UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

OF THE

FIFTY-NINTH ANNUAL MEETING

HELD AT

ST. ANDREWS NEW BRUNSWICK

August, 1977

PROCEEDINGS

1918-1956

The Proceedings of this Conference from 1918 to 1956 (the first annual meeting through the thirty-eighth) were published by the Conference. Copies are now hard to come by.

The Proceedings for these years were also published in full as part of the Annual Year Book of the Canadian Bar Association. See C.B.A. Annual Proceedings, Volumes 1 to 56.

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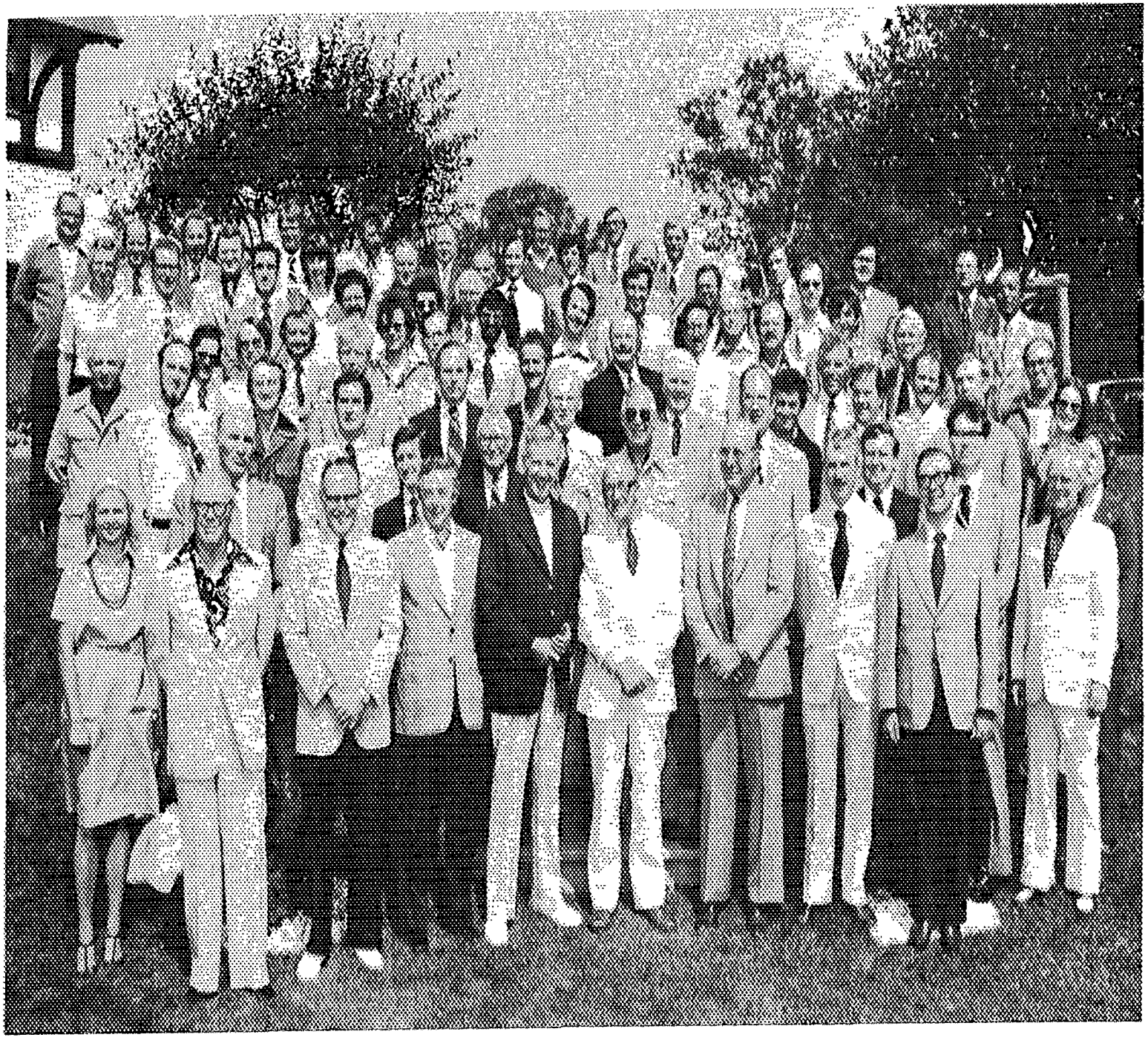

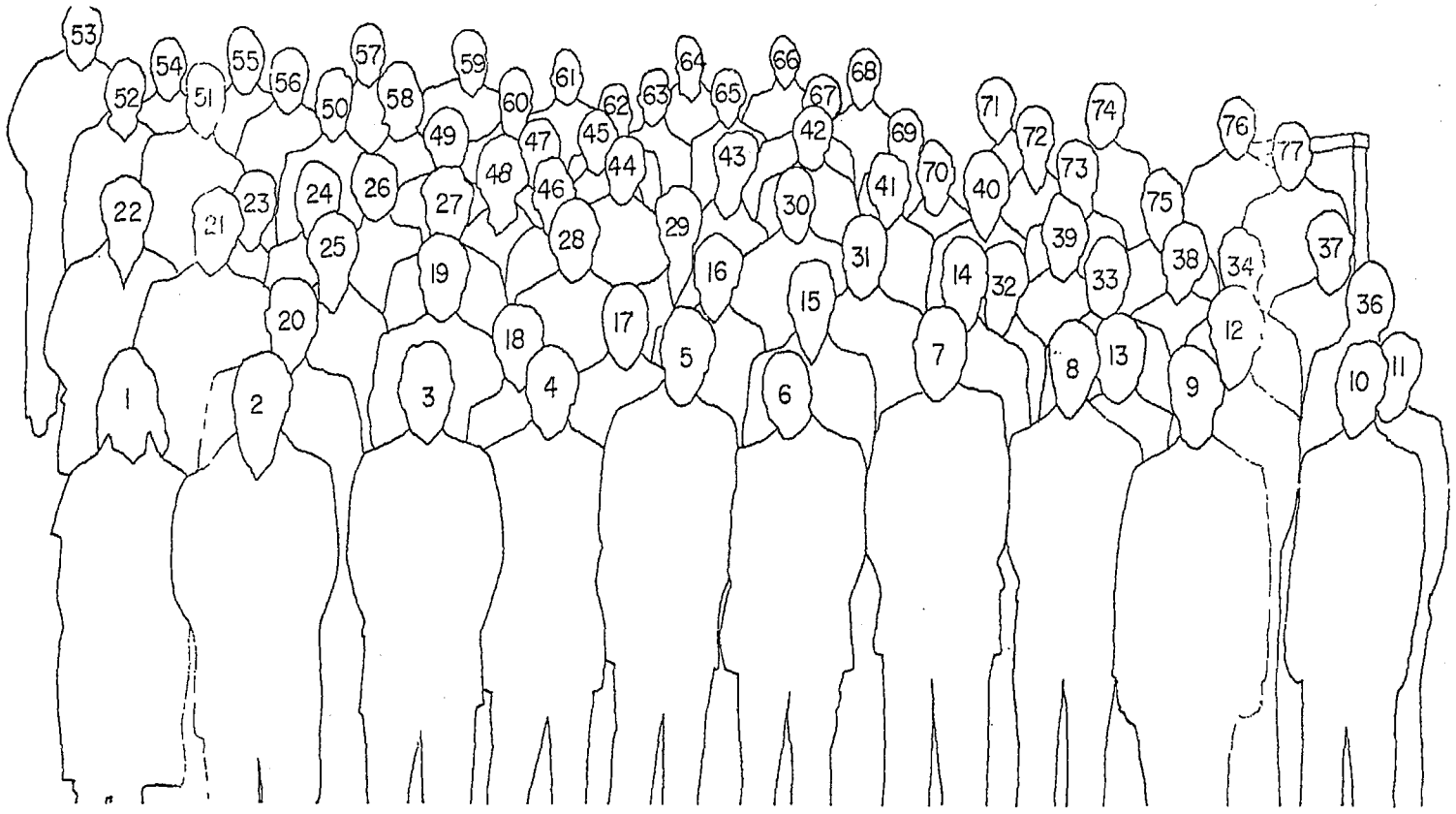

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Quebec	Daniel Jacoby, Montreal
Saskatchewan	Claire Young, Regina
Yukon Territory	Padraig O'Donoghue, Q.C., Whitehorse

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(August 1977)

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August, 1977

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Attorney General of Manitoba: HON. HOWARD PAWLEY, Q.C.
Minister of Justice of New Brunswick: HON. RODMAN E. LOGAN, Q.C.
Minister of Justice of Newfoundland: HON. T. A. HICKMAN, Q.C.
Attorney General of Nova Scotia: HON. L. L. PACE, Q.C.
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IN MEMORIAM

E. RUSSELL HOPKINS, Q.C.
Died 23 November 1976
A Member of this Conference
Representing Canada
From 1946 to 1950

YVES CARON, D.PHIL. (OXON.)
Died 11 June 1977
A Member of this Conference
Representing Quebec
From 1971 to 1977

REQUIESCANT IN PACE

HISTORICAL NOTE

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.
1977 Aug. 18-27, St Andrews

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 and 1977 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 and the 1976 meetings 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 and succeeding years from the Government of Canada.

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

LEGISLATIVE DRAFTING SECTION

MINUTES

The following attended (23):

Alberta: Messrs. Elliott and Larson.
British Columbia: Messrs. Adamson, Kennedy and Roger.
Canada: Mr. Beaupré, Mr. Pepper and Ms. Sisk.
Manitoba: Messrs. Balkaran and Tallin.
New Brunswick: Messrs. Hoyt and Pagano.
Newfoundland: Messrs. Penney and Ryan.
Northwest Territories: Ms. Flieger.
Nova Scotia: Mr. Walker.
Ontario: Messrs. Stone and Tucker.
Prince Edward Island: Mr. Moore.
Saskatchewan: Ms. Charwosky and Ms. Young.
Yukon Territory: Messrs. Cosman and O'Donoghue.

Arrangement of Minutes

For convenience of reference, adjourned items are reported without reference to adjournments and all substantive matters are arranged alphabetically.

Opening

The Section opened with Mr. Stone presiding. Mr. Elliott agreed to take the minutes in the absence of the secretary, Mr. MacNutt.

Hours of Sitting

It was agreed to sit from 9:00 a.m. to 12:30 p.m. and from 1:30 to 4:30 p.m. on the first two days.

Canadian Legislative Drafting Conventions
(1976 Proceedings, page 20)

The report of Messrs. Ryan and Stone (Appendix A, page 85) was distributed by Mr. Ryan but was not discussed.

RESOLVED that consideration of the comments and introduction to the Canadian Legislative Drafting Conventions be put over to the next annual meeting and that the Committee be continued to observe the outcome of any discussion by the Commonwealth Conference of Justice Ministers on the book by Sir William Dales on Legislative Drafting, A New Approach.

RESOLVED that Dr. Driedger be invited to attend the 1978 meeting of this Section in order that Dr. Driedger may,

(a) comment on the proposed Canadian Legislative Drafting Conventions and on the Comments on the Conventions prepared by Messrs Ryan and Stone; and

(b) participate in the discussion of the proposed Conventions and the Comments with members of the Section,

subject to appropriate funding being made available.

Education, Training and Retention of Legislative Draftsmen in Canada (1976 Proceedings, page 21)

Mr. Walker presented the report of the Special Committee composed of Messrs. Hoyt, MacNutt, Ryan and Walker (Appendix B, page 112).

There followed a general discussion with a jurisdiction by jurisdiction account of present drafting strength, the nature of drafting work, involvement with cabinet committees, legislative drafting courses available and recent experience in recruiting draftsmen.

There was a general consensus that,

(a) in recent years, inexperienced recruits for legislative counsel offices have not been hard to find;

(b) experienced draftsmen are very difficult to hire;

(c) although formal courses are of great assistance, the best education and training of legislative draftsmen is "on-the-job", if the office has sufficient staff to provide it.

RESOLVED that the Special Committee be continued to report at the 1978 meeting on further developments respecting the education, training and retention of legislative draftsmen.

Information Reporting Act (1975 Proceedings, page 85; 1976 Proceedings, page 227). Report of the Committee composed of Messrs. Stone, chairman, and Walker

On behalf of the Committee, Messrs. Stone (chairman) and Walker, Mr. Stone presented a fresh draft of a proposed Uniform Information Reporting Act and a discussion followed.

RESOLVED that a special committee composed of Messrs. Stone (chairman), Ryan, Tallin and Walker,

(a) further review the draft in light of the comments and suggestions made by the Section; and

(b) following the review, that the draft be retyped and submitted to the Uniform Law Section at this annual meeting.

Interpretation Act — Section 1 (1976 Proceedings, page 21)

Mr. Roger presented the report of British Columbia and a general discussion followed. It was agreed not to publish the report in the 1977 Proceedings.

RESOLVED that thanks be given to Mr. Roger for bringing forward the problems and difficulties that British Columbia had encountered in enacting the *Uniform Interpretation Act*.

Metric Conversion (1976 Proceedings, page 22)

Mr. Tucker presented the report (Appendix C, page 135) of the Special Committee [Messrs. Ryan and Tucker (chairman)]. The report was considered.

RESOLVED that the Special Committee on Metric Conversion be continued, composed of Messrs. Penny and Tucker (chairman) and that the committee report on the progress of Metric conversion in Canada at the 1978 meeting of the Section.

Mr. Stone then raised two matters that the Executive Director of the Metric Commission of Canada had asked him to put before the meeting:

1. That a Canadian Metric Legislative Drafting Style Manual be prepared.
2. That a person be nominated by the Section to attend meetings of the Procedures Committee of the American National Metric Council.

RESOLVED that the chairman of the Section reply to the Executive Director of the Metric Commission of Canada to the effect that as the manner of expressing metric measurements is not a matter of substantive law, each jurisdiction should follow its own drafting practices.

RESOLVED that Mr. Tucker be nominated for designation by the Metric Commission to attend meetings of the Procedures Committee of the American National Metric Council and that he report thereon at the next annual meeting.

New Business

Resolved that a committee consisting of Messrs. Tallin, chairman, Roger and Ms. Young report to the 1978 meeting of the Section on suggestions for the purposes and procedures for the Section in future years.

The following new items were agreed to be placed on the 1978 agenda of this Section:

1. Discussion on the Computerization of Statutes and Related Matters.
2. The Uniform Interpretation Act — the Experience of Each Jurisdiction.

1978 Meeting

It was agreed that the chairman of the Section would fix the time and place of the next meeting of the Section.

Officers

Mr. Stone was re-elected as chairman and Mr. Elliott elected as secretary for 1977-78.

OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8:00 p.m. on Sunday, 21 August, in the Algonquin Hotel with Mr. MacKay in the chair and Mr. MacTavish as secretary.

Address of Welcome

Mr. Gregory extended a hearty welcome to New Brunswick on behalf of his Premier and Attorney General both of whom, he announced, would be present later in the week.

George Keely

The President then introduced Mr. George Keely of Vail, Colorado, the President of the National Conference of Commissioners on Uniform State Laws, who would be our guest for the week.

Mr. Keely then addressed the members.

Introduction of Members

Those present were introduced by name and jurisdiction.

Minutes of Last Meeting

RESOLVED that the minutes of the 58th annual meeting as printed in the 1976 Proceedings be taken as read and adopted, subject to the correction of an inadvertent error with respect to *Hollington v. Hewthorn.*

Correction re Hollington v. Hewthorn

At the 1976 annual meeting of the Uniform Law Section the draft provisions to amend the *Uniform Evidence Act* as amended at that meeting were adopted and recommended for enactment (see 1976 Proceedings, page 29).

Regrettably, the provisions set out in Appendix O II, page 168 of the 1976 Proceedings, as being those that were adopted and recommended for enactment, are incorrect.

The provisions that were adopted and recommended for enactment are set out in these Proceedings as Appendix D, page 138.

President's Address

Mr. MacKay then addressed the meeting (Appendix E, page 140).

Treasurer's Report

Mr. Stone presented his report in the form of a financial statement of the year ending August 12, 1977 (Appendix F, page 145).

RESOLVED that the Treasurer's Report be received.

Appointment of Auditors

RESOLVED that the Treasurer's Report as received be referred to Mrs. Weiler and Ms. Flieger for audit and that their report be presented to the Closing Plenary Session.

Secretary's Report

Mr. Ryan presented his report for 1976-1977 (Appendix G, page 147).

RESOLVED that the report be received.

Executive Secretary's Report

Mr. MacTavish presented his report (Appendix H, page 150).

RESOLVED that the report be received.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Messrs. Walker, O'Donoghue and Tucker, 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, Mr. Tallin, 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 1977 and succeeding annual Proceedings be referred for approval by the Executive Secretary to the Executive or such members thereof as they may designate.

Further Annual Meetings

The President announced that the invitation of the Province of Newfoundland to host the 1978 annual meeting had been accepted with thanks.

He stated that the matter of the sites for succeeding annual meetings would be developed by the Executive during the week and an announcement made at the Closing Plenary Session on Saturday morning.

New Business

WHEREAS it is the opinion of this meeting that the comments of President MacKay in his opening address with respect to the current and future funding of this Conference should be acted upon at once;

THEREFORE BE IT RESOLVED that a special committee be established, composed of Messrs. Dussault, Gosse, Leal, Stone, Walker (chairman), to examine the fiscal history of the Conference, its present income and expenditures, and its future requirements, and to report with its recommendations at the Closing Plenary Session.

Close

There being no further business the meeting adjourned at noon to meet again in Special Plenary Session on Finances at a place and time to be announced by the President and again in the Closing Plenary Session on Saturday morning at an hour to be announced by the President.

UNIFORM LAW SECTION

MINUTES

The following delegates attended (49):

Alberta: Messrs. Elliott, Hurlburt, Larson and Wilson.
British Columbia: Messrs. Adamson, Kennedy, Lambert, Maddaford, Roger and Vogel.
Canada: Messrs. Gibson, MacKinnon, Muldoon and Pepper.
Manitoba: Messrs. Balkaran, Smethurst and Tallin.
New Brunswick: Messrs. Hoyt, Reid, Smith and Teed.
Newfoundland: Messrs. Mercer, Penney and Ryan.
Northwest Territories: Ms. Flieger.
Nova Scotia: Messrs. Caldwell and Walker.
Ontario: Messrs. Chester, Fram, Leal, Mendes da Costa, Perkins, Stone, Tucker and Mrs. Weiler.
Prince Edward Island: Messrs. Carver and Moore.
Quebec: Boulet, Colas, Jacoby and Rioux.
Saskatchewan: Messrs. Gosse, Hodges, Jackson, Ketcheson, Meldrum and Ms. Young.
Yukon Territory: Cosman and O'Donoghue.

Sessions:

The Section held ten sessions, two each day from Monday to Friday.

Distinguished Visitors

The Section was honoured by the participation of George Keely, President, National Conference of Commissioners on Uniform State Laws, and of the Honourable Rodman E. Logan, Q.C., Minister of Justice of New Brunswick.

Arrangement of Minutes

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 occurred and the subjects discussed are arranged alphabetically.

Opening

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

Hours of Sitting

RESOLVED that the Section sit from 9:00 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 require.

Agenda

The revised agenda of 1 August 1977 was considered and the order of business for the week agreed upon.

Children Born Outside Marriage (1976 Proceedings, page 28)

Although the British Columbia, Nova Scotia and Ontario reports were ready, it was decided to print them in this year's *Proceedings* but to postpone consideration of them until the 1978 annual meeting. (See Appendix I-I, II, III, pages 152, 163, 175.)

Class Actions

The report of British Columbia (Appendix J, page 208) was presented by Mr. Lambert. After consideration of the report, the following resolution was adopted.

RESOLVED that a committee be established composed of one or more representatives of British Columbia, Ontario and Quebec to be named by the Executive to monitor current studies and legislation and generally to watch developments in the field and to report to the 1978 annual meeting.

The Executive announced later that the Committee would consist of Mr. Lambert for British Columbia, as chairman, Mr. Mendes da Costa or his designate and Mr. Chester for Ontario, and Prof. Hubert Reid and Mr. Jacoby for Quebec.

Company Law (1976 Proceedings, page 28)

The annual report of Messrs. Rioux, Ryan and Walker (Appendix K, page 214) was presented by Mr. Ryan.

RESOLVED that the report be received with thanks and printed in the *Proceedings*.

Contributory Negligence and Tortfeasors (1976 Proceedings, page 28)

At the request of Alberta this subject was put over until the 1978 annual meeting.

Enactment of and Amendments to Uniform Acts

Mr. Tallin presented his annual report (Appendix L, page 241).

RESOLVED that the report be received with thanks and printed in the *Proceedings*.

Extra-Provincial Custody Orders Enforcement
(1976 Proceedings, page 30)

Mr. Adamson presented the British Columbia report.

After discussion, the following resolutions were adopted:

RESOLVED that this matter be referred to Ontario for study and, if considered advisable, the preparation of amendments to the Uniform Act.

RESOLVED that the British Columbia report be kept on file but, because of its tentative nature, it not be printed in the *Proceedings*.

International Conventions on Private International Law
(1976 Proceedings, page 30)

Mr. Leal presented the report of the Committee (Appendix M, page 244).

RESOLVED that the report and its four schedules be printed *in toto* in the *Proceedings*.

RESOLVED that the Committee be reconstituted by the Executive along the lines set out on page 110 of the *1973 Proceedings* and on page 149 of the *1974 Proceedings* and that it report to the 1978 annual meeting.

Interpretation (1976 Proceedings, page 31)

Mr. Ryan presented the report of Newfoundland and Nova Scotia (Appendix N, page 325).

RESOLVED that the report be adopted and that no changes be made in sections 9, 10, 11 of the *Uniform Interpretation Act*.

RESOLVED that the report be printed in the *Proceedings*.

Judicial Decisions Affecting Uniform Acts

Mr. Moore presented the annual report of Prince Edward Island (Appendix O, page 336).

RESOLVED that the report be received with thanks and printed in the *Proceedings*.

Law Reform Agencies

The representatives of a number of law reform agencies who were present made short statements outlining the current work programmes of their respective agencies.

Limitation of Actions (1976 Proceedings, page 31)

Mr. Fram opened the discussion of this subject explaining Ontario's position. He was followed by Mr. Hurlburt and a lengthy discussion of the Alberta report (*1976 Proceedings*, page 184) took place.

RESOLVED that the Alberta Commissioners be requested to prepare a draft of a *Uniform Limitation of Actions Act* in accordance with the

1976 Alberta report and the decisions taken at this meeting for consideration at the 1978 annual meeting.

Powers of Attorney (1976 Proceedings, page 32)

Mr. Fram presented a draft Uniform Act and some explanatory and supplementary material. The draft Act was considered after which the following resolutions were passed:

RESOLVED that the draft Uniform Act be referred back to Ontario to incorporate therein the decisions taken at this meeting and that the draft as revised be circulated as soon as possible and considered at the 1978 annual meeting.

RESOLVED that because of the tentative nature of the draft and other materials discussed at this meeting, they not be printed in the *Proceedings*.

Prejudgment Interest (1976 Proceedings, page 32)

It was agreed that consideration of the British Columbia Report (*1976 Proceedings*, page 216) be deferred and put on the agenda of the 1978 annual meeting.

Protection of Privacy: Collection and Storage of Personalized Data Bank Information (1976 Proceedings, page 32)

Mr. Gibson presented his report (Appendix P, page 344).

RESOLVED that Mr. Gibson's report be adopted.

RESOLVED that the item be dropped from the agenda.

Protection of Privacy: Credit and Personal Data Reporting (1976 Proceedings, page 32)

Mr. Stone presented the report of Nova Scotia and Ontario (Appendix Q, page 348).

After discussion of the draft *Uniform Information Reporting Act* (Schedule 2 of the report), the following resolution was passed:

RESOLVED that the *Uniform Information Reporting Act* as set out as Schedule 2 to the Ontario report be adopted, subject to the right of any two jurisdictions to disapprove it on or before 30 November 1977.

No disapprovals were received. Therefore the Act as set out on pages 350-361 of these *Proceedings* is adopted and recommended for enactment in that form.

Protection of Privacy: Evidence (1976 Proceedings, page 33)

Professor Grosman's memorandum, which dealt with the Admissibility of Illegally Obtained Evidence (Appendix R, page 362) was, in his absence, tabled.

RESOLVED that as this matter falls directly within the scope of the terms of reference of the Task Force on the Law of Evidence, it be referred to that body.

Protection of Privacy: Tort
(1976 Proceedings, page 33)

Mr. Walker presented the report of the Nova Scotia delegates (Appendix S, page 380).

RESOLVED that the report be adopted.

The draft Uniform Act attached to the Nova Scotia report was referred to Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland for study and report with recommendations to the 1978 annual meeting.

Support Obligations
(1976 Proceedings, page 33)

The discussion of this subject was led in turn by Mr. Leal, Mr. Hurlburt and Professor Payne.

Professor Payne's research paper which he prepared for the Conference was presented. It was entitled "Maintenance Rights and Obligations: A Search for Uniformity" and dated March 1977. Because of the expense involved this 199 page document is not reproduced in these *Proceedings*. A number of copies are on hand in the Office of the Executive Secretary; these may be borrowed at any time upon request.

At the conclusion of the long discussion, the following resolutions were passed:

RESOLVED that Ontario prepare a draft of a *Uniform Support Obligations Act* based upon the policy decisions taken at this meeting for consideration at the 1978 annual meeting.

RESOLVED that the draft of the *Uniform Reciprocal Enforcement of Maintenance Orders Act* presented by British Columbia and considered clause by clause at this meeting be referred back to British Columbia to prepare a fresh draft incorporating the policy and other decisions taken at this meeting and that the fresh draft be referred to the Legislative Drafting Section to vet the drafting and then report back to this Section during the 1978 annual meeting.

RESOLVED that as the draft of the *Uniform Reciprocal Enforcement of Maintenance Orders Act* considered clause by clause at this meeting was tentative and similar to the draft set out in the *1976 Proceedings* at page 253, it not be printed in these *Proceedings*.

Uniform Law Section: Purposes and Procedures
(1976 Proceedings, page 34)

(Appendix T, page 382).

Mr. Stone presented the Report of the Special Committee.

After discussion, the following resolutions were passed:

RESOLVED that the report be adopted and that the Rules of Procedure set out as Schedule 1 thereto be adopted, subject to the right of any jurisdiction to recommend amendments at the 1978 annual meeting.

RESOLVED that the Special Committee be reconstituted by the Executive to continue its study of ways to better facilitate the work of this Section and to report thereon to the 1978 annual meeting.

Vital Statistics
(1976 Proceedings, page 34)

At the request of British Columbia this item was put over for consideration at the 1978 annual meeting.

New Business

1. *Evidence: Taking of, Abroad.* The request of Manitoba to add to the agenda the matter of legislation to enable provinces to adopt The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was approved and Manitoba's memorandum (except the Convention) was directed to be printed in the *Proceedings* for consideration at the 1978 annual meeting (Appendix U, page 392).

2. *International Administration of Estates of Deceased Persons.* The request of Manitoba to add to the agenda the matter of legislation to enable provinces to ratify or accede to The Hague Convention concerning the International Administration of Estates of Deceased Persons was approved and Manitoba's memorandum (except the Convention) was directed to be printed in the *Proceedings* for consideration at the 1978 annual meeting (Appendix V, page 393).

3. *Matrimonial Property.* The request of Manitoba to add to the agenda the matter of Legislation Providing Uniform Conflicts of Laws Rules for Interprovincial Problems Arising in Connection with Matrimonial Property was approved and Manitoba's memorandum was directed to be printed in the *Proceedings* for consideration at the 1978 annual meeting (Appendix W, page 394).

4. *Wills: Impact of Divorce on Existing Wills.* Nova Scotia and Ontario were jointly charged with the preparation of a report for consideration at the 1978 meeting on the policy issues involved in this subject.

Officers: 1978 Annual Meeting

It was agreed that Mr. Smethurst would be chairman and Mr. MacTavish secretary of the Section for the 1978 annual meeting.

Close of Meeting

A unanimous vote of thanks was tendered to Mr. Leal for his handling of the onerous duties of chairman throughout the week.

The meeting of the Section was concluded.

CRIMINAL LAW SECTION

MINUTES

The following attended (32):

Alberta: Messrs. Paisley and Roslak.
British Columbia: Messrs. Branson, McDiarmid, Simson, Tweedale and Vogel.
Canada: Messrs. Chasse, Ewaschuk, Landry, Marin, Skelly and Tassé.
Manitoba: Messrs. Goodman, Myers and Pilkey.
New Brunswick: Messrs. Gregory and Strange.
Newfoundland: Mr. Kelly.
Nova Scotia: Messrs. Coles and Gale.
Ontario: Messrs. Arthur, Burton, Landon, McLeod and Morton.
Prince Edward Island: Mr. MacKay.
Quebec: Messrs. Dussault, Girouard and Tremblay.
Saskatchewan: Messrs. Kujawa and Perras.

Opening

Mr. Coles presided and Gail Davis acted as secretary.

Rules of Procedure

The report of Messrs. Chasse and MacKay was presented and discussed.

The second sentence of paragraph 5 read:

"The Agenda Materials shall be sent to the delegates by the Secretary by July 31st."

This was amended to read:

"The Agenda Materials shall be sent to the delegates by the Secretary as they are received and not later than July 15th."

The first sentence of paragraph 6 read:

"Items submitted after June 15th shall be added to the Supplementary Agenda."

This was amended to read:

"Items submitted after June 1st shall be added to the Supplementary Agenda."

RESOLVED that the Rules of Procedure as recommended in the report as amended be adopted.

The Rules of Procedure as amended and adopted read as follows:

UNIFORM LAW CONFERENCE OF CANADA
CRIMINAL LAW SECTION

RULES OF PROCEDURE

1. Each delegation shall designate a Senior Delegate for the purpose of these Rules.

2. Any of the Senior Delegates may have an item added to the Agenda.

3. A Senior Delegate who has had an item added to the Agenda is responsible for having the Agenda Materials for that item prepared for distribution by the Secretary and shall make a presentation of the item during the deliberations of the Criminal Law Section.

The Agenda Materials for each Agenda Item or Supplementary Agenda Item shall consist of:

(1) an Agenda Item Summary Page,

(2) Briefing Notes,

(3) such supporting materials as the Senior Delegate sponsoring the Agenda Item wishes to add.

The Agenda Item Summary Page shall consist of a single fourteen inch page which shall contain the following headings or comparable substitutes:

Subject
Submitted by
Brief summary
Factors for
Factors against
Recommendation

The briefing notes shall not exceed two fourteen-inch pages.

5. Agenda Materials must be sent to the Secretary by June 1st for inclusion in the Agenda Materials to be distributed by the Secretary. The Agenda Materials shall be sent to the delegates by the Secretary as they are received and not later than July 15th.

6. Items submitted after June 1st shall be added to the Supplementary Agenda. Supplementary Agenda Items shall be considered during the deliberations of the Criminal Law Section only if permission is granted by means of a majority vote of the delegates. Such vote is to be conducted during the deliberations of the Section. The

Secretary may request the Senior Delegate who adds an item to the Supplementary Agenda to be responsible for distributing his Agenda Materials to the delegates.

7. The resolving of Agenda Items and Supplementary Agenda Items shall be carried out by the passing of Recommendations which shall be determined by majority vote of the delegates. Such majority vote shall determine if a recommendation is 'carried' or 'defeated'. Or the delegates may by majority vote decide that an item is to be 'carried over' for another year or that no action is to be taken in regard to an item.

8. The Senior Delegate for the Federal Department of Justice shall report to the Delegates each year as to action taken upon, or the reaction to, the recommendations passed during the deliberations of the Section the previous year.

The Agenda and Supplementary Agenda

Motions were carried adopting the Agenda and Supplementary Agenda Items for discussion.

Additional Items

A motion was carried that the matters of "Pre-trial Procedures" and "Alternatives to Sentencing" be added to the end of the Supplementary Agenda.

Discussion Materials

Mr. Myers complemented Mr. Ewaschuk on the quality of the materials prepared. That sentiment was supported by all the delegates.

Order of Agenda Items

A motion was carried that items for discussion be taken in the order set out in Agenda and Supplementary Agenda books of discussion materials.

Item 1

Fees and Allowances C.C. s. 772

The Commissioners recommended that the tariffs in the Schedule to *Criminal Code* s. 772 be repealed and that the provisions in Part XXIV of the *Criminal Code* dealing with costs should also be repealed.

Comments:

— Quebec indicated they would abstain from voting.
— Mr. Pilkey wished it noted that if the Federal Government found the above recommendation to be impracticable, that he would recommend that s. 772 be amended to allow a discretion in the province to provide for such costs as they saw fit.

Item 2 —

Change of Venue — C.C. s. 527

The Commissioners were asked to consider whether a judge should be able to initiate his own motion for a change of venue.

The Commissioners recommended that the present law on change of venue be maintained.

Item 3 —

Drinking and Driving — C.C. s. 236.1

The Commissioners were asked to consider whether an amendment is necessary to make clear that prior driving offences are interchangeable beyond a first or second offence so as to constitute a present offence as a third or more offence.

It was agreed by the Commissioners that no such amendment was necessary and therefore it was recommended that no action be taken on this matter.

Comment:

— Mr. Kujawa wished it noted that he would recommend that the Federal Department of Justice should consider whether there is a need for an amendment to s. 236.1 to prevent potential misinterpretation.

Item 4 —

First Degree Murder — C.C. s. 214 — Proof of prior murder conviction before the jury.

The Commissoners recommended that the law be amended to require that the indictment need not specify first degree murder but that the previous conviction be considered as part of the sentencing process.

Item 5 —

Preferring Indictments in Non-Grand-Jury Provinces — Offences Revealed by the Evidence — C.C. ss. 504, 507.

The Commissioners recommended that the *Criminal Code* be amended to allow for the adding of counts to an indictment reflecting offences revealed by the evidence taken at the preliminary inquiry, without the need for the consent of the Attorney General or judge of the court. The purpose of this recommendation was to overcome the Ontario decision in *R.* v. *Dwyer et al.* (1977) 38 C.R.N.S. 129, holding that such counts may not be added without such consent.

Item 6 —

Appeals — C.C. s. 605 — Staying, quashing, refusing jurisdiction on indictments in Superior Courts.

The Commissioners recommended that the *Criminal Code* be amended to provide the Crown an appeal where a Superior Court Judge quashes or stays an indictment or refuses to exercise jurisdiction on an indictment.

Item 7 —

Special Election Offences — C.C. s. 429.1

The Commissioners recommended that *Criminal Code* s. 429.1 be repealed.

Item 8 —

Judicial Interim Release — Successive Applications for Release —C.C. s. 457.8(2)

The Commissioners recommended that applications for judicial interim release (bail) be allowed during show cause hearings, at the end of the preliminary inquiry, during trial, and otherwise only pursuant to the review provisions of *Criminal Code* ss. 457.5, 457.6 and 608.1, except where the Crown and the accused consent pursuant to s. 457.8(2)(c).

Item 9 —

Government Frauds — C.C. ss. 110, 112

The Commissioners recommended that *Criminal Code* s. 110(1)(f) be amended to cover situations where tenders have been invited as well as made and to apply to cases where one party offers consideration to another not to make a tender as well as to the withdrawal of tenders.

The Commissioners recommended that the maximum punishment in *Criminal Code* s. 112 be raised to five years imprisonment.

The Commissioners recommended that the Federal Government study which offences in *Criminal Code* s. 110 should be made applicable to municipal officials.

Item 10 —

Evidence — Privilege of Psychiatrists re Admissions of Accused

The Commissioners were asked to consider Resolution 12 passed at the 1976 Annual Meeting, as proposed by the Criminal Justice Section:

> "BE IT RESOLVED that the *Canada Evidence Act* be amended so that exchange of information between a psychiatrist interviewing a person, for the purpose of assessing that person's fitness to stand trial, or for the purpose of establishing a defence to an offence with which that person is charged, shall, if the interview is taking place as the result of an application for it by the person's counsel, be as privileged as if the exchange were taking place between the person and his lawyer."

The Commissioners recommended that the present law on privilege be maintained.

Item 11 —

Sentences — Increasing on Appeal

The views of the Commissioners were sought with regard to the fact that an appellate court has the power to increase sentence on an appeal against sentence by an accused without a cross-appeal against sentence by the Crown.

The Commissioners recommended that the present law on appeals be maintained.

George C. Keely, President, N.C.C.U.S.L.

On Tuesday morning all delegates welcomed Mr. George C. Keely, President of the National Conference of Commissioners on Uniform State Laws, to sit in on the deliberations of the Criminal Law Section.

Supplementary Agenda

Item 1 —

Driving Prohibition — C.C. s. 238

The Commissioners were asked to consider whether the power judges formerly had to prohibit from driving upon conviction for

Criminal Code driving offences should be reinstated in the *Criminal Code.*

It was agreed that this item be carried over to next year's Agenda for consideration at that time.

Item 2 —

Causing Death by Dangerous Driving

The Commissioners were asked to consider whether an offence of "dangerous driving causing death" should be created because of the uncertainty that judges face as to taking the fact of death into account where the accused is convicted of the included offence of dangerous driving on a charge of criminal negligence causing death.

The Commissioners recommended that the present law be maintained.

Item 3 —

(a) *Preferring indictments re offences revealed by the evidence — C.C. ss. 496(2), 504, 507.*

(This item was dealt with under Item 5 of the Agenda).

(b) *Requirement that accused sign Appearance Notice— C.C. s. 453.3(4)*

A motion that there be provision for obtaining the signature of the accused but that there be an additional provision establishing no invalidation of service if the accused's signature was not obtained, was defeated.

The Commissioners recommended that the words, "appearance notice", be taken out of *Criminal Code* s .453.3(4) and that the words, "or officer in charge" be removed from s. 453.3(5).

(m) *Compelling answers of prospective witnesses during police investigation of commercial crime*

The Commissioners were asked to consider whether the police should be given a power to compel witnesses to give evidence on oath during investigations of commercial crime, comparable to a similar power in the *Alberta Securities Act.*

It was agreed that this matter should be carried over to next year's Agenda and that it be left to Alberta for further study.

(o) *Magistrates' Courts; Power to Punish for Contempt — C.C. s. 472*

The Commissioners recommended that Magistrates be given power to punish for contempt of court, in the face of the court, and not in the face of the court as well, subject however to use of the procedure in *Criminal Code* s. 472 as a condition precedent to the use of such power to punish for contempt, in the case of a witness who comes within the situations set out in s. 472.

(l) *Causing a Disturbance in Private Place — C.C. s. 171*

The Commissioners were asked to consider whether the offence of causing a disturbance should be extended to private places because such disturbances carry over to public places or other private places.

It was agreed that this item be carried forward to next year's Agenda, along with the question whether causing a disturbance should remain in the *Criminal Code,* with the understanding that Alberta will be responsible for speaking to this item at next year's Agenda.

(c) *Certificate evidence on charges of driving while disqualified — C.C. s. 238*

It was recommended by the Commissioners that s. 238 of the *Criminal Code* be amended

(a) to provide a rebuttable presumption of valid service where proof of service of notice of intention to tender a certificate of disqualification and of the certificate is made by affidavit

— and —

(b) to create a rebuttable presumption as to the identity of the accused when the certificate contains certain particulars such as name.

(f) *Forgery and Corroboration — C.C. ss. 324, 326*

The Commissioners recommended that the corroboration requirement in the *Criminal Code* in relation to the offence of forgery should be removed.

(i) *False Pretences and Services — C.C. ss. 320, 322*

The Commissioners were asked to consider whether the offence of false pretences should be expanded to include services obtained as a result of a false pretence.

The Commissioners recommended that the present law on false pretences be maintained.

It was then decided not to consider further the matters in Item 3.

Item 4 —

Recommencing summary conviction proceedings that have been stayed — C.C. s. 732.1

The Commissioners were asked to consider whether *Criminal Code* s. 732.1(2) should be amended or repealed so as to allow stayed summary conviction proceedings to be recommenced at a time beyond the six months' limitation period set out in s. 721(2).

The Commissioners recommended that there be no amendment of the *Criminal Code* in regard to stays of proceedings in summary conviction matters.

The delegates set out the practice as to the use of the withdrawal and of the stay of proceedings in their jurisdictions.

B.C. — Charges are withdrawn only with the consent of the court, however prosecutors are given a general authority by the Attorney General to use the stay of proceedings.

Alta. — The Crown prosecutor is considered as having an unfettered right to withdraw; indictments are stayed but informations are withdrawn; the Crown prosecutor is given a general authority to stay proceedings.

Sask. — Informations are withdrawn, indictments are stayed; Crown prosecutor is given a general power to stay proceedings.

Man. — The withdrawal is not used; the stay of proceedings is used; Crown prosecutors are given a general power to stay proceedings.

Ontario — Prior to plea charges are withdrawn as of right in the Crown; indictments are stayed subject to referral to the Attorney General in sensitive cases; after plea there is a mixed use of withdrawals and stays in regard to informations depending upon whether the judge refuses to allow a withdrawal.

Quebec — The withdrawal is used; stays of proceedings are referred to the Attorney General.

N.B. — The right to withdraw a charge is taken as being unrestricted; consideration of each stay of proceedings is handled by the Attorney General.

N.S. — It is considered that the Crown has a right to withdraw before plea; and stays of proceedings are considered by the Attorney General's Department.

Nfld. — The Crown has an inherent right to withdraw a charge and the Attorney General is very reluctant to use the stay of proceedings.

P.E.I. — The withdrawal is exercised as a right in the Crown prosecutor; the Crown prosecutor is given a general authority to stay proceedings but sensitive cases must be referred to the Attorney General.

It was then agreed to move to Supplementary Agenda Items 9 and 14.

Item 9 —

Stay of Proceedings Before an Indictment is Found — C.C. s. 508

The Commissioners were asked to consider whether *Criminal Code* s. 508 should be amended to allow for a stay of proceedings in regard to an indictable matter, after an information has been laid but prior to an indictment having been found.

It was recommended that there be an amendment to cure the problem so that there will be a power available to the Attorney General or his agent to stay a proceeding at any time up to judgment.

Mr. L. P. Landry of the Federal Department of Justice then addressed the group as to the operation of Bill C-51.

Item 14 —

Hospital Orders

The Commissioners were asked to consider the possibility of enacting a power to allow a judge to order that any part of a convicted person's sentence be served in a psychiatric facility. It was indicated that the Federal Department of Justice is presently organizing a study of the concept of hospital orders which will include the cost implications, the taking of an inventory of psychiatric facilities and the receptiveness of the forensic psychiatric community. Regular consultation with the provincial Departments will be maintained.

The Commissioners recommended that the matter of hospital orders be deferred to next year's Agenda to await the results of the Federal study.

Item 5 —

Unexecuted Warrants of Committal

The Commissioners were asked to consider whether an amendment is necessary in regard to old unexecuted warrants of committal because there is doubt that a judge has power to vacate a warrant of committal, the opinion being he is *functus officio* on the passing of sentence.

The Commissioners recommended that there be an amendment that allows a warrant of committal to be vacated by a judge or a court after two years, and such vacating would operate as a remission of the fine.

Item 6 —

Admissibility Against Co-conspirators of Unlawfully Intercepted Private Communications

The Commissioners were asked to consider whether an amendment to *Criminal Code* s. 178.16 was necessary to counteract the decision in *R. v. L. et al. (No. 1)* [1976] 6 W.W.R. 128, wherein it was held that an unlawfully intercepted private communication, (which therefore would be inadmissible against the originator and intended recipient), would be admissible against co-conspirators, (pursuant to the rule recognized in *Koufis* v. *The King* (1941) 76 C.C.C. 161 (S.C.C.), as to admissibility of statements made in furtherance of the conspiracy), because such decision may run contrary to the intended purpose of the *Invasion of Privacy Act*, S.C. 1973-74, C. 50.

A motion that s. 178.16 be amended to exclude such evidence against the co-conspirators was defeated.

However, it was agreed that if a provincial Court of Appeal upheld the reasoning in *R. v. Li et al. (No. 1)*, [1976] 6 W.W.R. 128 (B.C. Co.Ct.), this matter would be added to next year's Agenda to be spoken to by the Federal Department of Justice.

Item 7 —

The Corroboration Requirement re Sexual Offences

The Commissioners were asked to consider whether the Common Law warning as to the danger of convicting for sexual offences in the absence of corroboration should be abrogated with respect to former s. 142 offences.

The Commissioners recommended that because of the decisions of the British Columbia Court of Appeal in *R.* v. *Firkins* (released July 12, 1977) and of the Ontario Court of Appeal in *R.* v. *Camp* (released June 29, 1977), on the non-applicability of the corroboration requirement in sexual cases under the former *Criminal Code* s. 142, consideration be given to the present law of corroboration as it applies to other offences in the *Criminal Code* such as the other sexual offences, and also to the corroboration rules in relation to the evidence of accomplices and children.

Item 8 —

Admissions of Fact at all Proceedings — C.C. s. 582

The Commissioners were asked to consider the fact that *Criminal Code* s. 582 only allows for admissions of fact during the trial of an indictable offence and not during a preliminary inquiry.

The Commissioners recommended that *Criminal Code* s. 582 be amended to apply to all proceedings under the *Criminal Code* and also amended so as to include a power in the Crown to make admissions of fact on consent.

Item 10 —

Extradition of Foreign Offenders; Jurisdiction of Prosecution — C.C. ss. 6, 423

The Commissioners were asked to consider the fact that although *Criminal Code* ss. 6 and 423 deem certain offences be committed within Canada, they do not specify where in Canada the accused is to be prosecuted if he is extradited.

The Commissioners recommended that there be an amendment to the *Criminal Code* to the effect that an information in regard to such extraterritorial matters may be laid anywhere in Canada.

Item 11 —

Attempted Theft and Fraud as Indictable Offences — C.C. ss. 421, 483

The Commissioners were asked to consider that attempt theft and attempt fraud were left as indictable offences even though theft and fraud etc. under $200. were re-defined in 1976 as Crown-option or hybrid offences and also to consider that only attempt theft and attempt fraud etc. *under $200.* are within the Magistrate's absolute jurisdiction as to indictable offences, the problem being that it is often difficult to specify the amount involved at the 'attempt' stage of theft and fraud.

The Commissioners recommended that the Crown be given the option to proceed by way of summary conviction with respect to attempt charges and that all attempt thefts and attempt frauds where the proceedings are by indictment, regardless of amount, be within the absolute jurisdiction of the Magistrate.

Item 13 —

Mixing Indictable and Summary Conviction Offences

The Commissioners were asked to consider whether an amendment was necessary because judicial authority precludes the mixing of indictable and summary conviction offences in the same information.

The matter was discussed but no action was deemed necessary.

Item 15 —

Amending Summary Conviction Informations — C.C. ss. 732, 529

The Commissioners were asked to consider whether a summary conviction court should be empowered to amend an information containing a defect apparent on its face where the motion to quash is taken before plea.

The Commissioners recommended that the equivalent of the present *Criminal Code* ss. 730 and 732(4) be added to s. 529 and that ss. 730 and 732 be removed and that s. 529 be added to s. 729.

Item 16 —

Kidnapping — Forcible Confinement — Hostage Taking — C.C. s. 247(1), (2)

The Commissioners were asked to consider whether an amendment is necessary to *Criminal Code* s. 247 in regard to hostage-taking situations because kidnapping requires, 'seizing' and 'carrying away' and possibly 'secreting' which are absent in hostage-taking incidents, and because the maximum penalty of five years for forcible confinement may be too low for such situations, particularly in regard to prison guards.

The Commissioners recommended that the maximum punishment for forcible confinement in C.C. s. 247(2) be increased to ten years from five years.

A motion to amend the above recommendation by adding to it a clause recommending that forcible confinement should be re-cast as

a Crown-option or hybrid offence with a ten year maximum for conviction on indictment and the six months maximum for summary conviction, was defeated.

Also, a motion to recommend that forcible confinement and kidnapping should be combined into one offence so that 'secreting' and 'taking away' would not be essential elements and also to abolish the separate offence of forcible confinement, was defeated.

Item 17 —

Waiver of Jurisdiction — Preliminary Inquiry

The Commissioners were asked whether an amendment expressly giving power to waive jurisdiction over a preliminary inquiry to another magistrate although there was a strong opinion that jurisdiction could be so waived now, there being nothing in the *Criminal Code* giving exclusive jurisdiction to a justice who has received a plea and election. On the other hand the Supreme Court of Canada held recently in *Doyle* that lower courts do not have an inherent power to make rules of procedure where the *Criminal Code* is silent.

The Commissioners recommended that *Criminal Code* ss. 464 or 465 be amended to incorporate the concurrent jurisdiction concept in s. 725(4) so that before the commencement of the taking of evidence at a preliminary inquiry, any justice having jurisdiction to conduct a preliminary inquiry into the offences alleged, has jurisdiction for the purposes of the hearing and adjudication as to committal or discharge.

Item 18 —

(a) *Community Service Orders*

Discussion on this item was deferred until the discussion on "sentencing alternatives" on Friday morning.

(b) *Search Warrants — Application for Return of Things Seized — C.C. s. 446(3)*

This matter was deferred for discussion for one day to await the report of some of the delegates who volunteered to formulate a possible amendment to *Criminal Code* s. 446. Five problems in regard to s. 446 were outlined by Mr. Morton of the Ontario delegation, the main one being the use of the application procedure in s. 446(3) to discover the details of a police investigation at a stage

prior to the laying of a charge by examining police witnesses under oath during the course of such hearing.

(c) *Driver Disqualified: the Words "or prohibited" — C.C. s. 238(3)*

The Commissioners were asked to consider recommending the removal of the words "or prohibited" from the offence of driving while disqualified in *Criminal Code* s. 238(3), in light of the fact that the offence of driving while prohibited has been abolished. Such amendment was proposed so as to prevent police officers from mistakenly attempting to lay a charge which no longer exists and to prevent confusion as to what charge is available in regard to violations of court ordered driving prohibitions which are still in existence.

The Commissioners recommended that *Criminal Code* s. 238(3) be amended to remove the words "or prohibited".

The delegates from all the provinces were invited to advise the Federal Department of Justice if there was a need created by their provincial motor vehicles legislation to preserve the words "or prohibited" in s. 238(3).

(d) *First Degree Murder — C.C. s. 214(6)*

This item was previously dealt with as Item 4 of the Agenda.

(e) *Secret Commissions — C.C. s. 383(3)*

The Commissioners were asked to consider recommending that the maximum penalty in *Criminal Code* s. 383(3) be increased because the fraud offence might not fit these secret commission situations.

The Commissioners recommended that the maximum penalty in s. 383(3) be raised from 2 to 5 years.

(f) *Evidence: Compellability of Spouses: Canada Evidence Act s. 4*

The Commissioners recommended that the present non-compellability of a spouse as a witness for the prosecution should be abolished so as to make the spouse a compellable witness, subject to a discretion in the judge to exempt the spouse from testifying for the prosecution if the spouse or accused satisfies the court that it is preferable that the spouse not be compelled to testify, however in regard to an offence involving an assault upon a child where bodily harm is involved, the spouse would be absolutely compellable.

(b) *Search Warrants: Application for Return of Things Seized — C.C. s. 446(3)*

After receiving the report of a committee of some of the delegates the Commissioners recommended the following amendments be made to *Criminal Code* s. 446:

1. *Change* "justice" to "judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction" in s. 446(3).

2. Add new 446(3A).

No application pursuant to subsection (3) shall be heard prior to the expiration of the period of detention ordered pursuant to s. 446(1) and any extension thereof pursuant to s. 446 (1)(a) unless

(i) the applicant satisfies the court that having regard to the nature of the articles seized and the circumstances of the applicant, the applicant will suffer undue hardship if the application is not heard earlier, or

(ii) the Attorney General or his agent consents.

The Commissioners also recommended an amendment adding a provision comparable to s. 11(2) of the *Combines Investigation Act* to either the *Criminal Code* or the *Canada Evidence Act*.

(g) *Restitution: Summary Conviction Proceedings — C.C. s. 653*

The Commissioners recommended that ss. 653, 654 and 655 be extended to apply to summary conviction proceedings.

(h) *Corroboration in Sexual Offences — former C.C. s. 142*

This Item was previously dealt with as Item 7 of the Supplementary Agenda.

(i) *Preferring Indictments — C.C. ss. 504, 507*

This Item was previously dealt with as Item 5 of the Agenda.

(j) *Plea of Guilty to an Included or "Other Offence" — C.C. s. 534(4)*

The Commissioners were asked to consider whether an amendment was necessary because of the interpretation given the words, "other offence", in *Criminal Code* s. 534(4) by the Ontario Court of Appeal in *R.* v. *Hogarth* 31 C.C.C. (2d) 232 and *R.* v. *Filliault* (released Nov. 26, 1976).

The Commissioners recommended that *Criminal Code* s. 534(4) be amended to add the words, "whether or not he has been charged with that offence".

(k) *Soliciting: Male Prostitutes — C.C. s. 195.1*

The Commissioners recommended that *Criminal Code* s. 195.1 be amended to cover male as well as female prostitutes.

(l) *Absconding During Preliminary Inquiry or Trial — C.C. ss. 471.1, 431.1*

The Commissioners were asked to consider whether an amendment should be recommended to deal with the decision in *R. v. Moosuk* (1976, Sask. Q.B.), wherein it was held that the mere fact that the accused is not present does not mean that he has absconded.

The Commissioners recommended that ss. 471.1 and 431.1 be amended to clarify the meaning of the word "absconds" so as to cover situations where the accused does not appear or remain in attendance.

(m) *Threatening — Face to Face or Oral Threats — C.C. s. 331(1)*

The Commissioners were asked to consider the need to recommend an amendment to *Criminal Code* s. 331(1) having regard to the decision in *R. v. Nabis* (1974) 18 C.C.C. (2d) 144 (S.C.C.), wherein it was held that the words, "or otherwise", do not include a threat made face to face because Parliament has limited that offence to threats conveyed in the specifically enumerated ways set out in that section.

The Commissioners recommended the deletion of the words in *Criminal Code* s. 331(1), "by letter, telegram, telephone, cable, radio, or otherwise", and the addition of the words, "by any means whatsoever", after the words, "to receive a threat".

Item 19 —

Bail at Trial — C.C. s. 457(5.1)(a) and (c)

The Commissioners were asked to consider whether to recommend an amendment to *Criminal Code* s. 457(5.1) so as to extend this reverse onus 'show cause' provision to situations where the accused is charged with the offence cited in paragraphs (a) and (c) during trial as well as those where he is charged while awaiting trial.

The Commissioners recommended that s. 457(5.1)(a) and (c) be amended by replacing the words, "awaiting trial", by the words, "under a recognizance or undertaking."

Item 20 —

Weapons in Motor Vehicle — C.C. ss. 90, 94

Because of the difficulty of proving knowledge in the accused of the presence of a prohibited or restricted weapon in a motor vehicle, the Commissioners were asked to consider whether to recommend appropriate amendments to *Criminal Code* ss. 90 and 94.

The Commissioners recommended that *Criminal Code* s. 90 be amended so as to read as follows:

> 90. Every one who is an occupant of a motor vehicle in which there is a prohibited weapon in circumstances where he might reasonably be expected to be aware of the presence of the weapon, is, in the absence of proof of lack of knowledge of the presence of the weapon, the proof of which lies on him, guilty . . . etc.

It was left to the drafters to put the same meaning into *Criminal Code* s. 94.

Item 21 —

Bribery of Judicial Officers — Consent to Prosecute — C.C. s. 108(2)

The Commissioners were asked to consider a recommendation that the consent to prosecute under *Criminal Code* s. 108(2) be amended to allow a provincial Attorney General to give such consent.

The Commissioners recommended the deletion of the words, "of Canada", in s. 108(2) after the words, "without the consent in writing of the Attorney General."

Item 22 —

Protection of the Canada Evidence Act: Contradictory Evidence — s. 5(2)

The Commissioners were asked to consider the need to recommend an amendment to deal with the situation where a witness testifies, under the protection of s. 5 of the *Canada Evidence Act*, that he committed the crime which is being tried and later denies guilt when he is charged.

The Commissioners recommended the addition of the words, "or for an offence under *Criminal Code* s. 124(1)", to s. 5(2) of the *Canada Evidence Act.*

Item 23 —

Extortion — Increased Maximum Penalty — C.C. s. 305

The Commissioners were asked to consider a recommendation that the maximum penalty for extortion be increased to life imprisonment for the reason that, "extortion is the modern way of committing robbery."

The Commissioners recommended that the maximum penalty in *Criminal Code* s. 305 be increased to life imprisonment.

Item 24 —

Threats as an Assault — C.C. s. 244

This Item was withdrawn as having been dealt with under Item 18(m).

Item 25 —

Previous Inconsistent Statements and Lawfully Intercepted Private Communications — Canada Evidence Act s. 9(2)

The Commissioners were asked to consider the use of lawfully intercepted private communications as prior inconsistent statements in regard to cross-examination under ss. 9(2) and 10(1) of the *Canada Evidence Act.*

The Commissioners recommended the addition to s. 9(2) of the *Canada Evidence Act*, of the words, "or lawfully intercepted", after the words, "or reduced to writing."

Item 26 —

Stated Cases — C.C. s. 762

The Commissioners recommended that in regard to pure questions of law, an appeal be provided in summary conviction matters to a Superior Court of Criminal Jurisdiction, and in Quebec, to the Court of Appeal, as a matter of right on a transcript or agreed statement of facts, agreed to by counsel, and that the existing appeal by way of stated case be abolished.

Federal-Provincial Uniform Legislation Project on Evidence

A joint meeting of the Uniform Law and Criminal Law Sections was held on Friday August 26th to hear a proposal put forward by Dr. Gosse, Q.C., Deputy Attorney General of Saskatchewan, in regard to co-operation between the Federal Government and the Provinces bringing about uniformity in the statute law in regard to the rules of evidence. After presentation Dr. Gosse moved the following resolution which was discussed and then carried on an unanimous vote in favour of the resolution:

"RESOLVED that the matter of the Federal-Provincial Uniform Legislation Project on Evidence be referred to Canada and Ontario, and such other jurisdictions as indicate an intention to participate to the Executive Secretary of the Conference on or before September 24, 1977, with the following directions:

1. The delegates of the jurisdictions to which the matter has been referred (hereinafter referred to as "the participating jurisdictions"), jointly appoint a Task Force with the following functions:
   (a) to recommend to the participating jurisdictions the terms of reference for the project,
   (b) to recommend to the participating jurisdictions the order in which particular subjects in the law of evidence should be dealt with by the Task Force, and to recommend a time-table for dealing with those subjects,
   (c) to proceed with the drafting of the uniform legislation, and
   (d) to prepare a draft report for presentation to the 1978 annual meeting of the Conference by the participating jurisdictions, and similar draft reports at subsequent annual meetings until the project is completed.
2. Before the Task Force proceed with the drafting of uniform legislation, the participating jurisdictions approve or, if desirable, alter the terms of reference, the priorities and time-table recommended by the Task Force.
3. The Task Force to consist of one person appointed by each of the participating jurisdictions and such other members as the participating jurisdictions agree upon.
4. Insofar as it is possible, the Task Force be a full-time working body, with power to consult such persons or groups as the participating jurisdictions authorize.
5. That the Task Force report progress regularly to the participating jurisdictions for their approval.
6. The Task Force keep the non-participating jurisdictions informed of the development of their proposals and invite comment at appropriate stages in their development.
7. (a) To the extent that all participating jurisdictions approve the provisions of the annual draft report of the Task Force, the draft report shall constitute a joint report of the participating jurisdictions.
   (b) To the extent, if any, that a participating jurisdiction does not approve the report of the Task Force, the participating jurisdiction may make as an addendum to the joint report, a separate report, giving its reason for disapproval, or if a participating

jurisdiction wishes to make independent comments without necessarily indicating disapproval, such comments also may be made in an addendum.

It is understood that no jurisdiction would be obliged to forestall amending the rules of evidence within its legislative jurisdiction until the work of the Task Force on any of the rules is completed or approved."

The Criminal Law Section then returned to its separate deliberations.

Nominating Committee

There was then a motion to have the Chairman appoint a nominating committee to bring in a slate of recommended officers for election by the Criminal Law Section. Motion carried.

Alternative to Sentencing

Mr. Stuart MacKinnon of the Federal Department of Justice led a discussion as to Community Service Orders, Fine Option programs, Restitution, Intermittent Sentences, Fines in lieu of Other Punishment and Discharges. The following Recommendations were carried by majority vote.

Community Service Orders and Supplementary Agenda Item 18(a)

The Commissioners were asked to consider whether the Community Service Order should be enacted as a separate sentence available as a condition of probation.

The Commissioners recommended that the Community Service Order be a part of *Criminal Code* s. 663, and as part of such provisions in regard to Community Service Orders, the following provisions be included:

(a) the offender consents;
(b) the court has been notified that a provincial program exists;
(c) the court has been satisfied that the offender is a suitable person for such program; and
(d) provision can be made under the program for the offender to work.

Intermittent Sentences

The Commissioners recommended that *Criminal Code* s. 663(1)(c) be amended to impose the following condition precedent to granting an intermittent sentence: Where the judge is satisfied on the basis of information received from the provincial authority that there is a designated facility available in order that the order can be enforced.

Fine in Lieu of Other Punishment

The Commissioners were asked to consider whether to recommend that *Criminal Code* s. 646(2) be amended to provide that a fine may be used in lieu of other punishment for those offences punishable with imprisonment for ten years or less (instead of five years) or for the offences of breaking and entering of premises other than a dwelling house (s. 306(1)(e)).

The Commissioners recommended that the present law be maintained.

Discharges

The Commissioners were asked to consider recommending that *Criminal Code* s. 662.1 be amended to authorize discharges for the offence of breaking and entering of premises other than a dwelling house, the reason being that some violations of s. 306(1)(e) are nothing more than petty thefts.

The Commissioners recommended that the present law be maintained.

Supplementary Agenda Item 12 — Breach of Probation — C.C. ss. 666, 663(1)(a)

The Commissioners were asked to consider whether Criminal Code s. 666 (breach of probation) should be repealed with respect to probation when there is no additional punishment imposed with that probation.

The Commissioners recommended that Criminal Code ss. 664(4) and 666 be amended so that they will not apply to a s. 663(1)(a) probation order, and that the same type of provision be made applicable to conditional discharges.

Federal Reaction to Last Year's Recommendations by the Commissioners

In regard to the matter of search warrants executed against lawyers' offices, Roger Tassé, Q.C., Deputy Attorney General of Canada, reported that the matter is under active consideration, however there are problems in regard to this whole area of privilege and in regard to consideration of the Law Reform Commission of Canada's proposals in its *Evidence Code*.

Mr. L.-P. Landry, Assistant Deputy Attorney General, Federal Department of Justice, reported that the Department was acting on all of the recommendations made last year except the recommendations in regard to search warrants on lawyers' offices and regularizing the procedure as to claiming privilege under s. 5 of the *Canada Evidence Act*.

Pre-Trial Disclosure and Discovery Practices

Some of the provincial jurisdictions indicated how questions of disclosure and discovery were handled and reported on new projects:

B.C. — a disclosure project was begun on July 4th; it is too early to judge success; many experienced defence counsel have been on holiday, therefore it is difficult to evaluate response; however preliminary indications are that counsel feel they were getting material prior to the project anyway and that the project is not giving them anything they were not getting previously; therefore it is unlikely that counsel will be making admissions as a result of disclosure so as to save time in court and therefore they can be expected to put the Crown to strict proof with the same frequency as previously.

Alberta — have just concluded a 6 months' project in Edmonton involving initially such offences as break and enter, possession, theft, fraud and false pretences, all over $200, assault, bodily harm, and uttering; mechanism:—after arraignment for preliminary inquiry the accused was given the option of participating in Disclosure Court, then adjournment for two weeks for counsel to meet, then back to Disclosure Court to find out if the preliminary inquiry could be reduced or if there would be a guilty plea or if the issues could be reduced in number; disappointed in results; the program was explained to the defence Bar; one month after start the program was increased to cover all electable offences to get more participation; there was a second notice to the Bar to obtain more interest; it is concluded that there has been poor participation because (1) historically there has been full disclosure (2) there is not much of a case backlog and therefore there is no urgency; however did learn the usefulness of having a Duty Crown Counsel on call for disclosure with the defence so as to make arrangements for guilty pleas etc.; very few preliminary inquiries were waived, a few were reduced in size, no time saving, some fewer witnesses called; concluded that the disclosure project has been given a fair trial;

don't see any need for a formalized or legislated disclosure mechanism in the system; if there is to be legislation then each province should be given the option to opt into the system.

Saskatchewan — no pre-trial project; however over the past 15 years prosecutors have given full disclosure in an informal system which has worked well; it hasn't reduced preliminary inquiries; experience indicates that if the goodwill between counsel exists we need no formalized system now but without that attitude no such code of procedure will remedy the situation; the main thing is the attitude of counsel; prosecutors should not stop disclosure because defence counsel does not "play ball".

Manitoba — haven't had much experience with projects; the Chief Provincial Judge has created a "pre-trial court" to settle issues; it is too early to tell results as there has been insufficient participation from which to judge since project has been in operation only one month; prosecutors have provided particulars for a long time.

Ontario — 2 programs — that of the Chief Justice of the High Court and that of the Attorney General; in regard to the first, the reports are good; it operates after the committal for trial by narrowing the issues; in regard to the A.G.'s program it is too early to tell; it operates as set out in the "Disclosure Guidelines" document (see the Schedule (page 60)); it is what counsel have been doing for years tied to an attempt to shorten the preliminary inquiry; disclosure is of the Crown's case and not of the police investigation; there is no right to discovery, disclosure is given i.e. there is no examination of witness; there is no role for the judiciary i.e. it is conducted strictly between counsel.

Quebec — a system in Montreal which could be labelled "Communication in lieu of Preliminary Inquiry" is used — disclosure sufficient to give defence counsel all they need to prepare their defence; the committal for trial on consent under Criminal Code s. 476 is used instead of the preliminary inquiry; counsel receive a summary of the statements of witnesses but not the names and addresses of witnesses; the system works very well in Montreal; many witnesses and dollars have been saved; the witness statements that are given are those that the Crown would call at a preliminary inquiry including the statement of the accused; opposed to the legislating of a disclosure or discovery system.

Nova Scotia — There is no project in operation; counsel seem to be satisfied with what they have been getting from the present *ad hoc* system.

Minutes

The delegates expressed their appreciation of the work done by Gail Davis in preparing the minutes of this year's Conference.

New Officers

The Nominating Committee of Messrs. Goodman and McDiarmid recommended and moved the election of Mr. Paisley as Chairman and Mr. Chasse as Secretary. Motions carried.

Appreciations

The delegates expressed their appreciation of the work done by Mr. Gordon Coles as chairman of this year's deliberations in the Criminal Law Section and of that of the Secretary in providing the minutes in finished form daily.

Close of Meeting

The new chairman took the chair and announced that next year's meeting would be held in St. John's, Newfoundland. The meeting was then closed.

SCHEDULE

(See page 58)

DISCLOSURE GUIDELINES

The Guidelines are in affect only in relation to prosecutions to which the following Criminal Code sections apply:

47(1)(2)(*a*)(*b*), 75, 76.1, 76.2, 78(*a*), 79(2)(*a*), 141, 146(1), 203, 218(1), 219, 221(1), 222, 223, 230, 232, 247(1), 251(1), 303 and 304.

These sections constitute all offences under the Criminal Code where the maximum penalty is life imprisonment except the offence of breaking and entering a dwelling house.

The Guidelines are:

1. Where Crown Counsel is of the belief that a plea of not guilty may be entered, he will make himself available to defence counsel by proposing in writing to defence counsel, prior to the date on which the matter is set to proceed, that defence counsel meet with him prior to the date on which the matter is set to proceed to review the evidence that the Crown expects is available and to discuss the nature and scope of the written disclosure that can be available in the case in the manner described in paragraphs 2(b) and (c) below.
2. (a) When such a meeting takes place, Crown Counsel, after reviewing the evidence that the Crown expects is available and discussing the nature and scope of the written disclosure that can be available in the manner described in paragraphs 2(b) and (c) below, will ask defence counsel to undertake to the Crown what the accused's election is going to be.

   (b) If the accused proposes to elect trial in Provincial Court, Crown Counsel will agree to provide him with the written disclosure described in paragraph 3 below within a reasonable period of time prior to trial.

   (c) If the accused proposes to elect trial in County or Supreme Court, or if the offence is in the absolute jurisdiction of the Supreme Court, Crown Counsel will endeavour to reach agreement with defence counsel as to the number of witnesses that must be called at the preliminary hearing. If agreement is reached on the limitation of witnesses, Crown Counsel will, in order to

ensure committal for trial, ask defence counsel to undertake that he will, after the calling of the agreed number of witnesses at the preliminary hearing, either:

(i) consent to a committal for trial pursuant to s. 476 of the Criminal Code, or

(ii) admit, for the purpose of the preliminary hearing, such facts as are disclosed in the written disclosure as, in the opinion of Crown Counsel, are necessary for the purpose of the preliminary hearing, or

(iii) agree to the filing of the synopsis of the expected evidence of such witnesses who have not testified at the preliminary hearing as, in the opinion of Crown Counsel, are necessary for the purpose of the preliminary hearing.

If such an undertaking is made by defence counsel, Crown Counsel will undertake to provide the written disclosure described in paragraphs 3(a) to (e) below after the agreed number of witnesses are called at the preliminary hearing.

(d) If

(i) defence counsel refuses to participate in a disclosure discussion after being afforded a reasonable opportunity to do so, or

(ii) a disclosure discussion is held but defence counsel refuses to give an undertaking regarding his client's election,

Crown Counsel shall apply, pursuant to paragraph 6 below, for exemption from adherence to these guidelines.

(e) If a disclosure discussion is held but:

(i) agreement is not reached on the total number of witnesses to be called at the preliminary hearing, or

(ii) defence counsel refuses to give an undertaking pursuant to paragraph 2(c) to ensure a committal for trial,

Crown Counsel will conduct a preliminary hearing in the ordinary way and will, after committal for trial, provide written disclosure pursuant to paragraphs 3(b), (c) and (d) below;

(f) If defence counsel participates in a disclosure discussion and agreement is reached as to the total number of witnesses to be called at the preliminary hearing and as to the manner of ensuring committal for trial pursuant to paragraph 2(c) above, but defence counsel subsequently, after the calling of the agreed number of Crown witnesses at the preliminary hearing, seeks to be relieved of his undertaking pursuant to paragraph 2(c) above, Crown Counsel will continue the preliminary hearing in the ordinary way, after an adjournment if necessary, and will, after committal for trial, provide written disclosure pursuant to paragraphs 3(b), (c) and (d).

(g) In a case involving more than one accused, where either paragraph 2(d)(i) or 2(d)(ii) or 2(e)(i) or 2(e)(ii) or 2(f) becomes applicable to one or more of those accused, Crown Counsel shall comply with these guidelines with respect to the remaining accused unless Crown Counsel applies for and receives an exemption from adherence to these guidelines pursuant to paragraph 6 below with respect to those remaining accused. If no such application for exemption is made or granted, Crown Counsel is entitled to seek an undertaking from counsel for the remaining accused, that any information provided to them by the Crown pursuant to these guidelines not be passed on by them to the other accused or counsel for the other accused.

3. Written disclosure should include the following:

(a) A synopsis of the evidence of each witness who is not examined at the preliminary hearing by either the Crown or the defence and whom the Crown proposes to call at trial as part of the Crown's case-in-chief.

No such synopsis need be provided in respect of any witness whom the Crown proposes to call at trial in reply only.

No synopsis that is provided need necessarily refer to any evidence of the witness that the Crown does not propose to elicit as part of the Crown's case-in-chief because such evidence would be relevant in reply only.

Each synopsis will be prepared on a form which will bear the following caution:

"This synopsis is provided to defence counsel as part of a programme designed to give to the accused disclosure of the Crown's case. It may not have been possible for Crown Counsel to interview this witness prior to the delivery of this document to defence counsel and, accordingly the synopsis may be incomplete. Should other material matters come to the attention of Crown Counsel, he will provide to defence counsel a synopsis of such additional matters orally or in writing if feasible prior to the calling of this witness at trial. The Crown will consider such additional matters as part of the original synopsis."

(b) A copy of any written statement and a report of any oral statement made by the accused to a person in authority which the Crown intends to tender at trial as part of the Crown's case-in-chief, together with any other written statement or report of any oral statement or part thereof made by the accused to a person in authority which, on its face, relates to the proof or disproof of the elements of the offence, within the custody or control of the prosecution.

(c) A copy of any prior criminal record of the accused in the custody or control of the prosecution.

(d) Copies of photographs and documentary evidence capable of reproduction which the Crown proposes adducing at trial and copies of all expert's reports which on their face relate to the proof or disproof of the elements of the offence and which are in the custody or control of the prosecution.

(e) The names and addresses of all witnesses whom the Crown, at the time of the delivery of items (a) to (d) above, proposes to call as part of the Crown's case-in-chief at trial, unless, in the opinion of Crown Counsel, there is reason to anticipate that the witness may be intimidated or otherwise improperly influenced.

4. Crown Counsel will further agree to provide such further material within categories (a) to (e) in paragraph 3 above as may come into the possession of the Crown prior to the calling, at the trial, of the witness to whom the material relates except in cases to which paragraphs 2(e) and (f)

above apply in which event the further material referred to therein shall be limited to categories (b), (c) and (d) in paragraph 3.

5. Crown Counsel shall in his discretion determine how these guidelines can best be followed in a case where an accused is unrepresented.

6. The Attorney General has directed that these guidelines be followed in every prosecution involving the section numbers of the Criminal Code referred to above unless Crown Counsel in charge of the prosecution is exempted from adherence to the guidelines or any part thereof by the Regional Crown Attorney.

SPECIAL PLENARY SESSION

(FRIDAY, AUGUST 26TH, 1977)

MINUTES

A Special Plenary Session convened at 9.00 a.m. with the President in the chair and the Executive Secretary acting as secretary.

Uniform Evidence Act (Federal and Provincial)

Dr. Gosse presented a memorandum on the desirability of uniformity in federal and provincial evidence legislation (Appendix X, page 395) and led a general discussion of the proposal.

At the conclusion of the discussion, the following resolution was passed unanimously:

> RESOLVED that the matter of the Federal-Provincial Uniform Legislation Project on Evidence be referred to Canada and Ontario, and such other jurisdictions as indicate an intention to participate to the Executive Secretary of the Conference on or before 24 September 1977, with the following directions:
>
> 1. The delegates of the jurisictions to which the matter has been referred (herein referred to as "the participating jurisdictions"), jointly appoint a Task Force with the following functions:
>
>   (a) to recommend to the participating jurisdictions the terms of reference for the project;
>
>   (b) to recommend to the participating jurisdictions the order in which particular subjects in the law of evidence should be dealt with by the Task Force, and to recommend a time-table for dealing with those subjects;
>
>   (c) to proceed with the drafting of the uniform legislation; and
>
>   (d) to prepare a draft report for presentation to the 1978 annual meeting of the Conference by the participating jurisdictions, and similar draft reports at subsequent annual meetings until the project is completed.
>
> 2. Before the Task Force proceeds with the drafting of uniform legislation, the participating jurisdictions approve or, if desirable, alter the terms of refrence, the priorities and time-table recommended by the Task Force.
>
> 3. The Task Force to consist of one person appointed by each of the participating jurisdictions and such other members as the participating jurisdictions agree upon.
>
> 4. Insofar as it is possible, the Task Force to be a full-time working body, with power to consult such persons or groups as the participating jurisdictions authorize.
>
> 5. The Task Force to report progress regularly to the participating jurisdictions for their approval.
>
> 6. The Task Force to keep the non-participating jurisdictions informed of the development of their proposals and invite comment at appropriate stages in their development.

7. (a) To the extent that all participating jurisdictions approve the annual draft report of the Task Force, the draft report shall constitute a joint report of the participating jurisdictions.

(b) To the extent, if any, that a participating jurisdiction does not approve the report of the Task Force, the participating jurisdiction may make as an addendum to the joint report, a separate report, giving its reason for disapproval, or if a participating jurisdiction wishes to make independent comments without necessarily indicating disapproval, such comments also may be made in an addendum.

It is understood that no jurisdiction is obliged to forestall amending the rules of evidence within its legislative jurisdiction until the work of the Task Force on any of the rules is completed or approved.

Close of Session

There being no further business, the Chairman closed the session.

CLOSING PLENARY SESSION

(SATURDAY, AUGUST 27TH, 1977)

MINUTES

The Closing Plenary Session opened with the President, Mr. MacKay, 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.

Uniform Law Section

The chairman, Mr. Leal, reported upon the activities of the Section.

Criminal Law Section

The chairman, Mr. Coles, reported upon the work of the Section.

Report of the Executive

The President made a report of the work of the Executive at its two meetings held during the week. He said:

"The Executive met twice during the Conference with all members present on both occasions except the Honorary President, Glen Acorn.

"In addition to the usual administrative responsibilities, a number of other matters were considered and they are very briefly outlined below.

"The suggestion by the Canadian Law Information Council that the new Consolidation of Uniform Acts be sold rather than distributed free of charge received a great deal of attention and it was finally decided that the Treasurer and Executive Secretary should discuss the matter with officials of CLIC and endeavour to resolve the problem to the satisfaction of all concerned.

"Acting upon the Resolution adopted at the Closing Plenary Session last year—and there being no confirmation of any legal disability forthcoming — the Executive, by ananimous vote, directed the Treasurer to apply the accumulated interest of the Research Fund to the General Account.

"The suggestion of Glen Acorn that a representative of this Conference in each province report annually on the work of the Conference to the provincial mid-winter meetings of the Canadian Bar was considered at length and it was decided that the incoming

president would write all local secretaries and discuss the matter further with them.

"As a recognition of respect and appreciation the Executive decided that future printed Proceedings of the Conference should contain a special block insert listing the names of all those members of the Conference who had died during the previous year.

"At the Closing Plenary Session in 1976 the Executive was authorized and directed by resolution to fix the place of the conference meetings for 1977 and 1978 and we are happy to report that, on your behalf, we have accepted the kind invitation of the Newfoundland Commissioners to hold our 1978 Conference in the beautiful Province of Newfoundland.

"In addition, the Conference last year resolved that the location of its annual meetings should be fixed two or three years in advance and your Executive therefore recommends that the following invitations be accepted:

For 1979: the invitation of the Province of Saskatchewan;
For 1980: the invitation of the Province of Prince Edward Island.

"Your Executive also acknowledges with thanks invitations from the Yukon, the Province of Manitoba, and Canada, and looks forward with great anticipation to future Conference meetings in those areas.

"In view of the very excellent accommodation provided for our meetings and personal comfort by our New Brunswick hosts, and recognizing our ever-enlarging membership, your Executive gave some thought to the preparation of a Conference Handbook outlining minimum criteria for Conference accommodations to assist host provinces in planning future conferences, and it was left to the incoming Executive to prepare such a guide.

"The fees of your Executive Secretary were examined by a committee of the Executive and resolved with mutual satisfaction."

The Executive has named Messrs. Leal and Smethurst to represent this Conference on the Council of the Canadian Bar Association.

Auditors' Report

Mr. Young on behalf of Mrs. Weiler and herself presented the auditors' report (Appendix Y, page 401).

RESOLVED that the report of the Auditors be adopted.

Treasurer's Report

RESOLVED that the Treasurer's report be adopted.

Annual Meetings

RESOLVED that the 1979 annual meeting be held in Saskatchewan and that of 1980 in Prince Edward Island.

Conference Finances

The report of the Special Committee on Finances was presented by Mr. Walker (Appendix Z, page 403).

RESOLVED that the report of the Special Committee be adopted.

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 New Brunswick and to the New Brunswick delegates to the Conference for the excellent arrangements, the beautiful setting and the fine accommodation provided for the meetings of the three sections of the Conference and its plenary sessions, for the reception tendered to the members of the Conference and their families on Sunday evening, the lobster cookout at Katy's Cove on Tuesday evening, the dinner provided to the delegates and their families on Thursday evening, and the many other activities throughout the time of the Conference, including the plays by the Chocolate Cove Players and the boat cruise on the Bay of Fundy.
2. To Premier Hatfield for attending the dinner on Thursday evening and addressing the delegates and their spouses.
3. To the Honourable Rodman E. Logan, Q C., Minister of Justice for New Brunswick, for attending the Conference and attending at our deliberations.
4. To Robert Scammell and Peter Pagano of the New Brunswick Department of Justice, for their efficient and gracious attention to the many business and social details of the Conference, including the arrangements for transportation between St. John and the Algonquin Hotel, the administrative support provided to the sections of the Conference, and the interesting and varied activities provided for the children of delegates to the Conference.
5. To Heather Strange and Carol Gregory for their gracious assistance in the social program for the delegates' spouses, including the antique show on Tuesday, the fashion show on Wednesday, and the luncheon on Thursday.
6. To the National Conference of Commissioners on Uniform State Laws for the friendship and courtesy extended to our President, Wendall MacKay, during his attendance at the 1977 Conference, and also for enabling us to receive the President of their Conference, George Keely, his charming wife Jane and children, Kendall and Edward, at our Conference.

7. To the Barristers Society of New Brunswick for the reception tendered to the delegates and spouses on Thursday.
8. To Arthur Stone for providing the added pleasure of hearing the music of the bagpipes on Tuesday evening.
9. To the staff of the Algonquin Hotel, and in particular the social convener, Nora Ellis, for the helpful and friendly service provided to the delegates and their families.

AND BE IT FURTHER 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-Ninth Annual Meeting of the Conference.

Nominating Committee's Report

Mr. Tallin, for the Committee, submitted the following nominations for 1977-78:

Honorary President	Wendall MacKay, Charlottetown
President	H. Allan Leal, Q.C., LL.D., Toronto
First Vice-President	Robert G. Smethurst, Q.C., Winnipeg
Second Vice-President	Gordon F. Coles, Q.C., Halifax
Treasurer	Claire Young, Regina
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

In closing the Conference, the President spoke as follows:

"Before welcoming my successor to the chair, may I express my personal thanks to the Algonquin Hotel and its staff for playing such a large part in making our meeting a success. Thanks also to the Province of New Brunswick, and particularly to Bob Scammell, for an organizational job exceedingly well done. And to the Executive, and Lach MacTavish, for their assistance and support during the year and during the Conference week. May I also thank the Province of Ontario for its continuing generosity in providing facilities and services for our Executive Secretary at no cost to the Conference.

"May I leave you with these thoughts:

"I think it is time for our Conference to grow up and provide its administrative officers with the necessary tools to do their jobs. The problems of presiding over a conference of this size without adequate assistance are extremely frustrating. There are no secretarial services available and here we are today giving our reports in long-

hand. These reports should be typed and distributed to the membership before the Closing Plenary Session so that they can be examined and questioned. Moreover, there is a great deal of running around to be done and minor details to be attended to and surely your president could more usefully employ his time in other matters. Your Executive Secretary cannot do these things because he acts as secretary to the Uniform Law Section and is tied up all week.

"I think, also, that it is time for the Conference to examine its membership. There is the danger that we will lose touch with reality if the Conference becomes dominated by civil servants and academics. We simply must find ways and means for getting more practising lawyers involved in our discussions, even if it means the Conference paying their expenses for attending our annual meeting.

"And it is time for the Conference to examine its structure. The present divisions of responsibility and methods of procedure were designed some years ago and while they may have been adequate at the time, I question whether they are adequate today.

"In the dying moments of my presidency I say to you that self-examination is good for the soul and it is a process which should be carried out by the Conference every five or ten years.

"On the civil law side particularly—fifty delegates this year—I see a wealth of brains, enormous potential, not being fully utilized and I do not think it is sensible for the Conference to be denied such tremendous resources. I challenge the incoming executive and the delegates of the Uniform Law Section to redesign the structure of the Uniform Law Section in order to utilize in greater measure the wealth of its intellectual powers.

"And finally, it is time for the Conference to consider the use of Canada's other official language. It may not always be possible or easy for us to provide simultaneous translation but I think where it is possible that we should make whatever effort or expenditure is required for it.

"May I congratulate you on the selection of your new officers. You have chosen wisely and well and as I hand over the office of president to Allan Leal I have the inner assurance that the Conference is in safe and competent hands.

"Allan Leal is a man of culture, of great learning, and is enormously competent. He is a man of very strong convictions and what

is even more important, he has the courage to express them, and my friends, that is terribly important in this vacillating world of ours.

"May I also say just a word about your retiring Treasurer, Arthur Stone. He is a man of many talents, extremely competent and with qualities of leadership which this Conference should not lose sight of.

"Thank you for the great honour of being your president. Not only did you honour me but my province as well, for it was the first time in the Conference's 58 year history that you selected a president from Prince Edward Island.

"Last year, when I took office, I thought it strange that there was no induction ceremony of any kind—simply a hand from the audience and a handshake from the outgoing president. There was no symbolic passing of leadership, no installation, and I felt that after 58 years—now 59—that there should be greater recognition of this important event.

"And so, ladies and gentlemen, as an expression of gratitude I wish to present to this Conference this gavel to serve the president while he is in office and which will symbolize the passing of power when he vacates his office to his successor.

"Allan Leal, friend and colleague, there is no one to whom I would rather pass this gavel than you. May it serve you well. Good luck and God bless you."

Mr. MacKay's remarks were followed by a standing ovation, after which Mr. Leal expressed the thanks of all present to Mr. MacKay for a job well done and closed the meeting.

STATEMENT TO THE CANADIAN BAR ASSOCIATION

by

Wendall MacKay

The Conference held its 59th annual meeting in the beautiful and historic old town of St. Andrew's, New Brunswick, founded by the Loyalists in 1783.

The Honourable Richard Hatfield, Premier of the Province of New Brunswick, the Honourable Rodman G. Logan, Q.C., Minister of Justice for New Brunswick, and Mr. George C. Keely, President of the National Conference of Commissioners on Uniform State Laws, were distinguished and welcome guests of the Conference.

The Legislative Drafting Section, with twenty-two delegates in attendance, convened on Thursday, August 18th, 1977, and continued until Saturday, August 20th. Among a large number of items discussed, delegates compared the so-called Continental System of drafting to that presently in effect in North America.

Arthur N. Stone, Q.C., of Toronto chaired the meeting and was re-elected chairman of the section for the following year.

The Uniform Law Section, under the chairmanship of H. Allan Leal, Q.C., LL.D., of Toronto, commenced its sessions on Monday, August 22nd, and continued for five full days of deliberations. All ten provinces, the two territories, and Canada were represented by a total of fifty delegates, establishing an attendance record.

Matters of uniform legislation considered by this section included Limitations of Actions, Support Obligations, Reciprocal Enforcement of Maintenance Orders, and Protection of Privacy. In addition, a committee was established to monitor developments in the handling of class actions—a rapidly developing area of law—and to prepare, if possible, model uniform provisions for consideration by the Section in 1978.

New procedures for the handling of the increasingly heavy agenda were adopted by the section.

R. G. Smethhurst, Q.C., of Winnipeg, was elected chairman of the Uniform Law Section for the following year.

Thirty-two delegates, representing all the provinces and Canada, attended the Criminal Law Section, which also met for five full days under the chairmanship of Gordon Coles, Q.C., of Halifax.

An extensive agenda of forty-six items, primarily concerning the criminal law, was dealt with, including *inter alia*, frauds upon the government, driving offences, contempt, length of stays, wiretap evidence, sexual offences, extradition, kidnapping and forcible seizure, and extortion.

In addition, delegates discussed at length proposals for pre-trial discovery in criminal matters and alternatives to sentencing, both subjects of very current interest in criminal law reform.

Ross W. Paisley, Q.C., of Edmonton, was elected chairman of the Criminal Law Section, and Kenneth L. Chasse of Ottawa, secretary for the following year.

On Friday, August 26th, the Uniform Law and Criminal Sections met in joint session to discuss proposed procedures for the development of uniform rules of evidence in Canada. Following discussion of the proposal, a resolution was unanimously adopted by the Conference enabling Canada, Ontario and such other provinces as wish to participate to establish a full-time Task Force for the purposes of developing and carrying out the project.

We are pleased to report that generous financial assistance from the Canadian Law Information Council has enabled the Conference to publish its second Consolidation of Uniform Acts.

The new Consolidation is now in the hands of the printers and is expected to be available by late this year. Copies of this valuable publication may be obtained by contacting the Executive Secretary.

Full details of all matters discussed by the Conference will be published in the Annual Proceedings and will be available, upon request, by writing to the Executive Secretary.

The new officers of the Conference are as follows:

Honorary President	Wendall MacKay, Charlottetown
President	H. Allan Leal, Q.C., LL.D., Toronto
First Vice-President	Robert G. Smethurst, Q.C., Winnipeg
Second Vice-President	Gordon F. Coles, Q.C., Halifax
Treasurer	Claire Young, Regina
Secretary	James W. Ryan, Q.C., St. John's

The Conference will meet at St. John's, Newfoundland in 1978.

OFFICERS AND MEMBERS OF THE CONFERENCE 1918-1977

HONORARY PRESIDENTS

Sir James Aikins, K.C., Winnipeg	1923-1928
Hon. John F. Lymburn, K.C., Edmonton	1932-1933
Hon. W. J. Major, K.C., Winnipeg	1933-1937
Hon. J. B. McNair, K.C., Fredericton	1937-1939
Hon. G. D. Conant, K.C., Toronto	1939-1941
Hon. F. F. Mathers, K.C., Halifax	1941-1943

Since 1943 the Immediate Past President has been elected Honorary President.

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. (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
Wendall MacKay, Charlottetown	1976-1977
H. Allan Leal, Q.C., LL.D., Toronto	1977-

VICE-PRESIDENTS

Mariner G. Teed, K.C., Saint John	1918-1923
Isaac Pitblado, K.C., Winnipeg	1923-1924
Robert W. Shannon, K.C., Regina	1925-1931
Douglas J. Thom, K.C., Regina	1931-1935
I. A. Humphries, K.C., Toronto	1935-1937
R. Murray Fisher, K.C., Winnipeg	1937-1938
W. E. Bentley, K.C., Charlottetown	1938-1939
R. Andrew Smith, K.C., Edmonton	1939-1941
Peter J. Hughes, K.C., Fredericton	1941-1943
W. P. Fillmore, K.C., Winnipeg	1943-1944
W. P. J. O'Meara, K.C., Ottawa	1944-1946
Eric H. Silk, K.C., Toronto	1946-1947
J. Pitcairn Hogg, K.C., Victoria	1947-1948
Antoine Rivard, K.C., Quebec	1948-1949
J. B. Milner, LL.B., Halifax	1948-1949
Horace A. Porter, K.C., Saint John	1949-1950
Clifford R. Magone, K.C., Toronto	1949-1951
G. S. Rutherford, Q.C., Winnipeg	1950-1952
L. R. MacTavish, Q.C., Toronto	1951-1953
H. J. Wilson, Q.C., Edmonton	1952-1954
E. C. Leslie, Q.C., Regina	1953-1955, 1957
Horace Read, Q.C., LL.D., Halifax	1956
John A. Y. MacDonald, Q.C., Halifax	1955-1959
J. F. H. Teed, Q.C., Saint John	1958-1960
E. A. Driedger, Q.C., Ottawa	1960-1961
O. M. M. Kay, Q.C., Winnipeg	1961-1962
W. F. Bowker, Q.C., Edmonton	1962-1963
H. P. Carter, Q.C., St. Johns	1963-1964
H. F. Muggah, Q.C., Halifax	1964-1965

OFFICERS

Gilbert D. Kennedy, Q.C., Victoria	1965-1966
Roy S. Meldrum, Q.C., Regina	1967-1968
Emile Colas, C.R., Montreal	1968-1969
J. E. Hart, Q.C., Edmonton	1968-1969
P. R. Brissenden, Q.C., Vancouver	1969-1970
W. C. Alcombrack, Q.C., Toronto	1969-1970
J. A. McQuigan, Q.C., Charlottetown	1970-1971
Rae H. Tallin, Winnipeg	1971-1972
Donald S. Thorson, Q.C., Ottawa	1971-1973
Robert Normand, Q.C., Quebec	1972-1974
Glen Acorn, Q.C., Edmonton	1973-1975
Wendall MacKay, Charlottetown	1974-1976
H. Allan Leal, Q.C., LL.D., Toronto	1975-1977
Robert G. Smethurst, Q.C., Winnipeg	1976-1978
Gordon F. Coles, Q.C., Halifax	1977-

TREASURERS

Frank Ford, K.C., Edmonton	1918-1924
W. Randolph Cottingham, K.C., Winnipeg	1925-1928
R. Murray Fisher, K.C., Winnipeg	1928-1931
E. René Richard, Sackville	1931-1934
C. P. McTague, K.C., Windsor	1934-1935
R. Murray Fisher, K.C., Winnipeg	1935-1937
R. Andrew Smith, K.C., Edmonton	1937-1939
Eric H. Silk, K.C., Toronto	1939-1941
W. P. J. O'Meara, K.C., Ottawa	1941-1944
J. P. Runciman, K.C., Regina	1944-1949
G. S. Rutherford, K.C., Winnipeg	1949-1950
A. C. DesBrisay, Q.C., Vancouver	1950-1956
G. R. Fournier, Q.C., Quebec	1957-1958
H. P. Carter, Q.C. St. Johns	1959-1960
M. M. Hoyt, Fredericton	1961-1965
W. E. Wood, Edmonton	1966-1968
H. E. Crosby, Halifax	1969-1971
Arthur N. Stone, Q.C., Toronto	1972-1976
Claire Young, Regina	1977-

SECRETARIES

John D. Falconbridge, K.C., Toronto	1918-1930
Sidney E. Smith, Halifax	1930-1934
V. C. MacDonald, K.C., Halifax	1934-1937
Wilson E. McLean, K.C., Winnipeg	1937-1941
Eric H. Silk, K.C., Toronto	1941-1944
L. R. MacTavish, K.C., Toronto	1944-1951
D. M. Treadgold, Q.C., Toronto	1951-1954
Henry F. Muggah, Q.C., Halifax	1955-1963
W. C. Alcombrack, Q.C., Toronto	1964-1968
James W. Ryan, Q.C., Ottawa	1969-1970
Robert Normand, Q.C., Quebec	1971-1972
Glen Acorn, Edmonton	1972-1973
Robert W. Smethurst, Q.C., Winnipeg	1973-1975
James W. Ryan, Q.C., St. John's	1976-

LOCAL SECRETARIES

Alberta: Frank Ford, K.C., '18-'20; Walter S. Scott, K.C., '21-'29; R. Andrew Smith, K.C., '30-'39; G. B. Henwood, K.C., '40-'42; H. J. Wilson, K.C., '43-'61; John E. Hart, Q.C., '62-'69; S. A. Friedman, Q.C., '70-'72; W. F. McLean, Q.C., '73; Glen Acorn, Q.C., '74-

British Columbia: Avard V. Pineo, '18-'34; Hon. R. L. Maitland, K.C., '35-'38; Henry G. Lawson, K.C., '39-'42; S. Pitcairn Hogg, K.C., '43-'49; Eric Pepler, K.C., '50-'53; H. Alan Maclean, Q.C., '54-56; Gerald H. Cross, Q.C., '57-'67; Gilbert D. Kennedy, Q.C., '68; G. Allan Higgenbottam, '69-

Canada: W. P. J. O'Meara, K.C., '36-'57; E. A. Driedger, Q.C., '58; H. A. McIntosh, '59-'65; J. W. Ryan, Q.C., '66-'73; F. E. Gibson, Q.C., '74-'76; Miles Pepper, Q.C., '77-

Manitoba: Herbert J. Symington, K.C., '18-'23; W. Randolph Cottingham, K.C., '24-'27; R. Murray Fisher, K.C., '28-'41; G. S. Rutherford, K.C., '42-'61; Rae H. Tallin, '62-

New Brunswick: J. D. Pollard Lewin, '18-'24; Cyrus F. Inches, K.C., '25-'29; E. René Richard, '30-33; Ralph P. Hartley, Q.C., '34; J. Bacon Dickson, K.C., '35-'47; J. Edward Hughes, '48-'51; E. B. MacLatchy, Q.C., '52-'55; M. M. Hoyt, Q.C., '56-'77.

Newfoundland: H. P. Carter, K.C., '50-'53; P. L. Soper, '54-'62; Sir Brian Dunfield, Q.C., '63-'65; H. P. Carter, Q.C., '66;

C. J. Greene, Q.C., '67-'71; Vincent McCarthy, Q.C., '72-'76; Geo. B. MacAulay, Q.C., '77- .

Northwest Territories and Yukon Territory: Hugo Fischer, '68-'71.

Northwest Territories: Frank G. Smith, '72-73; Patricia W. Flieger, '74- .

Nova Scotia: Stuart Jenks, K.C., '18-'20; Frederick Mathers, K.C., '21-'39; C. L. Beazley, K.C., '40-'49; H. F. Muggah, K.C., '50-'67; H. E. Crosby, Q.C., '68-71; Graham D. Walker, Q.C., '72- .

Ontario: John D. Falconbridge, '18-'19; J. C. Elliott, K.C., '20-25; John D. Falconbridge, K.C., '26-'33; I. A. Humphries, K.C., '34-'37; Eric H. Silk, K.C., '38-'46; Donald M. Treadgold, K.C., '47-'50; L. R. MacTavish, K.C., '51-'56; W. C. Alcombrack, Q.C., '57-69; A. N. Stone, Q.C., '70- .

Prince Edward Island: James D. Stewart, '18; W. E. Bentley, K.C., '19-'29; Sylvere des Roches, '30-'32; W. E. Bentley, K.C., '33-'47; Norman W. Lowther, K.C., '49; J. O. C. Campbell, K.C., '50-'59; G. R. Foster, Q.C., '60-'61; J. Arthur McGuigan, Q.C., '62-'71; Wendall MacKay, '72- .

Quebec: E. Fabre Surveyer, K.C., '18-'41; Charles Coderre, K.C., '42-'63; Gerard Tourangeau, '64; Julien Chouinard, Q.C., '65-'67; Robert Normand, Q.C., '68-'72; Claude Rioux, Q.C., '73-'74; Yves Caron, '75-'76; Daniel Jacoby, '77- .

Saskatchewan: Robert W. Shannon, K.C., '18-'32; D. J. Thom, K.C., '33-'34; J. P. Runciman, K.C., '35-'50; H. Wadge, K.C., '51-'56; J. H. Janzen, K.C., '57-'64; L. J. Salembier, '65-'66; A. C. Balkaran, '68; G. C. Holtzman, '69-'73; Louise Simard, '74-'75; Claire Young, '76-'77.

Yukon Territory: Robert D. Cosman, '77; Padraig O'Donoghue, Q.C., '72- .

MEMBERS

Alberta: Glen Acorn, Q.C., '65-'77; Wilbur F. Bowker, Q.C., LL.M., '53-'75; J. C. F. Brown, K.C., '20; A. H. Clarke, K.C., '19; C. W. Clement, Q.C., '61-'63; Mrs. M. M. Donnelly, '75, '76; David Elliott, '77; H. G. Field, Q.C., '68, '69; Frank Ford, K.C., '18-'24; S. A. Friedman, Q.C., '70-'73; Hon. Wilfrid Gariepy, K.C., '18; W. S. Gray, K.C., '36-'47; Brian Greer, '76; John E. Hart, Q.C., '62-'69; Wm. Henkel, Q.C., '74, 75; G. B. Henwood, K.C., '39-'42; Wm. H. Hurlburt, Q.C., '76, '77; Richard B. Larson, '77; Hon. John F. Lymburn, K.C., '27; H. J. Mac-

donald, Q.C., '62-'67; Stanley H. McCuaig, K.C., '32-'34, '37-'39; Alexander Andrew McGillivray, K.C., '21; K. A. McKenzie, '47-'52; W. F. McLean, Q.C., '73-'75; L. R. Meiklejohn, '72-'76; Henry C. Nolan, '32, '33; Ross W. Paisley, Q.C., '76, '77; Harold H. Parlee, K.C., '22-'24; Yaroslav Roslak, Q.C., '75-'77; J. W. Ryan, '52-'60 (see also under *Canada* and *Newfoundland*); J. J. Saucier, Q.C., '60; Walter S. Scott, K.C., '19-'29; R. Andrew Smith, K.C., '30-'39; H. J. Wilson, Q.C., '43-'61; W. E. Wilson, '70-'77; W. E. Wood, '60-'71.

British Columbia: R. D. Adamson, '74; William J. Baird, '29, '30; Cecil O. D. Branson, '74-'77; P. R. Brissenden, Q.C., '58-'73; William D. Carter, K.C., '24; H. E. A. Courtney, '19, '20; Gerald H. Cross, Q.C., '57-'69; A. C. DesBrisay, Q.C., '43-'57; Joseph N. Ellis, K.C., '19-'28; Keith Farquhar, "76; Hon. Davie Fulton, P.C., Q.C., LL.D., '72, '73; Herbert G. Garrett, '23; Leon Getz, '74, '75; J. P. Harrington, '73; G. Allan Higenbottam, '69-'77; G. P. Hogg, '52-'58; J. Pitcairn Hogg, K.C., '38-'49; Gilbert D. Kennedy, Q.C., S.J.D., '57-'77; J. Douglas Lambert, '74-'77; Henry G. Lawson, '25-'42; H. Alan Maclean, Q.C., '55, '56; Neil A. McDiarmid, '59, '60; W. Berk Maddaford, '76; Hon. R. L. Maitland, K.C., '31-'45; Al Melvin, '75; Eric Pepler, Q.C., '50-'54; Avard V. Pineo, '18-'34; Fran Provost, '76; Allan R. Roger, '74-'77; Robert C. Simson, '74-'77; Ross Tweedale, '77; D. H. Vickers, '74-'76; R. H. Vogel, '77; J. Stuart Yates, '21-'24.

Canada: J. D. Affleck, '50; Jerome Atreus, '75; Michael Beaupré, '77; Neil Brooks, '75; Kenneth L. Chasse, '76-'77; D. H. Christie, Q.C., '64-'76; David Cuthbertson, '75; Gail Davis, '77; E. A. Driedger, Q.C., '47-'67; Tanner Elton, '75; E. G. Ewaschuk, '76-'77 (See also under *Saskatchewan*); Patrick Fitzgerald, '75; Paul Fontaine, K.C., '45, '46; His Honour Judge Robert Forsyth, '44-'50; R. P. Francis, '75; Fred W. Gibson, Q.C., '74-'77; Hon. Mr. Justice E. P. Hartt, '75 (See also under *Ontario*); D. H. W. Henry, Q.C., '60; E. Russell Hopkins, '46-'50; W. R. Jackett, '42-'46; Keith Jobson, '75; Peter E. P. Johnson, '75, '76; Mark Krasnick, '75; Honourable Mr. Justice A. Lamer, '75-'77; G. V. La Forest, '75; Pierre Landreville, '75; L. P. Landry, '62, '63, '76, '77; Thomas D. MacDonald, Q.C., '50, '60-'63 (See also under *Nova Scotia*); Stuart G. MacKinnon, '77; A. J. MacLeod, '51-'59; J. F. MacNeill, K.C., '41; R. J. Marin, '77; J. C. Martin, Q.C., '61, '62; D. S. Maxwell, Q.C., '69-'73; Joanna McFadyen, '76; H. A. McIntosh, '59-'65;

J. W. Mohr, '75; Francis C. Muldoon, Q.C., '77 (See also under *Manitoba*); W. P. J. O'Meara, Q.C., '36-'58; Miles Pepper, Q.C., '76, '77; C. P. Plaxton, K.C., '36-'39; John E. Read, K.C., '24-'28 (See also under *Nova Scotia*); D. J. Rutherford, '75; James W. Ryan, Q.C., '66-'75 (See also under *Alberta* and *Newfoundland*); John A. Scollin, Q.C., '66, '67, '74, '75; P. A. (Mrs.) Sisk, '77; Stephen J. Skelly, '77; S. F. Sommerfeld, Q.C., '72-'75; Roger Tassé, Q.C., '74-'77; Donald S. Thorson, Q.C., '61-'76.

Manitoba: John Allen, K.C., '44-'51; A. C. Balkaran, '69-'77 (See also under *Saskatchewan*); Hjalinar A. Bergman, K.C., '22; A. C. Campbell, K.C., '33-'38; J. C. Collinson, K.C., '33-'34; W. Randolph Cottingham, K.C., '23-'27; James Bowes Coyne, K.C., '21; Hon. Richard W. Craig, K.C., '27-'32; Ivan J. R. Deacon, Q.C., '48-'60; W. P. Fillmore, K.C., '39-'47; R. K. Finlayson, '41; R. Murray Fisher, Q.C.; '28-57; G. R. Goodman, Q.C., '73-'77; W. J. Johnston, '69-'71; Orville M. M. Kay, C.B.E., Q.C., '50-'64; T. W. Laidlaw, '31; Wilson E. McLean, K.C., '35-'39; Andrew A. Moffat, K.C., '45-'49; Francis C. Muldoon, Q.C.; '73-'76 (See also under *Canada*); Mel Myers, Q.C., '73-'77; G. E. Pilkey, Q.C., '64-'77; Isaac Pitblado, K.C., '18-'32; G. S. Rutherford, Q.C., '42-'71; Isaac Silver, '74; Robert G. Smethurst, Q.C., '65-'77; Travers Sweatman, K.C., '20-'23; Herbert J. Symington, K.C. '18-'26; R. H. Talin, '59-'77; William J. Tupper, K.C., '18, '19; F. K. Turner, '61-'64; E. K. Williams, K.C., '22, '23.

New Brunswick: John A. Creaghan, '30-'34; J. A. Creaghan, Q.C., '55-'59; His Honour Judge J. Bacon Dickson, '35-'52; C. L. Dougherty, Q.C., '53-'57; D. J. Friel, '61, '62; James Friel, K.C., ; Gordon F. Gregory Q.C., '72-'77; Ralph P. Harley, K.C., '30-'34; James D. Harper, Q.C., '74; H. W. Hickman, Q.C., '56-'66; M. M. Hoyt, '56-'77; J. Edward Hughes, '41, '45-'51; Hon. Mr. Justice Peter J. Huges, '35-'47; Cyrus F. Inches, K.C., '25-'29; Hon. Wendell P. Jones, Q.C., '25-'29; A. R. Landry, '75; C. I. L. Leger, '63; J. D. Pollard Lewin, '18-'24; E. B. MacLatchy, Q.C., '46-57; E. Neil McKelvey, Q.C., '64-'66; R. D. Mitton, Q.C., '57, '58; Peter Pagano, '75, '77; Horace A. Porter, Q.C., '35-'53; E. René Richard, '28-'34; Alan B. Reid, '72, '73, '77; D. G. Rouse, '67-'71; Beverley G. Smith, '77; H. Hazen Strange, '72-'77; Eric Teed, Q.C., '77; John F. H. Teed, Q.C., '53-'63; Mariner G. Teed, K.C.,

'18-'23; William B. Wallace, K.C., '18-'24; J. E. Warner, '67-'71; Matthew Wilson, K.C., '18, '19.

Newfoundland: H. P. Carter, Q.C., '50-'69; Sir Brian Dunfield Q.C., '63-'65; C. J. Greene, Q.C., '50-'71; Hugh G. Kelly, '77; John Kelly, '76; George M. MacCaulay, Q.C., '70-'77; Vincent P. McCarthy, Q.C., '67-'76; Keith J. Mercer, '77; R. Austin Parsons, Q.C., '70-'74; Ronald G. Penney, '77; James A. Power, Q.C., '50-'52, '68; H. G. Puddester, Q.C., '50-'62; Francis J. Ryan, Q.C., '62-'69; James W. Ryan, Q.C., '76, 77 (See also under *Alberta* and *Canada*); P. L. Soper, L.L.B., '55-'62.

Northwest Territories: Dr. Hugo Fischer, '63-'71; Patricia W. Flieger, '74-'77; James R. Slaven, '75, '76; F. G. Smith, '68-'73.

Nova Scotia: C. L. Beasley, Q.C., '39-'49; Charles J. Burchell, K.C., '21-'23; A. Lloyd Caldwell, Q.C., '72-'77; William S. Charles, '72-'74; Gordon F. Coles, Q.C., '72-'77; Howard E. Crosby, '69-'71; Gordon S. Gale, '72-'77; Alex Hart, '47, '48; Stuart Jenks, K.C., '18-'23; D. William MacDonald, '75; John A. Y. MacDonald, Q.C., '49-'57; Thomas D. MacDonald, K.C., '38, '42-'48 (See also under *Canada*); Vincent C. MacDonald, Q.C., '34-'48; J. A. MacLellan, '75; Neil MacLeod, LL.B., '48; W. J. Mahoney, M.L.A., '25, '26; Frederick Mathers, K.C., '20-'39; Hector McInnes, K.C., '18; Frank L. Milner, K.C., '27-'29; J. B. Milner, '47, '48; Henry F. Muggah, Q.C., '47-'67; B. M. Nickerson, Q.C., '69-'71; Horace E. Read, O.B.E., Q.C., S.J.D., D.C.L., '50-'67; John E. Read, K.C., '36-'46 (See also under *Canada*); J. L. Ralston, K.C., '20, '23-'26; C. Rosenblum, Q.C., '75; His Honour Judge H. W. Sangster, '30-'32; Sidney E. Smith, '29-'33; Graham D. Walker, Q.C., '72-'77.

Ontario: Hon. Sir James Aikins, K.C. (Winnipeg) '18-'28; W. C. Alcombrack, Q.C., '56-'76; Fred J. Arthur, '77; Hon. Mr. Justice F. H. Barlow, '39-'62; W. C. Bowman, Q.C., '62-'72; H. H. Bull, Q.C., '65-'67; E. C. Burton, '77; Frank W. Callaghan, Q.C., '72-'76; Archie G. Campbell, '75; John Cavarzan, '75; R. S. G. Chester, '77; W. B. Common, Q.C., '57-'71; A. R. Dick, Q.C., '65-'73; Allan M. Dymond, K.C., '29-'31; Hon. John C. Elliott, K.C., '20-'31; John D. Falconbridge, K.C., '18-'33; R. Leighton Foster, K.C., '33-'34; Stephen V. Fram, '74-'77; F. John Greenwood, Q.C., '76; E. P. Hartt, '60 (see also under *Canada*); I. A. Humphries, K.C., '33-'37; Francis King, '18-'31; Daniel W. Lang, K.C., '34-'38; W. Herbert Langdon, Q.C., '77; H. Allan Leal, Q.C., LL.D., '63-'77; P. S. LeSage, Q.C., '73-'75; L. R.

MacTavish, Q.C., '43-'69; C. R. Magone, Q.C., '49-'56; Morris Manning, '75; R. W. McLeod, '77; Hartley D. McNairn, '38; Charles P. McTague, K.C., '32-'34; Derek Mendes da Costa, Q.C., S.J.D., '77; Craig Perkins, '77; E. Marshall Pollock, Q.C., '73, '74; Clay Powell, Q.C., '73; Arthur W. Rogers, '26-'28; John D. Scott, '76; Joseph Sedgwick, K.C., '44-'48; Allan O. Shipley, '76; Eric H. Silk, K.C., '34-'47; Cecil L. Snyder, K.C., '38; D. M. Treadgold, Q.C., '47-'55; Sidney Tucker, '74-'77; Mrs. K. M. Weiler, '76, '77; Robert Wherry, '46; Cecil A. Wright, K.C., '43-'46.

Prince Edward Island: William E. Bentley, K.C., '18-'29, '33-'47; J. Melville Campbell, '68-'71; J. O. C. Campbell, Q.C., '50-'59; Horace B. Carver, '75-'77; Hon. W. E. Darby, K.C., '47, '48; Sylvere DesRochers, '30-'32, '38-'44; Hon. C. Gavan Duffy, K.C., '20-'23; Gerald R. Foster, Q.C., '60, '61; R. S. Hinton, Q.C., '67; Gordon R. Holmes, '45-'47; F. A. Large, Q.C., '44-'59, '67; N. W. Lowther, K.C., '36-'44, '48, '49; W. Chester S. MacDonald, '60-'66; Kenneth R. MacDonald, '68-'71; Hugh D. MacIntosh, '76-'77: Wendall MacKay, '72-'77: Ian M. MacLeod, '68-'71; James W. MacNutt, '72-'76; K. M. Martin, K.C., '41-'44, '49-'55; W. L. Mathieson, '36-'37; J. Arthur McGuigan, Q.C., '62-'71; Raymond Moore, '77; J. P. Nicholson, '51-'59; D. O. Stewart, Q.C., '30-'32, '38-'44, '56-'59; James D. Stewart, K.C., '19, '20; E. Somerled Trainor, '60-'66; Hon. Mr. Justice George J. Tweedy, '30-'32, '38-'47.

Quebec: Edgar Allard, '74; J. Bellemare, '64; Hon. Valmore Bienvenue, K.C., '42, '43; Roger Bisson, Q.C., '48-'55; Paul Emile Blain, Q.C., '75; Georges Boulet, '77; Gerald Boisvert, '69-'73; Ariste Brossard, '42, '43; R. Brunet, '68; Yves Caron, '71-'76; W. F. Chipman, K.C., '42; Julien Chouinard, Q.C., '65-'67; Emile Colas, K.M., Q.C., '56-'77; Robert J. Cowling, '72-'74; Steven Cuddihy, '71-'74; Lucien Darveau, '70; Denys Dionne, Q.C., '68; Jean Drouin, '74, '75; Antonio Dubé, Q.C., '69; Jacques Ducros, '65-'67; J. W. Durnford, '65-'68; Gerald Fauteux, K.C., '44; G. R. Fournier, Q.C., '56-'62; Gerard Girouard, '75, '76; James K. Hugessen, '69-'71; Daniel Jacoby, '77; Walter S. Johnson, K.C., '43; Fred Kaufman, Q.C., '72, '73; Thomas R. Ker, Q.C., '46-'61; Eugene Lafleur, K.C., '18-'20; Yves Leduc, Q.C., '61, '62; C. S. LeMesurier, K.C., '45; Thomas H. Montgomery, Q.C., '62-'64; Louis Paradis, '69, '70; J. Philippon, '76; Louis-Philippe Pigeon, Q.C., '61-'67; Jean F. Pouliot, K.C., M.P., '44; Claude Rioux, '68-'70; Roch Rioux,

'77: Hon. Antoine Rivard, Q.C., '44-'58; Hon. Mr. Justice E. F. Surveyer, '18-'41; Gerard Tourangeau, '63-'64; Alfred Tourigny, K.C., '45-'47; Francis Tremblay, '76, '77; His Honour Judge Gerard Trudel, '74, '75.

Saskatchewan: A. C. Balkaran, '67, '68 (see also under *Manitoba*); Alex. Blackwood, K.C., '44-'46; Ms. Merillee Charwosky, '77; W. G. Doherty, Q.C., '60-'73; Gene Ewaschuk, '74, '75 (see also under *Canada*); Richard F. Gosse, Q.C., D.Phil., '77; Brian A. Grosman, '74-'77; Kenneth P. R. Hodges, '77; G. C. Holtzman, '69-'73; Georgina R. Jackson, '77; J. H. Janzen, Q.C., '57-'64; Peter E. Johnson, '69; Hugh M. Ketcheson, Q.C., '76, '77; Serge Kujawa, Q.C., '74-'77; E. C. Leslie, Q.C., '47-'64; W. G. Logan, '76; K. M. Lysyk, Q.C., '74-'75; Philip E. Mackenzie, K.C., '18-'20; Hon. William M. Martin, K.C., '21; J. G. McIntyre, Q.C., '69-'73; R. S. Meldrum, Q.C., '58-'77; Chad Musk, '75; Diane Pask, '74; John A. M. Patrick, K.C., '21, '22; D. W. Perras, '76, 77; R. L. Pierce, Q.C., '66-'71; J. P. Runciman, K.C., '35-'50; L. J. Salembier, '66, '67; J. L. Salterio, Q.C., '46-'57; Robert W. Shannon, K.C., '18-'32; Louise Simard, '74, '75; B. L. Strayer, '59-'62; Calvin F. Tallis, Q.C., '73; Douglas J. Thom, K.C., '22-'45; David A. Tickell, '74-'76; Hon. W. F. A. Turgeon, K.C., '18-'20; H. Wadge, Q.C., '51-'56; Claire Young, '75-'77.

Yukon Territory: Robert D. Cosman, '77; C. P. Hughes, '63-'67; Padraig O'Donoghue, Q.C., '68-'77.

APPENDIX A

(See page 22)

CANADIAN LEGISLATIVE DRAFTING CONVENTIONS — COMMENTS AND INTRODUCTION

REPORT OF MESSRS. RYAN AND STONE

At the 1976 meeting of the Legislative Drafting Section of the Uniform Law Conference of Canada the draft conventions respecting legislative drafting as presented by the report of the Special Committee of Messrs. Acorn, Hoyt and Tallin (Legislative Counsel from Alberta, New Brunswick and Manitoba, respectively) was approved, as amended. (*1976 Proceedings* p. 20).

These conventions, entitled the Canadian Legislative Drafting Conventions, can be found at pages 59-63 of the 1976 Proceedings.

At the same meeting it was resolved that Messrs. Ryan and Stone (Legislative Counsel from Newfoundland and Ontario, respectively) draft for consideration at the 1977 meeting,

(a) comments on each Convention as approved; and

(b) such introduction to the Conventions as they consider appropriate.

Because of the exigencies of our legislative programs, and because of our involvement on other committees of the Conference, we were not able to meet during the year on this resolution. In order to bring the matter forward in 1977, a paper was prepared by Mr. Ryan for discussion with Mr. Stone at this year's meeting of the Section. That paper is attached as a Schedule.

In these circumstances it is probably more useful to present that paper to the Section with an oral report from Mr. Stone on any aspects of the paper to which he wishes to address himself. It is our hope that our inability to meet on this matter during the year will not delay consideration by the Section, which it should not if this approach is acceptable to the Section.

James W. Ryan
Arthur N. Stone

St. Andrews
August, 1977.

SCHEDULE

LEGISLATIVE DRAFTING CONVENTIONS

(Designed particularly for the Uniform Law Conference of Canada)

BACKGROUND

At its organization meeting in 1918 the Conference instructed the British Columbia Commissioners to prepare and submit to the other commissioners "a set of general rules or suggestions for use in the drafting of uniform statutes" and to report to the next meeting of the Conference in that regard.

The British Columbia Commissioners (Messrs. Ellis, Courtenay and Pineo) presented their report at the 1919 meeting. The report was adopted and it was ordered that copies be sent to the Attorney General and Law Clerk in each province and to the members of the Canadian Bar Association. The report is set forth in the *Proceedings of the Canadian Bar Association*, volume 4, 1919, at pages 248 to 273, and in the 1942 *Proceedings* of the Conference at pages 81 to 106.

At the 1941 meeting of the Conference Messrs. Silk and Runciman, Legislative Counsel for Ontario and Saskatchewan respectively, were appointed a committee "to prepare a revision of the Rules of Drafting appearing in the 1919 Conference *Proceedings* and to report thereon at the next meeting of the Conference".

A report was accordingly submitted and was adopted by the Conference with slight alteration. The report reads in part as follows:

> We are of opinion and respectfully suggest that in the interests of uniform drafting this Conference requires a set of rules, concisely stated and numbered for convenience, embodying recognized principles of good drafting and principles of mechanics which are customarily followed by this Conference. Accordingly we have prepared and submitted a draft set of rules embodying such principles, which we have endeavoured to set forth in concise form and have numbered for convenience.
>
> The rules submitted should be regarded as rules suitable for adoption by the Conference rather than a codification of all existing undisputed rules of good draftsmanship.
>
> The rules are intended to embody general principles. We have endeavoured to express each rule as a general principle, avoiding such refinements of and exceptions to the rule as could be omitted without rendering the statement of the general principle inaccurate.

> In selecting the principles which should be embodied in these rules, several principles which should be followed in legislative drafting, but which on account of their nature are unsuitable to be incorporated as rules, were considered. Because it would be well in the drafting of uniform Acts to pay heed to many of these principles we have prepared a separate memorandum headed "Observations and Suggestions on Legislative Drafting.

The report appears at pages 70 to 106 of the *1942 Proceedings* of the Conference.[1]

The 1942 Rules were distributed widely among members of the legal profession in Canada and met with such favourable comment that the Conference felt in 1947 that the publication of a second and revised edition would be welcomed.

At the 1947 meeting of the Conference it was recommended that the Saskatchewan Commissioners revise the Rules of Drafting and report their recommendations as to the printing and distribution of copies thereof (*1947 Proceedings*, page 24).

Accordingly the Saskatchewan Commissioners revised the Rules adopted by the Conference in 1942 and in doing so adhered to the general principles followed by the draftsmen in 1942.

The form and sequence of the 1942 Rules did not call for improvement in the opinion of the Commissioners although various alterations were made in the context.

The Saskatchewan Commissioners recommended that the 1919 Rules, which appear as Appendix III to the 1942 Report be not reprinted. Reprinting would involve considerable expense, and the revised Rules contained in Appendix II to their Report, along with the Observations and Suggestions contained in their Appendix III, appeared to be sufficient (1948 Proc. pp. 59-70).

The Saskatchewan Commissioners recommended that the Appendix to their Report be set out in a suitable pamphlet and printed for distribution. The Rules were referred to the Secretary by Resolution and it was directed thereby that he prepare a pamphlet containing the article entitled *Uniformity of Legislation in Canada — An Outline* published in volume 25 of the *Canadian Bar Review*; a short history of the Rules of Drafting; the Rules of Drafting; observations and suggestions on the drafting of legislation; and a bibliography. He was

1. The foregoing is taken from the 1948 Report of the Saskatchewan Commissioners; 1948 Proc. pp. 60-61.

directed to arrange for the printing of 1000 copies of the pamphlet, if funds permitted.

The pamphlet was prepared and published in 1949 by the Secretary of the Conference, Mr. L.R. MacTavish, Q.C., and was well received. The pamphlet has been out of print for a number of years.

At the first meeting of the Conference in Newfoundland in 1967, the Uniform Law Section agreed that time be made available for a separate meeting of the various legislative draftsmen, either during or before or after the meeting of the Conference. Some 34 years earlier Mr. Douglas J. Thom, K.C., the Vice-President, in the presidential address to the Conference thought "that representations should be made to the provinces to the effect that the legislative drafsman, by whatever name he may be called, should be one of the representatives from each province". He expressed himself to be of the view that on the Conference "there should be the legislative draftsmen and I think in addition at least one lawyer in the active hurly-burly of everyday practice from each province" (1933 Proc. p. 248 in CBA printing).

By 1967 there was little time in a heavy schedule for legislative draftsmen (by whatever names they were being called by then) to discuss matters of particular concern to them at the meetings of the Uniform Law Section.

When the legislative drafting workshop first met in 1968 it was natural that it turn its attention almost immediately to the Conference's rules of drafting last revised twenty years earlier in 1948. In 1970 the drafting workshop prepared and presented a discussion draft of the rules of drafting (1970 Proc. pp. 19-23).

Dr. E. A. Driedger, Q.C., LL.D., who instructs in legislative drafting at Ottawa University, attended the drafting workshop at its invitation to discuss the rules of drafting. Following a meeting with Professor Driedger, and on exchange of views, the representatives of Alberta, Manitoba and Canada at the drafting workshop were assigned the rewriting of the rules of drafting in the light of the remarks and suggestions of Dr. Driedger (1921 Proc. p. 18).

In 1973 a working paper presented by Mr. Acorn on behalf of Alberta was carefully considered in the drafting workshop and referred back to Alberta for revision (1973 Proc. pp. 78-85). A report was again made by Mr. Acorn at the 1974 drafting workshop in which it was proposed that the expression "conventions" be used instead of

"rules" to denote (hopefully) "the generally accepted, conventional practices presently followed in the drafting of legislation by professional draftsmen" (1974 Proc. p. 73). Following review of the "conventions" at that meeting, revised *Drafting Conventions* were prepared in November 1974 by Mr. Acorn (1974 Proc. p. 81) (see also 1974 Proc. pp. 21, 73-79, 80, 81-86).

The *Drafting Conventions* were again considered at the 1975 meeting of the drafting worshop, which later at the 1975 Conference became the Legislative Drafting Section of the Uinform Law Conference (1975 Proc. pp. 42 & 48).

The draft *Conventions* were referred to Messrs. Tallin, Hoyt and Acorn for comparison with the English and American drafting conventions, *inter alia* (1975 Proc. p. 20). In 1976 the *Drafting Conventions* as presented and amended were approved (1976 Proc. pp. 20 & 59-63). It was left to Messrs. Ryan and Stone, Legislative Counsel of Newfoundland and Ontario, respectively, to draft comments on the approved *Drafting Conventions* and to prepare such introduction to the conventions as they consider appropriate, for consideration at the 1977 Conference.

INTRODUCTORY

The importance of careful and adequate draftsmanship in the preparation of uniform statutes cannot be over-emphasized. Favourable consideration by a government of a uniform statute should not be hindered by the manner in which the statute is expressed. As was stated in 1949 "Every uniform statute recommended by the Conference ought therefor to be beyond criticism not only as to substance but as to form."

But criticism of legislative drafting in the English-speaking world abounds, often with good cause.

> ". . . the laws which have found their various ways into the statute books of English-speaking countries . . . are spoken of as disgraceful, unworkmanlike, defective, unintelligible, abounding in errors, ill-penned, inadequate, loosely worded, depraved in style, peculiar absurdities, mischievious, baneful in influence—and besides, in their making 'technical skill often below the mark.' Otherwise, it might be presumed, they are all that could be asked of them—but no, in other writing we find that they are uncertain, confusing, obscure, ill-expressed, ambiguous, overbulky, redundant, entangled, unsteady, disorderly, complex, to say nothing of being 'uncognoscible'." Guide to Legislative Drafting in Arizona—Arizona Newsletter No. 15(1941) as noted at p. 5, Dickerson's Legislative Drafting.

Now, as in the past, there are any number of people who plead for greater "simplicity and clarity" in the forming of our laws. Those who plead thus fail to observe on the great progress made in the manner of expressing legislation since the Conference first turned its attention to drafting. Today, also, there are more aids available for the legislative draftsman than formerly, as the bibliography attached will demonstrate.

This improvement is obscured by the increase in the complexities of our fiscal and social affairs since the *Rules of Drafting* were first set out in 1919. The older style of drafting made the relatively simple legislative sentence complex; the modern style at its worst makes highly complicated legislative sentences virtually "uncognoscible" to other than the esoterists in the subject matter of the legislation. Undoubtedly the remedy for that mischief will not be found until, as Reed Dickerson noted (Legislative Drafting pp. 5-6), the underlying causes of poor drafting are recognized and dealt with.

> The greatest need in existing legislation is not a more readable style but a fuller grasp of the relevant substantive considerations, greater systemization, and greater uniformity in concept, approach, and terminology. Legislation cannot, of course, be permanently embalmed in static terminology. New laws should reflect the needs of the times. But the discrepancies in existing legislation are only partly traceable to normal growth. Many flow from accident, mistake, ignorance, or ineptitude.
>
> It would seem proper to assume that when Congress or a state legislature says different things it means different things, and that when it says the same thing it means the same thing. Experience shows, however, that it frequently enacts language that has been prepared by persons who pay inadequate attention to these assumptions. As a result, much of the law is unnecessarily hard to understand, both for itself and in its relationship to other enacted law. Terminology varies not only between different statutes dealing with the same subject but often within the same statute and sometimes even within the same section of the same statute.
>
> Besides the minimum requirements of consistence, what is needed is a closer adherence to accepted usage, and where accepted usage does not give an unequivocal answer, the adoption of conventions within the limits of what accepted usage allows.
>
> Although the individual draftsman can do little about leading the governmental drafting procession as a whole, he can do his part by selecting from among the varying usages those that seem closest to general usage and good sense. Government agencies and committees of Congress, and such institutions as the Legislative Counsel of the House of Representatives and the Senate, and their state counterparts, can also do much more to systemize and standardize legislative techniques and modes of expression.

It is unfortunate if in the preparation of uniform statutes sufficient care is not taken to frame the statutes in language acceptable to government legislative draftsmen. Being practical people they do not demand complete accord with their own styles or taste, but they are not inclined to recommend as members of the Conference statutes that do not come up to their minimum standards of drafting. While many of the drafting difficulties of earlier years (such as the extensive use of the subjective in describing circumstances in which a law would operate) have now gone, in large measure because of the Conference's rules of drafting, other differences in drafting have taken their place, which now need to be removed so far as the preparation of uniform statutes are concerned.

The *Drafting Conventions* are intended to standardize the expressions of uniform statutes so that the matters provided for in the *Conventions* will facilitate the acceptance of uniform statutes — and, moreover, make it easier on the whole for legislative counsel to accept the legislation of other Canadian jurisdictions where the policy requirements of their governments coincide.

It is well, perhaps, to repeat here comments printed in the earlier reports on drafting to the Conference (1948 Proc. pp. 65-66).

> ". . . nothing is so easy as to pull them [Acts of Parliament] to pieces, nothing is so difficult as to construct them properly . . ." Lord St. Leonards in *O'Flaherty v. McDowell* (1857), 6 H.L.C. 142, at p. 179.
>
> "People who draw Acts of Parliament are very commonly found fault with by those who never drew an Act themselves." Bramwell J.A. in *The Queen v. Monck* (1877) 2 Q.B.D. 544, at p. 552.
>
> "It might be well to warn the draftsman that in his case virtue will, for the most part, be its own reward, and that after all the pains that have been bestowed on the preparation of a bill, every Lycurgus and Solon sitting on the back benches will denounce it as a crude and undigested measure, a monument of ignorance and stupidity. Moreover, when the bill has become law, it will have to run the gauntlet of the judicial bench, whose ermined dignitaries delight in pointing out the shortcomings of the legislature in approving such an imperfect performance." Lord Thring, Practical Legislation, p. 8.
>
> ". . . that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand." Stephen J. in *Re Castioni* [1891] 1 Q.B. 149, at p. 167.

It is not likely that the *Drafting Conventions* will provide a panacea for the defects in legislative drafting at the present time in the English-speaking world. The latest word on that matter from England was pronounced by the Renton Committee (*The Preparation of Legislation — Report of a Committee Appointed by the Lord President of the Council*, London HMSO 1975, at p. 42).

> ". . . much more than good will and self-restraint are needed to make the statute book an orderly repository of reasonably intelligible law: Government must give the state of our legislation a much higher priority in their responsibilities. The legislative process is the main instrument of political change in our rapidly changing democracy, but it has for many years been incapable of efficiently meeting the demands made upon it."

COMMENTS, OBSERVATIONS AND SUGGESTIONS

There are a number of principles, practices, techniques, mechanics and style followed in Canada that are not dealt with in the *Drafting Conventions* or that underlie the statement of a convention. While unsuitable to be dealt with as a convention, because of variation in practice or otherwise, they should not be altogether ignored. As it would be well in preparing uniform statutes to heed many of these considerations, a number of the more useful are set out as a comment on a convention or as an observation or a suggestion.

Title of Statutes

The *Uniform Interpretation Act* (1973 Proc. pp. 276-291) provides no rule regarding the manner of citing statutes. Provincial statutes do so provide for Acts generally in a Statutes Act or in a revision statute for Acts contained in a revision. Such a provision usually provides that a statute may be cited by reference to its short title, its long title, without reference to its chapter or other number, or by reference to its chapter or other number in the annual statutes for the year or regnal year in which it was enacted.

By a convention accepted by the Conference, the two titles used for statutes, i.e. the so-called "long title" and the "short title" were replaced by a single title. It follows, therefore, in uniform statutes and in the statutes of those jurisdictions that follow this pracice, that there is no need for a provision to permit a statute to be cited by its "short title".

Where there is only one title for a statute, special care should be exercised in finding a title that will permit the statute to be found

without too much trouble. In rare cases only should parenthesis be used in the titles of statutes. This is a practice that can easily develop into a very fixed and irritating habit.

Some jurisdictions may have a legislative need for long titles (see: *The Composition of Legislation — Legislative Forms and Precedents,* Driedger, 2nd. Ed. Revised, Ottawa, Department of Justice 1976 p. 153; *Legislative Drafting*, Thornton, London, Butterworth's, 1970, p. 142).

The uniform convention on this matter is suitable for the Conference, which is not a legislative body. In a Legislature other considerations may well apply, in which case the uniform convention on titles could be usefully applied, when possible, to the "short" or given statutory title.

> "A Bill . . . may be regarded from two points of view. From one point of view it is a future law. From another point of view it is a proposal submitted for the favourable consideration of a popular assembly."

The short or only title of a statute, as the case may be, should be designed as part of the "future law". A long title, if required, is designed, most often, in consideration of a popular assembly.

Placement of Definitions

Words not used in the statute, should not be defined in it for use in subsequent regulations; and words and expressions defined in the general interpretation statute should not be included in the definitions in a particular statute unless they are intended to be an exception to the generally defined meaning.

It is annoying to find all the defined words of a statute listed in one place in considerable length when many of the defined terms are used only once in the body of the statute. On the other hand it is more annoying to find that a word has been generally defined for a statute in an obscure provision as an apparent parenthetical afterthought. (See Driedger op. cit. p. 49), Thornton, op. cit. pp. 159, 160).

Interpretation generally

Obviously it is more useful to a reader to be told how to construe portions or the whole of a statute at the outset. The reader of statutes does not need "surprise!" to tickle his fancy. Injecting application provisions in later portions of a statute is an unkindness to inflict on any reader of a statute.

Those drafting a uniform statute on the other hand should make themselves thoroughly conversant with the *Uniform Interpretation Act*. It would be expected that legislative counsel of each jurisdiction would be fully familiar with their own Interpretation Acts and be able to adapt the uniform Act to the jurisdiction wherever necessary.

For consistency it is preferable that uniform Acts be drafted in terms of the *Uniform Interpretation Act*. A glance over the statutes recommended from time to time by the Conference will indicate the need for this.

While there is a considerable degree of uniformity in the various provincial Interpretation Acts and the federal Act, they do differ in some areas. The enactment by all jurisdictions of the provisions of the *Uniform Interpretation Act* would facilitate the work of the Conference (See 1942 Proc. p. 78).

Anyone who prepares legislation is expected to be familiar with the general rules of interpretation based on judicial interpretation. A convenient summary of these were reproduced in the *1919 Proceedings* at pp. 47-48 and again in 1949 Proc. pp. 104-105. That summary is repeated for convenience.

> *"Judicial Rules of Interpretation*
>
> *The standard works on the interpretation of Statutes are written primarily for use by the Courts and legal practitioners. They are not so readily useful from the standpoint of the draftsman, being too detailed in their treatment for his general purposes. The draftsman should, however, make sufficient use of them to enable him to form a general conception of the rules used by the Courts in interpreting and construing statutes.*
>
> *The following extract from Sir Courtenay Ilbert's* Mechanics of Law Making *will be found suggestive in this connection:—*
>
> > *"The English draftsman has to consider not only the statutory rules of interpretation which are to be found in the Act of 1889, but also the general rules which are based on judicial decisions and which are to be found in a good many useful textbooks on the interpretation of statutes. Among the most important of these rules are:—*
> >
> > *"1. The rule that a statute must be read as a whole. Therefore the language of one section may affect the construction of another.*
> >
> > *"2. The rule that a statute may be interpreted by reference to other statutes dealing with the same or a similar subject-matter. Hence the language of those statutes must be studied. The meaning attached to a particular expression in one statute, either by definition or by judicial decision, may*

be attached to it in another. And variation of language may be construed as indicating change of intention.

"3. The general rule that special provisions will control general provisions.

"4. The similar rule that where particular words are followed by general words (horse, cow, or other animal), the generality of the latter will be limited by reference to the former ("Ejusdem generis" rule).

"5. The general rule, subject to important exceptions, that a guilty mind is an essential element in a breach of a criminal or penal law. It should, therefore, be considered whether the words "wilfully" or "knowingly" should be inserted, and whether if not inserted, they would be implied, unless expressly negatived.

"6. The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares.

"7. The presumption against any intention to contravene a rule of international law.

"8. The presumption against the retrospective operation of a statute subject to an exception as to enactments which affect only the practice and procedure of the courts.

"9. The rule that a power conferred on a public authority may be construed as a duty imposed on that authority ("may" = "shall")." (Ilbert's Mechanics of Law Making, *p. 119)."*

(A more recent Canadian publication, Driedger's *Construction of Legislation* is a useful tool for legislative counsel and other legislative draftsmen.)

Texts useful in interpreting statutes are Beal's *Cardinal Rule of Legal Interpretation,* Craies' *Statute Law,* Maxwell's *Interpretation of Statutes,* Odger's *The Construction of Deeds and Statutes,* and Driedger's *Construction of Statutes.*

Application

If a statute is to have a limited or unexpected application, that fact should appear early in the arrangement of its provisions. It surprises and confuses when a restricted application is found at or near the end of a statute. There is no conceivable reason for this situation arising with a uniform Act although an application provision may in a Legislature get "tacked on" to a Bill almost anywhere.

Parts and Divisions

The earlier Conference rule relating to Parts has been changed to accord with present-day practice. The rule had been that a complex

statute might be divided into Parts "each Part being treated as a simple Act and containing its principle or leading motive in concise form at the outset of the Act." But dividing into Parts was frowned upon unless the subjects are so different that they might appropriately be embodied in separate Acts.

Parts are more frequently used now to help the arrangement of lengthy Acts or to permit segments of an Act to be referred to more easily. Statutes may also, of course, be further divided into "Divisions" which are only sub-parts of a Part. No such arrangement of an Act should be done unless the context of the Part (or Division of a Part, when used) relates to a single or related subject. Ilbert's comment is still relevant:

> "The framework of a Bill may be made more intelligible by dividing it into parts and by grouping clauses under italic headings. But excessive subdivision should be avoided. As a rule a Bill should not be divided into parts unless the subjects of the parts are so different that they might appropriately be embodied in separate Acts. The division of an Act into parts may effect its construction by indicating the scheme of arrangement." (Ilbert's *Legislative Methods and Forms*, pp. 245, 246).

Special Cases and Exceptions

When a rule of law or rule of conduct stated by a legislative provision is to be subject to qualifications, exceptions, limitation or restrictions or other modification of a rule, the better practice has been to have them follow the statement of the rule. It is often convention to indicate by a suitable prefix that the rule is to be so modified, e.g. by prefixing a legislative provision with the flag "Subject to . .".

A following exception, restriction or qualification may be combined with the legislative statement of the rule by inserting it after the words "except that", "but". In other cases a separate sentence should be used. But all authorities on legislative drafting and with few exceptions all professional legislative counsel deplore and avoid the use of a proviso to introduce a qualification to a rule.

Transitional or Temporary Provisions

A provision intended to facilitate a transition from rules of one statute to those of another or provisions that are intended to apply for only a limited time would ordinarily be more conveniently set out in proximity to the subject governed by them. In the case of a provision performing that type of function in respect of a matter in one section only, it is more convenient to have it placed as the

last subsection of the section concerned. To do so is consistent with the principle supporting the drafting convention.

The practical advantage in Canada of having these provisions at the end of an Act (but before the commencement section, if one is required) is that on the periodic revision of statutes, the transitory or temporary provision can be omitted, without affecting the number of the other provisions and without requiring correction of cross references that would be otherwise necessary.

Repealing and Amending Provisions

Repeals and amendments of other statutes can upon enactment be considered "exhausted". They fall within a class similar to the transitory or temporary provision and should be so placed that they can be omitted on revision without affecting other provisions or cross-references within the statute.

The convention on this matter provides a convenience since the reader of statutes will in time anticipate the location of certain provisions within the statutes of those jurisdictions that follow the convention.

Commencement Provision

The placement of the commencement provision follows the same rationale as the repealing and transitional provisions.

Three comments should perhaps be made about commencement provisions:

1. There are cases where Acts are to come into force on the happening of an event (Royal Assent) upon which they would come into force without such a statement by virtue of other statutory authority. In the case of uniform statutes there should never be a provision bringing a uniform Act into force on assent because section 4(1) of the Uniform Interpretation Act so provides.
2. If a statute is to come into force on a fixed date or event other than assent, the commencement provision is often expressed as a rule of conduct (This Act *shall come* into force on X day) rather than as a rule of law (This Act *comes* into force on X day). (See the discussion of these rules *infra*).
3. Some jurisdictions place the provision authorizing a statutory short title as the last section of an Act. This is unnecessary in uniform Acts and a slight nuisance on revision if an Act has a number of transitory, temporary or amending provisions

preceding the commencement and short title provision. In an amending Act the nuisance does not exist as the whole Act is usually "exhausted" by the "textual" amendment technique.

Sections and Subdivisions

In 1916 a caveat was issued about statutory or legislative sentences:

> "Sentences ought to be and can be made as short and simple as desired. Indeed, any long-winded sentence can be broken up and recast into many short sentences, which would very much ehance the clearness of statutory expression. Frequently a long series of subjects is followed by many predicates and many dependent clauses of coordinate value. If the subject were repeated with each predicate, the length of the statute would be appreciably increased, but in all such cases it is possible to use the detached form of statement, that is, paragraph each predicate, every dependent clause, and the parts of the sentence upon which these clauses depend."
> (*Statute Law-making in Iowa*, p. 383).

Frequently the writer of a statute writes himself into a structural straight-jacket and, in order to wriggle around with his material, contrives long-winded, complicated sentence structures. This has become more common, ironically, by the more frequent use of tabulation within a sentence, which was developed and encouraged to assist clarity of expression. The following appears in Appendix III to the 1919 Report to the Conference (Reprinted 1942 Proc. p. 90).

> "Where it is deemed desirable to cover by one section a number of contingencies, alternatives, or conditions, it will add to the clearness of thought and expression and to the facility of discussion if the section is broken up into a number of distinct paragraphs distinguished by figures or letters." (*Proceedings, National Conference of Commissioners on Uniform State Laws, 1917*, p. 299).
>
> The arrangement of sentences in detached or tabular form and the use of mechanical devices for graphic presentation of enactments are common in English and Canadian Statutes. Clearness is materially increased by these expedients. They enable the reader to readily distinguish between the main and the dependent clauses, and to see the relation of the subject to its various predicates."

The tabular form of sentence can be much abused because it permits the writer to complicate a sentence with a great many coordinate clauses, a multiplicity of predicates and subjects, conditions and circumstances. The sheer number of words, without paragraphing or tabulating, would in an ordinary sentence discourage drafting the provision with that much content.

One method of avoiding such an inconvenient practice is to dispense with subdivision of sentences beyond the level of tabulation indicated as the *paragraph (i)* level, with the possible exception of the definition provision when the defined terms are introduced by the *clause (a)* level of tabulaton. (See 1968 Proc. p. 95).

Internal References to Provisions

Identification of a section in a statute should be unmistakable and indicated by reference to the number of the section, subsection, etc. intended to be referred to. But at the same time it is unnecessary to overdo the reference since there is a general statutory presumption that a reference to a section in a statute refers to a section of that statute; to a subsection refers to a subsection of that section, etc. (See Uniform Interpretation Act, sec. 29).

There are other presumptions concerning statutory references that arise from section 29 of the Uniform Interpretation Act which should be kept in mind to encourage brevity of expression.

Marginal Notes

It is well worth repeating what was written about marginal notes in 1919 in the Report of the Committee on Legislative Drafting (1919 Proc. App. Bot. p. 253 (CBA publication) and reprinted in the 1942 Proc. at p. 86).

> "Marginal notes to all uniform Statutes should be prepared by the draftsman. His knowledge of the subject-matter enables him readily to put them into proper form, and this attention on his part is necessary to ensure their uniformity.
>
> "Marginal notes should receive more attention than is usually given to them. Each note should express in a concise form the main object of the section on which it is made, or should at least indicate distinctly its subject-matter; and all the notes, when read together in the "arrangement of sections", should have such a consecutive meaning as will give a tolerably accurate idea of the contents of the Act." (Thring, p. 50).
>
> "Attention should be paid to the framing of marginal notes. A marginal note should be short and distinctive. It should be general and usually in a substantival form, and should describe, but not attemp to summarize, the contents of the clause to which it relates. For instance, a marginal note should run: 'Power of [local authority] to, &c.,' and not 'Local authority may, &c.'
>
> "The marginal note often supplies a useful test of the question whether a subject should be dealt with in one or more clauses. If the marginal note cannot be made short without being vague, or distinctive without being long, the presumption is that more clauses than one are required." (Ilbert's Legislative Methods and Forms, p. 246.)

Few jurisdictions in Canada use an "arrangement of sections" today. New Brunswick does so for its revision statutes but has omitted the marginal note upon adopting a bilingual format. Newfoundland recently brought back the "arrangement of sections" after having dropped the practice upon entering Confederation.

One thing is clear. If marginal notes are prepared carefully in respect of each provision, the drafter will more easily become aware when his section contains too much matter. The practice of analysing a Bill through its marginal notes imposes a useful discipline on the writer and assists in organizing both the contents of the section and the arrangement of a statute in a more logical and convenient fashion.

Voice

Parliamentary and Legislative Counsel a number of years ago began to avoid the use of the passive voice in statutes. As an absolute prohibition, however, the avoidance of the passive voice does not make too much sense, e.g. "This Act may be cited as . . .". And there are appropriate circumstances where the passive voice is less annoying and more esthetic than the active.

But still wisdom dictates care in its use. It has a real danger; the draftsman may conceal from his audience the legal subject of the statutory sentence. ("Legal subject" is used here in the sense given it by George Coode). Moreover, habitual use of the passive voice may cause the draftsman to forget or ignore the legal subject himself. There is the danger that he may provide that something be done without indicating by whom it is to be done. Older draftsmen tend to think active in most instances and use the passive voice only when to do so serves some useful purpose.

Tense and Mood

The drafting convention respecting tense and mood has subtly changed since the Conference first enunciated a rule of drafting for itself on the matter. The earlier rule required that the present tense be used in preference to the future tense, except in direct or prohibitive provisions; and the past tense used with the present tense to express a time relationship.

Legislative counsel are not now inclined to a statement of circumstances in the future tense form (If a man shall have been guilty of an offence . . . .); nor do they hesitate to rely on the present tense to state a case, circumstance or condition. The fact that the law is stated to be always speaking removes any psychological qualms about writ-

ing today for tomorrow's events in the present tense (Uniform Interpretation Act, sec. 8).

So far as mood is concerned Driedger comments:

> "Verbs in legislation are almost always in indicative mood. Although there is a special verb form for the subjunctive mood, in modern English the indicative mood form is used to express that mood. Thus *if Parliament be then in session* is now written *is in session*. One exception is *were*.
>
> "The imperative mood is never required since it is always in the second person and legislation is addressed to third persons." (Driedger: op. cit. p. 78).

The present convention recognizes the practice of using the subjective mood to emphasize the statement of a legal presumption, that is the *as if* state of things.

Definitions

Definitions are useful for the purpose of avoiding tedious repetition, and to remove ambiguity. But they should be used sparingly. While a definition can help to extend or restrict the meaning of a word, no word should be defined in an unnatural sense.

> "Few principles of legal drafting call for more scrupulous adherence than the principle that a term should not be defined in a sense that significantly conflicts with the way it would normally be understood in that context by the legislative audience to whom the law is primarily addressed." (Legislative Drafting, Dickerson, op. cit. pp 90-91).

Chapter VI of Driedger's revised edition of "Composition of Legislation" is devoted to the subject of definitions. He describes the functions to which definitions are put as being to delimit, to narrow, to particularize general descriptions, to enlarge, to settle doubts, to abbreviate or to shorten and simplify composition.

It is good drafting practice to avoid placing substantive provisions in the guise of definitions; or more to the point, it is lazy drafting and poor arrangement to do so.

Drafters of statutes can become addicted to definitions and fall into the habit of drafting terms even while still trying to formulate a legislative scheme. As with other tools of the trade, the definition device properly used is very helpful to clarity and simplicity (relatively speaking); abused it can compound confusion and complexity.

Objects and Purposes

There is a dichotomy in the attitude of legislative counsel at present to those who express a wish to have the objects and purposes of an Act expressly stated more frequently in legislation. This dichotomy appears in the convention where the traditional attitude is expressed first and provisions declaratory of the purpose of an Act are given recognition at the same time. The division in attitude arises out of a difference in the approach to drafting between the common law and the civil law jurisdictions, which is getting more consideration in the United Kingdom through its association with the civil law countries of Europe and in Canada at the federal level and undoubtedly in New Brunswick where there is a growing awareness of the civil law approach and the francophone logic.

Voices have been raised both in Canada and in England to adopt the approach of the civil law to the writing of legislation. The situation is described in the Renton Report, which recommended more use being made of statements of purpose. Some extracts from that report will be helpful to those who may have difficulty understanding the reasons for the difference in views.

> "9.13 In this country on the other hand, since the tendency is to spell out the law in great detail, the rules of interpretation are narrower and—though perhaps less so in the case of the Scottish courts —the courts look at the meaning of the words of the statute and do not tend to go behind those words in order to establish the intention of the legislature. In other words the courts presume that the legislature knew exactly what it wished to do and has done it and no filling in is required.
>
> "9.14 In the light of this explanation it can be seen that the traditional approach in Europe has been to express the law in general principles, relying upon the courts and the Executive to fill in the details necessary for the application of the statutory propositions to particular cases, in the light of the general intention of the legislature expressed in preambles, recitals and other documents. This approach appears to result in simpler and clearer primary legislation where detail is omitted, but equally it lacks the greater certainty which a detailed legislative application of the principles would provide. Here on the other hand the traditional approach has been to spell out in the statutes themselves the precise way in which the law is to apply in differing circumstances. This gives greater certainty in respect of the circumstances provided for, and it is not necessary to wait for rulings by the courts on particular applications; but it leads to more complex legislation which is less clear to the ordinary reader." (Renton Report at p. 55)
>
> "11.7 Among the advocates of statements of purposes are those whose task it is to pronounce or advise on the effects of legislation;

members of the judiciary, practising lawyers, and teachers of law. The draftsmen themselves are less enthusiastic. First Parliamentary Counsel takes the view that "in many cases the aims of the legislation cannot usefully or safely be summarised or condensed", and that "there may be a temptation to call for something which is no more than a manifesto, and which may obscure what is otherwise precise and exact". He also points out that "detailed amendments to a Bill after introduction may not merely falsify the accompanying proposition but may even make it impracticable to retain any broad proposition". The Parliamentary Draftsman for Scotland adopts the same view: apart from certain special circumstances, he says "the Act should in general explain itself". New Zealand's Chief Parliamentary Counsel told us that preambles were rare in public Acts in New Zealand; purpose clauses, forming part of the text of the Act, were sometimes used, but were not thought to aid comprehension. Professor Reed Dickerson thinks that "most purpose clauses are quite unnecessary"; that general purpose clauses tend to "degenerate into pious incantations . . . such as . . . the one in a recent ecology Bill, which in substance said "Hurray for Nature!"; but that "in prefatory language in individual sentences such as "For the purpose of this", or "For the purpose of that" or "In order to do this", you may have an economic, focussed purpose statement that is of some use".

"11.8 We agree that statements of purpose can be useful, both at the Parliamentary stage and thereafter, for the better understanding of the legislative intention and for the resolution of doubts and ambiguities. A distinction should, however, be drawn between a statement of purpose which is designed to delimit and illuminate the legal effects of the Bill and a statement of purpose which is a mere manifesto. Statements of purpose of the latter kind should in our view be firmly discouraged. We think that statements of purpose in preambles are particularly vulnerable to the "manifesto" type of drafting, and we should not like to see a reversion to the archaic use of preambles as a means of declaring or justifying the objectives of public Bills. The preamble can be valuable as a means of reciting facts, such as the terms of a relevant treaty. But when a general statement of purpose is appropriate, we think it should be contained in a clause in the Bill. This has advantages at the Parliamentary stage, since a purpose clause can be amended (or omitted) exactly like any other clause. Preambles are subject to special rules. For the reasons we have given, we think that purpose clauses can be helpful, but that they should be used selectively and with caution. We refer in paragraph 19.39 below to one particular class of legislation in which we recommend that statements of purpose should be generally used. Apart from that, *we recommend:*

(a) that statements of purpose should be used when they are the most convenient method of delimiting or otherwise clarifying the scope and effect of legislation;

(b) that when a statement of purpose is so used, it should be contained in a clause in the Bill and not in a preamble."

(Renton Report op. cit. p. 63).

Until the English-speaking common law jurisdictions develop a primary law that is a codified and written law and abolish the doctrine of *stare decisis*,[3] the principles set out in the Drafting Conventions are probably the best that legislative counsel can agree upon.

Words and Sentences

The conventions respecting words and sentences do not need much in the way of comment. Needless words create trouble; at the outset they indicate a failure to write tightly and concisely and at the end they confound the construing of the statute by their presence. A word is better than a phrase, if they mean the same, for one or more words of the phrase may well be needless; "null and void", "force and effect", for example.

Punctuation

The simplest and most useful rule about punctuation in a statutory sentence is this: Write the legislative statement so that it can be read unequivocably and then punctuate to help the reader. If the punctuation affects the meaning, dispense with it — or recast the provision.

Use of Words

The convention on the use of words records the better practice in Canada at this time. The "proviso" is not a problem today with legislative counsel; Latin expressions are slowly being replaced by the vernacular and formulae are becoming acceptable if not yet a familiar tool in the drafting workshop.

May and Shall

The *Uniform Interpretation Act* in paragraph 18 of section 26 (1973 Proc. p. 287) prescribes that "may" is to be construed as permissive and empowering; paragraph 27 of that section prescribes that "shall" is to be construed as imperative.

It is important in drafting legislation to take great care in using either of those expressions. In some cases the auxiliary "must" is more appropriate than "shall". (For a recent and detailed exposition of the use of these legislative auxiliaries reference can be made to Driedger's *Composition of Legislation op. cit. pp. 9-15*).

Coode in his analysis of a legislation expression considers it as consisting of four elements; 1stly, the description of *the legal subject*;

[3] It should not be assumed that codification of the body of the common law will enable legislation to be drafted in the manner of the European civil law. Fiscal laws in Europe are as detailed as in the English-speaking countries; and, secondly, the experience in the United States suggests that codification alone does not make for a European approach to drafting in a law community under the influence of case law and *stare decisis*.

2ndly, the enunciation of *the legal action*; 3rdly, the description of *the case*; and 4thly, *the conditions* on performance of which the legal action operates (Coode p. 6).

The analysis presented by this writer and the rules which he develops from that analysis are strikingly clear and logical.

The following brief extracts only can be presented here, but his entire book will well repay a careful study by every draftsman:[4]

"The purpose of the law in all cases is to secure some benefit to some person or persons . . .

"It is only possible to confer a Right, or Privilege, or Power, on one set of persons, by imposing corresponding Liabilities or Obligations on other persons, compelling these to afford the benefit conferred, or to abstain from invading it . . .

"Now no Right, Privilege, or Power can be conferred, and no Obligation or Liability imposed, otherwise than on some person.

"The person who may or may not or shall or shall not do something or submit to something is *the legal subject* of the legal action.

"The importance of a just discrimination and correct expression of the legal subject cannot easily be exaggerated. The description of the *legal subject* determines the *extent* of the law. On this portion of every legal sentence it depends whether a right or privilege shall be limited to too few persons or extended to too many; whether an obligation is imposed on more persons than is necessary or is not extended to sufficient persons in order to secure the correlative right; whether powers are reposed in right or wrong persons; whether sanctions are or are not made to fall on the proper subjects." (Coode, pp. 7, 9.)

"The *legal action* is that part of every legislative sentence in which the Right, Privilege, or Power, or the Obligation or Liability, is defined, wherein it is said that a person *may* or *may not* or *shall* or *shall not* do any act, or *shall* submit to some act.

"As the *legal subject* defies the *extent* of the law, so that description of the *legal action* expresses the *nature* of the law. It expresses all that the law effects, as law. The selection of the legal subject is important; but it is on the description of the *legal action* that the whole function of legislation exercises and exhausts itself." (Coode, pp. 9, 10)

"The rules of most effect as to the expression of the legal subject are:

"First, to keep the *legal subject* distinct in form and in place from other parts of the legal sentence.

"Secondly, not to permit it to be withdrawn from view, or disguised by the non-description of *persons* or by the substitution

4. This summary is taken from Appendix III of the 1919 Report to the Conference as reprinted in 1942 Proc. pp. 90-94.

of *things* instead of persons, or by the use of impersonal forms of expression." (Coode, p. 14).

"Not one case can be imagined in which it is necessary or convenient to use any other than permissible or imperative language in the enacting verb; and these two rules, therefore, ought never to be allowed to be infringed:

"1st. That the copula, which joins the *legal subject* and the *legal action*, is to be *may*, or *may not*, or *shall*, or *shall not*, as, "any person *may*," "no person *may*," "every person *shall*," or "no person *shall*".

"2nd. That the whole of the enacting verb is always to be an active verb, excepting only where the legal subject is to submit or suffer, as where executory force or punishment (sanctions), are directed to be submitted to by the person described in the legal subject. . . .

"There could arise no difficulty if these rules were observed:

"Whenever an act is allowed *as a right*, or as *privilege*, that is to all the members of the community, or to certain persons for their own benefit, the proper *copula* is "*may*".

"Whenever the act is authorized *as a power*, that is to certain persons to perform, not for their own benefit, but for the benefit of others on whose behalf the power is given, the proper *copula* is *shall*." (Coode, pp. 16, 17).

"As on the due expression of the *legal subject* the *extent* of the law depends, and as on that of the *legal action* the *nature* of the law depends; so on the expression of *the case*, and of *the conditions*, do the clearness, precision, and form of our statute law mainly depend.

"The rule to be observed is of such simplicity as to make its utterance appear almost an absurdity; but, simple as it is, it is the most frequently neglected of any rule of composition.

"It is, that *wherever the law is intended to operate only in certain circumstances, those circumstances should be invariably described* BEFORE *any other part of the enactment is expressed.*

"If this rule were observed, nine-tenths of the wretched provisoes and after-limitations and qualifications with which the law is disfigured and confused would be avoided, and no doubt could ever possibly arise, except through the bad choice of terms, as to the occasions in which the law applied, and those in which it did not. . . .

"It would add much to the facility of discovering *the case* immediately in every legal sentence, if it invariably commenced with the words "when" or "where" or "in case"." (Coode, pp 22, 24).

"A law universal as to its *subjects*, and restricted or not restricted to certain occasions (*cases*), may still operate only upon the performance by some person of certain *conditions*. It is not till something has been done that the right can be enjoyed, or that compliance with the obligation can be enforced, or that the liability can be applied.

"These *conditions* are invariably conditions precedent. The action of the law never takes place till these are complied with. . . .

"For the reason that the legal action is postponed, and cannot act upon the legal subject, until these conditions are all complied with, *the expression of the conditions ought immediately to precede that of the legal subject.*" (Coode, pp. 28, 29, 31)

"Every form of every possible legislative enunciation resolves itself into two or more of these four elements, of which *the legal subject* and *the legal action* are essential, and must necessarily be present, while *the case* or *the condition* may or may not be present.

"If the enactment is to operate on its subject universally, constantly, and unconditionally, the sole elements are the *legal subject* and the *legal action.*

"If the enactment is only to operate on its subject in certain circumstances, *the case* must express these circumstances in *the first words of the sentence*, and not in a subsequent phrase inserted parenthetically in the description of the subject or the action, nor in a separate proviso.

"If the enactment is only to operate on its subject after performance by somebody of certain precedent conditions, these *conditions should be all expressed immediately before the legal subject, and in the order in which they must be executed*; that is, in their chronological order.

"Next comes the *legal subject,* immediately followed by the appropriate model *copula,* introducing the *legal action.*" (Coode, pp. 33, 34).

"Parliamentary considerations favour the accumulation of materials into one clause. But as question of composition and interpretation, there can be no doubt that the more strictly each clause is limited to one class of *cases*, one class of *legal subjects*, and one class of *legal actions*, the better; and that it is a mischief to confer in one sentence two distinct species of rights, to impose two distinct kinds of obligations, to confer two distinct kinds of power, and so on; where parliamentary convenience does not prevail, no good draftsman ever does so." (Coode, p. 42).

"It will perhaps seem to be a great waste of care to make all these distinctions as to the elements, the method of distribution, and the expression of a *single legislative sentence.* . . .

"But it is of these simple elements that the whole law consists. If these be not well discriminated and well marshalled in each sentence, there is no hope for their being well combined in the whole law." (Coode, p. 68).

What Coode says of "shall" and "may" has been modified in modern practice. (See Driedger's *Composition of Legislation* 2nd ed., rev. chap. II; Thornton's Legislative Drafting, pp. 80, 81; Dicks Legal Drafting pp. 60, 61).

Coode's work should be known by all who prepare legislation. As Thornton says (p. 25) "it remains of value for its care for the structure of the sentence, its attention to the core of the sentence (the subject-verb, or subject-predicate relationship) and finally for Coode's emphasis on the arrangement of the modifying clauses in the best position. His suggested order is still worth keeping in mind and applying with discretion. As a general rule, Coode's advice still holds good and it is better to state the circumstances (Coode's case and conditions) in which a rule is to apply before stating the rule itself."

Circumstances and Conditions

The Drafting Convention so far as it concerns circumstances or conditions that affect the operation of a legislative rule follow the recommendations of Coode, which is now the traditional approach—but like the other conventions there will be occasions when the meaning of a legislative sentence will be more immediately understood if the convention is not observed.

Rule of Law vs. Rule of Conduct

In commenting on Coode's analysis, Driedger has remarked that

> "The essential questions to be asked and answered in relation to every sentence are:
> 1. To whom does the law apply?
> 2. What is the law?
> 3. In what circumstances does the law operate"?
> (Driedger, op. cit. p. 5)

There is a fourth question that should also be asked and answered: *HOW* is the law to operate? Does it require that it be expressed as *conduct* or *law*? That is, will the purpose be attained by

1. ordering a course of conduct, prohibiting a course of conduct, permitting a course of conduct, removing a power of conduct, or requiring a course of conduct or the refraining from a course of conduct? or
2. prescribing a direct rule of law in either a positive or negative form?

Examples from statutes may be helpful to show actual use. The following group (a) expresses *conduct*, while group (b) expresses *law*.

Group (a): An endorsement in order to operate as a negotiation *must be. . signed.* . (RSC 1970 c. B-5 s. 62(1)
The usual place of meeting . . . *shall be held* to be

the legal domicile. . (RSC 1970 c. B-5 s. 10)
No payment shall be *made* out of the Consolidated Revenue Fund . . . (RSC 1970 C.c. 7, s. 15(4))
The corporation *may employ*. . RSC 1970 c.c. 8 s. 15)
No person other than . . . *may own*. . (SC 1970 70-71-72 c. 49 s. 20(1))

Group (b): A bill is *dishonoured* by non-acceptance. . (RSC 1970 c. B-5 s. 81)
The fact that . . . *does not excuse* presentment. (RSC 1970 c. B-5 s. 79(2))

On a close examination of the *form* of a legislative sentence in modern statutes in Canada it is evident that there are only two *forms* of sentences. Coode's comment about not one case being imagined in which it is necessary or convenient to use any other than permissible or imperative language in the enacting verb, applies to the form of sentence that is expressed as a rule of conduct. He did not conceive of the modern use of the indicative mood, present tense, in the enacting verb, which is the form that expresses a direct rule of law. The distinction in the *form* of the legislative sentence provides a useful rule of thumb, which, if accepted as a matter of routine discipline by a writer of legislation, will be of great value to him in preparing legislation.

The rule of thumb can be expressed in another fashion.

1. If the legislative statement or sentence is to express a rule of direct law, use the indicative mood and, except when the rule is to operate in respect of past events only, the present tense of the operative verb.
2. If the legislative statement or sentence is to express a rule of conduct, use the appropriate legislative auxiliary "shall" "shall not"; "may"; "may not"; "must"; "must not".

A rule of law is distinguished from a rule of conduct in that the former operates without the intervention of a human agent, by its expression in the law; while a rule of conduct requires an agent to do or to refrain from doing something.

If this mode of expressing legislative statements is borne in mind, if one distinguishes each separate *legislative sentence,* its circumstances and conditions, keeps in mind the *legal subject* and ensures that that subject is stated or implied beyond any doubt, the ex-

pression of the *legal action* will fall almost automatically into the appropriate mood and tense or call forth the appropriate auxiliary, either in the positive or negative form as the legislative intent requires.

The uses of the verb in legislative sentences are described under the headings "Divine Ordination", "The Creative shall", "Unintended command", "Permission or power", "Commands to the inanimate", "Directory" by Driedger's Composition of Legislation, 2nd ed. rev. If the draftsman keeps distinguishing between *law* and *conduct* as he writes a *legislative sentence,* he should not find himself much concerned with the difference between the *divine ordination, the creative shall* and *commands to the inanimate.* He would be more aware of what he intends to accomplish with his legislative sentence; and the sentence should, consequently, be more accurate in its presentation of the legislative intent and even a little clearer and simpler.

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APPENDIX B

(See page 23)

EDUCATION, TRAINING AND RETENTION OF LEGISLATIVE DRAFTSMEN IN CANADA

REPORT OF MESSRS. HOYT, RYAN AND WALKER

At its meeting in August of 1976 the Legislative Drafting Section received a report of the Special Committee on Education, Training and Retention of Legislative Draftsmen in Canada following upon a general discussion of the contents of the report resolved that the Special Committee be continued to report further to the Section in 1977. The report of the Committee is found at pages 64 and 65 of the *1976 Proceedings* while the resolution adopted in 1976 is found at page 21 of the *Proceedings* of that year.

In pursuance of the directions given to the Special Committee, the following documents are made available for consideration:

SCHEDULE 1

Report on Education, Training and Retention of Legislative Draftsmen in Canada, prepared by Mel M. Hoyt, Q.C., Legislative Counsel, Province of New Brunswick.

SCHEDULE 2

Article entitled "Legislative Drafting in London and Washington" by Reed Dickerson.

Editorial Note: Reed Dickerson's article mentioned above is not reprinted in these *Proceedings* as copies are available from the Executive Secretary of the Conference.

The article was published in the *American Bar Association Journal, 1958* and was republished in *The Cambridge Law Journal, 1959.*

SCHEDULE 3

Part of a letter of April 29, 1977 from Dr. E. A. Driedger, Q.C. to your Chairman, along with his article entitled "The Legislative Training Programme in Ottawa".

APPENDIX B

Editorial Note: Dr. Driedger's article is not reprinted in these *Proceedings* as copies are obtainable from the Executive Secretary of the Conference.

The article was published in the Journals of the Commonwealth Parliamentary Association, October 1973, Vol. 54, No. 4.

It is the view of your Committee that the material presented with this report and that presented with the previous year's report should be given consideration by the Legislative Drafting Section through a general discussion and expression of views.

Mel M. Hoyt
James W. Ryan
Graham D. Walker (Chairman)

August 15th, 1977

SCHEDULE 1

EDUCATION, TRAINING AND RETENTION OF LEGISLATIVE DRAFTSMEN IN CANADA

REPORT BY MEL M. HOYT

I suppose we should first ask ourselves whether we hear any complaints or have any problems. If none, then we can look ahead and get ready for what will perhaps be a new challenge. Unfortunately, we already hear too many complaints and we already have too many problems.

It may not be necessary to separate education from training but there is a difference. For our purposes let us consider education as a means of introducing students to legislative drafting. This introduction, this preparation, is becoming more and more essential because legislative drafting is facing a new challenge brought about by increasingly rapid change. Training on the other hand might be considered as a means of coping with the problems inherent in the legislative process, with an eye on what improvements are being made in that process.

At law school, students should be introduced to legislative drafting in such a way that they will realize there is more to it than a study of case law. Case law is important in so far as it is the test applied to a certain combination of circumstances in a particular case, but students should not be left with the impression that case law is the only way to approach the legislative drafting process.

There are a few people who downgrade legislative drafting by saying that students need only to know a few rules of drafting that can be found in any manual on legislative drafting. Why do they downgrade legislative drafting by saying that? By creating this impression students will naturally turn to other courses in law.

If that is what some people think, then let us point out to them that a manual on legislative drafting is one thing; drafting in accordance with that manual is quite another. The pressures of time and the lack of personnel make it impossible for the draftsman to follow the niceties laid down in legislative drafting manuals. Just how to deal with these pressures is a constant challenge in itself and a good draftsman learns how to cope with them only through experience, but he cannot gain that know-how by experience unless in the first place he is directed and encouraged in the right direction. Once educated in legislative drafting, it develops with experience.

Legislation is an important field of law because through it we change our way of life, our whole concept of society. It would be interesting to find out, and perhaps we should find out, how many universities in Canada make a course in legislative drafting compulsory. It would be no surprise to me to learn that some universities don't offer such a course even as an elective.

There seems to be a general feeling that a study in wills and contracts deserves special attention and that anyone who can draft a will or a contract can also draft legislation. I agree that drafting legislation in some respects is the same as drafting wills, drafting contracts, or drafting anything else. Drafting anything is the art of writing what you want people to understand. I do not, however, agree that drafting wills and contracts deserves special attention to the exclusion of drafting legislation. Of course I am biased but it seems to me that the drafting of legislation deserves top priority. I wonder whether universities realize that a course in drafting legislation will help students draft wills, draft contracts, and draft anything else.

Right here we are being unduly critical of the universities. Why should they be aware of our problems when perhaps no one has brought them to their attention? But if they think legislation is good enough, I am sure it doesn't have to be pointed out to them that it could be better. What we should be searching for are ways to make it a lot better. I think the universities, the government, the legislature, the judiciary, the bar and in particular the public will agree on that.

APPENDIX B

The aim of legislative drafting is to state what is intended in such a way that all concerned can understand. The intention of the legislature is important. With a slip-shod arrangement, the intention becomes uncertain. To make the intention certain the draftsman starts by gaining an understanding of the problem, he then analyzes the proposed remedies and then arranges the necessary provisions in a clear and logical arrangement. This can only be done by clear thinking and logical expression.

Perhaps part of the problem lies in the fact that the government and the legislature permit drafting to be done by someone who spends most of his time doing something else. Since sessions are not continuous, the drafting of legislation is looked upon as something part time only. It is not part time; it is full time, and then some. This is what the universities, the government and the legislature do not realize. It is up to us to make them aware of it. It is up to us to develop ways to make our legislation a lot better.

Can the language of our present day legislation be improved? We hear it is vague, obscure and complex; its meaning is doubtful and puzzling and its effect is uncertain and evasive. Strange to say this fault may be the result of our attempt for certainty; we tend to overelaborate.

Not only is the language vague, obscure and complex, it is full of redundancies, and pairs of words, and the draftsman is advised not to make any changes now because those redundancies and pairs of words have become terms of art. The use of these meaningless words and phrases, these archaic expressions, the twists and turns of the double negative, require a rare type of expertise to ascertain or even guess at its meaning.

We must adopt simpler language and shorter sentences. There is no need for a sentence to go on and on and on. We must strive for simplicity and clarity. A statute should not only be written with simplicity and clarity of language, it should be readable. One should not have to apply some kind of a cross-word mentality to ferret out the meaning of an Act by referring to a dozen other Acts and regulations.

Before saying one should not have to apply that kind of mentality, let us ask ourselves whether our individual statutes can be coherently and logically arranged, and can the various statutes bearing on the same or related matters be brought together so as to lead the reader to the current state of the law on any given matter instead of into a morass of confusion.

One reason why statutes are so hard to read and understand is that the aim of the legislators and the draftsmen is to cover all possible contingencies. No one can foresee all the contingencies and any attempt to do so comes close to an exercise in futility. It is even worse than that because to leave out one contingency creates the presumption that the mention of some excludes others.

We have reached the stage where we can't see the forest for the trees; we can't see the broad general intention of the law because it is hidden behind too much detail. It has been recommended by reliable authorities that we should spend less time on providing for all possible combinations of circumstances and spend more time on stating broad general principles. They pretty well assure us that those broad general principles would be applied by judges to the merits of each case and the intention of the legislature would then be fulfilled. I question the plausibility of this, at least for the present, but let's not dismiss it lightly.

The courts might welcome it; it might solve a lot of their difficulties; it would lead to an appreciation of justice as distinguished from a literal interpretation of a hurriedly drafted detailed Act. It is modern thinking in England and the United States that judges should become partners with the legislators, and that if the legislators would give judges the trust and credit they so rightly deserve, the possibility of fulfilling the legislature's intention would be multiplied many times.

Since we here in Canada go into great detail and try to provide for all possible eventualities, the courts have been driven to a narrow interpretation; they take the words of the statute at their face value and do not feel it is their duty to fill in what is missing. I hope that is a fair statement to make about the courts. After all it was the legislature that was aware of the evil and it provided the remedy. In fact it contemplated so many contingencies and provided the exact method and remedy for each that it would be presumptuous on the part of the court to fill in the gaps. Our present method of being over precautious may help the court, but on the other hand it may frustrate the court, and confuse the lawyer and ordinary user.

How do judges feel about the way statutes are drafted? Don't ask them! But how would they take to the proposition that more be left to their discretion? Once given the broad general principle, how would they feel about filling in the details the best way they can? If their good offices be not abused, they no doubt would do an excellent job of supplying the deficiencies that were overlooked by the draftsman

and the legislators. If we could state the broad general intention of the legislature, no court would run wild with it. Judges are not made of that kind of stuff or they wouldn't be there. If we could state the broad general intention in simple, concise, straightforward style, the intention of the legislature would not be lost sight of and hidden behind a lot of detail.

Judges would perhaps take a new approach and deem every Act and every provision thereof remedial, and give such fair, large and liberal construction and interpretation as best insures the attainment of the objects of the Act. But what draftsman is going to take a chance on judges changing their approach? There must be some assurance or at least some indication from the courts that they will interpret an Act according to its true spirit, intent and meaning.

The courts have always approached legislation with a true sense of their responsibility to carry out the intention of the legislature. Each year, I think we can see a more definite trend to this beneficial approach by the courts. Let us do our part and at least consider the desirability of setting out broad general principles without so much detail.

I am not recommending that we adopt this method yet; I am asking that we consider it. We must not forget that under English law, much reliance has been placed on the common law, and it takes plain statutory language to change it.

We must not forget either that every year we have amendments to taxing statutes and sometimes new ones. These, by their very nature, are complex and intricate to the point of obscurity. The variety of schemes that entrepreneurs are capable of conjuring up makes a simple tax statute impossible.

Tax avoidance schemes that most of our insurance companies, banks and trust companies permit and even promote are to say the least enlightening. I use the word "enlightening" because it is all right to avoid taxation, it is all wrong to evade it. We expect trust companies, lawyers and accountants to plan our estates so that as a by-product we avoid taxes. If this is what we expect, we must make clear with the greatest of detailed provisions just what is all right and what is all wrong. What may appear to be a perfectly safe course may turn out to be very embarrassing for all concerned.

This detailed legislation that we draft here in Canada is not the result of non-confidence in the Courts. It is partly the result of a

practice that administrators have insisted on for their own guidance in making rulings; a practice that we have been beguiled into; a practice that would almost lead one to think that legislators think judges are incapable of giving effect to simple, clear, straight-forward statements of principle. I am sure judges would be willing to give us much needed guidance in getting the drafting of legislation on the road to what makes sense instead of what is today confining ridiculous detail.

Beware of judges, however, because they may have nothing but contempt for us. They have no occasion to see our strong side; they see only our weak side because they have only our vague, ambiguous, inconsistent provisions brought before them. No wonder some judges have expressed themselves so forcibly when taking the draftsman to task.

If we apply ourselves, we should be able to make our statutes more readable. We know that much detail can be set out in schedules to Acts, in which case the legislature can not be accused of placing too much power into the hands of the government. We also know that much detail can be set out in regulations and orders in council, in which case more power is placed in the hands of the government, but much time is saved in the legislature, especially in highly technical matters that, with all due respect to the legislators, many of them would not understand anyway. I am sure legislators would be the first to admit this; I am sure they would feel more confident to leave technical matters in the hands of ministers responsible for implementing the measures.

If we could state broad general principles in the Act and leave the details to schedules, regulations and orders in council, we would have an Act more readable, and perhaps better understood. But I ask you, would the Act together with the schedules, regulations and orders in council be more readable? Would the law relating to a particular matter be better understood?

I think we should direct our attention to what might properly be put in schedules and what might properly be put in regulations and orders in council. We cannot expect to get unanimity; in fact none of us can be expected to be consistent even with himself. I do, however, think that we should be able to get unanimity on the concept that better legislation will result by providing in the Act that detailed provisions can be found in the schedules or can be made by regulations and orders in council.

This concept is not the only one that will make an Act more readable. We should direct our attention to the arrangement of the Act. Already we are pretty well agreed on the framework, but there are minor variations in different jurisdictions. I am thinking now of the use of the long and short title and the place one might be expected to find the short title if there is one. I am thinking also of bringing together in their respective places provisions relating to evidence, penalties and delegated legislation. The general arrangement for each jurisdiction may already be established by custom and to change that kind of an arrangement would confuse the user, but no jurisdiction should permit a slip-shod shuffle of provisions that could very well be brought together into their respective places.

Maybe some thought should be given to bringing closely related matters under some kind of principal Act whereby the user would be directed in locating all the law on a particular matter. It may be that someone has the ingenuity to think up some such wonderful scheme. He would have to keep in mind amendments so that the law on whatever one is interested in is always up to date and in one place. Looseleaf statutes may be a step in that general direction, but they are not the answer to bringing together closely related matter in one place.

I don't see how any such scheme could be devised. How could various related matters be brought within any group so that they would be related for different requirements, the different requirements of those who use the statutes? When you consider the judge, the lawyer, the accountant, the government administrator, the legislator and last but not least, the public, when you consider the varied interests these various people have in statutes, it is not conceivable that any such scheme of grouping would be satisfactory for all of them.

These are only a few of the problems that we face and we should be coming up with a few suggestions, if not satisfactory answers. The difficulty that users of the statutes are facing is a matter for concern and study, and the fact that this difficulty will become more and more acute as the statutes grow, as they become more complex and technical, and as they continue to invade the lives of every man, woman and child from birth to death, make it a matter too big for us to tackle alone. We must ask help from the courts, from the universities, from the Canadian Bar Association, from experienced legislative counsel and from both the government and the legislature.

As the range of subjects treated by legislation broadens, as the volume of information grows, as population problems multiply, and other kinds of explosions make their impact on the government, all these will result in legislation that becomes more voluminous and more complex. Consequently, it becomes more and more important for all concerned to educate and train legislative draftsmen; for all concerned to recognize the skill and knowledge of the few legislative counsel we now have; for the universities and legislative counsel to develop jointly better techniques so that the user will not become more and more confused.

It is necessary to convince students that legislative drafting can lead to personal advancement and success in life. Too often the draftsman is regarded as a pettifogger. One day a certain barrister phoned me and started off by saying that it had just occurred to him that I might know as much about the Fatal Accidents Act as a lawyer would.

If those in the legal profession and in the higher echelons of the public service, and ministers too, could be made to realize that the legislative draftsman is an important expert in the legislative process, then we might find more law students more willing to be educated in this important specialty of the law.

The universities must educate law students in legislative drafting, and the government must train them in the legislative process. Universities can teach legislative drafting but the expertise cannot really be acquired in the classroom; it can be acquired only in the environment of the legislative draftsman's office. Courses at the university are necessary, but they cannot alone take the place of training.

Educators who have not had the practical experience of drafting legislation are inclined to assign projects that are imaginative, thought provoking, but not very interesting. They would not be inclined to assign a project where all the research has been done and the policy decisions have already been made. To merely state those decisions accurately, clearly and concisely is something, that, in their opinions, should have been learned below the university level, or at least before entering law school.

Imaginative projects are not what the student wants, or at least not what he needs. He needs a project that has more relevance to the real world; something he can point at and say "I had a hand in the writing of that Act."

APPENDIX B

When legislative drafting is taught at a university by pure academics, it will very likely consist of a course in research. To them, research is the important thing; reform is the important thing, and so it is; no one can question that. What I object to is the subtle suggestion perhaps innocently made, that drafting legislation is merely frosting the cake. Granted, research and policy making come before form, but without form, ambiguity will creep in and the confused expression will more often than not be the undoing of all that research and policy making.

Universities should teach students in the legislative drafting course that they should never do any research that can be done by someone else. Students that have to do legal research first and then the drafting, do not have much time left for drafting. Since law students are trained to do research in other courses, they should in the legislative drafting course concentrate on drafting so that it will not be put off until the end and finally neglected. Why concentrate on what they have already learned to do in other courses?

Universities should concentrate on the structural and compositional aspects of legislation rather than on the research area. In the legislative draftsman's office the pressure of time and the lack of personnel make it necessary for the draftsman to get as much research as possible done by other people. The draftsman has to get his research material from the experts who already have the knowledge, and from the policy makers; not from a book, but more often than not by using the telephone.

Granted, some book research must be done by the draftsman, but he should not be taught to have a sense of guilt for not doing the whole research job himself. Legislative draftsmen have very little time to do any real research beyond reading the relevant statutes and a few cases, and most important, thinking a lot about them.

The importance of educating and training legislative draftsmen is becoming more and more important. Not only are legislators expecting draft bills to be prepared in less and less time, there are more and more areas coming to light where you have to know the field pretty well before you can talk to the policy makers. The further we enter highly technical fields, the more we have to find out what the experts know and the policy makers want. Unless we know how to speak the experts language, how can we put the policy maker's decision in clear language and in logical order?

We must develop a system whereby today's problems resulting in rapid change can be remedied in a convincing way. Today laws are passed by the car-load, and they affect millions who are now well enough informed to think they should understand everything that affects them. This is a case of a little knowledge being a bad thing in so far as those millions in one way or another are revolting and openly defying the law; even declaring that they intend to do everything they can to stop the implementation of the law and to compromise at nothing short of repeal. We don't have to look at any one group or class to prove this point; we had better take a good look at our university professors, our medical doctors, our technicians, yes, even our school children. To make our laws understood and accepted by all is a mission impossible.

It is not idle, however, for us to consider the problem. Perhaps with help from all sides we can come up with something that is an improvement over what we have today; something that different interests can live with.

It is our duty to tackle this problem, and it is also the duty of universities to concern themselves with some kind of methodical, gradual advance in the simplification, acceptance and respect for the law.

If universities are to educate us in how to cope with society, it must be brought home to them that not only is every individual regulated by statutes, but also the affairs of every municipality in which we live, every corporation for which we work, every institution in which we are cared for, and every school and university where our children are educated.

Just as new technology breeds more technology, so does a new law breed more laws. In fact, technology and law are closely related. As our way of life changes through technological advances, the more demands there are for more legislation to remedy evils created by those changes.

It is a new kind of monster that universities should take a close look at. The bigger our statute books grow, the more complex are the legal problems resulting therefrom. Complexity leads to obscurity and obscurity leads to more detail, and more detail leads us right around to complexity again.

Although an attempt is being made to make the law clearer, in doing so the law is becoming harder to find. A person no longer

knows what his privileges and rights are; no longer does he know his obligations and liabilities. Why? Ironically, because of the law. When one does not know where he stands with regard to the law and cannot find out without incurring considerable expense, it is a hardship, sometimes a calamity and the law by which we should be able to live a secure life becomes a mockery.

No university is going to educate us in what is becoming more and more ridiculous. If the government and the legislators would direct the attention of the universities toward this problem and if legislative counsel would lend a hand, there might, there just might be some solution. It is not merely worth a try; it is a must.

Ordinary writing is not to be compared with legislative drafting. In ordinary writing the writer can expect the reader to grasp the intended meaning, but in legislative drafting the draftsman can expect the practising lawyer to distort the intended meaning even if it requires reading in bad faith. This is not intended as any slur against the practising lawyer; on the contrary, he is merely bringing the matter to the attention of the court for what it is worth. This distinction between ordinary writing and legislative drafting is well known, but I think it might be well worthwhile to stress the point.

If any doubt is left in a taxing statute, it is the duty of the practising lawyer to promote that doubt on behalf of his client. Consequently, the draftsman of a taxing statute cannot afford to leave anything in doubt. Under these circumstances, brevity and simplicity must give way to detailed complicated expressions that only a few specialists in the field are expected to understand.

There is good reason for taxing statutes to be drafted as they are; there is no reason for other statutes to be drafted the same way. If judges have seen fit to take the draftsman to task on a number of occasions, how exasperated must a practising lawyer get. If the practising lawyer becomes exasperated, if he just can't make sense out of what he reads, one of his consolations is that neither can the judges. If this is so, how can we expect businessmen and others to conduct their affairs with any feeling of security. I'm not just talking about taxing statutes now, I am talking about all that growing statute law that today is affecting the private and public lives of every poor soul that finds himself somewhere between the cradle and the grave.

If it is the responsibility of the universities to educate young people, there must be some kind of systematic instruction. It can

hardly be their duty to establish a system of instruction when they are hardly aware that we have a serious growing problem. All right then, let's bring the problem to the attention of the universities; let's not leave it on their doorstep; let's work it out with them with the help of the bench, bar, government, and the representative body of the people, the legislature.

When I talk to law students about legislation, I sense an immediate lack of comprehension. Most of them think a course in legislative drafting is a course in the interpretation of statutes. Unless legislative drafting is improved, interpretation will continue to be the main thing. But legislative drafting should be the main thing, interpretation is ancillary. If a statute is well drafted, there is little need for interpretation. For this very reason, if universities would make it clear to students which is the real thing and which is ancillary, those students would be more interested in legislative drafting. A little clarification from the universities, a little encouragement towards legislative drafting as an essential to legal academic training would pay high dividends to the government drafting office, to the judiciary, to the legislature, and to the public generally.

If universities consider courses in Conflicts and International Law essential, we should look at how international conventions are drafted. Conventions in private international law adopted for unification of law will sooner or later present a problem to our courts.

A convention is not like the statutes we are used to. Instead of trying to cover every possible combination of circumstances as our statutes attempt to do now, instead of being long and involved as our statutes are now, conventions state general principles in short sentences without defining very many if any words and expressions; they are not precise. Practising lawyers and judges will have to take a new approach to determine the intent. This is beginning to look more and more like a joint effort for all those who have anything to do with international law, but let's not make it such a joint effort that no one is going to do anything about it.

The government and the legislature are responsible for our statutes and I have a suspicion that the legislature thinks it is solely a problem for the government. The legislators, many of whom are practising lawyers, see no problem because so far as they are concerned all the legislation could be drafted by practising lawyers in their every-day office routine, and for subject matters that are not so routine, a little help is always forthcoming from some expert in the

field to which the law relates. If we want good legislation, we want good draftsmen, that is, draftsmen who are educated in their specialty, trained in their field and retained in their specialized profession.

It might be useful to suggest here that perhaps we should establish a policy of hiring young solicitors directly from law school. At that point they have not acquired too many bad habits. This type of person we can train because at university level they have been educated, hopefully without having developed any bad habits. It is the function of the university to educate, but it is our responsibilty to train.

The legislative draftsman must not only have a flair for drafting legislation, he must be able to get along with people, especially the policy maker and the political strategist. He doesn't learn all that in the university; he has to be trained in the legislative draftsman's office where the action is. This is an important phase of legislative drafting and it must not be neglected in the training process.

He must also possess a fair amount of common sense. No manual on legislative drafting will suffice to develop good statutes when the draftsman himself lacks the ability to project in his mind's eye how well a proposal will or will not work in actual practice.

At this point, let me emphasize two points. First, we do not have enough adequately trained staff to do the kind of job we should be doing. Secondly, we do not have enough time allowed to us by legislators to do the kind of job we should be doing.

We all know that when the legislature is ready for a particular bill, the legislature wants it whether a shoddy or a good product is before it. One reason why we have to spend so much time in the legislature looking after bills derives from the fact that nowadays too many bills are introduced before they are ready and the drafting has to be finished by means of amendments moved in the House. Legislators cannot understand why the bill cannot be introduced immediately and corrected in the House later on. This was not the case as late as twenty years ago, but today it has become almost standard practice. The date of introduction is more important to ministers than the quality.

When a minister insists on having a particular bill ready almost the next day, and you are informed of this great urgency by his deputy minister, there is no point in complaining to the deputy

minister that the deadline cannot be met. That deputy minister knows that you as legislative draftsman won't take as much flack as he will. So the pressure is being put on the legislative draftsman indirectly through the deputy minister, and that deputy minister realizes that he is backed up not only by his minister but by the government as a whole.

Just when the legislative draftsman should become involved in a legislative proposal depends upon the size of the staff, and the particular proposal and how far that proposal has been developed. If we have sufficient staff, it might be desirable to be involved at an early stage, and in some cases regardless of staff, it might be necessary to get involved before the proposal has been fully developed and the details over-elaborately worked out.

The legislative draftsman can't become too involved with every legislative proposal. He has to move quickly in and out of subject matters as the workload builds up here and there. He doesn't have to be a specialist with regard to any particular legislative proposal because he can always go to an expert and ask questions.

Sooner or later the legislative draftsman must become involved. If he can be a partner in the proposed legislation, he will derive from that relationship a kind of professional satisfaction which he deserves. On the other hand he should not devote so much time to the legislative proposal that he doesn't have enough time to devote to the actual work of drafting.

Another thing which should not be overlooked is that the draftsman should be freed of non-drafting functions. If this is overlooked we will soon discover that the nondrafting functions have taken precedence. We must always keep in mind that the draftsman's first duty is the drafting of legislation. These other nondrafting functions are usually things that other people can do, people who do not have adequate drafting skill. We have such a small fund of drafting talent that we have to be careful not to waste it on assignments that others can do just as well.

Most lawyers can turn out good legal opinions, but only a few can turn out good statutes. A good legislative draftsman not only requires a fair knowledge of the law, he also requires a flair for expressing the law clearly and concisely. This is one reason why good draftsmen are scarce, and since they are scarce, they should not be assigned to other assignments where others are available,

capable and willing. Furthermore, not only does this keep drafting talent where it is most needed, it keeps the draftsman more alert, in condition and experienced in his natural element of legislative drafting.

As I have already mentioned, interpretation of statutes must not be confused with drafting; they are related but quite distinct. I think this is the main reason why most lawyers think any lawyer can draft legislation; since they interpret the laws all the time, they naturally think they can draft better than a civil servant. They overlook the fact that not only should a draftsman be educated in that specialty at the university, he must also be trained by a pro to become more than an amateur. There are in the legislative drafting field altogether too many amateurs, altogether too few professionals.

Let me hasten to say that practising lawyers in their chosen fields of law are specialists who can give invaluable advice on legislative proposals. They can give warnings of pitfalls and loop-holes and they should be consulted on as many occasions as time permits and the budget allows.

However, teamwork must stop there. There can be no shifting of responsibility from the legislative draftsman to the practising lawyer. Such irresponsibility on the part of the draftsman would lead to a different arrangement, a different style and composition for every statute that is drafted by a different practising lawyer. In some cases there no doubt would be a considerable overlap and conflict with other statutes, especially those prepared by different lawyers for presentation at the same session.

The criticism that is being levelled at our statutes is not quite the fault of the draftsman. The fault lies in the shortage of draftsmen and to solve that shortage is what this is all about.

The government is aware of this criticism, but is it aware of the shortage? Since statutes constitute the official medium for curing evils in our society, surely it is not asking too much of government to give legislative drafting higher priority.

The cost of maintaining an efficient and adequately staffed office for drafting legislation is just another cost that has to be incurred in the legislative process, but it is a cost that will pay greater dividends than many other costs incurred by the legislature.

Maintaining an efficient and adequately staffed office for legislative drafting is not merely a matter of adding casual staff as required

from time to time, neither is it merely a matter of recruiting persons who have the aptitude for the work, it is a matter of training and retraining them.

In time the legislative draftsman discovers there are certain people in each department who know what is wanted and how to implement it. It is not always the deputy minister of a department who has the answers. If suitable people can be recruited and trained, their usefulness will increase with experience and they will become more useful as a result not only of education and training but as a result of just what seeps in through the pores, a kind of instinct of just where to go for the right answers.

To become a legislative draftsman, one has to work under an experienced draftsman with the hope that some of this expertise will rub off. That is not to say that a university course in legislative drafting serves little purpose. It might eliminate a lot of would-be draftsmen. More important is the probability that the course would reduce the training period and consequently the overload on the senior draftsmen. Recruits may still have to be trained from scratch, but their preliminary education would shorten the training period immeasurably.

Too often the young lawyer comes in and goes out of the legislative draftsman's office with no more interest in drafting legislation than he had when he came in. He usually applies for a job and is assigned to a vacant position. What some of them really want to be is trial lawyers because there seems to be a career there. Establishing a career field in legislative drafting might help because if a person is assigned to the legislative draftsman's office, he would know he was getting into something permanent, into a position that demands respect, into a specialty that requires skill.

The young legislative draftsman develops his knowledge and skill as best as he can with help from the more senior members of the office. Because a career drafting field does not as yet exist, there is little to attract good men to the field, little incentive for them to remain in it, and little opportunity for pride of identification with a recognized legal specialty.

Since legislation is the official medium for social control, it is important that the policy makers have adequate drafting help. This calls for professionalizing legislative drafting in some appropriate department of the government.

APPENDIX B

Legislative draftsmen have to work under pressure which makes the drafting of legislation a tough job where errors and omissions count. An adequate staff is essential to tackling big assignments that have to be completed within fixed time limits.

Even with an adequate staff, the draftsman has to serve at least two masters. He has to draft legislation in such a way that it will satisfy the legislature and at the same time satisfy the ultimate user. Statutes must therefore take on a form that will satisfy legislators, lawyers, and other persons those statutes will affect. Can we improve the form and still satisfy everyone? At the same time can we take some of the pressure off the legislative draftsman? We can try.

Let me mention here a problem that some jurisdictions do not have. In Ottawa, Quebec and New Brunswick we must also consider the matter of bilingualism. In New Brunswick, the translator is at a great disadvantage in that he cannot do much until he gets the English draft. This difficulty may reverse itself, but nevertheless the problem will remain on one side or the other. At the present time he not only has to work within the arrangement, style and composition of the English draft, he, being the last to get the draft, is the one the demands of time fall hardest on.

If the details in an Act are of a permanent nature, they could be set out in a schedule, but where they are temporary or subject to quick amendment, they should be relegated to delegated regulations. This will take some of the pressure off that builds up when the legislature is in session.

We might also consider whether explanatory notes should be done by the legislative draftsmen. They are not carried over into the Act and therefore could be taken care of by someone else thus leaving the legislative draftsman more time to devote to his other responsibilities that only he can manage.

Legislative draftsmen should also keep in mind that consolidations are special undertakings that have to be undertaken periodically. This requires skill, a skill and aptitude that only a few lawyers possess. Furthermore, even a crash program takes several months and it is not always easy to find suitable lawyers who are willing to undertake such a project. Therefore, I suggest that lawyers who might become legislative draftsmen be recruited and trained for consolidation projects. This training will be invaluable to any lawyer who later decides to enter the profession of legislative drafting.

Law revision is also a matter to be kept in mind by the legislative draftsman. Revision might in some respects come close to law reform but it should be kept separate because the purposes differ. The purpose of a revision is to remove anomalies and anachronisms, and to adopt uniform rules of drafting. The purpose of law reform involves decision making on what constitutes good or bad law. The legislative draftsman's duty is to write law that will carry out the policy maker's intention; it is not his duty to promote or condemn a proposal as good or bad law.

The legislative drafting office must not go too far afield. It must specialize and compress its activities for the plain reason that there is a scarcity of trained legislative draftsmen.

It is possible and necessary for a legislative drafting office to assign priorities to different forms of legislation. For instance, the drafting of statutes should be assigned to trained and experienced draftsmen; the drafting of regulations, although very important, should be assigned to persons less experienced so as to provide a training ground for them. Furthermore, most regulations can be drafted when the legislature is not in session and the pressure is off, thus making it possible for senior draftsmen to give time and advice in training the less experienced. There are other statutory instruments such as administrative orders in council and rules that might be given less priority than regulations. This regard for priorities will increase the efficiency of the legislative drafting office; first the legislative program will less likely be disrupted, and secondly, practical training will be carried on throughout the whole year while maintaining top efficiency at all times from all concerned.

We are trying to save time for the draftsmen because draftsmen are scarce. We must inquire into all forms of new technical methods that will allow him more time to spend on the thinking requirements involved in the legislative drafting process. For instance, just as the dictaphone and the duplicating machine can save time and drudgery for the draftsman, so too might the computer become useful in the legislative drafting process.

If we are going to retain competent legislative draftsmen, we must make available to them up-to-date mechanical devices, adequate and efficient personnel, and a degree of authority with regard to seconding specialized assistince in expeditious briefing in both legal and technical phases of the whole legislative drafting process.

All too often a draftsman's efforts go unnoticed. In some cases this would be welcomed because all too often the draftsman is held up to ridicule. At any rate the sponsor of a proposed Act is usually unaware of the difficulties encountered by the draftsman. Only legislators who have suffered the experience of drafting would be sympathetic to the draftsman. Even those legislators who have suffered the experience become more concerned about their own immediate problem of getting the bill introduced at just the right time and the Act passed in the face of opposition. Then after satisfying an unsympathetic legislator, the draftsman waits in silence, sometimes for years, to hear his tedious efforts misinterpreted by opposing lawyers and ridiculed by the bench.

Under those circumstances the legislative draftsman can't be expected to have much peace of mind or get much satisfaction out of his job. On the other hand if the draftsman could be given more recognition for his talent, for his accomplishments, for his part in shaping the social and economic developments of our country, and for his part in shaping the administrative functions of our government, his morale would be given the boost he deserves, and desperately needs at times. The draftsman can't pull himself up by his own boot straps; neither can his co-workers and supervisors be around to give a few words of encouragement; they have their own problems. Purpose and pride must be instilled in the draftsman by the universities, the judiciary, the government and the legislature.

Perhaps the problem here lies in the fact that we are pleading our case to everyone and no one cares. Legislative drafting requires more recognition; its importance is second to none. The better our legislation is drafted now, the less litigation there will be later on. The costs of litigation in time and money is staggering and it is going up higher and faster al lthe time. To say therefore that no one cares is an accusation that cannot be supported. To say that we had better prepare our case a little better and plead a little harder is a requisite we ourselves must attend to.

Although we realize drafting legislation can be a satisfying profession even with all its hard knocks, we nevertheless realize that private practice is very enticing with all its prestige and glamour. It is therefore important that we do all we can to educate, train and above all retain professional draftsmen in the legislative drafting process.

Even if would-be draftsmen decide that other areas of practice are more lucrative, more interesting, more glamorous, they will nevertheless have acquired a high respect for the process of legislative drafting and an understanding of some of the draftsman's problems. Furthermore, the draftsman who sticks with it might find he has an understanding friend in court as well as the legislature.

July 30, 1976 M. M. Hoyt

SCHEDULE 3

Mr. Graham D. Walker, Q.C., April 29, 1977
Legislative Counsel,
Halifax, Nova Scotia

Dear Mr. Walker:

Re: Legislative Drafting Section

I have finally got down to dealing with your letter of July 8, 1976.

The ideal method of education and training of legislative draftsmen in my opinion is "on-the-job" in a real legislative drafting office under close supervision and tutelage by an experienced draftsman. But there are difficulties. It seems that in Canada draftsmen in a drafting office are usually so busy drafting legislation that they do not have any time to give adequate supervision or instruction. In the British Parliamentary Counsel Office the junior-senior method is used; there, two people are always working on a bill, an experienced draftsman and a junior who is in the learning process. Drafting offices in Canada cannot afford this luxury, because there are not enough draftsmen. Furthermore, the shortage of draftsmen severely limits the number of newcomers that can be absorbed at one time.

My experience has indicated that it is very difficult to attract recruits into this area of legal work, largely because lawyers and law students do not know what drafting legislation is. Also, the position of legislative draftsmen in Canada lacks the prestige that such a position has in Britain. In Canada, I am afraid, legislative draftsmen are regarded as mere scriveners doing work that any clerk can do. The result is that young lawyers have a poor image of the public service and have no desire to join it.

It is difficult to retain draftsmen largely because working conditions are appalling and the financial rewards are not commensurate with the work. And I have known cases where a draftsman after ten years or so decides he doesn't want to spend his whole career drafting laws, and yearns to get into private practice.

The foregoing were the factors that induced me to begin my programme in legislation and to shape it as it is. Enclosed is a detailed description.

I felt that drafting and all aspects of legislation should be taught at a university and should qualify for a master's degree in law. In my view this must be done in order to raise the prestige of legislative draftsmen and to attract recruits into this area of legal work before they take employment in a law office. I try to approximate as closely as I can actual "on-the-job" training. I do not pretend to turn out accomplished draftsmen. Those who have completed my course will still have to learn the art of drafting legislation through actual work in a drafting office, but I hope that the basic training I give will greatly shorten their training time on the job and will relieve the experienced draftsmen.

There is the question whether a drafting organization should be a separate entity, as it is in England and Australia, or whether it should be part of a legal department. There are pros and cons. I grew up in the Department of Justice, and although a large percentage of my time was spent on drafting I did every type of work that was done in the Department. This experience was an advantage for me. Also, I had access to my fellow officers with whom I could discuss matters of law.

The disadvantage in such an arrangement, at least in my time, was that I could not build up a staff; young lawyers assigned to me were given much work to do, other than drafting, and often were taken away. Another disadvantage is that the salaries that could be offered had to conform to the salary structure of the Department as a whole.

Under the British and Australian systems the chief drafting officer is paid as high as the permanent secretaries, and that makes room for higher salaries for the rest of the professional staff. But in a separate drafting office there is the danger that draftsmen may become too isolated, and will not have ready access to people in the

legal department, or to pre-legislation files, such as opinions and litigation. It might be easier to recruit staff to a separate drafting entity, especially since higher salaries might be offered than to lawyers in the public service generally.

Yours sincerely,
Dr. E. A. Driedger, Q.C.
Professor of Law

APPENDIX C

(See page 24)

METRIC CONVERSION

REPORT OF SPECIAL COMMITTEE

At the 1976 meeting of the Legislative Drafting Section the following resolution was adopted:

> 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 Ryan.

This report is divided into three parts. The first part refers to the involvement of legislative counsel in advising on the preparation of metric conversion legislation. The second part mentions Bills introduced and general techniques. The third part deals with matters of style.

PART I

LEGISLATIVE COUNSEL

In some jurisdictions one legislative draftsman has been assigned responsibility for preparing or co-ordinating the preparation of metric conversion legislation.

In New Brunswick the Office of Legislative Counsel provides assistance in metric conversion through permanent representation at the Steering Committee and Working Committee levels.

In Newfoundland a member of the legislative counsel office has been assigned to assist the departments of government in drafting changes to legislation to accomplish metric conversion.

In Ontario, a member of the Office of Legislative Counsel represents the Ministry of the Attorney General on the Interministerial Metric Committee and has been designated to co-ordinate, in the Office of Legislative Counsel, the preparation of legislation involving metric conversion.

In Prince Edward Island the legislative counsel attends meetings of the interdepartmental committee on metric conversion.

In Saskatchewan the Legislative Counsel meets with the interdepartmental metric conversion committee.

PART II

BILLS INTRODUCED

Alberta has passed The Metric Conversion Statutes Amendment Act, 1976.

British Columbia has introduced amendments to the Motor-Vehicle Act and the Commercial Transport Act converting almost all non-metric measurements to metric measurements and various other Bills include measurements expressed in metric units.

Canada has introduced the Statute Law (Metric Conversion) Amendment Act, 1976, intended as the first of four annual omnibus bills.

Saskatchewan has introduced a Bill to amend The Vehicle Act to convert speed limits to metric units.

The techniques used in the various jurisdictions to effect metric conversion include:

(a) The amendment of an individual statute by an amending Act.
(b) The amendment of a number of statutes by amendments set out in an omnibus Act.
(c) The amendment of a number of statutes by an Act that lists the amendments in a schedule to the Act.
(d) The amendment of a statute to include authority for the making of regulations substituting metric measurements for measurement provisions in the statute "on the basis in each case either of the numeric equivalent or of a rationalization of the measurement for practical use".

PART III

STYLE

Differences in style in the writing of measurements can be seen in the drafting in the various jurisdictions. One jurisdiction uses "one hundred and fifty metres" while another jurisdiction uses "150 m".

Again, one jurisdiction uses "forty kilometres (24.86 miles) per hour", another uses "30 kilometres per hour" and a third uses "30 km/h".

Numbers are expressed in words (two hundred), in digits (500); in groups of 4 digits without a space (5000), with a space (1 0001) and with a comma ($2,500).

The Canadian Metric Practice Guide, approved by the Standards Council of Canada carries a "Special Note" that it is a "National Standard of Canada" that has been adopted by the Metric Commission.

Paragraph 2.7.2 of the Guide, under the heading "Rules for Writing Numbers" states:

> 2.7.2. To facilitate the reading of long numbers the digits are commonly separated into easily readable groups of three, counted from the decimal marker to the left and right. To avoid confusion with the decimal marker, the separator should be a space and not a comma, period, or any other mark. A space is not necessary with a 4 digit number except when the number is in a column with other numbers having 5 or more digits.
>
> Examples:
>
> 32 453.246 072 5
>
> 1245(1 245 optional)
>
> 3.1416(3.141 6 optional) but 3.141 59

The Guide also contains a note that "it is important to note that it remains the responsibility of the user of the standard to judge its suitability for his particular purpose".

While the choice of a particular legislative technique for metric conversion must be left to the individual draftsman, the Legislative Drafting Section may wish to consider the development of rules of style in the use of numbers and units of measurement.

Sidney Tucker
James W. Ryan

June 15, 1977

APPENDIX D

(See page 25)

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) that 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 corresponding 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 that 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.

Form of certificate of proof

(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

(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 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.

Defamation actions

(4) Where proof of the conviction or finding of guilt of a person is tendered in evidence pursuant to subsection (2) in an action for defamation, the conviction or finding of guilt of that person is conclusive proof that he committed the offence.

Where information admissible in evidence

(5) 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 of which the person was convicted or found guilty is admissible in evidence.

Matrimonial proceedings and paternity actions

28.2 Where

(a) a person has been found in any matrimonial proceeding to have committed adultery, or

(b) a person has been adjudged to be the father of a child in any action to which that person is a party,

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 of the 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.

Weight to be given to conviction, etc.

28.3 Subject to section 28.1 (4), 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.

APPENDIX E

(See page 25)

PRESIDENTIAL ADDRESS OF WENDALL MACKAY

My report will be brief and will consist of just a few personal observations during my tenure as your president.

The Conference's Aims

Some years ago several of my predecessors expressed concern about the aims, activities, and future role of the Conference, but I personally share the enthusiasm and belief of Don Thorson who, as President in 1974, stated: *"This Conference will never be a 'failure' so long as it continues to perform one critical function . . . providing a wholly unique forum for the formation and expression of fresh, diverse and often diverting ideas about, and of new and different approaches to our common problems about our laws . . ."*.

U.S. Conference

As your president, it was my privilege and pleasure to attend part of the 1977 National Conference of Commissioners on Uniform State Laws which this year met amidst the grandeur of the Rockies at Vail, Colorado.

In his report to you last year, Glen Acorn described in some detail the differences and similarities of our two Conferences and I shall not therefore, except for one or two points, repeat the narrative here. Suffice it to say that I was received and hosted as an honoured guest by our American colleagues and I have many happy memories of a unique and worthwhile experience. I can only hope that we shall be able to reciprocate to George and Jane Keely, Edward and Kendall, some degree of the warmth and hospitality with which they honoured me at Vail.

It's really a very unique experience to attend the United States Conference and I do hope that my successor will be able to attend the next U.S. Conference which I believe is slated for New York City.

The United States Conference is older than ours by some twenty-six years and will celebrate its centennial in 1992. I may not be around in fifteen years time but I do hope that our Conference will endeavour at that time to recognize the occasion, perhaps by holding our Conference at some point in the United States.

APPENDIX E

Our Diamond Jubilee

Speaking of anniversaries, I should perhaps remind you that our Conference reaches its diamond jubilee next year—1978—and some fitting recognition of that historic event would, I think, be quite in order.

Unlike Canada, judges play a very active role in the United States Conference and one cannot help speculating if this policy has fostered the somewhat disturbing trend in the U.S. for judges to ignore constitutional separation of jurisdictions and usurp the powers of the Executive Branch. I'm thinking particularly of recent events where courts have almost taken over the administration of correctional institutions in that country.

In Canada, we don't consider judges *fit* for our Conference—except perhaps those in a supernumerary capacity or those temporarily assigned to non-judicial functions—and in this respect I think our system is preferable to the United States. Moreover, it has the unique advantage that whenever we want to get rid of one of our members we simply arrange to have him elevated to the Bench!

But the U.S. Conference is superior to ours, I think, in membership, in that it admits elected State Legislators to its membership. Last year, our President, Glen Acorn, expressed dissatisfaction in his report with the *"low profile"* of our Conference and its failure to actively promote the enactment of its own Uniform Acts, and he took it upon himself to write all the Attorneys General and Ministers of Justice in Canada asking them to review those Uniform Acts which had not been enacted in their respective jurisdictions.

In his address of welcome to the U.S. Conference at Vail, Chief Justice Pringle of the Colorado Supreme Court made this statement:

"Nothing gets done in uniform law unless it has a champion". For the most part, many of our Uniform Acts do not get enacted simply because they do not have a champion, and perhaps the time has come for the Uniform Law Conference to examine its composition and admit to its membership some provincial and federal legislators, especially those legislators responsible for the administration of our laws. If, however, it is considered impractical to have all the Attorneys General attend our meetings, then the next and most logical officials to champion Uniform Acts are the Deputy Attorneys General. But where are they? Without exception all our potential champions are found in the Criminal Law Section wholly divorced from the business of designing, developing and drafting Uniform Acts.

1977 Consolidation of Uniform Acts

In February of 1976 the Uniform Law Conference formally applied to the Canadian Law Information Council, more familiarly known as CLIC, for financial assistance to publish a new Consolidation of Uniform Acts. The last Consolidation, containing all the Uniform Acts, was published in 1962; it was seriously out of date and as a result the 1975 Conference authorized the publication of an up-to-date Consolidation both as to content and form.

Because the publication of Uniform Acts did not fall within the first priorities established by CLIC our request for assistance was turned down; however, your Executive, at a meeting in Yellowknife on August 22, 1976, moved to reapply on the ground that CLIC had received increased funding from the provinces.

Subsequent correspondence and meetings and telephone conversations between the General Manager of CLIC, Mr. Peter Vivian, and your President, Executive Secretary, and Past President, Robert Normand, resulted in a letter from Mr. Vivian to Mr. MacTavish, dated April 5, 1977, confirming the decision of the Board of Governors of CLIC *"to provide funding to permit publication of the 1977 Consolidation of the Uniform Acts as compiled by the Uniform Law Conference of Canada"*.

It was a happy result for all of us.

The Consolidation is progressing well and should be available for distribution by October of this year.

As you are aware, it was the decision of your Executive both in 1975 and in 1976 that the new Consolidation be distributed free of charge but this decision has not been found agreeable by our benefactors, CLIC.

I attended the meeting of CLIC in Charlottetown on June 10, 1977, and on your behalf thanked the Council for its foresight and generosity. The minutes of that meeting read in part as follows: *"When informed that the publication would be distributed free of charge, members of Council were of the opinion that this publication should be sold. It would seem that when something is handed out gratuitously it is not considered worthwhile.*

"A motion was made by Balfour Halevy, seconded by Philip Shier, that a letter should be sent to the Uniform Law Conference to the effect that CLIC very much regrets the fact that this publication

will be distributed freely, as this would probably affect consideration of future funding requests".

May I say that I personally support the views of CLIC in regard to the sale of our new Consolidation.

In his letter to our Executive Secretary on April 5, 1977, referred to above, Mr. Vivian added a postscript which reads as follows: *"From your letterhead I expect that the Uniform Law Conference has never developed a logo. In order to provide artwork for the cover of the completed consolidation I will prepare some stylistic arrangements of the letters of U.L.C. for use as a logo on the cover of the binder".*

I have not seen the results of Mr. Vivian's artistry but it would appear that the Uniform Law Conference will now have a logo and, I suppose, to state an old maxim, *"Beggars should not be choosers".*

Conference Funding

At our 1971 Conference at Jasper, Alberta, a Special Committee on Finance was constituted *"to consider the finances and budget of the Conference in relation to increased costs, the additional assistance approved for the Secretary, and the position of the Conference in the light of the new matters arising from law reform and international conventions".*

The Committee met on several occasions and at the Closing Plenary Session recommended, *inter alia*, that the Federal Government and all the provinces, except P.E.I. and the two Territories, be assessed $1,500 per annum, and for the Province of Prince Edward Island and the two Territories $750 per annum each, for a total annual Conference income of $17,250.

That was six years ago and it should not be necessary for me to detail what has happened to Canada's economic climate since then. Costs have risen sharply and the value of our dollar has steadily declined. Moreover, additional annual expenditures have been incurred by the Conference.

There is also the matter of pride. As an old and honoured Canadian institution, wholly funded by government, I think we should be economically self-sustaining and I personally find it distasteful to go begging to another professional organization — also almost wholly funded by government—to help us do that which is our right and responsibility to do for ourselves.

May I therefore suggest that the Conference once again constitute a Special Committee on Finance to examine the state of our present and ongoing finances and to bring recommendations for our consideration at the Closing Plenary Session on Saturday morning.

Closing

May I express my deep appreciation to the members of the Executive for their assistance during the year. I have received the best of co-operation from everyone. Especially would I thank our genial and learned Executive Secretary without whose help and guiding hand I would not have been able to function as your president.

I wish all of you a rewarding and productive Conference.

Wendall MacKay,
President

APPENDIX F

(See page 26)

TREASURER'S REPORT

for the year ending August 12, 1977

GENERAL ACCOUNT

BALANCE ON HAND August 16, 1976			$17,875.88
RECEIPTS			
Annual Contributions			15,750.00
Interest			1,457.57
DISBURSEMENTS			
1976 Proceedings		$ 6,123.00	
1976-77 Letterhead		134.22	
President — expenses		324.79	
Secretary — telephone calls		28.53	
Executive Secretary			
Expenses attending			
1976 meeting	$ 1,024.10		
Petty Cash	500.00		
Secretarial Services	2,500.00		
Honorarium	8,800.00		
	$12,824.10	$12,824.10	
TOTAL RECEIPTS AND DISBURSEMENTS		$19,434.64	$35,083.45
BALANCE ON HAND August 12, 1977		$15,648.81	
		$35,083.45	$35,083.45

UNIFORM LAW CONFERENCE OF CANADA

RESEARCH FUND

RECEIVED IN GRANTS

1974-75-76-77		$87,852.00

DISBURSEMENTS

1974-75		$ 3,152.00	
1975-76		700.00	
1976-77		9,332.06	
		$13,184.06	13,184.06
BALANCE IN FUND			$74,667.94
FUND HELD			
1-year term deposit			29,446.37
30-day term deposit			43,098.13
Bank account			
Grant portion		$ 2,123.44	2,123.44
Accrued interest		11,596.30	
		$13,719.74	$74,667.94

1976-77 Research Projects	
Report re family support obligations	$6,277.56
Report on children born out of wedlock	54.50
Project for revision of Uniform Acts for publication	3,000.00
	$9,332.06

E. & O.E.
ANS: APS
August 12, 1977

Arthur N. Stone
Treasurer

APPENDIX G

(See page 26)

SECRETARY'S REPORT

The Conference is fortunate in having Mr. Lachlan MacTavish, Q.C., as Executive Secretary. The Conference profits from the excellent work, the extensive experience, and the sincere dedication that the Executive Secretary brings to his task each year. But the Secretary of the Conference is the greater beneficiary; he has his duties lightened to the point that it comes as a surprise at this time of the year to find that he still has any. One of them is making this report. This is the Secretary's report for the period ending August 20, 1977.

APPRECIATIONS

In accordance with a Resolution passed at last year's Closing Plenary Section of the Conference, letters of appreciation were sent on November 3rd, 1976 to all those referred to in that Resolution (See 1976 Proc. pp. 51-52).

IN MEMORIAM

Since our last gathering, the 58th Annual Meeting of this body, we have lost a former member of the Conference and a member of the Conference.

E. Russel Hopkins, Q.C. a member of the Conference for four years (1947-1950), first while with the External Affairs Department and latterly when Deputy Minister of Parliament, passed away last Fall.

Professor Caron of the Civil Code Revision Office, was a member of the Conference from Quebec from 1971 until his untimely death on June 11th, 1977.

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

FUTURE ANNUAL MEETINGS

At the last Plenary Meeting of the Conference, it was 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.

Because the 1978 Meeting of the CBA will be in Halifax, the Government of Newfoundland has offered to host the 1978 Meetings of the Uniform Law Conference, and this offer has been accepted by your Executive. We do not know at this time precisely which province will host the 1979 and 1980 Meetings but we expect to have more information for you before this week is out.

If the resolution referred to is to achieve its purpose, members should anticipate by three years the need to invite the Conference to its jurisdiction.

PUBLICITY

No overt publicity about the work of the Conference or its purposes was done in the past year. Publicity for the Conference was one of the new duties of the Secretary for which no *modus operandi* has been worked out. Perhaps discussion by the Executive during this Conference will better prepare us for the new PR duties envisaged in recent years.

LIST OF MEMBERS AND OFFICERS

In the past, the Conference published from time to time a cumulative list of members and officers of the Conference. The last such list was published in the 1953 Proceedings (pp. 147-154). In that year the Secretary, Mr. Don Treadgold (Ontario), reported that the previous list had been published in 1944.

It is my turn to point out that the last such list was published almost a quarter of a century ago. In the words that Mr. Treadgold used in 1953 — "The Conference might give consideration to the printing of up-to-date lists in the near future."

RESEARCH PROJECTS

The following research projects were approved and undertaken during the past year:

1. Research on the Law of Support under the aegis of the Alberta delegates. The researcher was Professor Julian Payne, then of Alberta.
2. Research on Children of Unmarried Parents was continued under the aegis of the British Columbia delegates by Professor Keith Farquhar of the University of British Columbia.

No new projects are under consideration at this time, but unquestionably, the Joint Project on Evidence, should it go ahead, will require substantial sums for research.

From the foregoing it is apparent that we have not yet become comfortable or familiar with the use of the research funds; while this may be a cause of concern for those who prefer to see money put into productive work rather than sit idle, I am consoled by a remark of the late Sir James Aikins, First President of the Conference, that steady progress is more to be desired than reckless plunging; that the right direction is more important than the length of the stride. Doubtless the Conference will find direction and pace in due course in the productive use of its research funds.

J. W. Ryan
Secretary

St. Andrews
20th August, 1977

APPENDIX H

(See page 26)

EXECUTIVE SECRETARY'S REPORT

This is the fourth annual report that I have had the honour of presenting to this Conference as your Executive Secretary; this, of course, is not to mention that back in the forties I made eight or more annual reports as secretary.

This evening I shall mention the year's highlights briefly.

CONSOLIDATION OF UNIFORM ACTS

During the year, I undertook and eventually completed a thorough review of all the Acts that are going into our volume *1977 Consolidation of Uniform Acts*. This second editorial revision was necessary to bring the approximately 500 pages of material into line with the dozen or so stylistic rulings that I sought and got from the Legislative Drafting Section a year ago in Yellowknife. Needless to say, this was a time-consuming and tedious task but it was essential to meet the high standards that this Conference should insist upon.

The big news of the year was, of course, the word that the Canadian Legal Information Council had decided to finance the production of this publication.

Once this was established, Peter Vivian and I had no difficulty in completing the many arrangements necessary for the project to proceed. At one time I had hope of having copies here for you today but unfortunately this has not been possible. In fact, the page proofs have not reached me yet; these I will correct myself. If all goes well from now on, as I am assured it will, we can expect distribution this autumn.

BACK NUMBERS OF PROCEEDINGS

The call for back numbers of our annual *Proceedings* from within and outside Canada continues unabated. Often these requests cannot be met, especially for the years prior to 1960. Again I make my pitch: should any of you come across copies that you do not need, please send them in to the office.

BIBLIOGRAPHY

The bibliography following the Historical Note that I introduced in the *Proceedings* two years ago and extended last year is, I believe,

proving to be useful. Please let me know of any corrections or additions that should be made. Obviously it should be as complete and correct as possible.

CUMULATIVE INDEX

The new style of the Cumulative Index that I prepared and introduced in the Proceedings last year is, I suspect, agreeable to you; at any rate I have not received a single comment of any kind from any one.

TABLE IV

My oft-repeated plea for the Local Secretary of each jurisdiction to arrange for a check of its part of Table IV, that is, the list of Uniform Acts enacted in his jurisdiction, has fallen, as usual, on deaf ears. If I am not mistaken, only Prince Edward Island and British Columbia have done their homework in the past year.

You may be interested to know that the Tables, particularly Table IV, are in the opinion of some people of some general interest to the profession. For instance, a fresh edition of the *Canadian Encyclopedic Digest's Practitioner's Desk Book* will include a reprint of our Tables. Suitable acknowledgment of the source will be included and, as well, a note to the effect that the Tables do contain errors and omissions.

OFFICE ACCOMMODATION, ETC.

The Attorney General of Ontario, his deputy, Allan Leal, and the Senior Legislative Counsel, Arthur Stone, have continued to furnish office accommodation, supplies and services to me and my part-time Secretary, Doris M. Stewart, at no cost to the Conference. The importance of this contribution in dollars in each of the past four years cannot be over-emphasized. Quite frankly, I don't know what the Conference, or I, would do without this generous support.

Lachlan MacTavish
Executive Secretary

Toronto
1 August 1977

APPENDIX I

(See page 29)

CHILDREN BORN OUTSIDE MARRIAGE

I

BRITISH COLUMBIA REPORT

At the 1976 Conference the Commissioners agreed on certain principles which were designed to form the basis for a Uniform Act concerning the status of children born outside marriage. All of those principles were constructed upon widespread agreement that, so far as is practically possible, the law should not differentiate between those children born within marriage and those born outside it.

An account of the discussions at the 1976 Conference is to be found at page 28 and pages 90-126 of the 1976 *Proceedings*, and the responsibility of the British Columbia Commissioners has been to prepare a draft uniform act embodying the decisions set out on pages 120-126 of the 1976 *Proceedings*.

The British Columbia Commissioners have once again enlisted the services of Professor Keith B. Farquhar of the Faculty of Law, University of British Columbia, to assist them in this task. Professor Farquhar was, in large measure, responsible for the reports on this matter appearing in both the 1975 and 1976 *Proceedings*, and it was thought appropriate to draw upon this experience.

Since the 1976 Conference a Bill entitled *"An Act to Reform the Law Respecting the Status of Children"* has been introduced into the Legislature of Ontario and the British Columbia Commissioners and Professor Farquhar acknowledge at once the fact that the existence of this Bill has been of considerable assistance. The Bill is attached as the Schedule.

It should be noted that a number of topics arising out of the discussion at the 1976 Conference were referred to other jurisdictions for reports. Some of these are referred to in other parts of this report, but two should be mentioned here.

1. It was agreed (see page 123 of the 1976 *Proceedings*) that the Ontario Commissioners should study further:
   (a) 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

(b) the general extra-provincial effect of the making of declarations of paternity or paternity orders by courts.

Notwithstanding the fact that this responsibility was allocated to Ontario, the British Columbia Commissioners have reached certain conclusions on these matters, and reference to them will be found in section 4(5) and (6), section 7(1)(c) and (d), section 8 and section 9 of the draft Act below. It was thought to be appropriate and convenient to make the draft Act as comprehensive as possible.

2. It was agreed (see pages 28 and 124 of the 1976 *Proceedings*) that the Ontario and Quebec Commissioners should consider the formulation of rules concerning the effect of artificial insemination, and report at the 1977 meeting.

The British Columbia Commissioners remain of the opinion that the question of artificial insemination transcends the scope of the draft Act, and have made no attempt to address the question.

It should also be noted that in order to make the draft Act as comprehensive as possible, the draft has been executed to some extent as if it were for British Columbia. The accompanying commentary and notes point out in appropriate circumstances where other provinces may need, or wish, to consider alternative formulations.

SCHEDULE

UNIFORM ACT

PART 1

EQUAL STATUS OF CHILDREN

1. (1) Subject to subsection 2, for all purposes of law of [ ] a person is the child of his natural parents and his status as their child is independent of whether the child is born inside or outside marriage.

(2) Where an adoption order has been made, ("here insert reference to statutory provision that applies") the child is the child of the adopting parents as if they were the natural parents.

COMMENTARY

This provision is sufficient for British Columbia, which recognizes all foreign adoptions and which provides, in its *Adoption Act*, that all adopted children sever all ties with their natural parents. Other provinces may wish to consider a provision along the following lines:

> Where an adoption order has been made in Canada or in any other jurisdiction approved, by regulation, by the Lieutenant-Governor in Council, the child is the child of the adopting parents as if they were the natural parents.

If this is not thought satisfactory, some provinces may wish simply to deal with the question of recognition of foreign adoption orders by incorporating the following test in subsection (2): "an adoption order made in circumstances, and according to rules, under which an adoption order is likely to be made in (*receiving province*)."

(3) Kindred relationships shall be determined according to the relationship described in subsection (1) or (2).

(4) A distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined for the purposes of the common law in accordance with this section.

2. (1) For the purposes of construing an instrument, Act or regulation, unless the contrary intention appears, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined under section 1.

(2) For the purpose of construing an instrument or enactment, the use, with reference to a relationship described in terms of blood or marriage, of the words legitimate or lawful or other words of the same effect shall not of itself prevent the relationship from being determined in accordance with section 1.

(3) Subsection (1) applies to,

(a) an Act of the Legislature or a regulation, order or by-law made under an Act of the Legislature enacted or made before, on or after the day this Act comes into force; and

(b) an instrument made on or after the day this Act comes into force but does not affect

(c) an instrument made before this Act comes into force; or

(d) a distinction or disposition of property made before this Act comes into force.

COMMENTARY

The Commissioners will recall that at last year's Conference there was a considerable debate on the extent to which a uniform act should be retroactive, and this matter was referred to Nova Scotia (see pages 28 and 125 of the 1976 *Proceedings*) for report at the 1977 meeting. The British Columbia Commissioners have, however, reached the conclusions embodied in subsection (3). The act should apply to instruments executed before the act comes into force, on the basis that people should not be forced to re-execute complicated wills and trusts which were drafted in reliance on the existing law.

The question also arises as to whether the draft act should apply retroactively to existing statutes. For example, should a child born outside marriage be able to re-open the concluded distribution of an intestate's estate? For practical reasons we think not. Thus, our formulation would allow a child born outside marriage to come in on an intestacy or on a testator's family maintenance/dependant's relief application only where the executor, administrator or trustee retains assets in his hands.

Some provinces may wish to make statute-by-statute decisions on whether the draft act should apply retroactively or only prospectively.

PART II

ESTABLISHMENT OF PARENTAGE

3. The courts having jurisdiction for the purposes of sections 4 to 6 are [the Supreme Court and any County Court or Unified Family Court in British Columbia].

COMMENTARY

It is worth recalling that there is room for considerable debate on whether a judge or other official appointed by a province under section 92 of the *B.N.A. Act* may make declaratory judgments which will have the far-reaching effect proposed for such judgments under this legislation. At page 123 of the 1976 Proceedings it is recorded

that: "In any commentary accompanying a Uniform or Model Act ... there should be a reference to the desirability of having those determinations made in a Unified Family Court."

4. (1) A person having an interest may apply to the court for a declaration whether or not the relationship of parent and child between two persons exists.

(2) Subject to subsections (3) and (4), where the court finds on the balance of probabilities that the relationship of parent and child is established, the court may make a declaratory order to that effect and the order shall, subject to section 6, be recognized for all purposes.

(3) Where an order has been made under subsection (2) and evidence becomes available that was not available at the previous hearing, the court may, on application, discharge or vary the order and, subject to subsection (4), make any other order, or give directions, ancillary to it.

(4) Where an order is discharged or varied under subsection (3), rights and duties which have been exercised and observed, and interests in property which have been distributed as a result of the previous order, are not affected.

(5) The registrar or clerk of the court shall give to the [Director of Vital Statistics] a statement in the form prescribed by the regulations respecting an order made under this section.

(6) Any person may inspect an order made under this section.

COMMENTARY

Subsections (5) and (6) serve two purposes. They allow birth registrations to be amended if necessary, and also provide a registry to which trustees and executors may look in determining whether declarations of paternity have been made.

5. An order shall not be made, discharged or varied under section 4 solely on the uncorroborated evidence of one person.

6. An order made under section 4(2) does not affect a disposition of property by a settlor or testator unless the court makes it during his life and for the benefit of his parent or child, or a person claiming through them.

COMMENTARY

The issue dealt with in this section was not addressed in 1976 because of lack of time (see page 126 of the 1976 *Proceedings*). The

reason for limiting the effectiveness of a section 4(2) order where the disposition of property is at stake is, basically, the discouragement of fraud and the making of multiple claims on the same estate or trust property. Hypothetical situations in which this could come about are described in a portion of the Report of the Ontario Law Reform Commission on this matter, which is reproduced on page 114 of the 1976 *Proceedings*. The Ontario Bill contains a similar, but more restrictive, provision in section 4(2) of that Bill.

7. (1) Unless the court, by the making of an order under section 4, declares otherwise, a man is presumed to be, and he shall be recognized in law to be, the father of a child in one or more of the following circumstances:

(a) The man is married to the mother at the time of the birth of the child, except where an order for a judicial separation has been made and the child is born more than 300 days after the making of the order;

(b) The man was married to the mother by a marriage that was terminated by the death of the man, a decree nisi of divorce, or a declaration of nullity, within 300 days before the birth of the child;

(c) The man acknowledges, under section 8 or like enactment of another jurisdiction in Canada, that he is the natural father;

(d) The man has been declared, by a court of competent jurisdiction in Canada, to be the father for all purposes, and that order subsists;

(e) The man and the mother have cohabited, to the exclusion of others, in circumstances in which they have had continuous opportunity for sexual mating, except where the cohabitation has ceased and the child is born more than 300 days after the cessation of cohabitation.

COMMENTARY

Clause (e) is the result of a decision taken after much deliberation at the 1976 Conference (see page 122 of the 1976 *Proceedings*). Professor Farquhar and the British Columbia Commissioners would, however, like most strongly to draw the attention of the Conference to the fact that the presumptions are designed to provide third parties with relatively objective tests according to which paternity shall be assumed. It is difficult to see how trustees and executors, and social agencies concerned with giving notice of various kinds of proceedings,

will ever be able to judge whether or not the conditions set out in clause (e) have been met. A similar observation may be made about section 8(1)(4) of the Ontario Bill.

> (2) Where a marriage is a nullity the man and the woman shall be deemed, for the purposes of subsection (1), to have been married during the period that one of them believed that they were married to each other.

COMMENTARY

The Ontario Bill adds a further subsection to this section. Section 8(3) of the Ontario Bill provides as follows:

> Where circumstances exist that give rise to a presumption or presumptions of paternity by more than one father under subsection (1), no presumption shall be made as to paternity nor recognition given thereto.

The aim of this subsection would appear to be to alert trustees and executors and social agencies to the fact that where, by the operation of section 7(1), a child is presumed to have two or more fathers, an application should be made to court under section 4 to determine the child's true father. As drafted, however, the Ontario subsection goes too far. If, for example, there were a "conflict of fathers" under sections 7(1)(b) and 7(1)(c), it would seem to forbid either father to take any paternal responsibility at all in the absence of a judicial declaration of paternity. The Ontario subsection also creates another difficulty. The British Columbia Commissioners are firmly of the view that judicial declarations of paternity made in, say, Alberta, should be given full faith and credit in, say, British Columbia. It is desirable that an Alberta decree should override a subsequent acknowledgment of paternity made in British Columbia under section 7(1)(c). In short, the effect of an Alberta decree in British Columbia should be discharged only by the making of a new decree in Alberta or British Columbia or elsewhere (see section 9 infra). The Ontario subsection, taken together with section 7(1), would, at best, confuse this issue or, at worst, lead to an undesirable devaluation of the effect of extra-provincial decrees.

After much thought, the British Columbia Commissioners have concluded that the Ontario subsection is unnecessary. If the effect of section 7(1) in any instance is to give a child two or more presumed fathers, it should be clear to trustees and executors, even without the Ontario subsection, that their duty is to go to court and have the

matter cleared up. Adoption and child welfare agencies may prefer to give notice to two presumed fathers rather than go to court for a judicial declaration of paternity. Finally, one presumed father may wish to assume and discharge parental responsibilities without going to court, and in the event that actual conflict between presumed fathers arises, the matter will inevitably lead to a section 4 application even without the Ontario subsection. Thus, section 8(3) of the Ontario Bill should be omitted from a uniform act, and has been omitted from the draft here presented.

8. (1) A man may file a statutory declaration with the [Registrar of Vital Statistics] that he is the natural father of a child.

(2) Subject to subsection (3), a statutory declaration filed under subsection (1) is effective for the purposes of section 7(1)(c) only if the mother has also filed a statutory declaration with the [Registrar of Vital Statistics] that the man is the natural father.

(3) Where the mother of a child dies within 30 days after its birth, a statutory declaration by a man, filed with the [Registrar of Vital Statistics] within 60 days after the birth, that he is the natural father, may be made for the purposes of section 8(1)(c), notwithstanding that the mother has not also filed a statutory declaration.

(4) Where a statutory declaration is made under a like enactment of another jurisdiction in Canada it may be given to the [Registrar of Vital Statistics] and shall have the same effect as if it were made under this section.

(5) A person having an interest may inspect a statutory declaration filed under this section.

COMMENTARY

Subsections (1)-(3) generally reflect the decisions reached at the 1976 Conference (see page 122 of the 1976 *Proceedings*). The 30-day period mentioned in subsection (3) has been arbitrarily chosen. The 60-day limitation on the effectiveness of the father's declaration was not discussed in 1976, but represents an attempt to preserve the element of consensus between the mother and the father which is inherent in subsection (2). In simple terms, a putative father should not, by a unilateral act, be at liberty to acquire the benefits of paternity when it suits him. The 60-day period is, once again, arbitrary.

Subsection (4) was not discussed in 1976, but it seems logical and is self-explanatory.

9. Where a man has been declared by a court of competent jurisdiction in Canada to be the father of a child for all purposes, then, notwithstanding that subsequent to the making of the order there has been an acknowledgment under section 8 or a like enactment of another jurisdiction in Canada that another man is the natural father, it shall be presumed that the man named in the order of the court is the father unless that order is:
   (a) discharged or varied; or
   (b) superseded by the order of another court of competent jurisdiction in Canada.

COMMENTARY

This section was not discussed at the 1976 Conference, but its aim, and the justification for it, have already been the subject of comment in the commentary following section 7(2).

Any question of how the order of the court of another province may, as a mechanical matter, be proved may be dealt with in regulations made under this act.

10. For the purpose of carrying out this Act according to its intent, the Lieutenant Governor in Council may make regulations and orders ancillary to it, and every regulation or order made under this section shall be deemed to be part of this Act and to have the force of law.

COMPLIMENTARY LEGISLATION

COMMENTARY

In 1976 the Conference took a number of other decisions which may or may not require legislation in any particular jurisdiction, but which nonetheless flow logically from the principles embodied in sections 1-10.

Where legislation *is* required on these decisions, most provinces will prefer to amend individual Acts rather than to rely on provisions of a Uniform Act. For that reason, only the decisions themselves are recorded here, for the sake of completeness.

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

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

(c) Similar principles should apply to dependant's relief/ testator's family maintenance legislation.

2. In distributing an estate the duty of trustees and executors ought to be to:

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

(b) search a provincial registry (see section 4(5) and (6) and section 8) which would record judicial declarations of paternity and acknowledgments of paternity which are effective under section 8.

(c) search only the registries of provinces where probate has been issued or re-sealed.

COMMENTARY

Although this matter was not discussed in 1976, the Conference may wish to afford some protection to trustees and executors, particularly in the light of section 7(1)(e) (if it continues to form part of the uniform act).

The following is a modified version of section 6(2) of the *Status of Children Act, 1969*, 1 Statutes of New Zealand, 1969.

> No action shall lie against any executor of the will or administrator or trustee of the estate of any person, or the trustee under any instrument, by any person who could claim an interest in the estate or property by reason only of the provisions of the (*Equal Status of Children Act*), to enforce any claim arising by reason of the executor or administrator or trustee having made any distribution of the estate or of property held upon trust or otherwise acted in the administration of the estate or property held on trust disregarding the claims of that person where at the time of making the distribution or otherwise so acting the executor, administrator or trustee could not reasonably be held to have had notice of the relationship on which the claim is based.

3. Any law which requires parents to support their children, and children to support their dependent parents, should be extended to encompass children born outside marriage.

4. 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.

   The Conference does not regard this formulation as necessarily 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.

5. 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.
6. All declared and presumed fathers should have equal rights to guardianship and custody of, and access to, their children.
7. 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.
8. The statutes of each province should be searched for distinctions made between legitimate and illegitimate children, and appropriate admendments should be made to eliminate those distinctions by reference to the principles embodied in the uniform act.

NOTES

1. *Appeals*

Some provinces, without general enactments concerning appeals, may find it necessary to make provision for appeals from orders made under section 4.

2. *The Rule in Russell v. Russell*

New Brunswick, if it has not already done so, may wish to abolish the rule in *Russell* v. *Russell* (1924) A.C. 687, by adding a subsection to section 5. An appropriate precedent is to be found in the *Evidence Act*, R.S.B.C. 1960, c. 134, s. 8(2).

3. *Blood Tests etc.*

At page 124 of the 1976 *Proceedings* it is recorded that:

> It was agreed that the evidentiary value of, and rules concerning, blood tests and anthropological examinations should be the subject of further study . . . Large areas of these subjects transcend the principles which should be encompassed by a uniform act on children born outside marriage.

The British Columbia Commissioners remain of this opinion, even though sections 10 and 11 of the Ontario Bill deal with blood tests.

The record of the 1976 Conference does not make it clear whether the blood test/anthropological examination issue was formally accepted as a new item on the programme of the Conference, or whether responsibility for further study was specifically allocated.

II

(See page 29)

NOVA SCOTIA REPORT

At the 1976 Conference the delegates from British Columbia presented a report on Children Born Outside Marriage. That report raised a number of questions. Question #18 was referred to the Nova Scotia delegates for report. The report of the British Columbia delegates is found at pages 90 to 119 of the 1976 *Proceedings*.

Question #18, which appears at page 110 of the 1976 *Proceedings*, is as follows:

> 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?

The answer of the Nova Scotia delegates to Question 18 is that it should be answered in the affirmative, namely, that 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.

In arriving at this conclusion, the Nova Scotia delegates gave consideration to material emanating from British Columbia, Alberta, Ontario, New Brunswick, Nova Scotia and Queensland.

The Nova Scotia delegates find themselves in agreement with the wording used in Section 4 of *"A Bill to Remove the Legal Disabilities of Children Born Out of Wedlock"* found in report #20 of the Queensland Law Reform Commission Report on the Law of Succession and other allied considerations in relation to illegitimate persons and with the views expressed by the Ontario Law Reform Commission in its report on Family Law Part (III) Children at pages 16 and 17 and pages 28 to 30 inclusive and summarized in the Summary of Recommendations numbers 5 and 6 on page 31. It differs with recommendation of #24 of the Institute of Law Research and Reform of the University of Alberta report #20 on the Status of Children, namely, recommendation #24 found on pages 54 and 55 of that report. The recommendation of the Alberta Institute is that any proposed Act not affect rights vested before its commencement and that any proposed Act apply to persons born and instruments executed before, as well as after its commencement. In differing with the approach of the members of the Alberta Institute, the Nova Scotia delegates find themselves in agreement with the view of the Ontario Law Reform Commission that to legislate other than as recommended by the Queensland Law Reform Commission and the Ontario Law Reform Commission would place too onerous a task on those people who have already executed trusts, wills and other dispositions to re-examine their affairs at the time of the new legislation.

To better enable the delegates to the Conference to assess the material in question there is attached to this report a copy of the proposed Section 4 of the proposed Queensland Bill (Schedule 1), a copy of pages 16, 17, 28 to 30 and 31 of the Ontario Law Reform Commission report (Schedule 2) and pages 54 and 55 of the report of the Institute of Law Research and Reform (Schedule 3).

Graham D. Walker
on behalf of the Nova Scotia Delegates

Halifax, Nova Scotia
August 15, 1977

SCHEDULE 1

A Bill to remove the legal disabilities of children born out of wedlock.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:—

1. *Short title and commencement.* (1) This Act may be cited as the *Status of Children Act* 197

4. *Instruments executed and intestacies which take place before the commencement of this Act.* [N.Z. s. 4; Vic. s. 4; Tas. s. 4.]

(1) All instruments executed before the commencement of this Act shall be governed by the enactments, rules of construction, and law which would have applied to them if this Act had not been passed.

(2) Where an instrument to which sub-section (1) applies creates a special power of appointment nothing in this Act shall extend the class of persons in whose favour the appointment may be made or cause the exercise of the power to be construed so as to include any person who is not a member of that class.

(3) The estate of a person who dies intestate as to the whole or any part of his estate before the commencement of this Act shall be distributed in accordance with the enactments and rules of law which would have applied to the estate if this Act had not been passed.

SCHEDULE 2

16

Section 12 of the Act, which makes provision for the retrospective registration of births where children have been legitimated, should be repealed. The concept of legitimation is irrelevant if our recommendations are accepted.[90]

(x) THE WORKMEN'S COMPENSATION ACT:

In *The Workmen's Compensation Act*[91] the definition of "member of the family" provides that where the workman is the parent or grandparent of an "illegitimate child", such child is included, and that

where the workman is an "illegitimate child", his parents and grandparents are also included.

We have already stated that we find the term "illegitimate child" repugnant, and are of the view that the term "child born outside marriage" is preferable. We would therefore recommend the re-drafting of this subsection.

III. Saving Provisions

The comprehensive nature of our recommendations regarding children born outside marriage makes it necessary, in our view, that certain saving provisions be enacted in the event that the recommendations are accepted.

First, all instruments executed and all intestacies taking place before any Act arising out of our Report became law, ought to be expressly said to be subject to the present law. We contemplate, of course, that the Act ought to cover children born outside marriage who are in existence at the time the Act comes into force, but we are at the same time of the opinion that it would be too onerous to ask those people who have already executed trusts, wills and other dispositions to re-examine their affairs at this time.

Secondly, our recommendations would, without more, place a difficult burden on those charged with the duty of administering trusts and estates. It is clearly impracticable to expect trustees, executors or administrators to make exhaustive searches for children born outside marriage or for persons claiming through them, when efforts are frequently made to conceal the existence of such children. We can envisage situations involving estates which may have been distributed for considerable periods of time before the discovery of children born outside marriage. It would in most of these situations be impossible to trace the share of the child or of persons claiming through him, and we prefer to recognize this rather than maintain a principle which may give rise to lengthy and complicated litigation. The duty to seek out beneficiaries imposed on a trustee, an administrator or executor ought not, therefore, to go beyond the duty to search for those children born outside marriage whose paternity is positively established or presumed, when the time for the ascertainment of possible beneficiaries arrives, by the means which we recommend.

In the application of the new principles which we outline it may be asked whether trustees, administrators or executors have a duty to

[90]Discussed *infra* at 40, 41.
[91]R.S.O. 1970, c. 505, s. 1(1)(r).

search outside Ontario for children born outside marriage who may be potential beneficiaries.

Our recommendations are, of course, comprehensive and we believe that no child born outside morriage should be deprived of rights which he would have had by being born within marriage. Nonetheless the question does arise, for example, whether a child born outside marriage to an Ontario testator in a foreign country should be permitted to pursue his claim as a beneficiary or whether trustees, administrators or executors should search for such a child. We do not wish to involve ourselves too deeply, within the confines of this Report, in principles of private international law, but we feel compelled to clarify these particular points.

We believe it to be of overriding importance that an estate should be distributed as quickly as possible and that it should be distributed only to those who have claims which are reliable. Our solution to the problem presented by the foreign beneficiary is, therefore, that any child who wishes to benefit from the reforms which we propose ought to establish his claim in Ontario according to the principles of Ontario law.

IV. Determinations of Paternity

The most obvious difficulty caused by our recommendations is the practical one of establishing a legal connection between a child born outside marriage and his father.[92] Although we adhere to our view that all children should have the same status, we recognize that paternal obligations should not arise until paternity has been established or presumed in some credible way. The very fact that in the nature of things paternity is disputable, makes it only proper that a putative father or other interested persons should have a right to be heard on the matter.

At present the fact of paternity can be established in three general ways—by presumption, by acknowledgment by the father, and by judicial decree. Each of our recommendations concerning the way in which paternity should be established in the future falls under one or other of these three headings.

(i) presumption

As we have outlined previously, a child is presumed to be legitimate if his mother and father were married at the time he was conceived or at the time of his birth.

We propose that this presumption of legitimacy, which is inconsistent with the principle of our recommendations, be modified and converted into a presumption of paternity. It would be intolerable if the child born within marriage were required to prove his paternity affirmatively, and indeed, we would prefer that no child be required to take this step. As it is, however, we feel that reality demands that the presumption of paternity not go beyond the fact of marriage.[93]

[92]We note that in certain rare circumstances difficulty may arise in establishing a maternal connection between a woman and a child, but this would seem to become an issue infrequently and we do not think it necessary to alter the present law.

[93]Cf. the alternative approaches suggested in the Report of the Family Law Reform Sub-Committee of the Society of Public Teachers of Law, *op. cit.* n. 52 *supra.*

a committee be set up with a view to devising a series of rules which could be promulgated by Order in Council.

VII. Limitation

The limitation period for the making of an affiliation order is set out in *The Child Welfare Act*.[116] It is provided that:

> No affiliation order shall be made under section 59 unless the application therefor is made in the lifetime of the putative father, and
>
> (a) within two years from the birth of the child;
>
> (b) within one year after the doing of any act on the part of the putative father that affords evidence of acknowledgment of paternity; or
>
> (c) within one year after the return to Ontario of the putative father where he was absent from Ontario at the expiration of the period of two years from the birth of the child.

Where paternity is raised as a collateral question, the limitation period is that laid down for the collateral question.

As our recommendations have as their philosophical basis the view that the paternal relationship should be encouraged, regardless of the marital status of the father, we regard the removal of a limitation period in matters of paternity as a logical extension of this principle.

In the nature of things a paternal connection may not be discovered for many years after a child's birth, and we think it unfair

that a technical rule should prevent the relationship from being given legal effect.[117] If, therefore, a man of middle age discovers his father we do not consider that he should be precluded from bringing a declaratory action in order to establish rights to his father's estate, provided that (in accordance with our previous recommendations) the father is still living, or, if he is not living, that an affiliation order has been made during his lifetime, linking him to the son.

The only qualification we would make to our views on this matter is that vested rights should not be disturbed by a finding of paternity subsequent to vesting. This issue should arise only in the context of inheritance rights. For example, A may dispose of a segment of his property by way of trust "in equal shares to all my children" living at the date of the trust deed "providing that they shall attain the age of eigheen years". All of A's children born within marriage reach eighteen and take their respective shares. Two years later a child, Z, born to A outside marriage establishes paternity against A. Although in theory all of A's children who benefited from the trust ought perhaps to disgorge a portion of their shares to recompense the child born out of wedlock, we do not think it practical to impose such a burden on them. We emphasize, however, that where rights have not become vested, a finding of paternity which may alter the subsequent distribution of property ought to be given full effect. For example, in the hypothetical situation which we outlined above, where no child

[116]S. 53

[117]Lasok, "Time Factor in Affiliation Proceedings," (1970) 120 New L.J. 679.

of A has reached the age of eighteen at the time when Z establishes paternity against A, Z should obviously take his share of the property at the appropriate time.

We wish to emphasize that it is not our intention that our proposals should complicate further the law relating to class gifts and class closing rules. We adhere strictly to the principles (i) that the rights and obligations of paternity should not arise until there is a judicial decree and (ii) that interests which have vested prior to a decree should not be subject to alteration.

Some hypothetical situations may serve to make the point clearer.

1. A leaves all of his property to "the children of my son B living at the date of my death". B has a child, C, born outside marriage in 1960. A dies in 1962. B dies in 1964.

(i) B's paternity of C is established in 1961. C falls within the class.

(ii) B's paternity of C is established in 1963. C does not fall within the class, as it has already closed (by virtue of A's death), the interests having become vested.

(iii) B's paternity of C is asserted in 1965. This assertion is useless, as B has died and paternity can be established only during the lifetime of the father.

(iv) An affiliation order is made in 1961, linking B to C. It is followed in 1965 by a judicial declaration that B is C's father. C may not benefit from A's estate, as the class of beneficiaries closed upon A's death. C may, on the other hand, benefit from B's estate, despite his death, if B's will includes gifts to "my children" which have not yet vested. For example, B's will may have given a life estate to his wife, with a gift over to "my children living at the date of her death". If, on the other hand, the will had specified the same life estate but had provided that the gift over should be to "my children living at the date of my death", C would not be able to claim, because he could not be said to be a member of the class in 1964 (the year of B's death). His membership in that class is dependent on a declaration of paternity, which is not obtained until 1965. In this situation, however, it will be possible for C to benefit from the intestacies after 1965 of his siblings born within B's marriage.

2. A leaves all of his property to "the children of my son B providing that they attain the age of eighteen". The present rule is that the class closes as soon as one of the children of B attains the age of eighteen. C, a child born within marriage, attains the age of eighteen in 1971. D is born outside B's marriage in 1968.

(i) If B's paternity of D is established in 1969, D falls within the class and takes, providing he subsequently attains the age of eighteen.

(ii) But if B's paternity of D is not established until 1972, D does not fall within the class.

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To summarize, under the present law, where classes are composed of "the children" of a person, membership in the class is determined in the final event by the application of the class closing rule to the fact and *time of birth* of any particular child. In the case of the child born outside marriage, membership in the class will be determined by the fact of birth and the *time of establishing paternity*. Classes, under our proposals, will remain open and will close just as they have always done. If, where there is a child born outside marriage, paternity is established before the closing of the class, the child will be a member. But if paternity is established after the closing of a class, the child will not be a member and vested interests will not be disturbed.

Because a decree of paternity will, under the recommendations, be always rebuttable, it may be that a child born outside marriage will become an ascertained member of a class but later, after the class has closed, become ineligible for membership. Our recommendations do allow for this contingency without causing complications. Indeed, the problem exists under the present law. Two hypothetical situations will serve once again to illustrate the point.

(i) A leaves all his property to "the children of B, provided that they attain the age of eighteen". B has children born within marriage and a child, C, born outside marriage in 1950. B's paternity of C is established by decree in 1966. A dies in 1967 and C, B's eldest child, attains the age of eighteen in 1968. The class closes at this point and C, having turned eighteen, takes a vested interest in his portion of A's estate. In 1972 another of B's children asserts successfully that B is not C's father. C having taken a vested interest cannot be forced to disgorge his share, as the proposals provide that vested interests should not be disturbed by a finding of paternity.

(ii) A leaves all his property to "the children of B, provided they attain the age of eighteen". B has children born within marriage, the eldest of whom, C, was born in 1951. He has another child, D, born outside marriage in 1960. B's paternity of D is established by decree in 1961. A dies in 1967. C attains the age of 18 in 1969 and the class closes. D is a member of the class but has only a contingent interest in

A's estate until 1978 when he attains the age of eighteen. In 1975 the 1961 decree is rebutted and it is proved that B is not D's father. D does not have a vested interest, and therefore he drops out of the class and his share is distributed among the other members of the class as they attain the age of eighteen.

In essence, therefore, the child born outside marriage whose paternity has been established and who thereby becomes entitled to a contingent interest has another implied contingency super-imposed on the contingency contained in the words of the gift e.g. "providing he attains the age of eighteen" *and* (impliedly) the decree of paternity which establishes his membership in the class is not rebutted before he attains the age of eighteen.

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SUMMARY OF RECOMMENDATIONS

1. The law of Ontario should declare positively that for all its purposes all children have equal status.
2. There should be a reversal of the common law rule of construction that any reference to "child", "children", or "issue" in an instrument or statute should be taken to exclude children born outside marriage.
3. The words "child", "children" or "issue" or other term having a similar meaning in a statute should specifically be stated to include all children, regardless of whether their parents have been married or not. This rule of construction should apply unless there is clear indication that the Legislature had in mind, in any particular case, a more limited class of children.
4. Among the statutes which should be amended to implement our recommendations are:

   The Devolution of Estates Act;
   The Dependants' Relief Act;
   The Fatal Accidents Act;
   The Insurance Act;
   The Marriage Act;
   The Perpetuities Act;
   The Succession Duty Act;
   The Vital Statistics Act;
   The Workmen's Compensation Act.

5. All instruments executed and all intestacies taking place before the implementation of these recommendations should be expressly said to be subject to the present law.
6. The duty to seek out beneficiaries imposed on a trustee, an administrator or executor ought not to go beyond the duty to search for those children born outside marriage whose paternity is positively established or presumed when the time for the ascertainment of possible beneficiaries arrives, by the means which we recommend.
7. Trustees, administrators or executors should not have a duty to search outside Ontario for children born outside marriage who may be potential beneficiaries.
8. *The Legitimacy Act* should be repealed, but a child born to a married woman should be presumed to be the child of her husband:
   (i) where the child is born during the marriage; or
   (ii) where the child is born within eleven months after the marriage has been terminated by death or by judicial decree.
9. It should be possible for any interested person to obtain a judicial decree of a declaratory nature that a given man is the father of a given child. Such a decree should operate as a presumption that the

SCHEDULE 3

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(5) *Wrongful Distribution*

Property may be distributed in ignorance of the right of a child born out of wedlock to share in it. The next question is whether it should be possible to trace and reclaim it. The law which applies to other cases of wrongful distribution should apply and we make no recommendation.

(6) *Retroactive Operation*

It can be argued and some members of our Board accept the argument, that the proposed Act should not apply to wills and other instruments executed before its commencement; the proposed Act will change the rules of interpretation of words referring to family relationships and it may be that a testator or grantor used those words with the intenion that they be interpreted according to the law as it was when he used them. The majority of our Board however believe that the proposed Act should apply to existing wills and instruments, though not so as to affect rights which have vested before its commencement; the proposals are intended to correct injustice, and it is much more likely that a testator or grantor would use such words without directing his mind to the question whether or not they included illegitimate relationships. The law applicable to an intestacy would, or course, be the law in force at the death of the deceased person.

RECOMMENDATION #24

(1) That the proposed Act not affect rights vested before its commencement.

(2) That save as provided in subsection (1) the proposed Act apply to persons born and instruments executed before as well as after its commencement.

[Draft Bill, s. 15]

X

REQUIREMENTS OF NOTICE AND CONSENT

1. *Introduction*

The father of a child born in wedlock is entitled to notice of various kinds of acts and proceedings which would affect his rights as parent and guardian. It is implicit in the notion of one status for all children that a father who is a guardian of his child born out of wedlock should have notice of similar acts and proceedings. It is also

implicit that the father of a child born out of wedlock should be able to give or withhold his consent to matters in which the father of a child born in wedlock would be able to do so unless as in cases of adoption and surrenders for adoption there are reasons to the contrary. We now turn to the question as to how a third party is to ascertain the identity of an unwed father. We also turn to the question whether the principle of serving the best interest of the child dictates that one should give notice to or obtain the consent of an unwed father who is not a guardian, to various matters affecting the child.

2. *Identification and Location of Unwed Fathers*

We address ourselves here to ways in which an unwed father might be identified and located. Later we will discuss the cases in which he should receive notice and in which his consent should be required.

III

(See page 29)

ONTARIO REPORT

Residual Matters: Declarations of Paternity, Recognition of Paternity Declarations, and Artificial Insemination.

In 1976 the Uniform Law Conference of Canada considered a memorandum from the British Columbia Commissioners setting out policy questions for discussion concerning children born outside marriage. At that meeting a number of matters were remitted to the Ontario Commissioners for further research and consideration. Ontario was to study:

(a) 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 (see 1976 *Proceedings*, p. 123);

(b) The general extra-provincial effect of the making of declarations of paternity or paternity orders by courts, (see 1976 *Proceedings*, p. 123);

(c) Should the following propositions be accepted? Legislation should state that a donor of semen used in artificial insemination has no legally recognized 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;

(d) Should a man and woman who are married or living together, and who consent to artificial insemination of the woman, be the only legally recognized 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?

(e) 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? (see 1976 *Proceedings*, pp. 28 and 105).

The last three topics were to be considered jointly by the Ontario and Quebec Commissioners.

1. DECLARATIONS OF PATERNITY

(a) *Introduction*

At the 1976 meeting, it was resolved that a Uniform Act should adopt the central principle that the status of illegitimacy be abolished. Should the status distinction between legitimacy and illegitimacy disappear, it would then be necessary to establish certain presumptions of paternity. When necessary to identify the father of a particular child, these presumptions could come into play without seeking a judicial determination of paternity. Presumptions referred to by the Commissioners include the marriage or cohabitation of the parents. As well, it was felt that there should be procedures whereby a court could make paternity declaration which would be final and conclusive in relation to the parties to the action. To ensure a speedy and inexpensive access to maintenance for children, it was felt a summary procedure which could make findings of paternity for maintenance purposes only should be retained.[1]

(b) *Effect on Judicial Declarations of Paternity on Public Records*

(i) *Statement of the Problem*

With the abolition of the status of illegitimacy, we are faced with the necessity of establishing other tests for the existence of rights and obligations as between a parent and a child. More and more jurisdictions are creating the judicial declaration of parent-

[1]Proceedings of the Fifty-Eighth Annual Meeting of the Uniform Law Conference of Canada (1976), pages 120-123.

age as the ultimate test. These declarations, based on presumptions of paternity, blood tests and other evidence, establish the legal relationship of parent and child conclusively for all purposes, and not simply for the resolution of a particular dispute between persons. While they are open to rescission by the same court on on the presentation of new evidence, they are, until such new evidence is heard, taken to be a final determination of the parent-child relationship.

Because such declaratory orders are conclusions for all purposes, it is clearly desirable that they be recorded by the authority responsible for maintaining public registries of vital statistics so they can be examined by interested parties. There are, however, several questions which arise in connection with the effect of declarations of parentage on public birth records. These questions include the following:

1. Should the declaration result in a change in the particulars of the birth registration itself, or should a separate registry be maintained for the recording of such declarations? Are there reasons for adopting both procedures?
2. Should the Registrar General of each province be required to record the declaration automatically, or should he retain the discretion to make such alteration to the public record as he sees fit? Alternatively should an application by one or both parents to have the alterations made be a requirement before the Registrar General takes the appropriate action?
3. Should the alterations to the birth registration include giving to the child the surname of the person declared by the court to be father of the child?
4. Should alterations to the public record in one jurisdiction be made on the basis of a judicial declaration of parentage made in another jurisdiction?

(ii) *Some Partial Solutions Offered by the Law Reform Agencies*

By comparison with the primary issue of doing away with the legal disabilities which have for so long attached to the status of illegitimacy, the above questions seem somewhat minor. Perhaps for this reason they have not been given a great deal of consideration on paper by the various law reform bodies. In Canada, the law reform agencies of Alberta, New Brunswick and Ontario, and a Royal Commission on Family and Children's Law in

British Columbia have each considered at least some aspects of the foregoing questions and they have made varying recommendations.

Alberta's Institute of Law Research and Reform said that when a declaration of paternity is made and accompanied by an order as to guardianship, the court should be required to make a corollary order as to the surname of the child and that the birth register should be amended in accordance with such an order.[2]

In British Columbia, the Royal Commission on Family and Children's Law recommended an administrative procedure for the voluntary formal registration of paternity under *The Vital Statistics Act*. Such a joint declaration by the two natural parents would have the same force and effect as a judicial declaration of parentage, in that it would constitute *prima facie* proof of paternity for all legal purposes, and not only for some matter of immediate concern, such as a support obligation.[3] The Royal Commission also recommended the judicial procedure for a declaration of paternity, which would of course take precedence if it differed from a declaration by the person who purported to be the parent. No suggestion is made concerning a possible amendment to the birth registration itself either following a formal registration of paternity by the parents or a judicial declaration by the court. The Royal Commission proposals were modelled after those of the Family Law Reform Sub-Committee of the Society of English Public Teachers of Law. That sub-committee spoke of "acknowledgement [of paternity] by enrolment", rather than of formal registration of paternity "because of the fear that that later would become confused in the popular mind with registration of the birth."[4] At least in its model, then, the British Columbia proposal envisions a totally separate registry for birth records on the one hand and voluntary acknowledgements of parentage on the other. It is not clear whether judicial declarations of parentage were also meant to be recorded in a separate registry kept for the children of unmarried parents, or whether they too would not result in any amendment to the original birth records.

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[2]Institute of Law Research and Reform, *Status of Children*, Report No. 20, The University of Alberta, Edmonton, June 1976, p. 37.

[3]Royal Commission on Family and Children's Law, *The Status of Children Born to Unmarried Parents*, Fifth Report, Part II, Vancouver, March 1975, p. 17.

[4]Family Law Reform Sub-Committee of the Society of English Public Teachers of Law, *The Illegitimate Child in English Law*, 1969, para. 49, note 32. Unpublished.

APPENDIX I

The Law Reform Division of the New Brunswick Department of Justice has recommended the establishment of a central registry system for all documentation relating to paternity of children born outside marriage.[5] This registry would include both statements of those claiming to be parents and copies of court orders determining parentage. Foreign documentation would also be filed in the registry, but always subject to review by the court of the Province.[6] Such a registry would be of assistance to executors, administrators and trustees in locating all beneficiaries, in the giving of notice to natural fathers before the hearing of an adoption application and in determining support obligations towards children of unmarried parents.

The Ontario Law Reform Commission, in recommending the establishment of a statutory provision for judicial declarations of parentage, suggested a similar registry for the court orders.[7] This recommendation has been embodied in a Bill, which has yet to be enacted by the Legislature of the Province, removing the distinction in law between legitimate and illegitimate children and providing judicial mechanisms for the establishment of parentage.[8] The Bill would require the courts to file all orders or judgments respecting parentage with the Registrar General. Provision is also made for filing a statutory declaration of paternity with the Registrar General by a putative father. Any person, on payment of a prescribed fee, would be able to inspect either a statutory declaration or an order or judgment so filed.[9] The Ontario Bill says nothing about the possibility that a judicial declaration of parentage would be reflected in an amendment to the birth registration of the child in respect of whom it is made, but it says that the Registrar General may *not* amend a birth registration on the strength of a statutory declaration of paternity filed by the putative father above.[10]

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[5]Law Reform Division, New Brunswick Department of Justice, *Status of Children Born Outside Marriage:* Their Rights and Obligations and the Rights and Obligations of their Parents, Working Paper, September 1974, p. 73.

[6]Ibid , p. 87.

[7]Ontario Law Reform Commission, *Report on Family Law—Part III: Children*, Toronto, 1973, p. 22.

[8]Bill 9, An Act to reform the Law respecting the Status of Children, Ontario Legislature, First Reading March 31st, 1977.

[9]Ibid., ss. 12 and 14.

[10]Ibid., s. 12(2).

New Zealand, by the *Status of Children Act* 1969, makes provision for a judicial "declaration as to paternity".[11] This Act also provides that such a declaration is to be forwarded to the Registrar General for filing in his office as if it were a formal voluntary acknowledgement of paternity. The Registrar General is to maintain "indexes of all instruments" of these types, which are open for inspection by "any person who . . . has a proper interest in the matter".[12]

Virtually identical legislation has been enacted in some of the Australian states.[13] An amendment to section 18 of the New Zealand *Births and Deaths Registration Act* provides that where there is no previous registration and a judicial declaration of paternity has been made the Registrar General must authorize the entry in the birth registry of the name and particulars of the father. Also, where the parents were not married at the time of the child's birth, a judicial declaration will serve as one of the grounds upon which the Registrar General may register the name and particulars of the father.

The *Uniform Parentage Act*[14] adopted in 1973 by the National Conference of Commissioners on Uniform State Laws (USA) makes provision for alteration of birth records.

(b) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that [an amended birth registration be made] [a new birth certificate be issued] under Section 23.

Section 23

(a) Upon order of a court of this State or upon request of a court of another state, the [registrar of births] shall prepare [an amended birth registration] [a new certificate of birth] consistent with the findings of the court [and shall substitute the new certificate for the original certificate of birth].

(b) The fact that the father and child relationship was declared after the child's birth shall not be ascertainable from the [amended birth registration] [new certificate] but the actual place and date of birth shall be shown.

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[11] *Status of Children Act*, Statutes of New Zealand, 1969, No. 18, s. 10.
[12] Ibid., ss. 8 and 9.
[13] *Status of Children Act*, Statutes of Victoria 1974, No. 8602; *Status of Children Act*, Statutes of Tasmania, 1974, No. 36.
[14] Reproduced as an Appendix to Harry D. Krause, *"The Uniform Parentage Act"* (1974), 8 *Family Law Quarterly* 16.

(c) The evidence upon which the [amended birth registration] [new certificate] was made and the original birth certificate shall be kept in a sealed and confidential file and be subject to inspection only upon the consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.[15]

The most up-to-date information available to us indicates that this uniform statute has been enacted in only five States.[16]

The U.S. *Uniform Parentage Act* does not attempt to establish special registries for documentation relating to the parentage of children of unmarried parents. It may be that the American States rely on their official vital statistics records as ready sources of information for those who need to determine legal relationships for one reason or another. In Canada, birth registrations and other vital statistics documents are only made available to persons whom the Registrar General has acknowledged to be entitled to such access, or on the authority of a court order.[17]

(iii) *Existing Provisions for the Amendment of Birth Registrations*

If they are to be an effective means of ascertaining the rights and obligations of persons whose legal relationships are in question, registries revealing what the persons themselves or the courts have said about those relationships must be easily accessible. The virtue of separate registries relating to the particulars of births outside marriage is that they could be much more open to the scrutiny of those who have good reason to see them. While birth registrations and other vital statistics are sometimes referred to as "public records", this does not mean that they are open to public scrutiny. A birth certificate, which the person can readily obtain, contains only the person's name, sex, the place where he was born and the date of both the birth and the registration. The birth *registration* includes the particulars of parentage, and can only be seen by persons authorized by the Registrar General or by order of the court.

Assuming that it is not desirable to make official records under *The Vital Statistics Act* more accessible, it would seem

[15]Ibid., pp. 21 and 23.

[16](National Conference of Commissioners on Uniform State Laws, *Handbook*, 1976, pp. 347, 369).

[17]For example, *The Vital Statistics, Act*, R.S.O. 1970, c. 483, ss. 40(1) and 43(3). The uniform *Vital Statistics Act* has been adopted in most Canadian jurisdictions, including Ontario. While the wording and sequence of the sections vary from province to province, the provisions are basically the same.

that the proposals made by the various Canadian law reform bodies to set up separate registries relating to the parentage of children born to unmarried parents are well founded. This is not to say, however, that original birth registrations should not be amended or replaced when a judicial declaration of parentage is at variance with the information contained in the registration. It is reasonable to expect that official public records will be as accurate as possible. Indeed, in most Canadian provinces, the uniform *Vital Statistics Act* contains several provisions intended to keep birth registrations in accord with newly emerging facts. In some instances these provisions require the Registrar General to make certain amendments to the registration, and in others he is empowered to make such amendments as he sees fit to make. The following are the circumstances in which amendments are either mandatory or possible under the *Uniform Vital Statistics Act*:

1. Child conceived by a married woman while she was not cohabiting with her husband.

   On the request of the mother and the man who acknowledges himself to be the father of the child, the Registrar General is required to change the surname of the child to that of the putative father or to replace the particulars of the husband with those of the putative father or both.[18]

2. Child born to an unmarried woman.

   The mother and the person acknowledging himself to be the father may request that the registration of the birth be amended so as to give the child the surname of the putative father and to include the particulars of that person as those of the father. The Registrar General is required to make the requested amendments.[19]

3. Foundlings.

   A new-born child who has been deserted may have its birth registered according to the best information available. If better information is later revealed, so that the identity of the child is established to the satisfaction of the Registrar General, he may set aside the original registration of birth and substitute a new one in accordance with the newly discovered facts.[20]

[18]*The Vital Statistics Act*, R.S.O. 1970, c. 483, s. 6(5) and (6).
[19]Ibid., s. 6(8) and (9).
[20]Ibid., s. 11.

4. Child "legitimated" by subsequent marriage of his parents.
   While references to the status of legitimacy are generally being eliminated, *The Vital Statistics Act* will still provide for the withdrawal of an original birth registration and its replacement by one listing all particulars as though the parents had been married to one another at the time of the child's birth.[21]

5. Child's given name changed within ten years of birth.
   The Registrar General is required to change the original name in the registration or add the new name as the case may be.[22]

6. Adoptions.
   On application by the adopting parent, the Registrar General may set aside an existing registration and enter a new registration as if the adopted person had been born to the adopting parent. If the adopted child was born outside Ontario, the Registrar General shall transmit a copy of the adoption order to the registration authority of the province or state where the child was born.[23]

7. Change of Name.
   When a legal name change has been completed, the Registrar General is required to note the change of name on the birth registration of that person.[24]

8. Errors in Registration.
   Where the Registrar General is satisfied that an error has been made in a registration of any vital statistic, he is empowered to make the necessary corrections or, with regard to the registration of a birth, to cancel the existing registration and substitute a new one.[25]

In the light of the foregoing provisions by which amendments to birth registrations are required or permitted under Canadian Vital Statistics legislation, it would be reasonable to expect the statutes introducing judicial declarations of parentage to include provisions authorizing the Registrar General to cause the birth registration of the child in respect of whom a declaration is made

[21]Ibid., s. 12.
[22]Ibid., s. 13.
[23]Ibid., ss. 24(2) and 25.
[24]Ibid., s. 26.
[25]Ibid., ss. 30 and 31.

to show the details of parentage as determined by the court. Without such a provision, there will inevitably exist for many children two documents — the birth registration and a declaration of parentage — which contain inconsistent information as to the paternity of those children.

(iv) *Options for Discussion by the Commissioners and the Conference*

The questions asked in the statement of the problem in section A of this Part can now be approached in the context of the recommendations of the various law reform agencies and with reference to some existing provisions in *The Vital Statistics Act*.

1. Should a judicial declaration of parentage result in a change in the particulars of the birth registration itself, or should a separate registry be maintained for the recording of such declarations? Are there reasons for adopting both procedures?

While the Canadian law reformers have generally recommended the separate registry system and ignored the possibility of amending the birth registration itself (except for the Alberta suggestion relating to a court order to change the child's surname), there are reasons for instituting both systems. Chiefly, the need for easy access to documents relating to the parentage of those born to unmarried parents requires a special registry for such persons, whereas their births ought also to be registered along with all other births in a province, and such registrations ought to be amended so they correspond with the known facts.

If it is decided that amendments ought to be made to existing birth registrations on the making of a judicial declaration of parentage, the second question could be restated as follows:

2. At whose instigation ought the relevant amendments to be made — the Court's, the Registrar General's, or the affected parties'?

The answer to this question may vary depending upon which particular amendments are being considered. Where the court bases its declaratory judgment on findings of fact at variance with those recorded in the birth registration, the correction of the erroneous or missing statement of the particulars of the father in the registration should probably be made solely on the basis of the Court's findings.

When we come to consider non-factual matters, and in particular the surname the child is to bear, different considerations may apply. This is the problem addressed by the third question for decision:

3. Should the alterations to the birth registration include giving to the child the surname of the person declared by the court to be the father of the child?

This question is one of continuing importance to the child, and one which presumably ought to be decided on the basis of the child's best interests in the light of his actual relationships with his parents. Perhaps this consideration was uppermost when the Alberta Institute of Law Research and Reform recommended that the court, when making a declaration of parentage with guardianship, "be required to make an order as to surname, and that the birth register should be amended in accordance with any order so made and registered".[26] Under the existing provisions of *The Vital Statistics Act*,[27] an unmarried mother and the acknowledging father can join in a request to have the child registered with the surname of the acknowledging father. The Registrar General has no choice but to make the requested amendment to the registration. Where a couple agree as to the name their child should bear it is reasonable that they ought to have their wishes acknowledged in the registration.

The Alberta Institute seems only to have contemplated the situation in which the appropriate name for the child is in dispute between the two parents, in which case it is clearly desirable for the court to make a determination of that issue at the time of the making of a declaration of parentage, and to instruct the Registrar General accordingly. In any case it should be clear that the issues of paternity and surname are separate, and that a birth registration could be amended with regard to the particulars of the father with or without a corresponding change in the surname of the child. Presumably once a person has become an adult, a declaration of parentage ought not to effect a change of name without the formalities ordinarily required under *The Change of Name Act*. The hearing required under that Act could be combined with the hearing of the application for a declaration of parentage.

[26]Note 2, supra, p. 37.
[27]*The Vital Statistics Act*, R.S.O. 1970, c. 483, s. 6(8) and (9).

The final question for decision is one which relates to the subject matter in Part II of this report:

4. Should alterations to the public record in one jurisdiction be made on the basis of a judicial declaration of parentage in another jurisdiction?

The second part of this Report will assess cross-jurisdictional impact generally of these declarations. Of primary concern is the evidentiary weight which ought to attach to them.

In considering this question, it is worth bearing in mind that alterations to the public record can be of two types — an actual change in the wording of the original registration or the addition of new material as an annotation or inclusion in the file. The current practice with regard to adoptions commends itself as being a suitable approach to the effect of declarations of paternity. Briefly, an adoption order (on a further application by the adopting parent) results in the substitution of a new birth registration as if the adopted person has been born to the adopting parent.[28] This rule applies where the adoption takes place in the jurisdiction in which the birth of the child is registered. If the adopted child was born in another jurisdiction, a copy of the adoption order is to be forwarded to the registration authority in that jurisdiction.[29] No instruction is given to the Registrar General who receives such an order from ouside his province. Presumably, they are filed with the birth registration, and would be open for examination on the same basis as the registration itself.

If, as the New Brunswick Law Reform Division has recommended,[30] a special registry is established for documents relating to children of unmarried parents, then copies of incoming declarations of parentage would be deposited in such a registry. They would then be easily available for search purposes and for production in court when required. All voluntary acknowledgements of paternity and all judicial declarations from other jurisdictions could be treated as evidence in each case, but not as proof of the parent-child relationship. This is one aspect of the issue to be addressed in Part 2 of this Report.

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[28]Ibid., s. 24(2).
[29]Ibid., s. 25
[30]Notes 10 and 11, supra.

2. RECOGNITION OF PATERNITY DECLARATIONS

(a) *Introduction*

Should a system of judicial declarations of paternity be developed in one or more of the Canadian jurisdictions, a supplementary question arises as to the *likely* and the *desirable* effect of such declarations, orders or presumptions outside the responsible jurisdiction. In many ways, this question revolves around the characterization of these new legal phenomena. For example, how are these new "paternity declarations" to be viewed or defined? There are several possibilities. It may be that paternity declarations are to be treated as analogous to any final judgment of a foreign court — or even merely as a matter of evidence. Alternatively, they could be treated as marriage or divorce decrees, creating "status" and thereby bringing in all the repercussions of private international law rules regarding status and incidents of status. There could be some intermediate state created by enabling legislation giving a paternity declaration a special extra-jurisdictional position. Precedents exist in both the *Reciprocal Enforcement of Maintenance Acts* and the *Uniform Enforcement of Custody Orders Act*. At a later stage, questions may logically arise as to the characterization of "presumptions of paternity", on which many paternity declarations or orders may rest. Are these simply circumstances of evidentiary value which may be given due regard by the foreign court or are these presumptions creative of a particular status which must be recognized by a foreign court and which may recall all appropriate status incidents?

Without detracting from the significance of the discussion of these questions, it is wise to state at the outset that the definition of issues in this area is rarely precise in that the complex matters of private international law cannot be easily resolved even with constant international consultation. Characterization of issues in private international law is quite often idiosyncratic and there is no guarantee that what seems logical to one jurisdiction may be acceptable to another. An ubiquitous problem is that issues must be narrowed and simplified if they are to be dealt with at all. In focussing on one aspect of the problem, it may often appear that the treatment of illness in one area of the law is expediated by the amputation of those parts which do not respond to the cure.

(b) *The General Treatment of Foreign Orders in Family Matters*

(i) It is difficult to conceptualize a paternity declaration being treated in the same manner as an ordinary foreign judgment. They cannot easily be compared to foreign judgments,

whether *in personam* or *in rem,* partly because a foreign judgment, *in personam* at least, must be for a definite sum of money. A paternity declaration, by its very nature does not speak for one occasion, for one right to enforcement, one debt to be recovered; rather, the paternity declaration results in no specific remedy, but establishes the condition of parentage from which may stem remedies on behalf of the affected child. However, it is possible that a paternity declaration may be treated as a foreign judgment in the sense that they be proven as such and that the local courts could refuse to explore the finding of paternity on its merits. Such a system would be practicable only when a specific right was sought to be enforced — such as a right to maintenance in the local jurisdictions. In many ways, this approach would treat the foreign paternity declaration almost a special category of evidence, rather than an established legal right merely seeking a remedy in a foreign jurisdiction.

(ii) *Status Designations*

As previously mentioned, there is a risk of oversimplification in the issue of status designation in relation to paternity declarations. Recognizing this, the question as to the extra-jurisdictional effect of paternity declarations or orders may be said to revolve around the following issues in private international law:

1. The determination of the existence of a particular status.[31]
2. The attachment of the appropriate incidents to that status, whether of local or foreign law.

The practical reason for discriminating conceptually between status and incidents of status in such cases is that while traditionally status properly conferred is entitled to universal recognition, the results of the establishment of status depends on the law of the place in which the status is recognized.

In Canadian jurisdictions, at least, the paternity declaration or order breaks new ground in creating a status based on a parent-child relationship which cannot easily be defined as falling within the familiar categories of "illegitimacy" or "legitimacy". Indeed,

[31]"Status" being defined as the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both. (J.D. Falconbridge, *Conflict of Laws*, 2nd ed., Toronto, 1954, p. 751).

it has been proposed these categories be abolished. The desirability of eliminating status distinctions between groups of children within a Province has been recognized. The question is whether this end to the differentiation between classes of children should be extended to situations where there are foreign elements. In such situations, how flexible will the present conflict of law rules be found — are they sufficiently tolerant to embrace these new or unknown status designations or concepts? Because of the limited Canadian experience in this area, it may be useful to turn to applicable analogous areas involving status considerations such as:

1. Recognition of foreign[32] divorces.
2. Recognition of foreign adoptions.
3. Recognition of foreign acts of legitimation.

Examination of these areas, even in a cursory fashion, may indicate approaches to be taken toward paternity declarations and presumptions.

(c) *Recognition of Foreign Divorces*

The conflict of laws rules relating to the recognition of foreign divorces in Canada may be summarized as follows:

1. A divorce will be recognized if obtained by the parties in the courts of their common domicile or in a court of their separate domicile.
2. A divorce will be recognized if it would have been recognized in the courts of the common or separate domicile of the spouses.
3. A divorce will be recognized if it were granted under circumstances in which a Canadian court would have taken jurisdiction.
4. A divorce will be recognized if granted in a jurisdiction which has a "substantial connection" with the spouses.
5. A divorce will not be recognized if obtained by fraud, duress, or if its recognition would be contrary to public policy.

These propositions reflect the relaxation of the common law rules for the recognition of foreign divorce. The "substantial connection" rule is one particularly responsive to the reality of modern-day

[32]The meaning of the word "foreign" obviously varies with the basic jurisdictional unit of local law. In the case of divorce law, "foreign" is "non-Canadian"; in the case of adoptions, it is a reference to law outside a particular province, including other Canadian provinces.

mobility and accords with developments in private international law in torts and contracts. There has been further suggestion that although these rules may cover most cases, in anomalous situations, it is best to go behind the rules and ask: Is there a good reason not to recognize this divorce? If not, the divorce should be recognized and Canadian incidents imposed on the foreign status. As of yet, this rule has not been adopted in Canada.

(d) *Recognition of Foreign Adoption Orders*

The phenomenon of adoption is an interesting study because, although it is an old and widespread practice, it has only recently been viewed as a legal act which has status implications. Even now, an adopted child in many jurisdictions exists in a legal half-way house between the lawful child of the marriage and the foster child.

In Canadian provinces, a court will generally assume jurisdiction in an adoption case if the prospective parents have provincial residence or domicile and the child has provincial residence. There has been considerable criticism of this rule, given that the primary consideration in adoption cases should be the child's welfare, and as long as there is some territorial connection, it is felt that technical jurisdiction rules should be abandoned. The use of the "substantial connection" rule would make recognition of foreign adoptions function on much the same principle as the recognition of foreign divorce decrees. While many would applaud this route, it appears that few countries have taken it. Even the liberal *British Adoption Act, 1968,* which extended recognition to "overseas adoption"[33] does not specifically abandon the requirement of domicile in the assumption of jurisdiction in foreign adoption cases.

The Hague Convention on Adoption directs the assumption of jurisdiction on either of two bases. One is the nationality of the adopter; the other is the "habitual residence" of the adopter. Nationality as a connecting factor is unknown in common law conflict of law rules. If anything, it seems to be a less useful concept than domicile. The use of "habitual residence" as a jurisdictional requirement is less objectionable, but it is also more rigid than the "real and substantial connection" rule. It is always more difficult for courts to consider the best interests of the child if fettered by narrow rules for the assumption of jurisdiction. It is likely that few would dispute that the welfare and best interests of the child should be paramount in

[33]"Overseas adoptions" include Hague Convention adoptions, adoptions in Commonwealth countries, and adoptions in certain listed countries such as the U.S A.

adoption cases. It is also true that it could not be in the best interests of the child to create a "limping" adoption — one which is recognized in one jurisdiction but not in another. One does expect courts to act with "common sense" in such cases, for example, refusing to make an adoption order in dubious cases where the adoption cannot be adequately investigated or where the adoption is not a real attempt to give the child a home, but is an attempt to manipulate some other law (e.g. immigration). On the other hand, States that take a more jaundiced view of the "common sense" of some jurisdictions' judges, may view an adoption granted on the basis of the perceived best interests of the child with some scepticism. The granting of adoptions to parents and children who have no connection with Ontario or Canada is a result anticipated by those opposing the "best interests" basis of recognition.

A further problem in matters of jurisdiction for the purpose of adoption is the existence of a gap between the principle on which Canadian Provinces will assume jurisdiction themselves and the principles on which they will recognize adoptions of other countries. Being anxious to promote the best interests of the child before the court, the jurisdictional rules may be bent. However, when dealing with foreign adoptions, Canadian provinces appear to be reluctant to recognize adoptions even if granted under circumstances in which a Canadian province would have taken jurisdiction. Thus, while within specific provinces, adoptions are made on several bases, the most common Canadian position continues to demand domicile of the parents, if not also of the child, in cases involving the recognition of foreign adoptions.[34]

(e) *Recognition of Foreign Acts of Legitimation*

Like adoption, legitimation, as a legal concept, is of recent origin, and has fallen on somewhat unreceptive ground in the area of private international law. The common law rule in legitimation cases is far more restrictive than in the case of recognition of foreign divorces or marriages. For example, at common law, the law of the father's domicile at the child's birth (out-of-wedlock), and the law of the father's domicile at the subsequent marriage of the parents determines whether the child will be considered *legitimatio per subsequens*

[34]Canadian case examples of reliance on domicile in adoption cases include: *Re Milestone* (1958), 15 D.L.R. (2d) 246; *Re Jensen Estates* (1963), 42 W.W.R. 514; *Kohut v. Fedyna* (1964) 2 O.R. 296. Recently, many Canadian provinces have altered adoption laws to require residence as a basis of jurisdiction rather than domicile. Unfortunately there has been no case law to indicate whether conflict of laws rules will reflect this.

matrimonium. There is little doubt that this is a particularly harsh rule, especially as it forces the child to assume a status designation as an incident of the father's domicile, rather than of his own residence. For this reason, there has been some recent case law, indicating an amelioration of the hard rule. Should the parents assume a domicile of choice, the courts may recognize the laws of this new domicile as governing the child's status as legitimized child. The child is no longer bound by the domicile of the father at birth and marriage, but is still bound to the domicile of the father at the relevant time.[35] There is little indication how far spread this rule is.

(f) *Summary of Analogous Areas*

In the private international law relating to adoption and legitimation, the connecting factor of domicile—of the parent, usually the father—is still the essential element in recognition of status. Only in the area of divorce has Canada, or Canadian provinces, gone further to embrace the "real and substantial connection" rule. In many ways, this seems odd, as it would appear ironic that the most inflexible rules are applied to test the status of children, while broader rules of recognition apply to adult status relating to marriage and divorce. This does not seem in tune with the general philosophy that the law should seek the best interests of the child—albeit, it is recognized that the status "as child" is one which continues into the adulthood of that child. The permanence of status findings may well be an important factor in considering reform.

(g) *Paternity Declarations: A Case Study*

Of course, it cannot be predicted with certainty how courts will treat paternity declarations or presumptions even if given the context of other legal experience with status designations as guidance. There is no guarantee that paternity declarations or presumptions will be viewed as being creative of status; it may be that the weight given these legal creations will be of evidentiary nature only—and it may be that this is considered an appropriate approach. One of the few Canadian cases which deals with the recognition of paternity orders is *Re MacDonald* (1962), O.R. 762, and for this reason, further exploration of this case is instructive.

The foreign State in this case was Mexico, where a system of paternity declarations was in existence. The case being one of succession to personalty under a will, the court was bound to distribute according to the domicile of the testator, which was Ontario. In this

[35]See, for example, *Boutillier v. Boutillier*, (1974) 44 D.L.R. (3d) 154.

process, a question arose as to the entitlement of the child, Maria Sanchez. The grandson was domiciled in Mexico and had a daughter there by a Mexican woman. He and the woman had not been married, but the daughter had obtained a judgment declaring she was the daughter of the testator's grandson. Referring to experts in Mexican law, Mackay J.A. examined the legal repercussions of this declaration and concluded:

> On the facts and evidence to which I have referred I have reached the conclusion that under the law of Michoacon [a State in Mexico] Maria Sanchez has the same capacities, incidents and obligations vested in her in relation to her father John Wardrope as she would have if she had been born a legitimate child. She has the same inheritance rights as a legitimate daughter under the Civil Code and by virtue of the paternity declaration is entitled to use her father's name, has the right of support and the obligation to support. It seems clear that the purpose of Mexican law is to equalize the rights of children whether they are legitimate or illegitimate and I hold that her status under Mexican law, for the purposes of this case, is such that she comes within the term "issue" of a grandchild of the testator.

The process by which this end is reached is an interesting one. Mackay J.A. says at page 769:

> It was ably argued by counsel for the respondent that nevertheless Maria Sanchez is, by the law of Mexico, an illegitimate child of John Wardrope. On this point, we return again to what is meant by the word "status". Is it the name which the foreign law attaches or do we look behind to determine what incidents, capacities and obligations imposed by the foreign law to determine whether those rights and obligations are so closely akin to those imposed in this jurisdiction in the case of a child born in lawful wedlock? And, as I have said, on the facts of this case I have reached the conclusion that the sum total of the capacities and obligations vested in the child in question by the *lex domicilli* are the same as those of a child born in lawful wedlock.

Essentially, the Court of Appeal asks this question: What are the incidents which attach to the status of legitimacy in Ontario? The answer refers to the right to support, the right to take on an intestacy, the right to use the father's name and so on. In Mexico, these same incidents attach to a child who has a judgment declaring a certain man to be her father. Mexico can therefore be seen to have established a system in which the differentiation between the status of

"legitimacy" and "illegitimacy" have little practical significance if a paternity declaration is made. In order to fit this new status into the scheme of the local law of Ontario, it is necessary to decide what this new status most closely resembles. Clearly, it closely resembles the status known as "legitimacy" in Ontario, it only seems logical that it should be then seen as such in Ontario. Once it is established that the status of the country of domicile of the beneficiary is like "legitimacy", it attracts the consequences of the local law of Ontario relating to legitimacy—such as the right to take as "issue" under a will.

(h) *Recognition Through Legislation*

For a number of reasons, in a number of instances, the old conflict of laws rules have not worked adequately to deal with legal decisions that have cried out for extra-jurisdictional force. Two well-known areas have been in the enforcement of maintenance orders for wives and children and in the enforcement of custody orders. The failure to give recognition to the former has given rise to the frustration of legitimate financial claims by dependants and the failure to give recognition to the latter had led to the increasing incidence of "child kidnapping" by disgruntled spouses. The evident injustice worked by confining custody or maintenance orders to their normal jurisdictional limits has led to the drafting of the *Uniform Reciprocal Enforcement of Maintenance Orders Act* and, more recently, the *Uniform Recognition of Custody Orders Act.*

The *Uniform Reciprocal Enforcement of Maintenance Orders Act* has been adopted, occasionally in revised form, by all Canadian provinces. Reciprocating States include all Canadian provinces, several American States, States and Territories in Australia, New Zealand, England, South Africa and others. When a maintenance order is made in one of these reciprocating jurisdictions, it is then confirmed in the enforcing jurisdiction and enforced as though it were an order made by the courts of that jurisdiction. The key to this Act is reciprocity; in order to enforce an order in a foreign State a similar right of enforcement by the foreign State must be granted within the local jurisdiction.

The *Uniform Recognition Custody Orders Act* operates on a different basis than the *Uniform Reciprocal Enforcement of Maintenance Orders Act.* The basis of recognition is not in any sense reciprocal—it is a unilateral recognition. The Act works to prevent local States from assuming jurisdiction to hear a custody case if a foreign

state has already made a custody order. This would act as a disincentive to parents who "forum shop" for a more favourable custody decision. The decline of jurisdiction is, of course, subject to the caveat that the courts will interfere if there is apprehension of serious harm to the infant should the original custody order be enforced.

(i) *Presumptions of Paternity*

The troublesome question of the impact of presumptions of paternity comes to mind in this context. At the present time, the presumption of legitimacy is recognized as giving rise to the status of legitimacy for the purposes of private international law. It is not necessary to have a judicial declaration or judgment—the conflict of laws rules accept that the child of a married woman is presumed legitimate and will proceed on this presumption. What effect will the abolition of the status of "legitimacy" and the introduction of several presumptions of paternity have on the tenets of private international law? There are certainly possibilities for confusion. It may be that the presumption of legitimacy will be retained in conflict of laws rules. There would then be two standards, one for situations of a purely local nature and one for situations involving foreign elements. Alternatively, the new presumptions of paternity could be considered as replacements for the old presumption of legitimacy; the existence of circumstances giving rise to presumptions of paternity may be considered sufficient to create a recognized parent-child relationship.

It may be, on the other hand, that the presumptions will be considered to have no foreign impact and interested parties will have to get a paternity declaration. This may seem undesirable, as it is already agreed that presumption should be of legal force without the necessity of a judicial declaration of paternity.[36] Should the legal effect of presumptions be limited to the arena of local law and not extended to the international forums? Should paternity presumptions be treated in the same manner as paternity declarations (as many paternity declarations may rest on these presumptions) or should the lack of a judicial order limit their foreign recognition? A fuller discussion is unfortunately beyond the scope of this report, but the position of paternity presumptions may merit some deliberation.

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[36]Proceedings of the Fifty-Eighth Annual Meeting of the Uniform Law Conference of Canada, (1976), pages 120-122.

(j) *Options for the Discussion by the Commissioners and the Conference*

Of course, the logical first question is whether the Conference is in favour of introducing specific proposals which would alter the likely state of the law should paternity declarations be introduced in Canadian jurisdictions. The alteration or reform of such law is at a secondary level since it is dependent firstly, on the abolition of the status of illegitimacy and secondly, on the applicability of traditional conflict of laws rulings to this new creature—the paternity declaration. Because of these factors, there is confusion as to the state of the law regarding paternity declarations and therefore, the necessity for reform.

Question One:

Do the Commissioners believe that the formulation of proposals for the treatment of paternity declarations is:

(a) necessary, and;

(b) desirable.

If it is considered both necessary and desirable that certain proposals be addressed to the issue of paternity declarations, a further question arises as to the approach to be taken. Would a re-statement of applicable conflict of law rules suffice, or would the machinery of enforcement legislation be necessary? Examples of the latter include the *Uniform Reciprocal Enforcement of Maintenance Orders Act* and the *Uniform Recognition of Custody Orders Act.* These have been discussed earlier.

Question Two:

Do the Commissioners believe that the formulation of proposals for the treatment of paternity declarations should be in the form of:

(a) a re-statement of applicable conflict of laws rules; or

(b) new, enabling legislation; or

(c) both?

Should it be considered necessary to have a *Uniform Recognition of Paternity Declarations Act,* on what basis should recognition be granted? There are models of both reciprocal and unilateral recognition in the *Uniform Reciprocal Enforcement of Maintenance Orders Act* and the *Uniform Recognition of Custody Orders Act.* In choosing between these alternatives, it is necessary that the desire of encouraging comity among nations not outweigh the best interests of

children whose welfare may depend on the recognition of paternity declarations.

Question Three:

Do the Commissioners believe that the recognition of paternity declarations should be:

(a) on a reciprocal basis; or

(b) on a unilateral basis?

Should it be decided that recognition should be on a unilateral basis, the extent of such recognition should be discussed. It is possible that every paternity declaration be recognized in the same manner. Alternatively, only paternity declarations of certain states could be given recognition. In the American *Uniform Parentage Act*,[37] the obligation exists to recognize the paternity declarations of all other American states.* These declarations are accorded different treatment from those of non-American states. A provision giving such special position to states in a federal system is also found in Tasmania's *Status of Children Act*.[38] In addition, this Act provides for the designation of other States whose orders may be recognized in Tasmania.[39] A similar provision might be considered an option in delineating the extent to which foreign paternity declarations be recognized.

Question Four:

Do the Commissioners believe that unilateral recognition should be granted to paternity declarations made by:

(a) Canadian provinces and territories only; or

(b) designated States; or

(c) all States?

Once the paternity declaration of a foreign State is introduced to a local court, what powers of investigation should the local courts have? It could be that the local court should have the power to hear any defences or arguments which could have been raised on the merits in the foreign State. Alternatively, consideration of the merits of a paternity declaration could be restricted to cases where there is an apprehension of harm to the child on the affected parties. A third

*Of course, there are good constitutional reasons for the inclusion of such a provision in an American Act.

[37]Found as an Appendix to Harry D. Krause, "The Uniform Parentage Act" (1974), and *Family Law Quarterly* 16. This Act has been adopted in North Dakota and Montana.

[38]Tasmania, *Status of Children Act*, 1974, No. 36, s. 8(17).

[39]Ibid. s. 8(8).

option would be that a court could inquire into only jurisdictional issues affecting the basic validity of paternity declaration. Jurisdictional issues would include the basis for assuming jurisdiction as well as "natural justice" issues such as whether there was a proper hearing or whether there was fraud and so on.

Question Five:

Do the Commissioners believe that if a paternity declaration is to be recognized, the local courts should have the authority to inquire into:

(a) the merits of the paternity declaration; or

(b) the merits of the paternity declaration only in exceptional cases; or

(c) the jurisdiction of the court making the paternity declaration?

If it is decided that a local court may inquire into the jurisdiction of the foreign court, in deciding whether the local court must recognize the paternity declaration, the acceptable basis of jurisdiction must be defined. This choice recalls the issues of basis of recognition of status discussed earlier. In particular, the analogous area of recognition of divorce decrees is worthy of consideration. In the case of recognition of foreign divorce decrees, a divorce is recognized if there is a "real and substantial connection" between a spouse and the jurisdiction. This would seem a sensible approach for paternity declarations, although there are other options which the Commissioners may favour.

Question Six:

Do the Commissioners believe that paternity declarations should be recognized if the foreign court assumed jurisdiction:

(a) on the basis of a "real substantial connection" of the parties to the jurisdiction; or

(b) on some other basis?

Supplementary questions arise as to the treatment of foreign presumptions of paternity in relation to the treatment accorded foreign paternity declarations. Declarations are frequently based on presumptions; should these inter-connected phenomena be treated differently in the realm of extra-jurisdictional recognition?

Question Seven:

Do the Commissioners believe that the formulation of proposals for the treatment of foreign presumptions of paternity is:

(a) necessary; and

(b) desirable?

Should the Commissioners favour such proposals or legislation, the form may be identical to that already explored in the case of paternity declarations. This may be desirable in the sense that these are inter-connected concepts. On the other hand, the difference between recognizing a court order and recognizing circumstances giving rise to a presumption cannot be overlooked.

Question Eight:

Do the Commissioners believe that recognition should be given presumptions of paternity:

(a) on the same basis as paternity declaration; or

(b) on some other basis?

It is unfortunately beyond the scope of this discussion to speculate further on the basis for recognition of presumptions of paternity.

3. ARTIFICIAL INSEMINATION

(a) *Introduction*

The Uniform Law Conference in 1976 deferred discussion of three policy questions concerning the legal implications of artificial insemination, pending further study by the Ontario and Quebec commissioners. The subject of artificial insemination becomes relevant in a general discussion of the status of children born out of wedlock because it is uncertain whether a child conceived by means of artificial insemination of spermatazoa of a man who is not the mother's husband is legitimate or illegitimate. Most writers on the subject tend to the conclusion that such a child would be illegitimate. This report deals primarily with the legal status of children born by artificial insemination, and does not canvas the larger medical, ethical and legal issues raised by the topical and controversial practice of artificial insemination.

"Artificial insemination" can be defined as the medical procedure in which spermatazoa are introduced into the female reproductive organs for procreative purposes by means other than coition. It has become usual to differentiate within the procedure, according to the source of the semen used. If it is that of the woman's husband, the procedure is known as Artificial Insemination Homologous (A.I.H.) where the semen is that of another male other than that of the husband, Artificial Insemination, Donor (A.I.D.) is the term applied. A

hybrid procedure, Combined Artificial Insemination, (C.A.I.) occurs when the insemination uses spermatazoa of the third party donor mixed with those of the husband.

In the case of Artificial Insemination Homologous, few legal problems arise. It is virtually inconceivable that the child could be born without the consent of both spouses.

The husband is, on any interpretation, the father of any child conceived and should not be denied all the rights and responsibilities of a parent. However, should the child be conceived from spermatazoa of a third party, more difficult questions are raised.

(b) *The relationship of the AID donor to a resulting child*

In AID, medical practice protects the anonymity of the third party donor. Most consent forms completed by donors require the donor, as the anonymous provider of semen, to disclaim all interests in the results including the identity of the woman who has been inseminated and the results of the insemination.

Indeed the secrecy of the procedure, and in particular the donor's anonymity, is essential if artificial insemination is to be considered acceptable. All jurisdictions that have considered the problem have insisted that in no case should a third party donor have any relationship to a child conceived by AID. The donor should neither have rights of custody or access nor be under any obligations with respect to maintenance or succession.

This clearly accords both with the intentions of the parties and the accepted understanding of the nature of AID itself. The man and woman who request artificial insemination wish to be the parents of the child. The donor would not wish to accept any legal responsibility for the child.

The British Columbia Royal Commission of Family and Children's Law recommended in its Report on the Status of Children Born to Unmarried Parents (1975) that legislation should state that a donor of semen used in artificial insemination has no legally recognized relationship with a resulting child. The Alberta Institute of Law Research and Reform similarly recommended in its Report on the Status of Children (1976) that if a married woman is artificially inseminated with semen all or part of which is donated by a man other than her husband the donor should not in law be the father of the child. Lastly, the Civil Code Revision Office has proposed in Article 122a of its Draft Civil Code that when artificial insemination

has been performed, the third party donor may not claim paternity of the child.

The consensus position achieved by these various reports simply recognizes the logical force of the recommendation to exclude a third party donor from any legal relationship to the child. To do otherwise would be to discourage AID altogether, for it would then be as unrealistic to expect third parties to donate semen except in very unusual cases as it would be to expect a woman to agree to the procedure.

(c) *The relationship of the AID parents to each other and to the resulting child.*

Under present law, the rights of parents and children toward one another can vary greatly depending on whether a child is legitimate or not. A child born to an unmarried woman, or whose biological father is a person other than the mother's husband, is, under the common law, illegitimate. This general rule is however modified by the strong presumption that a child born to a couple married at the time of the infant's birth is legitimate, a presumption summarized by the phrase *pater est quem nuptiae demonstrant.* This presumption is a strong one and can be rebutted by evidence proving that the mother's husband is not the biological father. As a result of the confidentiality normally attached to artificial insemination, it is unlikely that evidence that would rebut the presumption would ever be brought to light.

Nevertheless, reform is necessary in this area. Much would be done to resolve the problems if the disabilities of the illegitimate child were removed by a general statutory reform to equate the rights of children born in or out of wedlock. However it would also be desirable to pass legislation to ensure that the mother of an AID child and her husband should for all purposes be considered the natural parents of the child, and the child the legitimate child of the mother and her husband.

More difficult questions are raised by the recommendation in the British Columbia Royal Commission Report that Artificial Insemination should not affect an existing relationship between the parents who sought AID and most especially their status if married. It is still not clear whether AID might constitute adultery on the part of a wife who receives it. The case law on this subject is as unhelpful as it is antique. Rather than attempt to reconcile conflicting dicta from a variety of jurisdictions over the last sixty years, one may summarize by stating that it is unlikely that a Canada court would follow *Orford*

v. Orford (1921), 49 OLR 15 in concluding that AID without the husband's consent was adultery, in the face of British cases such as *Maclennan v. Maclennan* [1958] S.C. 105 and *Dennis v. Dennis* [1955] 2 All E.R. 51 which held that the sexual intercourse necessary for a finding of adultery must involve penetration. The question has become increasingly academic in recent years with the shift in family law away from nominate grounds of fault as a basis for dissolution of marriage or support.

Additional problems are posed by the fact that a marriage may still be dissolved on the grounds of non-consummation under the Divorce Act and as a ground for annulment outside the terms of the Divorce Act. Moreover the marriage might still be in jeopardy on the ground of non-consummation even if the husband himself had consented and had been the donor of the spermatazoa used in artificial insemination (AIH). Consummation of a marriage remains distinct from conception and presumably consensual artificial insemination could take place even when either spouse has refused to consummate the marriage. This fact situation is however as unlikely as it is complex.

(d) *Family relationships and the AID child*

As noted earlier, the child of married parents is normally presumed to be legitimate. However this presumption is rebuttable and will not be effective to ensure that the husband is for all purposes considered the responsible father. Section 5 of the Uniform Parentage Act adopted by the National Conference of Commissioners on Uniform State Laws in 1973 provides that:

> 5. [Artificial Insemination]
>
> (a) If, under the supervision of a licensed physician and with the consent of her husband a wife is inseminated artificially with semen donated by a man not her husband is treated in law as if he were the natural father of a child thereby conceived, the husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of

a court of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

If the husband has consented to the Artificial Insemination, he should be treated as the father and this relationship should not be subjected to presumptions which would deny that paternity.

Very rarely it may happen that a husband does not consent to the artificial insemination of his wife. In this situation it may be unreasonable to expect him to have the same responsibilities toward the child born as the result of insemination as he would have done had he either been the donor or had willingly consented to the procedure. A number of writers have argued that this inherently unsatisfactory situation should be prevented by legislation to regulate AID practices which would require the written consent of the husband to any artificial insemination of a married woman.

The Alberta Report recommended the husband of a woman who had conceived a child by means of AID or C.A.I. should be in law the father of the child if he consents to the artificial insemination, but not otherwise. Article 122 of the draft Quebec Civil Code is even more direct when a child has been conceived through artificial insemination, either by the husband or the *de facto* consort, or by a third party with the consent of both consorts or both *de facto* consorts, no disavowal or contextation of paternity is admissible. It might be desirable to modify these recommendations in situations where although the husband did not consent to the initial insemination, he has nevertheless acted *in loco parentis* to the child, after learning how the child was conceived. There seems no reason why a husband who wishes to be considered the parent of the child, and to accept the child into the family, should not be able to have the same rights as if he has initially consented to the operation.

Lastly additional problems are posed by cohabitation outside marriage. The Alberta Institute Report outlined this well:

> A man may agree to the artificial insemination because the relationship is expected to be of short duration, or simply because he does not feel entitled to object. We recommend that a man who

has cohabited with a woman for a year before the birth of a child should be responsible as a parent if he has consented to the artificial insemination and has also agreed to assume the responsibilities of a parent. If the cohabitation does not continue during that period the man should not be treated as the child's father.

Quebec, in the draft Civil Code and the British Columbia Royal Commission simply equate the positions of married couples and a man and woman who are living together as de facto consorts. If the couple consent to the artificial insemination they intend the man to be the legal father of the child. Should the law refuse to recognize this intention, it is denying the AID child in such cases the right to a father, and perpetuating the existence of inequalities in the rights of children based on parental status. Under this Conference's uniform Vital Statistics Act, the birth of a child of a married woman is generally registered showing the name of the mother's husband as the name of the child. It may be desirable to ensure that the husband is permitted to register himself as the father of the AID child without any reference to the question of paternity. If the mother is single or divorced, in no case should the registration of the child's birth require the identity of the donor to be produced. In addition, if a married couple were to represent themselves as the biological parents for purposes of claiming social allowances or property, they might commit the offence of making a false declaration. The best way of overcoming this problem is to provide that for all legal purposes the mother of an AID child and her husband shall be deemed to be the lawful parents of the child, and the child the legitimate child of the mother and her husband.

(e) *Reception of Evidence of Blood Testing in the AID situation.*

The British Columbia Royal Commission made one additional recommendation concerning evidence concerning blood-testing in artificial insemination cases. The Commission pointed out that the reception of such evidence in some cases could be embarrassing to a couple who has used artificial insemination. They gave as an example a case in which a person claiming paternity requested blood tests that produced a negative result for the legal father. This problem can be avoided if care is taken to match the donor's blood group with that of the husband.

However in order to resolve the issue of paternity when conflicting blood-type evidence is available, it may be necessary to inform the court of the use of artificial insemination. To protect the privacy

of the parents in such a case, the Royal Commission recommended that:

> When a paternity proceeding involves blood testing of a man and woman who have employed artificial insemination evidence of that fact and evidence of the blood type of the donor should be heard in the privacy of a judge's chambers.

It is difficult to disagree with such a common sense solution to a potentially embarrassing problem.

CONCLUSION

Artificial insemination is a new and sensitive topic for legislators and policy makers in Canada. As with many other medico-legal matters, making new legal rules is complicated by the tension between competing moral claims and developing medical practice. To many, artificial insemination is an invaluable technique to help the couple who desire children, but because of infertility or genetic complications cannot, or dare not, conceive. To others, artificial insemination is offensive and immoral, little more than medically approved adultery. However the broad ethical and legal debate about artificial insemination is not our concern here.

This report has concerned only the status in law of children conceived by means of artificial insemination. The issues it has canvassed are at once narrower and less problematic than the broad questions raised by AID, for the primary concern is with the status of the child, not with moral judgments on the conduct of the parents. This concern links the Report to the problems of children born out of wedlock. If we wish to escape from the unfortunate legacy of the law of bastardy, a law that labels children either first-class or second-class according to the formal legal status of their parents, then it would be invidious and regressive to create new distinctions between "AID children" and children conceived by more conventional means. A concern to keep safe the AID child from such unequal treatment is quite separate for a concern about the desirability of AID.

There is much to be said for legislation to regulate, or alternatively to discourage, AID. This Conference may one day wish to consider a *Uniform Artificial Insemination Act*, similar to its current *Uniform Human Tissue Gift Act*, encompassing not merely the status and rights of the AID child, but also the duties of the inseminating physician, responsibilities of donors, central registration of documents concerning AID, and maintaining the privacy of the parties. Such a

Uniform Act would occasion a broad ranging and complex debate that would be inappropriate when one is considering the status of children.

A remarkable consensus on the question of AID and the status of children has been achieved by the three Canadian law reform bodies that have considered the topic. The British Columbia recommendations form the basis of the policy questions addressed in this Report. It may be useful to set out the recommendations of the Alberta Institute of Law Research and Reform, and the draft articles of the Quebec Civil Code Revision Office. The Alberta recommendation is

1. If a married woman is artificially inseminated with semen all or part of which is donated by a man other than her husband
   (i) the donor not be in law the father of the child, and
   (ii) the husband be in law the father of the child if he consents to the artificial insemination but not otherwise.

2. Subsection (1) applies with necessary changes to a woman and a man who without being married cohabit throughout the year preceding the child's birth, but only if the man also consents to assume the responsibilities of parenthood.

The Quebec articles are as follows:

116. The presumed father may disavow the child.
The mother may also contest the paternity of the presumed father.

122. When a child has been conceived through artificial insemination, either by the husband or the *de facto* consort, or by a third party with the consent of both consorts or both *de facto* consorts, no disavowal or contestation of paternity is admissible.

122.a When artificial insemination has been performed, the third party donor may not claim paternity of the child.

125. No person may claim any status contrary to that assigned him by his act of birth and the possession of status consistent with such act.
Subject to Article [116] no person may contest the status of any person whose status is consistent with his act of birth.

125.a Every interested person may contest the status of a person whose status is not consistent with his act of birth.

125.b However, no one may contest the status of a person solely because that person was conceived through artificial insemination.

Once one accepts the basic thrust of the law concerning children born out of wedlock, that the law should promote equal status for all children, then the policy questions raised at last year's Conference by the British Columbia Commissioners do not pose insurmountable difficulties. To accept the B.C. propositions and to establish by law the legal paternity of the AID child, would simply serve to negate the unintended legal consequences of artificial insemination, consequences that it would be irrational to visit on the child which is the outcome of successful artificial insemination.

* * * * * * *

ACKNOWLEDGEMENTS

The first two parts of this Report were completed with the assistance of the Policy Development Division of the Ministry of the Attorney General. We wish to express our gratitude to Collene Parrish and Orville Endicott, Students at Law, for their scholarship and research.

The third part of the Report dealing with Artificial Insemination was undertaken jointly with the Quebec Commissioners. We are most grateful to Professor P-A. Crepeau, C.R., to the late Professor Yves Caron, and to Professor E. Groffier-Atala with whom very helpful discussions were held on the subject. However due to time pressures, the Quebec Commissioners have had no opportunity to examine and approve the Report and the Ontario Commissioners assume full responsibility for errors or omissions.

Finally we wish to express our gratitude to Simon Chester, Executive Counsel to the Deputy Attorney General for Ontario for his invaluable assistance with respect to the research and the drafting of the third part of this Report.

Toronto
August 1977

H. Allan Leal
on behalf of the
Ontario Commissioners

APPENDIX J

(See page 29)

CLASS ACTIONS

BRITISH COLUMBIA MEMORANDUM

This memorandum is divided into the following parts:

1. Purpose
2. Combines Investigation Act
3. General Issues (Political, Economic and Social)
4. Particular Issues (Legal)
5. Uniform Law Conference Issues

PURPOSE

The purpose of this submission is to set out the issues, or some of them, that may be considered relevant to a determination by the Conference as to whether work should be undertaken by the Conference towards the production of a Uniform Act relating to class actions.

It did not appear desirable to embark on a detailed analysis of the social or legal issues until some general direction was given by the conference.

The issues set out in this submission are therefore only set out in such a way as to permit the Conference to determine whether the matter of class actions should engage the attention of the conference as a project leading to a Uniform Act.

COMBINES INVESTIGATION ACT

In March 1977 the second stage of amendments to the *Combines Investigation Act* were introduced in Bill C-42. In June 1977 Bill C-42 was withdrawn, but it is expected that a similar bill will be reintroduced before long.

Bill C-42 contains a new Part V.1 of the *Combines Investigation Act*, consisting of sections 39.1 to 39.23 and that part is attached to this report.* The introduction of the new sections follows in time and to some extent in substance the recommendations set out in a document entitled *A Proposal for Class Actions under Competition Policy Legislation*, prepared for the Department of Consumer and Corporate

*As Bill C-42 is readily available, the new Part V.1 of the *Combines Investigation Act* is not reprinted here.

Affairs by Neil J. Williams, Professor of Law, Osgoode Hall Law School. For the purposes of his study Professor Williams expressly assumes that the remedies in damages given to private persons who can show losses resulting from the commission of a breach of the *Combines Investigation Act* are constitutional, and he does not explore that point.

If the new Part V.1 was enacted then a class action would be permitted in the Federal Court for the recovery of loss or damage suffered as a result of conduct contrary to the *Combines Investigation Act*, such as conspiracy to restrict competition, bid-rigging, formation of a merger, discriminatory pricing, misleading advertising, multiple ticketing or pyramid selling.

Part V.1 also contemplates what is called a substitute action under Section 39.14 and 39.15. If the court decides that a class action is not superior to other methods for the effective adjudication of the issue, then the Competition Policy Advocate may start an action on behalf of the class. His damages are measured by the damages suffered by the class but the amount recovered on the judgment is to be paid into the consolidated revenue fund.

The Federal Court is given jurisdiction over class actions but Section 39.23 permits the extension of jurisdiction to the Superior Courts of the provinces, in the following terms:

> "39.23 Where the Attorney General of Canada reports to the Governor in Council that agreement has been reached between or among
>
> (a) attorneys general of two or more provinces where no proclamation has previously been issued under this section, or
>
> (b) the attorney general of a province or the attorneys general of two or more provinces and the attorneys general of all provinces in relation to which a proclamation has previously been issued under this section,
>
> on principles of administration and consolidation of class actions ordered to be maintained by superior courts of those provinces and on the principles of administration of subsequent proceedings arising out of those class actions and that agreement has been reached on the manner in which those principles will be implemented by regulations made pursuant to section 39.22 or by uniform rules and orders of courts, the Governor in Council shall issue a proclamation vesting in the superior courts that ordinarily exercise original jurisdiction in those provinces in a case described in paragraph (a) and in the province or provinces in relation to which a proclamation has not previously been issued under this section in a case described in paragraph (b), concurrent jurisdiction with the Federal Court—Trial Division in respect of proceedings under this Part."

GENERAL ISSUES (POLITICAL, ECONOMIC AND SOCIAL)

(1) *Do the governments of the provinces wish to consider the desirability and policy alternatives in extending the class action procedures.*

The Law Reform Commissions of both Ontario and British Columbia, and perhaps others, as well as Law Reform Commissions in Australia, have had the matter of class actions referred to them. The present law is somewhat rudimentary and does not provide for the award of damages in class actions or the use of class actions where some of the circumstances of each member of the class may be identical but others may be different.

(2) *Do the attorneys general of the provinces, or any of them, wish to seek agreement with each other on principles of administration and consolidation of class actions generally.*

The fact that class actions may be desirable in cases where a product is consistently defective and where the product is sold from coast to coast and where the purchasers may move from province to province appears to make questions of uniformity of legislation and reciprocity of procedure of paramount importance.

(3) *Do the attorneys general of the provinces, or any of them, wish to reach agreement with each other on principles of administration and consolidation of class actions authorized by any federal legislation introduced in substitution for Part V.1 of Bill C-42.*

(4) *If the answer to questions (2) and (3) are both affirmative, should the procedure be the same for class actions within provincial legislative competence as for class actions under the Combines Investigation Act.*

(5) *If the answer to question (4) is in the affirmative, should the procedure be the procedure now set out in Bill C-42 or should the agreed procedure be different from the procedure now set out in Bill C-42.*

(6) *Should any uniform legislation on class actions confine itself to a basic procedure for the more economic and expeditious disposition of multiple claims involving common questions of law or fact against the same defendant; or should it also contain elements of broader social policy, and, if so, what elements.*

The proposed *Combines Investigation Act* provides for substitute actions giving no recovery to the injured members of the class though the amount of the damage is determined by the extent of

that injury, and provides for payment of the damages into the consolidated revenue fund.

Under the scheme for what has been called fluid class recovery and cy-pres application, the damages are determined by the total loss suffered by all the members of the class, but if members of the class cannot be located or do not file proof of loss, then the shares of those members in the total damage award will be placed in a fund and that fund will be applied to some social objective thought to be linked to the loss. For example, a class loss arising from manufacture and distribution of defective refrigerators could be placed in a fund to provide free cold beer to all further purchasers of the refrigerators or to pay the moving expenses of all citizens who propose to move their homes north of the Arctic circle.

This type of scheme may be contemplated under regulations to be made under the *Combines Investigation Act*.

PARTICULAR ISSUES (LEGAL)

I. *The Class*

(a) What are to be the criteria for determining the existence of a class?

(b) Must all class members have suffered identical damages? e.g. If the damages arise from purchasing a car with defective steering, can injured drivers, injured passengers and owners requiring repairs fall into the same class?

(c) Can there be a relaxation of the rules of privity of contract in determining the class? e.g. If the damage arises from overpricing by a manufacturer on his sales to a wholesaler, who then passes the price increase along to retailers, some of whom pass the increase along to consumers and some of whom do not; can there be a class composed partly of retailers and partly of consumers, neither of whom purchased from the offending manufacturer?

II. *Procedure*

(d) Should costs be awarded against an unsuccessful class action plaintiff?

(e) Should costs be awarded on a contingency basis to a successful class action plaintiff and, if so, on what basis and by whom should they be set?

(f) Should there be a preliminary screening process to determine that there is a proper class and a justiciable issue, and, if so, what should be the criteria applied?

(g) What discovery rights are to be accorded against members of a class?

(h) Should jurisdiction to deal with class actions be given only to superior courts?

(i) What control is to be exercised over consent judgments, settlements and discontinuances, particularly in relation to contingent fees?

III. *Res Judicata*

(j) What is to be the res judicata effect of a judgment in a class action?

(k) What notice of the proceedings must be given to members of the class and how are they to be determined for the purposes of notice and who is to pay for the notice?

(l) What rights is a member of a class to have to opt out of class actions proceedings and retain his individual rights of action?

IV. *Damages*

(m) What is to be the mechanism for assessing damages in class actions?

(n) Are damages to be assessed and recovered beyond the amount that class members actually prove, on the basis that other class members exist who do not prove their damages but who have suffered them?

(o) If damages are to be recovered in circumstances where they are not to be paid out to class members, either wholly or partially, how are the damages to be distributed and to whom?

(p) What procedures are to be established for members of the class to prove their losses and prove their membership in the class in order to obtain a share of a damage award?

UNIFORM LAW CONFERENCE ISSUES

(1) Is uniform legislation on class actions desirable?

(2) If so, is the Uniform Law Conference the appropriate vehicle to propose uniform legislation?

(3) If so, what policy direction is desirable, if any, before embarking on the preparation of uniform legislation?

(4) What procedures should be adopted to obtain those policy decisions, if any?

(5) Having regard to the provisions of Bill C-42 and also to the studies being undertaken by the British Columbia and by the Ontario Law Reform Commissions, is the matter of uniform class action legislation a matter that should be considered now or deferred to some other time?

APPENDIX K

(See page 29)

PROMOTION OF UNIFORMITY OF COMPANY LAW IN CANADA

REPORT OF NEWFOUNDLAND, NOVA SCOTIA AND QUEBEC

"In these times of class assertion and selfishness, meagre credit will be given to any who endeavour to serve the people generally. No chaplets await any member of this Conference for doing faithfully his inconspicuous duty. His reward will be in the consciousness of having helped in the upbuilding of Canada." Sir James Aikins, 1920 C.B.A. Proceedings, p. 321.

The late Yves Caron's keen interest in company law was responsible for bringing company law back after it had been allowed to lapse from the agenda of the Conference. By his tragically sudden demise, the Committee for the Promotion of Uniformity of Company Law in Canada has been reduced in stature, strength and purpose. We miss his good humour, quick intelligence and appreciation of the public good. But we were privileged to have been associated with him on this Committee and are the better for it. He performed his "inconspicuous duty" very well indeed and earned the very high esteem in which his colleagues and associates held him.

At last year's Conference, the report of the Special Committee for the Promotion of Uniformity of Company Law in Canada as amended by the Conference, was adopted. The report as amended recommended as follows: (See 1976 *Proceedings* pp. 28, 131, 132).

"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."

APPENDIX K

Following the Conference of 1976, the Secretary of the Conference conveyed the recommendations and adopted report to the First Ministers by letter. Copies of the letter so sent are attached as a Schedule.

Subsequently copies of the correspondence received from all jurisdictions was sent to the Ministers of each jurisdiction responsible for the administration of corporations in those jurisdictions. A copy of that letter and of the replies received to date are included in the Schedule.

On the whole the replies from the jurisdictions were very encouraging. The Government of Saskatchewan is attempting to organize a federal-provincial conference of officials concerned with corporation law in the Fall of 1977. It is hoped that from that Conference an association along the lines recommended by this Committee and the Uniform Law Section in 1976 may be established.

One area of concern should be noted and consideration given to remedial action. The Hon. Graham L. Harle, Minister of Consumer and Corporate Affairs, Alberta, made reference in his reply to the work presently being done by the Alberta Institute of Law Research and Reform and enclosed a copy of two papers released by that body for the consideration by the members of the legal profession of Alberta. In one of those papers (Preliminary Discussion Paper No. 2—The Criteria of Reform) under the heading II. Business Efficiency (d) Uniformity, the following comments were made:

> "It is doubtful if uniformity can ever be more than an ideal in Canada with its Federal and ten provincial jurisdictions. As an example the Civil Code Revision Office of the Province of Quebec has, in its 1976 Report, proposed the following Article 38.
>
> > In the event of fraud or gross fault, and even when the law restricts the personal responsibility of the founders, members or directors of a corporate person, the court, on application by any interested person, may charge the founder's members or directors or any of them, with the debt of the corporate person, to an amount deemed equitable.
>
> A concept quite at odds with the common law jurisdiction.
>
> However, the recently passed Canada Business Corporations Act (referred throughout these papers as the C.B.C.A.) with modifications is proposed to be adopted by Saskatchewan and Manitoba and is being considered for adoption in the Maritime Provinces. It is in many respects similar to the Ontario Business Corporations Act (O.B.C.A.). *We will not recommend an unsatisfactory solution for the sake of uniformity, and we will certainly not recommend that the new Act be put into a straight-jacket which would be imposed by a requirement*

that future amendments be made only with the consent of the Federal Government and several provincial governments solely for the sake of uniformity. Because the C.B.C.A. has been well drafted, and certainly meets our criteria of clarity, and because it is in force in Alberta as well as being the model for Saskatchewan and Manitoba, we are convinced that it is (sic) model which one should aways have in mind." (The emphasis in italics is ours).

The observations made in that Discussion Paper deserve notice by the Uniform Law Conference. The serious point of concern relates to the conception of uniformity expressed in that paper—which is not your committee's idea of uniformity. This committee feels it necessary for clarification of our position to repeat for this generation earlier remarks on the need for uniform provincial legislation in the proper cases.

In 1919 in his presidential address in Winnipeg (1919 Proc. for Tuesday 26th August) Sir James Aikins remarked:

"The old common law was created by customs and usages being stabilized by judicial decision. The common law of the Canadian provinces is growing in the endeavour to meet popular requirements by legislative enactments. These are being interpreted and commented on by the courts. The principles of the law thus being formed and meriting continuance need to be defined, articulated with older established principles and from time to time restated, so that the whole well put together can be easily understood by the people and applied by the courts. Such an assimilation of the conventional law of the provinces relating to business, such as a restatement and stabilization of them, is one of the purposes of this Conference. The people of the several provinces doing business throughout Canada well understand the desirability of having uniformity or standardization of the business laws.

In the making and consolidating of the law steady progress may not be satisfactory to restless classes but it is more to be desired than impulsive plunging. The right direction is more important than the length of the stride. There is much pressing work to be done for the good of Canada, and it requires all citizens to do their share according to their several talents and capacities."

Again in 1920 in his presidential address, this time in Ottawa, Si James Aikins said: (1970 Proc. pp. 320, 321)

"In order to make clear the purpose of the appointment of th Commissioners and the organization of the Conference, let me poin out that it is not their function or duty to initiate new laws or to drai uniform acts for such on any of the subjects committed to provinci jurisdictions by Section 92 of the British North America Act. Th is the prerogative of the people through their representatives in th legislatures. This even does not mean that the legislatures make th

laws. Rules of conduct or regulating laws on any subject in self-governing provinces and states have their origin in the persistent volitions and desires of a majority of the people interested in that subject, which are usually expressed in methods, practices and usages. Legislation which simply expresses the theories or the chimerical fancies of a legislator and which does not express the views and will of a people never becomes regulating law, though for the time being on the Statute Book. It will not be respected or enforced. Generally the habits, practices and methods of a people, particularly in reference to business and commerce, are constant, and the same or similar in all parts of a country where the conditions are alike. What is desired by a people is the best legal expression of those methods, customs and usages in all parts of a nation where the business or trade is carried on. But where there are several legislative jurisdictions preparing their acts separately, they naturally will vary in detail and be different in expression, though all may have a common aim. People having business dealings throughout all Canada, or in several provinces, are irritated and embarrassed and hindered by those differing details and variations of statutory law, and demand substantial uniformity. There are two ways by which that demand for uniformity may be satisfied, and satisfied it will be, for where there is a defect and loss results, and there is an available remedy, that remedy, if persistently required, is sure to come. One is by the Federal Parliament passing Acts under the jurisdiction conferred by Section 91; the other is by the provinces voluntarily adopting uniform enactments. The one means a centralizing of authority and an unbalancing of our Federal system, the other the preservation of local selfgovernment and the retention of those subjects intended when the British North America Act was passed. The unfortunate tendency is towards centralization, and the wording at the beginning and end of Section 91, and an overlapping in parts of Section 91 and 92, lend themselves to wide interpretation according to the expressed wishes from time to time, of the people. This centralizing was manifest in the passing recently of a Federal insolvency law and largely because for many years, when there was no such law the provincial enactments relating to fraudulent assignments, preferential payment of creditors and the distribution of insolvent estates, were not in harmony. The same tendency is seen in the increasing number of Dominion incorporations and the careful regulation of them, chiefly owing to the lack of alertness and attention of the provincial governments in not having more uniform, simpler, better and less lax laws relating to the creation and organization and regulation of provincial companies. The situation calls for immediate and wise action by local legislatures.

There is urgent need for an adequate, practicable and commercially sound uniform Companies Act in all the provinces. The Commissioners, if their efforts are encouraged and well supported by the provincial governments, can give signal assistance in securing such uniformity of provincial legislation relating to business and the like, and thus obviate a general demand for uniformity by an exercise of the Federal jurisdiction. Better have voluntary uniform local enactments where that is at all practicable in interprovincial business, than an

> enforced uniformity imposed by Federal authority through majorities who may not consider the wishes of localities or minorities. Voluntary uniformity and cordial inter-provincial co-operation are a safeguard against legislative intrusion by the Dominion. Sectional jealousies or provincial isolation will not promote business solidarity or develop that national consciousness and spirit without which Canada cannot attain that vigor, prosperity and happiness to which it aspires.

In promoting uniformity and harmony in commercial and company law, there never was any thought to impose uniformity for the sake of uniformity or to make a uniform statute a "straight-jacket" unto the provinces that adopt it. On the contrary, the objectives were and are more those expressed by Sir James Aikins. It is thought by your Committee that it is much better today as in 1920 to have *"voluntary uniform local enactments where that is at all practicable in interprovincial business, than an enforced uniformity imposed by federal authority through majorities who may not consider the wishes of localities or minorities."*

It is to be hoped, therefore, that the work of this Conference over six decades to obtain a practical measure of uniformity in corporate business law will not be thought to be a desire to obtain uniformity merely to impose constraints upon provincial authorities in respect of their jurisdiction in company law. The sixty-nine year history of the Conference in this matter is very strong evidence to the contrary.

There is comfort in the steps taken by Saskatchewan, Ontario and Canada to promote uniformity in the administration of company law. It is hoped that any organization flowing out of the efforts of these jurisdictions will keep our recommendations of 1976 in mind so that the organization will not be too narrow to accomplish its purposes.

Since its report last year the Committee has been informed that Manitoba has implemented the *Manitoba Corporations Act*, which is based largely on the *Canada Business Corporations Act*.

Saskatchewan has enacted a new Business Corporation Act. That too is based on the *Canada Business Corporations Act*, but so prepared that it can be used by other provinces as a uniform provincial business corporation statute.

Alberta is studying the matter of a new business corporation law. An aspect of that study was commented on earlier in this report.

The Government of Canada is reviewing its Act, and preparing a number of housekeeping amendments. It is also preparing a non-profit corporation Act for introduction at the next session or shortly thereafter.

Newfoundland still awaits a report on its Companies Act and the advantages or disadvantages of uniformity of an Act such as the *Canada Business Corporations Act.*

In the meantime the present members of your Committee recommend that the Conference

(a) express its appreciation to the appropriate authorities in each jurisdiction for the consideration given to the report and recommendations of this Committee in 1976; and

(b) reiterate the statement first made in 1920[1] and repeated in 1976 that the Conference stands ready to assist jurisdictions in any practical way within its means to promote uniformity in corporation law and administration.

James W. Ryan,
Graham D. Walker
Roch Rioux
for Newfoundland, Nova Scotia
and Quebec Delegates

August 15, 1977

[1]Sir James Aikins, 1920, August 30th, Ottawa: "To remedy this for those who trade and do business interprovincially and who earnestly require it, most of the local governments propose codifying uniformity of the laws respecting such commerce and business as far as it can reasonably be done, and the Commissioners and the members of the Canadian Bar Association have offered to assist."

SCHEDULE I

CORRESPONDENCE WITH FIRST MINISTERS ON BEHALF OF THE UNIFORM LAW CONFERENCE

Dear Premier:

At the 58th Annual Meeting of the Uniform Law Conference of Canada, held at Yellowknife in the Northwest Territories, the standing committee to report on the promotion of uniformity of company law in Canada, consisting of Commissioners from Newfoundland, Nova Scotia and Quebec, made certain recommendations which, with slight modification, were approved by resolution of the Uniform Law Section of the Conference.

The following recommendations were approved by resolution:

(1) The committee recommends that the 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).

(2) The 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, this Conference might well recommend that its proposals be implemented by agreement of First Ministers.

(3) Further, the 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.

In order to put these recommendations into proper perspective, it should be observed that when the Uniform Law Conference was organized in 1918, all the provinces were represented but not the Government of Canada. The Conference was known as the Conference of Commissioners on Uniformity of Laws in Canada until 1974 when it adopted its present name. Canada has sent representatives regularly since 1935, Newfoundland began sending representatives in 1952. Quebec, after the organization meeting in 1918, was spas-

Monsieur le Premier Ministre,

Lors de la 58e réunion annuelle de la Conférence sur l'uniformisation des lois au Canada, qui s'est tenue à Yellowknife (Territoires du Nord-Ouest), le comité permanent chargé du rapport sur l'uniformisation du droit des compagnies, composé des commissaires de Terre-Neuve, de la Nouvelle-Ecosse et du Québec, a avancé certaines propositions que la section de l'uniformisation des lois de la Conférence a, avec de légères modifications, approuvées par résolution, à savoir:

(1) Le Comité propose à la Conférence de porter immédiatement à l'attention du gouvernement fédéral et des gouvernements provinciaux son souci, qu'elle partage avec l'Association du Barreau canadien, d'uniformiser le droit des compagnies, ainsi que d'insister sur le besoin de créer une association composée de hauts fonctionnaires tant fédéraux que provinciaux responsables de l'application de ce droit et de représentants des groupes directement concernés (à savoir: les professions juridiques, les comptables, les courtiers en valeurs mobilières et les chefs d'entreprises commerciales ou industrielles.)

(2) Le Comité est d'avis que cet objectif ne sera atteint que si, comme en 1932, les premiers ministres des gouvernements en cause prennent les premières mesures. En conséquence, la Conférence pourrait préconiser que ces propositions soient mises en oeuvre avec l'accord des premiers ministres.

(3) En outre, le Comité propose à la Conférence d'accepter expressément de prêter son concours d'une manière efficace à tout organisme national susceptible d'être créé pour favoriser l'uniformisation du droit des compagnies.

Afin de situer adéquatement ces propositions, il convient de remarquer que toutes les provinces, mais non le gouvernement du Canada, étaient représentées lors de la fondation, en 1918, de la Conférence sur l'uniformisation des lois qui, avant d'adopter son nom actuel en 1974, s'appelait la Conférence des commissaires à l'uniformisation des lois canadiennes. Depuis 1935, le Canada y délègue régulièrement des représentants et c'est en 1952 que Terre-Neuve a

modically represented at the Annual Meetings until 1942 when representatives of the Bar of Quebec began to attend regularly and since 1946 one or more representatives from the Government of Quebec attended regularly.

One of the first efforts of the Conference to obtain uniformity involved the provincial Companies Acts; it began as a project initiated by the Canadian Bar Association. Although a number of uniform draft Companies Acts were developed in the early years of the Conference, no real progress was made in getting a uniform Act accepted by the provinces.

In December 1932, an inter-provincial conference took place in Ottawa of Premiers and Attorneys General at which steps were taken towards promoting uniform company law not only as between provinces but as between the provinces and the federal government also. As a result of that meeting, a federal-provincial committee was established, which continued, with a brief interruption because of the war, to meet and discuss means to achieve greater uniform company law; that committee worked with the Uniform Law Conference to produce two draft Uniform Companies Acts in 1961. The committee ceased to function in the sixties and is now extinct despite efforts in 1964 by the Canadian Bar Association to re-activate it.

Since then there has been much activity in the legislating of new business corporation law, and in basic concepts there is now closer harmonization in this branch of law than ever before. The history of the Conference's activities since 1919 will be found in the 1976 Proceedings of the Uniform Law Conference.

It is in this historical context that the recommendations were made to and approved by the Uniform Law Conference in 1976.

If there is to be a federal-provincial committee to promote more uniformity or harmonization in company law in Canada, the initiative must come, as it did in 1932, from the First Ministers. The Uniform Law Conference has expressed its willingness to be of assistance in any useful way to any federal-provincial organization that might be established by First Ministers to advance uniformity in this important area of our laws.

On behalf of the Uniform Law Conference it has been my privilege to bring this matter to your attention with the hope that you

commencé à en envoyer. Quant au Québec, après une représentation intermittente aux assemblées annuelles, des représentants tant du barreau à compter de 1942, que du gouvernement à partir de 1946, ont commencé à y assister régulièrement.

La Conférence a fait porter l'un de ses premiers efforts d'uniformisation sur les lois provinciales des compagnies, et ce dans le cadre d'un projet lancé par l'Association du Barreau canadien. Malgré la rédaction d'un certain nombre de projets durant les premières années d'existence de la Conférence, aucun progrès véritable n'a été accompli dans la réalisation d'une loi uniforme acceptée par les provinces.

En décembre 1932, a eu lieu à Ottawa une conférence interprovinciale des premiers ministres et des procureurs généraux, à laquelle un certain nombre de mesures ont été prises afin de favoriser l'uniformisation du droit des compagnies non seulement entre les provinces, mais également entre les provinces et le gouvernement fédéral. Cette Conférence a donné naissance à un comité fédéral-provincial, dont l'existence a été interrompue pendant la guerre, chargé d'étudier le moyen de favoriser l'uniformisation du droit des compagnies; ce Comité qui a publié en 1961, en collaboration avec la Conférence sur l'uniformisation des lois, deux projets de loi uniforme des compagnies a cessé ces activités dans les années 1960 et n'existe plus aujourd'hui malgré les efforts déployés en 1964 par l'Association du Barreau canadien pour en assurer la survie.

Depuis lors, une activité intense a régné dans le secteur du droit des compagnies commerciales, tant du point de vue législatif, que dans le domaine des notions fondamentales où l'on remarque une harmonisation plus étroite que par le passé. Le procès-verbal, non encore publié, de la Conférence de 1976 sur l'uniformisation des lois contient une récapitulation des activités de la Conférence depuis 1919.

C'est dans ce contexte que les propositions ont été formulées et que la Conférence sur l'uniformisation des lois les a approuvées en 1976.

Si un comité fédéral-provincial chargé de faire progresser l'uniformité ou l'harmonisation du droit des compagnies au Canada doit être créé, c'est aux premiers ministres d'en prendre, l'initiative, comme cela s'est passé en 1932. La Conférence sur l'uniformisation du droit consent expressément à prêter son concours d'une manière

might be inclined to encourage the setting-up of the kind of organization recommended by the Uniform Law Conference.

Sincerely yours,
Secretary

Replies from Jurisdictions:

1. Newfoundland
2. Nova Scotia
3. Prince Edward Island
4. New Brunswick
5. Canada
6. Quebec
7. Ontario
8. Manitoba
9. Saskatchewan
10. Alberta
11. British Columbia

efficace à tout organisme fédéral-provincial que les premiers ministres peuvent créer en vue de favoriser l'uniformisation dans ce secteur important du droit.

Au nom de la Conférence sur l'uniformisation des lois, j'ai l'honneur de porter cette question à votre attention, espérant que vous réserverez un accueil favorable à la création d'un organisme de ce genre.

Veuillez agréer, Monsieur le Premier Ministre, l'expression de ma considération distinguée.

Vous avons récu
les repénses suivantes:

1. Terre-Neuve
2. Nouvelle-Ecosse
3. Ile du Prince-Edouard
4. Nouveau-Brunswick
5. Canada
6. Québec
7. Ontario
8. Manitoba
9. Saskatchewan
10. Alberta
11. Columbie-Britannique

Newfoundland

November 30th, 1976

Dear Mr. Ryan:

I acknowledge receipt of your letter of November 22nd, 1976, wherein you advise of recommendations made at the last Annual Meeting of the Uniform Law Conference of Canada with respect to promoting uniform company law in Canada.

I have very carefully considered the recommendations contained in your letter of November 22nd and have no hesitancy in supporting same. Last year the Honourable T. Alex Hickman, Q.C., Attorney General of Newfoundland, retained Mr. Leo D. Barry, L.L.M. of St. John's to review the Newfoundland Companies Act and recommend whether a new Act is required or major amendments to existing legislation. Government has not received a report from Mr. Barry to date.

I am aware of work presently on-going in the Maritime Provinces with a view to making company law in that area uniform. This has been drawn to the attention of Mr. Barry and I anticipate he will consult with the appropriate persons in Maritime Canada who are engaged in re-drafting their company legislation.

I have forwarded a copy of your letter to the Attorney General, as well as Mr. Leo Barry.

I simply wish to assure you at this time of my support for the recommendations of the Uniform Law Conference of Canada as they relate to company law.

It may be some time before this proposal can be dealt with by a Conference of First Ministers. You may deem it appropriate to bring your proposal to the attention of the next Federal/Provincial Conference of Attorneys General.

If there is anything further you require of me at this time, please do not hesitate to write.

Yours sincerely,
Frank D. Moores,
Premier

January 10th, 1977

Dear Mr. Ryan,

I thank you for your letter of December 9th, 1976 and note with interest your comments concerning the recommendations of the Uniform Law Conference with respect to Company Law in Canada.

The Chairman of the Continuing Committee of Premiers is Honourable Peter Lougheed of Alberta and I would suggest you write Mr. Lougheed and ask that he bring it to the attention of Premiers at their next Annual Meeting.

Yours sincerely,
Frank D. Moores,
Premier

Nova Scotia

November 26, 1976

Dear Mr. Ryan:

I wish to acknowledge receipt of, and thank you for, your letter of November 22 respecting the 58th Annual Meeting of the Uniform Law Conference of Canada, held at Yellowknife in the Northwest Territories.

I have taken the liberty of forwarding your letter to the Honourable Leonard L. Pace, Q.C., Attorney General, for his information.

Thank you again for writing, and with kindest regards,

Sincerely,
Gerald A. Regan

Prince Edward Island

November 26, 1976

Dear Mr. Ryan:

Thank you very much for your letter of November 22nd.

The historical outline, together with your comments, are appreciated, and will be given every consideration as we consider future activities.

Yours very truly,
Alexander B. Campbell,
Premier,
Prince Edward Island

New Brunswick

January 18, 1976

Dear Mr. Ryan:

This is to acknowledge and thank you for your letter of November 22, 1976 containing the Resolution of the Uniform Law Conference advocating that steps be taken to accomplish a greater degree of uniformity in Canadian corporation law.

I am in agreement with the principles expressed in the conference resolution. The need for uniformity of legislation in this country

has been recognized since its creation and to this end it is my view that the Uniform Law Conference of Canada should continue to perform the basic function of ensuring that the greatest degree of uniformity of provincial laws is achieved.

I believe that the Uniform Law Conference should continue its work in the field of corporation law and I assure you that the work of your organization towards this end will receive my support. While special arrangements might prove to be necessary to accomplish uniformity in this area, I believe that we should attempt to accomplish this through the Uniform Law Conference initially and I would appreciate any further advice from your organization if I can be of assistance in this regard.

Sincerely,
Richard Hatfield

Canada

7 March 1977

Dear Mr. Ryan:

Thank you for your letter of November 22, 1976, in which you draw to my attention resolutions recently adopted by the Uniform Law Conference of Canada at its 58th Annual Meeting in Yellowknife.

As you know, the federal government has long held the view that greater uniformity among the several federal and provincial corporation laws is a desirable objective. However, it has not been an easy task either to establish the appropriate mechanisms to attain this objective or to develop a corporation statute which would serve as a model towards which the efforts and interests of both levels of government could be directed.

I am aware that in working towards a greater harmonization of corporation laws, the Uniform Law Conference has performed a unique and valuable role since its inception in 1918. I understand that the two models of a uniform corporation law produced in 1961 by the Conference have had a considerable influence on both federal and provincial efforts and legislation in this area with the result that we have made some substantial progress toward uniformity since 1971.

Nevertheless, there remains enormous scope to achieve greater uniformity among the technical provisions that are common to all the corporation laws. Recognizing this fact, the federal Department of Consumer and Corporate Affairs attempted in 1972 to establish a

federal-provincial committee of corporation law administrators that could serve as a co-ordinating mechanism to achieve greater uniformity in respect of both the substantive content and the administration of the corporation laws. The federal and provincial ministers responsible for the administration of their respective corporation laws agreed to establish such a committee. Unfortunately, however, the committee quickly ascertained that the problem could not be resolved by an ad hoc body and, after two meetings, decided not to pursue its work further.

Judging from this experience, we believe that what is required is some form of relatively permanent secretariat with adequate funds and staff to co-ordinate the views of government policy makers, corporation law administrators, professional associations and business groups. If the provinces were to favour this approch, the federal government would offer its unequivocal support. If, however, the provincial Premiers cannot accord this matter the necessary priority and resources at this time, I can assure you that the federal government remains committed to working with all interested parties to realize further progress in this area.

May I take this opportunity to express my appreciation to the Uniform Law Conference for its efforts over the years to promote uniformity of corporation law in Canada. I look forward to your continued assistance and co-operation in the future.

Sincerely
P. E. Trudeau

Quebec

Le 10 février 1977
Notre dossier 2971 13 01

Monsieur le secrétaire,

Le Premier ministre m'a demandé d'accuser réception de la lettre que vous lui adressiez en décembre 1976 relativement à la création d'un comité fédéral-provincial chargé de faire progresser l'uniformité ou l'harmonisation du droit des compagnies au Canada.

Monsieur Lévesque m'a demandé d'en transmettre copie à ses collègues, madame Lise Payette, ministre des Consommateurs, Coopératives et Institutions financières, monsieur Claude Morin, ministre des Affaires intergouvernementales, et monsieur Marc-André Bédard, ministre de la Justice.

Monsieur Lévesque serait heureux de pouvoir discuter de cette question lors d'une prochaine rencontre des Premiers ministres.

Veuillez agréer, monsieur le secrétaire, l'expression de mes sentiments les meilleurs.

Le chef de cabinet,
Louis Bernard

Ontario

January 10, 1977

Dear Mr. Ryan.

I acknowledge your letter of November 22, 1976, proposing the creation, on the initiative of the First Ministers, of a national association to promote uniformity of company law in Canada.

Your objective seems to me to be a very desirable one and the proposal that a federal-provincial mechanism be created has been received favourably by our Ministry of Consumer and Commercial Relations. May I suggest that it might be preferable to approach directly my colleague The Honourable Sidney B. Handleman, Minister of Consumer and Commercial Relations, and his counterparts in other jurisdictions. With their concurrence on behalf of the governments which they represent, your proposal can be placed before a future intergovernmental meeting of Ministers responsible for companies legislation.

Yours very truly,
William G. Davis

Manitoba

January 5th, 1977

Dear Mr. Ryan:

Premier Schreyer has asked me to acknowledge and thank you for your letter of November 22nd, 1976, in respect of the need to create an association to encourage uniformity in Canadian Corporate Law. I would certainly support in principle the creation of any association deemed necessary to facilitate the development of more uniform corporate law throughout Canada and for the exchange of ideas and improvement of administrative procedures. I would, of course, not want to encourage any unnecessary proliferation of organizations in Canada and had been under the impression that the encouragement of uniform laws wherever practical was a primary task of the Uniform Law Conference. I appreciate, of course, in this regard that the Uniform Law Conference does not include persons

involved in corporate law from the private sector or accountants, security brokers or commercial and industrial entrepreneurs and I assume that it is for this reason that the association has been proposed.

While supporting the principle and the objectives, I should hasten to add that during this period of government restraint on spending I would not be hopeful that Manitoba could provide financial assistance to such an association without further and careful consideration, including other priorities of government.

Yours very truly,
Howard Pawley,
Attorney-General

Saskatchewan

January 7, 1977

Dear Mr. Ryan:

Your letter dated November 22, 1976, addressed to Premier Allan E. Blakeney, advising of the recommendation approved by the 58th Annual Meeting of the Uniform Law Conference of Canada, has been referred to me and I am pleased to comment on it.

With respect to uniformity in Canadian corporation law, I agree with the conference recommendation that this is desirable. It is my opinion that a "corporation act" of a province or of Canada should not sacrifice principle in order to attract more incorporations. All "corporation acts" should be equal and create a practical balance of interest in respect of the rights and limitations of shareholders, creditors, management and the public and no one "corporation act" of a province or of Canada is necessarily more "tough" or "lax" than another.

It is on the above understanding that the Government of Saskatchewan proposes, at the spring Legislative Session of 1977, to introduce The Business Corporation Act, 1977 (Saskatchewan) which is uniform with the Canada Business Corporation Act enacted in 1975, and drafted as an exemplary act that could serve as a model to be followed by provincial legislators.

Saskatchewan's proposed Business Corporation Act was tabled in the form of a white paper in January, 1976, and received overwhelming acceptance at a seminar held in Regina on January 31,

1976, attended by about two hundred lawyers, accountants and other interested persons.

With respect to the recommendation for the need to create an association of federal-provincial officials responsible for 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), I think there is merit. However, it may be that the association could best function if limited to federal-provincial officials responsible for the administration of the "corporation acts", the association meeting annually and its meeting being open to public bodies and associations interested in corporation law to make representations. Further, such an association among its objectives could include:

(1) establishing and maintaining uniformity in Canadian corporation acts";

(2) co-operation and uniformity in the administration of the "corporation acts";

(3) recommending legislation respecting corporation law when necessary to adapt the law to changes in social conditions.

I trust that these comments will be of assistance to you.

Yours truly,
Roy J. Romanow
Attorney General

December 2, 1976

Dear Mr. Ryan:

I write to acknowledge and thank you for your letter of November 22, 1976, informing me about recommendations approved by the 58th Annual Meeting of the Uniform Law Conference of Canada.

I have referred your letter to the Honourable Roy Romanow, Attorney General, and the Honourable Elwood Cowley, Provincial Secretary, for their perusal. They may wish to correspond with you concerning the proposal in the near future.

Thank you again for this information.

Yours sincerely,
Allan Blakeney,
Premier

APPENDIX K

Alberta

December 8, 1976

Dear Mr. Ryan:

Thank you for your letter of November 22, advising of recommendations concerning the uniformity of company law in Canada, approved by resolution of the Uniform Law Section of the recently held 58th Annual Meeting of the Uniform Law Conference of Canada.

I appreciate you taking the time to write and advise me of the recommendations, and I am forwarding a copy of your correspondence to the Honourable Graham Harle, Minister of Consumer and Corporate Affairs, as well as to the Honourable Lou Hyndman, Minister of Federal and Intergovernmental Affairs, for their consideration.

Yours truly,
Peter Lougheed

British Columbia

March 29, 1977

Dear Mr. Ryan:

Your letter to the Premier of March 16, 1977, following your letter to the Premier of November 22, 1976, was forwarded to our Minister of Consumer and Corporate Affairs and our Minister of the Attorney-General.

Unfortunately, we have not yet received the benefit of their comments with respect to your letter but as a follow-up, at the request of the Premier, I can assure you that you will be hearing from them shortly.

Yours sincerely,
Dan Campbell,
Director,
Intergovernmental Relations.

UNIFORM LAW CONFERENCE OF CANADA

Uniform Law Conference

April, 27, 1977

Dear Minister:

On behalf of the Uniform Law Conference I wrote the First Ministers of all the jurisdictions in Canada drawing attention to the recommendations of that body in relation to the promotion of uniformity in company law.

I undertook subsequently to disseminate the responses of the appropriate Ministers in each jurisdiction to indicate the degree of encouragement forthcoming from First Ministers. For that purpose you will find attached the following:

(1) Recommendation of Uniform Law Conference

(2) Letter to First Ministers from Secretary, Uniform Law Conference

(3) Copies of replies from jurisdictions.

From the replies from Canada, Ontario and Saskatchewan particularly, the Uniform Law Conference would seem to have good reason to hope that this matter will be followed up by the appropriate officials and Ministers.

The comments of the British Columbia Commissioners in 1923 (quoted on page 145 of the 1976 proceedings — last page of Appendix I of this letter) are particularly relevant to the recommendation of the Uniform Law Conference in 1976.

Yours very truly,
J. W. Ryan,
Secretary

APPENDIX K

Newfoundland

May 12th, 1977

Mr. James W. Ryan, Q.C.
Secretary
Uniform Law Conference of Canada

Thank you for your letter of April 26th, 1977 wherein you enclose correspondence, etc. with reference to the promotion of uniformity in Company Law.

I will hold this matter in abeyance until you indicate what, if anything, is required of me in the future.

T. Alex Hickman
Minister of Justice

Nova Scotia

May 4, 1977

Mr. J. W. Ryan, Q.C.
Secretary
Uniform Law Conference of Canada

Dear Mr. Ryan:

I acknowledge yours of April 26, 1977, with enclosures.

I shall refer the matter to staff for their consideration.

Yours very truly,
Leonard L. Pace

UNIFORM LAW CONFERENCE OF CANADA

New Brunswick

May 27, 1977

Mr. J. W. Ryan
Secretary
Uniform Law Conference of Canada

Dear Mr. Ryan:

Your letter of April 27, 1977 with accompanying material, addressed to the Honourable Paul S. Creaghan, has been passed to me.

You may be interested to learn that the Province of New Brunswick is presently examining its legislation in the Companies field. An exhaustive study was undertaken by Professor Richard W. Bird of the University of New Brunswick Faculty of Law, which culminated in a report of February, 1975. The provisions of that report have been under study on an intermittent basis both by the Law Reform Division of the Department of Justice and by the Barristers' Society of New Brunswick. The latter has indicated its wish to submit both its comments and possible draft legislation, emanating from Professor Bird's report.

Please be assured that in considering any final legislation the aspect of uniformity of Company Law will be kept under consideration. The materials which you have forwarded to the Honourable Mr. Creaghan will be of assistance in this respect.

Yours very truly,
Beverly G. Smith
Director
Law Reform Division

May 17, 1977

Mr. J. W. Ryan
Secretary
Uniform Law Conference of Canada

Dear Mr. Ryan:

I acknowledge receipt of your letter of April 27th.

Although the responsibility for the Companies and Consumers Acts falls within the Ministry of the Provincial Secretary, the matter of the review of our Companies law is being handled by the Law Reform Division of the Department of Justice and I am taking the liberty of forwarding your letter to the Minister of Justice in New Brunswick for his reply.

Yours very truly,
Paul S. Creaghan
Minister

Ontario

May 11, 1977

James W. Ryan Esq., Q.C.
Secretary, Uniform Law Conference of Canada

Dear Mr. Ryan:

Thank you for your letter dated April 27, 1977 enclosing copies of documents and correspondence relating to the recommendation of the Uniform Law Conference that a national association to promote uniformity of company law in Canada be created.

I am informed that initiative in this area has been taken by Leo Beaudry, Deputy Provincial Secretary and Registrar of Companies for the Province of Saskatchewan and the administrators of companies legislation will be meeting in Regina in the Fall. Benson Howard, Executive Director of Companies Division of my Ministry, and Henry Ozolins, Director of the Companies Services Branch in that Division will be attending the conference. Apparently you will be participating and consideration of the resolution of the Uniform Law

Conference and discussion of the formation of an association on corporate law is proposed as an agenda item.

You may be assured of the wholehearted support of Mr. Howard on behalf of this Province.

Yours sincerely,
Sidney B. Handleman
Minister

Quebec

May 10, 1977

Mr. J. W. Ryan,
Secretary,
Uniform Law Conference of Canada,

Dear Mr. Ryan:

Thank you for your recent letter and enclosed documentation pertaining to the promotion of uniformity in company law.

I appreciated your taking the time to forward this to me for my information, and have also sent a copy to appropriate officials of my Department.

Once again, many thanks.

Sincerely
A. C. Abbott

Alberta

June 21, 1977

Mr. James W. Ryan, Q.C.
Secretary
Uniform Law Conference of Canada

Dear Mr. Ryan:

Since receiving your letter of April 27, 1977, I have been involved in considering the uniform philosophy as it relates to corporate law in Canada. Our Institute of Law Research and Reform is currently in the midst of a review of our provincial Companies Act and as a result, I have been somewhat more appreciative of the comparative and uniform suggestions in this field.

While Alberta would certainly support any effort by the Uniform Law Conference, we would most certainly be committed to finishing our above mentioned project. I can appreciate from a practitioner's point of view the philosophy behind the Commissioners' suggestions.

I feel that if your suggestion moves ahead, we should attempt to involve George Field who is the study team leader within the Institute of Law Research and Reform here in Edmonton.

Yours truly,
Graham L. Harle
Minister

British Columbia

May 24th, 1977

Mr. James W. Ryan, Q.C.,
Room 4, Confederation Buildings,
St. John's, Newfoundland.

Dear Mr. Ryan,

Please forgive my tardiness in replying to your letter of November 22nd, 1976 and March 16th last.

I quite agree that there is merit to setting up the type of organization you contemplate in your letter of November 22nd.

I think it important not only to constitute such a committee for the purposes of achieving uniformity of legislation but also for the purpose of identifying those areas where uniformity is either not possible or not desirable.

I would therefore suggest that you direct any further correspondence to my Minister of Consumer and Corporate Affairs, the Honourable K. Rafe Mair, under whose Ministry falls the jurisdiction over company law.

Yours sincerely,
W. R. Bennett, Premier
Province of British Columbia

UNIFORM LAW CONFERENCE OF CANADA

May 17, 1977

Mr. James W. Ryan
Room #4, Confederation Buildings
St. John's, Newfoundland

Dear Mr. Ryan:

While we are somewhat badly out of time, I think that you will be receiving a letter from our Premier, encouraging our participation in the committee you have proposed.

I think you will also notice from the Premier's letter that I am the person with whom you ought to maintain contact and I will be very pleased to, amongst other things, answer your correspondence much more promptly than has hitherto been the case.

Yours very truly,
K. Rafe Mair
Minister

APPENDIX L

(See page 29)

ENACTMENT OF AND AMENDMENTS TO UNIFORM ACTS, 1976-77

REPORT OF MR. TALLIN

Assignment of Book Debts Act

Alberta added a new provision to its Act dealing with the postponement of rights under an assignment of book debts. It also amended the Act with respect to the effect of late registration.

Bills of Sale Act

Alberta amended its *Bills of Sale Act* to deal with the postponement of rights under a registered bill of sale.

Bulk Sales Act

Alberta amended its *Bulk Sales Act* to differentiate between secured trade creditors and unsecured trade creditors and the way in which they are dealt with under the statement of creditors.

Conditional Sales Act

Alberta amended its *Conditional Sales Act* to provide for the postponement of rights under conditional sales agreements and also amended the provisions relating to the effect of conditional sales agreements on property which becomes affixed to realty.

Evidence Act

Alberta amended its *Evidence Act* by adding a modified version of sections 28.1, 28.2 and 28.3 of the *Uniform Evidence Act* adopted last year. The Alberta section reverses the rule in *Hollington vs. Hewthorne* but does not extend to findings of adultery or paternity.

In British Columbia amendments to the *Evidence Act* respecting the rule in *Hollington vs. Hewthorne* were passed.

Manitoba amended its *Evidence Act* with respect to the proof of proceedings or records of the courts by allowing the submission of court documents authenticated by the officer of the court having custody of the records.

Extra-provincial Custody Orders Enforcement Act

Alberta and New Brunswick enacted the *Uniform Extra-provincial Custody Orders Enforcement Act.*

Interpretation Act

Manitoba enacted a definition of "registered mail" and "certified mail" in its *Interpretation Act*.

Prince Edward Island made some amendments to its *Interpretation Act* including a definition of "registered mail", authority to issue warrants of distress for the sale of goods on default of payment of penalties and forfeitures and the effect of the proclamation of amendments to old statutes which have been revised at a time when the amendment cannot be included in the revision.

Saskatchewan amended its *Interpretation Act* respecting the publication of proclamations.

Jurors Act (Qualifications and Exemptions)

British Columbia passed an amendment to its *Jury Act* adopting, to a large extent, the Uniform proposals for qualifications, etc.

Manitoba amended its *Jury Act* to adopt, to a large extent, the *Uniform Jurors Act (Qualifications and Exemptions).*

Legitimacy Act

Newfoundland amended its *Legitimacy Act* to remove the exception applying to the child born when one of its parents was married to a third person.

Personal Property Security Act

Manitoba enacted a number of amendments to its *Personal Property Security Act* which is largely the Uniform Act. These amendments dealt with a variety of matters. Many were of a secondary nature. However, the application of the Act was restricted so that it does not apply to assignments of wages or salary or to security interests in property of the Crown or a Crown agency. They also revised the provisions relating to the filing of a notice in the Land Titles Office in respect of security agreements dealing with fixtures or goods that become fixtures. There was also a provision respecting the requirement for a discharge or release of security interests in consumer goods.

Presumption of Death Act

British Columbia amended its *Survivorship and Presumption of Death Act* to enact the new Presumption of Death provisions of the Uniform Act.

Nova Scotia enacted the new *Uniform Presumption of Death Act.*

Reciprocal Enforcement of Judgments Act

Manitoba amended its Act by changing the definition of "judgment" to include awards or orders made by boards, commissions or other bodies established by statute and that have jurisdiction or authority to make awards or orders for the payment of money in disputes arising between employers and employees. This will give the Manitoba courts the authority to enforce such awards or orders made by such statutory boards and commissions in reciprocating states.

Reciprocal Enforcement of Maintenance Orders Act

New Brunswick amended its *Reciprocal Enforcement of Maintenance Orders Act* to allow the enforcement of orders for maintenance which do not provide for periodic payments.

Regulations Act

Newfoundland enacted a *Statutes and Subordinate Legislation Act*. Part II dealing with subordinate legislation is substantially the *Uniform Regulations Act* with minor modifications.

Retirement Plan Beneficiaries Act

Alberta amended its *Trustee Act* to enact provisions similar to the *Uniform Retirement Plan Beneficiaries Act*.

Vital Statistics Act

Alberta made a number of amendments to its *Vital Statistics Act* which is based on the Uniform Act.

Manitoba amended its *Vital Statistics Act* which is also based on the Uniform Act.

Wills Act

Alberta enacted the International Wills provision of the *Uniform Wills Act*.

APPENDIX M

(See page 30)

INTERNATIONAL CONVENTIONS ON PRIVATE INTERNATIONAL LAW

REPORT OF THE SPECIAL COMMITTEE

1. INTRODUCTION

The Special Committee exists to encourage liaison between the Uniform Law Conference and federal and provincial governments concerning matters which are the subject of international conventions on private international law. The Committee scrutinizes existing treaties and conventions which are open for ratification or accession on behalf of Canada as a whole or on behalf of individual provinces. It recommends ratification or accession of those which are felt to be for the general benefit of Canada. If a particular treaty cannot be ratified or acceded to in the normal way due for example, to the Convention lacking a federal state clause, the Committee may recommend that the provisions be considered by the Uniform Law Conference as a uniform law for enactment by the member jurisdictions of the Conference. The Committee consists of H. Allan Leal, Esq., Q.C. (Chairman); E. Colas, Esq., C.R.; M. M. Hoyt, Esq., Q.C., R. Normand, Esq., C.R.; and J. W. Ryan, Esq., Q.C.

2. REPORT ON THE THIRTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Since the last meeting of the Uniform Law Conference, the Thirteenth Session of the Hague Conference on Private International Law met in the Hague during the period of October 4 to October 23, 1976. The Canadian delegation consisted of six individuals:

Mr. T. B. Smith, Q.C., Departmental General Counsel, Department of Justice, Government of Canada, Chief of the Delegation.

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

Mr. P-A. Crépeau, C.R., Professor, McGill University, President, Quebec Civil Code Revision Office.

Mr. R. H. Tallin, Deputy Minister (Legislation), Department of the Attorney General of the Province of Manitoba.

Mr. M. Hétu, Special Assistant, Office of the Deputy Minister, Department of Justice, Government of Canada.
Mr. C. V. Cole, Counsellor and Consul, Canadian Embassy, The Hague.

In all, 113 representatives attended from all twenty-eight member states together with an observer from the Republic of Venezuela. Delegates came from a broad range of legal backgrounds, from the ranks of professional law teachers, senior members of the judiciary, legal practitioners, law reformers and other permanent government officials.

Three major topics were on the agenda: the law concerning matrimonial property, marriage, and agency. Although time did not permit the Conference to complete its consideration of the law of agency, the Conference did approve two Conventions, a Convention on the Law Applicable to Matrimonial Property Regimes and a Convention on the Celebration and Recognition of the Validity of Marriages. The Conference decided to convene a Special Commission in the spring of 1977 to prepare a final text of the Convention on the Law of Agency.

A copy of the Final Act of the Thirteenth Session, containing the two final Conventions, is attached to this Report as Schedule 1. The Conventions are now open for signature by those states which were members of the Conference at October 1976.

Lastly, the Thirteenth Session considered important matters of Private Interntional Law for possible inclusion into future agenda of the Conference. The Thirteenth Session, through its Fourth Commission, requested the Standing Government Committee of The Hague Conference to study the desirability of:

1. including in the Agenda of the Fourteenth Session the preparation of a Convention on Legal Aid and Security for Costs;
2. taking under consideration the preparation of a Convention on the Law Applicable to Negotiable Instruments as a subject to be included in the Agenda of a future Conference, preliminary studies to be co-ordinated with work being undertaken by other organizations, notably the United Nations Commission on International Trade Law (Uncitral);
3. including in the Agenda of the Fourteenth Session the preparation of a Convention on Legal Kidnapping;
4. (a) including in the Agenda of the Fourteenth Session the preparation of a Protocol to the Convention on June 15, 1955 on the Law Applicable to International Sales of Goods

—permitting States Parties to that Convention not to apply it to consumer sales, or
—excluding such sales from the scope of the Convention;

(b) charging the Fourteenth Session with the question of the possible revision of this Convention, without however, submitting to the Fourteenth Session a draft amendment;

5. inviting the Permanent Bureau to continue the study of a Convention on the Law Applicable to Licensing Agreements and Know-How, in liaison with the international organizations concerned, notably the World Intellectual Property Organization (WIPO), as it considers the formal inclusion of this subject in the Agenda of the Fourteenth Session to be premature;

6. inviting the Permanent Bureau to undertake a study on the revision of the Convention of June 15, 1955 to Regulate Conflicts between the Laws of Nationality and Domicile, in order that the Fourteenth Session may take a decision on this point.

(A) *CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES*

As fundamental reform of family law proceeds apace throughout the world, so increasing attention has been paid to family law by organizations dedicated to the reform of private international law. Both final conventions concluded at the most recent session of the Hague Conference concerned vitally important topics within family law: matrimonial property law and the status of marriage itself. The Convention on the Law Applicable to Matrimonial Property Regimes is a dauntingly complex document as difficult to understand as it will ultimately be to administer. The subject is at the best of times highly complex; the intransigence of those holding opposing views joined with this factor to preclude an easy compromise.

Much in the Convention may strike the Canadian reader as unfamiliar and inappropriate. For example, a married couple coming to this country as landed immigrants may find their matrimonial property regime governed by the law of their nationality for some ten years following their arrival here. While this state of affairs is as unfortunate for those in the administration of justice as it is for the parties themselves, two factors mitigate the severity and inflexibility of the rule. Firstly, under the Convention the parties are free to change by designation the law applicable to their property regimes. Secondly, the former national law would cease to apply once the couple became Canadian citizens, which under the new Citizenship Act will be possible after three years of continuous residence. Bearing all this in mind, however, one cannot view with equanimity a basic

requirement that parties reside in a jurisdiction for ten years before the local law applies.

One explanation for such a lengthy residence requirement is that different countries have such different perceptions of the phenomenon of international migration. The countries of continental Europe tend to see the landed immigrant within Canada as equivalent in status to the migrant worker (or Gastarbeiter) within Europe. Gastarbeiter, typically adult males, separated from their families who stay back in the country of origin, maintain exceptionally close ties with their homeland. Even during protracted periods of absence, they see present residence as a temporary separation and intend to return to the homeland. In times of full employment, Gastarbeiter made major contributions to the European economy as a floating pool of cheap labour, as well as contributing substantial accumulations of foreign capital to countries such as Greece, Yugoslavia, and Southern Italy. However, in the present European recession and unemployment they constitute a major social, political and economic problem and European nations are markedly unwilling to enhance their legal status within the country of residence by conferring additional rights and privileges on the migrant. In vain could the Canadian delegation argue that the ties of the Canadian landed immigrant to his native country are familial and emotional, rather than legal in any significant sense. The result of this misperception is a rigid ten year residence requirement.

Whatever reservations one may have about the merits of the Convention itself do not reflect any wish to detract from the desirability, even necessity, of the task of making conventional rules to resolve conflict in this area. However, yet again, the Hague Conference has provided eloquent confirmation of one's suspicion that the gulf between those whose loyalty is to nationality as the logical major connecting factor, and those who proclaim the merits of the principle of residence, is so wide that no accommodation between the polarities could be easy to achieve. From 1972, through four years of intensive analysis and anxious negotiation, to the Thirteenth Session itself, an objective observer would have doubted that a convention agreeable to all would ever be possible. Such a precarious peace satisfies few. Commentators have predicted that the inevitable compromise between states which wish to have the law of nationality applied and those states which favour application of the law of the state of habitual residence, will ultimately prove so unsatisfactory to either camp that the full potential of the Convention may not be realized.

At the interim meeting of the Special Commission in 1975, and at the Conference plenary session in 1976, the Canadian delegation advanced compromise solutions to overcome these conceptual and ideological obstacles, to make it possible for Canada to ratify the Convention. However, the final result was that the final Convention was somewhat less than satisfactory for Canada. In view of this unhappy fact, and since the Convention is no more acceptable to the nationality jurisdictions, the outlook for its widespread acceptance is not bright.

If the Government of Canada decides to ratify the Convention in respect of one or more of the provinces or territories, the Convention contains no procedural impediments to such ratification. Article 25 of the Convention contains the usual Hague federal state clause relevant and amenable to the Constitutional framework of Canada: a Contracting State which has two or more territorial units in which different systems of law apply to matrimonial property regimes may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply all its territorial units or only to one or more of them, and may extend its declaration at any one time thereafter. The provisions of Article 30, read together with the provisions of Article 29, may bind the provinces and territories who agree to ratification, to a minimum period of five years compliance, depending on the co-incidence of the date of the ratification with the date on which the Convention comes into force and its renewal dates.

(i) *Issues of Substantive Law Within the Convention*

The Convention is generally concerned with the choice of law which is to be applied to matrimonial property regimes. For purpose of analysis, the factual situations which may arise can be divided into two categories: static and dynamic. The static situation is one in which no change takes place in the connecting factor relevant to the choice of law. It is assumed that spouses remain in the same jurisdiction during the course of their marriage or are not subject to a change of nationality. In a word, the relevant connecting factors remain constant. The dynamic situation, on the other hand, arises when such a change occurs; this in turn involves a consideration of whether one applies the principle of mutability or immutability. The Hague Convention adopts the principle of immutability, subject to certain exceptions and guarantees that the applicable law will not be replaced by another. Continuity is thus preserved, though at the cost of a certain inflexibility. Secondly, the Conference had to choose

between the principle of unity of the applicable law, or the acceptance of the principle of the simultaneous application of different systems of law to various parts of the matrimonial properties. The Convention rejects the possibility of using the *situs* as the connecting factor of general application; there is a single exception, which enables the parties to submit their immoveable property to the law of the *situs*. Otherwise the principle of unity of the applicable law is maintained. This is also subject to the provisions of Article 8 which stipulates that where the applicable law under the Convention is changed, by virtue of a change in the relevant connecting factors, the change of applicable law shall be effective only in the future, and property belonging to the spouses before the change is not subject to the new applicable law. It is, however, open to the parties to subject the whole of their property to the new law.

The Convention also deals with the important issue of whether the parties should be free to designate the law that is to apply to their property. The principle of limited party autonomy was accepted in the Convention and, indeed, it was the very acceptance of party autonomy which enabled the compromise to be found between the two main alternative connecting factors of nationality and habitual residence.

(ii) *Scope of the Convention*

Chapter 1 of the Convention sets out the scope of the entire document. Article 1 states that the Convention applies neither to maintenance obligations between spouses, nor to the succession rights of a surviving spouse, nor to the capacity of a spouse. The scope of the Convention is not defined, except in this negative fashion; this is unsatisfactory because of the differences in characterization of matrimonial property regimes that exist or may arise from country to country. The problem is left for resolution by the forum. Article 2 makes it clear that the Convention is intended to apply whether the parties belong to a country which has ratified the convention or not.

(iii) *Applicable Law*

Articles 3-14 of the Convention, contained in Chapter 2, govern the choice of the applicable law. Article 3 adopts the principle of limited party autonomy since it provides that the matrimonial regime is governed by the internal law designated by the spouses before marriage, but the spouses may designate only one of three possible choices of law:

> firstly, the law of any state of which either spouse is a national at the time of designation;

secondly, the law of the state in which either spouse has his or her habitual residence at the time of designation; or

lastly, the law of the first state where one of the spouses establishes a new habitual residence after marriage.

In this way the field of choice is limited to connecting factors of major significance; the law thus designated applies to the whole of the spouses' property. The spouses can also designate for all or some of their moveables, whether existing, or acquired subsequently, the law of the place where the immoveables are situated.

The reference to the internal law in the first paragraph of Article 3 removes the entire doctrine of Renvoi from the Convention. In addition, the term "designation" is used whenever the Convention is dealing with choice of law by the parties; however, when dealing with the applicable law under the conventional rules, the term "determination" appears.

Article 4 establishes the primary conventional rule of the choice of law; it states that in the absence of a designation by the spouses, the applicable law will be the internal law of the state where both spouses establish their first habitual residence after marriage. Although the first habitual spousal residence is thus given primacy as an objective connecting factor, it is subject to three important exceptions in favour of the applicability of the internal law of the state which is the common nationality of both spouses. The adoption of these exceptions represents an accommodation required in order to gain acceptance of the convention by the nationality states. The major exception permits any state of the common nationality of both spouses to make a declaration under Article 5 requiring the application of its internal law. This would permit the law of the state of common nationality to be applied, rather than that of the habitual residence of the spouses. The same result would follow where the spouses do not establish their first habitual residence after marriage within the same state. A residual clause in Article 4 states that if the spouses do not have their habitual residence in the same state, nor have common nationality, their matrimonial property regime will be governed by the internal law of the state with which in the circumstances the regime is most closely connected.

Articles 6, 7 and 8 deal with the change of applicable law arising from a later designation by the spouse, or from a change in the objective connecting factors. Article 6 establishes that the spouses at any time during marriage can designate a new law to apply to their matrimonial property instead of the internal law previously applicable

either as the result of a prior designation or by the application of the conventional rules. This choice too is a limited one, being confined to either the law of any state of which either spouse is a national at the time of designation, or alternatively the law of the state in which either spouse has his habitual residence at the time of designation. As with any previous designation of the applicable law, either an initial designation at the time of marriage, or at any time afterwards, the law thus designated will apply to the whole of their property, unless a special designation has been made with respect to immoveables in favour of the law of the *situs*.

As noted earlier, the provisions of Article 7 deal with the principle of mutability or immutability. The Convention adopts a general stance of limited immutability since it provides that the law made applicable by the conventional rules continues to apply so long as the spouses have not designated different applicable law, whether or not they change their nationality or habitual residence. However, the internal law of the state in which they both have their habitual residence, becomes applicable when habitual residence is established in that state, if the nationality of that state is their common nationality. Lastly, the law of the state of the habitual residence becomes applicable when their residence there after the marriage has endured for a period of not less than 10 years: this last stipulation is very important in the Canadian context, particularly in view of the problems imposed by the landed immigrant situation.

Article 8 makes it clear that the change of the applicable law will have only prospective effect, subject to the facultative provision that the parties may subject the whole of their property to the new law if they wish.

The choice of a matrimonial property regime may have very important implications for the legal relations between a spouse and a third party. Article 9 states the basic rule: these relations are to be governed by the law applicable to the matrimonial property regime in accordance with the convention. This is subject, however, to the important qualifications listed in Article 9. This states that the law of a Contracting State may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party where either that spouse or the third party has his habitual residence in its territory, unless —

1. any requirements of publicity or registration specified by that law have been complied with, or

2. the legal relations between that spouse and the third party arose at a time when the third party either knew or should have known of the law applicable to the matrimonial property regime.

The law of a Contracting State where an immovable is situated may provide an analogous rule for the legal relations between a spouse and a third party as regards that immovable. A Contracting State may specify by declaration the scope of the second and third parts of Article 9. Article 14 reserves the application of the law determined by the Convention if it is incompatible with public policy (ordre publique).

(iv) *Miscellaneous Provisions*

Chapter 3 consists of a variety of Articles dealing essentially with definitional matters. Article 15 defines the meaning which will be attributed to "common nationality" as the term is used in the Conventions. Article 15 (2) contains an important gloss on the meaning which will be attributed to the word 'voluntary': this provision was incorporated into the Convention at the request of the Swiss delegation.

Articles 16 and 17 contain what might be called the Federal State interpretation clauses, necessary for the proper interpretation and application of the phrases "national law" and "habitual residence" in a Federal state such as Canada. Article 18 makes it clear that the constituent parts of a Federal state are not bound to apply the conventional rules to conflicts between the laws of the legislative territorial units.

(B) *Convention on the Celebration and Recognition of the Validity of Marriages*

The second Convention approved at the Thirteenth Session concerned the Celebration and Recognition of the Validity of Marriages. Under the Chairmanship of Professor Willis L. M. Reese of the United States, work was undertaken on the topic by the Third Commission of the Conference. This Convention contains two sections, the first dealing with the conditions required for the celebration of marriage in a contracting state and the second concerning the recognition in a contracting state of the validity of a marriage contracted in another state. An earlier draft of the Convention had contained a third chapter dealing with the recognition of foreign decisions concerning marital status; this was omitted in the Final Draft Convention so as not to complicate the Convention unnecessarily or to prejudice its ready acceptance.

The second chapter of the Convention, dealing with the recognition of marriages already contracted, is likely to be the most important part. In order to promote acceptance and ratification by as many states as possible, the Convention contains a negative option in Article 16 permitting states to exclude the application of chapter 1 of the Convention, dealing with celebration of marriage, by means of a reservation.

Like the Convention on the Law Applicable to Matrimonial Property Regimes, the Convention on Marriage contains a federal state clause permitting states such as Canada which contain two or more territorial units in which different laws apply to marriage, to indicate at the time of ratification that the Convention would apply to one or more of these territorial jurisdictions: this federal clause is contained in Article 27 of the Convention.

COMMENTARY ON THE CONVENTION

(a) *Chapter 1 — Celebration of Marriage*

Chapter 1 of the Convention creates an international obligation to proceed with the celebration of a marriage when the future spouses fulfill the conditions of the law declared applicable under the Convention. The Convention thus regulates the conditions of both form and substance concerned with the celebration of marriage. In most cases the applicable law will be the internal law of the state where the marriage is celebrated. However, in two instances the applicable law could be a foreign law. Firstly, if the private international law of the country where the marriage is celebrated permits celebration in accordance with foreign formalities (see Article 2) the foreign law may regulate the formal requirements of marriage. Secondly, when neither of the spouses has the nationality of the state where the marriage is celebrated, nor habitually resides there, the foreign law shall apply with respect to substantial requirements, provided either that under the conflict rules of the state where the marriage is celebrated, these requirements are governed by foreign law, or alternatively that a contracting state has under Article 6 reserved the right not to apply its internal law in this situation.

However, the Convention does not impose an obligation to apply any foreign law whatsoever to the celebration of a marriage in a contracting state, since under the terms of the Convention the foreign law only comes into play in accordance with the conflict rules of the state where the marriage is celebrated.

Finally, the proposed system dovetails with chapter 2 of the Convention, the central Article, Article 9, of which is based on the recognition, in contracting states, of a marriage validly contracted under the law (including the conflict rules) of the state where it is celebrated.

(b) *Chapter 2 — Recognition of the Validity of a Marriage*

Most of the discussion at the Convention centered around the question of the recognition of existing marriages. This emphasis was understandable since it is in this area that the need for an International Convention on Marriage has been most strongly felt, particularly to prevent those "limping marriages", which are valid in one state but not in another.

The provisions of Chapter 2 must be seen in the light of Article 13 which authorizes contracting states to adopt rules of law more favourable to the recognition of marriages contracted abroad. This provision, designed to promote the international recognition of the state of marriage, would permit a contracting state, for example, to extend the rules of the Convention to one or more of the categories of marriage, such as military marriages, marriages celebrated aboard ships or aircraft, proxy marriages, posthumous marriages, or informal marriages, which are expressly excluded from the scope of the Convention by means of Article 8.

Chapter 2, like Chapter 1, applies regardless of any condition of reciprocity. The proposed rules are intended to be applicable in a contracting state to any marriage contracted abroad, whether the foreign state in question is a party to the Convention or not, and whether the marriage was concluded before the Convention came into force or not. Furthermore, since these are uniform rules of law, every state is permitted to incorporate them within its legislation, without necessarily being required to become a party to the Convention.

The basic rules set out in Article 9 which provides that a marriage which is valid under the law (including the conflicts rules) of the state where the marriage is celebrated, either at the time of celebration or thereafter, will be considered valid in any contracting state, except in the cases mentioned in Article 11, and subject to the general exception for public policy (Article 14).

(c) *Convention on the Law Applicable to Agency*

Although considerable progress was made at the Thirteenth Session towards the completion of a draft International Convention on the Law Applicable to Agency, ultimately it proved impossible to

conclude the Convention during the conference. Thus the Thirteenth Session requested that a Special Commission be convened to prepare a final text of a draft Convention. This meeting took place in June 1977 under the Chairmanship of Mr. T. B. Smith, Q.C. of the Department of Justice of the Government of Canada.

The draft Convention represents an ambitious extension of the work of the Hague Conference into the broad area of international commercial law. Related work has been done under the auspices of UNIDROIT and the European Economic Community. The June 1977 meeting considered three major matters: firstly, the scope of the convention, secondly, the relations between principal and agent, and lastly relations with third parties.

The most contentious matter was that concerning the relationship between the principal and the third party, and in particular what should be the basic connecting factor for the choice of law governing this relationship. A number of alternatives were proposed:

1. The law of the country of the place of business of the agent;
2. The law of the country designated in the agreement between principle and the third party as negotiated by the agent;
3. The law of the country in which the agent acted; and
4. The law of the country in which the contract is to be performed.

The general tendency was for most common law countries to support either alternative three or four, and for most civil law countries to support alternative one. This preference reflected a tendency on the part of most common law jurisdictions to seek to protect the third party in doubtful situations, while most civil law states, which have a more formalized concept of agency, wish in these circumstances to protect the agents.

Eventually, the Convention adopted a principal rule that the applicable law should be that of the state in which the agent had his principal business establishment at the relevant times. However, this general rule is subject to important exceptions, and in these situations the law of the place where the agent has in fact acted is to apply. For example, this law will apply when the third party has his business establishment in the state where the agent has acted.

While most disagreement centered on the selection of law applicable to external relationships, there was still considerable discussion of the applicable law to govern the internal relationships between principal and agent. In this area, the Convention adopts a basic rule that is considerably closer to the common law approach since it

respects the law chosen by the party. In this case, the major subsidiary rule is that, where not specifically designated, the applicable law would be the law of the state where at the time of the formation of the agency relationship, the agent had his business establishment, or, if this is not applicable, his habitual residence.

Although the Convention will be of considerable interest to Canadian readers, there may be major difficulties in implementation, since the law of agency is not a subject that can easily be assigned to either federal or provincial legislative competence. Provincial jurisdictions may well wish to consider whether they wish to have the convention implemented on their behalf. The draft convention does contain the usual Hague Convention clauses permitting units of a federal state to be considered as states for the purposes of identifying the applicable law; under the federal state clause the convention may be made to apply only to such units as may be specified at the time of accession to the convention by the federal state.

The Convention is a complex document, which reveals at all points the compromises and balances that were necessary to achieve its general acceptance. However, as with most other comprise solutions, the provisions eventually agreed do not correspond closely with the current rules applied in any member state, and for this reason the convention is unlikely to have a broad and immediate appeal. Given the increasing complexity and interdependence of world trade and commercial contracts, the long term prospects for acceptance and support are good. It will thus be in Canada's long-run interest for each province to consider whether legislation to implement the convention is desirable, and whether it would be in the interest of the province to seek ratification by Canada on its behalf. A copy of the convention is attached to this report as Schedule 2.

3. CONVENTION ON THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL MATTERS

At a meeting in London, held on October 26, 1976, negotiators from the United States of America and the United Kingdom initialled an *ad referendum* text of a Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters. This was the first such convention considered by the United States on the subject; for the United Kingdom, the convention deals with a number of matters in much greater detail than existing British bilateral treaties on judgments. The convention is divided into seven chapters: concerning the use of terms, the scope of the convention, the conditions

respecting the recognition and enforcement of judgments, the extent of such recognition, procedures to regulate recognition and enforcement, the recognition and enforcement of third state judgments, and final provisions. The central proposition is that if the court from which the judgment emanates had jurisdiction, and the judgment is final and binding, it should be recognized and enforced. The agreement sets out a number of acceptable alternative bases for jurisdiction.

This agreement results from the fact that some countries claim jurisdiction in civil cases on grounds which may have only the most tenuous connection with the parties and the dispute. For example, French courts will assume jurisdiction if the plaintiff is a French citizen, but if the defendant is French, they will not enforce a judgment against him from a foreign court. In other countries the jurisdiction is based on the presence in the country of assets of the defendant. The various rules on the recognition of judgments within Europe have been altered by the 1973 European Economic Community Convention relating to the jurisdiction of courts and the enforcement of judgments in civil and commercial matters. This convention requires EEC members to recognize and enforce judgments rendered in other EEC states on these tenuous grounds, if the judgment debtor is domiciled outside the Community. As a result the French jurisdiction of a French court could be invoked against a Canadian who had no connection with or assets in France and the resulting judgment would be executed against his assets located in England or any other Community country.

To avoid such a result would require a specific agreement to be concluded between Canada and each Community country providing that judgments rendered in these circumstances will not be recognized or enforced by the Community countries. However, this agreement would have to be set out in a general agreement for the recognition and enforcement of judgments, and it is this fact that prompted the agreement between the United States and the United Kingdom.

The majority of cases falling under the convention will be civil or commercial cases dealt with by the courts of either jurisdiction. It has been long standing international practice to limit the complexity of similar conventions dealing with judgments, by removing from their scope certain technical subjects customarily dealt with in separate conventions. Thus the subjects of capacity, family law questions, maintenance claims, administration of estates, bankruptcy and social security are excluded from the scope of the convention. In such cases,

judgments are either excluded on public policy grounds or because they lack finality.

Chapter 2 of the convention clarifies those matters which are to be excluded by recognizing the principle of severability of the judgment in respect of different matters. Chapter 3 defines what judgments of the courts of one contracting state will be recognized and enforced in the courts of the other. The central Articles in this Chapter are Articles 10 and 11 which set forth the basis of jurisdiction for both original judgments and for judgments on counter-claims. The procedures for the recognition and enforcement of one country's judgments in the other country are contained in Chapter 5. Chapter 6 ensures the recognition of judgments emanating from a third state which have been recognized by the courts of one of the contracting states.

To summarize, this type of agreement is a valuable aid to the process of recognition of judgments where the judgment creditor and debtor are located in or have assets in two different states. If a similar Convention was adopted by Canada it would ensure that no Canadian defendant is sued in a forum which has no connection with a transaction, and subsequently enforced in other countries of the European Economic Community. A copy of the UK/USA convention is attached as Schedule 3 to this report.

4. REPORT OF THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

(a) *Introduction*

During the last year UNCITRAL has been actively at work on many subjects, which may be of considerable interest to the members of the Uniform Law Conference.

The Tenth Plenary Session of the Commission considered at its May 23-June17, 1977 meeting in Vienna a draft Convention on the International Sale of Goods. This convention was the result of an extensive critical analysis of the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods and the UNIDROIT draft Law on the Validity of Contracts of International Sale of Goods; the research study had paid particular attention to the feasibility and desirability of dealing with both topics in a single instrument. A committee of the Commission also met to consider

security interests in goods and liability for damage caused by products involved in international trade.

UNCITRAL has also been considering a draft Uniform Law on the subject of international Bills of Exchange and promissory notes. Lastly, a draft Convention on the Carriage of Goods by Sea to replace the 1924 Hague Rules on Bills of Lading, was adopted by the Commission and has been referred to a diplomatic conference to take place in the near future.

(b) *UNCITRAL Rules on Arbitration*

Of particular importance in the Canadian context are the UNCITRAL rules on Arbitration which were approved by the Commission at its Ninth Session, subsequently adopted by the General Assembly of the United Nations and recommended for use in the settlement of international commercial disputes. The rules constitute a self-contained code for the submission of a dispute to arbitration, the constitution of an arbitral tribunal and procedural rules of conduct for these hearings. The rules will only apply if the parties to a contract agree in writing to refer disputes to arbitration under the rules. They are intended to provide an acceptable alternative to other international rules for arbitration, such as the European Convention on International Commercial Arbitration, and to extend the rules of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

From the Canadian point of view, the rules contain a number of features which may restrict their usefulness. Firstly, the rules are expressed to be inapplicable where they would have the effect of derogating from mandatory provisions of the local law. Secondly, the rules are, of course, voluntary, and only come into play when the parties make an *ad hoc* decision to proceed to arbitration under the rules. Lastly, they will probably only come into play when parties to a transaction, or dispute are dealing internationally, and there is no alternative method of dispute settlement that is mutually acceptable.

The UNCITRAL Rules of Arbitration are apparently under study by the Government of Canada which will eventually have to decide what action Canada will take with regard to the adoption of the rules. Although organizations such as the Canadian Manufacturers Association, and the larger Chambers of Commerce are aware of the rules, and their possible implications for business activities, many in the business community are not aware of the UNCITRAL Rules. Members of the Uniform Law Conference may wish to bring

these rules to the attention of business communities in the various provinces and territories for their information and comment: a copy of the UNCITRAL rules is attached to this report as Schedule 4.

5. REPORT ON THE WORK OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

UNIDROIT is the acronym given to the Istituto Internazionale per L'Unificazione del Diritto Privato whose headquarters are in Rome. The members of the Uniform Law Conference of Canada may be interested in the future programme of UNIDROIT. Work has reached an advanced stage on eight topics:

1. Conditions of validity of contracts for the international sale of goods (corporeal moveables)
2. Protection of the acquisition in good faith of corporeal moveables
3. Carriage of goods by inland waterway
4. The forwarding agents contract
5. The legal status of air cushion vehicles (hovercraft)
6. Gold clauses in international conventions on transport law
7. Progressive codification of international trade law
8. The hotel keepers contract .

Preliminary work has also begun on the following six items:

1. Leasing contracts
2. Factoring contracts
3. Transport by pipelines
4. Pleasure navigation (compulsory insurance and civil liability)
5. Harmonization of the legal regimes relating to the liability of the carrier of passengers and their luggage in the different modes of transport
6. The warehousing contract.

APPENDIX M

6. INTERNATIONAL CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF THE INTERNATIONAL WILL

The International Convention providing a Uniform Law on the Form of the International Will was drawn up by the Diplomatic Conference on Wills which met at Washington D.C. on October 16-26, 1973. The Convention was discussed at the Uniform Law Conference's 1974 meeting, a Report being made on page 155 of the Proceedings for that year.

On January 24, 1977 Canada deposited an Accession to this Convention on behalf of two provinces, Manitoba and Newfoundland. The provisions of the Convention were also included in Ontario's Succession Law Reform Bill, 1977, Bill 8, section 42, which received First Reading on March 31, 1977. This Bill was not enacted, but is expected to be re-introduced during the coming year.

ACKNOWLEDGEMENTS

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H. Allan Leal
Chairman

Toronto
1 August 1977

SCHEDULE 1

Edition Définitive
Final Edition

CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Treiziéme session
Acte final

Les soussignés, Délégués des Gouvernements de la République Fédérale d'Allemagne, de l'Argentine, de l'Australie, de l'Autriche, de la Belgique, du Brésil, du Canada, du Danemark, de la République Arabe d'Egypte, de l'Espagne, des Etats-Unis d'Amérique, de la Finlande, de la France, de la Grèce, de l'Irlande, d'Israël, de l'Italie, du Japon, du Luxembourg, de la Norvège, des Pays-Bas, du Portugal, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, de la Suède de la Suisse, de la Tchécoslovaquie, de la Turquie et de la Yougoslavie, ainsi que l'Observateur du Venezuela, se sont réunis à La Haye le 4 octobre 1976, sur invitation du Gouvernement des Pays-Bas, en Treizième session de la Conférence de La Haye de droit international privé.

A la suite des délibérations consignées dans les procès-verbaux, ils sont convenus de soumettre à l'appréciation de leurs Gouvernements:

A Les projets de Conventions suivants:

I

CONVENTION SUR LA LOI APPLICABLE AUX REGIMES MATRIMONIAUX

Les Etats signataires de la présente Convention,

Désirant établir des dispositions communes concernant la loi applicable aux régimes matrimoniaux,

Ont résolu de conclure une Convention à cet effet et sont convenus des dispositions suivantes:

Thirteenth Session
Final Act

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Brazil, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the Observer of Venezuela, convened at The Hague on the 4th October 1976, at the invitation of the Government of the Netherlands, in the Thirteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, they have decided to submit to the appreciation of their Governments —

A The following draft Conventions —

I

CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES

The States signatory to this Convention,

Desiring to establish common provisions concerning the law applicable to matrimonial property regimes,

Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions —

APPENDIX M

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention détermine la loi applicable aux régimes matrimoniaux.

Elle ne s'applique pas:

1 aux obligations alimentaires entre époux;

2 aux droits successoraux du conjoint survivant;

3 à la capacité des époux.

Article 2

La Convention s'applique même si la nationalité ou la résidence habituelle des époux ou la loi applicable en vertu des articles ci-dessous ne sont pas celles d'un Etat contractant.

CHAPITRE II — LOI APPLICABLE

Article 3

Le régime matrimonial est soumis à la loi interne désignée par les époux avant le mariage.

Les époux ne peuvent désigner que l'une des lois suivantes:

1 la loi d'un Etat dont l'un des époux a la nationalité au moment de cette désignation;

2 la loi de l'Etat sur le territoire duquel l'un des époux a sa résidence habituelle au moment de cette désignation;

3 la loi du premier Etat sur le territoire duquel l'un des époux établira une nouvelle résidence habituelle après le mariage

La loi ainsi désignée s'applique à l'ensemble de leurs biens

Toutefois, que les époux aient ou non procédé à la désignation prévue par les alinéas précédents, ils peuvent désigner, en ce qui concerne les immeubles ou certains d'entre eux, la loi du lieu où ces immeubles sont situés. Ils peuvent également prévoir que les immeubles qui seront acquis par la suite seront soumis à la loi du lieu de leur situation.

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

This Convention determines the law applicable to matrimonial property regimes

The Convention does not apply to —

1 maintenance obligations between spouses;

2 succession rights of a surviving spouse;

3 the capacity of the spouses

Article 2

The Convention applies even if the nationality or the habitual residence of the spouses or the law to be applied by virtue of the following Article is not that of a Contracting State.

CHAPTER II — APPLICABLE LAW

Article 3

The matrimonial property regime is governed by the internal law designated by the spouses before marriage.

The spouses may designate only one of the following laws —

1 the law of any State of which either spouse is a national at the time of designation;

2 the law of the State in which either spouse has his habitual residence at the time of designation;

3 the law of the first State where one of the spouses establishes a new habitual residence after marriage

The law thus designated applies to the whole of their property.

Nonetheless, the spouses whether or not they have designated a law under the previous paragraphs, may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated.

Article 4

Si les époux n'ont pas, avant le mariage, désigné la loi applicable à leur régime matrimonial, celui-ci est soumis à la loi interne de l'Etat sur le territoire duquel ils établissent leur première résidence habituelle après le mariage.

Toutefois, dans les cas suivants, le régime matrimonial est soumis à la loi interne de l'Etat de la nationalité commune des époux:

1 lorsque la déclaration prévue par l'article 5 a été faite par cet Etat et que son effet n'est pas exclu par l'alinéa 2 de cet article;

2 lorsque cet Etat n'est pas Partie à la Convention, que sa loi interne est applicable selon son droit international privé, et que les époux établissent leur première résidence habituelle après le mariage:

a dans un Etat ayant fait la déclaration prévue par l'article 5, ou

b dans un Etat qui n'est pas Partie à la Convention et dont le droit international privé prescrit également l'application de leur loi nationale;

3 lorsque les époux n'établissent pas sur le territoire du même Etat leur première résidence habituelle après le mariage.

A défaut de résidence habituelle des époux sur le territoire du même Etat et à défaut de nationalité commune, leur régime matrimonial est soumis à la loi interne de l'Etat avec lequel, compte tenu de toutes les circonstances, il présente les liens les plus étroits.

Article 5

Tout Etat pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, faire une déclaration entraînant l'application de sa loi interne, selon l'article 4, alinéa 2, chiffre 1.

Cette déclaration n'aura pas d'effet pour des époux qui conservent tous deux leur résidence habituelle sur le territoire de l'Etat où, au moment du mariage, l'un et

Article 4

If the spouses, before marriage, have not designated the applicable law, their matrimonial property regime is governed by the internal law of the State in which both spouses establish their first habitual residence after marriage.

Nonetheless, in the following cases, the matrimonial property regime is governed by the internal law of the State of the common nationality of the spouses —

1 where the declaration provided for in Article 5 has been made by that State and its application to the spouses is not excluded by the provisions of the second paragraph of that Article;

2 where that State is not a Party to the Convention and according to the rules of private international law of that State its internal law is applicable, and the spouses esablish their first habitual residence after marriage —

a in a State which has made the declaration provided for in Article 5, or

b in a State which is not a Party to the Convention and whose rules of private international law also provide for the application of the law of their nationality;

3 where the spouses do not establish their first habitual residence after marriage in the same State.

If the spouses do not have their habitual residence in the same State, nor have a common nationality, their matrimonial property regime is governed by the internal law of the State with which, taking all circumstances into account, it is most closely connected.

Article 5

Any State may, not later than the moment of ratification, acceptance, approval or accession, make a declaration requiring the application of its internal law according to sub-paragraph 1 of the second paragraph of Article 4.

This declaration shall not apply to spouses who both retain their habitual residence in the State in which they have both had their habitual residence at

l'autre avaient leur résidence habituelle depuis cinq ans au moins, sauf si cet Etat est un Etat contractant ayant fait la déclaration prévue par l'alinéa premier du présent article, ou un Etat non Partie à la Convention et dont le droit international privé prescrit l'application de la loi nationale.

Article 6

Les époux peuvent, au cours du mariage, soumettre leur régime matrimonial à une loi interne autre que celle jusqu'alors applicable.

Les époux ne peuvent désigner que l'une des lois suivantes:

1 la loi d'un Etat dont l'un des époux a la nationalité au moment de cette désignation;

2 la loi de l'Etat sur le territoire duquel l'un des époux a sa résidence habituelle au moment de cette désignation.

La loi ainsi désignée s'applique à l'ensemble de leurs biens.

Toutefois, que les époux aient ou non procédé à la désignation prévue par les alinéas précédents ou par l'article 3, ils peuvent désigner, en ce qui concerne les immeubles ou certains d'entre eux, la loi du lieu où ces immeubles sont situés. Ils peuvent également prévoir que les immeubles qui seront acquis par la suite seront soumis à la loi du lieu de leur situation.

Article 7

La loi compétente en vertu des dispositions de la Convention demeure applicable aussi longtemps que les époux n'en ont désigné aucune autre et même s'ils changent de nationalité ou de résidence habituelle.

Toutefois, si les époux n'ont ni désigné la loi applicable, ni fait de contrat de mariage, la loi interne de l'Etat où ils ont tous deux leur résidence habituelle devient applicable, aux lieu et place de celle à laquelle leur régime matrimonial était antérieurement soumis:

the time of marriage for a period of not less than five years, unless that State is a Contracting State which has made the declaration provided for in the first paragraph of this Article, or is a State which is not a Party to the Convention and whose rules of private international law require the application of the national law

Article 6

During marriage the spouses may subject their matrimonial property regime to an internal law other than previously applicable.

The spouses may designate only one of the following laws —

1 the law of any State of which either spouse is a national at the time of designation;

2 the law of the State in which either spouse has his habitual residence at the time of designation.

The law thus designated applies to the whole of their property.

Nonetheless, the spouses, whether or not they have designated a law under the previous paragraphs or under Article 3, may designate with respect to all or some of the immovables, the law of the place where these immovables are situated They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated.

Article 7

The law applicable under the Convention continues to apply so long as the spouses have not designated a different applicable law and notwithstanding any change of their nationality or habitual residence.

Nonetheless, if the spouses have neither designated the applicable law nor concluded a marriage contract, the internal law of the State in which they both have their habitual residence shall become applicable, in place of the law previously applicable —

1 à partir du moment où ils y fixent leur résidence habituelle, si la nationalité de cet Etat est leur nationalité commune, ou dès qu'ils acquièrent cette nationalité, ou

2 lorsque, après le mariage, cette résidence habituelle a duré plus de dix ans, ou

3 à partir du moment où ils y fixent leur résidence habituelle, si le régime matrimonial était soumis à la loi de l'Etat de la nationalité commune uniquement en vertu de l'article 4, alinéa 2, chiffre 3.

Article 8

Le changement de la loi applicable en vertu de l'article 7, alinéa 2, n'a d'effet que pour l'avenir, et les biens appartenant aux époux antérieurement à ce changement ne sont pas soumis à la loi désormais applicable.

Toutefois, les époux peuvent, à tout moment et dans les formes prévues à l'article 13, soumettre l'ensemble de leurs biens à la nouvelle loi, sans préjudice, en ce qui concerne les immeubles, des dispositions de l'article 3, alinéa 4, et de l'article 6, alinéa 4. L'exercice de cette faculté ne porte pas atteinte aux droits des tiers

Article 9

Les effets du régime matrimonial sur un rapport juridique entre un époux et un tiers sont soumis à la loi applicable au régime matrimonial en vertu de la Convention.

Toutefois, le droit d'un Etat contractant peut prévoir que la loi applicable au régime matrimonial ne peut être opposée par un époux à un tiers lorsque l'un ou l'autre a sa résidence habituelle sur son territoire, à moins:

1 que des conditions de publicité ou d'enregistrement prévues par ce droit aient été remplies, ou

1 when that habitual residence is established in that State, if the nationality of that State is their common nationality, or otherwise from the moment they become nationals of that State, or

2 when, after the marriage, that habitual residence has endured for a period of not less than ten years, or

3 when that habitual residence is established, in cases when the matrimonial property regime was subject to the law of the State of the common nationality solely by virtue of sub-paragraph 3 of the second paragraph of Article 4

Article 8

A change of applicable law pursuant to the second paragraph of Article 7 shall have effect only for the future, and property belonging to the spouses before the change is not subject to the new applicable law

Nonetheless, the spouses may at any time, employing the forms available under Article 13, subject the whole of their property to the new law, without prejudice, with respect to immovables, to the provisions of the fourth paragraph of Article 3 and the fourth paragraph of Article 6. The exercise of this option shall not adversely affect the rights of third parties.

Article 9

The effects of the matrimonial property regime on the legal relations between a spouse and a third party are governed by the law applicable to the matrimonial property regime in accordance with the Convention.

Nonetheless, the law of a Contracting State may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party where either that spouse or the third party has his habitual residence in its territory, unless —

1 any requirements of publicity or registration specified by that law have been complied with, or

2 que le rapport juridique entre cet époux et le tiers ait pris naissance alors que le tiers connaissait ou devait connaître la loi applicable au régime matrimonial

Le droit de l'Etat contractant où un immeuble est situé peut prévoir une règle analogue pour les rapports juridiques entre un époux et un tiers concernant cet immeuble.

Tout Etat contractant a la possibilité de spécifier au moyen d'un déclaration la portée des alinéas 2 et 3 du présent article

Article 10

Les conditions relatives au consentement des époux quant à la loi déclarée applicable sont déterminées par cette loi

Article 11

La désignation de la loi applicable doit faire l'objet d'une stipulation expresse ou résulter indubitablement des dispositions d'un contrat de mariage

Article 12

Le contrat de mariage est valable quant à la forme si celle-ci répond soit à la loi interne applicable au régime matrimonial, soit à la loi interne en vigueur au lieu où le contrat a été passé. Il doit toujours faire l'objet d'un écrit daté et signé des deux epoux.

Article 13

La désignation par stipulation expresse de la loi applicable doit revêtir la forme prescrite pour les contrats de mariage, soit par la loi interne désignée, soi par la loi interne du lieu où intervient cette désignation. Elle doit toujours faire l'objet d'un écrit daté et signé des deux époux

Article 14

L'application de la loi déterminée par la Convention ne peut être écartée que si elle est manifestement incompatible avec l'ordre public.

2 the legal relations between that spouse and the third party arose at a time when the third party either knew or should have known of the law applicable to the matrimonial property regime.

The law of a Contracting State where an immovable is situated may provide an analogous rule for the legal relations between a spouse and a third party as regards that immovable.

A Contracting State may specify by declaration the scope of the second and third paragraphs of this Article.

Article 10

Any requirements relating to the consent of the spouses to the law designated as applicable shall be determined by that law

Article 11

The designation of the applicable law shall be by express stipulation, or arise by necessary implication from the provisions of a marriage contract

Article 12

The marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made In any event, the marriage contract shall be in writing, dated and signed by both spouses.

Article 13

The designation of the applicable law by express stipulation shall comply with the form prescribed for marriage contracts, either by the internal law designated by the spouses, or by the internal law of the place where it is made. In any event, the designation shall be in writing, dated and signed by both spouses.

Article 14

The application of the law determined by the Convention may be refused only if it is manifestly incompatible with public policy ('ordre public').

CHAPITRE III — DISPOSITIONS DIVERSES

Article 15

Aux fins de la Convention une nationalité n'est considérée comme nationalité commune des époux que dans les cas suivants:

1 les deux époux avaient cette nationalité avant le mariage;

2 un époux a volontairement acquis la nationalité de l'autre au moment du mariage ou ultérieurement, soit par une déclaration prévue à cet effet, soit en ne déclinant pas cette acquisition alors qu'il savait que ce droit lui était ouvert;

3 les deux époux ont volontairement acquis cette nationalité après le mariage. Sauf dans les cas visés par l'article 7, alinéa 2, chiffre 1, les dispositions se référant à la nationalité commune ne sont pas applicables lorsque les époux ont plus d'une nationalité commune

Article 16

Aux fins de la Convention lorsqu'un Etat comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de régimes matrimoniaux toute référence à la loi nationale d'un tel Etat est entendue comme visant le système déterminé par les règles en vigueur dans cet Etat.

A défaut de telles règles on entend par Etat dont un époux a la nationalité, au sens des articles 3 alinéa 2, chiffre 1, et 6, alinéa 2, chiffre 1, l'unité territoriale où cet époux a eu en dernier lieu sa résidence habituelle; de même, pour l'application de l'article 4, alinéa 2, on entend par Etat de la nationalité commune des époux l'unité territoriale où l'un et l'autre a eu, en dernier lieu, une résidence habituelle.

Article 17

Aux fins de la Convention, lorsqu'un Etat comprend deux ou plusieurs unités

CHAPTER III— MISCELLANEOUS PROVISIONS

Article 15

For the purposes of the Convention, a nationality shall be considered the common nationality of the spouses only in the following circumstances —

1 where both spouses had that nationality before marriage;

2 where one spouse voluntarily has acquired the nationality of the other at the time of marriage or later, either by a declaration to that effect or by not exercising a right known to him or her to decline the acquisition of the new nationality;

3 where both spouses voluntarily have acquired that nationality after marriage. Except in the cases referred to in sub-paragraph 1 of the second paragraph of Article 7, the provisions referring to the common nationality of the spouses are not applicable where the spouses have more than one common nationality.

Article 16

For the purposes of the Convention, where a State has two or more territorial units in which different systems of law apply to matrimonial property regimes, any reference to the national law of such a State shall be construed as referring to the system determined by the rules in force in that State.

In the absence of such rules, a reference to the State of which a spouse is a national shall be construed, for the purposes of sub-paragraph 1 of the second paragraph of Article 3 and sub-paragraph 1 of the second paragraph of Article 6, as referring to the territorial unit where that spouse had his or her last habitual residence; and, for the purposes of the second paragraph of Article 4, a reference to the State of the common nationality of the spouses shall be construed as referring to the last territorial unit, if any, where each has had a habitual residence.

Article 17

For a purposes of the Convention, where a State has two or more territorial units

territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de régimes matrimoniaux, toute référence à la résidence habituelle dans un tel Etat est interprétée comme visant la résidence habituelle dans une unité territoriale de cet Etat.

Article 18

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de régimes matrimoniaux n'est pas tenu d'appliquer les règles de la Convention aux conflits entre les lois de ces unités, lorsque la loi d'aucu autre Etat n'est applicable en vertu de la Convention.

Article 19

Aux fins de la Convention, lorsqu'un Etat connaît, en matière de régimes matrimoniaux, deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi d'un tel Etat est entendue comme visant le système de droit déterminé par les règles en vigueur dans cet Etat.

A défaut de telles règles, la loi interne de l'Etat de la nationalité commune des époux s'applique dans le cas prévu à l'article 4, alinéa premier, et la loi interne de l'Etat dans lequel ils avaient tous deux leur résidence habituelle reste applicable dans le cas prévu à l'article 7, alinéa 2, chiffre 2. A défaut de nationalité commune des époux, l'article 4, alinéa 3, s'applique.

Article 20

La Convention ne déroge pas aux instruments internationaux auxquels un Etat contractant est ou sera Partie et qui contiennent des dispositions sur les matières réglées par la présente Convention.

Article 21

La Convention ne s'applique, dans chaque Etat contractant, qu'aux époux qui se sont mariés ou qui désignent la loi applicable à leur régime matrimonial après son entrée en vigueur pour cet Etat.

in which different systems of law apply to matrimonial property regimes, any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State.

Article 18

A Contracting State which has two or more territorial units in which different systems of law apply to matrimonial property regimes shall not be bound to apply the rules of the Convention to conflicts between the laws of such units where the law of no other State is applicable by virtue of the Convention

Article 19

For the purposes of the Convention, where a State has two or more legal systems applicable to the matrimonial property regimes of different categories of persons, any reference to the law of such State shall be construed as referring to the system determined by the rules in force in that State.

In the absence of such rules, the internal law of the State of the common nationality of the spouses applies under the circumstances referred to in the first paragraph of Article 4, and the internal law of the State where each has had a habitual residence continues to apply under the circumstances referred to in sub-paragraph 2 of the second paragraph of Article 7. In the absence of a common nationality of the spouses, the third paragraph of Article 4 applies.

Article 20

The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party.

Article 21

The Convention applies, in each Contracting State, only to spouses who have married or who designate the law applicable to their matrimonial property regime after the Convention enters into force for that State.

Tout Etat contractant pourra, par déclaration, étendre l'application de la Convention à d'autres époux.

CHAPITRE IV — CLAUSES FINALES

Article 22

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Treizième session.

Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères des Pays-Bas.

Article 23

Tout autre Etat pourra adhérer à la Convention.

L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères des Pays-Bas

Article 24

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.

Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères des Pays-Bas.

Article 25

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de régimes matrimoniaux pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment étendre cette déclaration.

A Contracting State may be declaration extend the application of the Convention to other spouses.

CHAPTER IV — FINAL CAUSES

Article 22

The Convention is open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Thirteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 23

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 24

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension shall be notified to the Ministry of Foreign Affairs of the Netherlands

Article 25

A Contracting State which has two or more territorial units in which different systems of law apply to matrimonial property regimes may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply to all its territorial units or only to one or more of them, and may extend its declaration at any time thereafter

Ces déclarations seront notifiées au Ministère des Affaires Etrangères des Pays-Bas et indiqueront expressément l'unité territoriale à laquelle la Convention s'applique.

Article 26

Un Etat contractant qui connaît, à la date de l'entrée en vigueur de la Convention pour cet Etat, un système complexe d'allégeance nationale peut spécifier à tout moment, par déclaration, comment une référence à sa loi nationale doit être entendue aux fins de la Convention

Article 27

Aucune réserve à la Convention n'est admise.

Article 28

Tout Etat contractant qui désire faire l'une des déclarations prévues aux articles 5, 9, alinéa 4, 21 et 26 la notifiera au Ministère des Affaires Etrangères des Pays-Bas.

Toute modification ou retrait d'une déclaration sera notifié de la même manière.

Article 29

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 22 et 23.

Par la suite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement, le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires auxquels la Convention a été étendue conformément à l'article 24, le premier jour du troisième mois du calendrier après la notification visée dans cet article

These declarations shall be notified to the Minstry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 26

A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify from time to time by declaration how a reference to its national law shall be construed for the purposes of the Convention.

Article 27

No reservation to the Convention shall be permitted.

Article 28

Any Contracting State desiring to make one of the declarations envisaged by Article 5, the fourth paragraph of Article 9, Article 21 or Article 26 shall notify such declaration to the Ministry of Foreign Affairs of the Netherlands.

Notice shall be given in the same manner of any modification or withdrawal of such a declaration.

Article 29

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 22 and 23.

Thereafter the Convention shall enter into force —

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance. approval or accession;

2 for a territory to which the Convention has been extended in conformity with Article 24, on the first day of the third calendar month after the notification referred to in that Article.

Article 30

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 29, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée, ou qui y auront adhéré. La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.

La dénonciation sera, au moins six mois avant l'expiration du délai de cinq ans, notifiée au Ministère des Affaires Etrangères des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.

La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 31

Le Ministère des Affaires Etrangères des Pays-Bas notifiera aux Etats membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 23:

1 les signatures, ratifications, acceptations et approbations visées à l'article 22;

2 les adhésions visées à l'article 23;

3 la date à laquelle la Convention entrera conformément aux dispositions de l'article 29;

4 les extensions visées à l'article 24;

5 les dénonciations visées à l'article 30;

6 les déclarations mentionnées aux articles 25, 26 et 28.

En foi de quoi, les soussignées, dument autorisés, ont signé la présente Convention

Fait à La Haye, le 19 , en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives

Article 30

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 29, even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years. Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 23, of the following —

1 the signatures and ratifications, acceptances and approvals referred to in Article 22;

2 the accessions referred to in Article 23;

3 the date on which the Convention enters into force in accordance with Article 29;

4 the extensions referred to in Article 24;

5 the denunciations referred to in Article 30;

6 the declarations referred to in Articles 25, 26 and 28.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the day of 19 , in the English and French languages, both texts being equally authentic, in a single copy which shall be

du Gouvernement des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Treizième session.

deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.

II

CONVENTION SUR LA CÉLÉBRATION ET LA RECONNAISSANCE DE LA VALIDITÉ DES MARIAGES

Les Etats signataires de la présente Convention,

Désirant faciliter la célébration des mariages et la reconnaissance de la validité des mariages,

Ont résolu de conclure une Convention à cet effet et sont convenus des dispositions suivantes:

CHAPITRE I — CÉLÉBRATION DU MARIAGE

Article premier

Ce chapitre s'applique aux conditions requises dans un Etat contractant pour la célébration du mariage.

Article 2

Les conditions de forme du mariage sont régies par le droit de l'Etat de la célébration.

Article 3

Le mariage doit être célébré:

1 lorsque les futurs époux répondent aux conditions de fond prévues par la loi interne de l'Etat de la célébration, et que l'un d'eux a la nationalé de cet Etat ou y réside habituellement; ou

2 lorsque chacun des futurs époux répond aux conditions de fond prévues par la loi interne désignée par les règles de conflit de lois de l'Etat de la célébration.

Article 4

L'Etat de la célébration peut exiger des futurs époux toutes justifications utiles du contenu de toute loi étrangère applicable selon les articles précédents.

II

CONVENTION ON CELEBRATION AND RECOGNITION OF THE VALIDITY OF MARRIAGES

The States signatory to the present Convention,

Desiring to facilitate the celebration of marriages and the recognition of the validity of marriages,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions —

CHAPTER I — CELEBRATION OF MARRIAGES

Article 1

This Chapter shall apply to the requirements in a Contracting State for celebration of marriages

Article 2

The formal requirements for marriages shall be governed by the law of the State of celebration.

Article 3

A marriage shall be celebrated —

1 where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or

2 where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration.

Article 4

The State of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the preceding Articles.

Article 5

L'application d'une loi étrangère déclarée compétente par ce chapitre ne peut être écartée que si elle est manifestement incompatible avec l'ordre public de l'Etat de la célébration.

Article 6

Un Etat contractant pourra se réserver le droit, par dérogation à l'article 3, chiffre 1, de ne pas appliquer sa loi interne aux conditions de fond du mariage é celui des époux qui n'aurait pas la nationalité de cet Etat et n'y aurait pas sa résidence habituelle.

CHAPITRE II — RECONNAISSANCE DE LA VALIDITÉ DU MARIAGE

Article 7

Ce chapitre s'applique à la reconnaissance dans un Etat contractant de la validité d'un mariage dans un autre Etat

Article 8

Ce chapitre ne s'applique pas:
1 aux mariages célébrés par une autorité militaire;

2 aux mariages célébrés à bord d'un navire ou d'un aéronef;

3 aux mariages par procuration;

4 aux mariages posthumes;

5 aux mariages informels.

Article 9

Le mariage qui a été valablement conclu selon le droit de l'Etat de la célébration, ou qui devient ultérieurement valable selon ce droit, est considéré comme tel dans tout Etat contractant sous réserve des dispositions de ce chapitre.

Est également considéré comme valable le mariage célébré par un agent diplomatique ou un fonctionnaire consulaire conformément à son droit, à condition que cette célébration ne soit pas interdite par l'Etat de la célébration.

Article 5

The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the State of celebration.

Article 6

A Contracting State may reserve the right, by way of derogation from Article 3, sub-paragraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither is a national of that State nor habitually resides there.

CHAPTER II — RECOGNITION OF THE VALIDITY OF MARRIAGES

Article 7

This Chapter shall apply to the recognition in a Contracting State of the validity of marriages entered into in other States.

Article 8

This Chapter shall not apply to —
1 marriages celebrated by military authorities;

2 marriages celebrated aboard ships or aircraft;

3 proxy marriages;

4 posthumous marriages;

5 informal marriages

Article 9

A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.

A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration.

APPENDIX M

Article 10

Lorsqu'un certificat de mariage a été délivré par une autorité compétente, le mariage est présumé être valable jusqu'à preuve du contraire.

Article 11

Un Etat contractant ne peut refuser de reconnaître la validité d'un mariage que si, selon le droit de cet Etat, un des époux, au moment de ce mariage:

1 était déjà marié; ou

2 était à un degré de parenté en ligne directe avec l'autre époux ou était son frère ou sa soeur, par le sang ou par adoption; ou

3 n'avait pas atteint l'âge minimum requis pour se marier et n'avait pas obtenu la dispense nécessaire; ou

4 n'était pas mentalement capable de donner son consentement; ou

5 n'avait pas librement consenti au mariage

Toutefois, la reconnaissance ne peut être refusée dans le cas prévu au chiffre 1 de l'alinéa précédent si le mariage est devenu ultérieurement valable par suite de la dissolution ou de l'annulation du mariage précédent.

Article 12

Les règles de ce chapitre s'appliquent même si la question de la reconnaissance de la validité du mariage doit être tranchée, à titre incident, dans le contexte d'une autre question.

Toutefois, ces règles peuvent ne pas être appliqués lorsque cette autre question est régie, d'après les règles de conflit de lois du for, par le droit d'un Etat non contractant.

Article 13

La présente Convention ne fait pas obstacle dans un Etat contractant à l'application de règles de droit plus favorables à la reconnaissance des mariages conclus à l'étranger.

Article 10

Where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established.

Article 11

A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State —

1 one of the spouses was already married; or

2 the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or

3 one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or

4 one of the spouses did not have the mental capacity to consent; or

5 one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.

Article 12

The rules of this Chapter shall apply even where the recognition of the validity of a marriage is to be dealt with as an incidental question in the context of another question.

However, these rules need not be applied where that other question, under the choice of law rules of the forum, is governed by the law of a non-Contracting State.

Article 13

This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign marriages.

Article 14

Un Etat contractant peut refuser la reconnaissance de la validité d'un mariage si cette reconnaissance est manifestement incompatible avec son ordre public.

Article 15

Ce chapitre est applicable quelle que soit la date à laquelle le mariage a été célébré.

Toutefois, un Etat contractant pourra se réserver le droit de ne pas appliquer ce chapitre à un mariage célébré avant la date de l'entrée en vigueur de la Convention pour cet Etat.

CHAPITRE III — DISPOSITIONS GÉNÉRALES

Article 16

Un Etat contractant pourra se réserver le droit d'exclure l'application du chapitre I.

Article 17

Lorsqu'un Etat comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de mariage, toute référence au droit de l'Etat de la célébration est entendue comme visant le droit de l'unité territoriale dans laquelle le mariage est ou a été célébré.

Article 18

Lorsqu'un Etat comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de mariage, toute référence au droit de cet Etat en ce qui concerne la reconnaissance de la validité d'un mariage est entendue comme visant le droit de l'unité territoriale dans laquelle la reconnaissance est invoquée.

Article 19

Un Etat qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de mariage n'est pas tenu d'appliquer la Convention à la reconnaissance, dans une unité territoriale, de la validité d'un mariage conclu dans une autre unité territoriale.

Article 14

A Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy ('ordre public').

Article 15

This Chapter shall apply regardless of the date on which the marriage was celebrated.

However, a Contracting State may reserve the right not to apply this Chapter to a marriage celebrated before the date on which, in relation to that State, the Convention enters into force.

CHAPTER III — GENERAL CLAUSES

Article 16

A Contracting State may reserve the right to exclude the application of Chapter I.

Article 17

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of the State of celebration shall be construed as referring to the law of the territorial unit in which the marriage is or was celebrated.

Article 18

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of that State in connection with the recognition of the validity of a marriage shall be construed as referring to the law of the territorial unit in which recognition is sought

Article 19

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, this Convention need not be applied to the recognition in one territorial unit of the validity of a marriage entered into in another territorial unit.

Article 20

Lorsqu'un Etat connaît en matière de mariage deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence au droit de cet Etat est entendue comme visant le système de droit désigné par les règles en vigueur dans cet Etat.

Article 21

La Convention ne porte pas atteinte à l'application de toute convention, contenant des dispositions sur la célébration ou la reconnaissance de la validité du mariage, à laquelle un Etat contractant est Partie au moment où la présente Convention entre en vigueur pour lui.

La présente Convention n'affecte pas le droit d'un Etat contractant de devenir Partie à une convention, fondée sur des liens particuliers de caractère régional ou autre, contenant des dispositions sur la célébration ou la reconnaissance de la validité du mariage.

Article 22

La présente Convention remplace, dans les rapports entre les Etats qui y sont Parties, la Convention pour régler les conflits de lois en matière de mariage, conclue à La Haye le 12 juin 1902

Article 23

Chaque Etat contractant, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, fera connaître au Ministère des Affaires Etrangères des Pays-Bas les autorités qui sont compétentes selon son droit pour délivrer le certificat de mariage visé à l'article 10, et ultérieurement tous changements concernant ces autorités.

CHAPITRE IV — CLAUSES FINALES

Article 24

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Treizième session.

Article 20

Where a State has, in relation to marriage, two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the system of law designated by the rules in force in that State.

Article 21

The Convention shall not affect the application of any convention containing provisions on the celebration or recognition of the validity of marriages to which a Contracting State is a Party at the time this Convention enters into force for that State.

This Convention shall not affect the right of a Contracting State to become a Party to a convention, based on special ties of a regional or other nature, containing provisions on the celebration or recognition of validity of marriages.

Article 22

This Convention shall replace, in the relations between the States who are Parties to it, the Convention Governing Conflicts of Laws Concerning Marriage, concluded at The Hague, the 12th of June 1902.

Article 23

Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, inform the Ministry of Foreign Affairs of the Netherlands of the authorities which under its law are competent to issue a marriage certificate as mentioned in Article 10 and, subsequently, of any changes relating to such authorities.

CHAPTER IV — FINAL CLAUSES

Article 24

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Thirteenth Session.

Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères des Pays-Bas.

Article 25

Tout autre Etat pourra adhérer à la Convention

L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères des Pays-Bas.

Article 26

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.

Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères des Pays-Bas

Article 27

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent en matière de mariage pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment étendre cette déclaration.

Affaires déclarations seront notifiées au Ministère des Affaires Etrangères des Pays-Bas et indiqueront expressément l'unité territoriale à laquelle la Convention s'applique.

Article 28

Tout Etat contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, faire une ou plusieurs des réserves prévues aux articles 6, 15 et 16. Aucune autre réserve ne sera admise.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands

Article 25

Any other State may accede to the Convention

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 26

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 27

A Contracting State which has two or more territorial units in which different systems of law apply in relation to marriage may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply to all its territorial units or only to one or more of them, and may extend its declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 28

Any State may, not later than the time of ratification, acceptance, approval or accession, make one or more of the reservations provided for in Articles 6, 15 and 16. No other reservation shall be permitted.

Tout Etat pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au Ministère des Affaires Etrangères des Pays-Bas.

L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée à l'alinéa précédent

Article 29

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 24 et 25.

Ensuite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires auxquels la Convention a été étendue conformément à l'article 26, le premier jour du troisième mois du calendrier après la notification visée dans cet article.

Article 30

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 29, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée ou qui y auront adhéré

La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.

La dénonciation sera, au moins six mois avant l'expiration du délai de cinq ans, notifiée au Ministère des Affaires Etrangères des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.

La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 29

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 24 and 25.

Thereafter the Convention shall enter into force —

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for a territory to which the Convention has been extended in conformity with Article 26, on the first day of the third calendar month after the notification referred to in that Article

Article 30

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 29 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

Le Ministère des Affaires Etrangères des Pays-Bas notifiera aux Etats membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 25:

1 les signatures, ratifications, acceptations et approbations visées à l'article 24;

2 les adhésions visées à l'article 25;

3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 29;

4 les extensions visées à l'article 26;

5 les déclarations mentionnées à l'article 27;

6 les réserves aux articles 6, 15 et 16, et le rétrait des réserves prévu à l'article 28;

7 les communications notifiées en application de l'article 23;

8 les dénonciations visées à l'article 30.

En foi de quoi, les soussignés, dument autorisés, ont signé la présente Convention.

Fait à La Haye, le 19 , en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Treizième session.

B La Décision suivante sur l'achèvement des travaux en matière de contrats d'intermédiaires:

La Treizième session,

Ayant constaté que les discussions qui ont eu lieu au sein de la deuxième Commission et ayant trait aux contrats d'intermédiaires ont contribué à un rap-

Article 31

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 25, of the following —

1 the signatures and ratifications, acceptances and approvals referred to in Article 24;

2 the accessions referred to in Article 25;

3 the date on which the Convention enters into force in accordance with Article 29;

4 the extensions referred to in Article 26;

5 the declarations referred to in Article 27;

6 the reservations referred to in Articles 6, 15 and 16, and the withdrawals referred to in Article 28;

7 the information communicated under Article 23;

8 the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the day of 19 , in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.

B The following Decision on the completion of deliberations relating to agency —

The Thirteenth Session,

Having noted that the discussion which took place within the Second Commission dealing with agency had contributed to bringing the points of view of the

prochement appréciable des points de vues des diverses délégations et qu'une réunion ultérieure de la Commission sous forme d'une Commission spéciale ou d'une Session extraordinaire d'une durée limitée est susceptible d'aboutir à l'adoption d'un projet de Convention;

Considérant qu'une Commission spéciale pourrait être convoquée pour élaborer un texte définitif de la Convention; qu'une telle Commission spéciale devrait être composée, sauf empêchement absolu, des personnes qui ont siégé à la Deuxième Commission de la Treizième Session;

Considérant en outre cette Commission spéciale devrait poursuivre les discussions sur la base des dossiers de la Treizième session, et qu'elle aura pour tâche d'élaborer un projet de Convention définitif;

Estimant qu'une telle Commission spéciale devrait pouvoir terminer ses travaux dans une réunion de dix jours ouvrables au maximum;

Vu l'article 7 du Statut de la Conférence;

Institue une Commission spéciale dans les conditions prévues ci-dessus;

Prie le Bureau Permanent de convoquer cette Commission avant le premier juillet 1977.

Décide que le projet de Convention adopté par la Commssion spéciale sera consigné dans un Acte final à signer par les Délégués présents à cette Commission spéciale.

C La Décision suivante sur les matières à porter à l'ordre du jour de la Conférence:

La Treizième session,

Considérant que l'article 3 du Statut de la Conférence prévoit que la Commission d'Etat examine toutes les propositions destinées à être mises à l'ordre du jour de la Conference;

Se fondant sur les propositions et suggestions émises lors des discussions de la Quatrième commission;

various delegations considerably closer together, and that a subsequent meeting of the Commission, whether in the form of a Special Commission or of an Extraordinary Session of a limited duration, would be likely to lead to the adoption of a draft Convention;

Considering it appropriate to convene a Special Commission in order to prepare a final text of the Convention; that this Special Commission should be composed of the persons, except where absolutely prevented, who constituted the Second Commission of the Thirteenth Session;

Desiring that this Special Commission should base its deliberations on the proceedings of the Thirteenth Session, and that it should undertake the task of preparing a final text of a draft Convention;

Estimating that a meeting of not more than ten working days should be sufficient to enable this Special Commission to conclude its deliberations;

Having regard to Article 7 of the Statute of the Conference;

Institutes a Special Commission in the foregoing terms;

Requests the Permanent Bureau to convene this Special Commission before the first of July 1977;

Decides that the draft Convention to be drawn up by the Special Commission will be embodied in a Final Act to be signed by the Delegates participating in this Special Commission.

C The following Decision on the matters to be placed on the Agenda of the Conference —

The Thirteenth Session,

Observing that Article 3 of the Statute of the Conference provides that the Standing Government Committee shall examine all proposals for items to be placed on the Agenda of the Conference;

Having regard to the proposals and suggestions put forward in the deliberations of the Fourth Commission;

Prie la Commission d'Etat d'examiner l'opportunité:

1 d'inscrire à l'ordre du jour de la Quatorzième session l'élaboration d'une Convention sur l'assistance judiciaire et la *cautio judicatum solvi*;

2 de prendre en considération l'élaboration d'une Convention sur la loi applicable aux effets de commerce comme sujet destiné à figurer à l'ordre du jour d'une prochaine conférence, les études préliminaires devant être adaptées au développement des travaux en cours dans d'autres organisations, notamment la Commission des Nations Unies pour le droit du commerce international (CNUDCI);

3 d'inscrire à l'ordre du jour de la Quatorzième session l'élaboration d'une Convention sur le déplacement illégal d'enfants à d'étranger (*Legal Kidnapping*);

4 *a* d'inscrire à l'ordre du jour de la Quatorzième session l'élaboration d'un Protocole à la Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels, conclue le 15 juin 1955,

— permettant aux Etats Parties à cette Convention de ne pas l'appliquer aux ventes aux consommateurs, ou

— excluant ces ventes du champ d'application de la Convention;

b de saisir la Quatorzième session de la question de la révision éventuelle de cette Convention, sans toutefois soumettre à la Quatorzième session un projet de révision;

5 d'inviter le Bureau Permanent à poursuivre l'étude d'une Convention sur la loi applicable aux licences et au savoir-faire, en liaison avec les organisations internationales concernées et notamment l'Organisation mondiale de la propriété intellectuelle (OMPI), tout en estimant prématurée l'inscription formelle de ce sujet à l'ordre du jour de la Quatorzième session;

6 d'inviter le Bureau Permanent à entreprendre une étude sur la révision de la Convention du 15 juin 1955 pour régler

Requests the Standing Government Committee to study the desirability —

1 of including in the Agenda of the Fourteenth Session the preparation of a Convention on Legal Aid and Security for Costs;

2 of taking under consideration the preparation of a Convention on the Law Applicable to Negotiable Instruments as a subject to be included in the Agenda of a future Conference, preliminary studies to be co-ordinated with work being undertaken by other organisations, notably the United Nations Commission on International Trade Law (UNCITRAL);

3 of including in the Agenda of the Fourteenth Session the preparation of a Convention on Legal Kidnapping;

4 *a* of including in the Agenda of the Fourteenth Session the preparation of a Protocol to the Convention of June 15, 1955 on the Law Applicable to International Sales of Goods

— permitting States Parties to that Convention not to apply it to consumer sales, or

— excluding such sales from the scope of the Convention;

b of charging the Fourteenth Session with the question of the possible revision of this Convention, without however submitting to the Fourteenth Session a draft amendment;

5 of inviting the Permanent Bureau to continue the study of a Convention on the Law Applicable to Licensing Agreements and Know-How, in liaison with the international organisations concerned, notably the World Intellectual Property Organisation (WIPO), as it considers the formal inclusion of this subject in the Agenda of the Fourteenth Session to be premature;

6 of inviting the Permanent Bureau to undertake a study on the revision of the Convention of June 15, 1955 to Regulate

les conflits entre la loi nationale et la loi du domicile, afin que la Quatorzième session puisse prendre une décision sur ce point.

D Enfin, la Conférence a émis les Voeux suivants:

1 Que le Ministère des Affaires Etrangères des Pays-Bas, désigné comme dépositaire des Conventions, veuille bien, le premier octobre 1977, ouvrir à la signature les Conventions adoptés par la présente Session;

2 Que les Etats Parties à la Convention sur la loi applicable aux régimes matrimoniaux prennent les mesures appropriées pour informer le public, et en particulier les personnes qui se marient sur leur territoire, qui viennent y établir leur résidence habituelle ou qui le quittent:

a de la possibilité qui est ouverte à des époux de désigner, dans certaines limites et en observant certaines formes, la loi applicable à leur régime matrimonial dans sons ensemble, ou seulement en ce qui concerne les immeubles;

b de la loi applicable au régime matrimonial à défaut de choix par les époux et du fait que cette loi peut changer dans certaines circonstances;

c de la faculté qu'ont les époux, en cas de changement de la loi applicable, de soumettre tous leurs biens à la nouvelle loi.

Fait à La Haye, le vingt-trois octobre mil neuf cent soixante-seize, en un seul exemplaire qui sera déposé dans les archives du Bureau Permanent et dont une copie certifiée conforme sera remise à chacun des Gouvernements représentés à la Treizième session de la Conférence.

Conflicts Between the Laws of Nationality and Domicile, in order that the Fourteenth Session may take a decision on this point.

D Finally, the Conference expresses the following Wishes —

1 That the Ministry of Foreign Affairs of the Netherlands, designated as depositary of the Conventions, be willing to open for signature the Conventions adopted by this Session as from the 1st of October, 1977;

2 That the States Parties to the Convention on the Law Applicable to Matrimonial Property Regimes take appropriate measures to inform the public, and in particular persons who marry in the State, who come there to establish their habitual residence, or who leave the State —

a of the possibility open to spouses to designate, within certain limits, and by observing certain formalities, the law applicable to their matrimonial property regime in its entirety, or in so far as it relates to immovables;

b of the law that, in the absence of a choice by the spouses, will be applicable to the matrimonial property regime, and of the fact that there may be a change of the applicable law in certain circumstances;

c of the faculty available to the spouses, in the event of a change of the applicable law, to submit all of their property to the new law.

Done at The Hague, on the 23rd day of October Nineteen hundred and seventy-six, in a single copy which shall be deposited in the archives of the Permanent Bureau, and of which a certified copy shall be sent to each of the Governments represented at the Thirteenth Session of the Conference.

Here follows the Signatures of the Chief Delegates of the Federal Republic of Germany, Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Spain, United States of America, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Norway, Netherlands, Portugal, United Kingdom of Great Britain and Northern Ireland, Sweden, Switzerland, Czechoslovakia, Turkey, Jugoslavia, Venezuela (as Observers).

APPENDIX M

SCHEDULE 2

CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

COMMISSION SPÉCIALE SUR LA LOI APPLICABLE AUX CONTRATS D'INTERMEDIAIRES

SPECIAL COMMISSION ON THE LAW APPLICABLE TO AGENCY

Protocole de clôture
de la Commission spéciale

Les soussignés des Gouvernements de la République Fédérale d'Allemagne, de l'Argentine, de l'Australia, de l'Autriche, de la Belgique, du Canada, du Danemark, de la République Arabe d'Egypte, de l'Espagne, des Etats-Unis d'Amérique, de la Finlande, de la France, de la Grèce, de l'Irlande, d'Israël, de l'Italie, du Japon, du Luxembourg, de la Norvège, des Pays-Bas, du Portugal, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, de la Suède, de la Suisse, de la Tchécoslovaquie et de la Yougoslavie, ainsi que l'Observateur du Venezuela, se sont réunis à La Haye le 6 juin 1977, conformément à la Décision prise lors de la Treizième session de la Conférence de La Haye de droit international privé.

A la suite des délibérations consignées dans les procès-verbaux, ils sont convenus de soumettre à l'appréciation de leurs Gouvernements:

Le projet de Convention suivant:

CONVENTION SUR LA LOI APPLICABLE AUX CONTRATS D'INTERMEDIAIRES ET A LA REPRESENTATION

Les Etats signataires de la présente Convention,

Désirant établir des dispositions communes concernant la loi applicable aux contrats d'intermédiaires et à la représentation,

One résolu de conclure une Convention à cet effet et sont convenus des dispositions suivantes:

Protocol of Closing Session
of the Special Commission

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the Observer of Venezuela, convened at The Hague on the 6th June 1977, in accordance with the Decision taken at the Thirteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, they have decided to submit to the appreciation of their Governments —

The following draft Convention —

CONVENTION ON THE LAW APPLICABLE TO AGENCY

The States signatories to the present Convention,

Desiring to establish common provisions concerning the law applicable to agency,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions —

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention détermine la loi applicable aux relations à caractère international se formant lorsqu'une personne, l'intermédiaire, a le pouvoir d'agir, agit ou prétend agir avec un tiers pour le compte d'une autre personne, le représenté

Elle s'etend à l'activité de l'intermédiaire consistant à recevoir et à communiquer des propositions ou à mener des négociations pour le compte d'autres personnes.

La Convention s'applique, que l'intermédiaire agisse en son propre nom ou au nom du représenté et que son activité soit habituelle ou occasionnelle.

Article 2

La Convention ne s'applique pas à:

a la capacité des parties;

b la forme des actes;

c la représentation légale dans le droit de la famille, des régimes matrimoniaux et des successions;

d la représentation en vertu d'une décision d'une autorité judiciaire ou administrative, ou s'exerçant sous le contrôle direct d'une telle autorité;

e la représentation liée à une procédure de caractère judiciaire;

f la représentation par le capitaine de navire agissant dans l'exercice de ses fonctions.

Article 3

Aux fins de la presente Convention:

a l'organe, le gérant ou l'associé d'une société, d'une association ou de toute autre entité légale, dotée ou non de la personnalité morale, n'est pas considéré comme l'intermédiaire de celle-ci, dans la mesure où, dans l'exercice de ses fonctions, il agit en vertu de pouvoirs conférés par la loi ou les actes constitutifs de cette entité légale;

b le trustee n'est pas considéré comme un intermédiaire agissant pour le compte du *trust,* du constituant ou du bénéficiaire.

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The present Convention determines the law applicable to relationships of an international character arising where a person, the agent, has the authority to act, acts or purports to act on behalf of another person, the principal, in dealing with a third party.

It shall extend to cases where the function of the agent is to receive and communicate proposals or to conduct negotiations on behalf of other persons.

The Convention shall apply whether the agent acts in his own name or in that of the principal and whether he acts regularly or occasionally.

Article 2

This Convention shall not apply to —

a the capacity of the parties;

b requirements as to form;

c agency by operation of law in family law, in matrimonial property regimes, or in the law of succession;

d agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority;

e representation in connection with proceedings of a judicial character;

f the agency of a shipmaster acting in the exercise of his functions as such

Article 3

For the purposes of this Convention —

a an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

b a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries

Article 4

a loi désignée par la Convention s'applique même s'il s'agit de la loi d'un Etat non contractant.

CHAPITRE II — RELATIONS ENTRE LE REPRÉSENTÉ ET L'INTERMÉDIAIRE

Article 5

La loi interne choisie par les parties régit le rapport de représentation entre le représenté et l'intermédiaire.

Le choix de cette loi doit être exprès ou résulter avec une certitude raisonnable des dispositions du contrat et des circonstances de la cause.

Article 6

Dans le mesure où elle n'a pas été choisie dans les conditions prévues à l'article 5, la loi applicable est la loi interne de l'Etat dans lequel, au moment de la formation du rapport de représentation, l'intermédiaire a son établissement professionnel ou, à défaut, sa résidence habituelle.

Toutefois, la loi interne de l'Etat dans lequel l'intermédiaire doit exercer à titre principal son activité est applicable, si le représenté a son établissement professionnel ou, à défaut, sa résidence habituelle dans cet Etat.

Lorsque le représenté ou l'intermédiaire a plusieurs établissements professionnels, le présent article se réfère à l'établissement auquel le rapport de représentation se rattache le plus étroitement.

Article 7

Lorsque la création du rapport de représentation n'est pas l'objet exclusif du contrat, la loi désignée par les articles 5 et 6 ne s'applique que si:

a la création de ce rapport est le principal objet du contrat, ou

b ce rapport est séparable de l'ensemble du contrat.

Article 4

The law specified in this Convention shall apply whether or not it is the law of a Contracting State.

CHAPTER II — RELATIONS BETWEEN PRINCIPAL AND AGENT

Article 5

The internal law chosen by the principal and the agent shall govern the agency relationship between them.

This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case.

Article 6

In so far as it has not been chosen in accordance with Article 5, the applicable law shall be the internal law of the State where, at the time of formation of the agency relationship, the agent has his business establishment or, if he has none, his habitual residence.

However, the internal law of the State where the agent is primarily to act shall apply if the principal has his business establishment or, if he has none, his habitual residence in that State.

Where the principal or the agent has more than one business establishment, this Article refers to the establishment with which the agency relationship is most closely connected.

Article 7

Where the creation of the agency relationship is not the sole purpose of the agreement, the law specified in Articles 5 and 6 shall apply only if —

a the creation of this relationship is the principal purpose of the agreement, or

b the agency relationship is severable.

Article 8

La loi applicable en vertu des articles 5 et 6 régit la formation et la validité du rapport de représentation, les obligations des parties et les conditions d'exécution, les conséquences de l'extinction de ces obligations.

Cette loi s'applique en particulier:
a à l'existence, l'étendue, la modification et la cessation des pouvoirs de l'intermédiaire, ainsi qu'aux conséquences de leur dépassement ou de leur emploi abusif;

b à la faculté pour l'intermédiaire de déléguer tout ou partie de ses pouvoirs et de désigner un intermédiaire additionnel;

c à la faculté pour l'intermédiaire de conclure un contrat pour le compte du représenté, lorsqu'il existe un risque de conflit d'intérêts entre lui-même et le représenté;

d à la clause de non-concurrence et à la clause de ducroire;

e à l'indemnité de clientèle;

f aux chefs de dommages pouvant donner lieu à réparation.

Article 9

Quelle que soit la loi applicable au rapport de représentation, on aura égard en ce qui concerne les modalités d'exécution à la loi du lieu d'exécution.

Article 10

Le présent chapitre ne s'applique pas lorsque le contrat créant le rapport de représentation est un contrat de travail.

CHAPITRE III — RELATIONS AVEC LE TIERS

Article 11

Dans les rapports entre le représenté et le tiers, l'existence et l'étendue des pouvoirs de l'intermédiaire, ainsi que les effets des actes de l'intermédiaire dans l'exercice réel ou prétendu de ses pou-

Article 8

The law applicable under Articles 5 and 6 shall govern the formation and validity of the agency relationship, the obligations of the parties, the conditions of performance, the consequences of non-performance, and the extinction of those obligations.

This law shall apply in particular to —
a the existence and extent of the authority of the agent, its modification or termination, and the consequences of the fact that the agent has exceeded or misused his authority;

b the right of the agent to appoint a substitute agent, a sub-agent or an additional agent;

c the right of the agent to enter into a contract on behalf of the principal where there is a potential conflict of interest between himself and the principal;

d non-competition clauses and *del credere* clauses;

e clientele allowances *(l'indemnité de clientèle)*;

f the categories of damage for which compensation may be recovered.

Article 9

Whatever law may be applicable to the agency relationship, in regard to the matter of performance the law of the place of performance shall be taken into consideration.

Article 10

This Chapter shall not apply where the agreement creating the agency relationship is a contract of employment

CHAPTER III — RELATIONS WITH THE THIRD PARTY

Article 11

As between the principal and the third party, the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by the

voirs, sont régis par la loi interne de l'Etat dans lequel l'intermédiaire avait son établissement professionnel au moment où il a agi.
Toutefois, la loi interne de l'Etat dans lequel l'intermédiaire a agi est applicable si:

a le représenté a son établissement professionnel ou, à défaut, sa résidence habituelle dans cet Etat et que l'intermédiaire ait agi au nom du représenté; ou

b le tiers a son établissement professionnel ou, à défaut, sa résidence habituelle dans cet Etat; ou

c l'intermédiaire a agi en bourse ou pris part à une vente aux enchères; ou

d l'intermédiaire n'a pas d'établissement professionnel.

Lorsque l'une des parties a plusieurs établissements professionnels, le présent article se réfère à l'établissement auquel l'acte de l'intermédiaire se rattache le plus étroitement.

Article 12

Aux fins de l'application de l'article 11, alinéa premier, lorsque l'intermédiaire agissant en vertu d'un contrat de travail le liant au représenté n'a pas d'établissement professionnel personnel, il est réputé avoir son établissement au lieu où est situé l'établissement professionnel du représenté auquel il est attaché.

Article 13

Aux fins de l'application de l'article 11, alinéa 2, l'intermédiaire, lorsqu'il a communiqué avec le tiers d'un Etat à un autre par courrier, télégramme, télex, téléphone ou autres moyens similaires, est considéré comme ayant alors agi au lieu de son établissement professionnel ou, à défaut, de sa résidence habituelle.

Article 14

Nonobstant l'article 11, lorsque la loi applicable aux questions couvertes par ledit article a fait l'objet, de la part du représenté ou du tiers, d'une désignation écrite acceptés expressément par l'autre partie, la loi ainsi désignée est applicable à ces questions.

internal law of the State in which the agent had his business establishment at the time of his relevant acts.

However, the internal law of the State in which the agent has acted shall apply if —

a the principal has his business establishment or, if he has none, his habitual residence in that State, and the agent has acted in the name of the principal; or

b the third party has his business establishment or, if he has none, his habitual residence in that State; or

c the agent has acted at an exchange or auction; or

d the agent has no business establishment.

Where a party has more than one business establishment, this Article refers to the establishment with which the relevant acts of the agent are most closely connected.

Article 12

For the purposes of Article 11, first paragraph, where an agent acting under a contract of employment with his principal has no personal business establishment, he shall be deemed to have his establishment at the business establishment of the principal to which he is attached

Article 13

For the purposes of Article 11, second paragraph, where an agent in one State has communicated with the third party in another, by message, telegram, telex, telephone, or other similar means, the agent shall be deemed to have acted in that respect at the place of his business establishment or, if he has none, of his habitual residence.

Article 14

Notwithstanding Article 11, where a written specification by the principal or by the third party of the law applicable to questions falling within Article 11 has been expressly accepted by the other party, the law so specified shall apply to such questions.

Article 15

La loi applicable en vertu du présent chapitre régit également les relations entre l'intermédiaire et le tiers dérivant du fait que ce dernier a agi dans l'exercice de ses pouvoirs, au-delà de ses pouvoirs ou sans pouvoirs.

CHAPITRE IV — DISPOSITIONS GÉNÉRALES

Article 16

Lors de l'application de la présente Convention, il pourra être donné effet aux dispositions impératives de tout Etat avec lequel la situation présente un lien effectif, si et dans la mesure où, selon le droit de cet Etat, ces dispositions sont applicables quelle que soit la loi désignée par ses règles de conflit.

Article 17

L'application d'une des lois désignées par la présente Convention ne peut être écartée que si elle est manifestement incompatible avec l'ordre public.

Article 18

Tout Etat contractant, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra se réserver le droit de ne pas appliquer la Convention:

1 à la représentation exercée par une banque ou un groupe de banques en matière d'opération de banque;

2 à la représentation en matière d'assurances;

3 aux actes d'un fonctionnaire public agissant dans l'exercice de ses fonctions pour le compte d'une personne privée.
Aucune autre réserve ne sera admise.

Tout Etat contractant pourra également, en notifiant une extension de la Convention conformément à l'article 25, faire une ou plusieurs de ces réserves avec effet limité aux territoires ou à certains des territoires visés par l'extension.

Tout Etat contractant pourra à tout moment retirer une réserve qu'il aura faite;

Article 15

The law applicable under this Chapter shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his authority, has exceeded his authority, or has acted without authority.

CHAPTER IV — GENERAL PROVISIONS

Article 16

In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules.

Article 17

The application of a law specified by this Convention may be refused only where such application would be manifestly incompatible with public policy *(ordre public)*.

Article 18

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply this Convention to —

1 the agency of a bank or group of banks in the course of banking transactions;

2 agency in matters of insurance;

3 the acts of a public servant acting in the exercise of his functions as such on behalf of a private person.
No other reservation shall be permitted.

Any Contracting State may also, when notifying an extension of the Convention in accordance with Article 25, make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation which it has

l'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification du retrait.

Article 19

Lorsqu'un Etat comprend plusieurs unités territoriales dont chacune a ses propres règles en matière de contrats d'intermédiaires et de représentation, chaque unité territoriale est considérée comme un Etat aux fins de la détermination de la loi applicable selon la Convention.

Article 20

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de contrats d'intermédiaires et de représentation ne sera pas tenu d'appliquer la présente Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu d'appliquer la loi d'un autre Etat en vertu de la présente Convention.

Article 21

Un Etat contractant qui comprend deux ou plusieurs unités territoriales qui ont leurs propres règles de droit en matière de contrats d'intermédiaires et de représentation pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'étendra toutes ces unités territoriales ou à une ou plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

Ces déclarations seront notifiées au Ministères des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

Article 22

La Convention ne déroge pas aux instruments internationaux auxquels un Etat contractant est ou sera Partie et qui contiennent des dispositions sur les matières réglées par la présente Convention.

CHAPITRE V — CLAUSES FINALES

Article 23

La Convention est ouverte à la signature des Etats qui étaient Membres de la

made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

Article 19

Where a State comprises several territorial units each of which has its own rules of law in respect of agency, each territorial unit shall be considered as a State for the purposes of identifying the law applicable under this Convention.

Article 20

A State within which different territorial units have their own rules of law in respect of agency shall not be bound to apply this Convention where a State with a unified system of law would not be bound to apply the law of another State by virtue of this Convention.

Article 21

If a Contracting State has two or more territorial units which have their own rules of law in respect of agency, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, and shall state expressly the territorial units to which the Convention applies.

Article 22

The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party.

CHAPTER V — FINAL CLAUSES

Article 23

The Convention is open for signature by the States which were Members of the

Conférence de La Haye de droit international privé lors de sa Treizième session.

Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères du Royaumes des Pays-Bas.

Article 24

Tout autre Etat pourra adhérer à la Convention.

L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 25

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur la plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.

Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 26

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 23 et 24.

Par la suite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement, le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires auxquels la Convention a été étendue conformément aux articles 21 et 25, le premier jour du troisième mois du calendrier après la notification visée dans ces articles.

Hague Conference on Private International Law at the time of its Thirteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 24

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 25

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 26

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 23 and 24.

Thereafter the Convention shall enter into force —

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for a territory to which the Convention has been extended in conformity with Articles 21 and 25, on the first day of the third calendar month after the notification referred to in those Articles

APPENDIX M

Article 27

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 26, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée, ou qui y auront adhéré.

La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.

La dénonciation sera, au moins six mois avant l'expiration du délai de cinq ans, notifiée au Ministère des Affaires Etrangère, du Royaume des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.

La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 28

Le Ministère des Affaires Etrangères du Royaume des Pays-Bas notifiera aux Etats membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 24:

1 les signatures, ratifications, acceptations et approbations visées à l'article 23;

2 les adhésions visées à l'article 24;

3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 26;

4 les extensions visées à l'article 25;

5 les déclarations mentionnées à l'article 21;

6 les réserves et le retrait des réserves prévus à l'article 18;

7 les dénonciations visées à l'article 27.

Article 27

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 26, even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States

Article 28

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify to the States Members of the Conference, and the States which have acceded in accordance with Article 24, the following —

1 the signatures and ratifications, acceptances and approvals referred to in Article 23;

2 the accessions referred to in Article 24;

3 the date on which the Convention enters into force in accordance with Article 26;

4 the extensions referred to in Article 25;

5 the declarations referred to in Article 21;

6 the reservations and the withdrawals of reservations referred to in Article 18;

7 the denunciations referred to in Article 27.

En foi de quoi, les soussignés dument autorisés, ont signé la présente Convention.

Fait à La Haye, le ., 19 , en français et en anglais, les deux texte, faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats membres de la Conférence de La Haye de droit international privé lors de sa Treizième session.

Fait à La Haye, le 16 juin mil neuf cent soixante-dix-sept en un seul exemplaire qui sera déposé dans les archives du Bureau Permanent et dont une copie certifiée conforme sera remise à chacun des Gouvernements représentés à la Treizième session de la Conférence.

In witness whereof the undersigned being duly authorised thereto, have signed this Convention.

Done at The Hague, on the day of 19 , in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.

Done at The Hague, on the 16th day of June Nineteen hundred and seventy-seven, in a single copy which shall be deposited in the archives of the Permanent Bureau, and of which a certified copy shall be sent to each of the Governments represented at the Thirteenth Session of the Conference

Here follows the Signatures of the Chief Delegates of the Federal Republic of Germany, Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Spain, United States of America, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Norway, Netherlands, Portugal, United Kingdom of Great Britain and Northern Ireland, Sweden, Switzerland, Czechoslovakia, Turkey, Jugoslavia, Venezuela (as Observers).

SCHEDULE 3

Text of October 1976

Convention between the United Kingdom of Great Britain and Northern Ireland and the United States of America providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters.

The United Kingdom of Great Britain and Northern Ireland and the United States of America;

Desiring to provide on the basis of reciprocity for the recognition and enforcement of judgments in civil matters;

Have agreed as follows:

CHAPTER I: USE OF TERMS

Article 1

In this Convention:

(a) "counterclaim" includes a cross action;

(b) "court addressed" includes any authority to which application is made for recognition or enforcement of a judgment under this Convention;

(c) "court of a Contracting State" means any court exercising jurisdiction for a "territory" of a Contracting State, but does not include any international court;

(d) "court of origin" means the court which gave a judgment for which recognition or enforcement is sought under this Convention;

(e) "defendant" means the defendant in the original proceedings including, where appropriate, a defendant to a counterclaim;

(f) "plaintiff" means the plaintiff in the original proceedings including, where appropriate, a counterclaimant;

(g) "respondent" means the person against whom recognition or enforcement is sought;

(h) "review" includes appeal;

(i) "territory" means, as may be appropriate, the United Kingdom, a constituent part thereof, or the area adjacent to the United Kingdom over which its courts exercise jurisdiction, the United States, a constituent part thereof, the area adjacent to the United States over which its courts exercise jurisdiction, the area over which a federal court of the United States

exercises jurisdiction, or any territory to which this Convention shall have been extended under Article 23; and

(j) "territory of origin" means the "territory" for which the court of origin was exercising jurisdiction.

CHAPTER II: SCOPE OF THE CONVENTION

Article 2

1. This Convention shall apply to judgments given after this Convention enters into force, by courts of the Contracting States in the exercise of their civil or commercial jurisdiction and, for the purposes of Article 18, to civil or commercial judgments given by courts of third States. Such application shall be irrespective of the name given to the proceedings which gave rise to the judgment or of the name given to the judgment, such as order or decree.

2. Except for the purposes of Article 18, this Convention shall not apply to judgments:

(a) for customs duties, taxes and other changes of a like nature;

(b) to the extent that they are for punitive or multiple damages;

(c) which are interlocutory;

(d) for disclosure of evidence;

(e) given by or on appeal from administrative tribunals;

(f) against States, including their constituent units;

(g) determining the existence or constitution of legal persons or the powers of their officers or directors; or

(h) determining questions relating to damage or injury resulting from a nuclear incident.

3. This Convention shall not apply to judgments which determine:

(a) the status or legal capacity of natural persons;

(b) matters of family law, including marital rights in property;

(c) maintenance claims, obligations assumed in whole or in part to satisfy a legal obligation to support another, or claims seeking to recover all or part of amounts paid by another for maintenance;

(d) matters of succession to, or the administration of, estates of deceased persons;

(e) issues in bankruptcy proceedings, in proceedings for the reorganization or winding-up of companies or other legal persons, or in proceedings for judicial arrangements, compositions and analogous matters;

(f) matters of social security or public assistance to the extent that the claim lies against a public fund or authority;

(g) matters concerning the judicial supervision of the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs.

4. This Convention shall apply to a judgment where the court of origin, in order to determine an issue not falling under paragraph (2)(g) or (h) or paragraph (3) of this Article, had to determine a matter falling within these provisions as a preliminary issue.

5. Severable parts of a judgment in respect of different matters shall be entitled to recognition or enforcement under this Convention if such parts would have been so entitled had they taken the form of separate judgments.

Article 3

The provisions of this Convention shall not prevent the recognition or enforcement of a judgment of a court of a Contracting State if that judgment would be recognizable or enforceable in accordance with the law otherwise applicable in the court addressed.

CHAPTER III: CONDITIONS OF RECOGNITION AND ENFORCEMENT

Article 4

1. A judgment given by a court of a Contracting State shall, subject to the provisions of this Convention, be recognized in the territory of the other Contracting State if:

(a) it was given by a court having jurisdiction under Articles 10 or 11; and

(b) it has binding effects within the territory of origin, notwithstanding that an application for review may be pending against it, or that it may still be subject to review, in that territory.

2. A judgment entitled to recognition under paragraph (1) shall, subject to the provisions of this Convention, be enforced in the territory of the other Contracting State if it is entitled to enforcement in the territory of origin.

3. To the extent that judgments given by courts of a Contracting State are inconsistent, priority shall be determined for the purposes of paragraphs (1) and (2) as follows:

(a) where the judgments were given in more than one territory of the Contracting State, any priority accorded by the law of that State shall be recognized; and

(b) where the judgments were given in a single territory of the Contracting State, any priority accorded by the law applicable in the courts of that territory shall be recognized.

Article 5

1. Where a judgment is subject to any form of review under the law applicable in the court of origin, and the respondent satisfies the court addressed that review has been or will be sought, the court addressed may grant or defer recognition or enforcement in accordance with the law applicable in that court.

2. Where recognition is sought in proceedings respecting a different cause of action, binding effects shall not be accorded to the judgment until all ordinary forms of review have been exhausted. However, the court may suspend the proceedings.

Article 6

Recognition or enforcement of a judgment is not required by this Convention if:

(a) by reason of the subject-matter of the action, exclusive jurisdiction over the claim adjudicated lies, under the law applicable in the court addressed, in courts or authorities other than those of the territory of origin; or

(b) the judgment was given in proceedings brought in violation of an agreement between the parties to the original proceedings giving exclusive jurisdiction to a court or other authority, or to an arbitral tribunal; or

(c) the judgment relates to an issue, arising under a trust instrument in respect of which, by virtue of the terms of that instrument, exclusive jurisdiction lies in courts or authorities other than those of the territory of origin.

Article 7

Recognition or enforcement of a judgment is not required by this Convention:

(a) where recognition or enforcement of the judgment would be manifestly repugnant to public policy;

(b) where the judgment was obtained by fraud;

(c) if proceedings based on the same transaction or occurrence:

(i) have resulted in an irreconcilable judgment by a court or authority of the Contracting State of the court addressed;

(ii) are pending before a court or authority of the Contracting State of the court addressed, were the first to be instituted, and may result in such an irreconcilable judgment; or

(iii) have resulted in an irreconcilable judgment by a court or authority of a third State that qualifies for recognition or enforcement under the law applicable in the court addressed;

(d) if, in the view of the court addressed, either the respondent enjoys immunity from the jurisdiction of that court or the defendant should have enjoyed immunity in the original proceedings; or

(e) where, to give its judgent, the court of origin had to decide a question relating to a matter specified in paragraph 2(g) or (h) or paragraph (3) of Article 2, and the decision differs from that which would have followed from the application to that question of the rules of private international law applicable in the court addressed.

Article 8

If the defendant or his successor in interest so requests recognition or enforcement of a judgment is not required by this Convention:

(a) where the defendant did not receive either actual notice of the proceedings in sufficient time to enable him to present his case or constructive notice substantially equivalent to that accepted by the law applicable in the court addressed;

(b) where jurisdiction for the purposes of paragraph (1) of Article 4 is based on the agreement of the parties, the defendant did not appear, and in the view of the court addressed the agreement is invalid;

(c) to the extent that recognition or enforcement would afford a recovery exceeding monetary limits upon liability fixed by a statute of the territory of the court addressed which applies under that court's rules of private international law;

(d) where, under the rules of private international law of the court addressed, its own law would have been applicable to

the case if it had been brought in that court and the judgment disregards provisions of that law which would have been applied by that court even if the parties had chosen another system of law;

(e) where the judgment is one recognizing or enforcing another judgment; or

(f) to the extent that the judgment gave relief directly against a person, natural or legal, whose liability results from an obligation of indemnification and that liability does not, under the law selected in accordance with the rules of private international law applicable in the court addressed, arise until liability has been established on the part of the person entitled to indemnification.

Article 9

Except as permitted by this Convention, there shall be no review of the judgment given by the court of origin, and recognition or enforcement shall not be refused for the reason that the court of origin reached a result different from that which would have been reached by application of the law selected in accordance with the rules of private international law applicable in the court addressed.

Article 10

A judgment is given by a court having jurisdiction for the purposes of paragraph (1) of Article 4 where one of the following can be established:

(a) the respondent or his predecessor in interest brought the original proceedings;

(b) the defendant had, at the time when the proceedings were instituted, a place of habitual residence within the territory of origin, or, if the defendant is not a natural person, had a principal place of business there, or was incorporated, or if unincorporated had its headquarters, there;

(c) the defendant had a branch or other establishment (other than a subsidiary corporation) within the territory of origin and the proceedings were in respect of a transaction or occurrence arising from business done by or through that establishment;

(d) the defendant, not acting pursuant to a statutory requirement, by an agreement in writing or by an oral agreement confirmed in writing had agreed expressly in respect of disputes which had arisen or might arise regarding a specified

legal relationship, to submit to the jurisdiction of the court of origin, or of the courts of the territory of origin;

(e) the defendant had been conducting business on a continuing basis within the territory of origin otherwise than through a subsidiary corporation, had appointed, or been under a legal duty to appoint, an agent to receive service of process there in respect of such business, and the proceedings were in respect of a transaction or occurrence arising from such business;

(f) in the case of a contract to supply goods or services the conclusion of the contract was preceded by an invitation to treat made by advertisement or otherwise either in or specifically directed to the territory of origin and the use of the goods or the performance of the services was in the contemplation of the parties to the contract to occur in whole or in substantial part within that territory;

(g) in the case of contractual claim the parties to the contract resided or, if not natural persons, had a place of business in the territory of origin at the time the contract was concluded and the obligation in issue was to be wholly or mainly performed there;

(h) in the case of an action whose object was to determine rights of ownership, use, possession or security in immovable or tangible movable property, that property was situated within the territory of origin when the action was instituted;

(i) in the case of an action whose object was to decide upon the validity, construction, interpretation, variation or implementation of a trust instrument or to determine disputes under that instrument between or among trustees and beneficiaries, the trust's principal place of administration was within the territory of origin, or the trust instrument provided expressly or by implication that the courts of that territory should have jurisdiction in such actions; or

(j) in the case of an action to recover damages for physical injuries to the person or for damage to tangible property, the acts or omissions that occasioned the injury or damage substantially occurred, and the injury or damage was suffered, in the Contracting State in which the court of origin was exercising jurisdiction, and either those acts or omissions substantially occurred or that injury or damage was suffered in the territory of origin.

Article 11

A judgment on a counterclaim is given by a court having jurisdiction for the purposes of paragraph (1) of Article 4 where one of the following conditions is satisfied:

(a) the respondent or his predecessor in interest voluntarily brought the counterclaim;

(b) the court of origin would have had jurisdiction to try the counterclaim as a principal claim under sub-paragraphs (b)-(j) of Article 10; or

(c) the court of origin had jurisdiction under Article 10 to try the principal claim and the counterclaim arose out of the transaction or occurrence on which the principal claim was based.

Article 12

In determining whether jurisdiction for the purposes of paragraph (1) of Article 4 is established under Articles 10 and 11, the court addressed shall not be bound by any conclusions reached by the court of origin relevant to the application of these Articles. The court addressed shall, however, be bound by findings of fact made by the court of origin unless the respondent establishes that they are incorrect. The respondent may not dispute such findings where the defendant appeared in the court of origin and failed to challenge its jurisdiction.

CHAPTER IV: EXTENT OF RECOGNITION

Article 13

1. A judgment entitled to recognition under this Convention shall, in any proceedings in the other Contracting State between the same parties, be given the same binding effects as if it were a judgment of the court addressed. However, the court addressed may, if the interests of justice so require, and shall, if the respondent so requests, give the judgment such binding effects as it would be given under the law of the territory of origin.

2. For the purpose of this Article, parties shall include all persons who were represented by parties in the original proceedings and the successors and assigns of such persons or parties.

APPENDIX M

CHAPTER V: PROCEDURES FOR RECOGNITION AND ENFORCEMENT

Article 14

Recognition under this Convention shall be accorded upon presentation of such of the documents specified in Article 15 as the court addressed considers requisite.

Article 15

1. A judgment for the payment of money which is entitled to enforcement under this Convention shall, to the extent that it has not been fully satisfied or carried out, be enforced by the court addressed. To the extent that a judgment orders forms of relief other than the payment of money, the court addressed may refuse enforcement or may order any measure of enforcement which the law of the court addressed permits for similar domestic judgments. The procedures for enforcement shall, except as otherwise provided in this Convention, be governed by the law applicable in the court addressed.

2. The court addressed may require:

(a) a copy of the judgment authenticated by the court of origin;

(b) unless the required information is set forth in the judgment, documentary evidence as to the form and modalities of the notice given to the defendant and as to the grounds upon which jurisdiction was assumed;

(c) a statement of the grounds relied upon to establish the jurisdiction of the court of origin under Articles 10 and 11; and

(d) an affidavit of such other facts as may be required by the rules of the court addressed.

Article 16

1. A judgment given in the United Kingdom shall be enforced in the United States by that procedure which provides for a form of notice to the respondent and is the simplest and most rapid provided by the law applicable in the court addressed for the enforcement of non-local judgments. Application for enforcement may be made to any court which exercises jurisdiction for the territory where enforcement is sought and which is competent to afford the relief requested.

2. A judgment given in the United States shall be registered for enforcement in the United Kingdom upon application made to a court of competent jurisdiction.

Article 17

1. A period of six years from the date of the original judgment if review has not been sought in a court of the territory of origin, or from the date of the most recent judgment, if review has been sought, shall be allowed for applications for enforcement under Article 16. However, no application shall be entertained where the judgment is no longer entitled to enforcement in the territory of origin.

2. No security for costs may be required of any person applying for enforcement of a judgment entitled to recognition under this Convention except where enforcement is granted of a judgment still subject to review.

3. Interest recoverable on a judgment enforced under this Convention shall, in respect of the period preceding the date on which enforcement is granted under paragraph (1) of Article 16 or registration for enforcement is effected under paragraph (2) of Article 16, be at such rate, if any, as may be specified in the judgment or in a certificate given by the court of origin.

4. From the date on which enforcement is granted under paragraph (1) of Article 16 or registration of enforcement is effected under paragraph (2) of Article 16, the judgment shall, for enforcement purposes, including prescriptive time limits and interest charges, be treated as a judgment given on that date by the court addressed.

5. Money judgments entitled to enforcement under this Convention may be enforced by the court addressed either in the currency specified in the judgment or in the local currency at the buying rate in the place where and on the date when enforcement is granted under paragraph (1) of Article 16 or registration for enforcement is effected under paragraph (2) of Article 16.

CHAPTER VI: RECOGNITION AND ENFORCEMENT OF THIRD JUDGMENTS

Article 18

1. Subject to any obligations under a treaty existing at the date of entry into force of this Convention or arising as the result of the accession of further States to such a treaty, a judgment given by a court or other authority of a third State against a person who is a national of a Contracting State or who has a domicile, a place of residence or a place of business, or which is incorported or has its registered office, in a Contracting State shall be refused recognition

or enforcement by the courts of the other Contracting State at the request of the respondent:

(a) where, pursuant to a treaty obligation, the courts of the third state would be precluded from exercising jurisdiction in proceedings against a person having the same connection with the State of the court addressed as the person sued had with the other Contracting State, or

(b) where the judgment would, if it had been given against a person having the same connection with the State of the court addressed, be denied recognition or enforcement on jurisdictional grounds or because proper notice was not given.

2. The provisions of paragraph (1) shall also be subject to any new treaty obligations assumed by a Contracting State where the consent of the other Contracting State has been obtained.

CHAPTER VII: FINAL PROVISIONS

Article 19

This Convention shall not prevail over other treaties in special fields to which both Contracting States are or shall have become Parties.

Article 20

A Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that it will not apply the Convention to judgments given by courts of the other Contracting State in respect of cultural objects which, having been determined by the competent authorities of the declaring Contracting State to be of cultural significance, are imported into the State for temporary display or exhibition pursuant to an agreement entered into between the object's foreign owner or custodian and that State or one or more cultural institutions therein.

Article 21

Either Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that it will not apply the Convention to a judgment that imposes a liability which that State is under a treaty obligation toward any other State not to recognize or enforce. Any such declaration shall specify the treaties containing the said obligations.

Article 22

The Contracting States may, by an exchange of notes, define the meaning of the term "habitual residence" as used in this Convention.

Article 23

1. Either Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that this Convention shall extend to any territory for the international relations of which it is responsible. Any extension of the Convention under this Article shall enter into force three months after the date of the notification, and may be terminated by six months' notice of termination.

2. Termination of the Convention in accordance with Article 25 shall, unless otherwise expressly agreed by both Contracting States, terminate it in respect of any territory to which it has been extended in accordance with paragraph (1) of this Article.

Article 24

Any difficulties which may arise in connection with the interpretation or application of this Convention shall be settled through the diplomatic channel or through any other means agreed by the Contracting States. Any such difficulty which is not settled by agreement may be submitted by either Contracting State to the International Court of Justice for decision upon three months' notice to the other Contracting State.

Article 25

This Convention shall be subject to ratification. Instruments of ratification shall be exchanged at . The Convention shall enter into force three months after the date on which the instruments of ratification are exchanged and shall remain in force for three years. If neither of the Contracting States gives notice to the other, not less than six months before the expiration of the said period of three years, of intention to terminate the Convention, it shall remain in force until the expiration of six months from the date on which either of the Contracting States gives notice of termination.

Article 26

This Convention shall be known as the "United Kingdom/United States Civil Judgments Convention 197 "

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

Done in duplicate at this day of 19 .

For the United Kingdom of Great Britain and Northern Ireland:

For the United States of America:

APPENDIX M

SCHEDULE 4

UNCITRAL ARBITRATION RULES

SECTION I. INTRODUCTORY RULES

Scope of application

Article 1

1. Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice, calculation of periods of time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

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* MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note — Parties may wish to consider adding:

(a) The appointing authority shall be . . . (name of institution or person);
(b) The number of arbitrators shall be . . . (one or three);
(c) The place of arbitration shall be . . . (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be . . .

Notice of arbitration

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and addresses of the parties;

(c) A reference to the arbitration clause of the separate arbitration agreement that is invoked;

(d) A reference to the contract out of or in relation to which the dispute arises;

(e) The general nature of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;

(b) The notification of the appointment of an arbitrator referred to in article 7;

(c) The statement of claim referred to in article 18.

Representation and assistance

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

SECTION II. COMPOSITION OF THE ARBITRAL TRIBUNAL

Number of arbitrators

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the notice of arbitration, the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

Appointment of arbitrators (articles 6 to 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:

(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and

(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having de-

leted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within 30 days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the

presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

Challenge of arbitrators (articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator apointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

Replacement of an arbitrator

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding article shall apply.

Repetition of hearings in the event of the replacement of an arbitrator

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

SECTION III. ARBITRAL PROCEEDINGS

General provisions

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

Place of arbitration

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

Language

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of claim

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Statement of defence

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

Amendments to the claim or defence

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

Pleas as to the jurisdiction of the arbitral tribunal

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purpose of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of

the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

Further written statements

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the period of time for communicating such statements.

Periods of time

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

Evidence and hearings (articles 24 and 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemd necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Interim measures of protection

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Experts

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of their party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

Default

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause of such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under the Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of hearings

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of Rules

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

SECTION IV. THE AWARD

Decisions

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

Form and effect of the award

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Applicable law, amiable compositeur

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Settlement or other grounds for termination

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the

parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

Interpretation of the award

Article 35

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall give in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraph 2 to 7, shall apply.

Correction of the award

Article 36

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

Additional award

Article 37

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

Costs (articles 38 to 40)

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the

appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

Deposit of costs

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the

appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

APPENDIX N

(See page 30)

SECTIONS 9, 10, 11 OF THE UNIFORM INTERPRETATION ACT

REPORT OF NEWFOUNDLAND AND NOVA SCOTIA

In 1974 Professor William S. Charles presented on behalf of the Nova Scotia Commissioners a report on sections 9, 10 and 11 of the *Uniform Interpretation Act,* which was referred to each Commissioner to study and to comment on in 1975. The report was not then printed. At the 1975 Conference the Nova Scotia Report was presented by Professor Charles and the Alberta Commissioners filed a Memorandum of Comments thereon (see 1975 *Proceedings* pages 32, 34, 218-253).

As time did not permit the study that the Nova Scotia report and the Alberta Comments warranted, the consideration of this matter was deferred to the 1976 Conference. In 1976 the matter came up again briefly and it was referred to Newfoundland and Nova Scotia for a report upon the 1974 Report of Nova Scotia and the 1975 Memorandum of Comments from the Alberta Commissioners.

The Nova Scotia Report of 1974-75 (1975 *Proceedings*, page 218) is a lengthy, well-researched and fair report on the matters of concern respecting the interpretation of statutes. It makes certain recommendations, some of which the Alberta Commissioners rejected. In turn the Alberta Commissioners made some suggestions for amendment to the *Uniform Interpretation Act*. In order to deal with this matter as briefly as possible without doing an injustice to the effort of Professor Charles, it seems useful to set out and deal seriatum with each recommendation contained in the summary of recommendations in the Nova Scotia Report of 1974-75.

1. *That courts be permitted to consult headings and marginal notes included as part of enacted legislation.*

At present the *Uniform Interpretation Act* provides in section 11 that marginal notes and headings form no part of the enactment in which they are found but are to be construed as being inserted for convenience of reference only (1973 *Proceedings*, page 279).

The Alberta Comment (1975 *Proceedings*, page 250) noted that the Nova Scotia recommendation agrees with the recommendations

of the United Kingdom Law Commissions in 1969 that a court should be able to consider the provisions of a statute in the context of headings and of marginal notes, though their weight may often be slight. The tentative view of the Alberta Commissioners was that section 11 of the uniform Act should stand, but they wished to hear elaboration of the case for reversing section 11, and perhaps a stronger case could be made for headings than for marginal notes.

On the matter of marginal notes and headings, it should now be noted that the Report of a Committee Appointed by the Lord President of the Council on the Preparation of Legislation (the Renton Committee) considered the recommendations of the United Kingdom Law Commissions in the course of its study. The Renton Committee's terms of reference were

> "with a view to achieving greater simplicity and clarity in statute law, to review the form in which public bills are drafted, excluding considerations of matters relating to policy formulation and the legislative programme; to consider any consequential implications for parliamentary procedure; and to make recommendations."

The United Kingdom Law Commissions recommended a set of draft clauses, one of which read

> "1.(1) In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following:
>
> (a) indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act."

Though this recommendation was opposed, judges told the Renton Committee (Renton Report, page 139) that they agree with this, and that to some extent it represents current practice (except as regards side-notes). While recognizing the force of the objections the Renton Committee considered that the balance was nevertheless in favour of admitting the "indications" mentioned in 1(1)(a). The Committee stated that they did not recommend any departure from the existing practice whereby punctuation and side-notes are not amendable in Parliament, and assumed that in applying the new principle judges would have regard to that practice.

Marginal Notes: Side-noting or marginal noting varies in practice in Canadian jurisdictions. These notes are rarely amended in the legislative process in the legislatures though often edited by officials or proof-readers in course of the legislative process. But what should be noted is that marginal notes are not always found at the bill

stage. The practice varies. Alberta has no side-notes; Manitoba uses the head-note rather than the side-note; New Brunswick has dropped the side-note on bills; Newfoundland uses side-notes and groups them also at the beginning of bills as a summary or analysis of contents.

Side-noting in provinces is, strictly speaking, a duty of the Lieutenant-Governor whose Commission provides that he "is to take care that all laws, assented to by him—shall, when transmitted by him, be fairly abstracted in the margin . . .".

In Canada, with the varied practices concerning side-noting, a uniform rule should not be premised on a state of affairs, such as the British practice or the practice in only a few legislatures. Increasingly, even uniform draft Acts are without side-notes which would be added, in accordance with local practice, after adoption by a province for enactment. In the circumstances we do not favour changing the uniform provision respecting marginal notes.

Head-Notes: While head-notes do not fall expressly within the United Kingdom Commissions, recommendations, clause 1(1)(a) above mentioned obviously contemplates that they be able to be resorted to in the construction of statutes. The uniform provision excludes them along with marginal notes. The Alberta Commissioners felt that a possibly stronger case could be made for headings as an aid to construction than for marginal notes.

The fact is that in Canada some jurisdictions follow the uniform rule and have done so for some time, e.g., Alberta, Newfoundland, while other jurisdictions such as Canada do not. On occasion amendments are made in federal statutes to correct, add or alter headings.

The problem we see with excluding headings from section 11 of the *Uniform Interpretation Act* arises from a consideration of the recommendation itself, viz. "headings . . . included as part of enacted legislation". Headings can arise otherwise than from "enacted legislation"; they can be dropped, inserted, altered or rearranged through the periodic general revisions common in Canada. Could we have an "enacted heading" and a "revision heading"? As in the case of the comment on marginal notes by the Renton Committee, are we to assume that in applying the new principle regarding headings judges would have regard to the practice in revising statutes?

On balance we do not find any overwhelming need to change the uniform provision so far as headings are concerned.

2. *That courts be permitted to consult explanatory memoranda and notes on specific clauses when attached to proposed legislation in Bill form.*

The Alberta Commissioners had no comment on that recommendation, merely noting their interest in the discussion on this subject in the report of the United Kingdom Law Commissions.

But the Renton Committee, while making recommendations about the publication of specially prepared explanatory material to assist in the understanding of bills, thought that "in general such materials should not be declared to be admissible for the purpose of interpretation. To do so would be to create what Professor Reed Dickerson has called a "split-level statute", of which only the primary level would have been fully debated in Parliament, and would, as a distinguished member of the judiciary put it, be asking the courts "to ride two horses, to construe technical draftsmen's language and layman's language".

This view has considerable merit, it is too easy to consider the explanatory material to be the "book" and the statute the "crystal ball"—and why, indeed, "gaze in the crystal ball when you can read the book?" (See reference to Aneurin Bevan's remark in the 1975 *Proceedings* at page 246).

Explanatory material created to inform a legislature is prepared with knowledge of the reactions, likes, dislikes and needs of the legislative body for which it is prepared. If the audience were to be extended to the judiciary the character of the material would change and it would be prepared, as is the legislation, to be as precise and accurate as possible in that other forum. This could well result in less clarity and simplicity in the explanatory material; the audience would have changed for the author so he would write much in the style of the provisions in the bill and for the same end.

The result would most likely be two difficult pieces of writing to consult instead of one, while the legislators would be less well informed by the explanatory material.

3. *That courts be permitted to consult the reports of law reform commissions, royal commissions, parliamentary committees and other fact-finding investigating bodies.*

On this recommendation the Alberta Commissioners had recourse to *Black-Clawson v. Papierwerke* [1975] 2 W.L.R. 513,

to which the 1975 Report of Nova Scotia also had made reference (1975 *Proceedings*, pages 228, 250).

This was strong support for the proposal put forward by Professor Charles in the 1974 Nova Scotia Report. Lords Reid, Wilberforce and Diplock were all agreed that a court could look at the Greer Report which recommended the Act under scrutiny to see the state of the existing law, and the mischief or defect in the existing law that the Greer Report was designed to remove; but they thought that the court could not look at the report to determine the intention of the proposed legislation. Viscount Dilhorne and Lord Simon of Gaisdale held that a wider use could be made of the Greer Report. (See 1975 *Proceedings* at pages 250 and 251 for fuller description of the judicial positions).

The Alberta Commissioners did not have a firm opinion. They found the Reid-Wilberforce-Diplock position very persuasive yet agreed with the opposing argument that it is hard to look at the report for one purpose and close one's eyes for another purpose. They did suggest that the Conference would receive help by examining the draft clauses recommended by the United Kingdom Law Commissions. Clause 1(1)(b) provides that a court may consider "any relevant report of a Royal Commission, Committee or other body which has been presented or made to or laid before Parliament or either House before the time when the Act was passed".

Clause 1(1)(d) of those recommendations provided that a court may consult "any other document bearing upon the subject matter of the legislation which had been presented to Parliament by command of Her Majesty before that time".

The Renton Committee considered these recommendations and concluded that they could not agree with them. The position of that Committee was stated as follows:

> "19.23 We appreciate that there is a difference of judicial opinion as to the extent to which such materials as are referred to in clause 1(1)(b) and (d) are at present admissible as aids to interpretation. We think, however, that the unrestricted admission of such materials would place too great a burden on litigants and their advisers, and indeed on the courts, and would create even greater difficulties for lawyers trying to advise their clients before a specific controversy had arisen. It would certainly do nothing to make statutes more immediately intelligible to the lay public, and it might greatly lengthen court proceedings. From the draftsman's point of view it seems at least possible that the desire for greater precision in order to avoid any possible ambiguity arising from comparison with these extensive

materials would produce more rather than less complicated provisions. We consider, therefore, that it would be preferable to leave it to Parliament, if it saw fit, to declare in the Act that specified material outside the Act (and not admitted by clause 1(1)(c)) should be admissible for the purpose of interpreting it." (Renton Report, page 142).

[The reference to clause 1(1)(c) is to any relevant treaty or other international agreement which is referred to in an Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time.]

On balance the view taken by the Renton Committee seems reasonable and more conducive to the improvement of the language of statutes.

4. *That the present rule excluding legislative history be amended to permit counsel to introduce in evidence statements made by members of both the federal and provincial legislatures during legislative discussion of proposed legislation and including statements made during discussion and debate in committee.*

The Alberta Commissioners' comment on this recommendation is found in the 1975 Proceedings at pp. 252-253. In conclusion they state "Our leaning is in favour of Professor Corry's view that on balance the present rule is sound."

The Renton Committee summed up their feelings with the observation "Our misgiving about the unrestricted admission of pre-legislative materials apply *a fortiore* to the admission of the records of Parliamentary proceedings on the Bill; though we recognize that it would be possible for Parliament to declare these to be admissible, . . . we would strongly urge that this should never be done."

Recommendation No. 4 was the one that brought forth the cry of anguish from a legislative draftsman in the discussions at the Conference in 1975 and the recounting of the "chamber of horrors" described in respect of legislative history in the United States in *Professionalizing Legislative Drafting — The Federal Experience* (Edited by Reed Dickerson and published in 1973 by the American Bar Association).

The practice of creating legislative history appears to be a fact of the draftsman's life in the States. It is touched upon lightly but accurately in the remarks of Judge Harold Leventhal (circuit Judge for the United States Court of Appeals for the District of Columbia

Circuit) when addressing the National Conference on Federal Legislative Drafting in the Executive Branch (*Professionalizing Legislative Drafting* p. 30):

> "So far as the draftsman is concerned, therefore, he must not only have an intelligible scheme for the statute so that it may adequately reflect the purpose of the legislature but also be realistic about what is to be included in the legislative history. And, if there is communication, as I hope is generally the case, between the legislative draftsmen in the executive department and their counterparts on the Hill—such as Mr. Littell suggested with Mr. Saperstein —I hope it carries over not only to the wording of the bill and the question that is raised with respect to the Conference Committee reports someday to make sure that what was done in haste has at least carried out the consensus of the meeting, but also to the composition and preparation of the Committee reports, which are the prime elements of legislative history.
>
> "Of course, you executive draftsmen are well acquainted with the possibilities of amendments and with prepared questions and answers for insertion in the Congressional Record by debate to take care of ambiguities that would otherwise appear, and other techniques of the craft. I needn't teach any of you to suck eggs. The point that I am concerned with is that apart from these little tricks, just clear statement of the legislative objectives—which are going to be the concern of the court whatever is done in the text—deserves your careful attention."

Anyone who is familiar with the problems of preparing legislation for government is aware of the little time available to draft adequately in the normal case. It is difficult to obtain precision, clarity, and simplicity in legislative language at any time but if one were called upon to anticipate the need for and prepare an adequate "legislative history" at the same time, inevitably the legislative history would supersede the statute in importance in the mind of the draftsman (the economic equivalent of "bad money driving out good money") and the statutes would continue to take on the characteristics of a crystal ball while efforts were spent on preparing the "book" for the court to read. One might even end up only looking at the statutes if the legislative history were ambiguous! (See *Citizens to Preserve Park Inc. v. Volpe*, U.S. 402, 214 n. 29 (1971).)

If this expenditure of time on the creation of legislative history is thought to be far-fetched, listen to Mr. Edward O. Craft in 1971 to the same group that Judge Leventhal addressed (*op. cit.* p. 143):

> EDWARD O. CRAFT: "I anticipate that I will need to revise the remarks I am about to make!
>
> "I hadn't intended to comment on revising and extending remarks, but your admonition to speak freely and then revise our remarks

reminds me of an incident which occurred before the committee staff system was created as a result of the Legislative Reorganization Act of 1946. Before that time members of the Office of the Legislative Counsel were frequently called upon to perform functions now performed by members of the professional staffs to the committees. After working on a bill with a committee, I was called upon by the chairman of the committee to assist in correcting, for the Congressional Record, his remarks on the floor of the House which he had made during the consideration of the bill. In response to a question from the ranking minority member, which had been asked for the purpose of creating legislative history, the chairman had responded "no" when the response should have been "yes". After considering the question and answer as recorded in the transcript prepared by the official reporters of debates the chairman decided that both the question and answer should be revised. He called the member who had asked the question and the two of them instructed me to correct both their remarks for the Congressional Record. As a result, according to the Congressional Record, as printed, the ranking minority member of the committee asked a question to which the chairman responded "yes" rather than "no". In addition, the Record contained additional remarks by the chairman explaining his answer."

It is difficult to see that the public good is better served by permitting legislative history to be consulted in aid of the interpretation of statutes, if the statutes themselves become more difficult to understand as they well might in the circumstances described above.

Nova Scotia's Section 8(5)

In the course of commenting on the 1974 report the Alberta Commissioners thought "that the Conference should consider Nova Scotia's section 8(5) . . . it does permit the court to consider the occasion and necessity for the enactment, the circumstances existing at the time it was passed, the mischief to be remedied, the object to be obtained, the former law and the consequences of a particular interpretation". Then they refer to section 15 of the *Uniform Statutory Construction Act* in the United States (1975 Proc. p. 252).

Section 8(5) of the N.S. *Interpretation Act* reads as follows:

"(5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:

(a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;

(c) the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation;
(g) the history of legislation on the subject."

[In the context of this report the marginal note to this provision is interesting. It states "All Acts remedial and to be construed as such"!]

The provision is subject to a certain ambiguity and appears to be a hybrid developed from the predecessor of Uniform section 11 and section 15 of the U.S. Uniform provision. However the U.S. provision applies "if a statute is ambiguous" and has other interesting differences. Section 15 is quoted again here for easy comparison:

"15. If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:
(1) the object sought to be attained;
(2) the circumstances under which the statute was enacted;
(3) the legislative history;
(4) the common law or former statutory provisions, including laws upon the same or similar subjects;
(5) the consequences of a particular construction;
(6) the administrative construction of the statute; and
(7) the preamble."

The Nova Scotia provision seems to make it mandatory that an enactment shall be interpreted to ensure the attainment of its objects by considering *inter alia* those matters set out. It would have been thought that if an enactment were ambiguous, those matters would be considered to the extent necessary to find the legislative intent, but to be required to do so in every case, as Nova Scotia's provision appears to do, does not seem consistent with the approach that when the language is clear and unambiguous there is no need to search further for legislative intent.

The recent application by the Nova Scotia courts of section 8(5) in *Marble Center Ltd. v. Kenney Construction Co. Ltd.* and *R. v. Wildsmith* do not appear to have provided the court with much assistance. *Marble Center Ltd.* (1972) 5 N.S.R. (2d) concerns a question of interpretation of the *Mechanics Lien Act*. At pages 478 and 479 of that report we find the following:

"*The Interpretation Act*, R.S.N.S. 1967, c. 151, s. 8 gives the general rule that ought to be applied when a question of statutory construction arises, i.e., when the text in question cannot be given its literal meaning according to the common understanding of language and the accepted rules of grammar, the "golden rule". This can happen because the text has no literal meaning—it is ambiguous or otherwise obscure, or does not make sense—or because it is in

conflict with some enactment or is absurd in the legal sense. Our provision is much more detailed than the Uniform Act:

"(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering, among other matters:

(a) the occasion and necessity for the enactment;
(b) the circumstances existing at the time it was passed;
(c) the mischief to be remedied;
(d) the object to be attained;
(e) the former law, including other enactments upon the same or similar subjects;
(f) the consequences of a particular interpretation;
(g) the history of the legislation on the subject.

"Some of these considerations are hardly discoverable by me with the means at my disposal at this date. Mechanics' liens were in use in the United States before they were adopted in Canada and the initial Acts in this country show some sophisticated legal devices from the first. The particular provision to be interpreted in the instant case is the result of the interaction of various legislatures and courts in Canada, but it may have had its remoter origins in the United States or elsewhere. It is only by considering the history of the legislation on the subject and its interaction with litigation that I can hope to recover any of the elements specified in Interpretation Act, s. 8(5)."

The *Wildsmith* case concerns an interpretation of the Nova Scotia *Gasoline Licensing Act*. The case is reported in (1973) 8 N.S.R. (2d). At page 70 of the report, we find the following comments by the judge:

"There is much more latitude, however, in exploring the background of legislation where the court is seeking to determine the purpose of the legislation and this is the first step it must take where any question of interpretation arises. The governing rule with respect to Nova Scotia's Statutes is that provided by Interpretation Act, R.S.N.S. 1967, c. 151, s. 8(5) which provides ample scope for exploring and applying the purpose of the Act. In the instant case, however, while the evidence indicates that the Nova Scotia Gasoline Retailers Association promoted the legislation in order, at least, to shake off promotions forced on them by the wholesalers, it does not show that the purpose was not also to eliminate competition in this kind of give-away between retailers and there is nothing in the Act to suggest otherwise. Indeed, the Act on its face applies to both situations and I am certainly not prepared to take judicial notice that the situation was more limited than that. The purpose of the Act as expressed in s. 13(1) already cited, is certainly wide enough to apply to both clauses of competition. (I have not cited any cases on these points because the textbooks and reports are replete with them)."

The result of the court's attempt to apply section 8(5) to the fact situation in the first case leads the court to determine that it is impossible for it to conform with the subsection while in the second case, the court limits the subsection to determining the purpose of the Act.

On balance one would find it difficult to recommend the adoption of Nova Scotia's section 8(5) in preference to the U.S. Uniform section 15—nor do we find justification for replacing our section 11 by that U.S. provision or adding it to the *Uniform Interpretation Act*. If "legislative history" is taken to be the Nova Scotian "history of legislation on the subject", the matters set out would be used if necessary by a court to find legislative intent, without the need to permit it by statute to do so.

In the circumstances we recommend no change in sections 9, 10 and 11 of the *Uniform Interpretation Act*.

James W. Ryan
Graham D. Walker

St. John's & Halifax
15 August 1977

APPENDIX O

(See page 30)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

PRINCE EDWARD ISLAND REPORT

The Prince Edward Island delegates submit their report on judicial decisions reported in 1976 and early 1977 that affect Uniform Acts of the Conference. This report is prepared pursuant to resolution (1976 *Proceedings*, page 27).

The decisions are listed in the annexed schedule in alphabetical order of the Uniform Act or subject considered.

Raymond Moore
Horace B. Carver
Wendall MacKay
of the Commissioners for P.E.I.

Charlottetown
August 1977

SCHEDULE

ASSIGNMENT OF BOOK DEBTS

Canadian Imperial Bank of Commerce v. *Sitarenios et al.* (1977) 14 O.R. 345 (Ont. C.A.).

Assignment of book debts securing loan from bank held not to constitute fraudulent preference.

BILLS OF SALE

Royal Bank of Canada v. *College Mercury Sales Ltd.* (1977) 72 D.L.R. (3d) 609 (Alta. C.A.).

Construction of section 13 of the Bills of Sale Act, R.S.A. 1970, c. 29.

A collateral chattel mortgage of a car was executed and registered in British Columbia where no affidavit of *bona fides* is required. The car was removed to Alberta and the chattel mortgage was registered there. The question for determination was whether the registration should be accompanied by an affidavit of *bona fides* as would be required for chattel mortgages executed in Alberta.

The court held that the mortgage was validly registered and an affidavit of *bona fides* was not essential.

The court compared the words of section 13 (relating to mortgages executed outside the province) which required filing of "the mortgage and of all affidavits and documents accompanying or relating to the mortgage" with those of section 10(1) (relating to mortgages executed in the province) which required filing of "such affidavits and documents as are required by this Act". The difference in wording was such as to denote a change in meaning.

The conclusion was supported by reference to section 14 of the Conditional Sales Act, R.S.A. 1970, c. 61, a cognate Act, where similar wording to that employed in section 13 of the Bills of Sale Act is used. There is no requirement of an affidavit for conditional sales executed in Alberta and therefore the reference to affidavits can only be equated with those accompanying the agreement from its place of origin.

CONTRIBUTORY NEGLIGENCE

Dominion Chain Co. Ltd. v. *Eastern Construction Co. Ltd.* (1976) 12 O.R., (2d) 201 (C.A. Wilson J.A. dissenting).

Construction of s. 2(1) of the Negligence Act, R.S.O. 1970, c. 296.

Section 2(1) of the Negligence Act, R.S.O. 1970, c. 296 provides "where damages have been caused or contributed to by the fault or neglect of two or more persons . . . each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent".

The court held that though this section applies only to tortfeasors an architect, engineer or builder may be liable in tort as well as in contract for negligent performance of his contractual duties. The fact that there is a contractual relationship between the parties does not exclude the coexistence of a right of action founded on negligence.

However it is essential for the application of the section that the person from whom contribution is sought would himself, if sued, have been liable to the person suffering the damage.

Per Wilson, J.A. (dissenting). An action against an architect, engineer or builder for negligent performance of his contractual duties sounds only in contract and the Negligence Act does not apply.

Dabous v. *Zuliani et al.* (1976) 12 O.R. (2d) (C.A. Wilson J.A. dissenting).

An appeal by a co-defendant architect from the dismissal of the plaintiff's claim against the co-defendant builder was allowed on the grounds that both defendants were tortfeasors to whom the contribution provisions of the Negligence Act, R.S.O. 1970, c. 296 applied.

Teno et al. v. *Arnold et al.* (1976) 11 O.R. (2d) 585 (C.A.).

A mother who fails to take reasonable and practicable precautions to prevent her child from wandering on the highway may be liable to the child in negligence and consequently liable to make contribution.

CONDITIONAL SALES

Canadian Acceptance Corp. Ltd. v. *Melanson* (1976) 14 N.B.R. 279 (N.B.S.C.).

Construction of s. 14(4) of the Conditional Sales Act, R.S.N.B. 1973, c. 15, s. 14.

Before a plaintiff can seek a deficiency under a conditional sales contract there must be strict compliance with section 14. A notice of sale which fails to credit the buyer with unearned finance charges is defective.

FATAL ACCIDENTS

Collins and Collins v. *Burge, Grant and the Charlottetown Hospital* (1977) 11 Nfld. & P.E.I.R. 520 (P.E.I.C.A.).

It is not necessary for a plaintiff to plead the Fatal Accidents Act or Survival of Actions Act so long as the pleadings and subsequent proof set out and establish the circumstances that bring the action within the statute.

LIMITATION OF ACTIONS

Protective Holdings Ltd. v. Maber (1975), 63 D.L.R. (3d) 547 (Alta. S.C.).

The Limitation of Actions Act, R.S.A. 1970, c. 209, s. 5(1)(c)(i) (section 3(1)(f) of the Uniform Act), requires actions for the recovery of money to be commenced within six years after the cause of action arose. A demand note was given more than six years before the action in it was commenced. In the interval a collateral mortgage was executed with the first payment thereunder to be made within the limitation period on the note, although there was no evidence of any payment under the mortgage. An action on the note was dismissed. The promissory note was payable on demand and the cause

of action arose when the note was made. The making of the mortgage did not suspend or defer the running of the statute.

Denton v. *Jones et al.* (No. 2) 1977, 14 O.R. (2d) 382 (Ont. High Court).

After the expiry of all relevant limitation periods an application to amend the statement of claim to allege trespass, in addition to negligence as originally pleaded, was permitted on the grounds that the pleading of an alternative ground for relief arising out of the same facts does not constitute the raising of a new cause of action and there was in any event no possibility of prejudice to the defendant.

Basarsky v. *Qinlan et al.* (1972) S.C.R. 380 applied.

PRESUMPTION OF DEATH

Re Harlow (1977) 13 O.R. (2d) 760 (Ont. C.A.).

The intestate died on July 18, 1966. She was survived by a sister who died on August 10, 1968. There had been a brother several years younger than the intestate and exhaustive inquiries were made after the intestate's death to see if any trace of him could be found. His sisters had last heard from him at some time in the period 1936 to 1941, at which time he was thought to be not well and perhaps in some kind of hospital or institution. All enquiries proved fruitless. The sister was entitled to at least a half-interest in the intestate's estate, and it was paid to her. The other half was paid into court. On application by the sister's estate for payment out of court it was held that the brother could be presumed to have been dead in 1966 when the intestate died. It is consistent with the most frequently expressed formulation of the presumption of death to declare that a particular person may be presumed to have died before a certain date. If the precise date of death is material, which in this case it was not, that becomes a matter of proof and may depend on who bears the onus of proof.

In the circumstances the Survivorship Act, R.S.O. 1960, c. 391 had no application since there was no uncertainty whether the brother survived the intestate.

PROCEEDINGS AGAINST THE CROWN

Amax Potash Ltd. et al. v. *Province of Saskatchewan* (1976) 11 N.R. 222 (S.C.C.).

Construction of s. 5(7) of the Proceedings Against the Crown Act, R.S.S. 1965, c. 18.

An action for a declaration that a provincial tax statute is *ultra vires* and for the return of monies paid under protest thereunder is a proceeding subject to the Proceedings Against the Crown Act notwithstanding that merely a declaratory judgment is sought.

A provision precluding suit against the Crown for acts done pursuant to an *ultra vires* statute is itself *ultra vires* as an attempt to do indirectly what could not be done directly, viz., to violate the distribution of constitutional authority under the British North America Act.

Roberts et al. v. *Barbosa et al.* (1976) 12 O.R. (2d) 260 (Ont. High Court).

This case which involved construction of s. 30(9) of the Highway Improvement Act, R.S.O. 1970, c. 201 would appear to have general application to proceedings against the Crown. Where a defendant makes a third party claim against the Crown and a statutory provision provides that an action against the Crown may be tried by a judge only, a jury notice may be set aside on the grounds of efficiency for the purpose of consolidating the actions.

RECIPROCAL REINFORCEMENT OF MAINTENANCE ORDERS

Attorney General for Alberta v. *Allard* (1977) 1 W.W.R. 335 (Alta. S.C.).

A decree *nisi* granted in Manitoba ordered the respondent to pay maintenance for his wife and children; the decree was registered in Alberta under the Reciprocal Enforcement of Maintenance Orders Act; a provincial judge in Alberta varied the order by reducing the amount payable. An application to quash the order reducing the payments was allowed. There is no jurisdiction in a family court in Alberta to vary an order for maintenance provided for in a divorce decree. The wording in s. 3(2) of the Reciprocal Enforcement of Maintenance Orders Act does not entitle a court to vary a maintenance order made under s. 11 of the Divorce Act; only the court which originally made the maintenance order can vary or rescind the order. Kirby J. applied the reasoning in the earlier B.C. Court of Appeal decision in *Rodness v. Rodness* (1976) 3 W.W.R. 414.

It would appear that the words "all proceedings may be taken on the (registered) order as if it had been an order originally obtained in the court in which it is so registered" in section 3(2) of the Uniform Reciprocal Enforcement of Maintenance Orders Act, when applied to an order granted as corollary relief under the Divorce Act,

must be construed as limited to enforcement of the order and do not confer power to vary or rescind the order.

Pastowysty v. *Goreman* (1969) 69 W.W.R. 592 (Alta. C.A.) and *Rodness* v. *Rodness* (1976) 3 W.W.R. 414 (B.C.C.A.) applied. See also *Hearn* v. *Hearn*, 25 R.F.L. 314 (not cited in the Allard case).

SURVIVORSHIP

(See *Re Harlow* listed under Presumption of Death.)

TESTATOR'S FAMILY MAINTENANCE

Re Buchanan (1976) 16 N.S.R. (2d) 262 (N.S.S C.).

The applicant under the Testator's Family Maintenance Act, R.S.N.S. 1967, c. 303 had been brought up by the testator and his wife from the time she was ten days old until she married at age 19.

She was not the natural child of the testator or his wife nor had she been adopted by either or both of them. The testator made no provision for her in his will.

McLellan C.C.J. considered the definitions of "child" and "dependant" in section 1 of the Act. While he considered that she could come within the definition of "child" (which is an inclusive definition) he held that she was not a "child of a testator" within the definition of "dependant". "I am unwilling to imply the necessary degree of relationship between testator and child to qualify the latter as a dependant solely from the fact that the testator stood *'in loco parentis'* to her."

VARIATION OF TRUSTS

Re Tweedie Estate (1976) 3 W.W.R. 1 (B.S S.C.).

Construction of sections 2(1) and 2(2) of the Variation of Trusts Act (1968) (B.C.), c. 57.

The deceased as part of her will created a trust fund in the amount of $10,000 with the annual income to be paid to the applicant. Upon the applicant's death the fund was to be divided between issue of the applicant, and if no issue then to the sister of the applicant or her issue. The applicant has a 33-year-old unmarried daughter, and the sister has two children and five grandchildren. The applicant desired to receive the trust fund in full and use the amount to discharge a bank debt. The applicant's daughter and sister and the sister's two children consented to the application.

The trust could not be terminated under the general law of trusts as all the beneficiaries were not ascertained but the court exercised its power under s. 2(1) of the Act to consent for those unable to consent. The word "benefit" in s. 2(2) should receive a very liberal interpretation where the likelihood of unborn realizing a financial benefit is small.

The court found that a real psychological, emotional and family benefit would result and as the most probable heirs consented, the application was approved.

WAREHOUSE RECEIPTS

Evans Products Ltd. v. *Crest Warehousing Ltd.* (1976) 5 W.W.R. 632 (B.C.S.C.).

The defendant, a warehouseman, received a number of crates of plywood for storage on behalf of the plaintiff. Because the crates were stored too close to electric heaters a fire resulted and damage was done to the plywood. A clause in the warehouse receipt issued by the defendant purported to limit his liability "to the actual value of the loss or damage of the stored goods and in no case shall the liability exceed $50.00 on any one package or stored unit unless the storer, at or prior to the time the goods are placed in storage has declared in writing a value in excess of $50.00 on such package or stored unit". The plaintiff did not declare a higher value.

It was held that the defendant could not rely on the clause to limit his liability because it impaired the obligation cast on the defendant by section 14 of the Warehouse Receipts Act, R.S.B.C. 1960, c. 404 "to exercise such care and vigilance in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances".

Hart v. *Pennsylvania Railroad* (1884) 112, U.S. 717 considered.

WILLS

Goldfield, Shore and Canada Trust Company v. *Koslowsky* (1976) 2 W.W.R. 553 (Man. Q.B.).

"Wife" when used in a will means wife at the time of execution notwithstanding the subsequent divorce of the testator and his wife.

Specht et al. v. *Archibald Estate* (1976) 16 N.S.R. (2d) 354 (N.S.S.C.).

The existence of a will is a precondition to an application by dependants for provision under the Testator's Family Maintenance Act, R.S.N.S. 1967, c. 303, s. 2.

APPENDIX O

A widow who had made a will in favor of her children subsequently remarried and failed to make a new will. It was held that the marriage revoked the existing will by virtue of section 16 of the Wills Act, R.S.N.S. 1967, c. 340. The application by her dependant children therefore failed and her estate fell to be administerd under the rules of intestate succession.

APPENDIX P

(See page 31)

PROTECTION OF PRIVACY: COLLECTION AND STORAGE OF PERSONALIZED DATA BANK INFORMATION

REPORT OF F. E. GIBSON, Q.C.

At the 1976 meeting of the Uniform Law Section, it was resolved that the writer should distribute to members of the Section copies of any successor to Bill C-72 entitled *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, as introduced in the First Session of the Thirtieth Parliament, and that the writer should report further on developments to the 1977 meeting.

Copies of Bill C-25 in the Second Session of the Thirtieth Parliament, which received first reading on November 29, 1976, were distributed to members of the Section on December 2, 1976. Since that time, Bill C-25 which bears the same title as its predecessor, Bill C-72, and which is more briefly entitled the *Canadian Human Rights Act*, has been fully considered by both the House of Commons and the Senate. It received Royal Assent on July 14, 1977 and is now Chapter 33 of the statutes enacted at the Second Session of the Thirtieth Parliament.

Section 2 of the *Canadian Human Rights Act* outlines the purpose of the Act. That section reads in part as follows:

> "2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:
>
> . . . . . .
>
> (b) the privacy of individuals and their right of access to records containing personal information concerning them for any purpose including the purpose of ensuring accuracy and completeness should be protected to the greatest extent consistent with the public interest."

Part IV of the Act is intended to give effect to this principle. In general terms, it provides that every individual is entitled to ascertain what records concerning him that are used in decision making processes relating directly to him are contained in federal information banks, to ascertain the uses to which those records are put after the coming into force of the Part, to examine those records or copies of them, to request correction of the contents and, where a requested

correction is not made, to require a notation to be made on the record of the requested correction. In addition, the Part provides that an individual is entitled to be consulted and must consent before personal information concerning him that was provided by him to the government for a particular purpose is used or made available for use for an unrelated purpose unless diversion of the information to the unrelated use is authorized by law.

There are exceptions to the general rights provided by the Part. An overriding exception provides that nothing in the Part authorizes the release of information to any person or the examination of information by any person in contravention of any federal-provincial agreement under which information is made available in confidence for inclusion in a federal information bank.

A key to the effectiveness of the Part is an index of federal information banks that will be published and distributed under the authority of the Part. Publication of information concerning a particular information bank in the index and any of the rights referred to earlier in respect of information in such an information bank, other than the right to be consulted on diversion of information to a new use, may be restricted by a Minister of the Crown, with the approval of the Governor in Council where,

> ". . . in the opinion of the appropriate Minister, disclosure of information contained in the information bank or relating thereto
>
> (a) might be injurious to international relations, national defence or security, or federal-provincial relations; or
>
> (b) would be likely to disclose information obtained or prepared by any (federal) government institution that is an investigative body
>
> (i) in relation to national security,
>
> (ii) in the course of investigations pertaining to the detection or suppression of crime generally, or
>
> (iii) in the course of investigations pertaining to particular offences against any Act of Parliament."

Further, a Minister of the Crown may restrict the rights referred to earlier in respect of a particular record in an information bank on either of the grounds mentioned above or because knowledge of the existence of the record or of information in the record would disclose a confidence of the Queen's Privy Council for Canada, might have an injurious effect on matters relating to an individual under sentence for an offence against an Act of Parliament, might affect the privacy of another individual or might impede the functioning of a court of law or like body or disclose legal opinions or advice given to a gov-

ernment institution or privileged communications between a lawyer and client in a matter of government business.

Finally, rights can be restricted in respect of all records in an information bank for reasons of economy for a limited period of time. If, at the expiration of that time, the restrictions are not lifted, very significant limitations on the use of information in the bank will apply.

One of the Commissioners of the Canadian Human Rights Commission will be designated as Privacy Commissioner with responsibility to investigate and report on complaints from individuals who allege that they are not being accorded the rights to which they are entitled under Part IV. Where the Privacy Commissioner concludes that a complaint is justified, he will be required to so notify the appropriate Minister of the Crown and will have authority to request that notice be given to him of any action taken to implement any recommendations made by him that arise out of the complaint. It should be noted, however, that neither the Privacy Commissioner nor any court is empowered to order any action to be taken in relation to such a complaint.

A Minister, who will likely be the President of the Treasury Board, will be designated for the purposes of Part IV. Among other matters, he will be responsible for the preparation and distribution of the index of federal information banks referred to earlier. The preparation of this index and of regulations under Part IV is currently taking place in the Treasury Board Secretariat in consultation with other government departments and agencies. It is anticipated that this work and other administrative arrangements will be completed in time to allow for the proclamation of Part IV on or about January 1, 1978.

Subsection 61(1) in Part IV will require the Privacy Commissioner to carry out or cause to be carried out such studies as are referred to him by the Minister of Justice concerning the extension to stores of records within the control of non-governmental bodies within the legislative authority of Parliament of the principle that the privacy of individuals and their right of access to records containing personal information concerning them for any purpose including the purpose of ensuring accuracy and completeness should be protected to the greatest extent consistent with the public interest. Commissioners and representatives may wish to consider whether or

not it would be desirable to undertake a study of uniform legislation to give general effect to this principle for stores of records within the control of non-governmental bodies within the legislative authority of the provincial legislatures.

F. E. Gibson

Ottawa
26 August 1977

APPENDIX Q

(See page 31)

PROTECTION OF PRIVACY: CREDIT AND PERSONAL DATA REPORTING

REPORT OF NOVA SCOTIA AND ONTARIO

At the 1976 meeting of the Conference the working paper presented by the Ontario Commissioners was considered together with the proposed draft Act. The draft Act considered appears at page 85 of the *1975 Proceedings* and the working paper at page 227 of the *1976 Proceedings*.

The matter was then referred under the following resolutions:

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.

Attached as Schedule 1 to this Report is a summary of the conclusions reached by the 1976 meeting.

Attached as Schedule 2 to this Report is a draft Act incorporating the instructions.

The participation of the Quebec delegates in this Report has been precluded by the death of Yves Caron who was carrying the matter for the Quebec delegates. This loss has handicapped your committee.

Arthur N. Stone, Chairman
Graham D. Walker for the
Nova Scotia Commissioners

29 June 1977

APPENDIX Q

SCHEDULE 1

SUMMARY OF INSTRUCTIONS BY THE 1976 MEETING

References are to the draft beginning at page 85 of the 1975 Proceedings unless "new draft" is indicated.

1. s. 1(1)(*f*)—Act to apply to reports about persons and corporations with authority to select exemptions by regulation. (Definition limiting "person" deleted in new draft and see s. 25(*a*) of new draft.)

2. s. 1(1)(*i*)—"report" to include showing or revealing the content of a file (s. 1(1)(*h*) of new draft).

3. s. 7(1)(*b*)(v)—to include a by-law of a municipality (s. 7(1)(*b*)(v) of new draft).

4. s. 7(3)—municipal governments to have same access as other governments (s. 7(3) of new draft).

5. s. 8(2)(*b*)—to permit repository to be in Canada or the enacting province (s. 9(1)(*b*) of new draft).

6. s. 8(3)—All restrictions are to apply to reports and certain ones left to be selected are to apply to the files (s. 9(3) of new draft).

7. s. 8(3)(*a*)—Only personal information required to be corroborated (s. 9(2)(*a*) of new draft).

8. s. 8(4)—Amend by inserting "a reference to" after "unless" in the second line and replace "by" in the fourth line with "from" (s. 9(4) of new draft).

9. s. 8—Medical information may only be reported with consent (s. 9(2)(*j*) of new draft) and agency to be subject to patient's privilege re medical information and consent may be limited (s. 10 of new draft).

10. s. 12—To adopt principle in Nova Scotia—s. 13(3) allowing reports from outside province but giving recipient certain obligations. Also to retain s. 12. This has been done by imposing the obligation only where report is from a non-reciprocating province (s. 16(3) of new draft and s. 12 deleted).

11. s. 13(1)(*b*)—Sources of all information to be disclosed (s. 15(1)(*b*) of new draft). Informant to be notified that he may be disclosed as source re personal information (s. 11 of new

draft) and failure to notify is an offence but not to affect a civil action. (The latter part re civil action does not now make sense to me so nothing has been done.)

12. s. 13(2)—To not withhold medical information from subject on doctor's request if the patient specifically requests it in writing (s. 15(2) of new draft).

I have also changed "circumstantial information" to "personal information" and changed the title to "Information Reporting Act".

SCHEDULE 2

UNIFORM INFORMATION REPORTING ACT

(as Adopted and Recommended for Enactment)

Definitions

1. In this Act

(*a*) "employment purposes" means the purposes of taking into employment, granting promotion, reassigning employment duties or retaining as an employee;

(*b*) "file", when used as a noun, means all of the information pertaining to a person that is recorded and retained by a reporting agency, regardless of the manner or form in which the information is stored;

(*c*) "information of record" means information about a person as to his name, other names by which he is or has been known, age, place of residence, previous places of residence, marital status, spouse's name and age, number of dependants, particulars of education or professional qualifications, places of employment, previous places of employment, any name under which he carries or has carried on business, income and assets, repayment history, outstanding credit obligations, cost of living obligations, medical information and any matter of public record concerning the person and any information voluntarily supplied to a reporting agency by the person;

(*d*) "medical information" means any information obtained from a medical practitioner, chiroprac-

tor, psychologist, psychiatrist or hospital, clinic or other medically related facility in respect of the health or condition of a person;

(*e*) "personal information" means information, other than information of record, about the character, health habits, physical or personal characteristics or mode of living of a person, or about any other matter concerning the person;

(*f*) "Registrar" means the Registrar of Information Reporting Agencies;

(*g*) "regulations" means the regulations made under the authority of this Act;

(*h*) "report" means a written, oral or other communication or the revealing by a reporting agency of information of record or personal information, or both, pertaining to a person for consideration in connection with a purpose set out in section 7;

(*i*) "reporting agency" means a person who for gain or profit furnishes reports.

Agreements to waive

2. This Act applies notwithstanding any agreement or waiver to the contrary.

Registrar

3. There shall be a Registrar of Information Reporting Agencies appointed (by the Lieutenant-Governor in Council).

Registration of reporting agencies

4. No person shall conduct or act as a reporting agency unless he is registered by the Registrar under this Act.

Registration

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where

(*a*) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business;

(*b*) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity;

(*c*) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity; or

(*d*) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Conditions of registration

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the *(tribunal holding hearings)* or prescribed by the regulations.

Not transferable

(3) A registration is not transferable.

Refusal to register

6. (1) The Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is not entitled to registration under section 5.

Revocation and refusal to renew

(2) The Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the registrant is in contravention of this Act or the regulations or is in breach of a term or condition of the registration.

(Each jurisdiction is to insert its own procedures for hearings and appeals respecting the refusal or revocation of registrations.)

To whom reports may be given

7. (1) Subject to section 15, no reporting agency and no officer or employee thereof shall knowingly furnish any information about a person from the files of the reporting agency except in a report that there is reason to believe is intended to be used in connection with

(*a*) the extension of credit to or the purchase or collection of a debt of the person;

(*b*) the entering into or renewal of a tenancy agreement with the person;

(*c*) employment by or of the person;

(*d*) underwriting of insurance involving the person;

(*e*) the person's eligibility, for any matter under a statute, regulation or by-law if the information is relevant thereto;

(*f*) a direct business transaction involving the person.

Information as to identities

(2) Notwithstanding subsection (1), a reporting agency

(*a*) may furnish any information from its file about a person in accordance with the written instructions of that person; and

(*b*) may furnish identifying information respecting any person, limited to his name, address, former addresses, places of employment and former places of employment, to any department of the Government of (province) or of Canada or of any province of Canada or any municipal corporation in Canada.

Sale of files

(3) A reporting agency shall not sell, lease or transfer proprietary rights to its files or any of them except to another reporting agency registered under this Act.

Who may obtain reports

(4) No person shall knowingly obtain any information from the files of a reporting agency respecting a person except in accordance with subsection (1).

Procedures of agencies

8. Every reporting agency shall adopt all such procedures as are reasonable to ensure the greatest possible accuracy and fairness in the contents of its reports.

Information not to be included in report

9. (1) A reporting agency shall not report information unless it is

(*a*) stored in a form capable of being produced for the purposes of section 15; and

(*b*) extracted from information appearing in files stored or collected in a repository located in (province) or elsewhere in Canada.

Idem

(2) A reporting agency shall not include in a report about a person

(*a*) personal information based on evidence that is not corroborated;

(*b*) information as to a judgment after seven years after the judgment was given, unless the creditor confirms in writing that it remains unpaid in whole or in part, and the confirmation appears in the file, or information as to a judgment fully paid;

(*c*) information as to a judgment against the person unless mention is made of the name and address of the judgment creditor as given at the date of entry of the judgment and the amount;

(*d*) information as to a bankruptcy after five years from the date of discharge therefrom;

(*e*) information as to any writ, judgment, collection or debt that appears to be statute barred by the expiration of time unless it is accompanied by evidence in the file that recovery is not so barred;

(*f*) information as to the payment or non-payment of a lawfully imposed fine after seven years;

(*g*) information as to a conviction for an offence after seven years from the date of the conviction, but information as to a conviction for an offence shall not be reported if at any time it is learned that after conviction a pardon has been granted;

(*h*) information as to a proceeding that was commenced against the person more than twelve months previously unless, when reported, the current status of the proceeding has been ascertained and is included;

(*i*) information regarding any charge laid against the person for an offence;

(*j*) medical information unless the person has consented to the disclosure;

(*k*) any other item of information adverse to the person that is more than seven years old unless it is voluntarily supplied by the person to the reporting agency; or

(*l*) information as to race, creed, colour, ancestry, ethnic origin or political affiliation.

(3) A reporting agency shall not enter or retain in the file of a person any information that must not be included in a report under clauses (*d*), (*f*), (*g*), (*k*) and (*l*). Information entered in file

(4) A reporting agency shall not report or maintain in its files any information unless a reference to the source of the information also appears on the file including the identity of the originator of the information and the identity of all persons from whom the information was collected or through whom it was disclosed to the reporting agency. Sources of information

(5) Every reporting agency shall maintain in its file respecting a person all the information of which the person is entitled to disclosure under subsection (1) of section 15. Maintenance of information in file

(6) Where a reporting agency gives a report orally, it shall note the particulars and content of the oral report in the file. Note of oral report

10. Medical information about a person that is in the possession of a reporting agency is subject to the same privilege in favour of the person as it would be if it were in the possession of his physician, and any consent to its disclosure may be limited in scope or purpose. Privilege for medical information

11. (1) No person shall solicit personal information or medical information knowing that the information given will be received directly or indirectly by a reporting agency unless he first advises the informant of the use to be made of the information and that his identity as the source will be recorded and might be disclosed. Warning upon soliciting personal or medical information

(2) Where a person knows that personal information or medical information received from another person will be received directly or indirectly by a reporting agency, he shall not disclose that information unless he had advised the person from whom the information is received, before receiving it, of the use to be made of it and that his identity as the source of the information will be recorded and might be disclosed. Disclosure of information given without warning

12. (1) Where a reporting agency opens a file respecting a person, the reporting agency shall, within two Notice of opening file

weeks after doing so, notify the person in writing of the fact.

Idem

(2) Every reporting agency in operation immediately before this Act comes into force shall, (insert period for compliance), notify in writing each person in respect of whom the agency maintains a file and who has not been notified under subsection (1) that such file is maintained.

Notice of report

13. Where a reporting agency gives a report respecting a person, the reporting agency shall notify the person of the fact within five days after the report is given, unless the person has previously consented in writing to the report being given.

Disclosure of report

14. (1) Every person who obtains a report respecting a person shall, upon the request of the person, advise him of the fact and of the name and address of the reporting agency supplying the report.

Notice re adverse action

(2) Where credit involving a person is denied or the charge for credit is increased either wholly or partly because of information received from a reporting agency or a person other than a reporting agency, the user of the information shall deliver to the person at the time such action is communicated to him notice of the fact and,

(*a*) of the nature of the information if the information is furnished by a person other than a reporting agency; or

(*b*) of the name and address of the reporting agency, if the information is furnished by a reporting agency.

Notice of passing on credit information

(3) No person extending credit to a person shall divulge to other credit grantors information as to transactions or experiences between himself and that person unless the person extending credit divulges the information within days after receiving a written consent from that person.

Right to disclosure of file

15. (1) Every reporting agency shall, at the written request of a person and during normal business hours

clearly and accurately disclose to the person without charge,

(*a*) the nature and substance of all information in its files pertaining to the person at the time of the request;

(*b*) the sources of the information;

(*c*) the names of the recipients of any report pertaining to the person that it has furnished,

(i) for employment purposes, within the two year period preceding the request, and

(ii) for any other purpose, within the six month period preceding the request; and

(*d*) the contents of any report made pertaining to the person to any other person in the form made

and shall inform the person of his right to dispute any information contained in the file and the manner in which it may be disputed.

Exception re medical information

(2) Any medical information pertaining to a person that the person's own physician has furnished to the reporting agency and specifically requested in writing be withheld from the person in his own best interest shall be withheld by the reporting agency from the disclosures required by subsection (1) unless the person specifically requests the information in writing.

Obtaining information

(3) A person, either alone or accompanied or assisted by another person of his choice, may obtain information concerning himself required under this section to be disclosed by a reporting agency from the agency in person or by telephone upon properly identifying himself.

Idem

(4) Every reporting agency shall provide trained personnel to assist a person to understand any information furnished to him under this section.

Abstract

(5) The reporting agency shall permit the person to whom information is disclosed under this section to make an abstract thereof.

Identification

(6) A reporting agency shall require reasonable identification of the person and a person accompanying

or assisting him before making disclosures under this section.

No conditions

(7) A reporting agency shall not require any undertaking, waiver, or release as a condition precedent to a disclosure under this section.

Explanation

(8) A person may deliver to a reporting agency in writing of not more than one hundred words an explanation or additional information respecting the circumstances surrounding any item of information about him in his file, and the reporting agency shall maintain such explanation or additional information in the file accompanying the item and include it in any report given containing the item.

Correction of errors

16. (1) A person may dispute any item or information contained in his file and where he does so, the reporting agency shall use its best endeavours to confirm or complete the information and shall correct the information to ensure the accuracy, fairness and completeness of the information.

Idem

(2) Where a reporting agency corrects information under subsection (1), the reporting agency shall, at the request of the person to whom the file relates, give notice of the correction to everyone to whom reports based on the unamended file were given within two years before the correction and who is designed by the person to whom the file relates.

Idem where report obtained outside (*province*)

(3) Where a person obtains information in a report from a reporting agency that is located outside (province) and not in a jurisdiction that is designated by the regulations, the person obtaining the report shall be deemed to be a reporting agency for the purpose of that report and the information shall be deemed to be information for the purposes of this Act.

Order by Registrar re information

17. (1) The Registrar may order a reporting agency to correct any information, or by order restrict or prohibit the use of any information, that in his opinion is inaccurate or incomplete or that does not comply with any provision of this Act or the regulations.

(2) The Registrar may order a reporting agency to give to any person who has received a report a notice of any corrections or prohibitions imposed by the Registrar in respect of information contained in the report. Enforcement of order

(Insert appropriate provisions for hearings and appeals respecting decision of Registrar under this section.)

18. Every reporting agency shall, within five days after the event, notify the Registrar in writing of, Notice of material changes

(*a*) any change in its address for service;

(*b*) in the case of a corporation, any change in the ownership of its shares or change in its officers; and

(*c*) in the case of a partnership, any change in the membership of the partnership.

19. *(Insert approprite provisions for inspections of reporting agencies.)*

20. (1) Any notice or order required to be given, delivered or served under this Act or the regulations is sufficiently given, delivered or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at his last known address. Service

(2) Where service is made by registered mail, the service shall be deemed to be made on the fifth day after the day of mailing unless the person on whom service is being made establishes that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the notice or order until a later date. Idem

21. (1) Where it appears to the Registrar that any person is not complying with any provision of this Act, notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights he may have, the Registrar may apply to (a Superior Court) for an order directing the person to comply with such provision and, upon the application, the Court may make the order, or such other order as the Court thinks fit. Restraining order

Appeal

(2) An appeal lies to the Court of Appeal from an order made under subsection (1).

False information

22. No person shall knowingly supply false or misleading information to a person who is engaged in making a report.

Offences

23. (1) Every person who,

(*a*) knowingly, furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;

(*b*) fails to comply with any order, direction or other requirement made under this Act; or

(*c*) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and upon summary conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both.

Corporations

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is $25,000 and not as provided therein.

Limitation

24. (1) A proceeding under clause (*a*) of subsection (1) of section 23 may be commenced within one year after the facts upon which the proceeding is based first came to the knowledge of the Registrar.

Idem

(2) A proceeding under clause (*b*) or (*c*) of subsection (1) of section 23 may be commenced within two years after the time when the subject-matter of the proceeding arose.

Certificate as evidence

25. A statement as to,

(*a*) whether or not a person is registered;

(*b*) whether or not any document or material has been filed with the Registrar;

(*c*) the time when the facts upon which proceedings are based first came to the knowledge of the Registrar; or

(*d*) any other matter pertaining to a registration or filing,

purporting to be certified by the Registrar is, without proof of the office or signature of the Registrar, receivable in evidence as *prima facie* proof of the facts stated therein.

Regulations

26. The Lieutenant-Governor in Council may make regulations,

(*a*) exempting any class of persons from this Act or the regulations or any provision thereof;

(*b*) governing applications for registration or renewal of registration and prescribing terms and conditions of registration;

(*c*) requiring the payment of fees on application for registration or renewal of registration, and prescribing the amounts thereof;

(*d*) requiring registered reporting agencies to be bonded in such form and terms and with such collateral security as are prescribed, and providing for the forfeiture of bonds and the disposition of the proceeds;

(*e*) requiring and governing the books, accounts and records to be kept by reporting agencies;

(*f*) designating jurisdictions for the purposes of section 16;

(*g*) prescribing minimum particulars to be contained in a report;

(*h*) requiring reporting agencies to make returns and furnish particulars to the Registrar;

(*i*) prescribing forms for the purposes of this Act and providing for their use;

(*j*) requiring any return to the Registrar or form to be verified by affidavit.

APPENDIX R

(See page 31)

PROTECTION OF PRIVACY: ILLEGALLY OBTAINED EVIDENCE IN CIVIL CASES

MR. GROSMAN'S REPORT

Preface

At the 1976 meeting of the Conference, the Ontario Commissioners' report on the *Protection of Privacy* generated considerable discussion. In particular, opposing points of view emerged relating to the admissibility of illegally obtained evidence in civil cases. As a result of that discussion, it was resolved that Professor Brian A. Grosman, Chairman, Law Reform Commission of Saskatchewan, and Mr. Francis C. Muldoon, Q.C., then Chairman, Law Reform Commission of Manitoba, each prepare and circulate a memorandum outlining the various points of view which emerged.

Pursuant to that request, the following memorandum was prepared in the offices of the Law Reform Commission of Saskatchewan by Mr. Michael Finley of the Commission staff with the assistance of Professor Grosman.

Brian Grosman

Saskatoon
27 July 1977

I. INTRODUCTION

Privacy has always been valued in the Canadian legal tradition. The Ontario Commissioners' report on the *Protection of Privacy*[1] is only one contemporary indicator[2] of a concern which can be traced back at least as far as *Entick* v. *Carrington,* the classic common law statement of civil liberties.[3] In that case, agents of the Secretary of State entered the plaintiff's home without proper warrant to search for seditious material. Lord Camden found that the search infringed the "sacred and incommunicable" rights of a subject to enjoyment of his property, and awarded damages for trespass.[4] The principle enunciated by Lord Camden has never been challenged. Rather, as technologically more sophisticated methods of surveillance have become available, the need to extend the logic of *Entick* v. *Carrington* has been recognized. The Ontario Law Reform Commission recommends adoption of sanctions against invasions of privacy which are not technically trespasses at common law.[5] Three provinces, Manitoba, British

Columbia and Saskatchewan, have already adopted legislation with the same intent.[6] The *Criminal Code* has been amended to make unauthorized electronic surveillance by police and private individuals an offence.[7]

Ironically, had Entick been charged with sedition, or sued for libel, on evidence collected by the trespassing agents, he might have been convicted or found liable without consideration of the civil liberties issues which attracted Lord Camden's attention. At much the same time that Lord Camden delivered his defence of the liberties of a British subject, the English courts were formulating a rule of evidence which provides for the admission of illegally obtained evidence in civil and criminal cases. Somewhat inconsistently, if not perversely, the decisions establishing that rule ignore the civil liberties issues which inevitably arise when evidence is gathered illegally. The rationale for the rule has not been improved with time. There is not a single reported decision in England or Canada in which illegally obtained evidence was admitted which addresses the issue of the right to privacy.

The reported decisions disclose no clear rationale for the rule. Perhaps the closest thing to a reasonable justification for admission of illegally obtained evidence is the *maxim* "it is still permissible to set a thief to catch a thief", which appears in an Ontario decision in 1912.[8] Implicitly, the courts have adopted the rule to protect society's interest in crime control and prevention. By extension, the courts have applied the rule in civil cases, believing (if in fact, any real thought was given to the matter) that a litigant's right to prove his case with all reliable evidence available to him should similarly be protected.

A rational rule relating to illegally obtained evidence must recognize that a complex problem of balancing competing interests and values is involved. English and Canadian courts have resolved the conflict by denying that it exists, despite the value placed by our legal tradition on the interests they have chosen to ignore.

Not surprisingly, those jurisdictions in which the problem of illegally obtained evidence has been seen to involve a conflict between civil liberties and other interests, a rigid rule providing for the admission of illegally obtained evidence has been rejected. The philosophy behind the American exclusionary rule focusses on this conflict. For example, in *Neuselin* v. *District of Columbia*, it was held that:

> When two interests conflict, one must prevail. To us, the interest of privacy safeguarded by the amendment is of more importance than the interest of punishing all those guilty of misdemeanours [9]

There is, of course, no constitutional statement of civil rights in Scotland, but Scottish courts have protected privacy rights in appropriate cases by exercise of a discretion to exclude illegally obtained evidence. In the leading case of *Lawrie* v. *Muir*, Lord Cooper held that

> From the standpoint of principle, it seems to me that law must strive to reconcile two highly important issues which are liable to come into conflict: (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberty by the authorities, and (b) the interests of the state to secure evidence bearing upon commission of a crime and necessary to enable justice to be done . . . Neither of these objects can be insisted upon to the uttermost.[10]

In Canada, the inadequacy of our rule relating to illegally obtained evidence has been recognized for some time. The Ouimet Commission recommended in 1969 that the decision to admit or reject illegally obtained evidence should be discretionary.[11] Both the Law Reform Commission of Canada's background paper on illegally obtained evidence and the Ontario Law Reform Commission's *Report on the Law of Evidence* reached similar conclusions.[12] Unfortunately, however, Canadian policy-makers and commentators have sometimes lost sight of the connection between the right to privacy and the admissibility of illegally obtained evidence. While the Manitoba *Privacy Act* excludes evidence obtained by tortious invasions of privacy in civil proceedings,[13] neither the British Columbia nor Saskatchewan Acts make a similar provision[14] The *Criminal Code* excludes evidence improperly obtained by electronic surveillance from proceedings within federal jurisdiction, but that provision has no application to other illegally obtained evidence, including evidence obtained by theft.[15]

Rational consideration of the problem of illegally obtained evidence has been further hampered by one of the less obvious effects of the Supreme Court's decision in *Regina* v. *Wray*.[16] Wray, charged with murder, made a statement under duress which led to discovery of the murder weapon. The Supreme Court upheld the conviction based on that evidence. The court declined, however, to enter into a consideration of the general rule that illegally obtained evidence is admissible. Instead, the decision turned on whether, apart from the rule relating to illegally obtained evidence, a trial judge retains a discretion to exclude any evidence which "would operate unfairly

against the accused, or according to his opinion, bring the administration of justice into disrepute".[17] The court held that such a discretion is virtually non-existent. That decision directed fresh attention to the illegally obtained evidence problem. However, the debate which followed was confined almost entirely to the issue defined by the court. Consequences of the admission of illegally obtained evidence other than its tendency to bring the administration of justice into disrepute were obscured in the subsequent criticism and defence of the Supreme Court's decision.[18]

A reasoned approach to the problem of illegally obtained evidence should consider the effect of such evidence on the reputation of the administration of justice. But that is only one interest which must be weighed. Definition of the problem as essentially one of the reputation of the administration of justice betrays the same sort of myopic vision which led to the *Wray* decision itself. Other interests should not be ignored; in particular, sight must not be lost of the civil liberties issues involved.

The legacy of the *Wray* decision is embodied in the draft Evidence Code prepared by the Law Reform Commission of Canada. Illegally obtained evidence is touched upon in only one section of the Code. The scope of that provision is confined to the issue of the reputation of the administration of justice. Section 51 of the Code provides that:

> Evidence shall be excluded if it is obtained under such circumstances that its use in proceedings would tend to bring the administration of justice into disrepute.[19]

The narrow approach to the illegal evidence problem which finds expression in the draft Evidence Code is inadequate as part of the law of evidence in criminal cases. It is doubly inadequate in a code of evidence which is designed to apply to both civil and criminal cases. Since illegally obtained evidence is most apt to bring the administration of justice into disrepute when evidence has been illegally obtained by the police, the provision proposed by the Law Reform Commission of Canada would have little application in civil cases. Fixing attention on the reputation issue has obscured the fact that illegally obtained evidence may be an issue in civil cases. Once the narrow focus of reputation issue is abandoned, it becomes clear that illegally obtained evidence can present many of the same problems in both civil and criminal cases. Civil liberties can be infringed by individuals as well as the state, and privacy must be protected against the activities of private investigators as well as the police.

This memorandum sets forth an argument for legislative enactment of a discretion to exclude illegally obtained evidence in civil cases. The argument focusses attention on the interests and values which come into conflict when illegally obtained evidence is tendered, with particular attention to the recognized value placed on individual privacy. It is submitted that only a discretion to exclude illegally obtained evidence will permit the courts to strike a satisfactory balance between conflicting interests.

II. ILLEGALLY OBTAINED EVIDENCE IN CIVIL CASES: THE PRESENT LAW

Illegally obtained evidence has not been an issue in civil cases as often as in criminal cases. There are only two reported Canadian civil cases dealing with the problem.[20] Both are divorce cases. English case law also contains few examples of illegally obtained evidence tendered in civil matters, but includes cases where stolen documents were tendered as evidence in commercial litigation.[21] Nevertheless, it is settled law in Canada that illegally obtained evidence is admissible in civil matters. There has been no hesitation to apply criminal case law relating to illegally obtained evidence to civil matters, and *vice versa*. The leading English authority, *Kuruma* v. *Regina*[22] holds that there is "no difference in principle in civil and criminal cases" where illegally obtained evidence is tendered. *Kuruma* is based on three earlier decisions. Two of them, *Lloyd* v. *Mostyn*[23] and *Calcraft* v. *Guest*,[24] are civil cases, and the third, *Regina* v. *Leatham*,[25] relies on the *Lloyd* case. *Kuruma* was adopted by the Supreme Court of Canada in *A.G. for Quebec* v. *Begin*[26] in 1955, but even before that date, Canadian courts had unequivocally recognized the rule in civil cases. In *Lightheart* v. *Lightheart*,[27] the Saskatchewan Court of King's Bench relied upon the Ontario Court of Appeal's decision in *Rex* v. *Honan*[28] to admit evidence illegally obtained in a divorce action. *Lightheart* was adopted in a similar Ontario case, *Cuthbertson* v. *Cuthbertson*[29] and applied by the Saskatchewan Court of Appeal in the province's leading authority on illegal evidence in criminal cases, *Rex* v. *Kostachuk*.[30] Any doubt that the rule is applicable in civil matters should be laid to rest by the fact that the earliest case in which something akin to the modern rule appears was a civil case, *Jordon* v. *Lewis*,[31] decided in 1740.

Jordon v. *Lewis* offers no reasoned justification for the admission of illegally obtained evidence. But unlike the cases which followed, that failure is explicable. The facts of the case indicate that nothing

more appeared to be involved than a technical irregularity in the act of a public official. Jordon had brought suit against Lewis for malicious prosecution. To prove the prosecution, he tendered a copy of an indictment obtained from a clerk of the Old Bailey. Technically, the clerk should not have released the copy without the Attorney General's fiat, which had not been obtained. The court dealt with the issue on the narrow facts of the case, admitting the evidence, but declining to lay down a rule applicable to improperly obtained evidence generally. *Jordon* v. *Lewis* was applied in *Legatt* v. *Tollerrey*[32] to an almost identical fact situation. Again, no general rule was suggested.

Unfortunately, *Legatt* v. *Tollerrey* was adopted as authority in a quite different sort of case in 1854. In *Phelps et al.* v. *Prew*,[33] a copy of a title document was tendered as secondary evidence of title when the original was held to be inadmissible as a privileged document. There appears to have been a suspicion that the copy was improperly obtained, but no finding was made on that issue. The *ratio decidendi* of the decision was that the privilege attached to the original did not extend to the copy. However, relying on *Leggatt*, the court suggested that even if the copy had been obtained by "improper means", it would be admissible. The court in effect elevated the decision in *Jordon* v. *Lewis* to the status of a general rule relating to evidence obtained by "improper means", without any attempt to justify the rule on principle. Although the rule was merely *obiter dicta* in *Phelps et al.* v. *Prew*, the courts apparently saw no reason to reconsider its basis in subsequent decisions.

The leading case of *Lloyd* v. *Mostyn*[34] also treated illegally obtained evidence in the context of rules relating to privilege. That case held that a bond could be proved by secondary evidence with a copy apparently taken from the opposing party's solicitor. An *obiter* comment suggested that even if the document was stolen, it would be admissible. *Lloyd* was applied in the earlier criminal case which states the rule, *Regina* v. *Leatham*.[35] Once again, the issue was essentially one of privilege. Leatham was prosecuted for corrupt practices at an election. Prior to his trial, he had testified before a commission of inquiry, and identified a letter written by him. The statute providing for the commission stipulated that no statement given in evidence before the commission would be admissible in any other proceeding. The letter was introduced at trial. It was held admissible on the ground that it was not a statement, and thus not privileged under the statute. But the court went on to speculate that

> Suppose by threats and promises a confession of murder was obtained but you also obtain a clue to a place where the written confession may be found . . . or the body; could not that latter evidence be made use of because the first clue to it came from the murderer? It matters not how you get it; if you steal it even, it would be admissible as evidence.

When the Privy Council considered the rule in *Regina* v. *Kuruma*[36] in 1955, there was no English case supporting it with anything but *obiter* comment. The Judicial Committee was forced to concede that the rule "may not have been stated in so many words in any English case". But the Judicial Committee avoided the opportunity to canvass the policy issues involved when illegally obtained evidence is tendered. Instead, it was content to elevate a series of *obiter* comments in privilege cases to the status of a rule of evidence.

The history of the rule in Canada does not lend it more credibility. The earliest Canadian decision which states the rule is *Regina* v. *Doyle*,[37] decided in 1887. In that case, the court adopted *Rex* v. *Warickshall*,[38] which holds that an improperly obtained confession confirmed by subsequently discovered facts is admissible, and applied it to admit illegally obtained evidence. It is a well established rule that a confession obtained by illegal means is, subject to the narrow exception set out in *Warickshall*, inadmissible. In *Doyle*, the court mistook the exception for the rule and extended it to illegally obtained evidence generally. A similar lapse in reasoning forms the basis of the decision in *Rex v. Honan*.[39] In that case, authority for the principle that a trick or artifice can be properly used to induce a suspect to confess[40] was thought to support admission of illegally obtained evidence. The leap in logic attempted by the court involves an unstated proposition which is indefensible. The decision implies that if tricks can be used to obtained confessions, so can illegalities. That proposition is, of course, contradicted by clear authority.[40A]

Regina v. *Honan* became the leading Canadian authority on illegally obtained evidence. Courts were willing to cite *Honan* and consider the matter closed,[41] until the Supreme Court adopted English authority in *A.G. for Quebec* v. *Begin*;[42] thereafter the courts have been content to rely on *Regina* v. *Kuruma*.[43]

The failure of English and Canadian courts to fully consider the policy issues underlying the admission of illegally obtained evidence perpetuates a rule of evidence which may never have been adequate. Even if the rule was once acceptable, it now requires closer examination. The growth of sophisticated techniques for the invasion of

privacy places an increased challenge upon the legislature and judiciary to protect individual liberties and the right to privacy. If those considerations could once be ignored, they can be ignored no longer.

III. FUNDAMENTAL CONSIDERATIONS

A. *Interest in Conflict*

A rational consideration of the rule relating to illegally obtained evidence should begin with an identification of the conflicting interests and values which confront the courts when illegally obtained evidence is tendered. The clash between privacy rights and protection of the public has already been identified. Although that conflict is perhaps the most difficult to resolve, there are other interests which must be considered in an examination of the illegally obtained evidence problem. The most significant aspects of the problem can be adequately analyzed if consideration is given to:

(1) the individual's right to privacy and freedom from illegal interference in his affairs;

(2) society's interest in the detection of crime, and the analogous principle that a litigant should be given every reasonable opportunity to prove the facts which support his pleadings;

(3) deterrence of illegal activity by police and private citizens;

(4) procedural efficiency; and

(5) the reputation of the courts and the administration of justice.[44]

B. *Privacy and Proof*

The Ontario Law Reform Commission's inquiry into privacy and the law responded to a growing concern about the threat to individual privacy posed by the unprecedented development of technological aids to invasion of privacy in the last twenty-five years. As Allan F. Weston, in an article entitled "Science, Privacy and Freedom" notes:

> The novelty of these techniques has allowed them, thus far, to escape many traditional legal and social controls which protected privacy in the pre-World War II era.[45]

A U.S. Senate Report issued in 1967 reveals that industrial espionage techniques, including electronic surveillance, theft of documents, and bribery to obtain commercial information, is widespread in labour-management and commercial relations in the United States.[46] Experts in industrial espionage estimate that incidents of private espionage triple each year.[47] The Report of the Younger Committee in Britain catalogued a number of examples of what they

called "reprehensible practices" involving invasions of privacy by private investigators. The list included: (1) conviction of a private detective in 1967 for installation of a wireless transmitter on a private telephone; (2) conviction in 1969 of a credit investigator who traced missing persons by impersonation of inland revenue officers; (3) conviction in 1971 of an employee of a chemical firm for offering bribes to obtain information from employees of a reliable firm; and (4) a conviction in 1972 for fraudulently obtaining information from banks concerning private individuals.[48] In all these cases, information obtained by private investigators might well have been introduced as relevant non-hearsay evidence in civil cases.

An increase in the number of cases in which evidence obtained by industrial espionage techniques can be expected. But even if firms making use of industrial espionage desire to keep a low profile, and prefer to use the information they obtain in that way for purposes other than litigation, the rule relating to admissibility should conform to general principles established to protect privacy rights. If industrial espionage is used only rarely to gather evidence, reform of the rule may be only a small part of the solution to the problem of the increasing threat to privacy. But a rule which admits illegally obtained evidence without consideration of privacy rights contributes to the problem by giving the appearance that the courts condone invasions of privacy.

The contest between individual privacy and protection of the public has dominated consideration of the illegally obtained evidence problem in those jurisdictions which recognize a civil liberties dimension to the problem. An exclusionary rule was adopted by the federal courts in the United States in 1914 in *Weeks* v. *The United States*.[49] In the decades which followed, similar exclusionary rules were established by judicial decision or legislative enactments in a number of states. In 1961, the Supreme Court held in *Mapp* v. *Ohio* that the Fourth Amendment protects "zones of privacy". The court implied an exclusionary rule applicable in both state and federal prosecutions.[50] American courts have regarded an exclusionary rule as the only effective way in which the judiciary can protect the rights to privacy when illegally obtained evidence is tendered. The logic of the rule is succinctly stated in *Neuselin* v. *District of Columbia*:

> Happy would be the result if both interests [privacy and conviction of criminals] could be completely protected. If this declaration is admissible, and justice meted out on the issue . . . where is the defendant's remedy for the inexcusable entry of his home? A single,

> effective way to assist in the realization of the security guaranteed by the Fourth Amendment in this type of case is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home.[51]

The Scottish courts have also recognized that exclusion of illegally obtained evidence is the most effective protection for the right to privacy when such evidence is tendered. Since the Scottish rule is discretionary, it is more flexible than the American exclusionary rule. In *Lawrie* v. *Muir,* Lord Cooper held that

> Neither of these objects can be insisted upon to the uttermost [the interests of the citizen and the interests of the state . . . protection is not intended as protection for the guilty citizen.[52]

But in the case where "the interests of the state" would otherwise be "magnified to the point causing all safeguards for protection of the citizen to vanish", the Scottish courts will exclude evidence as the most effective remedy for the citizen. Canadian proposals for reform of the rule relating to illegally obtained evidence which have taken protection of privacy into conisderation have recommended adoption of the Scottish discretionary approach. Both the Ontario Law Reform Commission's *Report on the Law of Evidence* and the Ouimet Committee Report recommend enactment of a discretionary power to exclude illegally obtained evidence.

A strong argument has been made by the American and Scottish courts to prefer protection of privacy to detection of crime in appropriate cases. A still stronger argument can be made to prefer the right to privacy over the right of a party in a civil action to prove his case with whatever evidence is available. Certainly, the private interests of the litigant should give way to protection of privacy before the public interest in crime control. That point has been recognized by several commentators[53] and by the Scottish courts. In *Argyle* v. *Argyle,* Lord Wheatley noted that:

> Greater latitude may be given to police officers who obtain evidence by irregular methods than to offenders who are not guardians of the public order and safety, but private individual. It would accordingly appear to follow that the narrower rather than the broader approach should be taken in the case of person who obtains evidence by illegal means to further his own ends in a civil process.[54]

Certainly, the *maxim* that it is permissible to set a thief to catch a thief has no place in the civil law of evidence. It is ironic, then, that the draft Evidence Code[55] would exclude illegally obtained evidence in many criminal cases, but permit its use in most civil cases. The unsatisfactory state of the law as it now stands is, perhaps, best

indicated by the fact that an illegal wiretap would be excluded from evidence in a criminal case, but admissible in a civil case.

C. *Deterrence of Illegal Acts*

Most advocates of reform of the rule relating to illegally obtained evidence argue that exclusion is an effective deterrent to illegal acts by police and parties to civil litigation. Such a position is an integral part of the justification for an exclusionary rule adopted by the American courts. It has, in fact, been advanced in some cases as the primary justification for the rule. For example, Judge Learned Hand explained the rule in *United States* v. *Pugliese* in these terms:

> As we understand it, the reason for exclusion of evidence competent as such is that exclusion is the only practical way of enforcing constitutional privilege. In earlier times, the action of trespass against the offending official may have been protection enough; but it is true no longer. Only in the case when the prosecution which itself controls the seizing officials, knows it cannot profit by their wrong, will the wrong be repressed.[56]

In Canada, the value of an exclusionary rule as a control on police behaviour has not always been recognized. The Ouimet Commission, for example, took the position that actions for assault and false arrest or trespass have proved "not ineffective as a means of controlling excesses in law enforcement".[57] Paul Weiler, while noting that tort law was not designed as an instrument for obtaining redress for abuse of police powers, finds that the tort remedy has been more effective for that purpose in Canada than in the United States.[58] Nevertheless, an exclusionary rule might have more value than Canadian commentators admit. There is not a single reported Canadian case in which damages resulting from the use of illegally obtained evidence were claimed.

But even if the deterrence argument is weak in criminal cases, it may merit more attention in civil matters. The courts should avoid a rule which may encourage parties in civil actions to undertake illegal activities. The police can be expected to know what is permissible and what is not, even if they do not always follow the letter of the law. Private citizens are more apt to be enticed into illegalities to prove their claims unless the law clearly provides that their illegal actions will not be rewarded. A useful analogy to the law of contract can be drawn. A contract will not be enforced by the courts if the contract effects an illegal purpose. This is a case where public policy interferes with the right to seek redress for breach of contract. Exclusion of illegally obtained evidence in civil cases would serve a

similar policy goal. Moreover, in criminal cases deterrence is weighed against protection of public order; in civil cases deterrence is weighed against the rights of an adverse party. A weaker deterrent effect would justify exclusion in a civil case than in criminal cases.

D. *Procedural Efficiency*

Commentators who oppose an exclusionary rule often argue that attention should not be deflected from the central issues before the court by pursuit of the "collateral issue" of the manner in which evidence was obtained.[59] Presumably, the illegality should be dealt with in a separate proceeding.[60] The courts have frequently reiterated that collateral issues should be avoided where possible, but there are other policy considerations which must be taken into account. Procedural rules should not operate to deny an effective remedy to a litigant with a legitimate grievance.

The collateral issue argument is not as strong as it may appear to be at first blush. It is a well established principle that there should be an end to litigation. Procedural rules permit combination of a number of claims by set-off and counterclaim in order that all issues between the parties might be disposed of at once. It seems a rather cumbersome procedure in civil cases to award damages against a party whose privacy has been invaded by his opponent, and then inform him that he might recover his loss in a separate action for invasion of privacy. Would it not be more efficient to dispose of the issue of illegally obtained evidence once and for all by excluding it in the first action? Such a procedure would be no more objectionable than set-off of a debt owing in a breach of contract case not otherwise involving the debt. In both cases, the net effect is to place the parties in the same position after one action that they would otherwise be in after a second action.

The procedural value of an exclusionary rule in civil cases is underlined by the principle enunciated by the English courts in *Lord Ashburton* v. *Pape*.[61] In that case, Lord Ashburton successfully enjoined the defendant from putting into evidence copies of letters which were obtained in a dishonest manner from Lord Ashburton's solicitor. The court distinguished *Calcraft* v. *Guest*[62] and *Lloyd* v. *Mostyn*,[63] in which illegally obtained copies of privileged documents were received as secondary evidence. In those cases, the manner in which the evidence was obtained was not considered to be an issue. But in an application for an injunction to restrain the use of illegally obtained evidence, the source of the evidence is, of course, the central issue. While the decision in *Lord Ashburton* v. *Pape* should be wel-

comed as a back-door approach to an exclusionary rule, the procedure it authorizes is unnecessarily cumbersome. If illegally obtained evidence is excluded at all, it would seem more sensible to permit the trial judge to refuse to receive it.

The *maxim* "what is relevant is admissible", often quoted by opponents of an exclusionary rule, recasts the procedural objection as as evidentiary principle. Both approaches assume that the courts are engaged in a single-minded pursuit of the truth, and should reject discussion of issues which detract from that purpose. The objection is no more persuasive in one form than the other. In fact, the equation of relevancy and admissibility is not good law. Wigmore divides rules governing admissibility of evidence into two classes. Most of the rules are designed to improve the quality of proof, but there are well established rules which are based entirely on extrinsic policy considerations.[64] The second class of rules exclude evidence of undoubted probative worth. The rules relating to privilege are examples of rules of that sort. Exclusion of illegally obtained evidence is not more suspect in principle than the rule which excludes privileged communications.

E. *The Reputation Issue in Civil Cases*

Undoubtably, evidence obtained illegally by the police in criminal investigations is more apt to bring the administration of justice into disrepute than anything which litigants in civil cases might do. It is unlikely that protection of the reputation of the administration of justice would ever, in itself, justify exclusion of evidence in a civil case. But when the courts admit illegally obtained evidence, an appearance may be created that the judicial system condones illegality.[65] That fact must be weighed with other considerations which support an exclusionary rule.

IV. TOWARD A DISCRETIONARY RULE

The decision to admit or reject illegally obtained evidence can be rationally founded only upon a balancing of competing interests. The analysis of those interests attempted above strongly suggests that illegally obtained evidence should be rejected in at least some cases. However, an absolute rule of exclusion would work injustice in almost as many cases as the present rule of absolute admissibility. In some cases, for example, the public interest may outweigh trivial or technical illegality. American experience seems to indicate that absolute exclusionary rules are not desirable. In the last two decades, American courts have begun to retreat from an absolute rule. The basic

philosophy of an exclusionary rule has not been questioned in the United States, but the need to make appropriate exceptions has been recognized.[66] For example, in *Wayne* v. *The United States*,[67] a federal court held that illegally obtained evidence which would have been "inevitably discovered" by legal investigation is admissible.

The only Canadian legislation establishing a broad exclusionary rule, the Manitoba *Privacy Act*,[68] rejects illegally obtained evidence absolutely. It is submitted that the Manitoba provision is not a satisfactory model.

Scottish case law provides a more flexible approach to the problem. Exclusion under Scottish law is discretionary. The Scottish courts have recognized that judicial treatment of illegally obtained evidence should depend on the facts in each case in which the problem arises. It is submitted that legislative provision for exclusion of illegally obtained evidence should create a similar discretion.

Some proposals for enactment of an exclusionary rule have, in effect, merely codified Scottish authority. In Israel, for example, draft legislation provides that:

> A court may refuse to admit in evidence any document (including any form of record of anything said, written, printed or photographed) which the party producing it has stolen, or obtained by any other illegal means, or in making or circulating which, the party producing it committed a criminal offence.[69]

Such a provision is, however, open to serious criticism. Creation of a simple discretion to exclude illegally obtained evidence might lead to arbitrariness and uncertainty.[70] However, as the authors of the Law Reform Commission of Canada's study paper on illegally obtained evidence have pointed out, that criticism can be avoided if legislators indicate the criteria to be applied in exercise of the discretion, and set out guidelines for its use.[71]

There are a number of models for legislation creating a discretion to exclude illegally obtained evidence which provide criteria for exercise of the discretion. The Ontario Law Reform Commission's draft *Evidence Act* provides that:

> 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.[72]

The Ouimet Committee recommended legislation providing that:

(1) The Court may in its discretion reject evidence which has been illegally obtained.

(2) The Court in exercising its discretion to either reject or admit evidence which had been illegally obtained shall take into consideration the following factors:

(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.[73]

The American *Model Evidence Code* provides that evidence obtained as a result of a "substantial violation" of the law should be rejected. In determining whether an illegality amounts to a substantial violation, the court must consider:

(a) the importance of the particular interest violated,

(b) the extent of deviation from lawful conduct,

(c) the extent to which the violation was wilful,

(d) the extent to which privacy was invaded,

(e) the extent to which exclusion of the evidence will tend to prevent violation of this Code,

(f) whether, but for the violation, the things seized would have been discovered, and

(g) the extent to which the violation prejudices the moving party's ability to support his motion [to exclude the evidence], or defend himself in the proceedings in which things are sought to be offered in evidence against him.[74]

V. RECOMMENDATIONS

The argument advanced in this memorandum supports the adoption of a statutory provision which would:

(1) Recognize the principle that illegally obtained evidence should be rejected where the effect of admission of the evidence on the interests of justice and the party against whom it is tendered outweighs the interests of the adverse party and the public which would be served by admission of the evidence.

(2) Create a judicial discretion to reject or admit illegally obtained evidence in appropriate cases.

(3) Provide criteria or policy guidelines to be applied in the exercise of the discretion similar to those recommended by the Ouimet Committee Report and the *Model Evidence Code*.

FOOTNOTES

1. Proceedings of the 58th Annual Meeting of the Uniform Law Conference of Canada, Appendix X.
2. Protection of privacy has been the topic of a number of law reform commissions and legislative reports in the English-speaking world in the last decade. Cf. *Report on the Protection of Privacy* (Ontario Law Reform Commission, 1968); *Report* (Task Force on Privacy and Computers, Government of Canada, 1972); *Report of the Younger Committee* (U.K., 1970); and *U.S. Senate Report No. 10* (97th Congress, 2nd Session).
3. (1765), 19 State Trials 1029.
4. *Entick* v. *Carrington, supra,* at 1029.
5. *Report on the Protection of Privacy, supra.*
6. Manitoba: *Privacy Act,* S.M. 1970, c. 15; British Columbia: *Privacy Act,* S.B.C. 1968, c. 39; Saskatchewan: *Privacy Act, 1974,* S.S. 1973-74, c. 80.
7. Stats. Can. 1973-74, c. 50, now sections 178.1-178.23 of the *Criminal Code.*
8. *Infra.*
9. 115 F. 2d 690 (C.A., D.C. 1940).
10. [1950] S.C. (J.) 19.
11. *Report of the Canadian Committee on Corrections,* 1969.
12. Ontario Law Reform Commission, 1976.
13. Manitoba, *Privacy Act, supra,* s. 7.
14. Sask *Privacy Act,* B.C. *Privacy Act, supra.*
15. Section 178.11 of the *Criminal Code* prohibits interception of private communications only when the interception is made by an "electromagnetic, acoustic, mechanical or other device".
16. [1971] S C.R 272.
17. *R.* v. *Wray, supra,* at 299, per Martland, J. A similar characterization of the issue is made in the concurring opinion at 297, per Judson, J.
18. Useful summaries of the criticisms levelled against the *Wray* decision can be found in D. W. Roberts, *The Legacy of R. v. Wray,* 50 C.B.R. 19, and *Evidence 10. The Exclusion of Illegally Obtained Evidence,* Study Paper prepared by the Law of Evidence Project, Law Reform Commission of Canada, 1974. Significant contributions to the discussion include: Joudouin, *Commentaire sur Regina v. Wray* (1976), 1 Rev. Gen. de Droit 390; B MacDonald, *Comment on R. v. Wray* (1971), 29 U. of T. Fac. L. Rev. 99, and A. F. Sheppard, *Restricting the Discretion to Exclude Illegally Obtained Evidence* (1971-72), 14 Crim. L.Q. 344.
19. *Report on Evidence,* Law Reform Commission of Canada, 1975, 22.
20. *Lightheart* v. *Lightheart*; *Cuthbertson* v *Cuthbertson, infra.*
21. Cf. *Lloyd* v. *Mostyn, Phelps et. al.* v. *Prew,* and *Calcraft* v. *Guest, infra.*
22. [1955] A.C. 197 (P.C.).
23. (1842), 10 Meeson & Welsby 478.
24 [1898] 1 Q.B. 759.
25 (1861), 8 Cox C.C. 498.
26. (1955), 112 C.C.C. 209 (S.C.C.).
27. [1927] 1 W.W.R. 393.
28. (1912), 26 O.L.R. 484 (C.A.).

29. [1951] O.W.N. 845 (H.C.J.).
30. (1930), 54 C.C.C. 189 (Sask. C.A.).
31. (1740), 104 E.R. 618.
32. (1811), 14 East 301 (K.B.).
33. (1854), 118 E.R. 1203 (Q.B.).
34. *Supra.*
35. *Supra.*
36. *Supra.*
37. (1887), 12 O.R. 347.
38. 1 Leah 263.
39. *Supra.*
40. (1908), 18 O.L.R. 640.
40A. *Ibrahim* v. *The Queen*, [1914] A.C. 599. See generally, Coffin, *Confessions*, 2d, 1976.
41. *Supra.*
42 *Supra.*
43. *Supra.*
44. For other similar classifications of competing interests and issues see R. Gibson, *Illegally Obtained Evidence*, *supra*, and Wigmore, *Evidence*, Article 2175 (McNaughton Rev. 1961).
45. 66 Colum. L.R. 1003.
46. *U.S. Senate Report*, *supra.*
47. 19 A.D.L. Rev. 422 (1967).
48. *Younger Committee*, *supra.*
49. 232 U.S. 383.
50. (1961), 367 U.S. 643.
51. *Supra.*
52. *Supra.*
53. Cf Allan Mewett, *Evidence and Illegality* (1974), 16 Crim. L.Q. 121 and Hans W. Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch* (1974), Texas L.R. Baade notes that while American courts have rejected illegally obtained evidence in some civil cases, the exclusionary rule is thought to be strictly applicable only to criminal cases since the Fourth Amendment has been interpreted as a protection against invasions of liberty by the state, not private citizens. This "classic mismatch" — a less stringent rule in civil cases — as Baade argues, is a product of the vagaries of U.S. constitutional history, and indefensible in principle.
54. [1963] Scots. L.T. 42.
55. *Supra.*
56. 115 F. 2d 690 (C.A., D.C., 1940).
57. *Report of the Canadian Committee on Corrections*, *supra.*
58. Paul Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer", in Linden ed., *Studies in Canadian Tort Law*, 1968.
59. Wigmore, *supra.*
60. *Lloyd* v. *Mostyn*, *supra.*
61. [1913] 2 Ch. 469. There was some doubt that this case correctly states the law, but it was disspelled in *Better* v. *B.O.T.*, [1971] 1 Ch. 680 which confirmed the rule in civil cases, but refused to extend it to criminal prosecutions.
62. *Supra.*
63. *Supra.*
64. Wigmore, article 2175, *supra.*
65. "The response by Wigmore [Evidence, article 2175, *supra*] that illegality is by no means condoned, but is merely ignored, is an unsatisfactory legal nicety. Illegality that is ignored by the institution whose very existence is

premised on obedience to the law, amounts to illegality condoned in the mind of the public." Ontario Law Reform Commission, *Report, supra.*

66. H. S. Novikoff, *The Inevitable Discovery Exception to Constitutional Exclusionary Rules,* (1974) Columbia Law Rev., Vol. 74, No. 1, 88.
67. 318 F. 2d 205 (D.C. Cir., 1963).
68. *Supra,* s. 7.
69. Draft Evidence Code, Israel (1952), s. 75.
70. *Evidence 10., supra,* 27.
71. *Evidence 10., supra,* 28. Unfortunately, the Commission's final *Report on the Law of Evidence, supra,* did not adopt the approach recommended in the study paper.
72. *Report on the Law of Evidence, supra* (Draft Act, s. 27).
73. *Report of the Canadian Committee on Corrections, supra,* 74.
74. *Model Evidence Code* (American Law Institute), s. 290.2.

APPENDIX S

(See page 32)

PROTECTION OF PRIVACY: TORT

NOVA SCOTIA REPORT

At the 1976 conference, the delegates passed the following resolution:

> 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.

Due to the untimely death of Mr. Yves Caron, it was not possible for the Quebec and Nova Scotia delegates to collaborate on a draft Uniform Act respecting the Tort of Invasion of Privacy. The Nova Scotia delegates have, however, prepared a draft Uniform Act for the consideration of the conference. See the Schedule to that Report.

So that the delgates from the other jurisdictions might have an opportunity to study and comment upon the draft Uniform Act before it is recommended to the conference, the Nova Scotia delegates propose the adoption of the following resolution:

> RESOLVED that the draft Uniform Act respecting the Tort of Invasion of Privacy be referred to Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland for study and recommendation and that the said delegates report their recommendations to the Uniform Law Section at the 1978 meeting.

Graham D. Walker,

On Behalf of the Nova Scotia Delegates

Halifax, Nova Scotia
15 August 1977

SCHEDULE

UNIFORM PRIVACY ACT

1. It is a tort, actionable without proof of damage, for a person to invade the privacy of another.

2. (1) The privacy of the plaintiff shall be presumed to have been invaded where the plaintiff establishes to the satisfaction of the court that the defendant has

(a) publicly disclosed private facts about the plaintiff which cause distress or embarrassment;

(b) publicly placed the plaintiff in a false light;

(c) used the name, identity or likeness of the plaintiff for his own advantage; or

(d) violated the seclusion or solitude of the plaintiff.

3. In a proceeding for the invasion of privacy the conduct which forms the basis of the plaintiff's complaint is not considered an invasion of privacy where the defendant demonstrates that

(a) the plaintiff consented to the act or conduct;

(b) the act was reasonable and necessary or had been authorized by a court of law;

(c) the act was necessary for the protection of a person or property;

(d) the comment or publication was in the public interest; or

(e) the conduct was not intended to be an intrusion upon any individual, his home, relationships, communications, property or business affairs.

4. (1) A proceeding for invasion of privacy shall be commenced in the court in which the plaintiff resides at the time of the alleged invasion of privacy within one year from the time when the invasion of privacy first occurred or the plaintiff became aware or should have known that the invasion of privacy occurred.

(2) Articles or documents in the possession of another person as the result of the invasion of the privacy of a person may be recovered by an executor or administrator but within two years from the date of the death of the deceased.

5. In an action for invasion of privacy the court may

(a) award damages;

(b) grant an injunction;

(c) order the defendant to account to the plaintiff for any profits that have accrued or that may subsequently accrue to the defendant by reason of or in consequence of an invasion of privacy;

(d) order the defendant to return any article or document that has come into his possession by reason of or in consequence of an invasion of privacy;

(e) grant any other relief to the plaintiff that appears fit and just under the circumstances.

APPENDIX T

(See page 33)

PURPOSES AND PROCEDURES OF THE UNIFORM LAW SECTION

REPORT OF THE SPECIAL COMMITTEE

At the 1976 meeting of the Conference in Yellowknife, N.W.T., the Uniform Law Section passed the following resolution:

> 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.

The Committee met in Toronto on November 26, 1976 and again on June 28, 1977.

The Committee's recommended changes are for the most part embodied in the redraft of the Section's Rules of Procedure in Schedule 1 to this report. The following is a section-by-section commentary on the redraft of the Rules with some additional recommendations included that do not involve changes to the Rules.

A copy of the present Rules of Procedure is attached for convenience of reference (Schedule 2).

1. *Section 1: Definition of "jurisdiction".* This is the same as section 1 of the present Rules with the insertion of reference to representatives.

2. *Section 2: Voting.* This is a complete overhaul of the present section 2 under which the number of members present has to be counted each time a vote is taken in order to ascertain the majority needed to carry a motion. The need to make the count has become so frequent and thus so time-consuming as to be a source of annoyance. The Committee recommends that in the case of any vote (other than a vote by way of a poll of jurisdictions) the motion should be carried by a simple majority of those actually voting on the motion: see section 1(1) of the redraft.

The Committee felt that the voting on matters considered by a jurisdiction to be important should be done in a manner that achieves fairness for all of the jurisdictions. In a simple majority vote of those voting, a jurisdiction that has five representatives present can obviously affect the outcome of the vote more than a jurisdiction

that has only one or two representatives present. The larger the delegation a jurisdiction has, the more it is able to influence a vote. We feel this is unfair to those jurisdictions having small delegations when votes are taken on substantive matters. Our proposal for change is embodied in subsections (2) and (3) of section 2 of the redraft. The features of the proposal are as follows:

— The chairman will in the usual case decide when it is appropriate to have a vote by jurisdiction on any matter, but any jurisdiction may, through its spokesman, require as a matter of right that a vote be taken by polling the jurisdictions.

— A vote by jurisdiction may be called for whether or not the motion has already been voted on pursuant to section 2(1).

— The representatives of each jurisdiction must designate one of their number to be the jurisdiction's spokesman for the purpose of voting. The spokesman for a jurisdiction may be a different representative for different votes.

— Each jurisdiction has three votes. The spokesman for each jurisdiction must declare the allocation of its three votes as for or against the motion or as an abstention. The three votes may be apportioned as any combination of these. (The possible combinations are: 3 for; 2 for, 1 against; 2 for, 1 abstention; 1 for, 1 against, 1 abstention; 3 against; 2 against, 1 for; 2 against, 1 abstention; 1 against, 2 abstentions; 3 abstentions.) The jurisdiction casts the three votes regardless of the number of its representatives attending, that is, whether more or fewer than three. Even where, for example, there is only one representative from a jurisdiction in attendance, he would cast the three votes for that jurisdiction in any combination he considers appropriate.

If none of the representatives of a jurisdiction are present at the time a vote-by-jurisdiction is taken or if the spokesman for a jurisdiction declines to declare all or any of his jurisdiction's votes, the votes of that jurisdiction not so cast shall be counted as abstentions.

— The proceedings will show only whether a motion was carried or defeated, without showing the number of jurisdictions voting for or against any motion or any breakdown of voting by jurisdictions. Forms could be made available to record votes by jurisdictions, but they would be for the use of those jurisdictions wishing to make such a record for their own purposes.

3. *Section 3: Formulation of Agenda.* This is new. The Committee recommends that following the issue of a preliminary agenda by June 15, the Chairman of the Uniform Law Section, in consultation with the Executive Secretary, finalize the Agenda for an annual meeting. The June 1st deadline for the distribution of reports should be adhered to and to that end the Agenda should show first the usual annual reports and those items that are ready to be proceeded with as of June 1st, in accordance with the priorities allocated to them by the Chairman. Any other items should appear on the Agenda after the items having priority and should be dealt with at the meeting accordingly.

4. *Section 4: Placing new items on the Agenda.* This is an overhaul of the present section 3. The deadline for filing recommendations for the addition of new items on the Agenda is extended from June 1st to August 1st. The Committee feels that while the presentation of a report containing policy questions is desirable, it should not be mandatory, at least at the recommendation stage. Where the filing requirements are not met, a recommendation may nevertheless be dealt with if a two-thirds majority consent. This continues the concept in the present section 3(5). The proposal contemplates a new item on the Agenda entitled "Recommendations for Additions to the Agenda".

5. *Section 5: Deciding on additions to the Agenda.* This is similar to the present section 4 except for the recasting of the clauses in subsection (2).

The Committee is of the view that where a proposed new project involves an area of major innovation or reform, the Section must first make a decision on the basis of the desirability of uniformity, the demand for it, the likelihood of acceptance of its final proposals and the difficulties involved in reaching agreement on policy questions. The fact that a subject is under study by, or has been reported on by, one or more law reform bodies should not by itself be a reason for not undertaking a project on that subject but, on the other hand, a divergence of views among law reform bodies on the subject may serve as an indication that there will be a diversity of political views on the subject of such a degree that uniform legislation will not come to pass even on basic points of principle.

6. *Sections 6 and 7: The form of proposals for uniformity.* These sections represent a considerable departure from the present section 5 because the final proposal for uniformity may not necessarily be a Uniform Act.

The Committee feels that while it is necessary to decide the matters of policy or principle for the benefit of those who have the carriage of any matter, it is equally necessary to decide at the outset the form of the proposal for uniformity. It may be appropriate, for example, to state only the principle. It may be that the Section would decide that the proposal should be a Uniform Act that embodies a legislative scheme in its entirety. It may decide that the proposal should be a Uniform Act that embodies only part of the scheme, that is, the key provisions that state the main matters of policy or principle, with incidental or procedural matters being left to the respective jurisdictions' discretion. In another case, the decision could be to have alternatives in the text for the key policy provisions to reflect alternative approaches resulting from differing views. A proposal for uniform law can take forms other than a complete Uniform Act and the Section should in each case determine which approach is the most appropriate: see section 7.

Since the form of the proposal would not necessarily be a Uniform Act, section 6 does not distinguish between the preparation of reports and the preparation of draft Acts, as do the present sections 4, 5, 6 and 7.

As to the proposed section 6(c), we recommend that where a project is assigned to two or more jurisdictions, an effort should be made to encourage personal meetings and minimize travelling expense by selecting jurisdictions on the basis of the convenience of travelling arrangements for those involved.

7. *The role of heads of law reform bodies.* It is recommended that the heads of the various law reform bodies who attend the Conference consider having a meeting by themselves apart from the annual meeting of the Section for the purposes of exploring areas of agreement and disagreement respecting matters coming before the Section in which they are involved and reaching consensus on methods of proceeding with these matters.

8. *Sections 8 and 9:* These sections are the same as the present sections 6 and 7 respectively except for the references to reports instead of draft Uniform Acts.

9. *Section 9: The Office of Chairman.* It has long been the custom of the Conference for the President to chair the meetings of the Uniform Law Section. Where the President sits in the Criminal Law Section, the task of presiding at the Uniform Law Section has fallen

on the 1st Vice-President, if he is a member of the Section, or the 2nd Vice-President. We feel that the time has come for the Section to annually elect its own Chairman, as does the Criminal Law Section and Legislative Drafting Section. This will enable the President to concentrate on the business of the Executive and of the plenary sessions.

10. *Drafting.* Where a Uniform Act is assigned for drafting, consideration should be given to the desirability of having more than one draftsman participating in the work and to encouraging voluntary referral of the draft to the Legislative Drafting Section for final scrutiny before it is reported. The Committee did not feel it necessary or appropriate to include this recommendation in the proposed redraft.

11. *Local Caucus.* Each jurisdiction should hold a caucus of its representatives before each annual meeting to study and discuss reports that will be on the Agenda for that meeting and to designate its spokesman or spokesmen for the purposes of casting the jurisdictions' votes. Again, we feel it neither necessary nor appropriate to include this in the proposed redraft.

The Committee respectfully commends for your consideration and acceptance the redraft of the Section's Rules of Procedure as contained in the Schedule hereto.

Arthur N. Stone, Chairman
Glen Acorn, Francis C. Muldoon,
James W. Ryan, and
Graham D. Walker

26 July 1977

SCHEDULE I

RULES OF PROCEDURE OF THE UNIFORM LAW SECTION

(ADOPTED SUBJECT TO REVIEW IN 1978)

1. In these rules "jurisdiction" means the Commissioners and representatives from,

(a) a province of Canada;

(b) a territory of Canada; or

(c) the Government of Canada.

2. (1) Except as provided in this section, a motion shall be carried by the affirmative votes of the majority of those persons voting on the motion.

(2) A motion shall be decided by way of a poll of the jurisdictions where,

(a) the chairman declares that the motion shall be so decided; or

(b) any jurisdiction requests that the motion shall be so decided, whether or not the motion has been previously decided by a vote conducted in accordance with subsection (1).

(3) Where a motion is voted upon by way of a poll of the jurisdictions,

(a) each jurisdiction is entitled to cast three votes;

(b) the three votes cast by a jurisdiction may be cast in any combination,

(i) for the motion,

(ii) against the motion, or

(iii) as an abstention;

(c) the votes of a jurisdiction may be cast only by one of the members of the jurisdiction who shall be selected beforehand by the members of that jurisdiction;

(d) any votes not actually cast shall be counted as abstentions;

(e) the motion is carried if the number of votes cast for the motion exceed the number cast against it;

(f) the minutes of the proceedings shall show only whether the motion was carried or defeated.

3. (1) A preliminary agenda for an annual meeting shall be sent out by the Executive Secretary to the Local Secretaries by June 15th prior to the meeting.

(2) The agenda for an annual meeting of the Section shall be settled prior to the meeting by the Chairman of the Section in consultation with the Executive Secretary.

(3) In settling the agenda for an annual meeting, the Chairman shall,

(a) show as the first items on the agenda the annual reports and those items that, as of June 1st, are ready to be proceeded with at the meeting;

(b) determine the order of the items referred to in clause (a) in accordance with the priorities that in his opinion should be accorded to them; and

(c) subject to subsection (3) of section 4, determine the order of any items other than those referred to in clause (a).

4. (1) A recommendation that a matter be undertaken by the Section,

(a) may be made only by a jurisdiction or the Canadian Bar Association; and

(b) must be filed with the Executive Secretary not later than the first day of August before the annual meeting at which the recommendation will be presented.

(2) A recommendation made under subsection (1),

(a) shall state the reasons for the recommendation; and

(b) should be accompanied, where possible, by a report on the subject that includes the questions of policy that the Section should determine.

(3) Where subsections (1) and (2) have been complied with, the recommendation shall be dealt with at the meeting under the item "Recommendations for Additions to the Agenda".

(4) Where subsections (1) and (2) have not been complied with, the recommendation may nevertheless be added to the agenda at an annual meeting if consent to consider it is given by way of a motion passed by a two-thirds majority at that meeting.

(5) If a motion under subsection (4) is defeated, the recommendation shall be added to the agenda for the next annual meeting.

5. (1) Where a recommendation made under section 4 is before an annual meeting, the first matter to be decided shall be whether the matter recommended is to be undertaken by the Section.

(2) In determining the question of whether the matter recommended should be undertaken by the Section, regard shall be had to the following:

(a) whether uniformity is desirable in respect of that matter;

(b) whether there has been any demand for uniformity in respect of that matter;

(c) whether there is any indication that the proposals recommended for adoption by the Section have any likelihood of being accepted; and

(d) the questions of policy that the Section should determine.

6. Where it is decided that a matter is to be undertaken by the Section,

(a) any report supporting the recommendation shall then be considered;

(b) one or more jurisdictions shall be directed to prepare a report; and

(c) where a direction is given to two or more jurisdictions to prepare a report or draft Act, the choice of jurisdictions shall, where possible, be made with a view to the convenience of travel arrangements for the persons involved in order to encourage personal meetings and to minimize travelling expense.

7. In the case of any matter undertaken by the Section, consideration shall be given to the form and method most appropriate to accomplish uniformity, taking into consideration the following methods or any combination thereof:

(a) the adoption of a statement of principle;

(b) a draft of operative provisions only of a Uniform Act;

(c) a draft Uniform Act;

(d) the recognition by one province of acts done in another province if valid under the laws of that other province;

(e) uniform provisions in alternative form.

8. The jurisdiction or jurisdictions charged with the preparation of a report shall forward copies of it to the Executive Secretary and to each Local Secretary prior to the first day of June of the following year for consideration at the annual meeting to be held in that year.

9. On the final adoption of a report, each jurisdiction shall advise its government of that fact and provide it with a copy of the report.

10. (1) The chairman of the Section for the ensuing year shall be elected at the conclusion of the Section's proceedings at each annual meeting of the Conference.

(2) In the event that the office of chairman is vacant, the Executive of the Conference shall appoint another person as chairman for the remainder of the former chairman's term.

(3) A meeting of the Section shall be presided over by the chairman, a person designated by the chairman or a person elected at the meeting for the purpose.

SCHEDULE 2

RULES OF PROCEDURE OF THE UNIFORM LAW SECTION

(1975 PROCEEDINGS, PAGE 63)

1. In these rules, "jurisdiction" means the Commissioners from
   (a) a province of Canada;
   (b) a territory of Canada; or
   (c) the Government of Canada.

2. A motion shall be carried by a majority vote of the persons present at the meeting.

3. (1) A recommendation that a matter be placed on the agenda
   (a) may be made only by a jurisdiction or the Canadian Bar Association, and
   (b) must be filed with the Executive Secretary not later than the first day of June before the annual meeting at which the recommendation will be presented.

(2) A recommendation under subsection (1) shall state the reasons for the recommendation and shall be accompanied by a report on the subject which, where possible, shall include the questions of policy that the Conference should determine.

(3) Where a recommendation is filed with the Executive Secretary under this section, the person making the recommendation shall mail copies of the recommendation and report so filed to all Local Secretaries on or before the first day of June before the annual meeting at which the recommendation will be presented.

(4) Where subsections (1) and (2) have been complied with, the Executive Secretary shall include the matter on the agenda under "New Business".

(5) Where subsections (1), (2) and (3) have not been complied with, the recommendation will not be considered until the next annual meeting unless consent to consider it is given by at least two-thirds of those persons present at the meeting at which the recommendation is sought to be presented.

4. (1) Where a recommendation made under section 3 is before an annual meeting, the first matter to be decided shall be whether the item recommended is to remain on the agenda.

(2) Where the recommendation does not relate to an amendment or revision of a uniform Act then in determining the question of whether the item recommended should remain on the agenda, regard shall be had to the following:

(a) whether there is an obvious need for, or whether it is in the public interest to have, a uniform Act on the subject;

(b) whether there has been any demand from any quarter for uniformity in legislation on the subject;

(c) whether there is any indication that the proposed enactment would have some likelihood of being enacted.

5. (1) Where it is decided that an item is to remain on the agenda,

(a) the report accompanying the recommendation shall then be considered and questions of policy raised in the report shall be answered, and

(b) one or more jurisdictions shall be directed to prepare a draft Act on the basis of the policy matters determined at the meeting.

(2) Notwithstanding subsection (1), clause (b), a report relating to an amendment to or a revision of a Uniform Act may be accompanied by a draft of the amendment or revision but in that case the report shall indicate what the changes are and the reasons for them and shall not consist of the draft Act only.

6. The jurisdiction charged with the preparation of a draft Act shall forward copies of it to the Executive Secretary and to each Local Secretary prior to the first day of June of the following year for consideration at the annual meeting to be held in that year.

7. On the final adoption of a draft Act, each jurisdiction shall advise its government of that fact and provide it with a copy of the uniform Act and the relevant material.

APPENDIX U

(See page 33)

TAKING OF EVIDENCE ABROAD

MANITOBA MEMORANDUM

At the 1968 meeting of The Hague Conference a Convention was prepared on the taking of evidence abroad in civil or commercial matters. A copy of the Convention is attached hereto. The Convention has already been ratified or acceded to by Denmark, the United States, Finland, France, Norway, Portugal, the United Kingdom, Sweden, Czechoslovakia and Spain. Some of these countries are countries with which Canadians have frequent contacts either in business or in a tourist way. Many matters probably arise where it would be convenient to be able to take evidence in one of these countries for use in a Canadian action or vice versa. For this reason, the Convention should be of interest to a number of provinces.

We suggest that the Conference undertake the preparation of a statute which would enable a province to adopt or accede to this Convention.

The Convention does not contain the usual federal state clause. However, The Hague Conference has indicated that there is a possibility that federal states, such as Canada, could accede to the Convention with respect to one or several provinces at a time. Indeed, Article 24 mentions federal states with respct to the designation of more than one central authority.

The Convention requires the designation of one or more central authorities for the administration of the Convention. Any Act drafted for the purposes of Canada therefore, would have to provide for the designation of a central authority. A choice would have to be made as to whether a central authority should be designated for all of Canada with some delegation from that central authority to the various provinces or a separate central authority should be designated for each province concerned.

Rae Tallin
for the Manitoba
Delegates

Winnipeg
1 June 1977

EDITORIAL NOTE: As the memorandum was a preliminary document only, the printing of the Convention in these Proceedings has been omitted.

APPENDIX V

(See page 33)

INTERNATIONAL ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS

MANITOBA MEMORANDUM

At the 1968 meeting of The Hague Conference on Private International Law, a Convention was prepared concerning the international administration of the estates of deceased persons. A copy of the Convention is attached hereto.

We suggest that a Uniform Act be prepared for provinces who might wish to accede to this Convention. Article 35 of the Convention contains a federal state clause which would allow the application of the Convention to one or more provinces at a time.

The accession to this Convention would allow for the administration of an estate in the adopting province of a non-resident deceased by the person named in an international certificate as the person entitled to administer the moveable estate of the deceased person. It is open to the adopting country or province to indicate, under Article 30, whether they will recognize powers with respect to immoveables in whole or in part.

This Convention would require some administrative backup by any province which wished to accede to it. However, it does not seem likely that the Convention would require any additional personnel or expenditure from what already exists with respect to the administration of estates in various provinces.

The adoption of the Convention would remove some of the difficulties which presently exist with respect to the resealing of Letters of Probate or taking out new Letters of Administration in order to deal with estates of non-residents.

Rae Tallin
for the Manitoba
Commissioners

Winnipeg
1 June 1977

EDITORIAL NOTE: As the memorandum was a preliminary document only, the printing of the Convention in these Proceedings has been omitted.

APPENDIX W

(See page 33)

CONFLICT OF LAWS IN MATRIMONIAL PROPERTY MATTERS

MANITOBA MEMORANDUM

A number of provinces have enacted or are considering the enactment of general reforms in the law relating to matrimonial property. It appears likely that the laws adopted by the various provinces will differ, if not drastically, at least in minor ways. These differences will likely give rise to problems of conflicts of law when dealing with matrimonial property during the course of a marriage or perhaps even on death. Questions will arise as to whether property situated in province A which belongs to a married couple who reside in province B should be subject to the laws of province A or province B in so far as marital property problems might affect it. It does not take much imagination to conjure up situations which might result in laws of several different provinces having to be applied to deal with the disposition of property on a divorce or separation or on death.

At the 1976 meeting of The Hague Conference on Private International Law, a Convention on this matter was drawn up. We do not propose the Convention be adopted, however, it might serve as a model for some concepts that should be considered in respect of any legislation along these lines.

We suggest that the Conference take this matter under consideration and attempt to draft legislation which would result in a single matrimonial regime law applying to any property owned by a married couple.

Rae Tallin
for the Manitoba
Commissioners

Winnipeg
1 June 1977

APPENDIX X

(See page 65)

THE DESIRABILITY OF UNIFORMITY IN FEDERAL AND PROVINCIAL EVIDENCE LEGISLATION

SASKATCHEWAN MEMORANDUM

I. BACKGROUND

1. *Federal*

In December, 1975, the Law Reform Commission of Canada completed a four-year study on the law of evidence with a proposal for an Evidence Code, made in a 115-page report to the federal Minister of Justice. The proposed Code would replace the *Canada Evidence Act* and certain other federal legislative provisions.

The Minister of Justice has since promised legislation and there has been considerable dialogue across Canada, much of it at the initiation of the Department of Justice, as to the merits of the proposed Code and as to the notion of a Code. While some support has been given, a good deal of criticism has been voiced.

Since the federal government's draft legislation has not yet been made public, it is not known to what extent the proposed legislation will be taking the criticism into account, or will otherwise differ from the Commission's proposed Evidence Code.

2. *Provincial*

All provinces and both the territories have evidence legislation, some having more extensive provisions than others. Insofar as legislative provisions exist, there is a rough similarity, not only among the provinces, but also between the provincial and the federal legislation. In common law jurisdictions, substantial areas of the law of evidence are governed by the common law which, on the whole, results in uniformity so far as those particular areas are concerned.

In 1941, the Uniformity Commissioners adopted model evidence legislation—the *Uniform Evidence Act*—which has been amended from time to time, and as recently as 1976. Four jurisdictions have enacted this model, either with minor modifications or at least substantially. Particular provisions have been enacted by a good many provinces, and also by the Parliament of Canada.

In March, 1976, the Ontario Law Reform Commission completed a seven-year study in a 278-page report to the Attorney General for Ontario. That report contained a proposed draft statute, which is substantially different, in nearly every respect, from the proposed Evidence Code of the Law Reform Commission of Canada.

Other provincial law reform agencies have also been dealing with the law of evidence, but not as extensively as the federal and Ontario commissions. For example, the Civil Code Revision Office in Quebec published a Report on Evidence in June, 1975, recommending certain changes to the Quebec Civil Code relating to a number of specific matters, such as proof of written documents, the giving of testimony, and admissions. The Law Reform Commission of British Columbia also has been examining a number of evidence problems. And the Alberta Institute of Law Research and Reform, which reported on the Rule in *Hollington v. Hewthorn* in 1975, has recently commissioned a study to examine the federal and Ontario proposals and other possible solutions.

The extent to which individual provinces or the territories may wish to follow the federal or Ontario models, make changes of their own, or leave their legislation as it is, is a matter of speculation at this time.

3. *Relationship between Federal and Provincial*

There are, of course, constitutional restraints on the extent to which the federal and provincial legislative authorities can make their evidence laws applicable. The extent of the applicability of those laws and their interrelationship is intricate. Below are examples of this relationship:

1. The *Canada Evidence Act* provides (in section 2) that its main provisions apply to criminal proceedings and "to all civil proceedings and other matters whatever respecting which the Parliament of Canada has jurisdiction". However, section 37 of the Act provides that, in such proceedings—subject to the Act and other federal legislation—the laws of evidence in force in the province in which the proceedings are taken, are applicable. Provincial evidence legislation may state "This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction". (See, as examples, section 3 of the British Columbia *Evidence Act* and section 2 of *The Evidence Act* of Ontario.

2. In matters heard in the Federal Court of Canada, that Court has a discretion to admit evidence not otherwise admissible if that evidence would be admissible in a similar matter in a superior court of a province in accordance with the law in force in any province, notwithstanding that it is not admissible by virtue of section 37 of the *Canada Evidence Act*. (See section 53(2) of the *Federal Court Act*.)

3. The *Divorce Act* specifically provides (in section 20) that divorce proceedings are to be governed by the laws of evidence of the province in which the proceedings are taken, unless the *Divorce Act* or other federal legislation provides to the contrary. The *Divorce Act* does contain a provision dealing with privilege.

4. There are complicated interrelated provisions in the provisions that deal with compelling witnesses to answer incriminating questions and the use of the answers to those questions in subsequent proceedings. A witness may be compelled to answer a question in criminal proceedings under section 5 of the *Canada Evidence Act*, but whether his answer can be used against him in subsequent civil proceedings may be governed by provincial legislation, as is the case with section 5 of the British Columbia *Evidence Act* or section 9 of *The Evidence Act* of Ontario. The same kind of problem can arise if the processes are reversed, the answer being elicited in the civil proceeding and an attempt being made to use the answer in subsequent criminal proceedings.

II. THE NEED FOR UNIFORMITY IN REFORM

The reports of the federal and Ontario law reform commissions amply demonstrate that there should be substantial improvement in the law of evidence. But whatever the imperfections of our present laws, what is not needed are two widely different sets of evidence rules in each province. This would be the case in Ontario, for example, if the federal and Ontario legislative bodies enacted statutes embodying the recommendations of their respective law reform commissions.

It is desirable that there be uniformity of evidence legislation, not only among the provinces but, as well, between the provinces and the federal legislative authority.

Similar rules of evidence should be applicable in each province with respect to the prosecution of Criminal Code offences, on the one hand, and to the prosecution of provincial offences, on the other. It does not make sense in the administration of justice, from either the points of view of fairness to the parties or of the efficiency of the system (requiring lawyers and judges to be familiar with two substantially different sets of rules) to have different rules with regard to confessions, hearsay, competence and compellability, privilege, or the examination of witnesses, as well as other matters. On the same or similar facts, for example, a person might be charged with dangerous driving under the Code or with driving without due care and attention under a provincial statute. A key witness might be competent or his evidence privileged in one hearing and not in the other. The test of the admissibility of a confession would be reliability with respect to the Criminal Code offence if the proposed federal Evidence Code were adopted, and voluntariness with respect to the provincial offence if the law applicable to that area were left unchanged. (Clearly differing rules for determining the admissibility of evidence should not provide a possible basis for enabling the prosecutor to choose between basis to laying charges under federal or provincial law.) The same reasoning may be applied to the law of evidence in civil cases. In the fact situations just referred to, the accused might also be a defendant in a civil suit for damages.

Another illustration is misleading advertising, which could form the basis of a complaint under either provincial consumer protection legislation or federal competition laws.

Also, in the development of new federal or provincial evidence legislation, care should be taken to ensure that, where necessary, the legislation is appropriately intermeshed. The present relationship between federal and provincial legislation was referred to earlier.

Furthermore, if it is considered of national interest to have a uniform standard of criminal justice across Canada, uniformity among the provinces themselves is desirable. While federal evidence legislation may largely achieve such a standard, insofar as the admissibility of evidence on criminal cases is concerned, that legislation may make applicable as it currently does, certain provincial laws of evidence, and these latter laws may vary from province to province.

It is recognized that there may be a small number of matters that would not be included in both federal and provincial legislation, or might need to be treated differently.

But it is urged that it is extremely important that an attempt be made to develop uniform legislation, so far as it is possible to do so, for both provincial and federal levels.

III. MACHINERY

The obvious machinery to provide uniform evidence legislation is, of course, the Uniform Law Conference of Canada. Initially, Ontario and Saskatchewan requested that the desirability of uniformity in federal and provincial evidence legislation be placed on the agenda for the 1977 Conference. Since then, it is understood that there have been similar requests from other jurisdictions.

This subject was discussed at the Federal-Provincial Conference of Attorneys General in Ottawa at the end of June. There was a general consensus that uniformity in reform was desirable, although it was recognized that it would be inappropriate for Ministers to undertake not to introduce reform legislation until such time as uniform model legislation had been achieved. There was a general concurrence by the Ministers with the suggestion that the Uniform Conference should consider the matter of uniformity and take steps to develop uniform legislation. For this latter purpose, the Attorney General of Ontario stated his province was willing to participate in the preparation work, and the federal Minister of Justice indicated that his Department would be willing to cooperate. Prior to the Conference, Alberta and Saskatchewan had agreed, if asked to do so by the Conference and if provided with adequate funds for the required personnel, to undertake the project.

There appears to be a widespread belief that the development of new uniform evidence legislation is a matter of prime importance and urgency.

It is recognized, of course, that the Uniform Law Conference does not have a sufficient full-time apparatus to undertake the substantial task of producing model evidence legislation. Nor is it reasonable to expect its usual method of reference to a province to report back the following year likely to produce a fruitful result. Individual provinces are unlikely to have the necessary manpower to do the job.

The preparation of uniform evidence legislation deserves special treatment.

It is suggested that a consortium of jurisdictions be given the task of producing draft model legislation. The consortium should include the federal jurisdiction and Ontario, which have been

responsible for the major reform proposals and have personnel who are conversant with the issues, and Alberta, which has taken a special interest, and perhaps one other province. Quebec, if it were willing to join the group, would bring its expertise on codification.

It is contemplated that the consortium would retain some personnel to assist in carrying out the project. The Conference does have in hand some research funds that might be made available for that purpose. Additional funds, if necessary, would have to be raised through agreement.

The Conference could establish an appropriate timetable. The consortium might be asked to bring draft model legislation to the 1978 Conference, or to come with the issues to that Conference with a view to having a draft for 1979. A more practicable, and perhaps a more generally-acceptable, approach would be for the consortium to bring draft legislation to the Conference on a piecemeal basis over a period of time, selecting at the beginning those areas on which agreement might most readily be reached. The consortium could be given the mandate to determine the most appropriate method of proceeding, including the matters of priorities and timetabling. The production of draft legislation would not, of course, necessarily involve codification.

Richard Gosse
for the Saskatchewan
Delegates

Regina, Saskatchewan.
July 8, 1977.

APPENDIX Y

(See page 68)

AUDITORS 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.

In so far as the General Account is concerned your auditors are satisfied that the method of presentation fairly reflects general acounting procedures.

With respect to the Research Fund, however, your auditors have the following concerns:

1. We note that in the 1976 Auditors report, concern was expressed that the Treasurer's report did not attribute interest earned on securities in which the Research Fund is invested to that Fund. The 1976 auditors recommended that, ". . . the question of applying the interest to the Research Fund or General Account should be resolved by the executive officers of the Conference after confirmation that there is no law of Canada that requires the interest to remain with the Research Fund."

We note that in the 1977 Treasurer's Report on the Research Fund it would appear that the accrued interest has been attributed to the Research Fund. However, we are advised by the Treasurer that based on a resolution of the Executive Committee the accrued interest for the past year is shortly to be transferred from the Research Fund to the General Account. We make no comment as to the legality of this transfer. We would submit that good accounting practice requires that a solicitor's certificate to the effect that such a transfer would not be in breach of the trust should be attached to the Treasurer's Report.

2. Your auditors note that a payment out of the Research Fund in the amount of $3,000 was made in connection with the revision of the Uniform Acts for publication. We understand that this expenditure was authorized by resolution of the Executive Committee. We further understand that monies will be received from C.L.I.C., for the Revision and Publication of the Uniform Acts. We strongly recommend that the Research Fund be reimbursed for the amount which has been prepaid on the project.

3. We have discussed the format of the Treasurer's Report regarding the Research Fund and it has been agreed that in future years the Treasurer's Report regarding the Research Fund will be divided into two parts. The first part will reflect the history or source and cash flow of the fund since its inception. The second part will be presented in a manner similar to the General Account or as a balance sheet in that the report will commence with the previous year's balance, show disbursements in the current year and cash on hand.

4. Finally, at the opening of the plenary session your auditors were requested to consider whether or not the initials "E. & O. E." standing for Errors and Omissions Excepted should form part of the Treasurer's Report. We also note that in transactions where further adjustments may be necessary the initials E. & O. E. are common. An example would be the statement of adjustments in real estate transactions. However, in deference to Graham Walker and in the spirit of *true* accounting practice, the Treasurer has agreed that in future the phrase will not appear.

Karen M. Weiler
Claire Young

August 25th, 1977

APPENDIX Z

(See page 69)

CONFERENCE FINANCES

REPORT OF SPECIAL COMMITTEE

As a result of the recommendation of the President, Mr. Wendall MacKay, in his Report to the Conference, a Special Committee on Finance was formed.

The Committee was composed of René Dussault, Richard Gosse, H. Allan Leal, Arthur N. Stone and Graham D. Walker (Chairman).

The Committee was directed to examine the state of present and future income, expenditure and financial need of the Conference and to report with recommendation to the Closing Plenary Session.

Present income is raised solely by annual contributions from the participating jurisdictions of the Conference. There is some income from interest on the contributions, this, however, is small. At present a contribution of $1500 is made by the provinces of Ontario, Quebec, New Brunswick, Nova Scotia, Manitoba, British Columbia, Saskatchewan, Alberta and Newfoundland. The Province of Prince Edward Island and the governments of the Yukon and the Northwest Territories make a contribution of $750. The Government of Canada pays $1500. The amount of these grants was determined by the Conference in 1971 (See *1971 Proceedings*, pages 105 and 106).

In addition, the Conference has available to it funds for certain specified purposes. These funds are, however, not available for the general purposes and objects of the Conference and thus cannot be considered as revenue of the Conference.

The annual contributions total $17,250 while the annual regular expenditures last year amounted to almost $19,500. These expenditures have by good management been held to the bare minimum. In some cases they reflect special arrangements that cannot be counted upon on a continuing basis. For example, the printing of the *1975 Proceedings* cost $9,940 while the cost of the *1976 Proceedings* was $6,123. The saving of almost $4,000 was fortuitous, perhaps a more realistic figure would be between $10,000 and $11,000. In addition the fee of the Executive Secretary has been increased annually in proportion to the inflationary trend. It is obvious from these figures that the Executive will have great difficulty in meeting present financial

commitments next year if the income of the Conference remains the same, indeed at first glance it is in a deficit position.

In addition to the foregoing, the cost of the president's reception is now borne by the Conference. The cost of duplicating reports has increased and the number of reports have multiplied. Greater and costlier travel is required by the members of the Executive and possibly there should be some reimbursement to members of the Conference in respect of certain special committees. Attendance on a regular basis of a representative at the National Conference of Commissioners on Uniform State Laws has and will result in increased annual expenditures. Further, the Conference in recent years has given serious consideration to inviting guest experts to attend and participate in the Conference activities, e.g. next year Dr. Elmer Driedger, Q.C., will be invited to attend the Legislative Drafting Section.

As a result of lack of revenue, the Conference had to go elsewhere for funds to print the *Consolidation of Uniform Acts*. The experience of the Conference in this respect has been disconcerting.

It is the conclusion of your Committee that if the Conference is to provide the leadership expected of it and to carry out its objects and purposes further income is required. The question is how much.

Bearing in mind that six years have passed since the amount of the present grants was fixed, the increase in the cost of supplies and services over that period of time, the present commitments of the Conference and the suggestions for adoption of increased activity by the Conference, it is the recommendation of your Committee that the Conference adopt the following resolution:

RESOLVED that:

(1) the governments of the provinces of Ontario, Quebec, New Brunswick, Nova Scotia, Manitoba, British Columbia, Saskatchewan, Alberta and Newfoundland be assessed $2,500 for their annual contribution to the Conference;

(2) the governments of Prince Edward Island, Yukon Territory and the Northwest Territories be assessed $1,250 for their annual contribution to the Conference;

(3) the Government of Canada be assessed $2,500 for its annual contribution to the Conference; and

(4) the amounts assessed to the governments for their annual contribution be applicable to the year beginning August 13, 1977, and each subsequent year unless sooner changed.

Graham D. Walker (Chairman)
René Dussault
Richard Gosse
H. Allan Leal
Arthur N. Stone

St. Andrews
26 August 1977

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 (Traffc 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.
—Affdavits 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.
Information Reporting Act	1977	

UNIFORM ACTS RECOMMENDED

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Interpretation Act	1938	Am. '39; Rev. '41; Am. '48; Rev. '53, '73.
Interprovincial Subpoenas Act	1974	
Intestate Succession Act	1925	Am. '26, '50, '55; Rev. '58; Am. '63.
Jurors' Qualifications Act	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 Beneficiaries	1957	8	1975	Retirement Plan Beneficiaries Act
—Perpetuities	1954	8	1975	In part by Retirement Plan Beneficiaries Act and in part by Perpetuities Act
Testators Family Maintenance Act	1945	4	1974	Dependants Relief 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

* *indicates that the Act has been enacted in part.*
° *indicates that the Act has been enacted with modifications.*
× *indicates that provisions similar in effect are in force.*
† *indicates that the Act has since been revised by the Conference.*

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.×; 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.×; 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.× *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); P.E.I. ('74) *sub nom.* Dependants of a Deceased Person Relief Act. Total: 2.

Devolution of Real Property Act — Enacted by Alta. ('28); N.B.* ('34); N.W.T.° ('54); P.E.I.* ('39) *sub nom.* Probate Act: Part V; Sask. ('28); Yukon ('54). Total: 6.

Domicile Act — 0.

Effect of Adoption Act — P.E.I. (' '). Total: 1.

Evidence Act — Enacted by Man.* ('60); N.W.T.° ('48); P.E.I.* ('39); Ont. ('60); Yukon° ('55). Total: 5.

—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.

—*Hollington v. Hewthorne* — Enacted by B.C. ('77). Total: 1.

—Judicial Notice of Acts, etc. — Enacted by B.C. ('32); Man. ('33); N.B. ('31); N.W.T. ('48); Yukon ('55). Total: 5.

—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); Sask. ('46); Yukon ('55). Total: 8.

Extra-Provincial Custody Orders Enforcement Act — Alta. ('77); B.C. ('76); Man. ('76); N.B. ('77); Nfld. ('76); N.S. ('76); P.E.I. ('76). Total 7.

Fatal Accidents Act — Enacted by N.B. ('68); N.W.T. ('48); P.E.I.[x]. Total: 3.

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); P.E.I. ('74); Sask.° ('68). Total: 8.

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); Sask. ('28); Yukon° ('54). Total: 8.

Jurors' Qualifications Act — Enacted by B.C. *sub nom.* Jury Act. Total: 1.

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) *sub nom.* Children's Act: Part I; Sask.° ('20, '61); Yukon* ('54). Total: 11.

Limitation 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; P.E.I.x; Sask.* ('41). Total: 3.

Pensions Trust 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); Sask. ('57). Total: 7.

Perpetuities Act — Enacted by Alta. ('72); B.C. ('75); N.W.T.* ('68); Ont. ('66). Total: 4.

Personal Property Security Act — Ont.° ('67). Total: 1.

Presumption of Death Act — Enacted by B.C. ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Man. ('68); N.W.T. ('62); N.S. ('63, '77); 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.° ('74); Sask. ('40); 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); P.E.I.[x]. Total: 2.

Service of Process by Mail Act — Enacted by Alta.[x]; B.C.° ('45); Man.[x]; Sask.[x]. Total: 4.

Statutes Act — P.E.I.[x]. Total: 1.

Survival of Actions Act — Enacted by B.C.[x] *sub nom.* Administrations Act; N.B. ('68); P.E.I.[x]. Total: 3.

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 6 jurisdictions before it was superceded by The Dependants Relief Act.

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.

Variation of Trusts Act — Enacted by Alta. ('64); B.C. ('68); Man. ('64); N.W.T. ('63); 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

* *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); Extra-Provincial Custody Orders Enforcement Act ('77); Frustrated Contracts Act† ('49); Human Tissue Gift Act ('73); Interpretation Act ('58); Intestate Succession Act ('28); Legitimacy Act ('28, '60); Limitation of Action Act ('35); Pensions 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); Retirement Plan Beneficiaries Act ('77); Service of Process by Mail Actˣ; 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); International Wills ('76). Total: 32.

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 Actˣ *sub nom.* Libel and Slander Act; Evidence — Affidavits before Officersˣ; Foreign Affidavits* ('53), *Hollington v. Hewthorne* ('77), Judicial Notice of Acts, etc. ('32), Photographic Records ('45), *Russell v. Russell* ('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); Jurors' Qualification Act ('77) *sub nom.* Jury Act; Legitimacy Act ('22, '60); Occupiers' Liability Act ('74); Perpetuities Act ('75); Presumption of Death Act ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Reciprocal 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: 33.

Canada

Evidence — Foreign Affidavits ('43), Photographic Records ('42); Regulations Act° ('50), superseded by the Statutory Investments Act, S.C. 1971, c. 38. 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); Jurors' Qualifications Act ('77); 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); Personal Property Security Act ('77); 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), Conflict of Laws ('55). Total: 38.

New Brunswick

Assignment of Book Debts Act° ('52); Bills of Sale Act[x]; Bulk Sales Act ('27); Conditional Sales Act ('27); Contributory Negli-

gence 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); Extra-Provincial Custody Orders Enforcement Act ('77); Fatal Accidents Act ('68); Foreign Judgments Act° ('50); Frustrated Contracts Act ('49); Intestate Succession Act ('26); Legitimacy 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: 31.

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 Subpoena 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° ('60); Reciprocal Enforcement of Maintenance Orders Act* ('51, '61); Regulations Act° ('77) *sub nom.* Statutes and Subordinate Legislation Act; 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 ('69) *sub nom.* Child Welfare Ordinance: Part IV; 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.

Nova Scotia

Assignment of Book Debts Act ('31); Bills of Sale Act ('30); Bulk Sales Act[x]; Conditional Sales Act ('30); Contributory Negligence Act ('26, '54); Cornea Transplant Act[x]; Corporations Securities Registration Act ('33); Defamation Act* ('60); Evidence — Foreign Affidavits ('52), Photographic Records ('45), *Russell v. Russell* ('46); Human Tissue Gift Act ('73); Legitimacy Act[x]; Pension Trusts and Plans — Appointment of Beneficiaries ('60); Perpetuities ('59); Presumption of Death Act° ('63); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act° ('73); Reciprocal Enforcement of Maintenance Orders Act ('49); Survivorship Act ('41); Testators Family Maintenance Act°; Trustee Investments* ('57); Variation of Trusts Act ('62); Vital Statistics Act° ('52); Warehousemen's Lien Act ('51); Warehouse Receipts Act ('51). Total: 25.

Ontario

Assignment of Book Debts Act ('31); Criminal Injuries Compensation Act ('71) *sub nom.* 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); Conditional Sales Act* ('34); Contributory Negligence Act* ('38); Defamation Act° ('48); Dependants' Relief Act° ('74) *sub nom.* Dependants of a Deceased Person Relief Act; Devolution of Real Property Act* ('39) *sub nom.* Part V of Probate Act; Effect of Adoption Act[x]; Evidence Act* ('39); Extra-Provincial Custody Orders ('76); Fatal Accidents Act[x]; Human Tissue Gift Act ('74); Interpretation Act ('39); Legitimacy Act* ('20) *sub nom.* Part I of Children's Act Limitation of Actions Act* ('39); Partnerships Registration Act[x]; Proceedings Against the Crown Act* ('73); Reciprocal Enforcement of Judgments Act° ('74); Reciprocal Enforcement of Maintenance Orders Act* ('51); Retirement Plan Beneficiaries Act[x]; Statutes Act[x]; Survival of Actions Act[x]; Variation of Trusts Act ('63); Vital Statistics Act* ('50); Warehousemen's Lien Act° ('38). Total: 19.

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); 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 ('24, '25); Reciprocal Enforcement of Maintenance Orders Act ('68); Regulations Act ('63); Service of Process by Mail Act[x]; Survivorship Act ('42, '62); Testators Family Mainteance Act ('40); Trustee (Investments) ('65); Variation of Trusts Act ('69); Vital Statistics Act ('50); Warehousemen's Lien Act ('21); Wills Act ('31). Total: 30.

Yukon Territory

Assignment of Book Debts Act° ('54); Bills of Sale Act° ('54); Bulk Sales Act ('56); Criminal Injuries Compensation Act° ('72) *sub nom.* Compensation for Victims of Crime Act; 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.

CUMULATIVE INDEX

EXPLANATORY NOTE

This index specifies the year or years in which a matter was dealt with by the Conference.

If a subject was dealt with in three or more consecutive years, only the first and the last years of the sequence are mentioned in the index.

The inquiring reader, having learned from the cumulative index the year or years in which the subject in which he is interested was dealt with by the Confernce, can then turn to the relevant annual *Proceedings* of the Conference and ascertain from its index the pages of that volume on which his subject is dealt with.

If the annual index is not helpful, check the minutes of that year.

Thus the reader can quickly trace the complete history in the Conference of his subject.

This index does not contain any references to the work of the Criminal Law Section, nor did the Cumulative Index which this index 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 index is arranged in parts:

Part I. Conference: General
Part II. Legislative Drafting Section
Part III. Uniform Law Section

An earlier compilation of the same sort is to be found in the 1939 Proceedings at page 242 to 257. It is entitled: TABLE AND INDEX OF MODEL UNIFORM STATUTES SUGGESTED, PROPOSED, REPORTED ON, DRAFTED OR APPROVED, AS APPEARING IN THE PRINTED PROCEEDINGS OF THE CONFERENCE 1918-1939.

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