance.

We point out, as Ontario has done, that a change in Part I whereby the right is extinguished will convert the law from one of procedure to one of substance, and this will have a bearing on the applicability of the law where there is a foreign element. British Columbia has included a provision whereby the court has a choice

whether to apply the British Columbia Limitations Act, or that of the foreign jurisdiction (Section 13).

One consideration is this. As a general rule, the Statute of Limitations must be pleaded. By failing to raise it a defendant waives the defence. If the right is extinguished then what is the position where a defendant omits to plead the statute? In New South Wales this question arose soon after the 1969 Act was passed and the Law Reform Commission considered it in a 1971 report. The Commission's opinion was that a defendant could waive the benefit, and that such waiver would not be contrary to public policy. The Commission recommended an amendment whereby "a party to the proceedings shall not have the benefit of the extinction unless he pleads or otherwise specifically relies on the extinction." If the extinction can be waived, then one wonders about the wisdom of providing for extinction.

PART PAYMENT, PROMISE TO PAY AND ACKNOWLEDGMENT

There are a number of sections in the Uniform Act that provide for extension of time when there is part payment or a promise to pay or an acknowledgment:

Part I — Section 7 provides for renewal of time when there is a promise, acknowledgment or part payment at any time.

Part II — Sections 12 and 13 deal with the same subject in connection with an action to recover monies charged on land and agreements for sale.

Part III — Section 30 provides for acknowledgment of title to land.

Part IV — Section 31 provides for acknowledgment by a mortgagee in connection with an action to redeem and section 33 provides for an acknowledgment or part payment by a mortgagor in connection with a mortgagee's action for foreclosure or sale. (The acknowledgment provision is badly drafted and inappropriate to a Land Titles Mortgage.)

Part V — Section 34 provides for part payment and for acknowledgment of the right of a purchaser in an action by him on the agreement, and section 36 provides for

part payment and acknowledgement by the purchaser where the action is by the vendor.

Part VI — Section 39 provides for part payment and acknowledgement by a purchaser under a conditional sale agreement.

We think the general principle of renewal by part payment or acknowledgement should remain. We think the provision for promises in Part I can be omitted, for promises come within acknowledgements. Acknowledgement or part payment should still be valid only if made in writing by a party or his agent and made to the other party and his agent.

We now turn to the question of co-debtors and the effect of part payment or an acknowledgement by one co-debtor on the creditor's right of action against the others. In Part I, section 9 specifically provides that in the case of joint debtors, an acknowledgement or part payment by one does not start time running again against the others. England has changed this rule so that part payment by one is effective against all though an acknowledgement is not. New South Wales and Ontario rejected the English provision. We think this is a difficult question. The English rule is fair to the creditor because it does not require him to satisfy himself that both debtors have joined in the payment. New South Wales on the other hand thought that it could lead to collusion between one debtor and the creditor, and that it is unfair to the non-paying debtor to permit time to be extended as against him. We seek guidance.

Whatever the position should be in connection with ordinary debts, there are problems as to the parties that are bound where the action is under Part II, III, IV, V and VI. Part payment may be made by "a person bound or entled to pay" under:

Part II — action for mortgage moneys (s. 12(1))

Part IV — action for sale or foreclosure of mortgages (s. 33)

Part V — Agreements for sale of land (ss. 35 & 36)

Part VI — Conditional sale agreements (s. 39).

Acknowledgement may be made by:

Part II — the person bound or entitled to pay (s. 12(1))

Part III — acknowledgement of title by person in possession of land (s. 30)

Part IV — acknowledgement of nature described in section 30

Part V — acknowledgement by purchaser (s. 36)

Part VI — acknowledgement by buyer (s. 39).

There may be two or more persons against whom action may be brought — co-mortgagors or co-purchasers. Again there may be a person who covenants as principal though he is not a mortgagor, and there may be a surety.

Let us assume that a part payment or acknowledgement has been made by one entitled to make it. Does this bind the others? In *Manufacturers Life* v. *Hodges* [1947] 1 DLR 195 (Alta. App. Div.) an acknowledgement by one co-owner was held to bind the other but the judgment seems to be based on agency. We think that either payment or acknowledgement should bind all mortgagors or purchasers. Otherwise the mortgagee would have lost his rights against them and could foreclose only the interest of the one paying or acknowledging. *Lewin* v. *Wilson* (1886) supports the view that payment by one mortgagor extends the time for foreclosure against both.

Whether acknowledgement by a mortgagor extends the time for suing a guarantor is doubtful, though an Alberta case, *Credit Foncier* v. *Singer* [1933] 3 WWR — holds that it does.

The language used in England's 1939 Act, section 25(1) and (2) and adopted in essence by British Columbia is that acknowledgement by the person in possession or a payment by the mortgagor or any person in possession shall "bind all other persons in possession of the mortgaged property during the ensuing period of limitation." We are not sure that this is a better provision than one that spells out whether or not it binds co-mortgagors — and it does not cover agreements for sale. We seek guidance.

In connection with the mortgagor's action to redeem a mortgage this is not a major problem in a jurisdiction where a mortgage is a mere charge. We note however that acknowledgement by the mortgagee of the mortgagor's right to redeem is acknowledgement to all mortgagors, though where there are two mortgagees an acknowledgement by one of the mortgagor's right to redeem does not bind the others [s. 31(2)-(4)].

Before leaving this subject, we note here two small points:

(1) We do not think that the principle of acknowledgement or part payment should apply to claims for unliquidated damages such as tort claims.

(2) As a matter of drafting we prefer to refer to part-payment and acknowledgement rather than to use the word "confirmation" which New South Wales and British Columbia have adopted.

DISABILITIES

Section 2(c) defines disability as disability arising from infancy or unsoundness of mind. In Part I, section 6 says that when a person is under disability when the cause of action arises he may bring action within the time limit or within two years after ceasing to be under disability. Then in Part VIII, Section 47 says that in connection with claims under Parts II, III or IV, a person under disability when the right to take proceedings first accrued, may bring action within six years after he ceased to be under disability or died. Then section 48 says that when a person is out of the province when the cause of action against him arose, action may be brought within two years of his return or within the time otherwise limited.

As for section 48, we recommend its repeal. This is in keeping with the trend elsewhere and we see no need to stop the running of time merely because the defendant is out of the province.

Sections 46 and 47 need examination. We think that they can be combined and that the period should be the time limited or alternatively two years after cessation of the disability, whichever is the longer. We invite attention to the Ontario recommendation, namely, the longer of the original period or "such period running from the time that the disability ceased except that in no case should the period extend more than six years beyond cessation."

It will be noted that the suspension comes into play only when the disability was existing when the cause of action arose. However, it has been held in two cases where the action was in negligence for personal injuries, that where the plaintiff is immediately rendered of unsound mind by the defendant's negligent act, the law does not take cognizance of part of a day, and since the plaintiff was of unsound mind on the same day the cause of action arose, the disability should be treated as being pre-existing and the disability provision came into play.

Kirby v. *Leather* [1965] 2 Q B. 36 (C.A.).
Kaszyk v. *Kloetstra* [1976] 1 WW 423, (affirmed 9 June, 1976 Alta. App. Div.).

The reasoning of these cases does not apply if the disability arises the day after the accident. These cases may be open to question. This leads us to the question whether the disability provisions should be

amended to include unsoundness of mind that supervenes the accrual of the cause of action. In 1974 the English Law Reform Committee made a report on Limitation of Actions in personal injury claims (Cmnd. 5630). The committee considered whether to recommend that time should not run by reason of supervening unsoundness of mind where that unsoundness was caused by the event that gave rise to the cause of action. The committee declined to make this recommendation. Ontario on the other hand recommended a general suspension during disability whether or not it existed when the cause of action accrued and whether it was produced by the event giving rise to the cause of action. British Columbia's section 7(3) enacts this policy. We are concerned, as was the English Committee, with the difficulty in determining when time is suspended, and for how long. We lean in favour of retention of the present rule, and seek guidance.

Whether or not the disability provision is changed so as to suspend time during supervening unsoundness of mind, consideration should be given to a provision such as England passed in 1954 and which our 1967 report mentions. The English provision said that time continues to run if the person under disability is in custody of a parent. This provision made sense so far as an infant is concerned but was inappropriate in the case of persons of unsound mind.

In 1966, Alberta adopted this provision for tort claims, in principle. The disability section does not apply (a) in favor of an infant in the actual custody of a parent or guardian, or (b) where the person under disability is a mentally incapacitated person whose affairs are in the custody of a committee or of the Public Trustee. The English section has been criticized for dealing with a person of unsound mind "in the custody of a parent." The Alberta provision is not open to this criticism.

The principle behind it is that a person under disability should not have the advantage of a suspension of time where there is some responsible person who can bring action on his behalf. Ontario recommended a provision like Alberta's, but extended to all claims except those against the parent or guardian or committee or Public Trustee.

New South Wales has not enacted a provision of this kind but instead has permitted the potential defendant to give notice to the prospective plaintiff or his "curator." The "notice to proceed" operates to start time running. British Columbia has adopted this provision [section 7 (6)-(11)].

In England the Law Reform Committee examined the English section in the 1974 report mentioned earlier, and recommended repeal on two grounds: the ineptness of the provision as applied to persons of unsound mind, and the unfairness to the person under disability if his parent does not in fact sue. The *Limitations Act 1975* effects the repeal.

The Alberta provision puts on parent or committee the responsibility of suing. If he does not sue then the person under disability is barred. The English Committee thought that the latter person should not be at the mercy of a third party. Another possible objection is that it may be hard to determine when a minor is in the actual custody of a parent. If the minor sues after reaching majority it is of course to his interest to show he was not in his parent's custody at the time the cause of action arose.

It thus appears there are three alternatives: to retain the present uniform provision, or to adopt one along the lines of Alberta's, or to adopt one along the lines of British Columbia's. We do not think there is an easy answer and seek guidance.

A minor point: Ontario recommended that "unsoundness of mind" should be extended to include inability to manage one's affairs because of disease or impairment of physical or mental condition. British Columbia's section 7(5) says that a person is under disability "while he is in fact incapable of or substantially impeded in the management of his affairs." This may be too broad. We lean in favour of the Ontario provision.

SUSPENSION OF TIME FOR FRAUD

Where the defendant had fraudulently concealed the existence of a cause of action under Part I or II, time begins to run on discovery of the fraud (section 4). In connection with Part III, section 29 is a similar provision though time begins to run at the time "at which the fraud was or with reasonable diligence might have been first known or discovered." Ontario has recommended a single provision to cover actions based on fraud, causes of fraudulent concealment of a cause of action, and actions for relief from the consequences of a mistake. In all these cases time would begin to run as provided in uniform section 29. Uniform section 29(2) protects a *bona fide* purchaser of land from exposure to the extended period.

We agree with Ontario's inclusion of mistake. Otherwise the present provisions are satisfactory, though they should be combined.

THE HIDDEN CAUSE OF ACTION

England's 1963 legislation, which was inspired by the silicosis cases, was confined to actions for personal injury. Our 1968 report recommended that any legislation on the subject should include claims for property damage and professional negligence. The reason is that the cause of action is sometimes "hidden" in these cases as well as in personal injury cases. This is because a claim in professional negligence sounds in contract. Thus the cause of action arises from breach which may occur before damage let alone knowledge of damage. We note that Lord Denning has recently said that the plaintiff may have a choice of suing in contract or tort (*Esso Petroleum Company* v. *Mardon* [1976] 2 All E.R. 5 at 15). Then in *Sparham-Souter* v. *Town & Country Limited* [1976] 2 All E.R. 625 he repudiated his own previous adoption of *Bagot* v. *Stevens* which holds that an action against an architect for negligence arose at the time of his negligent act. Lord Denning simply said "I recant" and said that time runs only from the date when damage became visible. We note these cases not to indicate that they will represent a change in Canadian law but to indicate the confusion and the need for legislation to deal with the hidden cause of action.

Our earlier reports recommended against a provision like England's 1963 Act, largely because of its complexity. One great issue was whether the plaintiff was entitled to an extension of time because he had received bad legal advice. The Court of Appeal ruled that he was so entitled. The House of Lords in *Central Asbestos Company* v. *Dodd* [1973] AC 518 in our opinion said No. The Court of Appeal, however, in *Harper* v. *National Coal Board* [1974] QB 614 held that *Dodd* did not so hold and persisted in its former view. In this state of affairs the Lord Chancellor asked the Law Reform Committee to give priority to the subject of limitations in personal injury claims. The Committee's report, already mentioned, recommended repeal of the 1963 provisions and the substitution of a new scheme. The Limitations Act 1975 adopts the recommendation. Its basic provision is to postpone the running of time until the date of the plaintiff's knowledge. This means knowledge:

(a) that the injury was significant;

(b) that the injury was attributable to the defendant's negligence;

(c) the identity of the defendant; and

(d) the identity of any other person whose alleged negligence caused the injury.

The plaintiff cannot claim an extension in time merely because he did not know he had a good cause of action. The Act spells out the meaning of "significant injury" and also says that "knowledge" includes knowledge from facts observable and from facts ascertainable with the help of expert advice. We question the wisdom of the "significant injury" clause. Already there has been a case in which the plaintiff suffered injury. It turned out to be more serious than originally thought so the plaintiff invoked the extension provision. The court refused to apply it because the injury was sufficiently serious in the first instance to warrant action. Had the injury appeared trivial until the expiration of the normal period the court would have applied the extension provision (*Miller* v. *London Electric Mfg. Co.*, The Times 16 Jan. 1976).

The Act contains an important additional provision which like the one just described is confined to personal injury cases. The court is given a discretion to extend the time beyond that permitted by the main provision. The factors to be considered in exercising the discretion are set out.

We do not recommend the conferring of a discretion but do recommend provision for an extension as does the 1975 English Act and the British Columbia Act. These do not require the leave of a judge as did England's 1963 Act, the New South Wales Act and other Australian state laws that follow them. British Columbia's Act says that time does not begin to run until the identity of the defendant is known and until he has within his means of knowledge such facts that a reasonable man would regard them as showing that the action would have a reasonable prospect of success and that he ought in his own interests to be able to bring an action. The Act defines "appropriate advice" This includes legal advice which, as we said earlier, England has now excluded. The Act also defines "facts."

Our 1968 report suggested a provision analogous to the concealed fraud section. Ontario thought that this would not be satisfactory. British Columbia thought it would be satisfactory if the key terms were defined. The British Columbia Act reflects this viewpoint. We would still like to attempt a simple provision.

Looking at England's definition of knowledge, it includes knowledge that in the ordinary case is irrelevant. Time normally runs against a plaintiff though he thinks his damage insignificant, or though he has not identified the wrongdoer, or though he has received bad advice. British Columbia's Act avoids some of the undesirable features of England's, but it retains the provision that legal advice is

relevant; and the "facts" that must be known include facts that in general need not be known before time begins to run.

Putting our position affirmatively, the mischief in the present law is that time runs before the plaintiff knows of damage, and the remedy lies in a "discovery of damage" provision. In connection with malpractice actions, there is modern legislation that achieves this result.

In Ontario *The Health Disciplines Act, 1974* provides:

> No duly registered member of a College is liable to any action arising out of negligence or malpractice in respect of professional services requested or rendered unless such action is commenced within one year from the date when the person commencing the action knew or ought to have known the fact or facts upon which he alleges negligence or malpractice.

In Quebec, a 1974 amendment to the *Civil Code* says:

> Art. 2260a. In matters of medical or hospital responsibility, the action in indemnity for bodily or mental prejudice caused to a patient is prescribed by three years from the date of the fault. However, if the prejudice becomes apparent gradually. the delay runs only from the day on which it first appeared.

Connecticut's statute says "no action to recover damages from malpractice . . . shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . ." Washington's 1971 statute says "any civil action for damages against . . . a member of the healing arts . . ., based upon alleged professional negligence shall be commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that the plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last."

We put forth the following for discussion:

> "Where the existence of a cause of action in negligence for personal injury or for damage to property or for professional negligence is unknown, the running of time is postponed until the date when the person asserting the claim knew or ought to have known of the facts upon which he alleges negligence (or "knew or ought to have known of the damage or injury").

It will be noted that section 8(1) of British Columbia's Act has an outside limit of 30 years as does section 47(2) of the Uniform Act. However, in the case of actions against hospitals and against physicians for malpractice the outside limit is 10 years. We understand that the latter provision was inserted by way of amendment while the bill was before the legislature.

We can see some justification for the 10 year limit but find difficulty in confining it to malpractice cases. We seek guidance.

COUNTERCLAIMS AND THIRD PARTY PROCEEDINGS

The only provision on this subject is in Part I. Section 11 says that Part I applies to a counterclaim or set-off. That is to say, they are barred if out of time. We agree with this as a general rule, at least with respect to counterclaims unrelated to the original cause of action. However many jurisdictions now permit a counter claim for third party proceedings at least in specific cases such as motor vehicle cases after expiry of time as long as the original action was in time and the counterclaim is connected with the subject matter of the action. Some of these provisions include third-party proceedings. Alberta's section 60 is an example in connection with tort claims. Ontario recommended and British Columbia enacted [Section 4(1)] such a provision applicable to all actions. We recommend this.

AMENDMENTS, EXCLUDING CHANGE OF PARTIES

The rule of *Weldon* v. *Neal* prohibits amendments setting up a new cause of action if made after expiration of the limitation period.

It is true that cases like *Cahoon v. Franks* [1967] SCR 455 and *Basarsky v. Quinlan* [1972] SCR 380 point to a relaxation of the rule. We think however there should be a statutory provision. One recommended by Professor Watson in a most helpful article, Amendment of Proceedings after the Expiry of Limitation (1975), 53 Can. Bar Rev. 237 reads:

> The court may allow an amendment changing the claims asserted in an action, notwithstanding that since the commencement of the action a relevant limitation period has expired, whenever the claim sought to be added by amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ.

We lean in favour of this provision not because of the drafting, but because it requires that the claim sought to be added must be related to the original cause of action. This requirement is absent from British Columbia's section 4(4).

AMENDMENTS CHANGING PARTIES

The frequent refusal to permit changes in parties after the expiration of time has often resulted in injustice. The action fails although the defendant, having been served with a statement of claim knew perfectly well what the cause of action was. British Columbia has simply permitted the adding or substitution of parties with respect to claims connected with the original cause of action [Section

4(1)(d)]. Professor Watson's recommendations are separate for the adding of plaintiffs and the adding of defendants. In a sense they are narrower than British Columbia's for they require that the defendant must have had such notice within the limitation period that he will not be prejudiced by the addition of a new plaintiff, and that a proposed defendant must have had the like notice. These provisions are:

> (b) Amendments Adding or Substituting a Plaintiff.
>
> The court may allow an amendment adding or substituting a plaintiff, or changing the capacity in which a plaintiff sues, notwithstanding that since the commencement of the action a relevant limitation has expired, if
>
> (i) the claim to be asserted by the new plaintiff in his new capacity, arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the action as originally constituted, and
>
> (ii) the defendant has, within the limitation period plus the period provided by law for the service of process, received such formal or informal notice that he will not be prejudiced in maintaining his defence on the merits, and
>
> (iii) the court is satisfied that the addition or substitution of the new plaintiff is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the action.
>
> (c) Amendments Adding or Substituting a Defendant
>
> The court may allow an amendment adding or substituting a defendant, or changing the capacity in which a defendant is sued, notwithstanding that since the commencement of the action a relevant limitation period has expired, if
>
> (i) the claim to be asserted against the new defendant, or against the original defendant in his new capacity, arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the action as originally constituted, and
>
> (ii) the party to be brought in by amendment has, within the limitation period plus the period provided by law for the service of process, received such formal or informal notice that he will not be prejudiced in maintaining his defence on the merits.

We are not certain whether the better provision is one like British Columbia's, or one like British Columbia's with the additional provision that the court must hold that the defendant or proposed party will not be prejudiced, or a provision like Professor Watson's. We seek guidance.

If provisions on the above lines are approved then one might query whether they belong in *The Limitations Act* or the Rules of Court or elsewhere. We think no harm is done in putting them in *The Limitations Act.*

If such amendments are passed then they would cover the special case of the plaintiff who did not have status when he sued, e.g. a purported administrator who did not yet have letters, and the case of the defendant who unknown to the plaintiff was deceased, and the

case of misnomer of a party. We suggest it will be necessary to retain a provision like Alberta's section 61(1)(a) covering the case of an action against a registered owner of a motor vehicle where it appears after the expiration of time that someone else is the actual owner. This would have to be covered specially if Professor Watson's recommendation is accepted but not if British Columbia's is.

THE CROWN

The Uniform Act defines "action" to include civil proceedings by and against the Crown (Section 2(a)). We think this is proper and recommend retention. However, if we keep the provision whereby time runs against an owner of land and in favor of an "adverse" possessor, then we must consider whether that provision should operate against the Crown. The *Nullus Tempus Act* had a 60-year period. It is not in force in Alberta, because the *Public Lands Act* prevents acquisition by prescription of any estate or other interest in Crown lands. It is however in force, we believe, in some provinces. Ontario has recommended a 30-year period. We seek guidance.

The last point connected with the Crown has to do with actions by and against the Crown in other capacities—that is to say the Crown in right of another province or of Canada. We are not sure that a plaintiff can implead the Crown in right of another province or of Canada in a provincial court but the Crown in those capacities might well be a plaintiff. On principle, they should not be favoured over the Crown in right of the enacting province. There seems to be doubt as to whether the Crown in these other capacities can be subjected to a provincial Limitations Act. In the case of Canada, *Reg.* v. *Montreal* [1972] F.C. 382 holds that a provincial limitations provision cannot limit or revoke the prerogatives of Her Majesty in right of Canada.

Ontario recommends as follows:

> "The proposed statute should apply not only to the Crown in right of Ontario but also, so far as the legislative power of the province permits, the Crown in all its other capacities."

We seek guidance.

NOTICE OF ACTION

The Limitations Act does not require notice in any type of action. However, municipal legislation in various provinces frequently does so. Failure to give notice can be just as fatal to the claim as the bringing of an action beyond the limitation period. We think there is some justification for a requirement of notice in cases involving non-repair

of highways and particularly in snow and ice cases. In other cases, however, we think that the requirement of notice is unfair. We seek guidance.

30 July 1976

Glen Acorn
W. H. Hurlburt
W. E. Wilson
of the Alberta Commissioners

APPENDIX T

(See page 32)

POWERS OF ATTORNEY

ONTARIO REPORT

INTRODUCTION

The following paper, intended as a decision document, is divided into two parts. The first part deals with proposals for the creation by legislation of a form of power of attorney, called an enduring power of attorney, which can survive the mental incapacity of the donor of the power. The second part deals with proposals for legislation setting out the rights and liabilities of agents, third parties and other parties pursuant to the termination, by revocation or by operation of law, of an ordinary (i.e., non-enduring) power of attorney.

Part One

ENDURING POWERS OF ATTORNEY

EXISTING LAW

According to the law of agency, a power of attorney granted to an attorney while the donor of the power is of sound mind becomes void when the donor becomes mentally ill to the degree that he loses legal capacity. This results from a basic theory of agency, namely, that the agent only has capacity to carry out those transactions which his principal has legal capacity to carry out. Therefore once the principal has lost capacity to contract, the agent's capacity is terminated also.

Often, however, a general power of attorney is executed by a person who is looking into the future and wishes to provide for someone, e.g., a member of his family, to look after his affairs when he is no longer capable of managing them by reason of old age or disease. If the attorney in such a situation immediately ceases to act on behalf of his principal as soon as he suspects the principal has become incompetent, he may very well be defeating the whole purpose of the power of attorney. If he continues to act at a time when his principal has, in fact, lost legal capacity, the attorney may be exposing himself to an action for breach of warranty of authority brought by a third party with whom the attorney has carried out transactions on behalf of his principal.

Several provincial law reform commissions have issued reports dealing with this problem. There is general agreement that the crea-

tion of a form of power of attorney capable of surviving the mental incapacity of the donor would be a valuable reform. It is generally felt that provincial legislation in respect to mental health and mental incompetency is not entirely satisfactory in dealing with situations where the affairs of someone who has become incapacitated through old age or mental disease need looking after. The commissions have voiced the opinion that legal proceedings to have someone declared "mentally incompetent" or "incapable of managing his affairs" may be distasteful and disruptive to family life.

It is also generally felt that an individual should have the right when mentally capable of making provision for the management of his affairs at a time when he is not so capable just as he may provide by a general power of attorney for the management of his property at a time when he will be absent from the jurisdiction.

The law reform commissions of Ontario, Manitoba and British Columbia have produced reports recommending legislation to create enduring powers of attorney. Their recommendations have differed markedly and are in some cases incompatible. What follows is a series of general propositions, each one followed by alternative recommendations representing the views of the three commissions. It is hoped that decisions taken on these alternatives will provide guidelines for draft uniform legislation.

FORMALITIES

(1) A power of attorney which is to be capable of enduring the mental incompetency of the donor must be in writing, signed by the donor, and dated.

(i) All the law reform commissions agree that these should be fundamental conditions.

(2) A power of attorney will not take effect as an enduring power unless there is an *express* statement in the instrument creating the power that it is to endure the mental incapacity of the donor.

(i) All the law reform commissions agree that an express statement should be a fundamental condition.

(3) An enduring power of attorney should be witnessed.

(i) The Ontario Law Reform Commission recommends that an enduring power be executed in the presence of at least one witness, who shall be someone other than the donee or the spouse of the donee.

(ii) The Manitoba Law Reform Commission recommends that an enduring power should be executed by the donor in the presence of at least two witnesses (i) neither of whom must be the donee or the spouse of the donee and (ii) one of whom must be a physician, surgeon, barrister or solicitor, and (iii) not more than one of whom is a member of the donor's family. The Manitoba Commissioners also recommended that provision be made for a supporting affidavit in which the witnesses testify that (a) they know the donor personally and (b) they have reason to believe the donor and the person executing the power of attorney are one and the same person, and (c) that the donor appears to be of sound mind and that he appeared to understand what was being executed.

(iii) The British Columbia Law Reform Commission recommends that the signature of the principal be witnessed, but also recommends that this be a non-mandatory requirement, i.e. failure to comply would not invalidate the power.

(4) The effect of non-compliance with the formalities of creating an enduring power should be to turn the power into an ordinary power of attorney which would be terminated if the donor becomes mentally imcompetent.

(i) The Ontario and Manitoba Law Reform Commissions make no recommendation.

(ii) The B.C. Law Reform Commission recommends that there be two kinds of formalities, namely, those which must be complied with if the document is to be effective as an enduring power of attorney and those which ought to be complied with, but which, if they are not, do not affect the validity of the document. In the first category the B.C. Commission placed the requirement that the instrument creating the power should be in writing, signed, and dated and that it should contain an express statement that the power is to endure. In the second category, the most important formalities are that the principal's signature should be witnessed (as mentioned above) and that the power should be under seal (because of the rule that an attorney cannot carry out any transaction which is required to be under seal unless the instrument creating his agency is also under seal—this rule is now almost obsolete since there are very few transactions

which must be executed under seal). The requirements in the second category would be voluntary, i.e. non-compliance would not prevent the creation of a valid enduring power of attorney provided the formalities in the first category are complied with.

The B.C. Commission further recommends that if an enduring power is invalid because it fails to comply with the mandatory formal requirements, the invalidity should only affect the endurance. If the agency agreement is otherwise valid at common law, it should take effect as an ordinary power of attorney which would not survive the mental incapacity of the principal.

FILING

(5) The attorney under an enduring power of attorney should be required, within some time limit, to file a copy of the power with the registrar of an appropriate court.

(i) The OLRC recommends that the attorney should be required to file a notarial copy of the enduring power of attorney in the office of the registrar of the surrogate court of the county or district where the donor or the donee resides, not later than fifteen days after the attorney first learns that the donor has become incapacitated. The OLRC feels that this filing requirement serves two functions: it puts the power of attorney on public record and publicly identifies the attorney.

(ii) The Manitoba Law Reform Commission recommends that the attorney be required to file two copies of the enduring power in the office of the registrar of the surrogate courts and in the office of the Public Trustee within 15 days after the date on which he has signed the form of acceptance on the power of attorney.

(iii) The British Columbia Law Reform Commission recommends that no requirement as to filing be included in the legislation. They see no particular utility in a filing system for enduring powers of attorney, and feel that the legislative scheme should be kept as simple as possible.

(6) Provision should be made for a judge to extend the time for filing.

(i) The Ontario Law Reform Commission recommends that provision be made for an application to the surrogate court for an order validating the exercise of the power of attorney

in the period subsequent to incapacity notwithstanding the attorney's failure to file.

(ii) The Manitoba Law Reform Commission makes a recommendation to the same effect as that of the OLRC.

(7) The effect of failure to file, subject to the provision for extension of time, should be that the power of attorney cannot be validly exercised after the donor of the power has become mentally incompetent.

(i) This proposition is precisely what is recommended by the Ontario Law Reform Commission.

(ii) The Manitoba Law Reform Commission recommends that where an enduring power is not properly filed, subject to the provision for extension of time for filing, the enduring power of attorney shall not come into force and shall be of no effect.

DUTIES OF THE ATTORNEY

(8) There are a number of common law duties which an attorney owes to his principal, such as:

(a) the duty not to enter upon a transaction where there is a potential conflict of interest;

(b) the duty to account;

(c) the duty to keep the principal's property separate from his own; and

(d) a duty of care and skill.

(i) The British Columbia Law Reform Commission recommends that the legislation should provide that a fiduciary relationship exists between principal and enduring attorney and that, in any action against an enduring attorney, the principal and his committee, executor, or other successors have the benefit of the proprietary equitable remedies which are available to a *cestui que trust.*

(ii) The B.C. Law Reform Commission also recommends that a duty of "prudent management" be placed on an attorney under an enduring power. The duty of prudent management means that an enduring attorney must exercise his powers as a man of ordinary prudence would manage his own private affairs for the benefit of

the principal and his family, having regard to the nature and value of the property of the principal and the circumstances and needs of the principal and his family. This duty should be subject to any explicit instructions given by the principal to the attorney at a time when the principal was mentally incompetent.

(iii) The B.C. Law Reform Commission recommends that the attorney should be insulated from liability so long as he acts in good faith. An enduring attorney should not be liable to a principal for carrying out an explicit instruction given at a time when he *bona fide* believed the principal to be competent or for failing to carry out an instruction given or ordered to be carried out at a time when he *bona fide* believed the principal to be incompetent.

ACCOUNTING

(9) The enduring attorney should be required to pass his accounts upon the application of an interested party or the Public Trustee on behalf of an interested party.

(i) The Ontario Law Reform Commission recommends that:

(a) provision be made for interested parties to apply to the surrogate court for an order that the attorney be directed to pass his accounts; and

(b) that the Public Trustee be empowered to apply to the surrogate court on behalf of interested parties for an order directing the attorney to pass his accounts if a complaint is made to him.

The OLRC believes that the fact that the attorney can be called upon to give an accounting acts as a salutary check on the exercise of the power.

(ii) The Manitoba Law Reform Commission recommends that the enduring power of attorney should specifically provide that every attorney, if so directed by the donor, should be required to file his accounts annually with the Public Trustee. Every attorney who has been given a special power of attorney pursuant to the Act, and whose power has been properly filed, should be required to file his accounts annually with the Public Trustee, as directed, and within one month of learning of the donor's death. The Public Trustee should

be empowered to require a special attorney, not so directed by the donor, to file accounts if an interested party complains. The Public Trustee should also be empowered to investigate the accounts filed by enduring attorneys, and to take what action he deems necessary to protect the estate of the donor. The Commissioners believe that a degree of supervision over special powers of attorney should be given to the Public Trustee and that he should be put in a position to assess whether or not the mentally incompetent donor's estate is being administered competently.

(iii) The British Columbia Law Reform Commission recommends that there be an express provision in the legislation reiterating the right of the successor to the donor, when the donor has died, to call for accounts from the attorney. The Commissioners emphasize that such a provision would add nothing to the present law, and they make no recommendation in regard to annual or other periodic accounting duties.

WHO CAN ACT AS AN ATTORNEY

(10) The Council of the Law Society of England, in its presentation to the English Law Commission, proposed very strict limitations on the persons who would be entitled to act as attorneys under an enduring power. For example, they felt that there should be at least two joint attorneys at least one of whom is not a member of the donor's family and at least one of whom must be, and remain, a member of a professional body or an organization which is, for practical purposes, in a position to guarantee his honesty.

(i) None of the Canadian law reform commissions recommend that there be any limitation at all on the persons who can act as enduring attorneys.

TERMINATION

(11) The death of the donor should terminate an enduring power of attorney.

(i) The Ontario Law Reform Commission recommends that the donor of a power of attorney should not be able to provide expressly for the survival of the power subsequent to his death. (There is existing legislation in Ontario which allows the donor to provide that a power of attorney shall survive his death.)

(ii) The Manitoba Law Reform Commission recommends that an enduring power should cease upon the death of the donor (subject to a few statutory exceptions).

(12) The enduring power of attorney should be terminated when the donor is found to be mentally incompetent or is not so found but is found to be incapable of managing his affairs and a committee is appointed.

(i) The Ontario Law Reform Commission recommends that the enduring power should cease to be valid when a declaration of mental incompetence is made and a committee appointed. Clearly the OLRC intends that the same result should follow where a determination is made that a person is incapable of managing his affairs and a committee is appointed.

(ii) The Manitoba Law Reform Commission makes a recommendation to the same effect as the OLRC recommendation. They further recommend that where an application has been made to the Court of Queen's Bench to have a committee appointed for the estate of a person who is declared mentally incompetent, notice of the application should be required to be served upon the attorney.

(iii) The British Columbia Law Reform Commission recommends that an enduring power of attorney should terminate upon the making of a declaration of mental incompetency under the *Patients' Estates Act*. They note that under the B.C. legislation, where there is no specific appointment of a committee, the Public Trustee becomes *ex officio* the committee of the patient, so that a declaration always has the effect of appointing a committee.

REMOVAL OF ATTORNEY

(13) Provision should be made in the legislation for the removal of an attorney and the substitution of another.

(i) The Ontario Law Reform Commission recommends that:

(a) provision should be made for interested parties to apply to the surrogate court to have a person other than the named attorney substituted for the named attorney; and

(b) the Public Trustee should be empowered to make an application to the surrogate court on behalf of interested

parties for the appointment of a substitute attorney if a request is made to him; and

(c) provision should be made for the attorney himself to apply to the surrogate court to have another attorney substituted, on giving notice of his intention to make such application to the Public Trustee and to all interested parties.

(ii) The Manitoba Law Reform Commission recommends that:

(a) provision be made to permit a donee of a filed enduring power to be relieved of his duties as attorney by written notice to the Public Trustee and the donor; and

(b) provision should be made to permit any interested party or the Public Trustee, in cases where a donor is incapacitated, to apply to the Court of Queen's Bench for an order either appointing a new attorney or appointing the Public Trustee to administer the estate of the donor where the original attorney dies or becomes incapacitated or where any member of the donor's family or other interested party or the Public Trustee is of the opinion that the original attorney is not performing his duties and accepting his responsibilities in a competent manner.

(iii) The British Columbia Law Reform Commission recommends that no provision be made for removal and substitution of the attorney. They feel that if there is dissatisfaction with the way in which the attorney is discharging his responsibilities or if the attorney dies or becomes incapacitated, the best course is to bring the whole matter within the *Patients' Estates Act* by seeking a declaration of mental incompetency and the appointment of a committee.

NO WAIVER

(14) The Act should contain a provision expressly stating that where a donor intends the power to survive any subsequent incapacity, he cannot contract out of or waive the provisions of the Act.

(i) All the law reform commissions have endorsed this recommendation.

Part Two

TERMINATION OF ORDINARY POWERS OF ATTORNEY

Protection of Agent

(15) The position of an agent who, under an ordinary (non-enduring) power of attorney, has carried out a transaction with a third party subsequent to his principal's becoming mentally incapable is not entirely clear at common law. In *Drew v. Nunn*, where the agent was the wife of the principal and therefore assumed to have known of the termination of the agency by reason of her husband's insanity, the principal was held to be liable on the grounds that he had originally held his wife out as his agent and that holding-out would continue until the third party received notice of the termination of the agency. In *Yonge v. Toynbee* on the other hand, it was held that even where the agent had no knowledge of the termination of his authority, he was liable to a third party on the basis of a breach of warranty of authority. These cases appear to be in conflict on the question of the liability of the agent.

A noteworthy recent example of legislation which attempted to clarify and restrict the common law liability of an agent acting under a power of attorney is *The Powers of Attorney Act 1971* which was enacted in England to give expression to the recommendations of the English Law Commission. The British Columbia Law Reform Commission in its Report entitled "The Termination of Agencies" also has made a number of recommendations relating to the liability of agents. The B.C. proposals are intended to apply to agents generally, not just to those acting pursuant to a power of attorney.

An agent acting pursuant to a power of attorney at a time when the power of attorney has terminated should not incur liability if he did not know at the time that the power of attorney had terminated.

(i) The B.C. Law Reform Commission recommends that an agent who acts in pursuance of his authority at a time when it has been terminated, whether by revocation or operation of law, shall not, by reason of the termination, incur any liability (either to his principal or to any other person) if at that time he did not know that the authority had been terminated.

(ii) Section 5 (1) of the U.K. *Powers of Attorney Act 1971* states:

> A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked shall not, by

reason of the revocation, incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked.

(16) Knowledge of the occurrence of an event which has the effect of terminating a power of attorney should be deemed to be knowledge of the termination of the power itself.

(i) Both the B.C. Law Reform Commission proposals and the English legislation contain such a provision.

(ii) The B.C. Commission also recommends that for purposes of the legislation, "knowledge" should include knowledge of such circumstances as would put a reasonable man on his inquiry. It appears that this is probably the common law position anyway, but the B.C. Commissioners wish to leave no doubt.

Protection of Third Parties

(17) The common law protects a third party in situations where the third party, without knowledge that the agent's authority has been terminated, deals with the agent.

(i) The B.C. Law Reform Commission recommends that where the authority of an agent has been terminated, whether by revocation or operation of law, and a person, without knowledge of the termination, deals with the agent, the transaction between them shall, in favour of that person, be as valid as if the authority had been in existence.

(ii) Section 5(2) of the U.K. *Powers of Attorney Act 1971* states:

> Where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

Protection of Other Parties

(18) Legislative protection should be given to persons who have not dealt directly with the agent but whose rights nevertheless hinge on the validity of the agent's authority.

(i) Section 5(4) of the U.K. *Powers of Attorney Act 1971* states:

Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of this section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if —

(a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or

(b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

(ii) The B.C. Law Reform Commission recommends that where the interest of a person depends on whether a transaction between an agent and a second person was valid by virtue of the provision protecting parties dealing with the agent, and the first person did not know that the authority of the agent had been terminated, it shall be conclusively presumed in favour of the first person that the second person did not at the material time know of the termination of the authority.

Stephen V. Fram
on behalf of the
Ontario Commissioners

30 June 1976

APPENDIX U

(See page 32)

Prejudgment Interest

BRITISH COLUMBIA REPORT

In 1973 the Law Reform Commission of British Columbia published a Report respecting Prejudgment Interest under the title: Report on Debtor-Creditor Relationships, Part IV — Prejudgment Interest. British Columbia, following the recommendations of the Report, enacted the *Prejudgment Interest Act,* S.B.C. 1974, chapter 65. A copy of the Act and the Law Reform Commission Report are attached to and form part of this report.

NOTE: As both the Act and the Report are readily available, neither is reproduced in these Proceedings.

The Law Reform Commission Report is concise and eminently readable and we recommend that each Commissioner take the time (less than an hour is required) to read the full Report.

The first question for the Conference is whether prejudgment interest is a suitable subject for the Conference to prepare model legislation. This requires the Commissioners to decide whether they believe prejudgment interest is a good thing and whether they foresee any reasonable likelihood that their jurisdiction would enact legislation respecting it. But before that question is answered a brief description of the nature of prejudgment interest should be made.

Basically the Report and the Act provide for a mandatory award of interest on every monetary judgment, calculated from the time a cause of action arose until the date of judgment. This is to be distinguished from an award of interest under the *Interest Act* (Canada) in respect of the period of time from the date of judgment to the date of execution on the judgment.

The basic premise of the Law Reform Commission was that a successful plaintiff, because of delays in the judicial system and other reasons, has not had the use of the money awarded in respect of his cause of action at the time the cause of action arose and that he has been deprived economically as a result. Conversely, the unsuccessful defendant, by not having to pay the plaintiff at the time the cause of action arose, has in effect had the use of the plaintiff's money until at least the date of judgment. The twofold purpose of the Report and Act was to remedy this apparent inequity and hopefully to speed up the administration of justice by removing any incentive that the defendant might have to delay settlement or trial of the issues.

For the Conference to determine whether prejudgment interest is a suitable subject for preparation of a model Act, we must consider the same sort of factors which relate to most of our other model Acts — namely, is there a significant value in having this subject dealt with uniformly by all the provinces.

An obvious advantage exists with respect to actions where the parties are in different provinces. In all provinces have similar law respecting prejudgment interest, parties in those provinces would have one less complication to deal with in pursuing or defending their action. Because the Report makes no distinction between debt and damage actions the model Act (if it were to follow the B.C. approach) would likely be relevant to virtually all inter-provincial proceedings. Therefore, the B.C. Commissioners believe that it would be of significant benefit to the administration of justice in Canada as a whole if the provinces had uniform legislation in respect of prejudgment interest.

QUESTION

Should the Conference prepare a model Act on the subject of prejudgment interest?

Assuming the answer is yes, the Conference then must decide various matters of policy so that a model Act may be prepared. Fortunately, the Law Reform Commission Report conveniently identifies the issues and makes recommendations in respect of them following a general discussion of the law and practice relevant to those issues. Therefore, this report will rely extensively on the Law Reform Commission Report as a basis for discussion.

The Commission's first three recommendations arose out of chapter 3 of the Report (pages 15 to 19). Chapter 3 is divided into 5 headings and it is convenient to ask the policy question with respect to each of those 5 headings followed by a question with respect to each of the Commission's first 3 recommendations.

QUESTION 1

Should prejudgment interest be awarded in respect of breach of contract where the money value of the judgment is easily ascertained? (See paragraph A of chapter 3 of the Report.)

QUESTION 2

Should prejudgment interest be awarded in respect of damages awarded for breach of contract generally, in cases where the amount of the damages is neither fixed by the contract, nor readily ascertain-

able by mathematical computation from a standard specified in the contract, or other objective criteria? (See paragraph 3 of chapter 3 of the Report.)

In this connection an interesting problem has arisen that was not adverted to in the Report, but has surfaced in the recent judgment of Meredith J. in *Schweickardt* v. *Thorne*, [1976] 4 W.W.R. 249. In essence, it is a problem of the relationship of the *Prejudgment Interest Act* and *Lord Cairns' Act* since under the latter statute Courts of Equity are given power to award damages in substitution for specific performance "in all cases in which the Court of Chancery has jurisdiction to entertain an application . . . for the specific performance, etc.," and the measure of damages is the difference between the contract price and the value of the property at the date of judgment, it is obvious that the *Prejudgment Interest Act* may have the effect of "doubling up" on the liability of the defendant, at least for a part of the period between the accrual of the cause of action and the date of judgment. Meredith J., in *Schweickardt*, considered this anomalous.

It is not immediately clear just how this issue should be resolved.

QUESTION 3

Should prejudgment interest be awarded for economic harm arising from a tort? (See paragraph C of chapter 3.)

QUESTION 4

Should prejudgment interest be awarded in respect of future economic loss? (See paragraph D of chapter 3.)

QUESTION 5

Should prejudgment interest be awarded in respect of non-economic harm arising from contract or tort? (See paragraph E of chapter 3.)

QUESTION 6

The Commission recommendation 1 was that reforming legislation should clearly embody the principle that interest is a form of compensation for the loss of use of money. Does the Conference agree?

QUESTION 7

The Commission recommendation 2 was that interest prior to a judgment be recoverable as a matter of right, regardless of the nature of the cause of action, in all actions for the recovery of the judgment sounding in money. Does the Conference agree?

The B.C. *Prejudgment Interest Act* reflects the previous Commission recommendation. (See section 1(1) of the Act.)

QUESTION 8

The Commission recommendation number 3 is that the only exception to the recommendation that interest prior to judgment be recoverable as a matter of right should be that no interest be recoverable on economic losses arising after the date of trial. Does the Conference agree?

This Commission recommendation is contained in section 2(a) of the *Prejudgment Interest Act.*

The next questions relate to the date from which interest should be calculated. The discussion on this issue is on pages 20 to 22 of the Report.

QUESTION 9

The Commission recommends on page 22 of its Report that with respect to general damages, interest for the prejudgment period be calculated from the date of accrual of the cause of action. Does the Conference agree?

This recommendation is enacted in section 1(1) of the Act.

QUESTION 10

The Commission recommends on page 21 of its Report that with respect to special damages, interest for the prejudgment period be calculated on 6 monthly totals from the date of accrual of the cause of action. Does the Conference agree?

This proposal of the Commission is contained in section 1(2) and (3).

Note that no attempt has been made either in the Commission Report or in the Act to determine legislatively when a cause of action arises. We are aware of the difficulty of determining this date in respect of particular cases but all of the law relating to the limitation of actions in available to the court in ascertaining the appropriate date.

QUESTION 11

The Commission recommends on page 23 that where a payment made into court by a defendant is accepted by the plaintiff that payment shall be deemed to include an amount in respect of interest to the date of payment in. Does the Conference agree? (See pages 22 and 23 of the Report.)

QUESTION 12

The Commission recommends on page 24 that where a plaintiff elects not to take out money paid into court, and the judgment in the

action is for an amount less than that paid in, no interest be recoverable for any period after the date of payment into court. Does the Conference agree? (See pages 23 and 24 of the Report for a discussion.) The previous two recommendations of the Commission are contained in section 4 of the Act. Note that the section speaks of a "party" rather than of plaintiff and defendant in order to cover the situation of a defendant by way of counterclaim.

In relation to Questions 11 and 12, the Conference might wish to consider the following views of the English Law Commission in its Working Paper 66, on *Interest* (para. 106):

> We adverted earlier to the dilemma of the plaintiff who is faced by a payment into court of a sum that covers the damages that he is likely to be awarded but does not include a sum in respect of interest. If the plaintiff takes the money out of court he may not apply for interest as there has been neither trial nor judgment. If, on the other hand, the case is tried but he is awarded no more by way of damages than the sum in court he may also be awarded interest but he will usually be ordered to pay the defendant's costs from the date of the payment in. A solution to the difficulty was suggested by the Court of Appeal in *Butler* v. *Forestry Commission* namely that the plaintiff, when faced with a payment into court of a sum that is adequate to cover the damages but not the interest, should write an open letter to the defendant inviting him to make a further payment in respect of interest and indicating a willingness to accept the money in court on these terms. If the defendant fails to offer anything for interest and, at the trial, the plaintiff recovers no more by way of damages than the sum in court, the plaintiff may apply for interest and may rely on the latter as a ground for being allowed his costs from the date of payment into court and for not having to pay the defendant's costs. In our Report on Personal Injury Litigation — Assessment of Damages we welcomed this suggestion as an acceptable solution. We have not changed our minds since.

QUESTION 13

The Commission recommends on page 25 of the Report that the court should not be given a discretionary power to deprive a plaintiff of prejudgment interest where he is otherwise entitled to it. Does the Conference agree? (See pages 24 and 25 of the Report for a discussion.)

Section 1(1) of the Act makes it mandatory for a court to apply prejudgment interest in all cases except those referred to in section 2 of the Act.

It might be noted that the English Law Commission proposes that there be no extension of the present limited English provisions for interest as a matter of right.

QUESTION 14

The Commission recommends on page 26 that the rate at which a plaintiff be entitled to recover interest be that allowed by law. Does the Conference agree? (See pages 25 and 26 of the Report for a discussion.)

Section 1 of the Act does not follow the above recommendation and instead requires the court to apply a rate of interest it considers appropriate in the circumstances, not less than the rate applicable in respect of interest on a judgment under the *Interest Act* (Canada). The Report basically takes the position that any attempt on the part of the Province to set an interest rate would be challengeable on constitutional grounds because "interest" is specifically referred to in section 91(19) of the B.N.A. Act. Curiously enough, no one has yet seen fit to challenge the *Prejudgment Interest Act* on this ground. The B.C. Commissioners argue that because the *Interest Act* (Canada) at the moment only prescribes an interest in respect of a judgment that has already been obtained, there is no "rate of interest allowed by law" that covers prejudgment interest. With the federal government not having legislated in this particular field we would argue that legislation by the Province is supportable as an adjunct to the administration of justice in the same way as the Province can set a rate of interest with respect to overdue payment of succession duties as an adjunct to its taxation powers.

The B.C. Commissioners recommend that the court be empowered to fix the rate of interest according to the circumstances of each case. It may be, given our experience with the Act, that some guidelines for the application of the discretion of the court ought to be made.

The only judicial discussion of this issue has been in the unreported case of *Becker* v. *Ekkert* (1975), where Craig J. said:

Some of the factors which I think are pertinent in the consideration are — what merit was there in proceeding to trial? — if there was a payment into court, when was it made and how close

was it to the judgment? — was there any undue delay in getting to trial, and if so, who was responsible for it? — what was the prevailing rate of interest from time to time from the date of the inquiry to the date of judgment? — what has been the conduct of the parties, generally?

There will doubtless be many other factors which will vary from case to case. For example, I think that in a jury trial the fact that the jury awarded substantially more to the plaintiff than the trial judge would have awarded had he been sitting alone is one factor, although the weight of such factor is, perhaps, less than some of the other factors which I have mentioned.

QUESTION 15

The Commission recommends on page 26 that the legislation should specifically provide that it does not operate to authorize the recovery of interest upon interest. Does the Conference agree?

Section 2(c) of the Act enacts this recommendation.

The English Law Commission has said that "if the sums recovered by way of damages represent interest paid by the plaintiff it would seem odd that the court should have no power to award interest in respect of them, and our professional view is that it should have such power. The proper construction of the Act on this point is open to argument: *Bushwall Properties Ltd.* v. *Vortex Properties Ltd.*, [1975] 1 W.L.R. 1649" (para. 114).

QUESTION 16

The Commission recommends on page 27 that the legislation should specifically provide that it does not operate where interest is payable as of right, whether pursuant to an agreement or otherwise. Does the Conference agree? (See pages 26 and 27 of the Report.)

Section 2(b) of the Act reflects this recommendation but is restricted to the cases where the parties have agreed about the payment of interest prior to judgment.

Perhaps we should note here that section 2(d) and (e) provide two other exceptions where interest should not be awarded under the Act. Paragraph (d) allows a judgment creditor to waive in writing his right to an award of interest and paragraph (e) provides that no interest shall be awarded on costs.

QUESTION 17

Does the Conference agree that interest should not be awarded where the judgment creditor waives his right to an award of interest?

When the Act was drafted it was felt that in order to ensure that the courts would routinely in every case award prejudgment interest, some special action by the judgment creditor should be required before the courts would be permitted to avoid their responsibility under the legislation.

QUESTION 18

Should the waiver referred to in the previous question be in writing?

> The B.C. Commissioners recommend that the waiver be in writing in order to avoid possible misunderstandings between the parties should there be a dispute about whether a waiver in fact was made and to provide a clear record on the file that prejudgment interest was waived.

QUESTION 19

Does the Conference agree that interest should not be awarded on costs?

> The B.C. Commissioners recommend this exception because costs in most cases are not usually demanded of a party until completion of the case. The successful plaintiff has not been deprived of an amount of money to which he would have been entitled at the time of the cause of action and therefore has not lost the benefit of anything. Additionally there is an administrative advantage in not embarking on the attempt to isolate those costs which may actually have been incurred prior to the judgment.

QUESTION 20

The Commission recommends on page 27 that the legislation should apply in all courts of record in the Province. Does the Conference agree?

The Act, by speaking only of a "court" accepts this principle.

QUESTION 21

On page 27 of the Report the Commission recommends that the legislation should apply only in respect of causes of action arising after the coming into force of the legislation. Does the Conference agree?

QUESTION 22

Does the Conference agree that where a judgment is obtained by default the Registrar of the court may exercise and carry out the powers and duties of the court under the legislation?

This aspect of prejudgment interest is not covered by the Law Reform Commission Report but is contained in section 3 of the Act. The mechanical difficulty of dealing with default judgments by the court itself is a significant one.

Finally, individual provinces, should they enact legislation respecting prejudgment interest, should consider whether a provision similar to section 5 of the B.C. Act is required. The Law Reform Commission Report recommends on page 27 that the Crown be bound by this legislation and by virtue of section 13 of the B.C. *Interpretation Act* the Crown is bound by the B.C. Act.

Allan R. Roger
for the British Columbia Commissioners

Victoria
July 1976

APPENDIX V

(See page 32)

UNIFORM PRESUMPTION OF DEATH ACT

(as Adopted and Recommended for Enactment)

Interpretation

1. In this Act,

(*a*) "court" means the (name of superior court of the jurisdiction);

(*b*) "interested person" means any person who is or would be affected by an order made under this Act, and includes,

(i) the next of kin of the person in respect of whom an order is made or applied for, and

(ii) a person who holds property of the person in respect of whom an order is made or applied for.

Order of presumption of death

2. (1) Where, upon the application of an interested person by originating notice of motion, the court is 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;

(*b*) the applicant has no reason to believe that the person is living; and

(*c*) reasonable grounds exist for supposing that the person is dead,

the court may make an order declaring that the person shall be presumed to be dead for all purposes, or for such purposes only as are specified in the order.

Date of presumed death

(2) An order made under subsection (1) shall state the date on which the person is presumed to have died.

Order to vary, amend, confirm or revoke

(3) Any interested person may, with leave of the court, apply to the court for an order to vary, amend, confirm or revoke an order made under subsection (1).

Certificate of order as evidence

(4) An order, or a certified copy thereof, declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death for such purposes.

Duty of personal representative

3. Where an order has been made declaring that a person shall be presumed to be dead for all purposes or for the purpose of distributing his estate, and the personal representative of the person presumed to be dead believes or there are reasonable grounds for him to believe that the person is not in fact dead, the personal representative shall not thereafter deal with the estate or remaining estate unless the presumption of death is confirmed by an order made under section 2(3).

Distribution where in fact alive

4. (1) Where a person who is presumed to be dead is, in fact, alive, any distribution of his property that has been made in reliance upon an order made under section 2, and not in contravention of section 3, shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead.

Directions for preservation and return of property

(2) Where a person who is presumed to be dead is found by the court to be alive, the court may, upon the application of any interested person and subject to subsection (1), by order give such directions as the court considers appropriate respecting the property of the person found to be alive and its preservation and return.

Distribution where in fact dead

5. Where a person who is presumed to be dead is in fact found to be dead, any distribution of his property that has been made in reliance upon an order made under section 2 shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against any person who would otherwise be entitled if the order made under section 2 had not been made.

Appeals

6. Any interested person may appeal an order made under this Act to the (*appropriate appellate court*).

APPENDIX W

(See page 32)

Protection of Privacy: Credit and Personal Data Reporting

ONTARIO REPORT

At the 1975 meeting of the Conference, it was resolved that consideration of the report of the Ontario delegates respecting credit and personal data reporting and including a draft Act be placed on the agenda for the 1976 meeting and that a further report be submitted analyzing the policy considerations involved. (1975 Pro., p. 27).

Attached as the Schedule to this Report is a working paper setting out 15 questions which, if answered, would be sufficient direction to finalize a draft Act. As background to the questions, there is reference to the position taken in respect of each question in the draft Act and in the legislation of each jurisdiction having legislation in this field.

Arthur N. Stone
for the Ontario Commissioners

Toronto
25 March 1976

SCHEDULE

Personal Information Reporting Act
Working Paper

1. Should reporting agencies be registered?	s. 3	p. 96
What are qualifications for registration or refusal?	s. 4	p. 97
2. Should the controls apply to credit reports only or also to reports for other purposes?	s. 7(1)	p. 101
3. Should the controls contain any special limitation or extension respecting reports to government agencies or police?	s. 7(3)	p. 104 Table 1
4. Should the controls apply to reports or information respecting, (a) all persons including corporations?		

(b) natural persons only?		
(c) natural persons, not engaging in a business?	s. 1(1)(f)	pp. 91, 95 Table 1
5. Should the controls be on the information in a file or on the information given in a report?	s. 8(3)	p. 108 Table 5
6. What limitation, updating or controls should apply to information stored or reported?	s. 8(3)	p. 108
7. To what extent should information stored or reported be required to be corroborated?	s. 8(3)(a)	p. 108 Table 4
8. To what extent should sources of information be required to be on the file?	s. 8(4)	p. 113 Table 3
9. Should control of the information on file include,		
(a) prohibition against selling its files except to another registered agency?	s. 7(4)	p. 105
(b) a requirement that information used be from files in a repository in the Province?	s. 8(2)	p. 106
10. Should there be a general standard of care for reporting agencies?	s. 8(1)	p. 106
11. What would be provided respecting reports obtained from an agency outside the jurisdiction?	s. 12	p. 120
12. Should there be any notification or control over information exchanged between users or obtained from persons other than reporting agencies?	s. 11(3) s. 11(2)	p. 119 p. 117
13. What notification should be given to the subject?		
(a) notice by agency of opening file	s. 9	p. 114

(b) notice by agency of giving report	s. 10	p. 115
(c) notice by user of obtaining report		
(i) respecting credit		pp. 115, 117
(ii) respecting other purposes	s. 11(1, 2)	Table 2
14. In provisions for disclosure,		
(a) should sources of information be required to be disclosed?	s. 13(1)	pp. 121, 134 Table 3
(b) should subject be entitled to add own explanation or additional information to the record?	s. 13(9)	p. 129
(c) under what conditions, if any, should medical information be withheld?	s. 1(1)(e) s. 13(2)	p. 90 p. 124
15. In provisions for amendment of file,		
(a) where amended on complaint, who should be advised of revised information?	s. 14(2)	p. 131
(b) what should powers of Registrar be?	s. 15	p. 133

NOTE: References to sections are to the sections of the Draft Model Act set out in the 1975 Proceedings, page 85.

References to pages are to pages in the 1975 Proceedings that contain a comparative analysis of the Draft Model Act and existing legislation in Canada.

References to tables are to tables for comparison of principal policy matters in the 1975 Proceedings, page 82.

APPENDIX X

(See page 33)

Protection of Privacy: Evidence

ONTARIO REPORT

Introduction

At the 1971 meeting of the Conference it was resolved that the evidence rule developed by 167G of Bill C-252 (*Protection of Privacy Act*) (A bill to amend the *Criminal Code*) be reviewed by the Quebec Commissioners and a report made recommending how this matter might be dealt with in provincial *Evidence Acts* (1971 Proceedings, page 83). At the annual meeting in 1975 Ontario was asked to submit a report, with the advice of Quebec, at the 1976 Conference.

Legislative History

Before embarking on a discussion of possible recommendations, something should be said with reference to the history of the legislation in question.

Bill C-252, referred to in the resolution and introduced by the then Minister of Justice, the Honourable John Turner, died on the order paper, having been given first reading. Bill C-6, on the same subject, received first and second reading in February and May of 1972. However, after subsequent discussion in Standing Committee, the Bill came back to the House in June, 1972 where it also died on the order paper. Bill C-176 (the present Act) was given first reading on April 13, 1973. Essentially it was the same as Bill C-6 of 1972 with amendments which had been suggested by the Committee on Justice and Legal Affairs. On December 4, 1973, the House of Commons passed Bill C-176, *An Act to Amend the Criminal Code,* the *Crown Liability Act* and the *Official Secrets Act*, which recognized, for the first time at the federal level, the right to privacy, and which created offences relating to the interception of private communications by the use of certain devices. The short title of the Act is *"Protection of Privacy Act"*. It came into force on June 30, 1974.

The Act is a compromise in many respects and, because it touches on sensitive areas, many of the provisions were inserted and passed solely on the basis that if there was dissatisfaction in the way in which the provisions were being carried out, they would be changed. Recently, as a result of continued pressures by law enforcement groups and others, the Minister of Justice introduced new legislation, Bill C-83, *"An Act for the better protection of Canadian society against*

perpetrators of violent and other crimes". This bill to amend the *Criminal Code* received first reading on February 24, 1976. Among other things, it would severely restrict the exclusionary rule contained at present in section 178.16(1) of the *Criminal Code* which provides that both a private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are inadmissible in evidence against the originator or intended receiver unless the interception was lawfully made or the originator of the communication or the intended receiver has expressly consented to the admission of the evidence. The proposed amendment adopts the position originally advocated by Bill C-252 in 1971 and provides for the admissibility of secondary evidence obtained directly or indirectly as a result of information acquired by interception of a private communication in circumstances where the private communication itself would be inadmissible as evidence. [For the relevant sections, see Schedule 1 attached]. The amendment to section 178.16 of the *Code* proposed in Bill C-83 was amended in the Standing Committee of the House of Commons on Justice and Legal Affairs, and the relevant provision of Bill C-83 as reported out of that Committee on 18 June 1976 is contained in Schedule 2, attached.

Protection of Privacy in Provincial Evidence Legislation

In considering how this question should be dealt with in provincial evidence legislation, we have had the benefit of the reports on evidence prepared by both the Law Reform Commission of Canada and the Ontario Law Reform Commission. However, both reports dealt with this area not so much from the point of view of invasion of privacy but rather were concerned with the manner in which evidence was obtained. Indeed, the Ontario Law Reform Commission recommended that further legislation concerning the question of the exclusion of evidence obtained as a consequence of an invasion of privacy should be dealt with, if necessary, in the context of comprehensive privacy legislation and not by way of amendment to *The Evidence Act.*

In discussing the rules governing the admissibility of illegally obtained evidence, the Ontario Law Reform Commission rejected the adopton of a rigid rule of exclusion to replace the existing rule in civil cases, that the court will admit all relevant evidence without considering the manner in which it was obtained. Rather the Ontario Law Reform Commission concluded that courts should have power in proper cases to reject any evidence, documentary or otherwise, on the ground that it was illegally obtained, whether through the illegal

acts of the party producing it or of a third party and that there should be guidelines for the exercise of the judicial discretion. The Ouimet Committee suggested guidelines applicable in the context of criminal law, that is:

(i) Whether the violation of rights was wilful, or whether it occurred as a result of inadvertence, mistake, ignorance, or error in judgment.

(ii) Whether there existed a situation of urgency in order to prevent the destruction or loss of evidence, or other circumstances which in the particular case justified the action taken.

(iii) Whether the admission of the evidence in question would be unfair to the accused.

The Ontario Law Reform Commission concluded that the power to exclude evidence obtained by illegal means in civil cases be exercised after considering all the material facts, the nature of the illegality and the concept of fairness to the parties. As a result it recommended the enactment in *The Evidence Act* of the following section:

> In a proceeding where it is shown that anything tendered in evidence was obtained by illegal means, the court, after considering the nature of the illegality and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence if the court is of the opinion that because of the nature of the illegal means by which it was obtained its admission would be unfair to the party against whom it is tendered. [Ontario Law Reform Commission, Report on The Law of Evidence, Draft Act, s. 27, p. 258.]

The Ontario Law Reform Commission also recognized that evidence may be obtained by methods which although not strictly illegal are nonetheless repugnant to the fair administration of justice. To safeguard against practices similar to those disclosed in *Regina* v. *Wray*, [1971] S.C.R. 272, it concluded that both the *Canada Evidence Act* and *The Evidence Act* (Ontario) should be amended to permit a trial judge to have control over the admission of evidence so as to preserve the integrity of the judicial process and to protect the administration of justice from practices likely to bring it into disrepute. Moreover, it stated that the judicial process is not confined to the courts but also encompasses officers of the law and others whose duties are necessary to ensure that the courts function effectively. Thus it recommended that:

1. *The Evidence Act* (Ontario) be amended to include the following provision:

   In a proceeding the court may refuse to admit evidence that otherwise would be admissible if the court finds that it was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute. [Ontario Law Reform Commission, Report on The Law of Evidence, Draft Act, s. 26, p. 258.]

2. The Attorney General of Ontario should make representations to the Government of Canada requesting that a similar amendment be made to the *Canada Evidence Act.*

3. Where a police officer in conducting an investigation is guilty of conduct likely to bring the administration of justice into disrepute, his conduct should be made a disciplinary offence under the regulations passed under *The Police Act.* (see R.R.O. 1970, R. 680 (as amended)).

The approach of the Ontario Law Reform Commission was very similar to that taken by the Law Reform Commission of Canada. Although the federal Commission felt that rules of evidence are unlikely to prove very effective in controlling police behaviour, it, nevertheless, believed that courts must be able to protect the integrity of the adjudicative process. Therefore, it concluded that evidence should be excluded if it was obtained in such a manner that its admission would bring the administration of justice into disrepute and in effect render the judicial process, which ultimately is designed to further the aims of the penal system, self-defeating.

Because of possible disagreement among judges about when the admission of unfairly obtained evidence would bring the administration of justice into disrepute, guidelines are set out in the legislation proposed by the federal Commission to assist judges in exercising their discretion. From these it is evident that the intent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule.

Comment

As noted previously, the foregoing recommendations were not designed to deal with the issue of privacy *per se,* but were directed to the manner in which evidence is obtained. Consequently, it may be

questioned whether the protection they provide is as comprehensive as that found, for example, in Manitoba's *Privacy Act* (S.M. 1970, c. 74, s. 7), which, in dealing with the law of evidence, states:

> From and after the coming into force of this Act, no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

Nevertheless, that is not to suggest that the recommendations would be completely inadequate, and certainly in provinces which have not yet enacted privacy legislation they could be used by the courts to guard against excessively zealous investigatory techniques.

Under the Ontario Draft Evidence Act, section 27, for example, a judge presiding over a civil trial could refuse to admit any evidence obtained by illegal means if under the circumstances and because of the nature of the illegality it would be unfair to the party against whom it is tendered. Although not all invasions of privacy have been declared illegal by either federal or provincial legislation, section 178.11 of the *Criminal Code* expressly makes it an indictable offence to wilfully intercept a private communication by means of an electromagnetic, acoustic, mechanical or other device in the absence of consent or authorization. Faced with such an illegal method of surveillance, a judge acting under section 27 of the proposed Ontario Act would have the power to exclude from evidence not only the private communication that has been intercepted but also secondary evidence whether obtained directly or indirectly as a result of such interception, since the section speaks of "*any* evidence obtained by illegal means". This, in fact, would offer more protection than the proposed amendments to section 178.16 of the *Criminal Code* as contemplated in Bill C-83.

Moreover, under section 26 of the Ontario Draft Evidence Act, the court could refuse to admit evidence even if obtained by legal means if it was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute. Conceivably this section could also be used to protect against invasions of privacy which would offend society's sensibilities, even if they were not actually criminal.

We only wish to add that while sections 26 and 27 of the proposed Ontario Act vest a discretionary power in the court, the legislation itself does not mention what factors should be considered in the exercise of that discretion. These factors, however, were discussed in

the report of the Ontario Commission and have been referred to above. Some provinces may favour the approach of the federal Commission and wish to include in their Evidence Acts the kinds of factors the court should consider.

Attached hereto as Schedule 3 is a comparative analysis of the relevant federal Commission and Ontario Commission proposals.

In consultation with the Quebec Commissioners and inviting their comment on what we have written, we were informed of the recommendations of the Civil Code Revision Office in its Report on Evidence, XXVIII, 1975, pp. 21-24. After providing in Article 2 that proof may be made of any fact relevant to the issues, Article 3 then states the exception that the court may reject any evidence obtained illegally if the gravity of the offence so warrants.

In current practice in Quebec, evidence is not refused merely because it has been obtained illegally. After having canvassed alternative solutions, the majority of the committee advising on this matter in Quebec decided in favour of allowing the courts to determine whether or not to admit the evidence, with due consideration for the gravity of the offence. It was felt that such a legislative attitude would prevent illegal acts, while at the same time allowing the courts to adjust the sanction to the seriousness of the offence.

We wish to record our special thanks to Miss Christine Mackiw, a summer research assistant with the Ontario Law Reform Commission, for her invaluable assistance in the preparation of this report.

H. Allan Leal
on behalf of the Ontario
Commissioners

22 July 1976

SCHEDULE 1

BILL C-252 (1971)

167c. (1) A private communication that has been intercepted is inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(a) the interception was lawfully made, or

(b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof,

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

(2) Subsection (1) applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction.

(3) For the purposes of this section only, an interception of a private communication in accordance with a permit given under subsection (1) of section 167F shall be deemed not to have been lawfully made where

(a) no application for an authorization to intercept private communications in the circumstances to which the permit relates is made under subsection (2) of section 167F; or

(b) such an application is made and is refused

(4) A private communication that has been intercepted in accordance with an authorization shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of his intention together with

(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and

(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

(5) Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

CRIMINAL CODE (at present)

Section 178.16 at present reads as follows:

"178.16(1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof

(2) Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection (1)

(*a*) is relevant, and

(*b*) is inadmissible by reason only of a defect of form or an irregularity procedure, not being a substantive defect or irregularity in the application for or

the giving of the authorization under which such private communication was intercepted or by means of which such evidence was obtained, or

(*c*) that, in the case of evidence, other than the private communication itself, to exclude it as evidence may result in justice not being done,

he may, notwithstanding subsection (1), admit such private communication or evidence as evidence in such proceedings.

(3) Subsection (1) applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction.

(4) A private communication that has been lawfully intercepted shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of his intention together with

(*a*) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and

(*b*) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

(5) Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege."

BILL C-83 (1976)
(as introduced on 24 February 1976)

8. Subsections 178.16(1) to (3) of the said Act are repealed and the following substituted therefor:

"178.16(1) A private communication that has been intercepted *is* inadmissible as evidence against the originator *of the communication* or the person intended by the originator to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication *is not* inadmissible by reason only that the private communication is itself inadmissible as evidence.

(2) A private communication that has been intercepted and that is admissible as evidence may be admitted in any criminal proceeding or in any civil proceeding or other matter whatever respecting which the Parliament of Canada has jurisdiction, whether or not the criminal proceeding or the civil proceeding or other matter relates to the offence specified in the authorization pursuant to which the communication was intercepted."

SCHEDULE 2

Extract from Bill C-83 as reported out of the Justice and Legal Affairs Committee on 18 June 1976

1973-74, c. 50, s. 2

8. Subsections 178.16(1) to (3) of the said Act are repealed and the following substituted therefor:

Intercepted private communication admissibility

"178.16(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

Idem

(2) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings

(*a*) is relevant to a matter at issue in the proceedings, and

(*b*) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,

he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

Idem

(3) A private communication that has been intercepted and that is admissible as evidence may be admitted in any criminal proceeding or in any civil proceeding or other matter whatever respecting which the Parliament of Canada has jurisdiction, whether or not the criminal proceeding or the civil proceeding or other matter relates to the offence specified in the authorization pursuant to which the communication was intercepted."

SCHEDULE 3

Illegally Obtained Evidence and Other Evidence (e.g. Confessions Obtained by a Trick) Procured by Means Repugnant to the Fair Administration of Justice

FEDERAL

15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

Evidence to be excluded if it was obtained in such circumstances that its use "would tend to bring the administration of justice into disrepute."

Specific factors to be weighed in exercising this discretion include gravity of the breach of human dignity and social values in obtaining the evidence, the importance of the evidence, whether harm to accused or others was wilful, whether urgency or other circumstances justified the seizure of the evidence.

ONTARIO

26. In a proceeding the court may refuse to admit evidence that otherwise would be admissible if the court finds that it was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute. *New.*

27. In a proceeding where it is shown that anything tendered in evidence was obtained by illegal means, the court, after considering the nature of the illegality and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence if the court is of the opinion that because of the nature of the illegal means by which it was obtained its admission would be unfair to the party against whom it is tendered. *New.*

Court to have discretion to exclude illegally obtained evidence if the manner in which it was obtained entails that its admission "would be unfair to the party against whom it is tendered."

More generally, court to have discretion to exclude evidence "if it was obtained by methods that are repugnant to the fair administration of justice and [its admission is] likely to bring the administration of justice into disrepute."

(Report recommends A.G. Ont. make representations to Govt. of Canada to have similar provision in *Canada Evidence Act.*)

COMPARISON

Both reports propose the statutory reversal of *Reg.* v. *Wray* which held that there is only a very limited discretion to exclude such evidence, and certainly not in the above terms. The federal *Code* would direct the court's attention to the kinds of factors which the Scottish courts have had regard to.

APPENDIX Y

(See page 33)

PROTECTION OF PRIVACY: TORT

NOVA SCOTIA REPORT

In 1972 the Uniform Law Conference of Canada, then the Conference of Commissioners on Uniformity of Legislation in Canada, adopted the following resolution:

> RESOLVED that the Nova Scotia Commissioners be instructed to reconsider the matter of 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.

This resolution is found at page 35 of the Proceedings of the Fifty-Fourth Annual Meeting. For one reason or another the matter was put over from year to year in 1973, 1974 and 1975.

It is the view of the Nova Scotia Commissioners that it is almost impossible to define "privacy" in relation to the tort of invasion of privacy and as a result the Nova Scotia Commissioners recommend that the resolution adopted in 1972 be repealed and that a new resolution be adopted in the following form or to like effect:

> RESOLVED that the Nova Scotia Commissioners be instructed to prepare a Draft Act respecting the tort of invasion of privacy for presentation at the 1977 meeting.

As background material pertaining to the tort of invasion of privacy and so that the resolution proposed by the Nova Scotia Commissioners might be assessed the following material is attached:

1. Copy of an article entitled "Privacy" written by William L. Prosser appearing in the August, 1960 edition of the California Law Review, Volume 48, No. 3 at page 383.

2. Copy of an article entitled "Science, Privacy and Freedom: Issues and Proposals for the 1970's" written by Alan Westin appearing in 66 Columbia Law Review at page 1003 printed in 1966.

3. Copy of an article entitled "A Definition of Privacy" written by Richard B. Parker appearing in 27 Rutgers Law Review at page 275 printed in 1974.

4. Copy of an article entitled "The Law and Privacy: The Canadian Experience" written by Peter Burns appearing in the March, 1976 edition of the Canadian Bar Review.

The article by William L. Prosser, then Dean of the University of California Law School at Berkeley, California, sets out the history of the right of privacy attributing the principle to Mr. Samuel D. Warren and his law partner, Louis D. Brandeis. He concludes that the right of privacy is not one tort, but four, stating that the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the plaintiff to be "let alone". The four torts he describes as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

He then proceeds to discuss each of these four torts making reference to numerous court decisions. He then analyzes the four attempting to single out their common features, deals with the question of public figures and public interest, the question of limitations and defences and concludes that it is time that the whole matter were examined to determine whether or not the case law has reached the stage it should or whether or not it has gone beyond where it should be. Please note the markings on the copy of the article are not mine but those of some other person who had occasion to make use of the volume.

The article by Alan Westin sets forth the nature and degree of privacy, the different psychological and physical relations between an individual and those around him and outlines the functions of privacy. A summary is provided by Professor Burns in his article in the Canadian Bar Review at pages 5, 6, and 7 as follows:

> In his paper, Westin begins by stating that the nature and degree of privacy accorded to individuals and organizations depends in the first instance on the political system and culture patterns of the society involved:
>
> > Totalitarian systems deny most privacy claims of individuals and non-governmental organizations to assure complete dedication to the ideals and programs of the state, while the totalitarian state's own governmental operations are conducted in secrecy. Democratic societies provide substantial amounts of privacy to allow each person widespread freedom to work, think and act without surveillance by public or private authorities and to provide similar

breathing room for organizations; but they try to strike a delicate balance between disclosure and privacy in government itself.

Westin takes the view that privacy in the sense of "being let alone" actually embraces four different psychological and physical relations between an individual and those around him. These he defines as the states of:

(a) Solitude. This is the state where an individual is separated from the group and freed from the observation of others. It is the most complete state of privacy attainable although even here the subject's peace of mind may be intruded by physical stimuli, supernatural belief or primordial psychological condition.

(b) Intimacy. This is the state where the individual is acting as part of a small group—the family, society, etc. Here corporate seclusion may be attained.

(c) Anonymity. This occurs where the individual, although doing public things in public places, finds freedom from identification and surveillance. Another form is the anonymous expression of views whereby the individual may publicly air his views but have his identity remain unknown.

(d) Reserve. Which expresses the individual's need to withhold information, to create mental distance to protect his personality.

Having described what the notion of privacy encompasses, Westin goes on to outline its functions. These are:

(a) The reinforcement of personal autonomy based on the belief in the uniqueness of the individual and his basic dignity and worth as a human being. Individuality stems from the need for autonomy.

(b) It grants emotional release in various situations, for example, from playing social roles or complying with social norms.

(c) Privacy provides the opportunity for self-evaluation which is necessary to process daily experiences and organize future experiences.

(d) The state of privacy also ensures limited and protected communication which is required to provide the individual with the opportunity to share confidences and intimacies with those he trusts.

In sum, then, privacy as a state or condition is a means for self-realization.

The article by Richard B. Parker, then Assistant Professor, Rutgers Law School, has for its main object the presentation and defence of a definition of privacy. The gist of the article can best be summarized by setting forth verbatim a paragraph from page 281:

> The definition of privacy defended in this article is that privacy is control over when and by whom the various parts of us can be sensed by others. By "sensed," is meant simply seen, heard, touched, smelled, or tasted. By "parts of us," is meant the parts of our bodies, our voices, and the products of our bodies. "Parts of us" also includes objects very closely associated with us. By "closely associated" is meant primarily what is spatially associated. The objects which are "parts of us" are objects we usually keep with us or locked up in a place accessible only to us. In our culture, these objects might be the contents of our purse, pocket, or safe deposit box, or the pages of our diaries. For some other culture these objects might be eating utensils or the inside of a personal shrine. What these objects happen to be in any given culture is not part of my definition of privacy.

The article by Peter Burns of the Faculty of Law, University of British Columbia, examines the matter of privacy under five headings:

1. What is Privacy? Under this heading Mr. Burns discusses and examines various definitions of privacy and attempts to define privacy.

2. Privacy and Traditional Legal Responses. Under this heading Mr. Burns examines both the common law and miscellaneous statutory remedies. In looking at the common law he deals with trespass to land, trespass to chattels, trespass to the person, nuisance, defamation, injurious falsehood, wilful infliction of nervous suffering, the law of contract, passing-off and appropriation and breach of confidence.

3. Canadian-Provincial Experiments in Privacy Protection. Under this heading early inquiries into privacy legislation is dealt with as well as the general privacy Acts in force in British Columbia, Manitoba and Saskatchewan. This heading also includes a description of personal information storage systems and Canadian legislation pertaining thereto.

4. The Criminalization of Electronic Surveillance. This topic deals with electronic surveillance and the criminal law, particularly the latest federal criminal code legislation.

5. Future Directions. Under this heading Mr. Burns concludes that political power, commercial gain or prurient interest has the capacity to interfere with others' private spaces. He points out that the traditional legal responses have been to rely on the common law. He suggests as an alternative to the judicialization of invasion of privacy, the creation of a privacy ombudsperson or commissioner with appeal procedures to the Supreme Court. He further suggests the retaining of judicial examinations of alleged invasions of privacy and the giving of jurisdiction to small claims courts. In addition, he suggests the use of the criminal law.

In regard to the approach to the drafting of legislation on privacy Mr. Burns suggests at pages 11 and 12 of his article that resort not be had to an attempt to define privacy but that the legislation be worded in such a way that the tribunal will exercise its own sense of what is proper in the circumstances in deciding whether there has or has not been a breach of privacy. His thoughts on this matter are as follows:

> How then should the "right to privacy" be regarded? Perhaps the most sensible approach, in the light of the difficulty of definition, is to adopt the suggestion of one commentator that:
>
> > It may be useful as a legal concept to regard the "right to privacy" as a principle, having a high order of generality, than a rule which will govern specific cases.

In such a way the right to privacy will reveal directions and be elastic. The rules will be articulated by statutes, case law and constitution, whereas the principle will be derived from moral and psychological imperatives. Accordingly the "right to be let alone" is not a rule but a principle which merely gives guidance in a specific case.

If this view of the right to privacy is taken, together with Prosser's "interest analysis", a coherent and workable law of privacy can develop, as indeed it has in the United States. The three general privacy statutes enacted in this country appear to bear out this approach, whether by accident or design In British Columbia, Manitoba and Saskatchewan there has been no attempt to define privacy as such, although certain factors are stated to be relevant when the tribunal of fact decides whether or not a privacy invasion has occurred.

This "open-textured" legislative approach, which is not very different from the judicial development of the law of negligence, seems most appropriate. The tribunal will exercise its own sense of what is proper in the circumstances in deciding whether there has or has not been a breach of privacy subject to the legislative directions and strictures. It may not be entirely satisfactory from a theoretician's perspective but from the viewpoint of efficiency and simplicity it is arguably best. In any event, until such time as a definition of privacy is constructed that incorporates the distinct and discrete legally protected interests we understand to fall under that term, the present "functional" direction appears to be the only way to stumble.

August 1976

Graham D. Walker of the
Nova Scotia Commissioners

NOTE: The articles discussed in the report are not reprinted here as they are readily available.

APPENDIX Z

(See page 33)

SUPPORT OBLIGATIONS: MAINTENANCE ORDERS

I

BRITISH COLUMBIA REPORT

CONTENTS

1. INTRODUCTION

This report is in response to the resolutions which appear at page 29 of the Proceedings of the Fifty-Seventh Annual Meeting held at Halifax in 1975. We would first wish to thank the Ontario delegates, and in particular Dr. Alan Leal, for their generous assistance in the collection of background materials for this report. Part 3 of this report is a draft of a model uniform Act that is proposed by the British Columbia delegates in this report.

In preparing the draft, correspondence was undertaken with:

1. the ten provinces and two territories of Canada;
2. the twenty states of the United States with which British Columbia has reciprocity;
3. the Federal Government of Australia; and

4. the Federal Republic of Germany;

and reference was made to the following enactments:

1. the *Uniform Reciprocal Enforcement of Maintenance Orders Act* as amended by the 1973 Uniformity Conference meeting at Victoria;

2. the *Uniform Reciprocal Enforcement of Support Act* for each of the twenty states of the United States with which British Columbia has reciprocity;

3. *The Maintenance Orders (Reciprocal Enforcement) Act 1972* of the United Kingdom;

4. the reciprocal enforcement of maintenance orders provisions of the *Australian Family Law Act, 1975* and Regulations;

5. the reciprocal enforcement of maintenance orders provisions of the New South Wales *Maintenance Act, 1964.*

The Canadian Council of Juvenile and Family Court Judges prepared a working paper entitled "Recommendations of the Council for Reform in the Reciprocal Enforcement of Maintenance Orders" as part of their June 1975 Conference and our draft Act incorporates many of their recommendations. The draft Act also incorporates recent developments in American, United Kingdom, and Australian legislation as well some ideas from the current uniform Act as adopted by the 1973 Uniformity Conference which have received favourable comment but have not, as yet, been generally enacted across Canada.

The basic goal underlying reciprocal enforcement of maintenance orders legislation is to minimize the procedural difficulties entitled in the making and enforcement of maintenance orders where:

1. it is not reasonable or possible to have the matter at issue litigated with all parties before one court, and

2. the claimant and respondent in a particular case are subject to the laws of different provinces or states abroad.

The new draft Act attempts to improve the manner by which this goal is approached by:

1. clarifying the choice of substantive and of procedural law applicable in reciprocal proceedings;

2. eliminating distinctions between the applicability of the Act to claimants who change their province or state of residence as compared to respondents who similarly move;

3. minimizing the distinction between final orders and confirmation orders relative to subsequent variation or rescission proceedings through reciprocal channels;

4. extending the procedures under the Act to cover:

   (a) maintenance provisions in a written agreement where those provisions are enforceable as if contained in an order of the court in the place where the agreement was made, and

   (b) affiliation orders and proceedings;

5. giving a court in the state where the respondent resides jurisdiction to vary or rescind a final order and giving a court in the state where the claimant resides a role in variation or rescission proceedings whether or not the court in question was involved in the making of the original orders; and

6. facilitating proceedings where a party resides in a reciprocating state which employs a different pattern of reciprocal enforcement legislation or where the courts employ different procedures or terminology.

Each of these six topics, in turn, will be discussed in the balance of this report.

2. NEW FEATURES

A. *Choice of Law*

The present law relative to choice of law in reciprocal enforcement of maintenance orders proceedings is very confused and the mechanism employed in the present uniform Act is cumbersome and the source of much of the confusion. Section 7(2) of the present Act gives the respondent the defences in the confirmation court which would have been available to him if he had appeared to the application in the initiating court which heard the complainant's evidence and it makes the "statement of grounds" prepared by the initiating court conclusive evidence of these defences.

That legislatively created mechanism is superimposed upon the general conflict of laws principles of the English common law that:

1. in any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or other means as provided by the rules of the court or laws to which the court is subject, and

2. in the absence of satisfactory evidence of foreign law, the court will apply the law of the forum.

However, it is not made clear in section 7(2) or elsewhere in the present Act whether the section 7(2) supersedes the common law conflict principles in whole, in part, or not at all. Not surprisingly, the courts have reacted in a variety of conflicting ways to this state of affairs.

In the United States of America the *Uniform Reciprocal Enforcement of Support Act* pattern of legislation in force in the states and territories resolves the issue by including a provision making both the procedural and substantive law applicable that of the state where the respondent resides. While this solution resolves the choice of law issue for the purposes of U.R.E.S.A. proceedings it would be inconsistent for us to adopt such a choice of law provision in our system if we concurrently retain the provisional order mechanism. In others words, it would be very cumbersome if we required a court in, say, Alberta to apply both the substantive and procedural law of, say, New South Wales in the course of hearing an application for a provisional order to be forwarded to New South Wales for confirmation proceedings on the assumption that the respondent now is within the jurisdiction of the courts of New South Wales.

The solution we propose is set out in sections 2 and 16(2) and (3) of the proposed uniform Act set out on pages 254 and 263 and is made possible by the fact that there is no jurisdiction under the common law whereby a court could make an order for lump sum or periodic maintenance. It follows that the substantive law giving courts the jurisdiction to make maintenance orders is created by legislative provision. Therefore section 2(1) coupled with sections 16(2) and (3) make it easy to prove the substantive law of maintenance obligation of the reciprocating state in the course of confirmation proceedings for a provisional order. Because non-English common law jurisdictions rely upon civil codes to prescribe civil rights and obligations under law, sections 16(2) and (3) and 2(1) apply equally.

Alternatively, the confirmation court may apply the substantive law of its own state where foreign law is not pleaded or adequately proved — section 2(2).

Section 2(3) allows both the court hearing proceedings for provisional orders and the court hearing confirmation proceedings to employ their own procedural law respectively. Section 2(4) facilitates continued reciprocity with those states which are or were formerly part of the British Commonwealth.

B. *Mobility of People and Equality of the Sexes*

Claimants are at a disadvantage under the existing Act where a final maintenance order was obtained by them under the *Divorce Act (Canada),* the deserted spouses' and children's enactment of the province, or other non-reciprocal maintenance legislation while both claimant and respondent were living in the same province and where a claimant then chooses to move to a reciprocating state. Because the respondent has not left the province where the order was made, the present reciprocal enforcement Act does not cover the situation where the claimant wishes to have the order enforced but is not prepared to return to the place where the order was originally made to commence proceedings. Section 7(3) in the proposed new Act remedies this discrepancy and thereby recognizes that women in our society are entitled to be just as mobile as men.

C. *Registered Orders*

The Maintenance Orders (Reciprocal Enforcement) Act, 1972 of the United Kingdom ended the distinction for the purpose of subsequent variation or rescission proceedings between orders which had been made by a court in a reciprocating state with both husband and wife (or parent and child) parties to the proceedings and subsequently registered in the enacting province (i.e. final orders) and orders which had originally been provisionally made in one state and then confirmed in another. The United Kingdom legislation contemplates that whether the court in the state where the respondent resides receives a final order or a provisional order for confirmation it will register the final order or the provisional order as confirmed and thereafter treat them both as "registered orders" which can be enforced, varied, or rescinded in like proceedings.

The present Canadian Uniform Act attempts to achieve the same end through sections 6(6), 6(7), and 7(5), with reference to confirmed orders, and sections 3(6) and 3(7) with reference to final orders.

In the proposed new Act the definition of "final order" in section 1 includes a "confirmation order" and the definition of "registered order" therefore includes final orders originally made in the province, final orders from reciprocating states registered in the province, and

confirmation orders made in the province. Further, the effect of clause (i) of the definition of "registered order" and section 7(2) is to make "filing" the equivalent of "registration" for the purposes of the Act thereby eliminating the need for a special registration procedure.

While our objective in drafting section 14 was to allow variation and rescission proceedings in all cases to be carried out in like manner to proceedings for an original maintenance order where the claimant and respondent reside in different states, sections 91(26) and 96 of the *British North America Act* prevent us from adopting the United Kingdom solution *in toto*. Section 91(26) gives exclusive jurisdiction to make enactments relative to marriage and divorce to the Parliament of Canada while section 96 of that Act provides that the trying of certain issues under certain rather ill-defined circumstances is reserved to federally-appointed judges. Hopefully subsections (2) and (3) of section 14 of the proposed new uniform Act take account of these constitutional considerations in a way which will minimize the discrepancies in the manner in which orders will be treated.

Note also that if the *Divorce Act* (Canada) were amended to allow proceedings to be brought under provincial reciprocal enforcement of maintenance orders enactments to vary or rescind maintenance orders made corollary to divorce, then section 14(2) would accommodate this change.

D. *Maintenance Agreements and Affiliation Proceedings*

Section 2 of the *Unified Family Court Act* of British Columbia and provisions of the Australian *Family Law Act, 1975* both contemplate that the maintenance provisions in written agreements filed with a court may thereafter be enforced by the court as though a maintenance order containing those provisions was in existence. Further, the Australian Act and its Regulations allow the reciprocal enforcement of maintenance orders channels to be employed relative to the enforcement of these maintenance provisions.

The definition of "final order" in section 1 of the new draft Act includes maintenance provisions in such a written agreement. In turn, the definition of "registered order" includes final orders. This will allow us to achieve the same ends as under the Australian Act relative to reciprocal enforcement of maintenance agreements.

Turning to affiliation, the definition of "order" in section 1 includes "affiliation order". This is a continuation of the provision in the existing uniform Act and allows affiliation orders whch were made by a court in a reciprocating court while the putative father

was within its jurisdiction to be subsequently dealt with as a final order in the enacting province. Section 10 extends this concept by allowing the provisional order, confirmation order mechanism to be employed where the putative father left the mother's state before proceedings were commenced against him.

E. *Jurisdiction to Make Provisional and Confirmation Orders of Variation or Rescission*

Under topic C above we discussed two aspects of the proposed section 14; constitution limitations and treating final orders and confirmed provisional orders similarly for purposes of variation and rescission. We now turn to subsections (1) and (4) to (8) inclusive.

Essentially, these provisions allow the claimant and respondent respectively to employ the courts in reciprocating states nearest their places of work or residence to decide issues of variation or rescission notwithstanding that these courts may not have been in any way involved in the proceedings for the original order. Further, where the respondent is no longer within the territorial jurisdiction of the court which made the original final order that court may, in certain circumstances, cease to have any role in subsequent variation or rescission proceedings as described in section 14.

Two things should be remembered when considering the variation or rescission mechanisms set out in section 14:

1. there is never any such thing as a "final" adjudication relative to an order for periodic maintenance payments; there is always the possibility that a court may, on application, subsequently vary the order in light of changed circumstances during the term of the order; and

2. the jurisdiction of the court which made the original maintenance order is founded upon the location of the respondent at the time proceedings for the original order were commenced, a factor (the location) which would otherwise be of momentary significance.

It follows that where both parties subsequently ceased to reside within the territorial jurisdiction of the court that court should cease to have jurisdiction to make new determinations concerning their affairs and that variation or rescission proceedings are such determinations. Again, the Canadian Council of Juvenile and Family Court Judges in their working paper strongly recommend this change.

F. *Reciprocity With Foreign States*

Several provinces have reciprocal arrangements with states of the United States and with countries which have never been part of the British Commonwealth system of reciprocal enforcement of maintenance orders. Section 6 of the new draft Act is meant to facilitate reciprocity with such foreign states.

G. *Additional Changes*

Note the definition of "Attorney General" in section 1. This extended definition is suggested to help prevent administrative bottlenecks.

The definition of "claimant" in section 1 and the provisions of section 4 allow welfare authorities to bring proceedings directly on behalf of welfare recipients.

Section 9(5) is new and allows the court to make interim maintenance orders where confirmation proceedings are delayed through remission for further evidence.

Section 13 is borrowed, in part, from the 1972 United Kingdom legislation. Rather than supposing a fine, however, it provides for a bonus to the claimant.

Note the time periods provided for appeals under section 15.

Section 16 consolidates and extends a number of evidentiary provisions scattered through the present Act. The special importance of section 16(2) relative to section 2 has previously been noted.

Section 17 will facilitate the preparation of income tax returns by both claimants and respondents in addition to assisting in court administration.

With reference to the definition of "reciprocating state" in section 1 and the provision for designation of reciprocating states under section 19(2), note that all provinces (including territories) would automatically be reciprocating states and would not require designation.

The Act has been extended to cover orders for lump sum payments. This was done by changing the definition of "order" in section 1 to include reference to lump sum payments. At present such orders must be processed through the *Reciprocal Enforcement of Judgments Act*.

3 August 1976

G. A. Higenbottam for the
British Columbia Commissioners

3. NEW DRAFT UNIFORM ACT

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

Definitions

1. In this Act,

"Attorney General" includes any person authorized in writing by the Attorney General to act for him in the performance of any of his powers or duties under this Act;

"certified copy" in relation to a document of a court, means the original or a copy of the document certified by the proper officer of the court to be a true copy;

"claimant" means a person in (the *Province*) or in a reciprocating state who has or is alleged to have a right to maintenance and includes a state, a political subdivision of a state, or an official agency of a state or its political subdivision as provided in section 4;

"confirmation order" means a confirmation order under the Act, or a corresponding enactment of a reciprocating state;

"court" means an authority having jurisdiction to make an order in a state;

"final order" means an order made in proceedings in which both claimant and respondent had proper notice of the proceedings and an opportunity to be present or represented at hearings of the court where the order was made and includes

(i) the maintenance provisions in a written agreement between a claimant and a respondent where those provisions are enforceable as if contained in an order of the court in the place where the agreement was made, and

(ii) a confirmation order made in a reciprocating state;

"maintenance" includes support or alimony;

"order" means an order or other adjudication of a court that orders or directs, or contains provisions that order or direct, the periodic or lump sum payment of money

by the respondent named in the order as maintenance on behalf of the claimant named in the order and includes an affiliation order;

"provisional order" means an order of a court in (*the Province*) that has no force or effect in (*the Province*) until confirmed by a competent court in a reciprocating state, or a corresponding order made in a reciprocating state for confirmation in (*the Province*);

"reciprocating state" means a state declared under section 19, or an enactment repealed by this Act, to be a reciprocating state, or a province;

"registered order" means

(i) a final order made in a reciprocating state and filed under the Act with a court in (*the Province*) when the respondent was present in (*the Province*), or

(ii) a final order described in section 7(3) where a written request under section 7(3) has been received by the court that made the order;

"registration court" means the court in (*the Province*) that made the final order deemed registered under the Act or where the registered order is filed under the Act;

"respondent" means a person in (*the Province*) or a reciprocating state who has or is alleged to have a duty to maintain a claimant, or against whom proceedings under the Act, or a corresponding enactment of a reciprocating state, are commenced;

"state" means (*the Province*) or a reciprocating state.

Choice of law

2. (1) Subject to subsection (2), in proceedings for a maintenance order under this Act a court in (*the Province*) shall apply the law of the reciprocating state where the claimant resides, if pleaded on behalf of the claimant, for the purpose of assessing the obligation of the respondent to maintain the claimant.

(2) In proceedings described in subsection (1) the court shall apply the law of (*the Province*) for the purpose of assessing the obligation of the respondent to maintain the claimant where

(a) the law of the reciprocating state is not pleaded on behalf of the claimant, or

(b) the court in (*the Province*) has not received what, in his discretion, is satisfactory evidence of the law of the reciprocating state.

(3) In a hearing in (*the Province*) under the Act the presumptions and other rules of evidence, however established, are those normally applicable in proceedings under (*Provincial enactments*) unless otherwise provided by this Act.

(4) Where the law or a reciprocating state required that the court in (*the Province*) provide the court in the reciprocating state with a statement of the grounds on which the making of the confirmation order might have been opposed if the respondent were served with (a summons) and had appeared at the hearing of the court in (*the Province*), the Attorney General is deemed a proper officer of the court for the purpose of giving the statement of the grounds.

Saving

3. This Act shall be construed to furnish an additional or alternative civil remedy and shall in no way impair any other remedy available to a claimant or a state relative to the same subject matter.

Remedies of a state

4. A state, a political subdivision of a state, or an official agency of a state or its political subdivision which is furnishing or has furnished support to an individual claimant has the same right to bring proceedings under this Act as the individual claimant for the purpose of securing reimbursement for support furnished and of obtaining continuing maintenance for the individual claimant.

Duties of the Attorney General

5. (1) On request in writing of a claimant or of an officer or court of a reciprocating state the Attorney General shall take all reasonable measures eo enforce an order made or registered in (*the Province*).

(2) Where a document is sent to the Attorney General under the Act for transmission to the proper officer of a reciprocating state, the Attorney General shall transmit the document accordingly.

Documents from abroad

6. (1) A court in (*the Province*) shall deem a document to be a provisional order or a final order, according to the tenor of the document, and proceed accordingly where the document, or a certified copy of the document,

(a) is received by the court, through the Attorney General, from a state declared under section 19(2) to be a reciprocating state,

(b) requests that a maintenance order be made or varied, and

(c) is signed by a presiding officer of the court in the reciprocating state.

(2) Where under this Act an order is sought to be registered or a provisional order is sought to be confirmed and the documents from the court in the reciprocating state contain terminology different from the terminology of this Act or customarily used in the court in (*the Province*), the court in (*the Province*) shall give a broad and liberal interpretation to the terminology so as to give force and effect to the documents within the meaning of this Act.

Registered orders

7. (1) Where the Attorney General receives a certified copy of a final order made in a reciprocating state before or after this Act comes into force and it is indicated that the respondent is within (*the Province*), the Attorney General may designate a court in (*the Province*) for the purposes of registration and enforcement and forward the order and supporting material to that court.

(2) On receipt of an order transmitted to it under subsection (1) or section 9(8)(a) the proper officer of court shall file the order with the court.

(3) Where a final order was made in (*the Province*) before or after the Act comes into force and the claimant subsequently has left (*the Province*) and is apparently in a reciprocating state, the court in (*the Province*) which made the order shall, on receiving written request from the claimant, respondent, or the Attorney General thereafter treat the order as a registered order.

(4) A registered order has, from the date it becomes a registered order in the registration court, the same force and effect, including any arrears accrued before registra-

tion, as if it had been a final order originally made by the registration court and may be enforced, varied or rescinded as provided in the Act whether the order was made before or after the Act came into force.

(5) A registered order does not cease to be a registered order solely by reason that it may have been varied in a manner contemplated by the Act.

(6) Where an order becomes a registered order, the respondent may apply to the registration court within one month after receiving notice of the registration to set aside the registration.

(7) The registration court shall set aside the registration if it decides that the order was obtained by fraud, error, or was not, in fact, a final order.

(8) An order set aside under subsection (7) may forthwith be dealt with by the court in (*the Province*) under section 9 as a provisional order.

Making of provisional orders

8. (1) On application by a claimant before or after the Act comes into force, a court in (*the Province*) may, in the absence of and without notice to the respondent containing maintenance provisions that the court would have had jurisdiction to include in a final order under (a Provincial enactment) if

(a) (*process*) had been served upon the respondent within (*the Province*) giving notice of the proceeding, and

(b) the respondent had failed to appear to that (*process*).

(2) Where a provisional order has been made a proper officer of the court shall send to the Attorney General for transmission to a reciprocating state

(a) three certified copies of the provisional order

(b) a sworn document setting out or summarizing the evidence given in the proceedings, and

(c) a statement giving available information respecting identification, location, income and assets of the respondent.

(3) Where, during proceedings for a confirmation order, a court in a reciprocating state remits the matter back to the court in (*the Province*) that made the provisional order to take further evidence, the court in (*the Province*) shall, after giving notice to the claimant, proceed to take further evidence in the usual manner for proceedings under this section.

(4) After evidence has been taken under subsection (3), a proper officer of the court shall forward a sworn document setting out or summarizing the evidence to the court in the reciprocating state together with whatever recommendations the court in (*the Province*) considers appropriate.

(5) Where a provisional order made under this section comes before a court in a reciprocating state and confirmation is denied in respect of one or more claimants, the court in (*the Province*) that made the provisional order may, upon application within 6 months from the denial of confirmation, re-open the matter and receive further evidence, and make, as it considers proper, a new provisional order for one or more of the claimants in respect of whom confirmation was denied.

Making of confirmation orders

9. (1) Where the Attorney General receives the documents referred to in section 8(2) from a reciprocating state and it is indicated that the respondent is within (*the Province*), the Attorney General may designate a court in (*the Province*) for the purpose of proceedings under this section and forward the documents to that court.

(2) The court on receipt of the documents referred to in subsection (1) shall, whether the provisional order was made before or after the Act came into force, (*issue process against*) the respondent and proceed as in an application for maintenance under (*a Provincial enactment*) using the evidence given on behalf of the claimant.

(3) Where the respondent is apparently outside (*the Province*), a proper officer of the court shall return the documents to the Attorney General with such information as is available about the location of the respondent.

(4) The court, before making a confirmation order in a reduced amount or denying maintenance to one or more

claimants, shall decide whether to remit the matter back to the court that made the provisional order for further evidence.

(5) Where a court remits a case under subsection (4), it may make an interim order for maintenance against the respondent.

(6) At the conclusion of proceedings under this section the court may make a confirmation order

(a) in the amount stated in the provisional order, or,

(b) in a greater or lesser amount or may refuse the confirmation order.

(7) Where the court makes a confirmation order, the court may direct that periodic payments under the order begin from a date not earlier than the date of the provisional order.

(8) After the conclusion of proceedings under this section the court, or a proper officer of the court, shall forthwith

(a) forward a certified copy of its order to the court that made the provisional order and to the Attorney General,

(b) file the confirmation order where one is made, and

(c) give written reasons to the court that made the provisional order and to the Attorney General, where an order is made refusing or reducing maintenance to one or more claimants named in the provisional order.

Affiliation proceedings.

10. (1) The affiliation of a child may be adjudicated as part of a maintenance proceeding under the Act unless the issue of affiliation has previously been determined by a court of competent jurisdiction.

(2) Where the respondent disputes affiliation in the course of proceedings to confirm a provisional order for maintenance, the provisional order shall be deemed to include affiliation.

Conversion to Canadian currency and translation of documents

11. (1) Where confirmation of a provisional order or registration of a final order is sought and the documents received by a court refer to amount of maintenance or arrears expressed in a currency other than Canadian currency, a proper officer of the court shall first obtain from a bank a quotation for the equivalent amounts in Canadian currency at the rate of exchange for the date the order was made or last varied.

(2) The amounts in Canadian currency certified on the order by the proper officer of the court shall be deemed to be the amounts for the purposes of the order.

(3) Where an order or other document is received by a court in (*the Province*) in a language other than (English *or* French), the order or other document shall have attached to it a translation in (English *or* French) approved for all purposes of this Act by the court in (*the Province*) and the order or other document shall be deemed to be in (English *or* French).

Enforcement

12. (1) The registration court has jurisdiction to enforce the registered order notwithstanding that the order was made in proceedings in which the registration court has no original jurisdiction or that the order is one that the court has no power to make in the exercise of its original jurisdiction.

(2) The provisions of (*the deserted spouses' and children's maintenance enactment of the Province*) for the enforcement of maintenance orders apply with the necessary changes and so far as applicable to registered orders.

(3) Enforcement proceedings may also be taken as if the registered order was an order originally made by (*the superior court of the Province*) where the registration court is that court.

(4) Where proceedings are taken to enforce an order, it is not necessary to prove that the respondent was served with the order.

(5) Where a registered order is being enforced and the registration court finds that the order has been varied by a court of competent jurisdiction subsequent to the

date of registration, the court shall record the fact of variation and proceed accordingly.

Penalty for not advising court of changes of address

13. (1) The Attorney General may, by application, bring summary proceedings against a respondent under a registered order in (*the Province*) for failing, without reasonable excuse, to give notice to the registration court of a change in the address of the respondent.

(2) The provisions of (*the summary convictions enactment of the Province*) apply with the necessary changes and so far as applicable to proceedings under this section however the penalty, upon conviction, is a bonus to the claimant under the registered order of a sum not exceeding $150.

Variation or rescission of registered orders

14. (1) The provisions of this Act respecting provisional orders and confirmation orders apply with the necessary changes and so far as applicable to proceedings under this section.

(2) Nothing in this section gives a provincially appointed judge jurisdiction to vary or rescind a registered order made by a federally appointed judge or allows a registered order originally made under a federal enactment to be varied or rescinded except as authorized by federal enactment.

(3) Subsection (2) does not prevent a provincially appointed judge from making a provisional order to vary or to rescind a registered order originally made by a federally appointed judge.

(4) A registration court has jurisdiction to vary or rescind a registered order where both claimant and respondent accept its jurisdiction.

(5) A registration court may on application by the claimant or respondent vary or rescind a registered order where

(a) the respondent is ordinarily resident in (*the Province*), and

(b) the claimant brings application in (*the Province*).

(6) A registration court may vary or rescind a registered order in proceedings for a confirmation order, where

(a) the respondent is ordinarily resident in (*the Province*),

(b) the claimant is ordinarily resident in a reciprocating state, and

(c) the court in the reciprocating state made a provisional order of variation or rescission and a certified copy of that provisional order is received by the registration court through the Attorney General.

(7) A registration court may, on application by the respondent, vary or rescind a registered order where

(a) the respondent is ordinarily resident in (*the Province*),

(b) the claimant is ordinarily resident in a reciprocating state, and

(c) the registration court, in the course of the proceedings, remits the case to a court of competent jurisdiction in the reciprocating state nearest a place where the claimant lives or works for the purpose of obtaining evidence on behalf of the claimant

or where

(a) the respondent is ordinarily resident in (*the Province*),

(e) the claimant is ordinarily resident in a non-reciprocating state, and

(f) the claimant is given notice of the proceedings (and the court may make such order for substituted or other service of notice, by letter, advertisement or otherwise, and may direct the manner of proving such service, as it may consider reasonable).

(8) The provisions of section 8 apply with the necessary changes and so far as applicable where the claimant

(a) is ordinarily resident in (*the Province*) and

(b) makes application in (*the Province*) for the variation or rescission of a final order

and the respondent is apparently ordinarily resident in a reciprocating state.

Appeals

15. (1) Subject to subsections (2) and (3), a claimant, respondent, or the Attorney General may appeal any ruling, decision or order under this Act of a court in (*the Province*) and (*the deserted spouses' and children's maintenance enactment of the Province*) applies with the necessary changes and so far as applicable to the appeal.

(2) A person entitled to appear in the court in the reciprocating state in the proceedings being appealed from, or the Attorney General on that person's behalf, may appeal within 75 days after the making of the ruling, decision, or order of the court in (*the Province*) appealed from.

(3) A person responding to an appeal under subsection (2) may appeal a ruling, decision, or order in the same proceedings within 15 days after receiving notice of the appeal under subsection (2).

(4) An order under appeal as provided in this section remains in full force and effect pending the determination of the appeal, unless the court appealed to otherwise orders.

Evidentiary matters

16. (1) In proceedings under this Act, spouses are competent and compellable witnesses against each other.

(2) A court in (*the Province*) may take judicial notice of the enactments of a reciprocating state in proceedings under this Act.

(3) A document purporting to be signed by a judge, officer of a court, or public officer in a reciprocating state shall, unless the contrary is proved, be deemed to be proof of the appointment, signature, and authority of the person having signed it in proceedings under this Act.

(4) Statements in writing sworn to be the maker, depositions, or transcripts of evidence taken in a reciprocating state may be received in evidence before a court in (*the Province*) under this Act.

(5) For the purposes of proving default or arrears under this Act, a court may accept in evidence a sworn

document made by any person, deposing to have knowledge of, or information and belief concerning, the fact.

Statement of payments

17. A registration court or a proper officer of it shall, on reasonable request of a claimant, respondent, the Attorney General, a proper officer of a reciprocating state or of a court of that state furnish a sworn itemized statement showing

(a) all amounts which became due and owing by the respondent during the previous 24 months, and

(b) all payments made by or on behalf of the respondent during that period.

Transmission of documents by court where respondent leaves (*the Province*)

18. Where a proper officer of a court in (*the Province*) believes that a respondent under a registered order has ceased to reside in (*the Province*) and is resident in or proceeding to another state, the officer shall advise the Attorney General and the court which made the order of any information he may have respecting the location, income and assets of the respondent and, on request by the Attorney General, a proper officer of the court which made the order, or the claimant, shall forward

(a) three certified copies of the order as filed with the court in (*the Province*), and

(b) a sworn certificate of arrears to the court or person indicated in the request.

Regulations

19. (1) The Lieutenant Governor in Council may make such regulations as are ancillary thereto and not inconsistent therewith.

(2) Where satisfied that laws are or will be in effect in a state outside Canada for the enforcement of orders made within (*the Province*) on a substantially similar reciprocal basis to this Act, the Lieutenant Governor in Council may declare, by order, that state to be a reciprocating state.

Transitional

20. (1) The (*reciprocal enforcement of maintenance orders enactment presently in force in the Province*) is repealed.

(2) Notwithstanding subsection (1)

(a) any order made under an enactment repealed by this Act continues, in so far as it is not inconsistent with this Act, valid and enforceable, and may be rescinded, varied, enforced, or otherwise dealt with under the provisions of this Act;

(b) where any enactment, Order in Council, or other document mentions or refers to an enactment repealed by this Act, the reference or mention shall be deemed to be to this Act.

II

ONTARIO REPORT

INTRODUCTION

At the 1975 Annual Meeting of the Conference it was resolved that the Ontario Commissioners prepare a report respecting the factors and elements relevant to the remedies and enforcement techniques of maintenance orders. In approaching this task we had very much in mind that the whole scheme of reciprocal enforcement is engrafted upon domestic enforcement in the jurisdiction where the maintenance order is confirmed or registered. As a result, no scheme of reciprocal enforcement will be able to operate any better than the domestic procedures ultimately to be applied in the enforcement of all maintenance obligations.

The Canadian Council of Juvenile and Family Court Judges has expressed the view that many of the problems associated with reciprocal enforcement would be resolved if the grounds for the imposition of support obligations were made uniform through Canada. Whilst we agree with this point of view, and suggest that the Uniformity Commissioners might wish to address themselves to this task in consultation with the Council, we would stress the importance not only of uniformity of the substantive law but also uniformity in procedure and legal institutions.

Although the Family Court is used generally for the enforcement of maintenance obligations, its use is by no means pervasive. Not all provinces have Family Courts. Moreover, the Province of New Brunswick, Prince Edward Island and Saskatchewan require that registration and confirmation of Supreme Court orders of other provinces be made in the Supreme Court of the receiving province. The result is that the reciprocal enforcement procedure is the function of the Supreme Court of the receiving province rather than the Family Court. In contrast, the legislation of other common law jurisdictions in Canada provides that the Attorney General or the Lieutenant Governor in Council may designate the court to which any incoming order will be directed for purposes of enforcement. As a consequence, an order of the High Court of Judicature in England, for example, may be enforced in the Family Court in Ontario. There are cogent practical advantages to be gained by these provisions because the enforcement process of the Family Court is usually more direct, more expeditious, and therefore more effective and cheaper than that in the Supreme Court.

We are of the view that most problems, not only of inter- but also intra- enforcement of maintenance orders, would be best solved by vesting jurisdiction over all family law matters in a single unified Family Court. We remind ourselves that Dean Roscoe Pound described the defects in a system of fragmented jurisdictions such as ours in these terms:

1. It involves conflicts and overlappings of jurisdiction and consequent waste of judicial power on jurisdictional points at the expense of the merits of cases.

2. It involves waste of litigants' time and money in throwing meritorious cases out of court to be litigated over again in other tribunals.

3. It involves successive appeals, such as those on jurisdictional questions followed by appeals on the merits.

4. It requires determination of controversies in fragments in which the merits of the whole situation may be lost or the efficacy of the legally appointed remedies may be impaired.

5. It involves waste of public money in maintaining separate courts of limited powers, whereas a unified administration not only would deal more adequately with each aspect but would assure effective dispatch of the whole at less expense both to litigants and to the parties. (Pound: The Place of the Family Court in the Judicial System (1959) N.P.P.A.J. 162.)

The principle of a unified Family Court with integrated jurisdiction in all family law matters has been embraced by most law reform bodies and many other governmental agencies and we trust it needs no extensive elaboration before this Conference. The difficult task lies in finding or fashioning the legal, constitutional and political means to enable it to become a reality. The importance of the principle for our present purposes is that the fragmented and uncoordinated nature of the distribution of jurisdiction in family law Court judgment for alimony can be enforced by registration against land, whilst a Superior Court order for maintenance under the *Divorce Act* or a family court order under provincial deserted wives' and children's maintenance legislation cannot.

In addition, the Superior Courts display an almost uniform lack of procedure and facilities for counselling, clinical, investigative and other support services. They lack effective enforcement mechanisms, such as the automatic enforcement scheme, and continue to base their

enforcement techniques on the unrealistic assumption that the parties, or their counsel, will protect their interests by the pursuit of appropriate remedies after judgment.

But even in the absence of a unified family court system there are substantive improvements that can be made with respect to the remedies and enforcement techniques available at present under the existing court structure. These recommended improvements are the concern of the balance of this report.

PART I

MAINTENANCE PROCEEDINGS IN THE SUPREME COURT

(a) *Maintenance during the subsistence of the marriage*

We do not pause here to deal with the details of the important recommendations that have been made by the law reform agencies for the improvement of the substantive law providing for the payment of maintenance during the subsistence of a marriage. These questions involve the relevance of fault, the abolition of cruelty, adultery and desertion as nominate grounds both for claim and defence, and the mutuality of the right to support between spouses. Suffice it to say that we support wholeheartedly the rationalization and modernization of this critical area of the law in order that more substantial justice can be achieved. Our concern, at this stage, is to deal with those recommendations which have been made to improve the effectiveness and enforcement of maintenance orders.

It is common ground that in an alimony action the court is restricted to ordering unsecured periodic payments by a husband to a wife, payable for the joint lives of the parties, or as varied by subsequent order of the court. Periodic payments of indefinite duration tend to foster the continued dependency of a spouse. Default by a respondent in making periodic payments is commonplace and the persistent pursuit of the husband may lead to his leaving the jurisdiction or refusing to work. The absence of security for these payments is a serious defect in their enforcement.

The broader range of corollary maintenance relief in a divorce action makes it a much more attractive remedy. Under the *Divorce Act*, the court upon granting a decree nisi may order that one spouse pay or secure to the other spouse periodic payments, or a lump sum of money, or periodic payments and a lump sum, and may impose

such terms, conditions or restrictions as it considers fit and just. But even in divorce proceedings the range of orders which the court may make remains incomplete, inasmuch as there is no power in the court to order the transfer of assets from one spouse to another nor can the court make orders concerning the use and occupation of the matrimonial home.

We subscribe to the recommendations which have been made for broadening the range of orders which the court should be able to make in awarding maintenance during the subsistence of the marriage and upon its dissolution. It has been recommended that, in addition to existing remedies, the court should be empowered, in appropriate cases, to order:

1. (a) a lump sum payment to supplement or replace periodic payments of maintenance;

   (b) that maintenance, whether awarded as a lump sum or as periodic payments, be secured;

   (c) that the maintenance order shall itself constitute a charge against any interest of the respondent in specified property;

   (d) the transfer of marital property, or of any interest in such property, exclusively for the purpose of reducing or satisfying a support obligation;

   (e) that maintenance be paid for a limited period only, or until the happening of a specified event, provided that the court should retain jurisdiction to extend or award maintenance beyond the prescribed period or after the occurrence of any specified event;

   (f) the payment of a lump sum or of increased periodic payments to enable a dependent spouse to meet debts reasonably incurred for his or her own support prior to the commencement of maintenance proceedings.

2. The court should have broad power to vary maintenance orders in the event of a material change in the circumstances of either spouse. This power to vary should include:

   (a) the power to increase or decrease maintenance prospectively, and to discharge or suspend an order for periodic payments or instalments due under a lump sum award;

   (b) the power to vary or discharge an order for security and to vary the terms of the security;

(c) the power to vary an order for periodic payments by awarding a lump sum in addition to or in lieu of periodic payments.

3. Lump sum awards should be subject to variation by the court only upon proof of a substantial or unforeseen change of circumstances, particularly where the award was intended to be in full satisfaction of a support obligation. The power to vary, by decreasing, lump sum awards should be confined to amounts remaining unpaid under the order.

4. The court should have no jurisdiction to vary periodic payments of maintenance retrospectively.

5. An order for maintenance made during marriage should terminate upon the death of either spouse. Upon the death of a respondent spouse, the rights of the surviving spouse and any dependent children should be determined under the provisions of the applicable dependants' relief legislation.

6. An order for maintenance during marriage should terminate upon divorce. This would include any order for the payment of a lump sum which, at the time of the divorce, is not yet due. The issue of maintenance after divorce should be determined, as now, in divorce proceedings. The *Divorce Act* should be amended, however, to provide that the court should respect, wherever possible, orders for maintenance during marriage, particularly those intended to be in full satisfaction of a support obligation.

7. The *Divorce Act* should be amended to make it explicit to permit the court to entertain an application for maintenance after the granting of the decree nisi where the issue of maintenance was not considered at trial. Leave of the court should be required before making such an application.

8. The court should have the power to vary or to discharge arrears of maintenance accumulated during marriage upon such terms as seem fit and just.

9. Arrears owing at the death of a dependent spouse should be treated as a debt owing to the dependant's estate, subject to the right of the respondent to apply to the court for relief against arrears.

10. Arrears owing at the date of death of a respondent spouse should be treated as a debt of the deceased's estate, subject to the right of the personal representative of the deceased to apply to the court for relief against arrears.

11. Interim maintenance should be awarded, where necessary, to either spouse upon the basis of need determined as a question of fact, without the aid of the existing presumption that wives are always inherently dependent upon their husbands for support.

12. The court should have jurisdiction, similar to that now exercised under section 10 of the *Divorce Act*, to award interim maintenance for a period which, in appropriate circumstances, may predate the commencement of the maintenance proceedings.

13. The standard of support reflected by interim maintenance awards should continue to be governed by the essential purpose for which they are made: to enable a dependent spouse in need of support to be maintained pending the court's final determination of the respondent's support obligation.

14. The authority of the court to order interim support should be confined, as at present, to orders providing for periodic payments of maintenance.

15. Interim alimony, once it has been ordered, should not be subject to subsequent variation.

16. An applicant who fails to obtain a permanent order for maintenance should be required to repay interim maintenance paid by the successful respondent under an interim order if, upon the evidence at trial, the court is of the opinion that it would be unjust for the applicant to retain the benefits received under the interim order.

17. The court should be empowered to vary a separation agreement between spouses if it is established that the agreement was unfair, or that there has been a substantial change in circumstances rendering it unfair for the one spouse to have to perform his obligations unmitigated, or for the other to have to accept the amounts agreed upon. (The Ontario Law Reform Commission, Report on Family Law, Part VI, Support Obligations, pp. 139-142.)

Payments under a judgment for alimony are currently enforced in Ontario, and we believe elsewhere in the common law provinces, in the same way as any other execution and include proceedings for garnishment. In addition, an alimony judgment may be registered against land owned by the respondent spouse and, if necessary, enforced by sale. The special position of a dependent spouse, perhaps with onerous family responsibilities and certainly with meagre resources, dictates that improved methods of enforcement be introduced.

(i) *Attachment of Earnings*

We have already stated that under the present law a spouse's wages may be attached under a judgment in alimony by means of garnishment. A garnishment order of the Supreme Court, once served upon the employer of the respondent spouse, requires that employer to pay into court any monies owing by him to the respondent. The order, however, attaches only those earnings actually "owing or accruing" at the time of service. In order to attach earnings payable in the future, the procedure must be repeated as future earnings become due for payment. Moreover, under *The Creditors Relief Act (Ontario)*, all amounts paid into court under the garnishment order must be distributed proportionately amongst all creditors having executions against the respondent spouse.

A wife who has an alimony judgment may also enforce it under the garnishment procedure of *The Small Claims Court Act (Ontario)*. Whilst in some respects this is a more effective and less cumbersome procedure than garnishment in the Supreme Court, it is subject to the same inability of realization on future wages. It would appear, therefore, that an attachment order, as opposed to garnishment, would provide a more direct and less costly means of realizing on future earnings of a maintenance debtor and should be adopted in this country. In the Province of Saskatchewan, wages and salary may be attached merely by serving a copy of the maintenance order upon the respondent spouse's employer. We would favour a provision making attachment available only upon order of the court and then only where there has been default in payment under the maintenance order. As a corollary and to safeguard the security of employment of the maintenance debtor against improper treatment by the employer it should be provided that no employer shall dismiss or suspend any employee upon the ground that the employee's earnings have become subject to an attachment order.

The case for giving priority to maintenance creditors, particularly if all maintenance (as has been proposed) is to be based on need, is a compelling one. It follows that amounts collected under an attachment order should not be subject to *pro rata* distribution amongst creditors under *The Creditors Relief Act* or similar legislation.

Finally, legislation permitting the registration against land of an alimony judgment should be enlarged to permit such registration of any maintenance order of the Supreme Court, including an order for maintenance in divorce proceedings and the court should be em-

powered to vary or discharge the security interest created by such registration.

(ii) *Transactions Intended to Defeat Maintenance Claims*

There is no power at present in the Supreme Court, either under provincial legislation or the *Divorce Act* to enjoin an apprehended disposition of property intended to defeat a claim for maintenance. In an area of the law where disputes are prone to be acrimonious this lacuna places a premium upon spite and irresponsibility and to the extent that it is indulged in, it imposes an unwarranted burden on the general public. The superior court ought, therefore, to have the power in maintenance proceedings, either before or after judgment, to enjoin the apprehended disposition of property by a spouse whose intent is to defeat a claim for maintenance or to prevent the enforcement of a maintenance order. Similarly, the court has the power in proceedings for maintenance during marriage to set aside dispositions made for these purposes.

(b) *Maintenance Ancillary to Divorce*

Although the *Divorce Act* provides for the making of orders to secure maintenance awards of either periodic or lump sums, the legislation does not give the court power to order one spouse to transfer property to the other in full or partial satisfaction of the award. In practice, however, the discharge of the obligation to pay a lump sum award is frequently effected by the voluntary transfer of property, such as the matrimonial home. Indeed, several cases have expressly provided that an order for a lump sum award can be satisfied by the voluntary transfer of property.

The *Divorce Act* contains an important provision relevant to the subject under review by this Conference inasmuch as the legislation enacts that an order for corollary relief made on granting of a decree nisi has legal effect throughout Canada. The order may be registered in any other superior court in Canada and enforced as an order of the court where it is registered. Thus the maintenance creditor may register it with the superior court where the maintenance debtor resides and the order will be enforced by the registering court "in like manner" as one of its own orders.

A serious limitation on the efficacy of the provision, however, lies in the fact that section 11(2) of the Act provides that any variation or rescission of a maintenance order made upon granting a decree nisi of divorce can only be granted "by the court that made the

order". The potential hardship imposed by this provision need not be laboured before a group concerned with the merits of reciprocal enforcement of maintenance orders. It is indefensible in principle that even where both spouses are before the receiving superior court that the application for variation or rescission could not be entertained except by the originating court. *A fortiori* although family courts in certain provinces have the power to enforce maintenance orders made ancillary to divorce, they are not permitted to vary or rescind the orders.

A form of *de facto* variation of superior court maintenance orders is nonetheless regularly practised. Although these courts cannot remit arrears of maintenance or reduce payments ordered to be made by the superior court, neither can they commit or threaten to commit a defaulting maintenance debtor who is genuinely financially unable to pay. The result is that the Family Court will ascertain, in light of all the circumstances, how much the respondent is capable of paying and will not commit as long as the lesser amount is paid. Technically speaking, the respondent will be in arrears according to the superior court order since the amount cannot be varied in the Family Court.

There would appear to be no reason in law or in logic why maintenance orders ancillary to divorce should not be made subject to variation or rescission by the Family Courts in cases where the court thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of the parties or either of them. Certainly no constitutional impediment lies in the way. The English magistracy have enjoyed the statutory right to vary high court maintenance orders for some time now. New York State has a similar rule permitting the Family Court to modify support orders made by the superior court in cases where there has been a change in circumstances. The Canadian Juvenile and Family Court Judges' Council has recommended that the *Divorce Act* be amended to permit the registration, enforcement and variation in any Family Court of the corollary relief portions of a Canadian divorce court order. An alternative provision is that contained in the *Family Relations Act* (British Columbia). It provides that requests for variation or rescission of a superior court maintenance order filed for enforcement with the Family Court will be made to the Family Court judge. The latter will hear the evidence with regard to the spouse's ability to pay and the conditions, means and other circumstances that must be considered in a variation or rescission hearing and will come to a conclusion whether

any change in the maintenance should be made. This conclusion is then transmitted in the form of a recommendation to the court that made the original order.

It is said that under such a procedure, given the regard that a higher court pays to the conclusions of the judge who sees the witnesses and hears the evidence, any variation or rescission of the maintenance order will, in substance, be the decision of the Family Court, while remaining, in form, a decision reserved to the higher court.

No doubt fiction serves a useful function in many areas of the law but resort to it ought not to be overdone, particularly at the expense of those who are least able to pay. Where politically and constitutionally possible, surely there is much to be said for taking the direct route, and in this case that route is to confer jurisdiction on the family courts to make the final determination.

PART II

MAINTENANCE PROCEEDINGS IN THE LOWER COURT

In the common law provinces, provincial maintenance legislation is characterized by relatively inexpensive and simple procedures. The causes are heard before courts which specialize in family matters. In some provinces this is a Family Court, properly so called, and in others a special court with special jurisdiction in this branch of the law.

(a) *Form of Proceedings*

In Ontario (as in certain other provinces) *The Deserted Wives' and Children's Maintenance Act* imposes a support obligation upon a deserting husband through quasi-criminal proceedings. The respondent is brought before the court by means of laying an information and issuing of a summons, usually served by a police officer, the process accusing the respondent of desertion and failure to maintain his wife and children. Such a procedure in a troubled marriage may often be inflammatory and it certainly is inimical to chances of reconciliation. In the interest of achieving a less fractious and more amiable disposition of family disputes, the existing quasi-criminal proceedings in the family courts should be replaced by a civil procedure, summary in character and similar to that now used in the small claims courts. This procedure would place less emphasis on questions of guilt or innocence and would mitigate to some degree the ill will

spawned or aggravated by the adversary system in criminal proceedings.

To initiate a claim for maintenance the applicant should be required to file with the Family Court a notice of claim and hearing, together with a sworn statutory declaration by the applicant setting forth in a prescribed form the particulars of his or her financial position. Service of these documents upon the respondent should be effected by officers of the Family Court. This introduction of required statements of financial circumstances has long been needed. A family court judge currently may have great difficulty in obtaining full and accurate information about the means of the parties, which is often the most important factor to be considered in making an order. His only source of information, the oral and documentary evidence which emerges during the trial, is frequently inadequate since the procedure does not provide for discovery and because many spouses are unrepresented by counsel. It would be a mistake to deal with this problem by adopting the rules of procedure in the Supreme Court regarding examination for discovery and pre-trial inspection and production of documents. An application for maintenance in the Family Court should remain a summary remedy, available for all, whether legally represented or not.

The respondent should be entitled to dispute the claim in writing but should not be required to do so. Before trial, the respondent should be required only to file with the Family Court within a specified period following the service of the notice of claim and hearing a sworn statutory declaration setting forth in a prescribed form the particulars of his or her financial position.

However, in order to protect a respondent from being forced to disclose his or her financial affairs in a case in which the applicant's entitlement to support is doubtful, respondents should be given the right to apply to the court to have the filing of the declaration of financial means deferred until the applicant has established a *prima facie* entitlement to maintenance. The court should be empowered to defer the filing where it appears to the court that the respondent may have a good defence to the claim.

Moreover, whenever an application is made to the court to vary or discharge an existing maintenance order, both parties should be required before the hearing to file the prescribed statutory declaration. Also, whenever a respondent is in default in his or her payments, he or she, upon being asked to appear on a show cause hearing, should be required to file the prescribed declaration as to his or her means.

Similarly, in the case of an application for child maintenance, a procedure should be adopted to obtain information concerning the financial position of the child or of any third party who might be under a legal obligation to support the child.

When an applicant refuses to complete the declaration, the application should be considered as incomplete and it should not be processed. Moreover, a respondent's failure, without lawful excuse, to file a declaration or the making of a false declaration by either party, should be an offence punishable on summary conviction and subject to the penalties that are provided for these offences in the *Criminal Code*.

(b) *State Involvement in Support Obligations*

One of the most recent and encouraging developments in the law of support obligations is the increasing intervention of the state in their enforcement. Clearly, however, immediate and regular financial assistance should continue to be provided under existing welfare programs to dependent spouses and children who are in need by reason of the inability or refusal of a person under a duty to maintain to discharge the support obligation.

Moreover, because of the concern that all support services should, so far as possible, be available from the Family Court, and in order to minimize the stigma sometimes associated with welfare payments, wherever feasible and particularly in large metropolitan areas, financial assistance should be made available to dependent spouses and children through a welfare office located in the family court and staffed by officers of municipal and provincial welfare administrations.

The requirement imposed by some welfare authorities that the dependent spouse commence maintenance proceedings against the other spouse as a condition of eligibility in welfare assistance is undesirable. It is the state, rather than the person being maintained by the state, which is directly interested in recovering money paid to support the dependants of defaulting spouses.

Accordingly, a municipal or provincial welfare agency which is providing, or which has provided, financial assistance to a dependent spouse or child, should be able to commence proceedings in its own right against any person under an obligation to maintain the spouse or child. The right of a welfare agency to commence proceedings in its own name would be a claim for recoupment and the amount of a maintenance order in favour of a welfare agency should never exceed

the amounts being paid out periodically by the agency to support the respondent's dependants.

It is increasingly accepted that the state itself should assume a large measure of responsibility for the enforcement of maintenance orders. The necessity for this is ever more compelling if, in the future, all support obligations are to be based upon need. A respondent's determination to evade his support obligations often requires more time, money, energy and initiative than can be expected of a deserted or separated spouse. Recognition of this fact has led the family courts in several provinces to experiment with programs under which the court itself enforces every order it makes instead of waiting for the deserted spouse or a representative of the welfare authorities to initiate enforcement proceedings.

Alberta, British Columbia, New Brunswick, Nova Scotia, Manitoba and Ontario all have some system of court enforcement under development or in operation. Under the Ontario program enforcement proceedings no longer await the initiative of the wife or welfare administration. Accounts are reviewed regularly; as soon as an account is found to be in arrears the defaulting husband is notified. In the absence of a satisfactory explanation for default, a show cause summons is issued and the husband is required to attend a hearing to explain his default to a family court judge.

There is ample evidence even at this date that automatic enforcement schemes are effective. Indeed, the current problems of the scheme are the result of its success. The system has become overloaded and appears to suffer from inadequate staffing. The result is that periodic review of the files can only take place at more infrequent intervals, which places the entire program in jeopardy. In Ontario monitoring is now in the four to five week range instead of the desired two week span.

It is obvious that priorities must be adjusted and financial constraints ameliorated to prevent these automatic enforcement schemes from faltering. Their utility is not limited to the recovery of funds for disbursements to dependent wives and children and to welfare authorities. The procedure has other salutary effects. Automatic enforcement discourages the accrual of arrears which form a psychological barrier to future compliance with the court order. Moreover, the regular review of performance under maintenance orders frequently discloses factual situations which justify applications for variation to reflect the changed circumstances of the parties.

It should be stressed that the Ontario system is used to enforce all maintenance orders within the jurisdiction of the provincial family courts. These include not only orders under *The Deserted Wives' and Children's Maintenance Act*, but also alimony judgments and divorce maintenance orders of the Supreme Court, Surrogate Court maintenance orders, and maintenance orders being enforced by the Ontario courts under *The Reciprocal Enforcement of Maintenance Orders Act*.

> The Ontario automatic enforcement programme has been supplemented by a second system called the 'Parental Support Programme' under which trained social workers are assigned by the Ministry of Community and Social Services to the family courts. The parental support workers deal only with cases where the unsupported wife has assigned her maintenance order to the welfare authorities. In other words, they are protecting the public purse rather than being engaged in a general programme of providing assistance to needy dependants. The workers trace missing payors, make home visits, assist and give moral support to both husbands and wives in re-hearing situations involving variation of orders or reduction of arrears, and devote substantial attention to working out family problems with a view to reconciliation. This programme is not in effect in all Ontario family courts, but initial results have shown that compliance with maintenance orders has more than doubled when it has been combined with the automatic enforcement system. This is an extraordinary success rate. (Law Reform Commission of Canada, Family Law: Enforcement of Maintenance Obligations, p. 19.)

The success which has attended the initiation of automatic enforcement procedures ought not to obscure the adverse effects which they may have on the proper functioning of the court. The family court judge should remain aloof from those enforcement processes which may lead to a suggestion of bias. Moreover, regular family court personnel cannot be expected to assume indefinitely the additional responsibility involved in the program without jeopardy to the discharge of their normal duties. It is for these reasons that it has been recommended that an enforcement branch should be established in each local office, if feasible and desirable, to deal with these special functions.

In addition to its duties in relation to the automatic enforcement program, the enforcement branch might also usefully perform certain functions of an investigative nature, designed to assist the process

whereby the support obligation is judicially determined, by locating defaulting spouses and by providing information concerning the parties' economic positions.

(c) *Orders by the Lower Court*

We have dealt with the expanding range of orders in maintenance proceedings which ought to be at the disposal of the Supreme Court judges in making and enforcing support obligations in the superior court. The desirability of achieving consistency of principle would lead one to suggest that family court judges should be empowered to grant similar relief. Two factors prevent this: the constitutional limitation imposed by section 96 of the *British North America Act* on the functions of provincially appointed judges; and the restricted nature of maintenance proceedings in the family court.

Within these limitations, however, the range of orders that the family court judges are able to make in maintenance proceedings should be expanded. It has been recommended that:

1. The family court should be empowered, within the limits of the jurisdiction that can be conferred on a provincially appointed judge:

(a) to order the payment of a modest lump sum, in addition to periodic payments, for the purpose of meeting special needs;

(b) to order periodic payments, including periodic payments of limited duration or until the happening of a specified event, in which case the recipient of the award should be free to apply to the court to have it extended, or to re-apply for maintenance after the expiration of the specified period;

(c) to order that a maintenance payment, whether lump sum or periodic, be secured;

(d) to order that a spouse or someone under an obligation to support a child shall pay maintenance, and in addition, provide security for the payment of such maintenance;

(e) to order that the maintenance order shall itself constitute a charge against any interest that the respondent may have in any specified property;

(f) subject to the rights of third parties, to order the transfer of personal property from one spouse to another, or to make orders concerning the right to its use;

(g) when awarding maintenance and subject to the rights, if any, of third parties in the family residence and subject to such

conditions as the court may impose, to order that a spouse or parent have the right to occupy or use the family residence until the rights of the spouses or parents in such residence are determined by agreement or by a court of competent jurisdiction, or until suitable alternative provision is made for the accommodation of any dependent spouse, parent or children;

(h) upon adjourning an application for maintenance of a spouse, to make interim orders concerning:

(i) maintenance of spouses;

(ii) maintenance of children;

(iii) possession of the family residence.

2. An order for maintenance in the family court, either for spouses or children, should terminate upon the death of any party, or upon divorce. The right to maintenance of any dependants after the death of a respondent should be determined under the *Dependants' Relief Act*. The right to maintenance in the event of divorce, should be determined by the court having jurisdiction in the divorce proceedings.

3. The Family Court should be empowered to vary or discharge arrears of maintenance upon such terms as seem fit and just.

4. Where the parents of a child, in respect of whom a maintenance order has been made, become reconciled, the right to collect arrears should not be automatically terminated. The Family Court should be empowered to make such order as it deems just concerning any arrears which have accumulated pursuant to an order made by that court.

5. Upon the death of a person paying maintenance, any accumulated arrears owing at the date of death should be treated as a debt of the estate, subject to the right of the personal representative to apply to the court for variation or discharge of the amount of the arrears.

6. Upon the death of a recipient, or in the case of child support, on the death of the child, any accumulated arrears of maintenance should continue to be collected; but the court may vary or discharge the amount of any such arrears, if it thinks fit and just to do so, having regard to all the circumstances of the case.

7. The family court should be empowered to vary or discharge any order upon proof of a material change in circumstances.

8. The court should be empowered to rehear any application for an order when evidence has become available that was not available upon the previous hearing and that could not by reasonable means have come to the attention of the applicant. (Ontario Law Reform Commission, Report on Family Law, Part VI, Support Obligations, pp. 220-222.)

(d) *Enforcement of Maintenance Orders*

A serious and persistent problem in maintenance proceedings in the Family Court is the limited power which the court possesses to enforce its orders. Even with automatic enforcement programs, additional methods of enforcing maintenance orders must be developed and increased powers of enforcement conferred.

(i) *Attachment of Earnings*

We have already dealt with the desirability of conferring power to attach earnings where there has been default under a maintenance order being enforced by the Supreme Court and that the attachment order should have priority over other creditors and should not be subject to proportional distribution. Similar powers should be granted to the family court judges.

(ii) *Registration Against Land*

It is recognized that the registration against land of a maintenance order providing for periodic payments poses problems of a different order than registration of an ordinary civil judgment for a fixed sum. Nevertheless, there is no defensible reason why the maintenance creditor should lose whatever protection this method of levying execution may afford. It is by no means ineffective, particularly where a forced sale of real estate, subject to a registered charge, may be the only way of liquidating accumulated arrears. This remedy does not exist at the moment and it should be provided.

(iii) *Committal*

Others have pointed out that the power of committalfor a maintenance debt is not only self-defeating if the maintenance debtor chooses to go to prison rather than to comply with the order of payment, but that in principle committal for non-payment is objectionable and inconsistent with the view that legal order should be restored to discordant family relations. If the powers of enforcement of maintenance obligations were expanded to include requiring the provision of security, the attachment of earnings and registration against land of

maintenance orders then it might be found to be expedient to abolish committal entirely as an enforcement remedy and thus remove the last vestige of the use of the criminal sanction for the non-payment of a civil debt. If committal is to be retained, it ought to be restricted to cases of recalcitrance and never applied where there is an inability to pay. Moreover, safeguards ought to be introduced to preclude absolutely the exercise of the power against any spouse or parent who has, or may have responsibility for the care of children.

PART III

TRACING MISSING SPOUSES

Obviously all the remedies and enforcement techniques mentioned in the foregoing discussion will be of little utility if the dependant cannot find the absconding spouse. Until recently, however, when a husband absconds, the deserted wife was required to find him herself. The courts did not have the staff or the facilities with which to trace missing spouses, or the responsibility to do so. The situation often changes, however, when the wife goes on welfare, in which case the interest in protecting the public revenue will sometimes cause the government to take a hand in attempting to locate the husband. Reference has already been made to the "Parental Support Programme" in Ontario, one of whose functions is to trace missing maintenance debtors in cases where the maintenance creditor has assigned her rights to the welfare authorities.

The view of the Ontario Law Reform Commission is that both those who are receiving welfare assistance and those who are not should receive the same help in locating their missing spouses. There are various methods by which this can be done. In England, the government has authorized disclosure of addresses from some official records to courts at their request. In the United States, special units have been set up in state welfare departments to trace missing persons who are in breach of their support obligations. Legislation has been enacted in some states empowering these departments to obtain from the records of other state agencies information which will assist in tracing these individuals and directing the agencies to co-operate with the welfare departments in this regard. In British Columbia private investigators paid from funds allocated by the government are used for this purpose.

Thus, a primary function of the support services of the Family Court, and particularly the enforcement branch where it exists, should

be the location of absconding spouses. The efforts of each court should be centrally co-ordinated in every province and there should be facilities for the rapid and thorough exchange of information among the central co-ordinating bodies of each province. Provisions should be made, subject to suitable safeguards regarding the privacy of individuals involved, for full co-operation and exchange of information between the tracing services of the family court and the various agencies of government that maintain data respecting the location of individuals, such as motor vehicle registration departments, hospital insurance plans and similar agencies at the provincial level; and unemployment insurance commissions, postal insurance and tax records at the Federal level. It is not contemplated that access should be given to all the information contained in government records concerning individuals but rather the disclosure should be restricted to information concerning his present address.

In the preparation of this paper we have relied heavily upon the work of the law reform commissions, particularly the Law Reform Commission of Canada and the Ontario Law Reform Commission, and their reports on support obligations in the family law studies. We wish to record our gratitude to them.

H. Allan Leal
of the Ontario Commissioners

Toronto
July 1976

APPENDIX ZA

(See page 34)

TRADES AND BUSINESSES LICENSING

REPORT OF NEWFOUNDLAND AND PRINCE EDWARD ISLAND

This subject was first raised in 1974 by the Commissioners for Quebec when they presented a Bill, which had been tabled in their National Assembly entitled "The Travel Agents Act". They considered that it might be of general public interest throughout Canada to have uniform legislation on the subject. The issue was assigned to the Commissioners for Prince Edward Island and Newfoundland to report to the 1975 meeting. (1974 Pro., pp. 31, 32.)

Following brief discussions at the 1975 annual meeting, the same Commissioners were assigned the task of reconsidering the whole issue under the heading of "Trades and Businesses Licensing" and of drafting an appropriate Act with regulations for consideration by the Conference. (1975 Pro., p. 25.)

Examination of the laws of the various provinces on the subject of licensing of trades and businesses reveals considerable legislative activity in all provinces with particular emphasis to independent legislation dealing with specific types of trades and businesses. Alberta has a general Act dealing with the subject of licensing of those trades and businesses which may be designated from time to time as a trade or business to which the Act applies by the Minister having responsibility for the Act. The Alberta legislation confers extensive powers on the Minister to prepare different regulations for the different types of trades and businesses which are brought within the legislative net by the ministerial order. In other words, the Alberta Act is enabling legislation only. It is not known to what extent the appropriate Minister in Alberta has made use of this Act for the purposes of controlling businesses because in addition to this general Act, the Province of Alberta, like other provinces, has seen fit to enact separate laws for specific trades and businesses.

Ontario has extensive legislative control over specific businesses in addition to its general consumer protection and business practice legislation. Separate Acts controlling real estates and business brokers, travel agents, motor vehicle dealers, insurance agents, pawnbrokers, paperback and periodical distributors, private investigators and

security guards, embalmers and funeral directors, and collection agencies are already on the Ontario statute book. The legislative policy of other provinces is broadly the same. Quebec has a very comprehensive statute (or code) controlling within the framework of one Act the licensing of particular specified businesses, such as auctioneers, secondhand dealers, automobile distributors, peddlers and others. Since the provinces appear to have an established legislative policy on the subject of licensing (with the possible exception of Alberta), it is felt that uniform legislation of a general nature would not be adopted. Further, it is considered that legislation similar to that in force in Alberta must of necessity be of an enabling nature. The regulations made under such legislation would differ considerably for different types of businesses or different classes of trades.

It is the recommendation of the Newfoundland and Prince Edward Island Commissioners that this matter be removed from the agenda for the reasons specified above.

George B. Macaulay
for the Newfoundland and Prince Edward Island Commissioners

29 July 1976

TABLE I

UNIFORM ACTS PREPARED, ADOPTED AND PRESENTLY RECOMMENDED BY THE CONFERENCE FOR ENACTMENT

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Accumulations Act	1968	
Assignment of Book Debts Act	1928	Am. '31; Rev. '50, '55; Am. '57.
Bills of Sale Act	1928	Am. '31, '32; Rev. '55; Am. '59, '64, '72.
Bulk Sales Act	1920	Am. '21, '25, '38, '49; Rev. '50; '61.
Conditional Sales Act	1922	Am. '27, '29, '30, '33, '34, '42; Rev. '47, '55; Am. '59.
Condominium Insurance Act	1971	Am. '73.
Conflict of Laws (Traffic Accidents) Act	1970	
Contributory Negligence Act	1924	Rev. '35, '53; Am. '69.
Criminal Injuries Compensation Act	1970	
Defamation Act	1944	Rev. '48; Am. '49.
Dependants' Relief Act	1974	
Devolution of Real Property Act	1927	Am. '62.
Domicile Act	1961	
Effect of Adoption Act	1969	
Evidence Act	1941	Am. '42, '44, '45; Rev. '45; Am. '51, '53, '57.
—Affidavits before Officers	1953	
—Foreign Affidavits	1938	Am. '51; Rev. '53.
—*Hollington v. Hewthorn*	1976	
—Judicial Notice of Acts, Proof of State Documents	1930	Rev. '31.
—Photographic Records	1944	
—*Russell v. Russell*	1945	
—Use of Self-Criminating Evidence Before Military Boards of Inquiry	1976	
Extra-Provincial Custody Orders Enforcement Act	1974	
Fatal Accidents Act	1964	
Foreign Judgments Act	1933	Rev. '64.
Frustrated Contracts Act	1948	Rev. '74.
Highway Traffic —Responsibility of Owner & Driver for Accidents	1962	
Hotelkeepers Act	1962	
Human Tissue Gift Act	1970	Rev. '71.
Interpretation Act	1938	Am. '39; Rev. '41; Am. '48; Rev. '53, '73.
Interprovincial Subpoenas Act	1974	

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Intestate Succession Act	1925	Am. '26, '50, '55; Rev. '58; Am. '63.
Jurors: Qualifications, etc.	1976	
Legitimacy Act	1920	Rev. '59.
Limitation of Actions Act	1931	Am. '33, '43, '44.
—Convention on the Limitation Period in the International Sale of Goods	1976	
Married Women's Property Act	1943	
Medical Consent of Minors Act	1975	
Occupiers' Liability Act	1973	Am. '75.
Partnerships Registration Act	1938	Am. '46
Perpetuities Act	1972	
Personal Property Security Act	1971	
Presumption of Death Act	1960	Rev. '76
Proceedings Against the Crown Act	1950	
Reciprocal Enforcement of Judgments Act	1924	Am. '25; Rev. '56; Am. '57; Rev. '58; Am '62, '67.
Reciprocal Enforcement of Maintenance Orders Act	1946	Rev. '56, '58; Am. '63, '67, '71; Rev. '73.
Reciprocal Enforcement of Tax Judgments Act	1965	Rev. '66.
Regulations Act	1943	
Retirement Plan Beneficiaries Act	1975	
Service of Process by Mail Act	1945	
Statutes Act	1975	
Survival of Actions Act	1963	
Survivorship Act	1939	Am. '49, '56, '57; Rev. '60, '71.
Testamentary Additions to Trusts Act	1968	
Trustee (Investments)	1957	Am. '70.
Variation of Trusts Act	1961	
Vital Statistics Act	1949	Am. '50, '60.
Warehousemen's Lien Act	1921	
Warehouse Receipts Act	1945	
Wills Act		
—General	1953	Am. '66, '74.
—Conflict of Laws	1966	
—International Wills	1974	

TABLE II

UNIFORM ACTS PREPARED, ADOPTED AND RECOMMENDED FOR ENACTMENT WHICH HAVE BEEN SUPERSEDED BY OTHER ACTS, WITHDRAWN AS OBSOLETE, OR TAKEN OVER BY OTHER ORGANIZATIONS

Title	Year Adopted	No. of Jurisdictions Enacting	Year Withdrawn	Superseding Act
Cornea Transplant Act	1959	11	1965	Human Tissue Act
Fire Insurance Policy Act	1924	9	1933	*
Highway Traffic —Rules of the Road	1955	3		**
Human Tissue Act	1965	6	1970	Human Tissue Gift Act
Landlord and Tenant Act	1937	4	1954	None
Life Insurance Act	1923	9	1933	*
Pension Trusts and Plans —Appointment of Beneciaries	1957	8	1975	Retirement Plan Beneficiaries Act
—Perpetuities	1954	8	1975	In part by Retirement Plan Beneficiaries Act and in part by Perpetuities Act

*Since 1933 the Fire Insurance Policy Act and the Life Insurance Act have been the responsibility of the Association of Superintendents of Insurance of the Provinces of Canada (*see* 1933 Proceedings, pp. 12, 13) under whose aegis a great many amendments and a number of revisions have been made. The remarkable degree of uniformity across Canada achieved by the Conference in this field in the nineteen-twenties has been maintained ever since by the Association.

**The Uniform Rules of the Road are now being reviewed and amended from time to time by the Canadian Conference of Motor Transport Authorities.

TABLE III

UNIFORM ACTS SHOWING THE JURISDICTIONS THAT HAVE ENACTED THEM IN WHOLE OR IN PART, WITH OR WITHOUT MODIFICATIONS, OR IN WHICH PROVISIONS SIMILAR IN EFFECT ARE IN FORCE

Note

x indicates that provisions similar in effect are in force.

Accumulations Act — 0.

Assignment of Book Debts Act — Enacted by Alta. ('29, '58); Man. ('29, '51, '57); N.B. ('52); Nfld. ('50); N.W.T. ('48); N.S. ('31); Ont. ('31); P.E.I. ('31); Sask. ('29); Yukon ('54). Total: 10.

Bills of Sale Act — Enacted by Alta. ('29); Man. ('29, '57); N.B. (x); Nfld. ('55); N.W.T. ('48); N.S. ('30); P.E.I. ('47); Sask. ('57); Yukon ('54). Total 9.

Bulk Sales Act — Enacted by Alta. ('22); Man. ('21, '51); N.B. ('27); Nfld. ('55); N.W.T. ('48); N.S. (x); P.E.I. ('33); Yukon ('56). Total: 8.

Conditional Sales Act — Enacted by N.B. ('27); Nfld. ('55); N.W.T. ('48); N.S. ('30); P.E.I. ('34); Sask. ('57); Yukon ('54). Total: 7.

Condominium Insurance Act — Enacted by B.C. ('74) *sub nom.* Strata Titles Act; Man. ('76); P.E.I. ('74). Total 3.

Conflict of Laws (Traffic Accidents) Act — Enacted by Yukon ('72). Total: 1.

Contributory Negligence Act — Enacted by Alta. ('37); N.B. ('25, '62); Nfld. ('51); N.W.T. ('50); N.S. ('26, '54); P.E.I. ('38); Sask. ('44); Yukon ('55). Total: 8.

Corporations Securities Registration Act — Enacted by N.W.T. ('63); N.S. ('33); Ont. ('32); P.E.I. ('49); Sask. ('32); Yukon ('63). Total 6.

Criminal Injuries Compensation Act — Enacted by Alta. ('69); B.C. ('72); N.W.T. ('73); Ont. ('71); Yukon ('72). Total: 5.

Defamation Act — Enacted by Alta. ('47); B.C. (x) *sub nom.* Libel and Slander Act; Man. ('46); N.B. ('52); N.W.T. ('49); N.S. ('60); P.E.I. ('48); Yukon ('54). Total: 8.

Dependants' Relief Act — N.W.T. ('74). Total: 1.

Devolution of Real Property Act — Enacted by Alta. ('28); N.B. ('34); N.W.T. ('54); Sask. ('28); Yukon ('54). Total: 5.

Domicile Act — 0.

Evidence Act — Enacted by Man. ('60); N.W.T. ('48); Ont. ('60); Yukon ('55). Total: 4.

—Affidavits before Officers — Enacted by Alta. ('58); B.C. (x); Man. ('57); Nfld. ('54); Ont. ('54); Yukon ('55). Total: 6.

—Foreign Affidavits — Enacted by Alta. ('52, '58); B.C. ('53); Can. ('43); Man. ('52); N.B. ('58); Nfld. ('54); N.W.T. ('48); N.S. ('52); Ont. ('52, '54); Sask. ('47); Yukon ('55). Total: 11.

—Judicial Notice of Acts, etc. — Enacted by B.C. ('32); Man. ('33); N.B. ('31); N.W.T. ('48); P.E.I. ('39); Yukon ('55). Total: 6.

—Photographic Records — Enacted by Alta. ('47); B.C. ('45); Can. ('42); Man. ('45); N.B. ('46); Nfld. ('49); N.W.T. ('48); N.S. ('45); Ont. ('45); P.E.I. ('47); Sask. ('45); Yukon ('55). Total: 12.

—*Russell v. Russell* — Enacted by Alta. ('47); B.C. ('47); Man. ('46); N.W.T. ('48); N.S. ('46); Ont. ('46); P.E.I. ('46); Sask. ('46); Yukon ('55). Total: 9.

Extra-Provincial Custody Orders Enforcement Act — B.C. ('76); Man. ('76); Nfld. ('76); N.S. ('76); P.E.I. ('76). Total: 5.

Fatal Accidents Act — Enacted by N.B. ('68); N.W.T. ('). Total: 2.

Foreign Judgments Act — Enacted by N.B. ('50); Sask. ('34). Total: 2.

Frustrated Contracts Act — Enacted by Alta. ('49); B.C. ('74); Man. ('49); N.B. ('49); Nfld. ('56); N.W.T. ('56); Ont. ('49); P.E.I. ('49); Yukon ('56). Total: 9.

Highway Traffic and Vehicles Act, Part III, Responsibility of Owner and Driver for Accidents — 0.

Hotelkeepers Act — 0.

Human Tissue Gift Act — Enacted by Alta. ('73); B.C. ('72); Nfld. ('71); N.W.T. ('66); N.S. ('73); Ont. ('71). Total: 6.

Interpretation Act — Enacted by Alta. ('58); B.C. ('74); Man. ('39, '57); Nfld. ('51); N.W.T. ('48); P.E.I. ('39); Sask. ('43); Yukon ('54). Total: 8.

Interprovincial Subpoenas Act — B.C. ('76); Nfld. ('76); N.W.T. ('76). Total: 3.

Intestate Succession Act — Enacted by Alta. ('28); B.C. ('25); Man. ('27); N.B. ('26); Nfld. ('51); N.W.T. ('48); P.E.I. ('44); Sask. ('28); Yukon ('54). Total: 9.

Legitimacy Act — Enacted by Alta. ('28, '60);; B.C. ('22, '60); Man. ('20, '62); N.B. ('20, '62); Nfld. (x); N.W.T. ('49, '64); N.S. (x); Ont. ('21, '62); P.E.I. ('20); Sask. ('20, '61); Yukon ('54). Total: 11.

Limitations of Actions Act — Enacted by Alta. ('35); Man. ('32, '46); N.W.T. ('48); P.E.I. ('39); Sask. ('32); Yukon ('54). Total: 6.

Married Women's Property Act — Enacted by Man. ('45); N.B. ('51); N.W.T. ('52); Yukon ('54). Total: 4.

Medical Consent of Minors Act — N.B. ('76). Total: 1.

Occupiers' Liability Act — B.C. ('74). Total: 1.

Partnerships Registration Act — Enacted by N.B. (x); Sask. ('41). Total: 2.

Pensions Trusts and Plans — Perpetuities — Enacted by B.C. ('57); Man. ('59); N.B. ('55); Nfld. ('55); N.S. ('59); Ont. ('54); Sask. ('57); Yukon ('68). Total: 8.
—Appointment of Beneficiaries — Enacted by Alta. ('58); B.C. ('57); Man. ('59); Nfld. ('58); N.S. ('60); Ont. ('54); P.E.I. ('63); Sask. ('57). Total: 8.

Perpetuities Act — Enacted by Alta. ('72); B.C. ('75); N.W.T. ('68); Ont. ('66). Total: 4.

Personal Property Security Act — 0.

Presumption of Death Act — Enacted by B.C. ('58); Man. ('68); N.W.T. ('62); N.S. ('63); Yukon ('62). Total: 5.

Proceedings Against the Crown Act — Enacted by Alta. ('59); Man. ('51); N.B. ('52); Nfld. ('73); N.S. ('51); Ont. ('63); P.E.I. ('73); Sask. ('52). Total: 8.

Reciprocal Enforcement of Judgments Act — Enacted by Alta. ('25, '58); B.C. ('25, '59); Man. ('50, '61); N.B. ('25); Nfld. ('60); N.W.T. ('55); N.S. ('73); Ont. ('29); P.E.I. ('); Sask. ('); Yukon ('56). Total: 11.

Reciprocal Enforcement of Maintenance Orders Act — Enacted by Alta. ('47, '58); B.C. ('72); Man. ('46, '61); N.B. ('51); Nfld. ('51, '61); N.W.T. ('51); N.S. ('49); Ont. ('48, '59); P.E.I. ('51); Que. ('52); Sask. ('68); Yukon ('55). Total: 12.

Reciprocal Enforcement of Tax Judgments Act — 0.

Regulations Act — Enacted by Alta. ('57); Can. ('50); Man. ('45); N.B. ('62); Nfld. ('56); N.W.T. ('73); Ont. ('44); Sask. ('63); Yukon ('68). Total: 9.

Retirement Plan Beneficiaries Act — Enacted by Man. ('76). Total: 1.

Service of Process by Mail Act — Enacted by Alta. (x); B.C. ('45); Man. (x); Sask. (x). Total: 4.

Survival of Actions Act — Enacted by B.C. (x) *sub nom.* Administrations Act; N.B. ('68). Total: 2.

Survivorship Act — Enacted by Alta. ('48, '64); B.C. ('39, '58); Man. ('42, '62); N.B. ('40); Nfld. ('51); N.W.T. ('62); N.S. ('41); Ont. ('40); P.E.I. ('40); Sask. ('42, '62); Yukon ('62). Total: 11.

Testamentary Additions to Trusts Act — 0.

Testators Family Maintenance Act — Enacted by Alta. ('47); B.C. (x); Man. ('46); N.B. ('59); N.S. ('); Sask. ('40). Total: 6.

Trustee Investments — Enacted by B.C. ('59); Man. ('65); N.B. ('70); N.W.T. ('64); N.S. ('57); Sask. ('65); Yukon ('62). Total: 7.

Variations of Trusts Act — Enacted by Alta. ('64); B.C. ('68); Man. ('64); N.W.T. ('); N.S. ('62); Ont. ('59); P.E.I. ('63); Sask. ('69). Total: 8.

Vital Statistics Act — Enacted by Alta. ('59); B.C. ('62); Man. ('51); N.W.T. ('52); N.S. ('52); Ont. ('48); P.E.I. ('50); Sask. ('50); Yukon ('54). Total: 9.

Warehousemen's Lien Act — Enacted by Alta. ('22); B.C. ('22); Man. ('23); N.B. ('23); N.W.T. ('48); N.S. ('51); Ont. ('24); P.E.I. ('38); Sask. ('21); Yukon ('54). Total: 10.

Warehouse Receipts Act — Enacted by Alta. ('49); B.C. ('45); Man. ('46); N.B. ('47); N.S. ('51); Ont. ('46). Total: 6.

Wills Act — Enacted by Alta. ('60); B.C. ('60); Man. ('64); N.B. ('59); N.W.T. ('52); Sask. ('31); Yukon ('54). Total: 7.

—Conflict of Laws — Enacted by B.C. ('60); Man. ('55); Nfld. ('55); Ont. ('54). Total: 4.

—(Part 4) International — Enacted by Alta. ('76); Man. ('75); Nfld. ('76). Total: 3.

TABLE IV

LIST OF JURISDICTIONS SHOWING THE UNIFORM ACTS ENACTED THEREIN IN WHOLE OR IN PART, WITH OR WITHOUT MODIFICATIONS, OR IN WHICH PROVISIONS SIMILAR IN EFFECT ARE IN FORCE

Note

* *indicates that the Act has been enacted in part.*
° *indicates that the Act has been enacted with modifications.*
x *indicates that provisions similar in effect are in force.*
† *indicates that the Act has since been revised by the Conference.*

Alberta

Assignment of Book Debts Act ('29, '58); Bills of Sale Act† ('29); Bulk Sales Act† ('22); Contributory Negligence Act† ('37); Criminal Injuries Compensation Act† ('69); Defamation Act† ('47); Devolution of Real Property Act ('28); Evidence Act — Affidavits before Officers ('58), Foreign Affidavits ('52, '58), Photographic Records ('47), *Russell v. Russell* ('47); Frustrated Contracts Act† ('49); Human Tissue Gift Act ('73); Interpretation Act ('58); Intestate Succession Act ('28); Legitimacy Act ('28, '60); Limitation of Actions Act ('35); Pension Trusts and Plans — Appointment of Beneficiaries ('58); Perpetuities Act ('72); Proceedings Against the Crown Act° ('59); Reciprocal Enforcement of Judgments Act ('25, '58); Reciprocal Enforcement of Maintenance Orders Act ('47, '58); Regulations Act° ('57); Service of Process by Mail Act[x]; Survivorship Act ('48, '64); Testators Family Maintenance Act° ('47); Variation of Trusts Act ('64); Vital Statistics Act° ('59); Warehousemen's Lien Act ('22); Warehouse Receipts Act ('49); Wills Act° ('60). Total: 31.

British Columbia

Compensation for Victims of Crime Act ('72) *sub nom.* Criminal Injuries Compensation Act; Condominium Insurance Act ('74) *sub nom.* Strata Titles Act; Defamation Act[x] *sub nom.* Libel and Slander Act; Evidence — Affidavits before Officers[x]; Foreign Affidavits* ('53), Judicial Notice of Acts, etc. ('32), Photographic Records ('45), *Russell v. Russel* ('47); Extra-Provincial Custody Orders Enforcement Act ('76); Frustrated Contracts Act ('74); Human Tissue Gift Act ('72); Interpretation Act ('74); Interprovincial Subpoenas Act ('76); Intestate Succession Act ('25); Legitimacy Act ('22, '60); Occupiers' Liability Act ('74); Perpetuities Act ('75); Presumption of Death Act ('58); Recipro-

cal Enforcement of Judgments Act ('25, '59); Reciprocal Enforcement of Maintenance Orders Act° ('72) *sub nom.* Family Relations Act; Service of Process by Mail Act° ('45) *sub nom.* Small Claims Act; Survival of Actions Act[x] *sub nom.* Administration Act; Survivorship Act° ('39, '58); Testators Family Maintenance Act[x]; Trustee (Investments*) ('59); Variation of Trusts Act ('68); Vital Statistics Act° ('62); Warehousemen's Lien Act ('22); Warehouse Receipts Act° ('45); Wills Act° ('60); Wills — Conflict of Laws ('60). Total: 31.

Canada

Evidence — Foreign Affidavits ('43), Photographic Records ('42); Regulations Act° ('50). Total: 3.

Manitoba

Assignment of Book Debts Act ('29, '51, '57); Bills of Sale Act ('29, '57); Bulk Sales Act ('51); Condominium Insurance Act ('76); Defamation Act ('46); Evidence Act* ('60); Affidavits before Officers ('57), Foreign Affidavits ('52), Judicial Notice of Acts, etc. ('33), Photographic Records ('45), *Russell v. Russell* ('46); Frustrated Contracts Act ('49); Human Tissue Act ('68); Interpretation Act ('57); Intestate Succession Act° ('27); Legitimacy Act ('28, '62); Limitation of Actions Act° ('32, '46); Married Women's Property Act ('45); Pension Trusts and Plans — Appointment of Beneficiaries ('59), Perpetuities ('59); Presumption of Death Act° ('68); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act ('50, '61); Reciprocal Enforcement of Maintenance Orders Act ('46, '61); Regulations Act° ('45); Retirement Plan Beneficiaries Act ('76); Service of Process by Mail Act[x]; Survivorship Act ('42, '62); Testators Family Maintenance Act ('46); Trustee (Investments°) ('65); Variation of Trusts Act ('64); Vital Statistics Act° ('51); Warehousemen's Lien Act ('23); Warehouse Receipts Act° ('46); Wills Act° ('64); Wills — Conflict of Laws ('55). Total: 36.

New Brunswick

Assignment of Book Debts Act° ('52); Bills of Sale Act[x]; Bulk Sales Act ('27); Conditional Sales Act ('27); Contributory Negligence Act ('25, '62); Defamation Act° ('52); Devolution of Real Property Act* ('34); Evidence — Foreign Affidavits° ('58); Judicial Notice of Acts, etc. ('31); Photographic Records ('46); Fatal Accidents Act ('68); Foreign Judgments Act° ('50); Frustrated Contracts Act ('49); Intestate Succession Act ('26); Legit-

imacy Act ('20, '62); Married Women's Property Act ('51); Medical Consent of Minors Act ('76); Partnerships Registration Act[x]; Pension Trusts and Plans — Perpetuities ('55); Proceedings Against the Crown Act* ('52); Reciprocal Enforcement of Judgments Act ('25); Reciprocal Enforcement of Maintenance Orders Act° ('51); Regulations Act ('62); Survival of Actions Act ('68); Survivorship Act ('40); Testators Family Maintenance Act ('59); Trustee (Investments) ('70); Warehousemen's Lien Act ('23); Warehouse Receipts Act ('47); Wills Act° ('59). Total: 30.

Newfoundland

Assignment of Book Debts Act° ('50); Bills of Sale Act° ('55); Bulk Sales Act° ('55); Conditional Sales Act° ('55); Contributory Negligence Act ('51); Evidence — Affidavits before Officers ('54), Foreign Affidavits ('54), Photographic Records ('49); Extra-Provincial Custody Orders Enforcement Act° ('76); Frustrated Contracts Act ('56); Human Tissue Gift Act ('71); Interpretation Act° ('51); Interprovincial Subpoenas Act° ('76); Intestate Succession Act ('51); Legitimacy Act°[x]; Pension Trusts and Plans — Appointment of Beneficiaries ('58); Perpetuities ('55); Proceedings Against the Crown Act° ('73); Reciprocal Enforcement of Judgments Act° ('); Reciprocal Enforcement of Maintenance Orders Act* ('51, '61); Regulations Act ('56); Survivorship Act ('51); Wills — Conflict of Laws ('76), International Wills ('76). Total: 24.

Northwest Territories

Assignment of Book Debts Act° ('48); Bills of Sale Act° ('48); Bulk Sales Act† ('48); Conditional Sales Act° ('48); Contributory Negligence Act° ('50); Corporation Securities Registration Act° ('63); Criminal Injuries Compensation Act ('73); Defamation Act° ('49); Dependants' Relief Act* ('74); Devolution of Real Property Act° ('54); Effect of Adoption Act (Child Welfare Ordinance Part IV) ('69); Extra-Provincial Custody Orders Enforcement Act ('76); Evidence Act° ('48); Fatal Accidents Act† ('48); Frustrated Contracts Act† ('56); Human Tissue Gift Act ('66); Interpretation Act°† ('48); Interprovincial Subpoenas Act° ('76); Intestate Succession Act° ('48); Legitimacy Act° ('49, '64); Limitations of Actions Act* ('48); Married Women's Property Act ('52); Perpetuities Act* ('68); Presumption of Death Act ('62); Reciprocal Enforcement of Judgments Act* ('55); Reciprocal Enforcement of Maintenance Orders Act°

('51); Regulations Act° ('71); Survivorship Act ('62); Trustee (Investments) ('71); Variation of Trusts Act ('63); Vital Statistics Act° ('52); Warehousemen's Lien Act° ('48); Wills Act° — General (Part II) ('52), — Conflict of Laws (Part III) ('52), — Supplementary (Part III) ('52). Total' 35.

Ontario

Assignment of Book Debts Act ('31); Compensation for Victims of Crime Act° ('71); Cornea Transplant Act[x]; Corporation Securities Registration Act ('32); Evidence Act* ('60) — Affidavits before Officers ('54), Foreign Affidavits ('52, '54), Photographic Records ('45), *Russell v. Russell* ('46); Frustrated Contracts Act ('49); Human Tissue Gift Act; Legitimacy Act ('21, '62); Pension Trusts and Plans — Appointment of Beneficiaries ('54), Perpetuities ('54); Perpetuities Act ('66); Proceedings Against the Crown Act° ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of Maintenance Orders Act° ('59); Regulations Act° ('44); Survivorship Act ('40); Variation of Trusts Act ('59); Vital Statistics Act ('48); Warehousemen's Lien Act ('24); Warehouse Receipts Act° ('46); Wills — Conflict of Laws ('54). Total: 25.

Prince Edward Island

Assignment of Book Debts Act ('31); Bills of Sale Act ('47); Bulk Sales Act ('33); Conditional Sales Act ('34); Condominium Insurance Act° ('74); Contributory Negligence Act ('38); Corporation Securities Registration Act ('49); Defamation Act ('48); Evidence — Judicial Notice of Acts, etc. ('39), Photographic Records ('47), *Russell v. Russell* ('46); Frustrated Contracts Act ('49); Interpretation Act ('39); Intestate Succession Act° ('44); Legitimacy Act ('20); Limitation of Actions Act° ('39); Pension Trusts and Plans — Appointment of Beneficiaries ('63); Proceedings Against the Crown Act° ('73); Reciprocal Enforcement of Judgments Act ('); Reciprocal Enforcement of Maintenance Orders Act° ('51); Survivorship Act ('40); Variation of Trusts Act° ('63); Vital Statistics Act ('50). Total: 23.

Quebec

The following is a list of the Uniform Acts which have some equivalents in the laws of Quebec. With few exceptions, these equivalents are in substance only and not in form.

Assignment of Book Debts Act: see a. 1570 to 1578 C.C. (S.Q. 1950-51, c. 42, s. 3) — remote similarity; Bulk Sales Act: see a. 1569a and s. C.C. (S.Q. 1910, c. 39, mod. 1914, c. 63 and

1971, c. 85, s. 13) — similar; Conditional Sales Act: see Consumer Protection Act (S.Q. 1970, c. 71, ss. 29-42); Criminal Injuries Compensation Act: see Loi d'indemnisation des victimes d'actes criminels, L.Q. 1971, c. 18 — quite similar; Evidence Act: Affirmation in lieu of oath: see a. 299 C.P.C. — similar; Judicial Notice of Acts, Proof of State Documents: see a. 1207 C.C. — similar to "Proof of State Documents"; Human Tissue Gift Act: see a. 20, 21, 22 C.C. — similar; Interpretation Act: see Loi d'interprétation, S.R.Q. 1964, c. 1, particularly, a. 49: cf. a. 6(1) of the Uniform Act, a. 40: cf. a. 9 of the Uniform Act, a. 39 para. 1: cf. a. 7 of the Uniform Act, a. 41: cf. a. 11 of the Uniform Act, a. 42 para. 1: cf. a. 13 of the Uniform Act — these provisions are similar in both Acts; Partnerships Registration Act: see Loi des déclarations des compagnies et sociétés, S.R.Q. 1964, c. 272, mod. L.Q. 1966-67, c. 72 — similar; Presumption of Death Act: see a. 70, 21 and 72 C.C. — somewhat similar; Service of Process by Mail Act: see a. 138 and 140 C.P.C. — s. 2 of the Uniform Act is identical; Trustee Investments: see a. 981o C.C. — very similar; Warehouse Receipts Act: see Bill of Lading Act, R.S.Q. 1964, c. 318 — s. 23 of the Uniform Act is vaguely similar; Wills Act: see C.C. a. 842 para. 2: cf. s. 7 of the Uniform Act, a. 864 para. 2: cf. s. 15 of the Uniform Act, a. 849: cf. s. 6(1) of the Uniform Act, a. 854 para. 1: cf. of s. 8(3) of the Uniform Act — which are similar.

NOTE

Many other provisions of the Quebec Civil Code or of other statutes bear resemblance to the Uniform Acts but are not sufficiently identical to justify a reference. Obviously, most of these subject matters are covered one way or another in the laws of Quebec.

Saskatchewan

Assignment of Book Debts Act ('29); Bills of Sale Act ('57); Conditional Sales Act ('57); Contributory Negligence Act ('44); Cornea Transplant Act[x]; Corporation Securities Registration Act ('32); Devolution of Real Property Act ('28); Evidence — Foreign Affidavits ('47), Photographic Records ('45), *Russell v. Russell* ('46); Foreign Judgments Act ('34); Human Tissue Gift Act° ('68); Interpretation Act ('43); Intestate Succession Act ('28); Legitimacy Act° ('20, '61); Limitation of Actions Act ('32); Partnerships Registration Act* ('41); Pension Trusts and Plans — Appointment of Beneficiaries ('57); Perpetuities ('57);

Proceedings Against the Crown Act° ('52); Reciprocal Enforcement of Judgments Act ('); Reciprocal Enforcement of Maintenance Orders Act ('68); Regulations Act ('63); Service of Process by Mail Act[x]; Survivorship Act ('42, '62); Testators Family Maintenance Act ('40); Trustee (Investments) ('65); Variations of Trusts Act ('69); Vital Statistics Act ('50); Warehousemen's Lien Act ('21); Wills Act ('31). Total: 31.

Yukon Territory

Assignment of Book Debts Act° ('54); Bills of Sale Act° ('54); Bulk Sales Act ('56); Compensation for Victims of Crime Act° ('72); Conditional Sales Act° ('54); Conflict of Laws (Traffic Accidents) Act ('72); Contributory Negligence Act° ('55); Cornea Transplant Act ('62); Corporation Securities Registration Act ('63); Defamation Act ('54); Devolution of Real Property Act ('54); Evidence Act° ('55), Foreign Affidavits ('55), Judicial Notice of Acts, etc. ('55), Photographic Records ('55), *Russell v. Russell* ('55); Frustrated Contracts Act ('56); Interpretation Act* ('54); Intestate Succession Act° ('54); Legitimacy Act* ('54); Limitation of Actions Act ('54); Married Women's Property Act* ('54); Pension Trusts and Plans — Perpetuities ('68); Presumption of Death Act ('62); Reciprocal Enforcement of Judgments Act ('56); Reciprocal Enforcement of Maintenance Orders Act° ('55); Regulations Act° ('68); Survivorship Act ('62); Trustee (Investments) ('62); Vital Statistics Act° ('54); Warehousemen's Lien Act ('54); Wills Act° ('54). Total: 32.

TABLE V

CUMULATIVE INDEX

EXPLANATORY NOTE

This table specifies the year or years in which the Conference in Plenary Session or the Legislative Drafting Section or the Uniform Law Section has dealt with particular subjects; it supersedes the Cumulative Index of recent years.

When a subject has been dealt with in three or more consecutive years, the reference is to the first and the last years of the sequence.

For the page reference to a particular subject in a particular year, consult the index at the back of the Proceedings of that year, or that failing, the minutes of that year.

This table does not contain any references to the work of the Criminal Law Section, nor did the Cumulative Index which this table replaces. The matters considered by the Criminal Law Section are to be found under "Criminal Law Section: Matters Considered" in the index at the back of each annual volume of Proceedings.

This table is arranged in parts as follows:

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