UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

OF THE

SIXTIETH ANNUAL MEETING

HELD AT

ST. JOHN'S NEWFOUNDLAND

August, 1978

PROCEEDINGS

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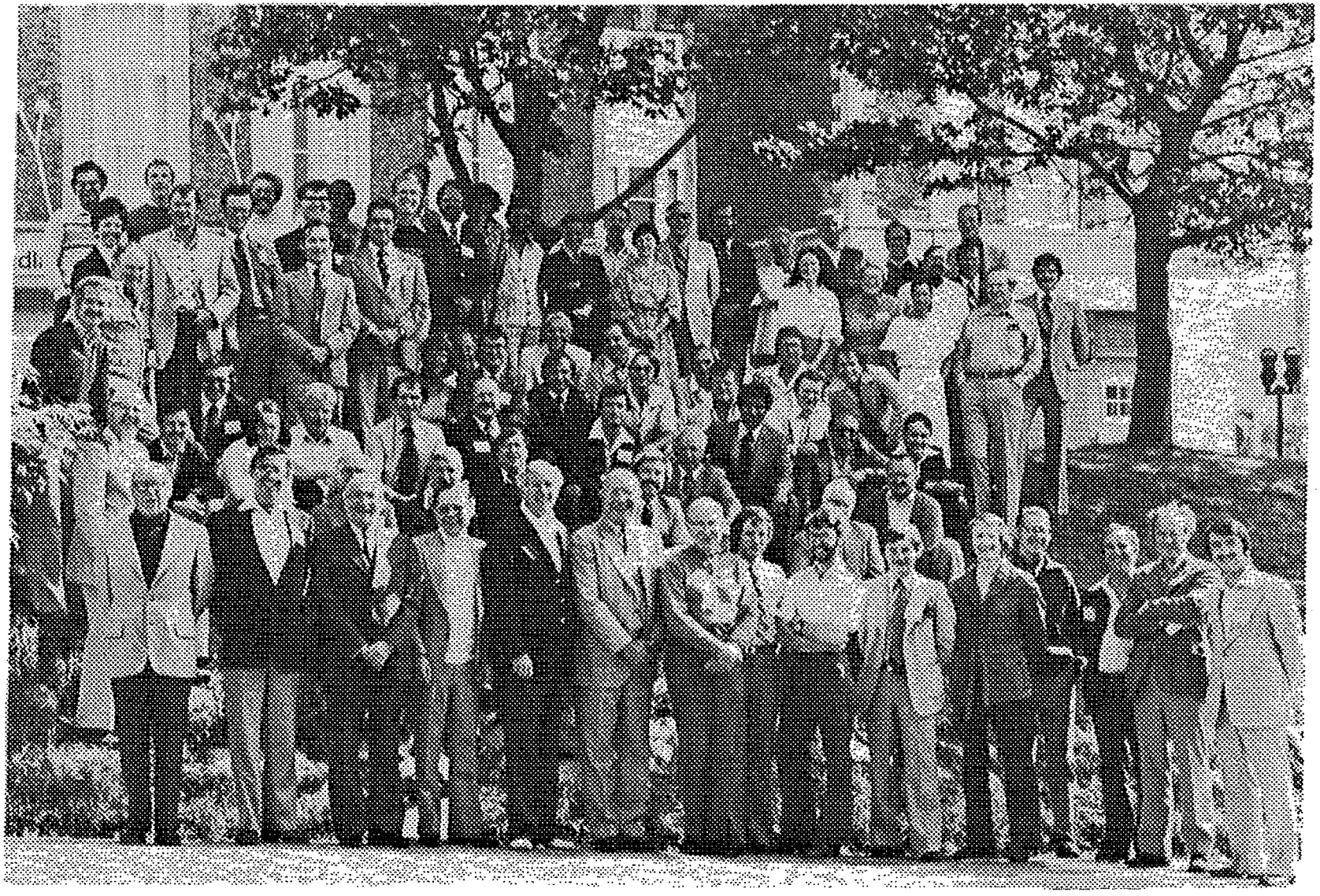

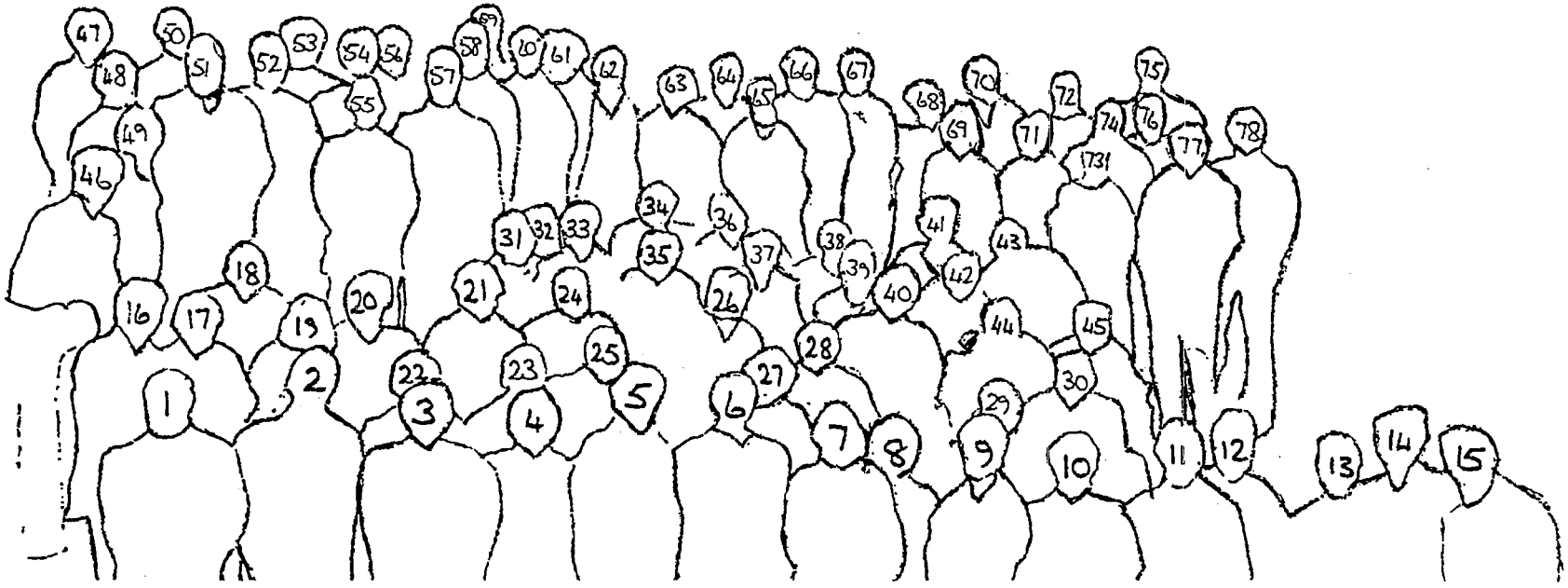

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66. A. Lloyd Caldwell, Halifax
68. Hugh M. Ketcheson, Regina
69. Georgina R. Jackson, Regina
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71. Lilias Toward, Halifax
72. Neil A. McDiarmid, Victoria
73. Ann Vice, *Ottawa*
74. Arthur Close, Vancouver
75. Gordon S. Gale, Halifax
77. William H. Hurlburt, Edmonton
78. Gerard Martin, Corner Brook

Absent: Alta., Davidson; B.C., Farquhar, Mackenzie, Vogel; Can., Baudouin, Bergeron, Bissonnette, duPlessis, Greenspan, Jordan, Landry, Pepper, Sisk, Stoltz; N.B., Guerette; Nfld., Kelly, Mercer, Ryan; N.W.T., Flieger, Singer; Ont., Tucker; P.E.I., Stewart; Que., Carrier, Longtin, Rioux; Sask., Cumming, Ozirny; Yukon, Cosman.

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Two copies should be sent to the Executive Secretary of the Conference and the remaining copies should be taken to the meeting at which the report is to be considered.

If material is to be translated into French by the Canadian Intergovernmental Conference Secretariat, the copy must be in the hands of the Executive Secretary before the end of June of the year in which it is to be considered.

All reports should be dated.

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(For local addresses, etc., see list of delegates, pages 9-16)

Executive Secretary

Lachlan MacTavish, Q.C.
Box 1, Legislative Bldg., Queen's Park
Toronto, Ontario M7A 1A2

DELEGATES

(August 1978)

The following listed persons were designated by their respective governments to attend some part of the 1978 annual meeting of the Conference. Of the 105 so designated, 101 attended.

Legend

(*L.D.S.*) Attended the Legislative Drafting Section.
(*U.L.S.*) Attended the Uniform Law Section.
(*C.L.S.*) Attended the Criminal Law Section.
(*S.P.S.*) Attended the Special Plenary Session.
(*) Was unable to attend the Meeting.

Alberta:

H. B. CASSON, Assistant Director, Criminal Justice, Department of the Attorney General, 9919-105 Street, Edmonton T5K 2E8. (*C.L.S.*)

ROBERT H. DAVIDSON, Davidson and Pringle, 10138-121 Street, Edmonton T5N 1K4. (*C.L.S.*)

MARG DONNELLY, Director, Legal Research and Analysis, Department of the Attorney General, 9919-105 Street, Edmonton T5K 2E8. (*U.L.S.*)

WILLIAM H. HURLBURT, Q.C., Director, Institute of Law Research and Reform, 402 Law Centre, University of Alberta, Edmonton T6G 2H5. (*U.L.S.*)

ROSS W. PAISLEY, Q.C., Deputy Attorney General, 9919-105 Street. Edmonton T5K 2E8. (*C.L.S.*)

BARINDER PANNU, Solicitor, Department of the Attorney General, 9803-102A Avenue, Edmonton T5J 3A3. (*S.P.S.*)

H. GRAHAM REID, Chief Legislative Counsel, 400 Oxbridge Place, 9820-106 Street, Edmonton T5K 2J6. (*L.D.S. & U.L.S.*)

YAROSLAV ROSLAK, Q.C., Director, Criminal Justice, Department of the Attorney General, 9919-105 Street, Edmonton T5K 2E8. (*C.L.S.*)

WILLIAM E. WILSON, Q.C., Barrister and Solicitor, 900 Chancery Hall, Edmonton T6J 2C8. (*U.L.S.*)

CLAIRE YOUNG, Assistant Chief Legislative Counsel, 400 Oxbridge Place, 9820-106 Street, Edmonton T5K 2J6. (*L.D.S. & U.L.S.*)

British Columbia:

TOM R. BRAIDWOOD, 1500-510 West Hastings Street, Vancouver V6B 1M6 (*C.L.S.*)

ARTHUR L. CLOSE, Solicitor, Law Reform Commission, 1080-1055 W. Hastings Street, Vancouver V6E 2E9. (*U.L.S.*)

KEITH B. FARQUHAR, Faculty of Law, University of British Columbia, Vancouver V6T 1W5 (*U.L.S.*)

GILBERT D. KENNEDY, Q.C., S.J.D., Associate Deputy Attorney General, Revised Statutes Commissioner, Room 025, Parliament Buildings, Victoria V8V 4S6. (*L.D.S. & U.L.S.*)

KEN C. MACKENZIE, Guild, Yule and Co., 1680-505 Burrard Street, Vancouver V7X 1C9. (*U.L.S.*)

NEIL A. MCDIARMID, Q.C., Associate Deputy Attorney General, 1016 Langley Street, Victoria V8W 1V8. (*C.L.S.*)

ALLAN R. ROGER, Deputy Legislative Counsel, Parliament Buildings, Victoria V8V 1X4. (*L.D.S. & U.L.S.*)

ANTHONY F. SHEPPARD, Prof. of Law, University of B.C., 2075 Westbrook Place, Vancouver V6T 1W5. (*S.P.S.*)

HERB M. THORNTON, Assistant Legislative Counsel, Parliament Buildings, Victoria V8V 1X4. (*L.D.S. & U.L.S.*)

RICHARD H. VOGEL, Q.C., Deputy Attorney General, 1016 Langley Street, Victoria V8W 1V8. (*U.L.S.*)

H. N. YACOWAR, Solicitor, Ministry of the Attorney General, 76 Dallas, Apt. #46, Victoria V8V 4S6. (*C.L.S.*)

Canada:

JEAN-LOUIS BAUDOUIN, Q.C., Vice-Chairman, Law Reform Commission of Canada, 130 Albert Street, Ottawa K1A 0L6. (*C.L.S.*)

MICHAEL BEAUPRÉ, Assistant Parliamentary Counsel, House of Commons, Parliament Buildings, Ottawa K1A 0A6. (*L.D.S.*)

ROBERT C. BERGERON, Legislative Counsel, Department of Justice, Ottawa K1A 0H8. (*L.D.S.*)

P. A. BISSONNETTE, Deputy Solicitor General, 140 Laurier West, Ottawa K1A 0P8. (*C.L.S.*)

K. L. CHASSE, Legal Adviser, Policy Planning Section, Department of Justice, Ottawa K1A 0H8. [Department of the Attorney General, Victoria, British Columbia (after 1 October 1978)]. (*C.L.S.*)

R. L. DUPLESSIS, Law Clerk and Parliamentary Counsel, The Senate, Parliament Buildings, Ottawa K1A 0A4. (*L.D.S.*)

E. G. EWASCHUK, Director, Criminal Law Amendments Section, Department of Justice, Ottawa K1A 0H8. (*C.L.S.*)

FRED E. GIBSON, Q.C., Chief Legislative Counsel, Department of Justice, Ottawa K1A 0H8. (*U.L.S.*)

DONALD G. GIBSON, Special Adviser, Criminal Law Amendments Section, Department of Justice, Ottawa K1A 0H8. (*C.L.S.*)

PIERRE GRAVELLE, Assistant Deputy Minister, Policy, Planning and Development, Department of Justice, Ottawa K1A 0H8. (*C.L.S.*)

EDWARD L. GREENSPAN, Greenspan, Gold and Moldover, 4005 T-D Centre, Toronto M5K 1G8. (*C.L.S.*)

F. J. E. JORDAN, Director, Constitutional, Administrative & International Law, Department of Justice, Ottawa K1A 0H8. (*U.L.S.*)

L. P. LANDRY, Q.C., Assistant Deputy Attorney General, Criminal Law, Department of Justice, Ottawa KIA 0H8. (*C.L.S.*)

FRANCIS C. MULDOON, Q.C., Chairman, Law Reform Commission of Canada, 130 Albert Street, Ottawa K1A 0L6. (*U.L.S.*)

MILES H. PEPPER, Q.C., Senior Legislative Counsel, Department of Justice, Ottawa K1A 0H8. (*L.D.S. & U.L.S.*)

PATRICIA SISK, Privy Council Section, Department of Justice, Ottawa K1A 0H8. (*L.D.S.*)

DOUGLAS E. STOLTZ, Assistant Parliamentary Counsel, Law Branch, House of Commons, Parliament Buildings, Ottawa K1A 0A6. (*L.D.S.*)

ROGER TASSÉ, Q.C., Deputy Minister, Department of Justice, Ottawa K1A 0H8. (*C.L.S. & U.L.S.*)

Manitoba:

ANDREW C. BALKARAN, Deputy Legislative Counsel, 116 Legislative Building, Winnipeg R3C 0V8. (*L.D.S. & U.L.S.*)

GILBERT R. GOODMAN, Q.C., Assistant Deputy Attorney General, 543-405 Broadway Avenue, Winnipeg R3C 3L6. (*C.L.S.*)

GORDON E. PILKEY, Q.C., Deputy Attorney General, 110 Legislative Building, Winnipeg R3C 0V8. (*C.L.S.*)

ROBERT G. SMETHURST, Q.C., D'Arcy & Deacon, 300-286 Smith Street, Winnipeg R3C 1K6. (*U.L.S.*)

RAE H. TALLIN, Deputy Minister and Legislative Counsel, 116 Legislative Building, Winnipeg R3C 0V8. (*L.D.S. & U.L.S.*)

New Brunswick:

GORDON F. GREGORY, Q.C., Deputy Minister of Justice, P.O. Box 6000, Fredericton E3B 5H1. (*C.L.S.*)

RAYMOND J. GUERETTE, Palmer, O'Connell, P.O. Box 1324, Saint John E2L 4H8. (*U.L.S.*)

PETER PAGANO, Legislative Solicitor, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1. (*L.D.S. & U.L.S.*)

H. HAZEN STRANGE, Director of Public Prosecutions, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1. (*C.L.S.*)

ERIC L. TEED, Q.C., Teed & Teed, P.O. Box 6639, Station A, Saint John E2L 4S1. (*C.L.S. & U.L.S.*)

Newfoundland:

LINDA BLACK, Legislative Counsel, Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7. (*L.D.S. & U.L.S.*)

JOHN G. KELLY, Director of Public Prosecutions, Department of Justice, Confederation Building, St. John's A1C 5T7. (*C.L.S.*)

GEORGE MACAULAY, Q.C., Deputy Minister, Department of Justice, Confederation Building, St. John's A1C 5T7. (*C.L.S.*)

GERARD MARTIN, Barrister & Solicitor, P.O. Box 1077, Corner Brook A2H 6T2. (*C.L.S.*)

KEITH MERCER, Assistant Deputy Minister, Department of Justice, Confederation Building, St. John's A1C 5T7. (*U.L.S.*)

A. JOHN NOEL, Legislative Counsel, Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7. (*L.D.S. & U.L.S.*)

MARY NOONAN, Solicitor, Department of Justice, Confederation Building, St. John's A1C 5T7. (*U.L.S.*)

THOMAS J. O'REILLY, O'Neill, Riche, O'Reilly and Noseworthy, 323 Duckworth Street, St. John's A1C 1G9. (*)

RONALD PENNEY, Senior Legislative Counsel, Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7. (*L.D.S. & U.L.S.*)

JAMES W. RYAN, Q.C., Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7. [Little Reef House, Fitts Village, St. James, Barbados W.I. (After 31 August 1978)] (*L.D.S. & U.L.S.*)

Northwest Territories:

PATRICIA FLIEGER, Chief, Legal Services Division, Department of Public Services, Yellowknife X0E 1H0. (*L.D.S. & U.L.S.*)

DEREK SINGER, Legislative Counsel, Department of Public Services, Yellowknife XOE 1H0. (*L.D.S. & U.L.S.*)

Nova Scotia:

A. LLOYD CALDWELL, Q.C., Walker, Dunlop, P.O. Box 3366 (S), Halifax B3J 3V1. (*U.L.S.*)

GORDON F. COLES, Q.C., Deputy Attorney General, P.O. Box 7, Halifax B3J 2L6. (*C.L.S.*)

GORDON S. GALE, Director (Criminal) Department of the Attorney General, P.O. Box 7, Halifax B3J 2L6. (*C.L.S.*)

LILIAS M. TOWARD, Chairman, Nova Scotia Law Reform Commission, Howe Building, Hollis Street, Halifax B3J 2L6. (*U.L.S.*)

GRAHAM D. WALKER, Q.C., Legislative Counsel, P.O. Box 1116, Halifax B3J 2L6. (*L.D.S. & U.L.S.*)

Ontario:

SIMON CHESTER, Executive Counsel, Ministry of the Attorney General, 18 King Street East, Toronto M5C 1C5 (*U.L.S.*)

LEE K. FERRIER, MacDonald & Ferrier, 401 Bay Street, Toronto M5H 2Y4. (*U.L.S.*)

H. ALLAN LEAL, Q.C., LL.D., Deputy Attorney General, 18 King Street East, Toronto M5C 1C5. (*U.L.S. & C.L.S.*)

STEPHEN B. MCCANN, Counsel, Policy Development Division, Ministry of the Attorney General, 18 King Street East, Toronto M5C 1C5. (*U.L.S.*)

R. M. MCLEOD, Assistant Deputy Attorney General and Director of Criminal Law, 18 King Street East, Toronto M5C 1C5. (*)

C. J. MEINHARDT, Regional Crown Attorney, Crown Attorney's Office, Box 672, Lindsay K9V 4W9. (*C.L.S.*)

DEREK MENDES DA COSTA, Q.C., S.J.D., Chairman, Ontario Law Reform Commission, 18 King Street East, Toronto M5C 1C5. (*U.L.S.*)

HOWARD F. MORTON, Director, Crown Law Office—Criminal, Ministry of the Attorney General, 18 King Street East, Toronto M5C 1C5. (*C.L.S.*)

CRAIG PERKINS, Counsel, Policy Development Division, Ministry of the Attorney General, 18 King Street East, Toronto M5C 1C5. (*U.L.S.*)

CLAY M. POWELL, Q.C., Carter & Powell, 390 Bay Street, Toronto M5H 2Y2. (*)

ARTHUR N. STONE, Q.C., Senior Legislative Counsel, Ministry of the Attorney General, Box 1, Legislative Building, Queen's Park, Toronto M7A 1A2. (*L.D.S. & U.L.S.*)

J. D. TAKACH, Deputy Director, Criminal Law Section and Director of Crown Attorneys, 18 King Street East, Toronto M5C 1C5. (*C.L.S.*)

SIDNEY TUCKER, Counsel, Office of the Legislative Counsel, Box 1, Legislative Building, Queen's Park, Toronto M7A 1A2. (*L.D.S.*)

Prince Edward Island:

HUGH D. MACINTOSH, Law Reform Commission, P.O. Box 1628, Charlottetown C1A 7N3. (*U.L.S.*)

M. RAYMOND MOORE, Legislative Counsel, P.O. Box 1628, Charlottetown C1A 7N3. (*L.D.S. & U.L.S.*)

GRAHAM W. STEWART, Deputy Minister, Department of Justice, P.O. Box 2000, Charlottetown C1A 7N8. (*C.L.S.*)

Quebec:

GEORGES BOULET, Conseiller, Ministères des Affaires Intergouvernementales, 1225, Place Georges V, Quebec G1R 4Z7. (*)

ME DENIS CARRIER, Directeur adjoint de la recherche, Ministère de la Justice, 945, rue Turnbull, Quebec G1R 2X6. (*L.D.S.*)

ME EMILE COLAS, K.M., Q.R., 800, Place Victoria, Room 2501, Montreal H4Z 1C2. (*U.L.S.*)

ME RENÉ DUSSAULT, Sous-ministre, Ministère de la Justice, 225, Grande-Allée est, Quebec G1R 4C6. (*C.L.S.*)

ME DANIEL JACOBY, Sous-ministre associé, Ministère de la Justice, 945, rue Turnbull, Quebec G1R 2X6. (*U.L.S.*)

ME GILLES LÉTOURNEAU, Directeur de la recherche, Ministère de la Justice, 945, rue Turnbull, Quebec G1R 2X6. (*C.L.S.*)

ME MARIE-JOSÉ LONGTIN, Directeur adjoint a la législation gouvernementale, Ministère de la Justice, 945, rue Turnbull, Quebec G1R 2X6. (*L.D.S. & U.L.S.*)

ME SERGE MENARD, 500, Place d'Armes, Suite 1980, Montreal H2Y 2W2. (*C.L.S.*)

ME MICHEL POTHIER, Procureur de la Couronne, 1, Notre-Dame est, Montreal H2Y 1B6. (*C.L.S.*)

ME ROCH RIOUX, Sous-ministre associé, Ministère des Consommateurs, Coopèratives et Institutions financières, 800, Place d'Youville, Quebec G1R 4Y5. (*U.L.S.*)

ME FRANCOIS TREMBLAY, Sous-ministre associé, Ministère de la Justice, 225, Grand-Allée est, Quebec G1R 4C6. (*C.L.S.*)

ME PIERRE VERDON, Substitut en chef du Procurer Général du Québec, 1, Notre-Dame est – 4e étage, Montreal H2Y 1B6. (*C.L.S.*)

Saskatchewan:

MERRILEE CHAROWSKY, Acting Legislative Counsel & Law Clerk, Room 101, Legislative Building, Regina S4S 0B3. (*L.D.S. & U.L.S.*)

RONALD CUMMING, Chairman, Law Reform Commission of Saskatchewan, 1003-201 21st Street East, Saskatoon S7K 0B8. (*U.L.S.*)

RICHARD GOSSE, Q.C., D.Phil., Deputy Attorney General, City Hall, 2476 Victoria Avenue, Regina S4P 3V7. (*C.L.S.*)

KEN HODGES, Research Director, Law Reform Commission of Saskatchewan, 1003-201 21st Street East, Saskatoon S7K 0B8. (*U.L.S.*)

GEORGINA JACKSON, Crown Solicitor, Department of the Attorney General, City Hall, 2476 Victoria Avenue, Regina S4P 3V7. (*U.L.S.*)

HUGH M. KETCHESON, Q.C., Director, Civil Law Branch, Department of the Attorney General, City Hall, 2476 Victoria Avenue, Regina S4P 3V7. (*U.L.S.*)

SERGE KUJAWA, Q.C., Associate Deputy Minister and General Counsel (Criminal Law), Department of the Attorney General, City Hall, 2476 Victoria Avenue, Regina S4P 3V7. (*C.L.S.*)

BONNIE OZIRNY, Legislative Counsel's Office, Room 101, Legislative Building, Regina S4S 0B3. (*L.D.S.*)

DEL W. PERRAS, Director, Public Prosecutions, City Hall, 2476 Victoria Avenue, Regina S4P 3V7. (*C.L.S.*)

Yukon Territory:

ROBERT D. COSMAN, Legislative Draftsman, Box 2703, Whitehorse Y1A 2C6. (*L.D.S.*)

PADRAIG O'DONOGHUE, Q.C., Director of Legal Affairs, Box 2703, Whitehorse Y1A 2C6. (*U.L.S.*)

DELEGATES EX OFFICIO

August, 1978

Attorney General of Alberta: HON. JAMES L. FOSTER, Q.C.

Attorney General of British Columbia: HON. GARDE B. GARDOM, Q.C.

Minister of Justice and Attorney General of Canada: HON. OTTO LANG, P.C., Q.C.

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.

Attorney General of Ontario: HON. R. ROY MCMURTRY, Q.C.

Minister of Justice of Prince Edward Island: HON. ALEXANDER B. CAMPBELL, Q.C.

Minister of Justice of Quebec: HON. MARC-ANDRÉ BEDARD, Q.C.

Attorney General of Saskatchewan: HON. ROY J. ROMANOW, Q.C.

IN MEMORIAM

HUGO FISCHER, LL.D. (Prague)
Died 2 February 1978
A Member of this Conference
Representing
the Northwest Territories
From 1963 to 1971

WILLIAM PARKER FILLMORE, Q.C.
Died 1 May 1978
A Member of this Conference
Representing Manitoba
From 1939 to 1947
And Its President
From 1944 to 1946

GEORGE ALLAN HIGENBOTTAM
Died 29 June 1978
A Member of this Conference
Representing British Columbia
From 1969 to 1978

REQUIESCANT IN PACE

HISTORICAL NOTE

More than 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, Motreal.
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.
1978. Aug. 17-26, St. John's.

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 Prov-

ince 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 is 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.

A novel experience in the life of the Conference—and a most important one—occurred at the 1978 annual meeting when through the good offices of the Federal Department of Justice the Canadian Intergovernmental Conference Secretariat brought in from Ottawa its first team of interpreters, translators and other specialists and provided its complete line of services, including instantaneous French to English and English to French interpretation at every sectional and plenary session throughout the ten days of the sittings of the Conference.

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LEGISLATIVE DRAFTING SECTION

MINUTES

Attendances

Twenty-nine delegates were in attendance. For details see List of Delegates, pages 9 to 16.

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 the Chairman, Mr. Stone, presiding. Mr. Penney agreed to act as secretary in place of Mr. Elliott, who is no longer with the Conference.

Hours of Sitting

It was agreed to sit on Thursday, August 17th, and Friday, August 18th, from 9:30 a.m. to 12:30 p.m. and 2:00 p.m. to 5:00 p.m.

Miscellaneous Matters

RESOLVED that the proceedings of the Section not be taped.

RESOLVED that a message of condolence be sent to the family of the late G. Allan Higenbottam.

RESOLVED that the Section express its gratitude to Mel M. Hoyt, Q.C., who is no longer with the Conference.

RESOLVED that the Section express its regrets to Dr. Elmer A. Driedger that he was unable to attend the meetings of the Section due to ill health and wish him a speedy recovery.

RESOLVED that the Section give a special vote of thanks to James W. Ryan, Q.C., who is leaving the Conference.

Canadian Legislative Drafting Conventions
(1977 Proceedings, page 22)

After consideration of the draft Commentaries (*1977 Proceedings, page 85*) submitted by Messrs. Ryan and Stone, the following resolutions were adopted:

RESOLVED that the Commentaries as amended be adopted and printed in the *Proceedings* (Appendix B, page 64) and in the loose-leaf *Consolidation of Uniform Acts* in a form that is convenient for quick reference.

RESOLVED that a vote of thanks be given to Messrs. Ryan and Stone for their work over the years on this subject.

Computerization of Statutes and Related Matters (1977 Proceedings, page 24)

Each jurisdiction reported on the computerization and printing of statutes.

RESOLVED that the item remain as a standing item on the agenda.

Education, Training and Retention of Legislative Draftsmen in Canada (1977 Proceedings, pages 23 and 112)

There was a general discussion on this matter. Quebec had distributed a report, which was discussed.

RESOLVED that the Committee, consisting of Messrs. Carrier and Walker, continue to study the matter and to report to the next meeting of the Section.

Interpretation Act: The Experience of each Jurisdiction with the Uniform Interpretation Act

There was a general discussion of this matter.

Indexing of Statutes and Regulations

There was a general discussion on the CLIC preliminary report and recommendations, including the use of a table of contents at the beginning of each Act along the lines of the Analysis in the Newfoundland statutes.

Metric Conversion (1977 Proceedings, pages 24 and 135)

The report of Messrs. Penney and Tucker (Appendix C, page 91) (CICS Document 840-135/036) was presented by Mr. Penney.

RESOLVED that the report be accepted and that the Committee not be continued.

Purposes and Procedures of the Section (1977 Proceedings, page 24)

The report of Messrs. Rogers, Tallin and Ms. Young was presented by Mr. Rogers.

RESOLVED that the report be received but not published.

RESOLVED that the Chairman be empowered to nominate *ad hoc* committees and refer to them draft legislation referred to the Section for drafting scrutiny.

Translation of Statutes

There was a general discussion of this matter.

Uniform Reciprocal Enforcement of Maintenance Orders Act

The draft prepared by British Columbia was referred to a sub-committee of Messrs. Moore, Pagano and Thornton for revision and submission to the Uniform Law Section.

New Business

A discussion was held on the clause-paragraph aspect of the Uniform Drafting Conventions. A poll of the jurisdictions indicated an even split in practice.

RESOLVED that the question be placed on the agenda for the next meeting of the Section.

Officers

Mr. Stone was re-elected as chairman and Mr. Penney was elected as secretary for 1978-79.

OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8:00 p.m. on Sunday, 20 August, in the Newfoundland Hotel with Mr. Leal in the chair and Mr. MacTavish as secretary.

Address of Welcome

Mr. Leal introduced the Honourable T. Alex Hickman, Q.C., Minister of Justice of Newfoundland, who in reply extended a hearty welcome to Newfoundland.

John W. Wade, LL.D.

Mr. Leal then introduced Dr. Wade, Vice-President of the National Conference of Commissioners on Uniform State Laws, who would be our guest during the week. The President outlined in brief his visit to the annual meeting of our American counterpart at New York City in July.

Dr. Wade, a professor of law at Vanderbilt University in Tennessee, then addressed the delegates.

Introduction of Delegates

Mr. Macaulay seconded his minister's welcome to Newfoundland and then introduced the Newfoundland delegates.

This was followed by each jurisdiction in turn, the senior member of each delegation introducing the other members.

Minutes of Last Annual Meeting

> RESOLVED that the minutes of the 59th annual meeting as printed in the 1977 Proceedings be taken as read and adopted, subject to the corrections set out in Appendix A, page 63.

President's Address

Mr. Leal then addressed the meeting (Appendix D, page 97).

Treasurer's Report

Claire Young presented her report in the form of a financial statement of the year ending August 11, 1978 (Appendix E, page 104).

RESOLVED that the Treasurer's Report be received.

Appointment of Auditors

RESOLVED that the Treasurer's Report as received be referred to Messrs. Balkaran and Penney for audit and that their report be presented to the Closing Plenary Session.

Secretary's Report

Mr. Ryan presented his report for 1977-1978 (Appendix F, page 106).

RESOLVED that the report be received.

Executive Secretary's Report

Mr. MacTavish presented his report (Appendix G, page 109).

RESOLVED that the report be received.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Georgina Jackson and Messrs. Rioux and MacIntosh, 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, and with Ms. Flieger and Mr. Landry added, to report to the Closing Plenary Session.

Close

There being no further business the meeting adjourned at noon to meet again in Special Plenary Session on Thursday morning to consider the report of the Federal/Provincial Task Force on Evidence and again in the Closing Plenary Session.

UNIFORM LAW SECTION

MINUTES

Attendances

Fifty-seven delegates were in attendance. For details see List of Delegates, pages 9 to 16.

Sessions

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

Distinguished Visitors

The Section was honoured by the participation of Dr. John Wade, Vice-President, National Conference of Commissioners on Uniform State Laws.

The Section was also honoured by the visit of the Honourable H. G. Puddester until recently a judge of the Supreme Court of Newfoundland and a member of this Conference from 1950 to 1962.

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 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 17 July 1978 was considered and the order of business for the week agreed upon.

Children Born Outside Marriage (1977 Proceedings, page 29)

The British Columbia, Nova Scotia and Ontario reports (*1977 Proceedings, pages 152, 163, 175, respectively*) (CICS Document 840-135/006) were considered.

The discussion was led by Professor Farquhar, followed by Messrs. Perkins and Chester.

At the conclusion of a lengthy consideration of the matters raised in the three reports, the following resolution was adopted:

> RESOLVED that this project be referred to British Columbia to prepare a draft uniform act having regard to the decisions and comments made at this meeting; that British Columbia distribute copies as soon as may be to the delegates attending the current sessions of this Section, and that the draft so prepared and distributed be considered at the 1979 annual meeting

Class Actions (1977 Proceedings, page 29)

Dr. Mendes da Costa presented the report of the Special Committee (Appendix H, page 111) in the place of Douglas Lambert, resigned.

After discussion, the following resolution was adopted:

> RESOLVED that the Committee established at the 1977 Conference to monitor current studies and legislation and generally to watch developments in the field of class actions and to report to the 1978 annual meeting be continued with its membership to be named as soon as may be by the Executive (see under *Report of the Executive*, page 57) with power in the Executive to fill any vacancies and the Committee to report to the 1979 annual meeting.

Company Law (1976 Proceedings, page 28)

Part 1 of the annual report on the Promotion of Uniformity of Company Law in Canada was presented by Mr. Ryan and Part 2 of the report was presented by Mr. Jacoby in the absence of Mr. Rioux (Appendix I, page 121).

The thanks of the Section was extended to Mr. Ryan who has chaired the Committee for several years.

> RESOLVED that the Committee be continued with members from Nova Scotia, Prince Edward Island, and Quebec, with the member from Quebec as chairman.

> RESOLVED that this year's report be received and printed in the *Proceedings* with one change, namely, that in Part 1 under the heading "Yukon" the material be struck and a statement as to the situation in the Yukon, to be prepared by Mr. O'Donoghue, substituted.

Consolidation of Uniform Acts: Revision

This matter, which was referred to by Mr. Leal in his presidential address and by the Executive Secretary in his annual report, be referred to Manitoba to consider how best to proceed with a review and up-dating of the uniform acts in the *1978 Consolidation of Uniform Acts* and to report thereon at the 1979 annual meeting.

Contributory Negligence: Tortfeasors (1977 Proceedings, page 29)

At the request of Alberta this subject was put over to the 1979 annual meeting.

Enactments of and Amendments to Uniform Acts (1949 Proceedings, page 18)

Mr. Tallin presented his annual report (Appendix J, page 138).

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

Extra-Provincial Custody Orders Enforcement (1977 Proceedings, page 30)

RESOLVED that the report of the Ontario Commissioners (Appendix K, page 143) (CICS Document 840-135/011) be referred to the Committee on International Conventions on Private International Law for consideration with the Department of Justice, Ottawa, and assist them in any way possible in the preparation of Canada's position regarding this matter at the 1980 plenary session of the Hague Convention. and that the Committee report the results to the 1979 annual meeting.

RESOLVED that the Ontario report be printed in this year's *Proceedings.*

International Administration of Estates of Deceased Persons (1977 Proceedings, page 33)

Consideration of this subject was put over to the 1979 annual meeting.

International Conventions on Private International Law (1977 Proceedings, page 30)

Mr. Leal, chairman of the committee, presented the report (Appendix L, page 164) (CICS Document 840-135/051).

RESOLVED that the report be received.

RESOLVED that the Convention on the Taking of Evidence abroad in Civil or Commercial Matters and associated documents be referred

back to the Committee for study and report to the 1979 annual meeting.

RESOLVED that the report only be printed in the *Proceedings*, omitting the three documents attached to the report (see Appendix L, page 164).

Judicial Decisions Affecting Uniform Acts (1977 Proceedings, page 31)

In the absence of Mr. Moore, Mr. MacIntosh presented the report of Prince Edward Island (Appendix M, page 175).

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

RESOLVED that Prince Edward Island prepare a report on this subject for presentation at the 1979 annual meeting.

RESOLVED that the Executive consider the advisability of integrating in some way the cases affecting Uniform Acts into the supplements to the loose-leaf Consolidation of Uniform Acts.

Law Reform Agencies (1977 Proceedings, page 30)

A general discussion took place as to the relationship, if any, between the agencies and the Conference.

RESOLVED that the matter be considered by the Executive.

RESOLVED that the Executive Secretary prepare and include in a Newsletters a summary of the current work being done by the various law reform agencies in Canada.

Oral statements as to current or projected work projects were presented by representatives of law reform agencies as follows: British Columbia (Mr. Close), Alberta (Mr. Hurlburt), Saskatchewan (Mr. Hodges), Manitoba (Mr. Smethurst), Ontario (Dr. Mendes da Costa), Quebec (Mr. Jacoby), New Brunswick (Mr. Pagano), Prince Edward Island (Mr. MacIntosh), Nova Scotia (Lillias Toward), Newfoundland (Mr. Mercet), Canada (Mr. Muldoon).

Limitations (1977 Proceedings, page 30)

RESOLVED that in view of the lack of adequate time this subject be put over to the 1979 annual meeting.

RESOLVED that the Alberta report (Appendix N, page 183) be received and printed in the *Proceedings*.

Matrimonial Property: Proposal for Uniform Conflict of Laws Rules for Interprovincial Problems (1977 Proceedings, page 33)

Consideration of Manitoba's memorandum (*1977 Proceedings*, page 394) was put over to the 1979 annual meeting.

Powers of Attorney (1977 Proceedings, page 31)

The Report of the Ontario Commissioners (Appendix O, page 236) was presented by Mr. McCann.

After discussion, the draft *Uniform Powers of Attorney Act* attached as the Schedule to this report was referred to the Legislative Drafting Section.

Later Mr. Stone for the Legislative Drafting Section reported that they had revised the draft Act and substituted a fresh draft for consideration.

After discussion, the following resolution was adopted:

> RESOLVED that the draft *Uniform Powers of Attorney Act* (the Schedule to the Ontario Report) as redrafted by the Legislative Drafting Section (Appendix O, page 238) be adopted: that copies be sent by the Local Secretary for Ontario to the other Local Secretaries for distribution to the delegates in their respective jurisdictions who attended this meeting; and that if the Act as so distributed is not disapproved by two or more jurisdictions by notice to the Executive Secretary on or before the 30th day of November 1978, it be recommended for enactment in that form.

Note: Copies were distributed as required by the above resolution. One disapproval only was received (British Columbia). Therefore the *Uniform Powers of Attorney Act* as it appears in Appendix O, page 238, is recommended for enactment.

Prejudgment Interest (1977 Proceedings, page 31)

Consideration of the British Columbia report (*1976 Proceedings*, page 216) was deferred until the 1979 annual meeting.

> RESOLVED that the Ontario memorandum dated 6 June 1978 (CICS Document 840-135/008) be printed in this year's *Proceedings* (Appendix P, page 239).

Protection of Privacy: Tort (1977 Proceedings, page 32)

The report of Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island (Appendix Q, page 262) was presented by Mr. Walker.

After discussion of the draft Act set out as the schedule to the report the following resolution was adopted:

> RESOLVED that the draft *Uniform Privacy Act* be referred to Nova Scotia, Quebec and Ontario (with the Nova Scotia representative as chairman) to consider the policy matters discussed at this meeting, to prepare a fresh draft Act, and to report thereon at the 1979 annual meeting.

Support Obligations (1977 Proceedings, page 32)

I

The Ontario report and attached draft Act were presented by Mr. Perkins (CICS Document 840-135/038).

To assist in the discussion Mr. Walker presented copies of Bill 18 introduced in the Nova Scotia Legislature in February 1978 (CICS Document 840-135/043).

After considerable discussion the following resolution was adopted:

RESOLVED that the draft *Uniform Family Support Obligations Act* attached to the Ontario report be referred back to Ontario to prepare a fresh draft having regard to the decisions and comments made at this meeting, together with any comments which each delegate is urged to send to Mr. Perkins as soon as may be after this meeting, for consideration early in the 1979 annual meeting.

RESOLVED that the documents considered at this meeting be not printed in this year's *Proceedings* owing to their tentative nature.

II

Consideration of the matters that were the subject of the second resolution set out at the bottom of page 32 of the 1977 *Proceedings* (that concern the draft *Uniform Reciprocal Enforcement of Maintenance Orders Act*) was deferred to the 1979 annual meeting.

Uniform Law Section: Purposes and Procedures (1977 Proceedings, page 33)

Mr. Stone presented the report of the Committee on Purposes and Procedures of the Uniform Law Section (Appendix R, page 265).

RESOLVED that the report of the Committee be adopted except Recommendation No. 2 (separate meetings).

RESOLVED that the Committee be continued, composed of Messrs. Colas, Ferrier, Muldoon, Tallin and Walker, and that the Committee elect its chairman from among its own members.

RESOLVED that the thanks of this Section be extended to Mr. Stone for his work on the Committee as its chairman.

Vital Statistics (1977 Proceedings, page 33)

At the request of the British Columbia Commissioners this subject was withdrawn from the agenda.

Wills: The Impact of Divorce on Existing Wills
(1977 Proceedings, page 34)

Mr. Walker, speaking for himself and Mr. Chester, presented a report (Appendix S I, page 269). He also presented a memorandum (Appendix S II, page 280). As the materials mentioned in the memorandum are readily available they are not printed in these *Proceedings*.

After discussion the draft amendments to section 17 of the *Uniform Wills Act* were referred to the Legislative Drafting Section for review and revision.

Upon the return of the proposed amendments from the Uniform Law Section and after further discussion, the following resolution was adopted:

RESOLVED that section 17 of the *Uniform Wills Act* be amended:

(a) by inserting the symbols and figure "(1)" immediately following the section number thereof;

(b) by striking out the article "A" in the first line thereof and substituting therefor the words and comma "Subject to subsection (2), a"; and

(c) by adding thereto the following subsections:

(2) Where in a will

(a) a devise or bequest of a beneficial interest in property is made to a spouse;

(b) a spouse is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon a spouse,

and after the making of the will and before the death of the testator, the marriage of the testator is terminated by a decree absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

(3) In subsection (2) "spouse" includes the person purported or thought by the testator to be his spouse.

Section 17 of the *Uniform Wills Act* as amended by the Conference is set out as Appendix S III (page 280).

Officers: 1979 Meeting

It was agreed that Mr. O'Donoghue would be chairman and Mr. MacTavish secretary of the Section for the 1979 annual meeting.

Close of Meeting

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

The meeting of the Section was concluded.

CRIMINAL LAW SECTION

MINUTES

Attendances

Forty-one delegates were in attendance. For details see List of Delegates, pages 9 to 16.

Opening

Mr. Paisley presided and Mr. Chasse, assisted by Mr. Don Gibson, acted as secretary.

The chairman welcomed the delegates and all were introduced.

Agenda

It was decided to hold two sessions a day as required and to deal with the items on the agenda by jurisdictions.

ALBERTA

Item 1 —

Impairment by Intoxicating Vapours — C.C. s. 234.

It was agreed by the delegates that this item should be deferred to the Ontario section of the agenda.

Item 2 —

Definition of Offences re. Authorization to Intercept — C.C. ss. 195 and 178.1.

The Commissioners recommended that paragraph (g) of s. 195(1) be included in the list of offences in s. 178.1.

The Commissioners recommended that paragraph (j) of s. 195(1) be included in the list of offences in s. 178.1.

Item 3 —

Bail Review by Court of Appeal — C.C. s. 608.1 — amended to include a reference to s. 475.5.

It was agreed that this matter be deferred to later in the agenda.

Item 4 —

Causing a Disturbance — "Public Place" — C.C. s. 171.

The following paragraphs from the Minutes of the Criminal Law Section of last year's Conference were considered (page 42 of the *Proceedings*):

"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."

The Commissioners recommended that s. 171 not be amended.

Item 5 —

Definition of "Municipal Official" and "Official" — Whether an Indian Band Councillor is an "Official" — C.C. s. 107.

It was agreed that no action be taken.

Item 6 —

Outstanding Warrant of Committal — Person Apprehended in Another Province.

— and —

Item 7 —

Arrest Without Warrant — Offence Committed in Another Jurisdiction — Proposal to Extend Relevant Provisions to Include Summary Conviction Matters — C.C. s. 454(2).

It was recommended that these matters (along with Ontario's Item 13 be referred to a committee chaired by Mr. Ewaschuk) to report on Thursday afternoon.

Item 8 —

Justice Unable to Continue Preliminary Inquiry — C.C. Part XV.

The Commissioners recommended that the provisions of the *Criminal Code* be adapted to situations where a Justice is unable to

continue a Preliminary Inquiry and another Justice in that jurisdiction can.

Item 9 —

Dangerous Offender Legislation — Whether C.C. s. 175(1)(e) should be included in s. 689(1)(a).

It was agreed that no action be taken.

Item 10 —

Bribery of Police Officers — C.C. ss. 109-112.

The Commissioners were asked to consider whether the *Criminal Code* should be amended to make it an offence for any peace officer to accept a gift or receive a benefit without the written permission of the Chief of Police.

After much discussion the Commissioners agreed that this matter be left to the general review that the Federal Department of Justice is presently making of s. 110(1)(c).

Item 11 —

Breach of Terms and Conditions of Lottery Licence — C.C. s. 190.

The Commissioners were asked to consider whether the *Criminal Code* should be amended to contain the following section:

190(3.1) Everyone who fails to comply with the terms or conditions prescribed pursuant to subsection (2) is guilty of

(a) an indictable offence and is liable to imprisonment for two years, or

(b) an offence punishable on summary conviction.

The Commissioners recommended against the inclusion of such a section in the *Criminal Code.*

Item 12 —

Punishment for Theft of a Firearm — C.C. s. 294.

The Commissioners were asked to consider whether the *Criminal Code* should contain a specific provision covering the theft of a firearm, and making it an indictable offence with a maximum sentence of five years.

The Commissioners recommended against the inclusion of such a provision in the *Criminal Code.*

Item 13 —

Offence of Causing Death by Dangerous Driving — C.C. s. 203.

It was agreed that this item be deferred until the Nova Scotia section of the agenda.

Item 14 —

Offences Dealing with Tenders to Obtain Government Contracts — C.C. s. 110(1)(f).

The Commissioners were asked to consider whether this offence should be extended to the situation where a prospective tenderer attempts to induce a second prospective tenderer from actually making his tender.

As this is now covered by clause 12 of Bill C-51, it was agreed that no further action be taken.

Item 15 —

Driving Prohibition — C.C. s. 238.

The following paragraphs from the Minutes of the Criminal Law Section of last year's Conference were considered (*1977 Proceedings,* pp. 40, 41):

"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."

Provincial legislation provides for licence suspension upon conviction for these offences. As there is presently a case before the Supreme Court of Canada that should decide whether the accused need actually be aware of the licence suspension (*Mydryk*), it was agreed that this item be carried over to next year's Agenda for consideration at that time.

Item 16 —

Compelling Answers from Prospective Witnesses in Complex Cases.

The following paragraphs from the Minutes of the Criminal Law Section of last year's Conference were considered (*1977 Proceedings*, p. 41):

"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.

"It was agreed that this item be deferred to a later section of the Agenda, and that the study paper be distributed to those Commissioners who have not received a copy."

BRITISH COLUMBIA

Item 1 —

Jury Pooling.

The Commissioners were asked to consider the preliminary report on jury pooling.

It was agreed that no action be taken.

Item 2 —

Transfer of Remnant Sentences Interprovincially — C.C. s. 434(3).

It was recommended that this matter be added to those matters previously referred to a committee chaired by Mr. Ewaschuk to report on Thursday afternoon.

Item 3 —

Intermittent Sentences — C.C. s. 663(1)(c).

The Commissioners were advised of the practical problems that are created when intermittent sentences are served in police lockups and holding cells.

As this problem has been coverd by clause 133 of Bill C-51, it was agreed that no further action be taken.

The Commissioners recommended that the *Criminal Code* be amended to provide that the maximum length of time over which an intermittent sentence could be served would be one year.

Item 4 —

Analysis of the Criminal Law Amendment Act, 1977, Concerning Interception of Private Communications.

It was agreed that British Columbia would submit a study document to the Federal Department of Justice, to enable the Federal authorities to determine whether any amendments would be made to Part IV.I of the *Criminal Code.*

Item 5 —

Prostitution.

It was agreed that this topic would be deferred until Thursday.

Item 6 —

Procuring Attendance of Prisoner — C.C. s. 460.

The Commissioners were asked to consider whether there should be added to section 460, a general provision that would enable a judge to release an inmate:

(1) for the purposes set out in an order,
(2) for the period of time specified in an order, and
(3) under the responsibility of the person specified in an order.

The Commissioners recommended against the inclusion of such a provision in the *Criminal Code.*

Item 7 —

Statutory Forms.

The Commissioners were asked to consider whether to include statutory forms in the *Criminal Code* for such matters as breathalyzer certificates.

Item 8 —

Defence of Due Diligence — Strict and Absolute Liability Offences and the Supreme Court of Canada's Decision in R. v. Sault Ste. Marie (1978), 3 C.R. (3d) 30.

It was agreed that these two items be deferred and added to next year's agenda. British Columbia agreed to prepare these items for discussion.

NOVA SCOTIA

Item 1 —

Offence of Dangerous Driving Causing Death.

Nova Scotia asked that this item be removed from the Agenda.

MANITOBA

Item 1 —

Forcible Entry — C.C. s. 73(1).

The Commissioners recommended that the following words be added to C.C. s. 73(1): "and whether or not he had any intention to take possession of the property."

Item 2 —

Possession of Housebreaking Instruments — C.C. s. 309.

The Commissioners recommended that s. 309(1) of the *Criminal Code* be amended by adding the words, "or for entering a motor vehicle, vessel or aircraft", after the word "safebreaking" in lines 3 and 6.

Item 3 —

Re-election for Non-jury Trial on Preferred Indictments — C.C. s. 507.

The Commissioners recommended that the *Criminal Code* provide that where the Crown consents, the accused may re-elect for trial by a judge sitting alone without a jury on an indictment preferred under s. 507. (Nova Scotia is still a 'grand-jury province' and therefore prefers indictments under ss. 504 and 505. Nova Scotia agreed with this recommendation.)

Item 4 —

Mandatory Blood-alcohol and Breath Samples — Protection from Liability for Taking Samples.

This matter was deferred until consideration of Ontario's Item 3.

ONTARIO

Item 1 —

Reporting of Serious Acts of Violence by Hospital Authorities to the Police.

The Commissioners recommended that this be considered a matter of provincial responsibility and that a duty to report such matters by hospital authorities should not be the subject of a criminal offence.

Item 2 —

Instruments for Automobile Theft.

This matter had already been dealt with as Manitoba's Item 2.

Item 3 —

Mandatory Blood, Alcohol and Drug Samples.

The Commissioners were asked to consider an amendment to the criminal law that would compel doctors to take samples of bodily substances upon request by a peace officer, where the peace officer has reasonable grounds to believe that an offence has been committed.

After much discussion, the Commissioners recommended:

(a) that no amendment be made to the *Criminal Code* to compel a doctor to take samples of bodily substance from a potential accused;

(b) against support in principle for provincial legislation along the lines of the draft *Manitoba Blood Test Act*; and

(c) that no amendment be made to the *Criminal Code* to incorporate the effect of the draft *Manitoba Blood Test Act* to protect a doctor from criminal liability who takes a sample of bodily substance from a potential accused.

Item 4 —

Inclusion of Semi-Automatic Weapons in the Category of Restricted Weapons — C.C. s. 82.

The Commissioners recommended that the *Criminal Code* be amended to include all semi-automatic weapons in the category of restricted weapons.

Item 5 —

Impairment by Alcohol or a Drug — C.C. s. 234.

The Commissioners were asked to consider whether s. 234(1) of the *Criminal Code* should be amended to add the words "or by any combination of alcohol or a drug" after the word "drug" in line 2. After discussion, this item was withdrawn.

Item 6 —

Definition of a Drug; Impairment by Intoxicating Vapours — C.C. s. 234.

The Commissioners recommended that s. 234(1) of the *Criminal Code* be amended to add the words "or any other substance" after the word "drug" in line 2.

Item 7 —

Escaping Lawful Custody — C.C. s. 133.

The Commissioners recommended that s. 133 of the *Criminal Code* be amended to give the Crown the option of proceeding by way of summary conviction.

Item 8 —

Proposal for a Unified Criminal Court.

The Commissioners recommended that this proposal be referred to the Deputy Attorney Generals' Council as an agenda item for the next meeting.

Item 9 —

Pardons for Drinking and Driving Offences.

The Commissioners were asked to consider whether the *Criminal Records Act* should be amended to provide that in the case of convictions for offences under ss. 234, 234.1, 235 and 236, no pardon be granted for a period of five years.

The Commissioners recommended against the inclusion of such a section in the *Criminal Records Act.*

Item 10 —

Dangerous Boating on the Great Lakes — C.C. s. 240.

The Commissioners were asked to consider whether s. 240 of the *Criminal Code* ought to be amended so as to ensure that activities on the Great Lakes and other bodies of water forming the border of

Canada are included. After discussion it was agreed that such activities were already covered by the existing section, and this item was withdrawn.

Item 11 —

Return by the Attorney General in Firearms Cases — C.C. s. 101(3).

The Commissioners recommended that s. 101(3) of the *Criminal Code* be amended to add the words "or his agent" after the words "Attorney General" in line 2.

Item 12 —

Indecent Acts Committed on Private Property — C.C. s. 169.

The Commissioners were asked to consider an amendment to the *Criminal Code* to provide that any wilful and indecent act in public view, whether or not in a public place, be made a criminal offence.

The Commissioners recommended against the inclusion of such a provision in the *Criminal Code.*

Item 13 —

Release from Custody on Warrant from Other Jurisdictions — C.C. s. 454(2)(b).

It was recommended that this matter be added to those matters previously referred to a committee chaired by Mr. Ewaschuk to report on Thursday afternoon.

Item 14 —

Securing Attendance of Accused where New Trial Ordered on Summary Conviction Matter.

The Commissioners recommended that the *Criminal Code* be amended to provide that the Appeal Court or the summary conviction court have the power to enforce the attendance of an accused where a new trial has been ordered in a summary conviction matter.

Item 15 —

False Assertions before a Special Examiner — C.C. s. 122.

The Commissioners recommended that s. 122 of the *Criminal Code* be amended by deleting the words "before a person who is

authorized by law to permit it to be made before him" in lines 4 and 5 or by creating a separate offence of making a false statement during a discovery or cross examination on an affidavit.

Item 16 —

Delayed Notification of Interception — C.C. s. 178.23(4).

The Commissioners recommended that s. 178.23(4) of the *Criminal Code* be amended by deleting the words, "that the investigation of the offence to which the authorization relates is continuing and is of the opinion", in lines 3 and 4.

Item 17 —

Definition of "Weapon" and "Offensive Weapon" — C.C. s. 2.

The Commissioners recommended that s. 2 of the *Criminal Code* be amended so as to accomplish two objectives:

1. To eliminate the circular aspect of the existing definition.
2. To re-define "weapon" so as to include objects which are used for the purpose of threatening, intimidating, striking or causing injury to any person.

Item 18 —

Elimination of Right of Appeal by Private Complainant — C.C. Part XXIV.

The Commissioners recommended that the *Criminal Code* be amended to make clear that the Attorney General has an absolute right to intervene in summary conviction matters at any stage of the proceedings.

Item 19 —

Prostitution — Proof — Keeping a Common Bawdy House — C.C. s. 193.

— and —

Item 20 —

Soliciting by 'Customer' — C.C. s. 195(1).

These two items were deferred to Thursday to be dealt with along with similar items added to the British Columbia agenda items.

Item 21 —

Theft Under $200 — Increasing Jurisdiction — C.C. s. 483.

The Commissioners recommended that s. 483 of the *Criminal Code* be amended by increasing the monetary jurisdiction in subsection (a) from $200 to $500.

QUEBEC

Item 1 —

Enforcement of Fines Imposed by Judgment— C.C. ss. 646, 653(2).

The Commissioners recommended that s. 646 of the *Criminal Code* should be amended to include a mechanism similar to that provided in s. 653(2) to enable the Attorney General to enforce as a judgment the amount of the fine to be paid.

Item 2 —

Publicity of Search Warrants.

The Commissioners recommended that the *Criminal Code* be amended to add the following section:

(1) Before the commencement of criminal proceedings, no one may publish in a newspaper or broadcast, or any other manner whatsoever, the information contained in a search warrant, nor the fact that it has been executed.

(2) The above provision is not applicable to such publications or broadcasts agreed to expressly by the person who was the subject of the search, and the person alleged in the search warrant to have committed the offence.

When asked to consider whether the Crown's agreement should be required under subsection (2), the Commissioners recommended against such a proposal.

Item 3 —

Public Mischief — C.C. s. 128.

The Commissioners recommended that s. 128 of the *Criminal Code* be amended:

(1) by inserting the words "or during the course of such an investigation by a peace officer" between the words "investigation" and "by" in line 2, and

(2) by changing the verbs in clauses (a) to (d) to the present tense.

Item 4 —

Payment of Fine During Appeal.

The Commissioners recommended that the *Criminal Code* be amended to contain a provision permitting the Court of Appeal to suspend the obligation to pay a fine imposed as a sentence where the sentence or guilty verdict is appealed.

Item 5 —

Review of Order for Interim Release.

The Commissioners were asked to consider whether ss. 457.5(1) and 457.6(1) of the *Criminal Code* should be amended to allow a judge to review an order made in accordance with s. 457.8(2)(b).

As this is now covered by clauses 67 and 68 of Bill C-51, it was agreed that no further action be taken.

Item 6 —

Presumption of Intent in Cases of Attempted Break and Enter — C.C. s. 306(2)(a).

The Commissioners recommended that clause (a) of s. 306(2) be amended to read: "broke and entered a place or attempted to break and enter a place is, in the absence of any evidence to the contrary, proof that he broke and entered or attempted to break and enter with intent to commit an indictable offence therein; or"

Item 7 —

Theft of Information; Access to Computers.

The Commissioners recommended that legislation be introduced into the *Criminal Code* dealing with theft (and related offences) of certain types of information, and accessing of information from computers.

Item 8 —

Review of Interlocutory Orders Made by a Superior Court.

The Commissioners recommended that there be introduced into the *Criminal Code* a mechanism for reviewing interlocutory orders

made in excess of jurisdiction by a Superior Court which cannot be rectified by means of an appeal on the merits. Such a mechanism would require the leave of the Court of Appeal and would not have the effect of staying the proceedings before the Superior Court, unless the Court of Appeal ordered otherwise.

The Commissioners also recommended that the *Criminal Code* be amended to provide that in all applications for extraordinary remedies, the trial judge has the discretion to continue the trial where he is of the opinion that the motion is frivolous or without merit. Where leave is obtained from the Court to which the application is made, the trial judge no longer has this discretion.

Item 9 —

Common Gaming House — C.C. s. 179.

The Commissioners recommended that s. 179(4) of the *Criminal Code* be amended by adding as clause (c): "A place can be a common gaming house even if it is used in one of the prohibited fashions on only one occasion".

Item 10 —

Slot Machines — C.C. s. 180(3).

The Commissioners were asked to consider whether the definition of "slot machine" should be amended.

The Commissioners recommended against amending the definition of "slot machine".

NEW BRUNSWICK

Item 1 —

Limitation Periods for Indictable Offences.

The Commissioners recommended that the concept of limitation periods for indictable offences be referred to the Federal Department of Justice for further study, and that a report be prepared for the Conference next year.

Item 2 —

Return of Seized Property.

The Commissioners recommended that s. 446 of the *Criminal Code* be amended so as to apply to articles seized by a peace officer both with and without a search warrant.

Item 3 —

Hybrid Offences

The Commissioners were asked to consider whether ss. 234, 234.1, 235 and 236 of the *Criminal Code* should be amended to provide separate subsections for the indictable and the summary conviction offence.

The Commissioners recommended against such an amendment.

Federal/Provincial Task Force on Uniform Rules of Evidence

A Special Plenary Session was held to receive the report of the Task Force (see page 56).

Mental Disorder in the Criminal Process

Mr. Ken Chasse reported to the delegates in the Criminal Law Section on the Department of Justice's Mental Disorder Project. This was an information item on the course of the Project; no resolution or recommendation was sought at this meeting.

The Project is based on the Law Reform Commission of Canada's Report, *Mental Disorder in the Criminal Process.* A summary of the work completed in the Project was distributed by Mr. Chasse. The first stage of consultations has been completed. Its purpose was to determine how mentally disordered prisoners and accused persons are presently handled in the Criminal Justice System, and to discover the major problems connected with implementing the Commission's recommendations. In particular, the recommendations concerning hospital orders and the Review Boards were concentrated upon during consultations because they have the greatest potential impact upon existing health and corrections resources. It has become clear that the success of implementing any changes to the existing system is very much dependent upon the facilities and attitudes in each area. Therefore, the second stage of consultation will concern detailed discussions with the provinces on what changes can be made.

CANADA

Item 1 —

Criminal Breach of Contract — C.C. s. 380.

The Commissioners recommended that clause (e) of s. 380(1) of the *Criminal Code* be repealed.

Item 2 —

Early Return of Stolen Goods.

The Commissioners adopted in principle that non-compulsory (optional) legislation be prepared to provide for the early return of stolen goods.

Item 3 —

Substitutional Service of Notice of Appeal — C.C. s. 605.

The Commissioners recommended that the *Criminal Code* be amended to provide as follows: "Where the accused can not be found after reasonable efforts have been made to effect service upon him, the Crown may effect substitutional service of a notice of appeal upon that accused in accordance with an order of a judge of the Court of Appeal and upon the accused's lawyer of record at trial."

Item 4 —

Enforcement of Warrants of Committal.

The Commissioners recommended the following changes to the *Criminal Code:*

(a) that s. 461 be amended to apply to both warrants of committal and warrants of arrest;
(b) that s. 454 be amended to apply to both warrants of committal and warrants of arrest, and to both indictable and summary conviction offences;
(c) that s. 454(2) be amended to permit the release of an accused person on an undertaking (with or without conditions) where the Crown consents;
(d) that s. 631 be amended so as to clearly apply to both warrants of committal and warrants of arrest;
(e) that s. 434 be amended to permit the execution of a sentence remanent from the province where the sentence was imposed to the province where the accused is found, upon consent of the Attorneys General of the two provinces. The remanent is to be served consecutively to any outstanding sentence imposed in the province where the accused is found.

Item 5—

Duty of Registered Owner of Vehicle Involved in Hit and Run Accident.

The Commissioners were asked to consider whether the following subsections should be added to s. 233 of the *Criminal Code:*

(5) that the registered owner of the motor vehicle which is involved in an accident such as is referred to in s. 233(2) is required to furnish upon the request of a police officer, the name and address of the person who had the registered owner's permission to drive the vehicle at the time of the accident, or in contravention of this section;

(6) Everyone who, without lawful excuse, the proof of which lies upon him, fails to make the disclosure as requested in subsection (5) is guilty of:

(a) an indictable offence and liable to imprisonment for five years, or

(b) an offence punishable on summary conviction.

The Commissioners recommended against the inclusion of such a provision in the *Criminal Code.*

Item 6 —

Molotov Cocktail — Explosive Substance — C.C. s. 80.

The Commissioners recommended the addition of the following as clause (c) of s. 80 of the *Criminal Code*: "has in his possession a molotov cocktail (a bottle of gasoline containing a wick or other fabric)".

Item 7 —

Procedural Irregularities at Trial.

The Commissioners recommended that the *Criminal Code* be amended to contain the following section:

> Where the court had both territorial jurisdiction and jurisdiction over the subject matter, in the absence of objection at trial and in the absence of prejudice, a conviction will not be set aside because of a procedural irregularity.

Item 8 —

Trial Without Jury — C.C. s. 430.

The Commissioners recommended that s. 430 of the *Criminal Code* be amended so as to apply to all provinces and territories and so as to require the consent of both the accused and the Crown.

ALBERTA (CONTINUED)

Item 3 —

Bail Review by Court of Appeal — C.C. s. 608.1.

The Commissioners were asked to consider an amendment to s. 608.1 of the *Criminal Code* to give the Crown a right of appeal from an order for release.

It was agreed that this matter be deferred to next year's meeting.

Item 16 —

Compelling Answers from Prospective Witnesses in Complex Cases.

A written submission prepared by Barry J. Cavanaugh was distributed. It was agreed that this matter be referred to the Federal Department of Justice for further study, and that a report be prepared for next year.

BRITISH COLUMBIA (CONTINUED)

Item 5 —

Soliciting — C.C. s. 195.1.

The Commissioners were asked to consider whether the *Criminal Code* should be amended to provide: Where a person approaches another person in a public place and offers to engage in sexual conduct for the gain of either, that person commits an offence.

The Commissioners recommended against the inclusion of such a provision in the *Criminal Code.*

ONTARIO (CONTINUED)

Item 20 —

Soliciting by 'Customer' — C.C. s. 195.1.

The Commissioners recommended that s. 195.1 of the *Criminal Code* be amended to provide that the offence of soliciting can be committed by either the prostitute or the customer.

Item 19 —

Common Bawdy House — C.C. s. 193.

The Commissioners were asked to consider the need for a study to determine whether to provide a deeming provision in the *Criminal Code* to overcome the present difficulty of proving that premises used for the purposes of prostitution constitute a common bawdy house.

The Commissioners recommended that no action be taken.

Federal Reaction to Last Year's Recommendations by the Commissioners

Mr. L.-P. Landry, Assistant Deputy Attorney General, Department of Justice reported on the action that had been taken as a result of the recommendations made last year. A copy of this report is included (Appendix U, page 348).

Discussion of the Law Reform Commission's Working Paper on Sexual Offences

Mr. F. C. Muldoon, Chairman of the Law Reform Commission of Canada, commented upon the Working Paper, and advised that a Report to Parliament on the subject was being prepared.

Discussion of Bill C-52

This discussion centred around the practical difficulties involved in proving the assault resulted in "severe physical or psychological damage" to the victim, and in establishing the nature of a previous conviction where both ss. 149 and 149.1 are referred to as "indecent assault".

Discussion of the Law Reform Commission's Report on Criminal Procedure, Part I, Miscellaneous Amendments

Following comments by Mr. Muldoon, the discussion centred around the preliminary inquiry. Most of the delegates were in favour of maintaining the preliminary inquiry and felt that legislative amendments should be kept to a minimum.

Disclosure Projects

This discussion indicated that the success of the project usually depended upon the attitude of defence counsel. In those cases where the Crown voluntarily gave full disclosure, there were more guilty pleas and more consent committals under s. 476. The end result was that court time was saved and witnesses were not inconvenienced.

List of Senior Delegates for Next Year

Alberta	— Paisley
British Columbia	— McDiarmid
Canada	— Ewaschuk
Manitoba	— Pilkey
New Brunswick	— Gregory
Newfoundland	— Macaulay
Nova Scotia	— Coles
Ontario	— McLeod
Prince Edward Island	— Stewart
Quebec	— Dussault
Saskatchewan	— Kujawa

Rules of Procedure

The chairman referred to the rules of procedure contained in last year's minutes, and pointed out that these rules had not been adhered to. This makes it very difficult to run the sessions in an orderly manner.

It was agreed that in the future, closer attention would be paid to the rules. A change was made in rule 5 in that the agenda materials are to be sent to Mr. Ewaschuk at the Department of Justice in Ottawa. A screening committee would be struck to be chaired by the new chairman. Matters considered improper would be sent back to the respective delegations for reconsideration.

New Officers

The nominating committee recommended and moved the election of Mr. Dussault as chairman and Mr. Don Gibson as secretary. Carried.

Close of Meeting

The new chairman took the chair and, on behalf of the delegates, expressed his appreciation of the work done by Mr. Paisley as chairman. Next year's meeting is to be held in Saskatoon.

SPECIAL PLENARY SESSION

MINUTES

A Special Plenary Session convened at 9.00 a.m. on Thursday, August 24, with Mr. Leal presiding and Mr. Chasse acting as secretary.

The Special Plenary Session of the Conference was called to receive the First Report of the Federal/Provincial Task Force on Uniform Rules of Evidence. (Appendix T, page 283).

The President of the Conference, Mr. Leal, outlined the history of the Task Force and the purpose of the Plenary Session. It was indicated that it was not intended that the delegates enter into a detailed discussion of the substantive content of the Report at this year's meeting. Mr. Leal then introduced Professor Anthony Sheppard of the Faculty of Law, University of British Columbia, the Advisor to the Task Force.

Ken Chasse, Chairman of the Task Force, then outlined the work of the Task Force and how it serves the present process of reform of the law of evidence. The Terms of Reference required by the 1977 Resolution (Paragraph No. 1) creating the Task Force, and set out in the Report (Section 1.4), were reviewed, along with the proposed timetable adopted by the Task Force. A second report will be presented to the Conference in 1979 and the final report in August, 1980. The Task Force proposes to finish its review of the law of evidence by the end of June 1980.

The delegates indicated approval of the method of work adopted by the Task Force and approved the suggestion that a review of the recommendations of the Task Force begin at the 1979 Conference. The delegates also approved the suggestion that the Report of the Task Force be published and distributed to interested groups.

Also, it was made clear by more than one speaker that the recommendations of the Task Force are not necessarily those of the participating jurisdictions. A note to that effect appears in the Report (Section 1.9).

Close of Session

There being no further business, the Chairman closed the Special Session.

CLOSING PLENARY SESSION

MINUTES

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

(An abbreviated session was held on Friday evening instead of Saturday morning as planned because of the travel difficulties caused by the Air Canada strike.)

Legislative Drafting Section

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

Uniform Law Section

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

Criminal Law Section

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

Report of the Executive

The President made a report on the work of the Executive at its meetings held during the week.

He announced that the Committee on Class Actions would be composed of Marie-José Longtin, chairwoman, a second member from Quebec to be chosen by the chairwoman, Dr. Mendes da Costa or his designate, Mr. Chester, and Mr. Mackenzie.

He stated that as had been announced a year ago (*1977 Proceedings*, page 69) the 1979 annual meeting would be held in Saskatchewan. He now added that it would be held in the Bessborough Hotel, Saskatoon, from August 16th to August 25th inclusive. The CBA will meet in Calgary.

In 1980 the Conference will meet in the Hotel Charlottetown at Charlottetown, Prince Edward Island, from August 14th to August 23rd inclusive. The CBA will meet in Montreal.

In 1981 the Conference will meet at Whitehorse, Yukon Territory. The CBA will meet in Vancouver.

Auditors' Report

Mr. Penney on behalf of Mr. Balkaran and himself presented the auditors' report (Appendix V, page 355).

RESOLVED that the report of the Auditors be adopted.

Treasurer's Report

RESOLVED that the Treasurer's report be adopted.

Resolutions Committee Report

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

RESOLVED that the Conference express its appreciation by way of a letter from the Secretary.

1. To the Government of Newfoundland and the delegates of Newfoundland for hosting the Sixtieth Annual Conference of the Uniform Law Conference of Canada, a dinner at the Act III for the Legislative Drafting Section, the banquet at the Woodstock Colonial Inn and trips on the schooner "The Norma and Gladys", to mention only a few of the details involved in the preparation of a successful conference. A special thanks to Mrs. Mary Noonan in this regard.
2. To the Lieutenant-Governor of Newfoundland, the Honourable Gordon A. Winter, and Mrs. Winter for entertaining us at a reception at Government House.
3. To the Honourable T. Alex Hickman, Minister of Justice for Newfoundland, for welcoming the Conference at its Opening Plenary Session and at the excellent dinner at the Woodstock Colonial Inn.
4. To Miss Elizabeth Harrington and her accompanying musicians for the delightful concert at the Woodstock Colonial Inn.
5. To the Law Society of Newfoundland for the reception at the Bally Haly Golf and Country Club.
6. To the National Conference of Commissioners on Uniform State Laws for the invitation to attend and the hospitality which they extended to Mr. and Mrs. H. Allan Leal at the National Conference in New York, N.Y. and to Dr. John Wade and his wife, Mary, for honouring this year's conference with their presence.
7. To Mrs. G. Macaulay for hosting a coffee party at her home and to the other ladies of St. John's who helped make this a most entertaining time.
8. To all the Newfoundlanders whose hospitality, warmth, and good cheer has been so evident throughout our stay in St. John's.

New Business

The following resolutions were adopted unanimously and the Secretary requested to send copies to CLIC and CICS, respectively.

RESOLVED that this Conference notes the successful conclusion of the publication entitled "Consolidation of Uniform Acts" and that this Conference again expresses it's grateful thanks to the Canadian Law

Information Council for its generous financial help without which the project could not have been undertaken.

RESOLVED that this Conference notes the successful assistance of the Canadian Intergovernmental Conference Secretariat in the Sixtieth Annual Meeting and wishes to express its thanks to the Secretariat for its many services so well performed.

Nominating Committee's Report

Mr. Tallin, for the Committee, submitted the following nominations for 1978-79:

Honorary President	H. Allan Leal, Q.C., LL.D., Toronto.
President	Robert G. Smethurst, Q.C., Winnipeg.
First Vice-President	Gordon F. Coles, Q.C., Halifax.
Second Vice-President	Padraig O'Donoghue, Q.C., Whitehorse.
Treasurer	Claire Young, Edmonton.
Secretary	Arthur N. Stone, Q.C., Toronto.

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

Close of Meeting

Mr. Leal after making his closing remarks turned the chair over to Mr. Smethurst.

Mr. Smethurst, after paying tribute to Mr. Leal for his outstanding contribution to the Conference, adjourned the meeting.

STATEMENT TO THE CANADIAN BAR ASSOCIATION

by

GORDON F. COLES

The Uniform Law Conference of Canada held its Diamond Jubilee Annual Meeting last week at the city of St. John's, Newfoundland.

The Honourable Alex T. Hickman, Q.C., Minister of Justice for Newfoundland and Professor John Wade, Vice-President of the National Conference of Commissioners on Uniform State Laws, and his wife, were our distinguished guests.

The Legislative Drafting Section met on Thursday, August 17, 1978, and Friday, August 18, 1978. Twenty-nine delegates were in attendance. Among a large number of items discussed were the translation of statutes, the indexing of statutory material, the automated printing and computerization of legislation, and metric conversion. The Section adopted commentaries to the Canadian Legislative Drafting Conventions adopted in 1977.

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

A special meeting of Canadian law reform agencies was convened at the same time as the Conference for informal discussions on Friday the 18th and Saturday the 19th of August. The law reform commissions discussed ways of improving liaison and co-ordination of their work.

The Uniform Law Section, under the chairmanship of R. G. Smethurst, Q.C., of Winnipeg, began its sessions on Monday, August 21, continuing for five full days.

Every jurisdiction in Canada was represented at the meeting, and a record number of 57 delegates were in attendance.

The agenda was lengthy, but among the items discussed were the following: the promotion of uniform company law, the tort of protection of privacy and powers of attorney. Family law figured prominently in the discussions. The Section devoted considerable time to the treatment of support obligations, the status of children born outside marriage, the *Uniform Extra-Provincial Custody Orders Enforcement Act*, and amendments to the *Uniform Wills Act*.

The section discussed the report of a special committee set up to investigate ways of improving the efficiency of the Section. Padraig O'Donoghue, Q.C., was elected chairman of the Uniform Law Section for 1978-79.

Forty-one delegates representing all the provinces, as well as the federal government, attended the Criminal Law Section, which met under the chairmanship of Ross W. Paisley, Q.C., of Edmonton.

This Section discussed a large number of items where amendments might be necessary to the *Criminal Code*. Federal Bills C-51 and C-52 dealing with rape, pornography and prostitution were the subject of vigorous debate. The section also dealt with the recent report of the Law Reform Commission of Canada on sexual offences. The section considered the desirability of amending the *Code* to permit blood, drug or alcohol samples to be taken in a greater variety of cases; and to amend the *Canada Evidence Act* so that witnesses could be compelled to talk to the police in complex investigations, such as securities frauds.

Mr. René Dussault, Deputy Minister: Justice of Quebec, was elected as chairman for 1978-79 and Mr. Donald Gibson of the Department of Justice, Ottawa, was elected as secretary.

On Thursday, August 24, the Conference met in a special plenary session to consider the progress made during the last year by the Conference's joint Federal-Provincial Task Force on Uniform Rules of Evidence. The task force, which was set up in August 1977, consists of representatives of Canada, Quebec, Ontario, British Columbia, Nova Scotia and Alberta. Its task is to attempt to bring about uniformity among the provincial and federal rules of evidence by stating the present law and surveying the Report on Evidence of the Law Reform Commission of Canada, the Report of the Law of Evidence of the Ontario Law Reform Commission, the reports of the other provincial law reform commissions on various subjects in the law of evidence, the major codifications of the law of evidence in the United States and the major reports on the law of evidence from England and the other Commonwealth countries, for the purpose of setting out the alternative solutions for the various problems in the law of evidence, and recommending the preferred solutions amongst those alternatives.

We were pleased to see that substantial progress had been made by the task force, and that it was proceeding on target towards the formulation of uniform rules of evidence by 1980. Since we are

anxious to involve the practising bar in the process of reform, we intend to publish the task force's first annual report in the near future to inform the Bar of the methods being used to achieve uniformity in evidence law.

We were delighted to publish during the last year a loose-leaf binder containing the second consolidation of the uniform acts of the Conference. This publication, produced with the generous financial assistance of the Canadian Law Information Council, may be obtained from the Executive Secretary of the Uniform Law Conference.

Full details of all other business transacted at the Conference will be published in the *Proceedings* of the 60th Annual Meeting, which will be available, on request, from the Executive Secretary, Lachlan MacTavish, Q.C.

The officers of the Conference for 1978-79 are:

Honorary President	— H. Allan Leal, Q.C., LL.D., Toronto.
President	— Robert G. Smethurst, Q.C., Winnipeg.
1st Vice-President	— Gordon F. Coles, Q.C., Halifax.
2nd Vice-President	— Padraig O'Donoghue, Whitehorse.
Treasurer	— Claire Young, Edmonton.
Secretary	— Arthur N. Stone, Q.C., Toronto.

Next year the Conference will meet at Saskatoon, Saskatchewan.

APPENDIX A

(See page 27)

CORRIGENDA: 1977 PROCEEDINGS

Page 12. Under *Ontario* add in the alphabetical order "Howard F. Morton, Counsel, Crown Law Office—Criminal, Ministry of the Attorney General, 18 King Street E., Toronto, M5C 1C5".

Page 26. Under the heading *Appointment of Auditors* "Flieger" in the second line of the resolution should read "Young".

Page 68. Under the heading *Auditors' Report* "Mr." in the first line should read "Ms.".

Page 76. The second term of E. C. Leslie, Q.C., Regina, as Vice-President should read "1957-1958"; the term of Horace Read, Q.C., LL.D., Halifax as Vice-President should read "1956-1957".

Page 77. Between Kennedy and Meldrum at the top of the page insert:

"M. M. Hoyt, Q.C., Fredericton 1966-1967"
"Louis-Philippe Pigeon, Q.C., Quebec 1966-1967"

Under the heading TREASURERS the term of Frank Ford should read "1918-1925" and the terms of Messrs. Des-Brisay, Fournier, Carter, Hoyt, Wood, Crosby and Stone should read, respectively, "1950-1957, 1957-1959, 1959-1961, 1961-1966, 1966-1969, 1969-1972, 1972-1977".

Page 80. Under *Canada* Fred W. Gibson should read "Fred E. Gibson"; Peter E. P. Johnson, '75, '76 should read "Peter E. Johnson, '75, '76 (See also under *Saskatchewan*)"; R. J. Marin should read "His Honour Judge R. J. Marin, '77".

Page 81. Under *Manitoba* R. H. Tallin, '59-'77 should read "Rae H. Tallin, '58-'77".

Page 82. Under *Nova Scotia* John A. Y. MacDonald, Q.C., '49-'57 should read "John A. Y. MacDonald, Q.C., '49-'68".

Page 83. Under *Quebec* Emile Colas, K.M., Q.C., '56-'77 should read "Emile Colas, K.M., Q.C., '56-'66, '68-'77"; after Mr. Durnford insert "René Dussault, '77".

Page 84. Under *Saskatchewan* Merillee Charwosky should read "Merrilee Charowsky"; after Peter E. Johnson, '69 insert "(See also under *Canada*)".

APPENDIX B

(See page 25)

CANADIAN LEGISLATIVE DRAFTING CONVENTIONS

(As Approved by the Legislative Drafting Section
of the Uniform Law Conference of Canada, 1978)

Historical Note

This project was undertaken by the Section in 1973 and continued in 1974 and 1975 (1973, 1974 and 1975 *Proceedings*, pages 78, 21 and 19 respectively).

In 1976 a draft of what has come to be called the Canadian Legislative Drafting Conventions was presented by Mr. Acorn on behalf of a committee and was adopted with amendments (1976 *Proceedings*, pages 19 and 59).

At that meeting Messrs. Ryan and Stone were requested to prepare and submit to the 1977 meeting of the Section comments on each convention as approved and an introduction to the conventions.

At the 1977 meeting, Messrs. Ryan and Stone presented a report (1977 *Proceedings*, page 22) attached to which was a schedule composed of material under three headings: BACKGROUND, INTRODUCTORY, and COMMENTS, OBSERVATIONS AND SUGGESTIONS (1977 *Proceedings*, page 85). Consideration of this material was deferred.

The 1977 schedule was considered at the 1978 meeting and the material, now called COMMENTARIES, was amended in minor respects, adopted and ordered to be printed in the *Proceedings* and in the loose-leaf *Consolidation of Uniform Acts* in a form convenient for quick reference.

For a more complete history of the subject see BACKGROUND mentioned above.

Arrangement

Title of Act

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

(2) The title should be as short as possible.

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

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

Placement of definitions

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

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

Interpretation and application

3. Provisions respecting the interpretation or application of an Act should follow the definition section.

Parts of an Act

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

Special cases & exceptions

5. A special case or an exception to a general principle or statement should follow the general principle or statement.

Transitional & temporary provisions

6. Transitional or temporary provisions should follow the subject matter to which they relate.

Repealing and amending provisions

7. Provisions repealing or amending other Acts should be placed at the end of the Act but preceding the commencement section.

Commencement sections

8. The section dealing with the commencement or coming into force of the Act should be the last section of the Act.

Division of provisions

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

(2) A section may be composed of either

(a) one sentence only, or

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

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

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

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

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

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

(8) Where it is necessary to add a new section, subsection, subclause or paragraph to an Act, the decimal system of numbering adopted by the Conference (1968 Proceedings, pages 76-89) should be used to designate the addition.

Internal references to provisions

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

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

Marginal notes

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

Voice

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

Tense and mood

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

Definitions

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

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

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

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

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

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

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

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

Objects and purposes

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

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

Words and sentences

16. (1) Needless words should be avoided.

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

(3) Long, unsubdivided sentences should be avoided.

(4) Punctuation should be done carefully and a pro-

vision should be rewritten if a change in punctuation might change its meaning.

Use of words

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

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

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

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

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

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

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

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

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

(10) Unnecessary adjectives and adverbs should be avoided.

(11) Latin expressions should be avoided wherever practicable.

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

"may" and "shall"

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

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

Circumstances and conditions

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

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

COMMENTARIES ON THE CONVENTIONS

Introduction

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."

Now, as in the past when the Conference first began, there are any number of people who plead for greater "simplicity and clarity" in the forming of our laws. Those who plead so fail to observe 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 Canadian style attempts to make the legislative sentence no more complicated than the subject makes necessary. But it must be admitted that the techniques of the modern Canadian style of drafting can be abused, and at its worst it can make 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 the underlying causes of poor drafting are more generally recognized and dealt with by all those concerned in the legislative process.

The Drafting Conventions are intended to standardize the expression of uniform statutes and thereby 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 not likely that the Drafting Conventions will provide a panacea for the defects in legislative drafting at the present time in the English-speaking, common law jurisdictions in Canada. The latest word on the difficulties of drafting in English in a common law milieu was pronounced in England by the Renton Committee. *(The Prepara-*

tion 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."

General 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 but 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 sections of the Conventions or as an observation or a suggestion under the section.

Title of Act

Text

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

(2) The title should be as short as possible.

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

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

Commentary

The *Uniform Interpretation Act* (1973 *Proceedings*, page 276) 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 practice, 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.

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.

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, but it must not be overlooked that it can be resorted to, later, for its interpretative value under the common law.

Placement of Definitions

Text

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

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

Commentary

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 and Application

Text

3. Provisions respecting the interpretation or application of an Act should follow the definition section.

Interpretation Generally

Commentary

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 to be surprised by the injection of application provisions in the later portions of a statute.

Those drafting a uniform statute should also make themselves thoroughly conversant with the *Uniform Interpretation Act*. It would be expected that legislative counsel of each jurisdiction would be familiar with their own Interpretation Acts and be able to adapt the uniform Act to the jurisdiction whenever 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 *Proceedings*, page 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 page 47 and again in the 1949 *Proceedings* at page 104. That summary is repeated here 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 (p. 119) 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")."

A more recent Canadian publication, Driedger's "Construction of Legislation" is a useful tool for legislative draftsmen.

Texts useful in interpreting statutes are Beal's *Cardinal Rules 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 the reader when a general application restricting the provisions of the statute is found at or near the end.

Parts of an Act

Text

4. An Act may be divided into "Parts" to enhance its readability but should not be so divided unless the subject-

matter of each Part is sufficiently different from the other Parts.

Commentary

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 notice 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 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) 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*, page 245).

Section 5: Special Cases & Exceptions

Text

5. A special case or an exception to a general principle or statement should follow the general principle or statement.

Commentary

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 convenient 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 and Temporary Provisions

Text

6. Transitional or temporary provisions should follow the subject matter to which they relate.

Commentary

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 general transitional or temporary 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 numbering of the other provisions and requiring the correction of cross-references.

Repealing and Amending Provisions

Text

7. Provisions repealing or amending other Acts should be placed at the end of the Act but preceding the commencement section.

Commentary

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 the jurisdictions that follow the convention.

Commencement Provision

Text

8. The section dealing with the commencement or coming into force of the Act should be the last section of the Act.

Commentary

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 (for example Royal Assent)

upon which they would come into force without so stating by virtue of other statutory authority. In the case of uniform statutes, section 4(1) of the *Uniform Interpretation Act* so provides for the commencement of Acts upon Royal Assent unless another time is given.

2. If a statute is to come into force on a fixed date, or on the happening of an event other than assent, the commencement provision is sometimes 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.

Sections and Subdivisions, etc.

Text

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

(2) A section may be composed of either

(a) one sentence only, or

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

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

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

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

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

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

(8) Where it is necessary to add a new section, subsection, subclause or paragraph to an Act, the decimal system of numbering adopted by the Conference (1968 *Proceedings*, page 76) should be used to designate the addition.

Commentary

In 1916 a caveat was issued in the United States about statutory or legislative sentences that was noted in Appendix III to the 1919 Report to the Conference (Reprinted: 1942 *Proceedings*, page 81):

> 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 enhance the clearness of statutory expression. Frequently a long series of subjects is followed by many predicates and many dependent clauses of co-ordinate 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.

Frequently the drafter of a statute writes himself into a structural straight-jacket and, in order to introduce other matters into 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 *Proceedings*, page 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, page 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 relating 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 co-ordinate 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 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 tabulation, (See 1968 *Proceedings*, page 95.)

Internal References to Provisions

Text

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

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

Commentary

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*, section 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

Text

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

Commentary

It is well worth repeating what was written about marginal notes in 1919 in the Report of the Committee on Legislative Drafting (1919 *Proceedings*, Appendix III, page 253 (CBA) and reprinted in the 1942 *Proceedings* at page 86):

> Marginal notes to all uniform statutes should be prepared by the draftsman. His knowledge of the subject-matter en-

ables 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 substantive form, and should describe, but not attempt to summarize, the contents of the clause to which it relates. For instance a marginal note should run: "Power of (local authority) to, etc.," and not "Local authority may, etc.,".

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).

The "arrangement of sections" referred to by Lord Thring is not used to any extent in Canada at this time except in Newfoundland. (That jurisdiction recently adopted a pre-Confederation practice of indicating the contents of an Act, section by section, at the beginning of the Act. This "arrangement" is referred to as an "Analysis" following New Zealand practice. The Convention is arranged in that fashion for this Commentary.) New Brunswick introduced a "Chapter Outline —Sommaire" in its latest revised statutes but omitted marginal notes. This arrangement of sections can be quite helpful to both the drafter and reader.

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 analyzing 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

Text

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

Commentary

Legislative draftsmen 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, as in the case of "This Act may be cited as . . .". And there are circumstances where the passive voice provides a more esthetic result than does the active voice.

But 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 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. Experienced 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

Text

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

Commentary

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.

Drafters 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 writing today for tomorrow's events in the present tense (*Uniform Interpretation Act*, section 8).

So far as mood is concerned Driedger comments:

> Verbs in legislation are almost always in indicative form. Although there is a special 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 present convention recognizes the practice of using the subjunctive mood to emphasize the statement of a legal presumption, that is, the *as if* state of things.

Definitions

Text

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

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

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

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

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

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

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

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

Commentary

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.* p. 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; abused, it can compound confusion and complexity.

Objects and Purposes

Text

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

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

Commentary

Many jurists, practising lawyers and teachers of law advocate more use in legislation of statements of general purpose to clarify its scope and effect. Career draftsmen in Britain, Canada and the United States in the main oppose general purpose clauses. They can be abused or overused as an attractive "cosmetic" convenience to legislators; they summarize in other words what is more specifically provided elsewhere in the statute; and they lead to the situation where the general provisions govern or override the particular later provisions of the statute.

Objects or purpose clauses are not always the most convenient method of clarifying or delimiting the scope of legislation. On occasion a long title may be more useful; sometimes a factual statement in a preamble of the mischief to be remedied is the better method.

A purpose provision can be most useful where it has a limited and known function. For example:

1. Where the statute replaces an area of common law and it is necessary to state the area intended to be replaced, the extent of which may not be apparent from or may be wider than the detailed substantive provisions.
2. Where there is a substantial reform in a matter in which traditional jurisprudence is deeply ingrained. The detailed substantive provisions require some flexibility for judicial discretion and the possibility arises that the ingrained judicial thinking may be reintroduced in the exercise of judicial discretion.
3. To provide a declaration of intent in accord with the legislative authority of the enacting body.

Words and Sentences

Text

16. (1) Needless words should be avoided.

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

(3) Long, unsubdivided sentences should be avoided.

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

Commentary

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.

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

Text

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

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

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

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

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

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

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

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

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

(10) Unnecessary adjectives and adverbs should be avoided.

(11) Latin expressions should be avoided wherever practicable.

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

Commentary

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"

Text

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

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

Commentary

The *Uniform Interpretation Act* in paragraph 18 of section 26 (1973 *Proceedings*, page 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*, 2nd Edition, 1976, page 9.)

Circumstances and Conditions

Text

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

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

Commentary

The drafting convention on this point, so far as it concerns circumstances or conditions that affect the operation of a legislative rule, follows 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.

CONCLUSION

Coode's Analysis

Coode in his analysis of a legislative expression considers it as consisting of four elements; firstly, the description of *the legal subject*; secondly, the enunciation of *the legal action*; thirdly, the description of *the case*; and fourthly, *the conditions* on performance of which the legal action operates (Coode, page 6).

The analysis presented by that 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:

> 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* defines 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 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 provisos 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, 23).

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; Dick's *Legal Drafting,* pp. 60, 61.)

Coode's work should be known by all who prepare legislation. As Thornton says (page 25) "it remains of value for its care for the structure 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.

In Canada Coode's analysis has been the starting point for a number of present-day drafting and teachers of legislative drafting. No one can feel himself to be the *compleat* drafter of bills if he cannot refer to Coode's legislative sentence or determine, by Coode's rules, who is the *legal subject* of his legislative sentence.

Rule of Law vs. Rule of Conduct

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

> 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?

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* . . . (RSC 1970-71-72, 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 a human agent to do or to refrain from doing some act or thing.

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 expression 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 auxiliary "shall" in legislative sentences are described under the headings "Divine Ordination", "The Creative shall", "Unintended command", "Permission or power", "Commands to the inanimate", "Directory" in 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 more immediately understood.

Editorial Note: The bibliography attached to the Commentaries is not reprinted here.

It can be found in the 1977 *Proceedings* on page 110.

APPENDIX C

(See page 25)

METRIC CONVERSION

REPORT OF COMMITTEE

The 1977 meeting of the Legislative Drafting Section passed the following resolution:

> **RESOLVED that the Committee on Metric Conversion be continued, composed of Messrs. Penney and Tucker (Chairman) and that the Committee report on the progress of Metric Conversion in Canada at the 1978 meeting of the Section.**

PART I

Progress in Metric Conversion

The Committee has circulated the various jurisdictions as to progress made in this area. They report as follows:

Prince Edward Island reported on May 9, 1978 that because of their recent election there was no legislative activity in this area. Bills had been prepared dealing with tobacco tax, gasoline tax, and the *Highway Traffic Act*, which they expected would be introduced in June. They also advise that: "Senior departmental officials have been charged with responsibility for identifying and implementing the necessary changes in accordance with the deadlines set by the Metric Commission of Canada."

British Columbia reported on May 10, 1978 that the *Metric Conversion Act, 1977*, the *Commercial Transport Amendment Act, 1977*, and the *Motor Vehicle Amendment Act, 1977 (No. 3)* have been proclaimed, with the exception of section 4 of the *Metric Conversion Act, 1977*. They advise that these "represent about half the measurements in the statutes." Further conversions may take place this session but are expected to be few in number. He also points out that "the conversion was not always rounded off to a 'rational' figure. For instance 'one quarter of an acre' became not 1000 m^2, but 1012 m^2. This sort of conversion was particularly common with respect to taxing provisions. . . ."

Quebec reported on 15 May 1978 the following as their procedure:

"1. *Conversion co-ordination*

The departments and agencies were asked by the Quebec Metric Commission to search and identify the Canadian units of measure in the laws and regulations they are responsible for that have to be converted to attain the required objective.

The legislative affairs branch of the Department of Justice has charge of the co-ordination of this work and of the drafting of the legislative and regulatory texts appropriate to the conversion, based on the data supplied by the departments and agencies.

2. *Conversion already made*

Six departments wanted certain Acts or all legislation for which they are responsible to be amended during the 1977 fall session in order to bring about conversion to the international metric system, without specific reference to any one particular field. These were the Departments of Natural Resources, Lands and Forests, Labour and Manpower, Education, Consumer Affairs, Co-operatives and Financial Institutions, and Cultural Affairs. Fifteen Acts were thus affected.

Several regulations that are the responsibility of the Department of Labour and Manpower were also amended in regard to conversion under a general regulation made at the beginning of March of this year.

Both in the case of the Act and the regulation thereunder, the amendment technique adopted is the 'omnibus' type, whereby the amendments made to the various laws and the various regulations are contained in the one law or the one regulation.

Similarly, the amendments still to come will be made by inserting in that Act or in that regulation the texts covering the units that have to be converted.

When that operation has been completed, the same instrument will contain all the amendments to the Quebec laws and to the Quebec regulations that are necessary to bring about the conversion of the units mentioned therein."

Bill 79, *An Act to Facilitate Conversion to the International System of Units (SI) and to Other Customary Units*, was assented to on 22 December 1977.

Ontario reported on 19 May 1978 that *The Highway Traffic Amendment Act, 1978* was passed and that this completed the metric conversion of *The Highway Traffic Act* begun by *The Highway Traffic Amendment Act, 1977 (No. 2)*. They reported again on 23 June 1978 that *The Metric Conversion Statute Law Amendment Act, 1978* was introduced in the Ontario Legislature on 22 June 1978.

Nova Scotia reported on 23 May 1978 that no legislation had been introduced into the Nova Scotia House of Assembly on this subject.

New Brunswick reported on 17 May 1978 that New Brunswick has passed a Metric Conversion Act and there was a further Bill before their House providing for further amendments. He reports that only a few areas remain to be done.

Canada reported the introduction of Bill C-22 on 20 December 1977, *An Act to Facilitate Conversion to the Metric System of Measurement.*

The Yukon reported on 31 May 1978 that a new *Motor Vehicle Ordinance* has been passed incorporating metric changes and that they expected it to come into force on 19 June 1978. The *Election Ordinance* of 1977, the *Liquor Ordinance* and the *Recreation Development Ordinance Regulations* have also been converted.

Alberta reported on 14 June 1978 that *The Metric Conversion Statutes Amendment Act, 1976* has had Schedule A, relating to speed and distance for highway traffic, proclaimed. *The Metric Conversion Statutes Amendment Act, 1977* has been passed. This Act completes, with a few exceptions, the conversion to SI. As of the date of the report only the amendment to *The Surveys Act* has been proclaimed in force. *The Land Titles Act* has been amended to permit the Lieutenant-Governor in Council to make regulations for the use of SI in any instrument or caveat. A number of regulations have also been converted, e.g., the *Alberta Building Regulation, 1978*, and other regulations relating to construction.

Saskatchewan reported on 22 June 1978 that the following Acts have been passed:

The Boiler and Pressure Vessel Act, 1977—
proclaimed July 1, 1977,
An Act to amend The Vehicles Act (No. 2)—
proclaimed in part Sept. 1, 1977,
An Act to amend The Agricultural Societies Act, 1976,
An Act to amend The Fuel Petroleum Products Act—
not proclaimed,
An Act to amend The Northern Administration Act—
not proclaimed,
An Act to amend The Legislative Assembly Act (No. 1)—
not proclaimed.

The Education Act, 1978—not proclaimed.

The Report also advises that:

"Saskatchewan has a Director of Metric Co-ordination who is also the chairman of an interdepartmental metric conversion com-

mittee. The Director meets with individual departments concerning metric conversion while the committee at this time is largely used as a means of disseminating information. Technically speaking, all legislation containing measurements are to be channeled through the Office of the Metric Co-ordinator, but expediency has dictated in some cases that legislation pass directly to the Legislative Counsel. Metric amendments are made as a matter of course to all draft legislation going through the Legislative Counsel's Office.

Originally Saskatchewan's plan was to proceed with an omnibus bill containing amendments to approximately fifty pieces of legislation. This was prepared but did not go ahead. In this area the province was and continues to look for some guidance from the federal government in this regard and, as long as the federal government continues to proceed with piecemeal amendments, Saskatchewan will as well."

Newfoundland reports that it has passed *The Metric Conversion Act, 1977* and that this Act has been proclaimed. That Act amended, among others, *The Highway Traffic Act. The Metric Conversion Act, 1978*, has been introduced in the House of Assembly. As well, extensive revision work over the past two years has incorporated metric changes.

Reports have not been received from Manitoba or the Northwest Territories.

PART II

Style

The 1977 meeting of the Legislative Drafting Section also passed the following resolution:

> 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.

Concern has been expressed at recent meetings of the Intergovernmental Metric Conversion Committee on this position. In the Saskatchewan report, their Director of Metric Co-ordination stated:

> "This topic was presented by Metric Commission Canada apparently after conducting correspondence with the Federal Department of Justice and the Ontario Ministry of the Attorney General on this subject. The correspondence revealed and it was the opinion of the members of the Intergovernmental Committee that those of the legal profession responsible for drafting legislation were not apparently using any kind of standard guidelines that may be found in the 'Canadian Metric Practice Guide'. It was mentioned that the *Weights and Measures Act* which is an extremely bad example because it does not follow rules, has been used as reference legislation.

> The Committee itself agreed that the provincial co-ordinators cannot solve the problem, but possibly they could refer it to their legal people, an opportunity this memo is providing. It was also suggested that the Canadian Standards Association should be given the opportunity to make a presentation to the Uniform Law Conference."

It is apparent that the Commission is unhappy with the use of words rather than symbols, e.g., sixteen metres as opposed to 16 m; or the combination of words with numbers, e.g., 16 metres. The Canadian Metric Practice Guide at paragraph 2.6 outlines the "Rules for Writing SI symbols".

Professor Driedger points out at page 169 of *The Composition of Legislation* that:

> "Symbols ($, ¢, %, etc.) and abbreviations (p.c., fi. fa., Feb., sec., chap., cap., subsec., e.g.) are not favoured in legislation, although the dollar and percentage signs are used in taxation statutes, particularly in setting out rates of income tax. In the ordinary case it is best to avoid symbols and abbreviations; they may be susceptible of several interpretations, and they could be ruined in the typesetting and escape undetected."

The Special Committee is in general agreement with the proposition advanced by Professor Driedger. This is especially the case where one is dealing with a new language of measurement where the words of measurement are themselves not known, much less so the symbols for these words. The Committee does not recommend any changes in the basic drafting principles in this area for the purposes of metric conversion and the resolution passed by this Section last year. It notes, however, that some jurisdictions favour the use of figures for three digit and larger numbers and for mixed fractions and rates of speed. This is clearly a matter for each jurisdiction to decide, in conformity with its normal practice.

PART III

Report of Chairman on Procedures Committee of the American National Metric Council

The 1977 meeting of the Legislative Drafting Section also passed the following resolution:

> 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.

Following the resolution of the Section, the Executive Director of Metric Commission Canada informed the chairman of the Pro-

cedures Committee of the American National Metric Council that Sidney Tucker had been named as the member representing Canada.

Mr. Tucker subsequently attended a meeting of the Procedures Committee held in Washington on March 2, 1978 and reported on the meeting to the Executive Director of Metric Commission Canada. The meeting was attended by members of the Committee on the Metric System of the American Bar Association and by members of the National Conference of Commissioners on Uniform State Laws.

The primary purpose of the meeting was to discuss a draft model State metric conversion statute, but it also provided an opportunity for general discussion of legislative approaches to metric conversion.

The background material distributed for this meeting and the discussion at the meeting indicated that spelling and symbols for use with the metric system were not completely settled at that time in the United States.

The American National Metric Council has adopted the American spellings of "meter" and "liter", but at the meeting it was agreed that spellings and symbols might be varied in special circumstances.

The background material for the meeting also mentioned that there is controversy in the United States over the use of the "pascal" as the unit of measure of pressure.

The American National Metric Council has established a working group to prepare a metric style manual for legislative draftsmen. The working group has not yet responded to requests for working papers or reports on its progress.

The purpose of Metric Commission Canada in requesting the nomination of a person to attend meetings of the Procedures Committee of the ANMC appears to have been twofold. Firstly, to promote uniformity in the use of metric terms in legislation and, secondly, to encourage legislative draftsmen to use the style or mode of expression of metric terms approved by the Standards Council of Canada.

Legislative draftsmen should be familiar with the terminology of the metric system and the style used to express this terminology should be uniform within each jurisdiction. The objectives should be clarity and certainty in the use of the metric system in the drafting of legislation.

Sidney Tucker (Chairman)
Ronald Penney

15 July 1978.

APPENDIX D

(See page 27)

PRESIDENT'S ADDRESS: H. ALLAN LEAL, Q.C., LL.D.

Fellow Commissioners, Ladies and Gentlemen,

My first and happy duty is to welcome you to St. John's to the 60th Annual Meeting of the Uniform Law Conference of Canada. I am truly delighted that so many of you were able to join us here tonight.

If I may, I would like at the outset to give a warm welcome on behalf of the Conference to Dr. John Hade of Vanderbilt University, and his wife Mary, and Vice President of our sister organization, the National Conference of Commissioners on Uniform State Laws. Professor Wade is well known, through his writings, to most of us. His achievements are as impressive as those of the conference he represents.

Professor Wade is currently a distinguished professor of law at Vanderbilt University, where he was Dean from 1952 to 1972. During that period he built up the Vanderbilt Law School into a well known and justly renowned institution. He received his legal training at Mississippi and Harvard, and has taught at Mississippi, Vanderbilt, Texas, Cornell and Columbia. He is a member of the American Law Institute and is currently the Reporter for the Second Restatement of Torts. He is also a member of the States Advisory Committee on Private International Law. Professor Wade specializes in the subjects of conflicts of laws, jurisprudence, legislation, oil and gas, and torts. He is the author of texts on restitution, torts and legal method. We are delighted to have them here with us.

My wife Muriel and I had the great pleasure to attend the annual meeting of the National Conference in New York city a few weeks ago. We were greatly touched by the friendliness and hospitality shown to us. Like all our recent presidents who have made the pilgrimage to observe the National Conference in action, I developed considerable respect for the gavel-wielding ability of the chairman at their meetings, and admiration for the orderly and efficient way they conduct their business.

There are a number of familiar faces missing tonight, and I would like to say a few words about three Conference members who

have died, and others who have left our ranks for other reasons, during the last year. In February, Doctor Hugo Fischer of Ottawa passed away. Hugo was one of our first Commissioners representing the Territories, a man of great erudition and charm. I remember particularly his work towards the preparation of the *Uniform Conflict of Laws (Traffic Accidents) Act.*

More reecntly, we learned of the death of William Parker Fillmore, Q.C., one of the Manitoba Commissioners. Mr. Fillmore was a Manitoba Commissioner from 1939 to 1947, including two terms (1944-1946) as president of this Conference. I personally did not have the pleasure of meeting him, but those who knew him well tell me that he was a scholar, a gentleman, and a great supporter of this Conference.

Finally, we learned with great sadness that Allan Higenbottam died on the 29th of June after a long illness. Allan had been a member of the Conference since 1969 up to the time of his death and for years was Local Secretary for British Columbia. Both he and his wife Rhoda had hoped to join us here in St. John's.

The British Columbia delegation is also changed due to the absence of Doug Lambert, who came to the Conference as a practitioner, and a part-time member of the Law Reform Commission of British Columbia. Doug was appointed Chairman of that Commission earlier this year, but has since resigned on receiving an appointment to become a member of the British Columbia Court of Appeal. Finally, we shall miss three of our former presidents. A month ago, Don Thorson, like Doug Lambert was appointed an appellate judge. Don, who was our president from 1973 to 1974, will sit on the Ontario Court of Appeal. He joins an ever-increasing number of our former colleagues who constitute a veritable "Uniform Law Mafia" in our superior courts: the last time I checked there were eleven former Commissioners on the appellate courts of this country, together with another twelve in the trial division of the various supreme courts. That in itself is a tribute to the high quality of delegates which the several jurisdictions continue to send to this Conference.

Glen Acorn, president from 1975 to 1976, stepped down this year as Legislative Counsel for Alberta, and moved across to work on a special revision of the *Municipal Act* and related legislation.

Finally, last year Wendall MacKay, our president from 1976 to 1977, resigned as Deputy Minister of Justice for Prince Edward

Island and left public life. This Conference owes Don Thorson, Glen Acorn and Wendall MacKay a great deal. We shall miss them all, and wish them well!

I know that Wendall has not been far from the minds of many of us in recent months. It will be recalled that last year he gave to the Conference a gavel to be used by the presidents of this Conference during their terms in office. I have caused a silver plaque to be engraved and placed on the gavel. The inscription reads: "Presented to the Uniform Law Conference of Canada by Wendall MacKay, President 1976-77."

This year we are sixty years old. I remember that Dr. Wilder Penfield, the neurologist, used to describe sixty as a make or break age. He advised all his patients to go off in drastically new directions at that age. When I joined the ranks of sexagenarians last year, I had left the relatively secure waters of law reform, and embarked onto a much more hazardous career, as a deputy attorney general. For myself, I can only say that I found Dr. Penfield's advice to be absolutely invaluable and salutary, if at times a little demanding on the system.

I think that this Conference should as it reaches sixty recognize and accept what it is and what it has done, and be able to face the future with the knowledge that its achievements are sound and respected. Presidential addresses have a natural tendency to be harsh homilies, urging the Conference on through its labours during the following week. Perhaps, in previous years, we have been too caught up in doubting analyses, in quests for immediate and sufficient purposes and identity, and invidious comparisons between our ways and those of our American counterpart. In this, we are perhaps not at fault, unsatisfied or unsuccessful, but rather quintessentially Canadian. I suggest to you that what we should be doing at the age of sixty is to seek a new definition and meaning of our ideal of uniformity. It becomes obvious to all who re-read the earlier proceedings of this Conference, that not merely have we grown in numbers and in scope, but that the very nature of our work has altered.

I suspect that a great deal of this change can be traced to changes in the legal profession during that period, and also to alterations and perception of the appropriate role of government and justice departments. The increasing pace of social change has made extraordinary demands on all of us.

Law reform has become a major and essential element of our work. Shortly after I joined this Conference, I became the first of its members to be fully engaged in law reform activity. I think that you honoured all my law reform colleagues here tonight when you chose me as your president. Thirteen years labouring in that particular vineyard have convinced me that it will require significant contributions of imagination, energy and dedication, if our system of laws is to meet the challenges that our society increasingly makes upon it. These demands are not made simply upon courts, governments and the profession as a whole, they also require the urgent attention of this Conference.

Like many of you, I take great pleasure in leafing through the pages of our new *Consolidation of Uniform Acts*. But I was singularly struck by how much of the hard work represented by those Uniform Acts was now becoming obsolete and outmoded. I think we have to set up a mechanism for re-examining those Uniform Acts, to determine which stand urgently in need of revision, in the light of changed circumstances, and in the light of legislative changes and improvements made by the several jurisdictions. Too frequently, the hard work policy discussions which go into the revision of legislation by our member jurisdictions are not carried forward to this Conference. The Conference presents an unparalleled opportunity for the exchange of information on recent proposed developments in legislation across Canada; I think that we are only starting to discover the true significance of this Conference.

In short, I think we should be re-examining our methods of establishing priorities and setting programmes. I think that if we take law reform seriously as a major goal of this Conference, then we should be prepared to draw up something approaching a five-year plan to co-ordinate our activities, and make our uniform laws ready for the morrow. I have no illusions that this will involve a great deal of hard work and thinking, and that it will require us to use, as never before in the past, committees, task forces, and working groups. I think that the work of the Federal-Provincial Task Force on Evidence is a marvellous reminder of what we can accomplish, if we work together, having the will to tackle a job as vast as the formulation of Uniform Rules of Evidence. Another example could be drawn from the Commercial Law area, where the 1893 *Sale of Goods Act* currently in force in most provinces, embodies the commercial attitude and practices of a bygone era. In Ontario, our Law Reform Commission has been engaged since 1970 on a major research programme in this area, working towards a

comprehensive revision of the *Sale of Goods Act*, drawing from all that is best in the *Uniform Commercial Code* in the preparation of which our sister Conference played an important part. When the Commission reports, we will have an unparalleled opportunity to take a giant stride in the commercial law area.

There are many other areas beyond these. This Conference will never lack for work or for subjects where remedial uniform legislation is necessary and desirable.

I think that when we come to consider the meaning of uniformity, we must necessarily take a broad, liberal and expansive view of that concept. Uniformity in the sense of the preparation and enactment of uniform statutes is and must continue to be our sustaining ideal. But it must not mark the necessary limits of our work. If we see the output of this Conference as simply to be measured by means of a chart of the enactment of uniform legislation, then we perforce undervalue central elements in our Conference.

First, to do so does not accord proper recognition to the very valuable role of the Criminal Law Section, whose outputs are at once less tangible and more immediate than Uniform Acts. Seeing the various Criminal Law Amendment Bills as they are introduced or reading through the minutes of the Standing Commons Committee on Justice and Legal Affairs, one cannot but be impressed by how seriously the senior criminal law policy makers in the Justice Department at Ottawa value the contribution of the Criminal Law Section. We continue to be very grateful to the Federal Justice Department for their support, not merely in this area, but in their continuing contribution to the Conference's Research Fund. Indeed, I feel that the existence of the Research Fund should act as a spur to us to find new projects for study and report.

Second, the meaning we attach to uniformity must also encompass the formal and informal work of the Legislative Drafting Section. The common problems faced by legislative draftsmen are specialized in nature but I am confident that this Conference has given draftsmen across the country an excellent opportunity to work towards the harmonization of their practices and operations.

Lastly, I hope that we will never overlook the very real personal benefits that derive from our gathering together for ten days each year. In a sense this conference is a veritable market place of ideas, giving us unequalled opportunities for the discussion of common problems and goals. It is moreover the most productive as well as

the most harmonious federal-provincial conference in existence. While the Conference has wisely steered clear of explicit constitutional and political controversy, I think it has played a very real part in mitigating against the structural and administrative obstacles that are the necessary incidents of multi-jurisdictional government.

For all these reasons, I suggest to you that uniformity today does not mean simply our work towards uniform acts. It is primarily a controlling ideal, an ideal which requires of us the utmost good faith and co-operation. It represents a commitment to the development of common legal principles and policies to the end that the people of Canada may have a rational and progressive system of laws, fashioned to the local needs of each jurisdiction, but drawing from the several experiences of all of us.

I would like to say a few words about developments within the past year that I regard as very important. First, of course, is the fact that this is the first year in which we have fully recognized the bilingual nature of our country. Through the services of the Canadian Intergovernmental Conference Secretariat our documents are available in both official languages, and simultaneous interpretation is being provided for all our meetings. I would like on your behalf to warmly welcome Ann Vice, and the team which she leads, and thank them for all the work they have done on our behalf. Having worked with Miss Vice at conferences during the last year, I know that the work of CICS will immeasurably improve our discussions with minimal disruption to the informal atmosphere of the Conference that we so enjoy. The CICS people are our welcome guests and I know that all of us will go out of our way to make them part of the uniform law community.

Second, I am delighted that the representatives of the various Canadian law reform agencies have again taken the opportunity of this annual meeting to meet formally here in St. John's. If these agencies are not meeting under our auspices, then they are at least meeting with our blessing and encouragement, and I was pleased to learn that their meeting was both enjoyable and productive.

Lastly, reading the report of the Task Force on Evidence filled me with a great sense of the potential of this Conference. This group has accomplished a great deal since we wished them well a year ago at St. Andrew's; their report is a model of its kind, bearing witness to the benefits that can be derived from a joint federal-provincial working group working closely and intensively together towards a common goal.

This week will be a full one for all of us. I know that we shall enjoy being the guests of the host province of Newfoundland and getting to know the island and its people, and I hope seeing a little of the unique culture and cuisine of the islanders. I wish you well in the deliberations of each section, and hope that all of you will have an enjoyable, productive and worthwhile stay in St. John's. Thank you.

APPENDIX E

(See page 28)

TREASURER'S REPORT

for the year ending August 11, 1978

GENERAL ACCOUNT

BALANCE ON HAND August 12, 1977			$ 15,648.81
RECEIPTS			
Annual Contributions			20,250.00
Interest			1,038.45
Interest transferred from Research Fund			11,596.30
DISBURSEMENTS			
1977 Proceedings		$ 9,253.80	
1977-78 Letterhead		155.79	
1977 Conference expenses		474.26	
President—expenses		661.05	
Executive meeting expenses		1,693.01	
Bank charges		11.02	
Legal Services		105.00	
Executive Secretary			
Expenses attending 1977 meeting	$ 662.79		
Petty Cash	500.00		
Secretarial Services	3,000.00		
Honorarium	10,000.00		
Travel expenses	167.65		
	$ 14,330.44	$ 14,330.44	
TOTAL RECEIPTS AND DISBURSEMENTS		$ 26,684.37	$ 48,533.56
BALANCE ON HAND August 11, 1978		$ 21,849.19	
		$ 48,533.56	$ 48,533.56

APPENDIX E

RESEARCH FUND

BALANCE ON HAND August 12, 1977			$ 86,264.24
	RECEIPTS		
Interest			3,544.06
Government of Canada Contribution			25,000.00
	DISBURSEMENTS		
Lachlan MacTavish — honorarium	$ 3,000.00		
Re Consolidation of Uniform Acts Julien Payne — attendance at 1977 meeting	736.11		
Keith Farquhar—research on children born outside marriage	992.00		
Transfer of Interest to General Account	11,596.30		
Evidence Task Force	25,000.00		
Bank Charges	9.52		
	$ 41,333.93		
TOTAL RECEIPTS AND DISBURSEMENTS	$ 41,333.93		$114,808.30
BALANCE ON HAND August 11, 1978	$ 73,474.37		
	$114,808.30		$114,808.30

NOTE:
Fund held

1-year term deposit	$ 31,581.23
6-month term deposit	25,000.00
30-day term deposit	10,504.03
Bank account	6,389.11
	$ 73,474.37

August 11, 1978

Claire Young, Treasurer

APPENDIX F

(See page 28)

SECRETARY'S REPORT

As this is the 60th Annual Conference of the Uniform Law Conference, I feel particularly gratified that I am able to make the annual Secretary's Report on this occasion.

Appreciations

In accordance with the resolution passed at last year's closing Plenary Session of the Conference, letters of appreciation were duly sent to all those referred to in that resolution.

In Memoriam

Since our last Conference two former members and one member have passed away.

William Parker Fillmore, Q.C.

On May 1st, 1978 at the age of 91 years of age, William Parker Fillmore, Q.C., a member of the Conference from Manitoba from 1939 to 1947, and president of the Conference for two terms, 1944-45 and 1945-46, passed away at Winnipeg.

Hugo Fischer

Doctor of Law (Prague), LL.B. (London). Dr. Hugo Fischer passed away suddenly on February 2nd, 1978 in Ottawa. He had been a member of this Conference representing the Northwest Territories for the Department of Northern Affairs and National Resources, 1963-1971. He was a member of the Bar of British Columbia.

George Allan Higenbottam

Died suddenly on June 29th, 1978 in Victoria. He was a member of the Conference from 1969 to the time of his death and was one of the earlier attendees at the Legislative Drafting Section.

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

APPENDIX F

JUDICIAL APPOINTMENTS

On a happier note, I am glad to be able to record for this meeting judicial appointments of three former members of the Conference which occurred since our last meeting.

Hon. Mr. Justice Lamer, a member of the Conference for Canada from 1975 to 1977, has been appointed to the Court of Appeal of Quebec.

Donald S. Thorson, a member of the Conference from 1961 to 1976, has been appointed to the Ontario Court of Appeal.

J. Douglas Lambert, a member of the Conference from 1974 to 1977, has been appointed to the British Columbia Court of Appeal.

The Conference wishes these former members much success and many productive years in their new roles.

LIST OF OFFICERS & MEMBERS OF THE CONFERENCE

Following last year's report and recommendation, the Executive Secretary prepared and published at pages 75 to 84 of the 1977 *Proceedings*, a list of former officers and members of the Conference. Mr. MacTavish is to be commended for this list; not only did it involve a considerable amount of work, but it made the information available generally to all of the members of the Conference.

RESEARCH PROJECTS

The principal research matter under way at this time is the project on Uniform Rules of Evidence, which promises to be one of the major accomplishments of the Uniform Law Conference when it is completed. The moneys involved and the extent of the work already done will be made evident in other reports and meetings at this Conference.

CONCLUSION

It has been my privilege to make the Secretary's Report in other years as a representative of Canada (1969-1970) and latterly as a representative of my own province of Newfoundland.

The Secretary of the Conference at the 1949 Annual Meeting noted that Newfoundland had in that year become a part of Canada and as a result the closing Plenary Session in 1949 approved a resolution that the Secretary acquaint the Attorney General of New-

foundland with the Works and Objects of the Conference, and to invite him to become an *ex officio* member and to name one or more representatives of Newfoundland to attend and participate in the annual meetings of the Conference as members thereof.

As a result, Mr. Harry P. Carter, Q.C. (1950-1969) became the first representative of Newfoundland to attend the Conference. He became the first and only Newfoundlander to date to be president of the Conference (1965-66). In Canada's Centennial Year 1967, the Uniform Law Conference met in Newfoundland for the first time. It is therefore appropriate, perhaps, that it is meeting here for its 60th Conference—in the newest province of Canada. The only sad feature about this is that Mrs. Carter, who was such a gracious hostess during Mr. Carter's regime, passed away suddenly a few weeks ago. She would undoubtedly have liked to have renewed acquaintances with those who attended the Conference here in 1967.

James W. Ryan
Secretary

20 August 1978

APPENDIX G

(See page 28)

EXECUTIVE SECRETARY'S REPORT

This is the thirteenth annual report that I have had the privilege of making to this Conference—eight as secretary in the forties and five as executive secretary in the seventies.

In view of the crowded agenda tonight, I propose to be extremely brief.

The highlight of the year now ending was the publication and distribution of the *Consolidation of Uniform Acts*, a project that has been under way for four years (1974 *Proceedings*, page 56) with the financial support of the Canadian Law Information Council.

Judging by the number of congratulatory letters received, the work has been well received throughout the world, particularly in Commonwealth countries and in the United States.

The volume will be kept up to date annually by the preparation and distribution of a supplement as soon as may be after each annual meeting.

It will be noted that some of the provisions of some of the older Uniform Acts are in need of revision in the light of changed conditions since they were first promulgated. It is to be hoped that machinery can be set up by the Uniform Law Section during its sittings this week to provide for a progressive and orderly review over the next few years of these outdated Uniform Acts.

At any rate, the *Consolidation of Uniform Acts* is a milestone in the life of this Conference for which we all can feel justly proud along with the Canadian Law Information Council whose generous financial help made it all possible.

Those of you who have attended previous annual meetings of this Conference will know that in my annual reports I have requested the co-operation of all in a number of matters. I will not plead with you or beg of you any more—no longer will I preach to you on the need for your help nor will I hound you for information. I will merely mention tonight the most important of these matters. (1) The demand for back numbers of the annual *Proceedings* is great—please send in to me any unneeded copies you may come across. (2) The Bibliography, Table IV, and the Cumulative Index (1977 *Proceed-*

ings, pp. 20, 21, pp. 414-420, pp. 421-430, respectively, of the 1977 *Proceedings* should be as complete and as correct as possible—please send me any additions or corrections that you may come across. Obviously the usefulness of these features depends upon their accuracy, and their accuracy depends upon you, especially those of you who hold office as Local Secretaries.

In closing this report I must point out the great contribution that the Ministry of the Attorney General of Ontario has made and is continuing to make to this Conference. For the fifth consecutive year the Ministry has furnished me with office accommodation, mailing privileges, office supplies and services of all kinds at no cost to the Conference. I would be most remiss if I did not draw this generous support to your attention once again. To Mr. Leal and Mr. Stone our grateful thanks.

One further point: If I have been slow in replying to your letters or have omitted sending expected acknowledgements, I apologize. The fact is that my part-time secretary, Doris M. Stewart, has had three eye operations during the year which has resulted in a curtailment of the good service that I like to think my office normally provides.

Lachlan MacTavish
Executive Secretary

Toronto, Ontario
14 August 1978

APPENDIX H

(See page 30)

CLASS ACTIONS

REPORT OF COMMITTEE

The British Columbia Commissioners presented a report to the Conference in 1977 setting out some of the issues that must be settled in seeking uniform class actions legislation. (1977 *Proceedings*, Appendix J, page 208).

After consideration of the report of the British Columbia Commissioners, 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 named a committee consisting of Douglas Lambert of British Columbia, Derek Mendes da Costa and Simon Chester of Ontario and Hubert Reid and Daniel Jacoby of Quebec. At the request of Daniel Jacoby, Marie-José Longtin was substituted for himself as a committee member in February, 1978.

The Chairman has met each of the committee members, with the exception of Professor Reid, during the year, but at no time in the year did it appear that the expense of a meeting of the committee would have been justified.

The most significant progress in this field in the last year was the introduction of *Projet de Loi 39, Loi Sur Le Recours Collectif*, in the Quebec Legislature. The Bill was introduced in the fall of 1977; submissions were invited and received in the spring of 1978 and the Bill was given second reading early in June 1978. By the time that this report is circulated, it is anticipated that the Bill will have been enacted. (*See the Schedule to this Appendix.*)

Committee member Marie-José Longtin was directly involved in the preparation of Bill 39 and has kindly agreed to prepare and circulate a report on the Quebec legislation. While, for convenience, Me Longtin's report will be circulated as a separate document, it is agreed that her report forms a part of this report of the Special Committee.

At the time of the 1977 Conference the matter of Class Actions had been referred to the Law Reform Commissions of British Columbia and Ontario. Each of those commissions has continued its work on this subject over the last year and it is now anticipated that both commissions will be considering the issues and research papers on those issues late in 1978 or early 1979. As a prelude to the discussion of uniform legislation, the British Columbia and Ontario Law Reform Commissions have discussed the possibility of sharing research papers and other materials as the research is being developed for consideration and decisions. As these commissions reach the stage of making recommendations there will arise a crucial time for this special committee in seeking to promote the production of a uniform act. No doubt the Quebec legislation will be of enormous assistance to the law reform commissions and to this special committee.

The Committee recommends that it be continued, and invites the adoption of the following resolution:

> RESOLVED that the Committee established at the 1977 Conference to monitor current studies and legislation and generally to watch developments in the field of class actions and to report to the 1978 annual meeting be continued with its membership to be named and vacancies filled by the Executive, and that the Committee report to the 1979 annual meeting.

J. D. Lambert
Chairman

8 June 1978.

SCHEDULE

CLASS ACTION COMMITTEE

THE QUEBEC LAW RESPECTING THE CLASS ACTION[1]

INTRODUCTION

On 8 June 1978, the Québec National Assembly passed a Bill called the "Act respecting the class action" whose purpose it was to incorporate the procedure treating of class actions in the Code of Civil Procedure, and to set up an agency which would assist in the financing of such actions, the agency to be called the *Fonds d'aide aux recours collectif* (referred to hereinafter by its English equivalent of "Class Action Assistance Fund" or "Fund".

The Code of Civil Procedure already permitted the bringing of certain group actions. Article 59 of the Code, for example, allows an exception to the principle that "a person cannot use the name of another to plead" in providing that "when several persons have a common interest in a dispute", any one of them may act for the others if he has a mandate from them to that effect. Besides that recourse, the Code also recognizes the consolidation of actions and the joinder of parties in cases where the claims have the same juridical basis or raise the same points of law and fact. However, these two types of recourse are not well suited to group actions in matters of consumer claims, the environment, business or discriminatory practices, and it was considered advisable, therefore, to add to the existing law so that a veritable class action could be established.

The introduction of the class action procedure into Québec law required various accommodations in view of the fact that our juridical institutions and traditions were not readily adaptable to that form of procedure. There was, for instance, in the establishing of such a recourse, the need to provide exceptions to certain principles such as "a person cannot use the name of another to plead" without a mandate or that all the parties must be known, or, again, that the law does not preoccupy itself with trivialities. It was further necessary to draw up special rules concerning the conduct of the action, the proof, prescription or *res judicata*, and establish a mode of financing.

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[1]Document prepared by Me Marie-José Longtin, assistant director of legislation, Department of Justice of Quebec, responsible for the drafting of the Act respecting the class action.

This document seeks in particular to outline the principles that are characteristic of the class action and of the Assistance Fund, and points out the preferences of the Québec legislator in regard to several questions already raised in the brief submitted to the Conference of 1977 by British Columbia.

1. The Class Action

The class action procedure has been incorporated in the Code of Civil Procedure which determines the rules of procedure in force before the courts of civil jurisdiction. The selection of that legislative vehicle shows the desire of the legislator not to limit the scope of the recourse to only certain types of action; the recourse therefore can be had to any claim that can be brought before the courts. However, the legislator has prescribed certain rules to which attention should be drawn. Let us, then, examine the prerequisites to the bringing of the action, its conduct, and the judgement.

(a) Conditions for instituting the class action

The Code of Civil Procedure provides that the class action cannot be brought without the authorization of the court, that court being the court of common law, namely, the Superior Court. The Superior Court was chosen in order to avoid procedural argument over the jurisdiction *ratione materiae*. Note also that the action can only be instituted by a motion.

1° the group

The Code of Civil Procedure has not attempted to define the notion of "group", but that notion is indirectly stated by the definition of the word "member" and the questions raised by the personal claims of the members. Thus, the member is a natural person who is part of a group of persons who have recourses raising identical, similar or related questions of law or fact and on behalf of whom another member may sue without a mandate.

The first identification of the group is made by the one who wishes to obtain the status of representative, but the court decides the composition of the group in its judgement granting the motion for the class action. The legislator wishes that the determination of the group and the questions of law or fact to be dealt with collectively be based on wide criteria, thus the use of the terms "identical, similar or related".

2° authorization

The member who wishes to bring a class action must file a motion with the court to obtain authorization to institute the action. Without exception, such member must be a natural person. The motion states the facts giving rise to the action, sets forth the nature of the recourses of the members and describes the group. It is served on the person against whom the action is brought and supported by an affidavit. It is not the wish of the legislator to allow an examination on the merits of the action at the motion stage of the procedure. However, as in the case of any motion, it will be possible to examine the person alleging the facts as to the veracity of such facts.

To determine whether or not it authorizes the action, the court must consider three factors:

(i) the existence of a recourse: to this end, it considers whether the facts alleged seem to justify the conclusions sought;

(ii) the existence of a group: it considers if the recourses of the members raise identical, similar or related questions of law or fact; and

(iii) the practical aspect: in this regard, it considers whether the composition of the group makes the other group recourses of the Code of Civil Procedure difficult or impractical.

If these criteria are met, the court must, in addition, grant the status of representative to one of the members and, in doing so, employ the standard of adequate representation.

3° the notice

The class action requires the establishing of information mechanisms for the benefit of the members. The Code of Civil Procedure already provides different modes of publication of notices including notices in newspapers or the *Gazette officielle du Québec*, letters, or radio and television announcements.

In the case of the class action, certain compulsory notices are prescribed including one when the bringing of the action is authorized, and when a transaction or a judgement intervenes. The Code, on the other hand, leaves wide powers of discretion to the judge as the court may order the publication of any notice when it so deems necessary for maintaining the rights of its members.

However, at the authorization stage of the class action, the Code makes the publication of the notice obligatory and it indicates the information it must contain: the description of the group, the common

questions and the conclusions sought, the right of members to intervene or be excluded, information on the costs and the district in which the action is to be brought.

4° the right of opting out

The notice given to members after the authorization to institute the action states the right of the member to exclude himself from the group, the formalities to be followed and the time limit permitted in which to exclude himself. Such time limit is peremptory and is fixed by the court under the provisions of the Code which already stipulate that the time limited for exclusion cannot be less than thirty days or more than six months after the date of the notice to the members.

The member who wishes to avail himself of this opting-out right does so by notifying the prothonotary in writing; he is also deemed to have excluded himself if he does not discontinue a personal suit he has brought seeking the same recourse as the class action.

(b) The conduct of the action

Due to its specific nature, certain rules have had to be drawn up in order to allow the action to be instituted with a certain efficiency while still maintaining the rights of the parties and the members.

To that end, the salient points of the action may be summarized as follows:

1° the class action must be brought within three months of its authorization; if not, any interested party may apply to the court to have it declared perempted;

2° except for recourses in warranty, the defendant cannot urge preliminary exceptions against the representative unless they are common to a substantial part of the members;

3° the defendant may proceed with an examination on discovery or with a medical examination of the representative or intervener, but he cannot submit a member to such examination on discovery or medical examination unless the court considers it useful to the adjudication of the common questions; moreover, the defendant cannot examine a member on articulated facts;

4° a member cannot intervene in the action except to assist the representative or in support of the claim and the court may limit his right to produce certain proceedings if it is of the opinion that the interventions are prejudicial to the conduct of the action;

5° an admission by the representative binds the members unless the court considers that the admission causes them prejudice;

6° the personal recourse of the representative is considered in determining whether proof by testimony may be received, unless the court decides otherwise in the interests of justice.

Let us emphasize that the Act contains provisions for revising the judgement authorizing the action, the dividing of the group, the substitution of the representative or the waiving of that status, and also a general provision stipulating that the judge may prescribe measures for accelerating the conduct of the action and simplifying the proof.

Lastly, let us point out that the transaction or the confession of judgement for a part of the claim is only valid if the court approves it and a notice is given to the members.

(c) The judgement

The final judgement on the questions of law or fact dealt with collectively has the authority of *res judicata* with regard to the members not excluded from the group.

If it condemns a person to the payment of a sum of money, the judgement orders either collective recovery or individual recoveries. We point out that every final judgement must be followed by a notice to the members stating the questions remaining to be determined and the terms and conditions governing individual claims.

The collective recovery becomes the rule if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members even though the members are not identified. In this case, the debtor deposits the amount at the office of the court and, upon default thereof, the prothonotary acts as the seizing officer. It should be noted that the court may order the debtor rather to carry out a compensatory measure or to pay a part of the amount and carry out such a measure. The court may also fix terms and conditions of payment. In the case of collective recovery, if the court is of the opinion that the liquidation of individual claims is impracticable or too onerous, it may provide instead for the distribution of the balance—after payment of law costs and the attorney's fees—in the manner it deems appropriate, but only after having heard the parties and any other person it designates. The Code leaves a wide discretion to the court in this regard. Also, it may dispose of the balance remaining after individual claims have been made.

If the judgement orders individual liquidation of claims, each member must, within one year following publication of the notice, file his claim at the office of the court of the district in which the action was heard, or of any other district as determined by the court. The court may in this case provide certain terms and conditions to facilitate the bringing of these claims and determine special rules of proof and procedure, and the defendant may then urge the exceptions against a claimant that he could not move in questions dealt with collectively, such as prescription, the demand for particulars, etc. There again, the Act leaves a wide discretion to the judge in the selection of exceptions but the court no doubt can evolve its own rules from existing procedures.

We must add that the parties to collective actions, namely, the representative, the defendant or the intervenant may appeal from a judgement whereas the member cannot do so if the representative does not appeal.

2. *Financing of the class action*

Class actions may entail heavy costs for a representative, particularly in connection with experts' fees, the cost of notices, or judicial or extra-judicial costs.

In order to avoid the cost of the action preventing interested persons from availing themselves of their rights, the Québec legislator has, in the Act respecting the class action, established a Class Action Assistance Fund whose purpose is to ensure the financing of these actions. But, before proceeding with the study of that agency, it may be interesting to note the situation concerning costs.

(a) Law costs

The Act respecting the class action has not created a special system in regard to law costs and attorneys' fees. It is provided that the general rules must be applied, leaving the possibility for the Bar to regulate the computation of fees and the adoption of specific judicial tariff rules.

The general rules of the Code of Civil Procedure will continue to apply to costs including those of article 477 which stipulate that the losing party must pay all the costs unless the court orders otherwise. Note that the costs are taxed by the prothonotary but that a review is provided for.

The only special provision in the collective action stipulates that, in the case of collective recovery, law costs and the fees of the repre-

sentative's attorney are collocated before any distribution of the amounts.

(b) The Class Action Assistance Fund

The purpose of the Class Action Assistance Fund is to ensure the financing of collective actions, upon request. Thus, a person who is granted the status of representative, or one who wishes to obtain that status, may submit an application for assistance to the Fund. In his application, he must set forth the facts and his claim, describe the group, state its financial condition, indicate the purposes for which the aid is intended to be used, the amount required, and the revenues and services available to him.

In the case where the applicant does not have the status of representative, the Fund considers the right that the person intends to assert, the probability that the class action will be brought, and it asserts whether the action may be brought without such assistance. If the applicant is granted the status of representative by the court, the Fund limits itself to an assessment of the need for assistance in order to bring the class action.

If assistance is granted, an agreement is concluded between the Fund and the recipient providing for such aspects as advances, the use of the assistance, subrogation rights and, up to the amounts allowed, the Fund pays the attorney's fees, the costs of notification and the expenses expedient to the preparation or the bringing of the action. Note that the decision to refuse aid may be appealed from before the Provincial Court.

The Fund is financed by public funds, for its budget must be voted annually by the Legislature. However, the Fund obtains revenue from other sources: reimbursement of assistance or subrogation of the Fund in the rights of the representative or of his attorney for the sums it has paid, and the withholding of a percentage, fixed by regulation, of the balances and of individual claims.

CONCLUSION

In this brief exposé of the Québec law respecting the class action, we have outlined certain options which the Québec legislator has selected in regard to the conception of the class action and to its scope. He has thus considered it advisable to establish a class action which is not limited to certain types of actions or rights and he wanted to allow collective recovery of damages, collective declaratory judgement or the division of balances by the court.

Also, with respect to the constitution of the group, the legislator did not want to be too restrictive in his expressions when, at the proceeding stage, he tried to establish a certain equilibrium between the rights of the parties, the defendant, the representative or intervenant, and the rights of absent members. Lastly, the Act grants wide discretionary powers to the court and it provides for the information of the members and respect for their rights, procedures of notification or opting out, and, in the collective aspect of the action, collective recovery procedures or the awarding of damages.

The Act respecting the collective action was sanctioned on 8 June and should come into force in whole or in part in the coming months Then it is that we shall better be able to judge the functioning of the action and ascertain its strong or weak points. Needless to say, the experience of the Québec courts in matters of class actions over the next few years will be cause for reflection and re-evaluation of certain aspects of the proceedings and it is quite possible that these assessments will lead to new legislative arrangements or adjustments.

Daniel Jacoby
for the Québec representatives

Québec, Québec
August, 1978.

APPENDIX I

(See page 30)

PROMOTION OF UNIFORMITY OF COMPANY LAW IN CANADA

REPORT OF COMMITTEE

At the 1975 Conference it was decided that there would be an annual report to the Uniform Law Section respecting the promotion of uniformity in Company Law in Canada. (1975 *Proceedings*, page 25).

This year your committee's report will be presented in several parts:

(1) a report on matters that have occurred in the area of Uniform Company Law since the last meeting;
(2) a report on the special circumstances of company law within a civil law institution as in the case in Quebec;
(3) a short consideration of partnership law as a branch or aspect of company law.

PART I

In October 1977, the Deputy Provincial Secretary of Saskatchewan hosted a conference of administrators of corporation law, at which all provinces but Prince Edward Island were represented. The chairman of this committee attended as a member of the Uniform Law Conference as well as a representative of Newfoundland. In addition to its official representation, Alberta was also represented by Mr. George Field, chairman of the special committee studying the revision of the company law in Alberta. The Government of Canada was also represented.

The meeting was fruitful to the extent that administrative difficulties existing between jurisdictions were discussed and, in some cases, remedies applied or promised.

Another meeting was scheduled for early 1978 but has not yet taken place though there is an indication that British Columbia has offered to host such a meeting.

Early in 1978 the administrators of company Acts in the Atlantic provinces met in Halifax and discussed difficulties peculiar to their regions.

Reviewing activities in the various jurisdictions in the present positions at the time of this report appear to be as follows:

Newfoundland: In June 1978, the Minister of Justice presented a paper entitled "Proposals for a New Company Law for Newfoundland", and stated that the Government would like to have the views of business, the legal profession, accountants and other members of the public on the proposals as submitted. If any other jurisdictions are interested in the report, a copy may be obtained by writing to the Department of Justice of Newfoundland and Labrador.

By and large, the proposal for a new Company Act follows generally the new Acts of Canada, Saskatchewan, Manitoba and Ontario—but it has, naturally, suggested departures for the purposes of Newfoundland, which may be of interest elsewhere.

The report also contained recommendations concerning partnerships and business names.

Nova Scotia, New Brunswick and Prince Edward Island: The Premiers of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island at a meeting of the Council of Maritime Premiers directed that uniform company legislation be drafted for their consideration. The matter has been referred to the Nova Scotia Law Reform Advisory Commission for recommendation. The Commission expects to make its recommendation within the next three months. When the report is received it will be referred to the legislative counsel of Nova Scotia, New Brunswick and Prince Edward Island to be placed in uniform statutory form. From this stage, it will proceed to a joint meeting of the three premiers and attorneys general or ministers of justice at which time the policy consideration will be finalized. It will then be returned to the three legislative counsel for drafting in final form. Introduction into and passage through the three provincial Houses should follow in due course.

Ontario: Your committee has been informed that proposals to amend *The Corporations Act* of Ontario are being considered. Some uniformity with the federal Act will be suggested; but also other concepts will be introduced by the proposals that are not presently in the *Canada Business Corporations Act.*

Canada: Bills were presented to Parliament since our last report to amend the *Canada Business Corporations Act.* Some of *these* amendments were already made law in the Saskatchewan Act. The federal government also introduced a bill relating to the non-profit (or not-for-profit) corporations since we last met.

Manitoba: The Act of the province, which is relatively new, follows to a great extent the ground broken by *The Business Corporations Act* of Ontario. We have no report on new activities thereunder.

Saskatchewan: Saskatchewan has recently enacted a new Act entitled *The Business Corporations Act* (1976-77, c. 10) which followed the federal Act in most instances but anticipated some areas requiring amendment and made alterations required because of provincial laws.

There is some possibility that Saskatchewan is considering a new non-profit corporation statute.

Alberta: There is a special committee organized in this province that has been preparing extensive, in-depth studies for the purpose of proposing revision of this province's company law. This committee was mentioned in last year's report.

British Columbia: The British Columbia Legislation Committee of the Ministry of Consumer and Corporate Affairs will be examining all corporate legislation within the next year or so and some changes may result therefrom, which may bring more uniformity in the Act of that province. The latest Act in British Columbia dates from 1973 and has had some 125 amendments made to it since then. This has resulted in that Act being reported as working "reasonably well in the market place". No major changes are contemplated at the moment.

Northwest Territories: A review of corporation law is underway in this jurisdiction. A complete revision of the *Companies Ordinance* may be undertaken as a result.

Yukon: There have been no recent legislative developments in company law in this jurisdiction. However, the *Companies Ordinance* is currently undergoing study by the Yukon Department of Consumers and Corporate Affairs with a view to early revision in conjunction with a current proposal respecting securities legislation being prepared on a uniform basis with similar legislation in British Columbia.

PART II

COMPANY LAW IN THE QUEBEC MILIEU

NOTES POUR LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

En 1976, le comité spécial pour la promotion de l'uniformité du droit des compagnies recommandait la formation d'une association

d'officiers gouvernementaux chargés de l'administration du droit corporatif aux fins de faire avancer la cause de l'uniformisation de ce droit au Canada.

Messieurs Ryan, Walker et Caron réitéraient ce voeu dans un rapport transmis à la conférence sur l'informisation tenue à St. Andrews en 1977. J'acceptais sur les lieux mêmes d'endosser d'office ce rapport aux lieu et place de monsieur Caron vu le décès de ce dernier peu avant la conférence.

Exposant la conception qu'il se faisait sur l'uniformité du droit corporatif, ce comité rappelait qu'il est préférable d'avoir une législation volontairement uniforme utilisable dans les échanges commerciaux interprovinciaux qu'une uniformité imposée de force par les autorités fédérales par le truchement de majorités qui ne considéreront peut-être pas les désirs locaux ou ceux des minorités. Quoique l'on se défendait bien de vouloir imposer une camisole de force aux provinces, il semble qu'une certaine crainte d'une action fédérale en matière de législation serve de moteur à l'établissement de l'uniformisation du droit corporatif. Je crois que l'uniformisation du droit corporatif ne doit pas être préconisée pour des raisons d'un caractère qui m'apparaît plutôt négatif. A ce sujet, les ministres qui se sont succédés au ministères des Consommateurs, Coopératives et Institutions financières ont refusé de reconnaître au gouvernement fédéral le droit d'édicter des lois cadres susceptibles d'application au Québec lorsque celles-ci ont pour effet d'établir des règles de droit civil pouvant avoir force de loi sur le territoire québécois. Car s'il existe un idéal qui soit l'uniformisation du droit corporatif, il existe au Québec une exigence plus fondamentale encore qui est la cohérence de son droit privé, condition essentielle pour qu'un régime juridique puisse servir l'intérêt des contribuables et la sécurité de leurs transactions; ce qui est le but recherché par tout législateur éclairé.

En matière de droit commercial, auquel est intimement lié le droit corporatif, partie intégrante du droit civil, cette cohérence du droit local prend une importance d'autant plus grande vu le lien intime existant entre l'économique et le juridique. Aucune initiative efficace ne saurait être prise économiquement relativement à un bien ou à un droit sans une base juridique claire. La recherche de règles juridiques uniformes est un leurre si elle prétend confondre les régimes juridiques locaux légalement établis.

Les concepts juridiques qu'implique notre théorie civiliste des obligations sont définis par un vocabulaire propre au monde québécois. Cette théorie fondamentale explicite toute une gamme de rela-

tions juridiques grâce auxquelles se formulent concrètement des contrats clairs, valides et efficaces permettant ainsi d'en apprécier les effets et les responsabilités civiles qui en découlent. Le dynamisme économique est assujetti à l'ordre juridique, le désordre provoqué par l'avènement d'un dualisme juridique en matière de législation civile déboucherait inévitablement sur l'inefficacité de ce que certains définissent par le terme d'interprovincialité.

Il n'est pas inutile ici de rappeler ce que déclarait le ministre des Consommateurs, Coopératives et Institutions financières à l'occasion d'une conférence fédérale-provinciale sur le projet de loi C-16 concernant la protection des emprunteurs et déposants:

> "Il est reconnu que le Canada est partagé en dix provinces complètement autonomes l'une vis-à-vis l'autre et qu'elles partagent par contre certaines compétences législatives avec le gouvernement fédéral. Il est, d'autre part, une réalité qui existe depuis 1774 et qui transcende l'AANB. C'est que le Canada est partagé entre deux systèmes de droit: le droit civil propre au Québec et la 'Common Law' propre aux autres provinces canadiennes.
>
> "Autant notre langue ne doit pas être quelque peu française, autant notre droit ne peut être quelque peu civil. Car ce droit représente pour le Québec une valeur fondamentale qui a ses sources et ses représentations dans des traditions, des moeurs, des usages et un contexte social et humain tout à fait particulier. Plus spécifiquement, le Code civil est la véritable expression de la personnalité du monde québécois et d'une discipline intellectuelle et juridique originale. En un mot, c'est le produit d'une civilisation, d'un peuple.
>
> "Cependant, nous osons croire que le Fédéral ne recherche pas l'uniformisation pour l'uniformisation elle-même. Car cette diversité, en autant que le Québec est concerné, est la conséquence logique du maintien d'un système de droit original qui doit demeurer tel. De toute façon, sous l'apparente divergence de deux grands systèmes de droit privé a survécu et peut continuer à survivre une forme d'unicité sur l'essentiel des problèmes juridiques et de leur solution. Notre droit civil tout comme la 'Common Law' est assez dynamique pour puiser en lui-même des solutions originales conformes à son génie et à sa forme d'expression et pour s'adapter à des conditions économiques et sociales nouvelles."

Le ministre profitait de cette occasion pour rappeler que le gouvernement fédéral ne saurait, sous prétexte d'uniformisation et sans en anéantir les effets, adopter une législation dont l'un des inconvénients serait d'amplifier l'incohérence en matière de droit et de procédure civils au Québec. Il rappelait que le souci premier du législateur québécois est de maintenir la cohérence de l'ensemble du droit civil. Il ajoutait que cet ensemble ordonné pourrait être profondément troublé par l'insertion, dans le réseau de notre droit civil,

des diverses dispositions dont l'approche juridique est tout à fait étrangère à l'esprit de notre droit. Et le ministre ajoutait que la structure de nos recours juridiques, notamment en matière de responsabilité, est fondée sur les contrats, les délits et les quasi-delits. Et que la théorie des obligations, pièce maîtresse du Code civil, ne saurait être mise en danger sans mettre en péril tout ce monument juridique L'infiltration, dans notre organisation de droit civil, de règles étrangères à son génie engendrerait, ajoutait-il concubinage juridique et une duplication des lois qui placeront l'usager du droit dans un maquis judiciaire et une confusion juridique qui anéantiront le but même recherché par l'uniformisation. Il me semble inopportun que des compagnies constituées par des juridictions différentes et ayant droit de cité dans un même territoire puissent voir les personnes qui sont en relation juridique avec elles assujetties à des règles de droit privées incohérentes.

Le fait que nous accordions priorité au droit local lorsqu'il s'agit de droit civil ne signifie pas pour autant que la notion d'uniformisation est impossible en matière de droit corporatif. Les corporations sont une réalité avec laquelle les québécois sont familiers puisqu'elles sont présentes sur le territoire québécois depuis l'avènement du pays. Nos habitudes de commerce avec les autres provinces et nos voisins du sud ont créé des habitudes et une familiarité avec des techniques et un vocabulaire que nous n'entendons pas sacrifier inutilement. Nous savons pertinemment que les compagnies sont le mode privilégié de faire affaires sur le continent nord-américain. Nous connaissons les exigences de la concurrence commerciale et nous savons également que notre clientèle n'est pas captive de l'administration québécoise vu la constante possibilité pour les québécois de constituer leurs corporations sous la loi fédérale et même en vertu des lois des autres provinces. Nous avons donc intérêt à maintenir l'uniformité dans ces règles à caractère institutionnel et qu'on retrouve de façon générale dans les corporatives modernes. Le partage à l'intérieur du droit corporatif de ce qui est du droit institutionnel et de ce qui est du droit civil, le rattachement de l'ensemble au Code civil applicable à titre supplétif, exigera un travail d'identification et de départage que n'ont pas à faire les juridictions de Common Law. Ce travail est actuellement confié à l'équipe récemment formée pour refondre notre droit corporatif.

La décision de refaire chez nous le droit corporatif ne date pas d'aujourd'hui. Il y a longtemps que la décision est prise, mais l'évolution de ce dossier a connu quelques hésitations qui se justifient en partie par la situation tout à fait particulière que confère à notre droit

l'existence de notre système de droit civil. L'évolution de ce dossier a donc été tributaire de l'évolution parallèle du dossier de la refonte de notre Code civil, lequel contient, à l'heure actuelle, des dispositions fondamentales quoique peu élaborées en matière de droit corporatif. Le projet de Code civil récemment déposé par l'Office de révision du Code civil contient des chapitres entiers qui influeront directement et de façon profonde sur notre droit corporatif. Il appartient au comité de refonte de notre droit corporatif de faire les recommandations qu'il jugera opportunes relativement à ce projet de Code. Entre-temps, le ministre a l'intention de procéder à des modifications urgentes qui s'inspireront fortement des changements apportés par les autres juridictions canadiennes. Elles porteront sur la partie institutionnelle de droit corporatif, à savoir le mécanisme de constitution d'une corporation et ses modifications, son financement, l'articulation de ses assemblées et des organes de direction, etc.

Le comité de refonte de notre droit corporatif aura également une autre tâche immense à accomplir, soit l'intégration de cette masse invraisemblable de législation corporative en vigueur au Québec. Nous administrons au ministère au-delà d'une trentaine de lois générales concernant les compagnies et dont la plupart sont d'une réelle importance. Je ne cite que la Loi des compagnies, la Loi des compagnies étrangères, la Loi des pouvoirs spéciaux des corporations, la Loi des renseignements sur les compagnies, la Loi de la mainmorte, la Loi des compagnies de fiducie, la Loi sur les assurances, la Loi des valeurs mobilières, la Loi des sociétés de prêts et placements, la Loi des compagnies minières, la Loi des syndicats professionnels, la Loi des caisses d'épargne et de crédit, la Loi des associations cooperatives, la Loi des sociétés coopératives agricoles, etc., etc. Nous avons également à intégrer au-delà d'une centaine de lois générales génératrices de corporations sans but lucratif qui, tantôt, sont complétées par la troisième partie de la Loi des compagnies ou, tantôt, complètement autonomes. Ces lois permettent à une corporation d'en former d'autres par lettres patentes ou d'être formées par des moyens les plus divers qui vont de l'autorisation municipale au décret ministériel. Cet effort d'intégration et de transition est immense.

Le résultat de ce travail sera ensuite soumis à un comité de consultants.

Il est consolant de constater que des praticiens, des enseignants et des fonctionnaires spécialisés en droit corporatif voient, dans cette refonte, une occasion unique de procéder à une "civilisation" de notre droit corporatif. C'est pourquoi il y a tout lieu de croire que le

cheminement de notre refonte ne sera pas tout à fait semblable à celui qu'ont connu les autres juridictions canadiennes. Dans certains cas, les solutions de droit civil différeront souvent profondément de celles adoptées par d'autres juridictions. Dans certains cas, il y aura harmonisation et dans d'autres cas, il y aura uniformisation et ce surtout en ce qui concerne le caractère institutionnel du droit corporatif.

Ce comité a déjà d'ailleurs contacté les officiers en charge de l'administration du droit corporatif dans certaines juridictions canadiennes dans un souci d'harmonisation de notre législation, sinon d'uniformisation avec celle des autres juridictions.

Cette recherche de la cohérence de notre droit privé n'est donc pas nécessairement inconciliable avec la promotion de l'uniformisation du droit. Malgré les aménagements qu'exige notre situation particulière, nous sommes convaincus que notre droit corporatif inséré le cadre juridique qui lui est propre conservera aux corporations qui oeuvrent sur notre territoire le dynamisme propre à ce mode privilégié de faire affaires.

Dans cette perspective, nous sommes convaincus de l'opportunité de collaborer à tout effort de promotion de l'uniformité du droit corporatif.

PART III

It has been some time since this Conference has considered the situation of partnership law in the common law jurisdictions. This was one of the earliest subjects considered by this Conference in 1918.

A number of events are brought to your attention.

In 1976 the National Conference of Commissioners on Uniform State Laws completely revised the *Uniform Limited Partnership Act of 1916*. In 1968 Alberta replaced the *Limited Partnership Act* by one based, as we understand, on the United States Uniform Act of 1916.

Other provinces have statutes on limited partnerships that appear to predate Confederation, that is by a statute of the Province of Canada 1849 (12 Victoria chap. 75). In 1920 all of Canada except Prince Edward Island seemed to have followed that statute so there was uniformity in the field. The present position might now usefully be examined by the Conference.

Saskatchewan appears to have replaced the *Registration of Partnership* statute with *The Business Names Registration Act* (1977, c. 11). The *Registration of Partnership Act* was a Uniform Act (see *Proceedings*, 1929, 1938, 1942, 1946).

In Europe a novel type of business organization, on a lower level than the small private incorporated company, has appeared. This might be best described as the limited responsibility partnership. As it has developed in a civil law area (that is Germany), it may well begin to pervade the European community including England. Perhaps this committee could usefully look at this development and keep aware, should it (like condominiums) begin to move into our business concepts.

Your committee brings forward this report for your information and whatever action the Uniform Law Section deems suitable at this time.

Roch Rioux
James W. Ryan
Graham D. Walker
for Quebec, Newfoundland and
Nova Scotia representatives

PROMOTION DE L'UNIFORMITÉ DROIT DES COMPAGNIES AU CANADA

À la conférence de 1975 on a décidé qu'il y aurait présentation d'un rapport annuel à la section de l'uniformisation du droit au sujet de la promotion de l'uniformité dans le droit des compagnies au Canada.

Le rapport annuel de 1977 a été présenté par MM. Rioux, Ryan et Walker au nom du Québec, de Terre-Neuve et de la Nouvelle-Ecosse.

Aujourd'hui le rapport de votre comité vous est présenté en plusieurs parties; il y aura

(1) un rapport sur des matières qui ont surgi depuis la dernière réunion dans le domaine de l'uniformisation du droit des compagnies;

(2) un rapport sur les circonstances spéciales du droit des compagnies à l'intérieur d'une institution de droit civil comme c'est le cas au Québec;

(3) un court examen du droit des sociétés en nom collectif en tant que branche au aspect du droit des compagnies.

La partie 2 du rapport sera présentée par M. Rioux ou son délégué.

Partie I: En octobre 1977, le secrétaire provincial adjoint de la Saskatchewan était l'hôte d'une conférence d'administrateurs du droit des corporations, à laquelle étaient représentées toutes les provinces sauf l'Ile-du-Prince-Edouard. Le président de votre comité y a assisté à titre de membre de la conférence sur l'uniformisation du droit de même qu'en tant que représentant de Terre-Neuve. En plus de ses représentants officiels, l'Alberta était également représentée par M. George Field, président du comité spécial étudiant la revision du droit des compagnies en Alberta. Le gouvernement canadien était également représenté.

La réunion a porté fruit en ce sens que les difficultés administratives existantes entre les ressorts ont été discutées et que, dans certains cas, des solutions ont été appliquées ou promises.

Une autre réunion était prévue pour tôt en 1978 mais n'a pas encore en lieu bien qu'il y ait indication que la Colombie-Britannique a offert d'être l'hôte d'une telle réunion.

Tôt en 1978 les administrateurs des lois sur les compagnies régissant les provinces de l'Atlantique se sont réunis à Halifax et ont discuté des difficultés particulières à leurs régions.

La revue des activités menées dans les divers ressorts peut se résumer comme suit: [en allant d'est en ouest—comme le soleil].

Terre-Neuve: En juin 1978, le ministre de la Justice a présenté un document intitulé "Propositions pour un nouveau droit des compagnies terre-neuvien", et il a déclaré que le gouvernement aimerait recevoir les points de vue du monde des affaires, des avocats, des comptables et du public en général sur les propositions soumises. Si d'autres ressorts sont intéressés au rapport, un exemplaire peut être obtenu en écrivant au ministère de la Justice de Terre-Neuve et du Labrador.

Dans l'ensemble, la proposition formulée en faveur d'une nouvelle loi des compagnies est alignée sur les nouvelle lois que possèdent la juridiction fédérale, la Saskatchewan, le Manitoba et l'Ontario—bien qu'elle propose de s'en écarter sur certains points pour les besoins de Terre-Neuve, écarts qui peuvent être susceptibles d'intéresser d'autres ressorts.

Le rapport contient également des recommandations concernant les sociétés en nom collectif et les raisons sociales.

Nouvelle-Ecosse, Nouveau-Brunswick et Ile-du-Prince-Edouard:

Les premiers ministres des provinces de Nouvelle-Ecosse, Nouveau-Brunswick et de l'Ile-du-Prince-Edouard ont, lors d'une réunion du conseil des premiers ministres des Maritimes, prescrit la préparation d'une loi uniforme sur les compagnies qui devra leur être soumise pour examen. La question a été déférée à la commission consultative de réforme du droit de la Nouvelle-Ecosse, pour recommandation. La commission s'attend à déposer sa recommandation dans pes prochains trois mois. Lorsque le rapport sera déposé, il sera envoyé aux conseillers juridiques des législatures de la Nouvelle-Ecosse, du Nouveau-Brunswick et de l'Ile-du-Prince-Edouard pour transposition en loi uniforme. De là, le texte ira à une réunion conjointe des trois premiers ministres et procureurs généraux ou ministres de la Justice pour qu'on en arrête définitivement l'orientation. Il sera ensuite retourné aux trois conseillers juridiques des législatures pour rédaction en forme finale. Le projet de loi devrait ensuite déposé dans chacune des trois chambres provinciales et adopté en temps et lieu.

Ontario: Votre comité a été informé que les propositions visant à modifier la loi sur les corporations de l'Ontario sont présentement à l'étude. Une certaine uniformité avec la loi fédérale sera proposée, mais les propositions soumettront également d'autres concepts qu'on ne retrouve pas actuellement dans la Loi sur les corporations commerciales canadiennes.

Canada: Des projets de loi ont été depuis notre dernier rapport présentées au Parlement en vue de modifier la Loi sur les corporations a également déposé un projet de loi relatif aux corporations sans but commerciales canadiennes. Certaines de *ces* modifications ont déjà été édictées dans la loi de la Saskatchewan. Le gouvernement fédéral a également déposé un projet de loi relatif aux corporations sans but lucratif depuis notre dernière réunion.

Manitoba: La loi de cette province, qui est relativement nouvelle, suit dans une large mesure la voie prise par la loi sur les corporations commerciales de l'Ontario. On ne nous a pas signalé de nouvelles initiatives à cet égard.

Saskatchewan: La Saskatchewan a récemment édicté une nouvelle loi sur les corporations, qui suit la loi fédérale dans la plupart des cas

mais modifie certains secteurs dans lesquels une modification s'impose, et qui en outre propose des changements rendus nécessaires par les lois provinciales.

Il y a possibilité que la Saskatchewan soit en train d'envisager une nouvelle loi sur les corporations sans but lucratif.

Alberta: Un comité spécial est sur pied dans cette province et il a préparé des études vastes et approfondies en vue d'une revision du droit des compagnies de cette province. Ce comité est mentionné dans le rapport de l'an dernier.

Colombie-Britannique: Le comité de la législation de Colombie-Britannique du ministère de la Consommation et des corporations examinera toutes les lois sur les corporations au cours de la prochaine année ou d'une période un peu plus longue et proposera peut-être certains changements qui introduiront plus d'uniformité dans la loi de cette province. La dernière loi en Colombie-Britannique remonte à 1973 et elle a reçu depuis lors 125 modifications. Cela a eu pour résultat qu'on signale que cette loi fonctionne "raisonnablement bien dans le milieu des affaires". On n'envisage pas de changements majeurs à ce moment-ci.

Territoires du Nord-Ouest: Une revue du droit des corporations est présentement menée dans ce ressort. Il s'en suivra peut-être l'armorce d'une revision complète de l'ordonnance sur les compagnies.

Yukon: Votre comité n'a pas de renseignements sur ce qui intervient actuellement dans le domaine du droit des compagnies au Yukon.

Partie II: Le droit des compagnies dans milieu québécois

NOTES FOR THE UNIFORM LAW CONFERENCE OF CANADA

In 1976, the Special Committee to promote Uniform Company Law recommended the establishment of an association of government officials responsible for the administration of corporation law in order to advance the case of uniformity in this area of the law in Canada.

At last year's Uniform Law Conference, held at St. Andrew's, Messrs. Ryan, Walker and the late Yves Caron repeated this view in their report. At that meeting, I decided to endorse the report instead of M. Yves Caron who died shortly before the Conference.

In outlining what it had in mind for uniform company law, the committee recalled that it is better to have voluntary uniform local enactments for use in interprovincial business, than an enforced uniformity imposed by federal authority through majorities who may not consider the local wishes or those of minorities of localities or minorities. While it was urged that there was no intention to put a straitjacket on the provinces, it seems that a certain fear of federal legislative action is fuelling the drive toward uniformity of corporation law. But I believe that uniformity of corporation law ought not to be advocated solely for reasons that seem to me largely negative in character. On this point, the successive Ministers who have held the Consumer Affairs, Co-operatives and Financial Institutions portfolio have refused to recognize any rights of the federal government to enact general statutes which could be applied to Quebec when the result would be to establish rules of civil law, which could have legal effect within Quebec. For if there is an ideal of uniform company law, Quebec has an even more basic requirement, which is the coherence of its private law: this is an essential condition for a legal regime that can serve the interests of Quebec taxpayers and protect their business dealings. This must surely be the goal of all enlightened and progressive legislators.

Commercial law is so intimately bound up with company law, as an integral part of civil law, that the coherence of local law takes on an even greater significance in view of the close links that exist between the state of the economy and the legal system. No productive economic initiatives can be taken with respect to assets or rights without a clear basis in law. The search for uniform rules of law is a trap if it considers long-established local legal regimes as interchangeable.

The legal concepts which are involved in our civil law theory of obligations are defined by terminology adapted to the Quebec environment. This basic doctrine explains a whole range of legal relations, through which one can draw up clear, valid and effective contracts thus enabling anyone to grasp the rights and obligations that they entail. A vital economy is dependent upon legal order. The disruption provoked by the introduction of a dualism in civil legislation would inevitably result in the ineffectiveness of what is sometimes called "interprovinciality".

It may be useful to recall what the Minister of Consumer Affairs, Co-operatives and Financial Institutions said at the Federal-Provin-

cial Conference on Bill C-16, the *Borrowers and Depositors' Proctection Act:*

> "It is recognized that Canada is divided into ten provinces that are completely autonomous as between themselves, and that these provinces share certain legislative powers with the federal government. On the other hand, there is a reality that has existed since 1774, and which transcends the British North America Act: Canada is divided between two systems of law—the Civil Law of Quebec and the Common Law of the other Canadian provinces.
>
> "Just as our language must not be somewhat French, so our law must not be somewhat Civil. This law represents for Quebec a fundamental value that has its roots and its expression in wholly distinctive traditions, customs and practices and in social and human contexts that are unique. More specifically, the Civil Code is the true expression of the personality of Quebec and of a particular intellectual and legal discipline. In short it is the product of a civilization, of a people.
>
> "However, we are willing to believe that the Federal Government is not seeking uniformity merely for the sake of uniformity. Because this diversity, as far as Quebec is concerned, is the logical result of the maintenance of an original system of law which must so remain. In any case, beneath the apparent dissimilarity of two great systems of private law, a kind of unity on what essential legal problems are, and how they can be solved, has survived and can continue to survive. Our civil law, like the common law, is sufficiently vital to find within itself creative solutions in accord with its own spirit and form of expression; it is also vital enough to adapt to new social and economic conditions."

The Minister took the opportunity to recall that the federal government could not effectively, under the guise of uniformity, adopt legislation which would have as one of its disadvantages, the effect of increasing whatever incoherence there is in Quebec law and civil procedure. He recalled that the chief concern of the Quebec lawmaker is to preserve the overall coherence of civil law. He added that this ordered whole could be profoundly disrupted by the introduction, into the web of civil law, of various provisions whose legal philosophy is alien to the spirit of our law. The Minister went on to say that the structure of our legal remedies, especially in the area of civil liability, is based upon contracts, delicts, and quasi-delicts. He stressed that the theory of obligations which is the very corner stone of the Civil Code, could not be endangered without threatening this entire body of law. The infiltration of alien rules, rules foreign to the spirit of our law, would create, he added, an unholy union of systems, and a duplication of laws, which would place the citizen in a judicial maze and a confusion of laws which would bring to nought the quest for uniformity. It seems unfortunate that companies incorporated in different jurisdictions, and which are

entitled to exist in the same territory may see persons who enter into legal relationships with them subject to incoherent rules of private law.

The fact we give priority to local law when we are dealing with civil law does not mean for a minute that uniformity is impossible in the area of company law. Corporations are a reality, with which our people are familiar, since they have been present in Quebec since its beginning. Our ways of doing business with other provinces and our neighbours to the south have made us familar with techniques and a vocabulary that we are not ready to jettison lightly. We know for certain that companies are the most favoured way of doing business on the North American continent. We are aware of the demands of business competition. We know too that our citizens are not captives of the Quebec administration since they can always incorporate under the federal statute and even under the laws of the other provinces. It is in our interest therefore to maintain uniformity in those "institutional" rules which one generally finds in modern companies acts. The dividing line in company law between what is "institutional law" and what is "civil law", and the application of the Civil Code to matters otherwise not covered, imposes a task of identifying which is which, and making distinctions which Common Law jurisdictions do not have to do. This task is currently assigned to the departmental group recently set up to review our company law.

The decision to remake our company law wasn't taken yesterday. The decision was made a long time ago, but the progress of this undertaking has been marked by fits and starts, that can be partially explained by the unique situation that exists as a result of our civil law system. These developments are dependent upon the parallel developments taking place to re-organize the Civil Code itself. The Code currently contains basic general rules which haven't been worked out very far in the company law area. The draft Civil Code recently submitted by the Civil Code Revision Office contains whole chapters which will directly and profoundly influence our entire company law. The departmental committee's job is to make recommendations as it sees fit on the Draft Code. Meanwhile the Minister intends to bring forward urgently needed amendments which will be greatly influenced by changes made by other Canadian jurisdictions. They will bear on the "institutional" part of company law, that is, the mechanics of incorporation, financing, meetings, and directorships, etc.

The departmental committee will also have the important task of unravelling and integrating the extraordinary hodge-podge of

company law in force in Quebec. At the department we administer more than thirty general statutes dealing with company law, most of which are quite important.

I shall simply refer to the *Companies Act*, the *Foreign Companies Act*, the *Special Corporate Powers Act*, the *Companies Information Act*, the *Mortmain Act*, the *Trust Companies Act*, the *Insurance Act*, the *Securities Act*, the *Trust and Loans Societies Act*, the *Mining Companies Act*, the *Professional Associations Act*, the *Savings and Credit Unions Act*, the *Co-operative Associations Act*, the *Farming Co-operatives Societies Act* and so on. We also have to integrate more than a hundred statutes dealing with non-profit corporations, which are sometimes complemented by the *Companies Act*, Part III, or in other cases are self-sufficient. These statutes allow a corporation to constitute others by letters patent, or to be created by a variety of methods ranging all the way from municipal authorization to ministerial order. The task of integration and transfer will be tremendous.

In due course the results of this work will be submitted to a consultative committee of experts.

It is refreshing to see that practitioners, law teachers and civil servants specializing in company law view this revision as a unique opportunity to make our company law more civilian, and perhaps more "civilized". That is why we fully believe that the path taken by our revision will not be completely the same as that taken in the other Canadian jurisdictions. In some cases the civil law solutions will differ markedly from those adopted by other jurisdictions. In some cases there will be harmonization, in others uniformity, especially as regards the "institutional" part of company law.

Moreover, the committee has already made contact with the officials responsible for administering company law in other Canadian jurisdictions with a view to harmonizing our legislation, if not to make it uniform with the other provinces' laws.

This research for coherence in our private law is not necessarily incompatible with the promotion of uniformity. Despite the accommodations which our own situation requires, we are convinced that if our company law is placed squarely within its own legal framework it will enable companies operating within Quebec to retain the vitality associated with this most favoured way of doing business.

From this point of view, we are convinced that it is desirable to co-operate in all efforts to promote uniform company law.

Partie III: Ce n'est pas d'aujourd'hui que cette conférence s'est penchée sur la situation du droit des sociétées en nom collectif dans les ressorts de common law. Cela a été un des premiers sujets examinés par cette conférence en 1918.

Un certain nombre d'événements vous sont signalés:

En 1976 la conférence nationale des commissaires de l'uniformisation des lois des Etats américains a complètement revisé la loi uniforme en 1976 sur les sociétés en nom collectif à responsabilité limités. En 1968 l'Alberta a remplacé sa loi sur les sociétés en nom collectif à responsabilité limitée par une lois basée, croyons-nous comprendre, sur la loi uniforme de 1976 des Etats-Unis.

D'autres provinces ont sur les sociétés en nom collectif à responsabilité limitée des lois qui semblent dater d'avant la Confédération, en raison d'une loi de la province du Canada de 1849 (12 Victoria chap. 75). En 1920, tout le Canada sauf l'Ile-du-Prince-Edouard semble avoir suivi cette loi-là de sorte qu'il y a eu uniformité dans ce domaine. Peut-être cette conférence trouverait-elle maintenant profit à examiner la situation actuelle.

La Saskatchewan semble avoir remplacé sa loi sur l'enregistrement des sociétés en nom collectif par une loi sur l'enregistrement des raisons sociales, adoptée en 1977. La loi sur l'enregistrement des sociétés en nom collectif était une loi uniforme (voir les *Proceedings* de 1929, 1938, 1942, 1946).

En Europe un nouveau type d'organisme d'affaires, d'un échelon inférieur à celui d'une petite compagnie privée constituée en corporation, est apparu. La meilleure façon de la décrire serait peut-être de dire qu'il s'agit d'une société en nom collectif à responsabilité limitée. Comme il s'est constituté dans un pays de droit civil (soit l'Allemagne), il est bien possible qu'il s'infiltre dans la communauté européene y compris en Angleterre. Peut-être notre comité pourrait-il utilement jeter un coup d'oeil sur ce nouveau phénomène et en garder la trace, au cas où cette institution nouvelle (comme les immeubles en co-propriété) viendrait un jour à filtrer dans nos concepts.

Votre comité dépose ce rapport pour votre information et pour toute mesure que pourrait considérer souhaitable, à ce moment-ci, la section de l'uniformisation du droit.

James W. Ryan
Graham D. Walker
Roch Rioux

APPENDIX J

(See page 31)

ENACTMENTS OF AND AMENDMENTS TO UNIFORM ACTS, 1977-78

REPORT OF MR. TALLIN

Bills of Sale Act

Prince Edward Island amended its Act to include some procedural provisions dealing with manner of sale of chattels seized under a bill of sale.

By an amendment to the *Sale of Goods Act*, New Brunswick provided that registration of a bill of sale or other document under the *Bills of Sale Act* would constitute notice of the bill of sale or other document within the registration district to all persons claiming from the person who sold the goods under the bill of sale.

Conditional Sales Act

Prince Edward Island amended its Act to include some procedural provisions dealing with manner of sale of goods seized under a conditional sale agreement and with extension of time for filing conditional sale agreements.

By amendment to the *Sale of Goods Act*, New Brunswick provided that filing of a conditional sale agreement or other document under the *Conditional Sales Act* would constitute notice of the conditional sale agreement or other document within the registration district to all persons claiming from the person who bought or agreed to buy the goods.

Contributory Negligence Act

Prince Edward Island enacted the Uniform Act with some minor modifications and with some additional provision dealing with procedural matters.

Criminal Injuries Compensation Act

Quebec enacted amendments to its *Crime Victims Compensation Act* dealing with the interruption of the prescription period prescribed under the Civil Code by reason of application under the Act. Also it

added a provision allowing applications made under the *Workmen's Compensation Act* or the Act to promote good citizenship to be treated, in certain cases, as applications made under the *Crime Victims Compensation Act.*

Dependant's Relief Act

Ontario adopted the Uniform Act, with some changes, as Part V of the *Succession Law Reform Act, 1977.*

Domicile Act

Ontario enacted some provisions respecting the domicile of a child as section 68 of the *Family Law Reform Act, 1978.* These provisions do not follow the uniform *Domicile Act.*

Extra-Provincial Custody Order Enforcement Act

Saskatchewan enacted the Uniform Act with minor changes.

Fatal Accidents Act

In conjunction with enactment of the *Survival of Actions Act,* Alberta amended the *Fatal Accidents Act.* The maximum of $500 for funeral expenses was deleted and provision was made for special damages for bereavement to the spouse of the deceased person, to the parents of the deceased person and to minor children of the deceased person.

Prince Edward Island enacted a new *Fatal Accidents Act* which follows in many respects the Uniform Act but which contains additional provisions respecting procedural matters.

Ontario re-enacted the *Fatal Accidents Act* as Part V of the *Family Law Reform Act* with some changes. The most important change is that the provisions would now apply to claims of dependants of a person who was injured as well as a person who was killed.

Human Tissue Gift Act

Quebec amended the provisions of the *Civil Code* which deal with this matter in respect of the manner in which a minor may give his consent.

Interpretation Act

Alberta enacted the definition of "province" which includes the Northwest Territories and the Yukon Territory.

New Brunswick enacted two minor amendments, one providing that where an enactment provides for a document, etc., to be delivered or sent by registered mail, it may be delivered or sent by certified mail and the second to provide that words importing a feminine gender include masculine gender and corporations.

Northwest Territories amended its Ordinance to provide that words importing a feminine gender include masculine gender.

Saskatchewan amended its Act to include a reference to the *Provincial Court Act* in the definition of "magistrate".

Quebec amended its *Interpretation Act* to provide that in case of doubt, the construction placed on any Act shall be such as not to impinge on the status of the French language.

Interprovincial Subpoena Act

Saskatchewan enacted the Uniform Act with minor changes including a provision that the Act does not apply to subpoenas issued in respect of an offence under an Act of the Legislature or any other offence however created.

Intestate Succession Act

Ontario re-enacted its *Intestate Succession Act* as Part II of the *Succession Law Reform Act, 1977* with some differences from the Uniform Act.

Manitoba amended its *Devolution of Estates Act* which is very similar to the uniform *Intestate Succession Act*. The amendments provide that a widow of an intestate would receive first $50,000 plus 50% of the balance of the estate.

Jurors (Qualifications)

Manitoba enacted a provision which would disqualify a person from serving as a juror if he is convicted of an indictable offence unless he has been pardoned.

Legitimacy Act

Ontario repealed its *Legitimacy Act* as part of its *Children's Law Reform Act, 1977* by which illegitimacy was abolished.

Married Women's Property Act

Manitoba enacted a provision to make the Act subject to the *Marital Property Act.*

Saskatchewan amended its Act to allow for applications to the district courts.

Partnerships Registration Act

Quebec amended its *Companies and Partnerships Declaration Act* to provide for registration of firm names in the French language only.

Personal Property Security Act

Manitoba enacted some provisions respecting signatures on financing statements and other documents to be registered in the personal property registry. The signature of the secured party would not be required if the debtor has already signed the security agreement creating the security interest and the financing statement contains a declaration to that effect. Notice of transfer of collateral to the debtor to a third party will have to be signed by the secured party but not by the debtor or the transferee of the interest in the collateral. Further rules were also enacted respecting the signature required on an amendment statement in certain instances.

Presumption of Death Act

Northwest Territories amended its Ordinance to enact the new provisions of the Uniform Act.

Reciprocal Enforcement of Maintenance Orders Act

Saskatchewan enacted a minor amendment to take into account its Unified Family Court.

Retirement Plan Beneficiaries Act

Ontario adopted the uniform provisions as Part III of the *Succession Law Reform Act, 1977.*

Northwest Territories enacted the Uniform Act with minor modifications.

Survival of Actions Act

Alberta enacted the *Uniform Survival of Actions Act* with some changes.

Prince Edward Island enacted the Uniform Act with some changes.

Survivorship

Ontario adopted the *Uniform Survivorship Act* as Part V of the *Succession Law Reform Act, 1977.*

Wills Act

Ontario adopted the Uniform Act, including the uniform provisions for adoption of convention on international form of wills, as Part I of the *Succession Law Reform Act, 1977.*

Saskatchewan enacted a minor amendment to bring the Act in line with an amendment to their intestate succession law dealing with the surviving spouse's priority claim to the first $40,000 of the estate.

Rae Tallin

Winnipeg
1 August 1978

APPENDIX K

(See page 31)

EXTRA-PROVINCIAL CUSTODY ORDERS ENFORCEMENT

ONTARIO REPORT

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Preface

At the 1977 meeting of the Conference British Columbia presented a report indicating that it wished to put forward certain amendments to the *Uniform Extra-Provincial Custody Orders Enforcement Act*. At that time, the Ontario Commissioners indicated they wished to propose a review of that Act. After discussion, the matter was referred to Ontario for study (1977 *Proceedings*, page 30).

This report is the result of the study.

Toronto
10 July 1978

Karen M. Weiler
for the
Ontario Commissioners

I

Introduction

The problem of one parent removing a child to a foreign jurisdiction by force or deception, or at any event without the concurrence of the other parent having care or custody of the child, is a matter of increasing concern in today's mobile society. The issue of custody, difficult to determine at best, is rendered more complex when interjurisdictional problems arise. Basically, one parent will be seeking to regain custody of the child which has been "snatched" while the other will attempt to obtain judicial sanction for his or her actions.

At the present time there are a number of grounds upon which a court may assume jurisdiction to entertain a custody proceeding. Under the traditional ground of the physical presence of the child within its boundaries, the court in the *McKee*[1] case took jurisdiction,

and, notwithstanding a California order granting custody of the child to the mother, re-opened the entire question of custody. After a full evidentiary hearing before an Ontario Supreme Court judge, custody was eventually awarded to the father who, in defiance to the court order, had taken the child to Ontario and applied for custody. Although the Privy Council upheld this decision, most Canadian courts have since come to realize that if courts always assume jurisdiction based on the physical presence of the child, a state of confusion would result. Any parent possessing ample financial means and dissatisfied with the original order could, by moving from one jurisdiction to another, prolong litigation as to an infant's custody until a favourable decision was obtained. Given the lack of effective criminal sanctions imposed on abducting parents, the singular lack of statutory guidelines to assist a judge in applying the common but vague criterion of "the best interests of the child", and the fact that the courts of a parent's former place of residence may be more sympathetic, a parent may in fact feel he or she can only stand to gain by forcefully removing the child from the custody of the other and shopping for a favourable forum.

This paper will review the existing attempts which have been made to deal with this problem and pose a series of questions and alternatives with a view to discouraging parental kidnapping of children as far as possible.

[1][1951] A.C. 352.

II

Background

1. The Uniform Act

As we all know, in Canada, each province is considered a "foreign" jurisdiction. A custody order made by a "foreign" court of competent jurisdiction does not have the force of a foreign judgment. It is a well-known principle of private international law that a foreign judgment may not be relied upon for enforcement in a jurisdiction, unless it is final, binding, and not subject to variation in the forum pronouncing it.[2] A custody order is always subject to variation and cannot of its nature be final.

In response to these problems, the Uniform Law Conference of Canada, at the initiation of Manitoba, adopted the *Uniform Extra-Provincial Custody Orders Enforcement Act* in 1974. To date it has been enacted by the legislatures of Alberta, British Columbia, Manitoba, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island.

The Act was and is a significant step forward in the evolution of the view that a child is not a chattel to be possessed by the parent having immediate physical control over him or her. Instead, by generally ensuring recognition of custody orders of another province or other foreign jurisdiction, the Act is a significant deterrent to "civil kidnappers". This is particularly so in view of the fact that for the Act to be invoked, there is no requirement of reciprocity with other jurisdictions.

> The Manitoba Commissioners assumed that for jurisdictions in Canada the prime concern would be the welfare of the particular child affected. (They) could not see how the welfare of a particular child who was the subject of a custody order being considered by a court in a Canadian province could be related to the question of whether or not the law of the jurisdiction from which the child came provided for reciprocal enforcement of custody orders.[3]

This view was unanimously adopted by the Commissioners and the same assumption of primary concern for the welfare of the child is the basis under the Act for unilateral enforcement of custody orders of other countries and states.

The *Uniform Extra-Provincial Custody Orders Enforcement Act* requires enacting provinces to recognize and enforce extra-provincial

[2]Conflict of Laws (3rd ed.), 1974, Castel, p. 804.
[3]1974 Report, p. 111.

custody orders unless it is satisfied that, at the time the custody order was originally made, the child did not have *a real and substantial connection* with the jurisdiction in which the order was made (section 2). If there was no real and substantial connection with the jurisdiction making the order, and if the child and all parties affected by the custody order are resident in the enforcing jurisdiction, the court may vary the custody order and in so doing shall give first consideration to the welfare of the child (section 3). A person is deemed not to be a resident of the jurisdiction if the sole reason for his physical presence there is to make or oppose an application to vary (section 3(2)). The court may also vary a custody order where it is satisfied that a child would suffer serious harm by being restored to the custody of the person named in the order.

The mere physical presence of the child with one parent claiming custody does not, therefore, result in a new inquiry and full-scale investigation as to the merits of the previous custody order. Instead, subject to the conditions already mentioned, the court will give effect to the foreign order.

2. Other Legislation

Other countries and jurisdictions have not been idle in developing solutions to the problem of parental kidnapping of children.

Australia

As part of its overall reform of family law, Australia has recently passed legislation providing for registration and recognition of inter-state and overseas custody orders. Upon registration of an overseas order, the order has the same force and effect as if made pursuant to the *Family Law Act* and a court shall not exercise jurisdiction unless (a) every person having rights of custody or access to the child consents or (b) there are substantial grounds for believing that the welfare of the child will be adversely affected if the court does not exercise jurisdiction. If a court does exercise jurisdiction it may vary a custody order based on (b) or because there has been such a change in the circumstances of the child that the order ought to be made.

Where an order is registered under the *Family Law Act* it is an offence under the *Family Law Act* to interfere with the right of a person to custody or access of the child. Failure to comply with these provisions may result in an order to pay a fine, a requirement

to enter into a recognizance, delivery up of a passport or the making of any other order the court considers necessary to enforce compliance.

The United States

The National Conference of Commissioners on Uniform State Laws and the American Bar Association have recommended a *Uniform Child Custody Jurisdiction Act* which has been adopted by several states.*

Under this Act a court can not make a custody order or modify an existing custody decree based on the mere physical presence of the child unless the child has been abandoned, or it is necessary in an emergency to protect the child from abuse or neglect, or no other state would have jurisdiction.

In order to have jurisdiction to make an initial custody order or to modify a decree, the proceeding must be commenced in the child's *home state* (that is where he has lived with his parents for the preceding six months, temporary absences excluded). However, the court may assume jurisdiction where it is in the best interest of the child if the child and his parent have a *significant connection* with the state *and* there is available in that state *substantial evidence* concerning the child's present or future care, protection, training and personal relationships. In order to modify custody orders of another state the court must find that the state which made the order no longer has jurisdiction and that it has jurisdiction on the basis mentioned above.

If a parent seeking to *modify a custody order* has, without the consent of the person entitled to custody, wrongfully removed the child or improperly detained him in violation of a court order the court *must decline* jurisdiction unless the interest of the child clearly requires otherwise. If a parent is seeking an *initial custody order* and has wrongfully taken the child from another state the court *may decline* jurisdiction.

The court may also decline jurisdiction to make an initial or modification decree if it finds that a court of another state is a more appropriate forum. This finding may be made upon the court's own motion, the motion of a party to the proceeding or a representative

*These states are Arizona, California, Colorado, Hawaii, Maryland, Michigan, North Dakota, Oregon, Wyoming, Alaska, Delaware, Florida, Indiana, Iowa, Minnesota, Missouri, New York, Montana, Ohio, Pennsylvania and Wisconsin.

of the child. Among the factors which the court takes into account in making this determination are whether the child has a closer connection with another state, substantial evidence concerning the child is more readily available in another state or if another state is the child's home state. In deciding whether or not to decline jurisdiction the court may communicate with the court of the other state with a view to assuring that jurisdiction will be exercised by the more appropriate court. Needless to say when a custody proceeding has already been commenced in an appropriate forum the court must decline to exercise its jurisdiction.

When it becomes necessary to enforce a custody decree of another state because one of the parties violated it, that party may be required to pay necessary travel and other expenses and attorney's fees incurred by the party entitled to custody or his witnesses.

The general policies of the Act extend to the international area. Recognition and enforcement of custody decrees of other countries will be granted upon proof that reasonable notice and an opportunity to be heard were given to all affected persons.

3. JURISPRUDENCE

The Present Situation in Ontario

Although Ontario has not enacted the *Uniform Extra-Provincial Custody Orders Enforcement Act*, Ontario courts have developed a jurisprudence which recognizes that custody decisions should be made where the most evidence with respect to the children is available, and that jurisdiction based on the physical presence of the child alone ought to be declined.

In *Nielsen v. Nielsen*,[4] Galligan J. took judicial notice of the recommendations made by the Committee on Conflicts of Jurisdiction Affecting Children in the United Kingdom constituted by the British parliament who analyzed the problem of child kidnapping. Adopting the reasoning of such English cases as *Re P. (G.E.) (An Infant)*,[5] *Re H. (Infants)*,[6] and *Re E. (D.) (An Infant)*,[7] Mr. Justice Galligan concluded that the child's ordinary residence is the last place in which the child resided with his parents and that, unless

[4](1971) 16 D.L.R. (3d) 33.

[5][1965] Ch. 568 (C.A.) 393.

[6][1965] 3 All E.R. 906 aff'd [1966] 1 All E.R. 886 (C.A.).

[7][1967] 1 All E.R. 329 aff'd [1967] 2 All E.R. 881 (C.A.).

there were exceptional circumstances, the court in which the child has his ordinary place of residence has jurisdiction to deal with the custody of infants even although the child is no longer present within the jurisdiction.

Mr. Justice Galligan did not deny the jurisdiction of the courts where the child was physically present to deal with the issue of custody. In his opinion, ". . . the *McKee* case does not in any way detract from the jurisdiction I think that this (Ontario) court has. It is likely that the courts where the children are physically present have jurisdiction to deal with the children that are there, but that does not mean that I do not have jurisdiction . . . ". He further expressed the view that the courts of the jurisdiction where the child is physically present should recognize and give effect to the orders of the courts of the place in which the child is ordinarily resident, *unless* in exceptional circumstances the court was satisfied beyond a reasonable doubt that serious harm could result to the child.

In *Re Ridderstroem*[8] and *Re Loughran*,[9] the Ontario Court of Appeal also rejected the traditional notion of relitigating and redetermining the best interests of a child physically present within its boundaries and declined to take jurisdiction on the basis that the child was not ordinarily resident in Ontario.

A child's ordinary residence cannot be changed by the unilateral act of one parent. An exception to this general rule is where the other parent who has had his or her child snatched acquiesces in the change or delays in instituting proceedings to such an extent that he or she must be taken to acquiesce. A second exception is where it can be shown that the child would suffer serious harm by being returned to the custody of the other parent in returning him to the jurisdiction.

The United Kingdom

As indicated earlier, the concept of jurisdiction based on ordinary residence is largely founded on developments in English jurisprudence. In the case of *Re T*[10] an English woman who had married a Canadian and was living in Alberta took the two children of the marriage and brought them to England without her husband's knowledge or consent. She then petitioned for judicial separation on the ground of cruelty and for custody of the children. Although it was argued by

[8][1972] 2 O.R. 113.

[9][1973] 1 O.R. 109 (C.A.).

[10][1968] Ch. 704.

counsel for the mother that the case differed from other decisions because there was no order of a foreign court order which was flouted by the parent removing the children out of the Alberta court's jurisdiction, the English court disagreed. Harman L.J. felt that "the removal of the children from their home and their surroundings by one of their parents who happens to live in or have connections with another country is a thing against which the court should set its face, and that, unless there is a good reason to the contrary, it should not countenance proceedings of that kind."[11] The question to be determined was first, where do the children belong, where is the matrimonial establishment? Prima facie the parent who breaks up the home cannot expect to profit from the conduct: he or she may be called a wrongdoer. He decided that the proper court to decide about the custody of the children was the Alberta court.

A similar decision was reached by the English Court of Appeal in *Re L.*[12] where an English mother married to a German man and living in Germany subsequently took the children who had been brought up in Germany to England and placed them in school there. The court refused to hear the merits of the custody dispute although no previous custody order had been made.

> To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all facts which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of the court in the country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this.[13]

4. Working Towards International Conventions

The Scottish Law Commission

The Scottish Law Commission in its Working Paper No. 68 has suggested that it would be preferable to adopt as the basic test of jurisdiction the "habitual residence" of the child as opposed to ordinary residence.

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[11]Ibid at p. 715.

[12](1975) 17 R.F.L. 374.

[13]Ibid at p. 391.

Habitual residence denotes a kind of connection, differing from ordinary residence in that greater weight is given to the quality of the residence, its duration and continuity, and factors pointing to durable ties between a person and his residence.

The Scottish Law Commission stated that there would be advantages for the future if a uniform test were adopted throughout the field of family law as far as possible. They concluded that the use of this concept would align more closely the rules of jurisdiction in matrimonial proceedings enacted in the *Domicile and Matrimonial Proceedings Act* of 1973.

The concept of habitual residence is now used in international conventions to which effect has been given by recent statutes in England, and is the basic test of jurisdiction in Article 1 of the Hague Convention on the Protection of Infants of October 5, 1961. It is, therefore, a test of international jurisdiction which is likely to attract international recognition.

Europe

The Federal Republic of Germany, Austria, France, Luxembourg, The Netherlands, Portugal and Switzerland have ratified the 1961 Hague Convention which gives the courts of a *child's nationality* and the courts of the *child's habitual residence* jurisdiction in custody matters. Contracting states agree to recognize each other's custody orders but the courts of a child's nationality have jurisdiction to supersede awards made by the courts of a child's habitual residence.

The 1976 Draft European Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children prepared by a Committee of Experts of the Council of Europe contains similar provisions. In addition, an order by reason of a change in the circumstances of the child (including the passage of time), but not including of itself a change in the residence of the child, and provided the original decision is manifestly no longer in accordance with the interests of a child.

Under the Draft Convention each contracting state must designate a central authority to (i) receive an application for recognition and enforcement of a custody order and a document empowering it to act on behalf of the applicant; (ii) take measures to discover the whereabouts of the child; (iii) take measures to secure the recognition or enforcement of the decision including the return of the child to the applicant.

5. Desirability of Review

The proposals and developments in various jurisdictions are likely to converge in 1980 at the 14th session of the Hague Conference on Private International Law, where, at Canada's suggestion, the problem of the international abduction of children by parents is an agenda item.

It is therefore desirable that the Commissioners review the existing *Uniform Extra-Provincial Custody Orders Enforcement Act* with an eye to giving guidance to those representing Canada at the Hague. At the local level, extra-provincial custody legislation by a particular province is cold comfort to a resident of that province who has had his or her child kidnapped to another country. The parent resident in any province must look to the legislation of the foreign country or state where the child is now physically present in this regard. In order to further the welfare of a Canadian child who has been forcibly removed from the country and from the parent with whom he or she was residing, it is essential that the various provinces have the opportunity to request ratification of agreements with other countries by the Canadian government on their behalf and that they be in a position, should they so desire, to make agreements with various states in the United States. If agreements are to be entered into (with a view to benefitting a particular province's residents) it will be essential that there be a common base for legislating recognition of a foreign order.

III

Discussion of Issues and Alternatives

1. *When should a court decline jurisdiction?*

There are five options to consider:

(a) when a custody order has been made;
(b) when proceedings have been commenced but no order has been made;
(c) when there has been a violation of a separation agreement;
(d) When the child was habitually resident with one or both parents and the other parent forcibly or surreptitiously removes the child, without the consent of the other, to another jurisdiction; or

(e) the court should always decline jurisdiction in (a) and (b) but should have a discretion to decline jurisdiction in (c) and (d).

The *Uniform Extra-Provincial Custody Orders Enforcement Act* provides that a court shall decline to assume jurisdiction in a custody case where there is an outstanding court order made by a proper forum unless it is satisfied that a child would suffer serious harm by being restored to the parent named in the custody order (sections 2 and 4). This is the minimal legislative position.

A logical extension of this position would be for the courts to decline jurisdiction where proceedings have been commenced in the proper forum but one parent, in anticipation of an adverse outcome, has taken the child and returned to a jurisdiction where he or she formerly resided or with which he or she still has ties. The further disruption of the child's life in the marriage breakdown situation, the duplicity of proceedings and the attendant expense involved, militate against condoning this sort of action.

A more difficult question is whether the court should recognize custody provisions contained in a private separation agreement. At the time the *Uniform Extra-Provincial Custody Orders Enforcement Act* was proposed it was thought that the variety and complexity of private arrangements would make it impractical to enforce them; and further, that unless the provisions in a separation agreement were given legal recognition by a duly established extra-provincial tribunal, it would be inappropriate to invoke the judicial and enforcement process of the state to enforce them. It was also felt there would be difficulty in ascertaining whether or not a separation agreement had been superseded by a custody order. There was no comment at that time as to the disturbance of a *de facto* custody situation.

Since the enactment of the Uniform Act it has become fairly common practice to obtain a writ of habeas corpus based upon a separation agreement from another jurisdiction ordering the body of the child to be produced before the court and requesting that the child be returned to the person having custody in accordance with the provisions of the agreement. There is also case law whereby the courts have refused to take jurisdiction to decide a custody case where there is a separation agreement or a *de facto* custody situation has been disturbed.[14] In a sense, therefore, legislation would simply

[14]See *Re T.* and *Re L.* supra note 10 and 12; *Rioux v. Rioux* (1962) 40 W.W.R. 251 (Man. C.A.); *Furjan v. Furjan* (1975) 23 R.F.L. 321 (P.E.I. S.C.) and (1977), 28 R.F.L. 391; *Burgess v. Burgess* (1977), 75 D.L.R. (3d) 486 (N.S. C.A.).

be codifying existing practice and case law were it to specify that jurisdiction would be declined in these instances. This would also accord with the increasing emphasis placed by legal writers and the courts on the importance of continuity and stability of the child's environment as a major criterion in determining the best interests of the child.

On the other hand it may be too much to require that the court automatically decline jurisdiction and recognize another forum as more appropriate when the jurisdiction of that forum has never been invoked and all the parties in question are already before a court.

The U.S. *Uniform Child Custody Act* has particular appeal in this area. Unless the court exercises its exceptional powers the Act would appear to make it mandatory that a court decline jurisdiction where there is an outstanding court order as to custody properly made. However, where the court is dealing with a separation agreement or a *de facto* situation, the Act is permissive only. The court may decline jurisdiction in these instances.

If the aim of the uniform legislation is to discourage parental kidnapping of children as far as possible and to discourage courts in assuming jurisdiction based solely on the physical presence of the child, it is recommended that the scope of the Canadian Act be broadened.

Unless it is satisfied that serious harm would come to the child or there are other exceptional circumstances the court should decline jurisdiction not only where there is an ontstanding custody order, but where proceedings have been commenced in a proper forum. Where there is a separation agreement in existence or a *de facto* custody situation has been disturbed, the Act shoul dindicate that the court may decline to exercise jurisdiction with a view to ensuring that the child is returned to the proper forum.

2. *On what basis should the court decline jurisdiction in a custody case?*

We propose two options for declining jurisdiction:

(a) That the child has a *close and substantial* connection with another jurisdiction.
(b) That the child is *ordinarily or habitually resident* in another jurisdiction.

(a) *Close and substantial connection*

The *Uniform Extra-Provincial Custody Orders Enforcement Act* is based on the presumption that the extra-provincial tribunal properly assumed jurisdiction to grant a custody order. (In this respect the Act is similar to the Australia legislation and does not enquire as to the basis on which custody was awarded, (e.g. Was it the best interests of the child?) However, this presumption may be rebutted by proof that the child did not have a *real and substantial* connection with the jurisdiction granting the order. This standard or ground stems from the language in *Indyka v. Indyka.*[15] That case related to divorce jurisdiction but the Commissioners felt the language was suitable for application to custody orders as well. It was left to the courts to determine what constitutes a "real and substantial connection".

The first case in which the Act was invoked was *MacLean v. MacLean,*[16] wherein a child who was the subject of an Ontario custody order was retained by her mother in Prince Edward Island beyond the agreed upon summer access period. In deciding whether or not to recognize the Ontario custody order, McQuaid J. first considered whether it had been made by a court with whom the child had "a real and substantial connection". He stated,

> Real and substantial connection, I would equate as being *ordinarily resident* as the phrase is applicable in other legislation, or alternatively where there is a family domicile of some continuity or permanence to the degree that that can be attained in our mobile society. If that factor is found to exist, then the Courts in that province have jurisdiction, and its order, must be respected and enforced by the tribunal before which the application is being heard.

If the term close and substantial connection is going to be equated with ordinary residence, perhaps in the interests of avoiding confusion the Uniform Act ought to be amended to use this term. If the terms are not to be used synonymously, further legislative guidance may be in order.

The term "close and substantial" connection as used in relation to divorce is a broad ground which enables recognition of as many decrees as is possible. This is important because a divorce decree determines the status of the parties to remarry and the legitimacy of future offspring. A decree absolute of divorce is final with respect to status. A custody order is never final. A broad ground for recog-

[15][1967] 2 All E.R. 689.

[16](10th Dec. 1976) (P.E.I. S.C.) (affirmed September 16, 1977) not yet reported.

nition of custody orders means that most custody orders will be recognized. It may also indirectly condone the actions of a parent, who, prior to a court order, takes a child by force to a jurisdiction with which the parent has ties, and after a period of time seeks to obtain a court order. Also, if we have wide grounds for recognition of jurisdiction where more than one court has assumed jurisdiction, the result may be conflicting custody orders.

Assume that a child resides with her father in jurisdiction "A". Assume further that the child visits the mother in jurisdiction "B" where the mother originally grew up and now works. The mother refuses to return the child, enrolls it in the local school and launches custody proceedings in jurisdiction "B". Could it be said that the child has a real and substantial connection with jurisdiction "B"? It would appear that the answer to this question is yes. However, the courts in jurisdiction "A" also have jurisdiction to grant custody of the child because the preponderance of evidence concerning the child and the child's habitual residene are in jurisdiction "A". The fact that the child is no longer physically present within the jurisdiction does not mean that the courts in jurisdiction "A" can no longer make a custody order.

An enforcing court would then be faced with deciding which of two conflicting custody orders granted in two courts with whom the child has a real and substantial connection to enforce.

(b) *Ordinary or habitual residence*

With minor exceptions, the courts today stress that the best interests of the child are generally better served if he is ordered to be returned to his place of ordinary residence and custody determined there. This is a more precise and narrower ground of jurisdiction.

> So long as the mother and father are living together in the matrimonial home the child's ordinary residence is the home—and it is still his ordinary residence, even while he is away at boarding school. It is his base from whence he goes out and to which he returns. When father and mother are at variance and living separate and apart and by arrangement the child resides in the house of one of them—then the home is his ordinary residence.[17]

[17]Re P. (G.E.) (An Infant) supra #5 at p. 585. Cited with approval in *Re Kemp and Dawson* (1974) 3 O.R. (2d) 605 (H C.); *Nielson v. Nielson* [1971] O.R. 541; *Re Ritchie and Ritchie* (1974) 5 O.R. (2d) 520 (C.A.); *Vachon v. Vachon* (1975) 22 R.F.L. 392 (Ont. S.C.). However, a child is capable of acquiring an ordinary residence separate from his parents *Ritchie v. Ritchie* (1974) 5 O.R. (2d) 520 (C.A.).

Generally speaking, ordinary residence cannot be changed by the unilateral act of one parent, unless the other parent acquiesces in the change or delays so long in bringing proceedings acquiescence is presumed.[18]

Adoption of this ground for declining jurisdiction would avoid the problem of which of two conflicting custody orders to recognize. For example, suppose the parties were ordinarily resident in England and upon separation custody was awarded to the mother. Four years later the father obtained an *ex parte* order for interim custody in his favour while the child was visiting him in Scotland. Subsequently, the parties agreed that the child could spend his school vacation in Manitoba with the mother. When the mother failed to return the child, the father promptly applied to the Manitoba courts for an order returning the child.

If the situations where a court should refuse to assume jurisdiction are broadened as suggested in issue #1, adoption on the ground of ordinary or habitual residence will also discourage a court from assuming jurisdiction prior to a court order being made simply because a child may have some connection with that jurisdiction.

The ground of ordinary or habitual residence as developed in Ontario and Canadian jurisprudence, is well-known in English jurisprudence, and is recognized by several countries in Europe. Adopting this ground would more likely enable Canadian provinces to make arrangements with other jurisdictions to assist Canadian residents whose children have been taken abroad.

The ground of habitual residence assumes that the preponderance of evidence concerning the child will be where he is habitually resident and that therefore the court in that jurisdiction is best qualified to make a decision concerning the child's custody. It has been argued that this may not always be the case. The ground of habitual residence has therefore been criticized as being too narrow and lacking in flexibility.

The ground of requiring ordinary or habitual residence of the child before a custody order will be recognized, being a narrow one, means that fewer custody orders will be recognized.

An attempt to obtain the advantages of both grounds could be made by allowing the courts to assume or decline jurisdiction on both the ground of habitual residence and on the basis that a child has a close and substantial connection with a jurisdiction. Conflict

[18]*Supra* note 16 and note 12.

would be avoided *prior* to the making of a custody order by conferring pre-eminent jurisdiction to make an order on the jurisdiction where the child is habitually resident.

At the same time a custody order which has already been made by a jurisdiction where the child is habitually resident *or* where he has a close and substantial connection would be recognized. (If there were conflicting orders, the order made by the jurisdiction where the child was habitually resident could be given pre-eminence.) This system, which is similar to the U.S. *Uniform Custody Act*, would retain the flexibility to recognize custody orders on a broad basis and yet discourage child kidnapping.

It would also facilitate the making of agreements with other countries concerning Canadian children who have been kidnapped.

3. VARIATION

(a) The *Uniform Extra-Provincial Custody Orders Enforcement Act* gives a court power to vary the order of another state or province if it is satisfied that (a) the child does not have a real and substantial connection with the state in which the original order was made or last enforced, *and* (b) that the child has a real and substantial connection with the enforcing province or all parties affected by the order are resident in the enforcing province. [section 3(1)].

In addition, should the Act

(i) give the enforcing court power to decline jurisdiction and refer the matter to a third jurisdiction with whom the child may now have a close and substantial connection (or where he is now habitually resident); or

(ii) allow the enforcing court to entertain a motion for variation based upon the consent of all affected parties?

(i) *Power to decline and refer to a third jurisdiction:*

Suppose the child had a real and substantial connection with Ontario when the original custody order is made. Subsequently, the parent having custody of the child takes the child to Nova Scotia and the child develops a real and substantial connection with that province.

Several years later the custodial parent, being the mother, remarries and moves to Alberta with her new spouse. The child is left

with his maternal grandparent to finish out the school term. Over Christmas the child visits his mother for two weeks and goes on to visit his father in Manitoba. The child tells his father he does not wish to live in Alberta with his mother because he does not get along with his step-parent.

The child no longer has a real and substantial connection with Ontario. The child has a real and substantial connection with Nova Scotia but the order has not been enforced there. The child does not have a real and substantial connection with Manitoba.

The Manitoba courts have no power to vary the order. Moreover, the Act makes no provision for the Manitoba courts to decline jurisdiction and refer the matter to the most appropriate jurisdiction.

(ii) *Jurisdiction based upon consent of all affected parties:*

Another alternative would be to give the courts power to vary based upon the consent of all parties affected. Australia makes provision for conferring jurisdiction on the court based upon the consent of the parties. Normally, in family law cases, if a court does not have jurisdiction over a matter the parties cannot, by consent, confer jurisdiction upon the court. There is also concern that, unless the child is independently represented, he or she would not be in a position to give a valid consent and yet the child is certainly an affected party.

The advantages to this alternative is that it would enable a court to decide whether or not to vary a custody order in a situation where there has been a kidnapping, one party has pursued the child, discoveries have been held and sufficient evidence is before the court upon which to make a decision; the parties want a decision; yet the the court feels it should decline because the child is not habitually resident in the jurisdiction or does not have a close connection with it. Although the parties cannot agree on who should have custody of the child, they may be able to agree on who the umpire should be and, in what is essentially a private dispute, this may be in the child's best interests.

(b) The Act states that in varying a custody order the court shall give first consideration to the welfare of the child. Should the Act also require that as a prerequisite to variation, there has been a change of circumstances since the original order was made?

The Act implies that there must be a material change of circumstances prior to variation. Subject to section 3(1)(a) and (b), section

3(1) provides that a court may vary a custody order "as if the custody order had been made" by the court. Assuming that the same powers are conferred upon the enforcing court to "vary" a foreign order as the court possesses under local law, a power of variation—as opposed to appeal—will only arise upon a showing of a substantial change of circumstances. If this is correct, as a pre-condition to variation under section 3, the applicant would have to satisfy the court that there has been a change of circumstances.

Of course, once the power of the enforcing court to vary is established, the court should give first consideration to the welfare of the child.

Instead of being an implied pre-condition, perhaps the requirement of a change of circumstances ought to be more explicitly stated.

4. Enforcement Provisions

The *Uniform Extra-Provincial Custody Orders Enforcement Act* provides that, "A court on application shall enforce, and may make such orders as it considers necessary to give effect to a custody order as if the custody order had been made by the court . . . ". (section 2).

The question is whether the Act should be amended so as to contain some minimal enforcement provisions. If so, what should these provisions be?

The B.C. Commissioners' Report

At the 1977 Conference, the British Columbia Commissioners recommended the inclusion of further provisions with respect to enforcement of an extra-provincial custody order. Their reason for so doing was to clarify the jurisdiction of an inferior court in extra-provincial custody order enforcement.

Judges of the Supreme Court have *parens patriae* jurisdiction and, in the exercise of that jurisdiction, have power to make whatever orders are necessary with respect to enforcement of a custody order.

Provincial court (family division) judges lack the *parens patriae* power and it is doubtful whether county court judges possess such power. Therefore, it was argued that the enforcement powers of the court should be specifically set forth in the Uniform Act to ensure effective enforcement.

A contrary view:

At the time the Uniform Act was put forward, the Commissioners considered the question and concluded that attempting to spell out the actual modalities of enforcement in the draft Act seemed to be a futile activity. Enforcement of custody orders differs depending on the differing agencies, procedures and remedies from jurisdiction to jurisdiction. It would be untenable to provide that a court has certain powers of enforcement under the extra-provincial Act which the court would not have in respect of its own local orders. In the result the person attempting to enforce a foreign custody order in a particular province is obliged to accept the local standard of enforcement of custody.

A possible option:

At the present time, the extra-provincial Act does not include any administrative procedure for enforcement. This means that the individual wishing to invoke the Act must incur the necessary expense of hiring a lawyer, commencing an application, and, in all likelihood, going to the jurisdiction to enforce the order.

Under the *Uniform Reciprocal Enforcement of Maintenance Orders Act* where a maintenance order has been made against a person by a court in a reciprocating state and a certified copy has been transmitted to the Minister of Justice or Attorney General, he sends a certified copy of the order to the proper officer of the proper court and, on receipt, the order is registered. The effect of registration is to give the court power to enforce the order as if it had been an order of that court and its officers are required to take all proper steps to do so.

Omitting the reference to receipt of an order from a reciprocating state, the *Uniform Extra-Provincial Custody Orders Enforcement Act* could contain a statement that where a custody order has been made against a person by a court having authority to make custody orders and a certified copy of the order has been transmitted to the Minister of Justice or Attorney General, the certified copy of the order will be sent to the proper court for enforcement and upon receipt of the order it will be registered and enforced as if it had been an order of that court. The officers of the court could also be required to take all proper steps to enforce the order. (Where the order had been made by a court outside Canada it might also be wise to require proof that reasonable notice and an opportunity to be heard were given to all affected persons.)

A further option:

A further option would be to allow a superior court order from another jurisdiction to be registered and enforced in provincial court (family division). However, if it appears to the enforcing provincial court that a variation of the superior court order would be appropriate, provision would have to be made for transmission of the order to the appropriate superior court, together with a report, and for notification of all affected parties.

Adopting this further option would meet the concern raised by the British Columbia Commissioners (at last year's meeting) that sections 3 and 4 can be construed as giving a provincially appointed judge the jurisdiction to vary a custody order made by a judge of the superior court in another province, contrary to section 96 of the *British North America Act*. Whether or not a central administrative agency is designated by the Act, it would be advisable to amend the *Uniform Extra-Provincial Custody Orders Enforcement Act* to include a provision that a custody order of an extra-provincial jurisdiction can only be varied by a corresponding court.

IV

Summary of Recommendations

1. Unless it is satisfied that serious harm would come to the child or there are exceptional circumstances the court should decline jurisdiction not only where there is an outstanding custody order, but where proceedings have been commenced in a proper forum. Where there is a separation agreement in existence or a *de facto* custody situation has been disturbed, the Act should indicate that the court may decline to exercise jurisdiction with a view to ensuring that a child is returned to the proper forum.

2. As a general rule and unless there are exceptional circumstances:

Where a custody order has been made a court should decline jurisdiction when the order has been made by a jurisdiction where the child was habitually resident or with which the child had a close and substantial connection at the time of the making of the order.

Where a custody order has not been made a court should decline to take jurisdiction unless it is the jurisdiction where the child is

habitually resident or unless the child would not have a closer connection with another jurisdiction.

In all cases the jurisdiction where the child is habitually resident should be given pre-eminence.

3. In addition to the present variation clause, the *Uniform Extra-Provincial Custody Orders Enforcement Act* should:

(i) give the enforcing court power to decline jurisdiction and refer the question of variation to a jurisdiction with which the child has a close and substantial connection or where he is now habitually resident.

(ii) allow the enforcing court to entertain a motion for variation based upon the consent of all affected parties.

The Act should also specifically state that before taking jurisdiction to vary an order in the best interests of the child there must have been a change of circumstances since the making or enforcement of the original order.

4. The *Uniform Extra-Provincial Custody Orders Enforcement Act* should contain a statement that where a custody order has been made against a person by a court having authority to make custody orders and a certified copy of the order has been transmitted to the Minister of Justice or Attorney General; the certified copy of the order will be sent to the proper court for enforcement and upon receipt of such order it will be registered and enforced as if it had been an order of that court.

A superior court order of another jurisdiction should be capable of registration and enforcement in provincial court (family division). However, if it appears to the enforcing provincial court that a variation would be appropriate, provision would have to be made for transmission to the appropriate superior court, together with a report, and for notification of all affected parties.

APPENDIX L

(See page 31)

INTERNATIONAL CONVENTIONS ON PRIVATE INTERNATIONAL LAW REPORT OF COMMITTEE

INTRODUCTION

Since responsibility for the implementation of international treaties concerning matters falling domestically under provincial legislative jurisdiction depends upon effective liaison and co-operation between the federal and provincial authorities, the Conference five years ago established a Committee on International Conventions on Private International Law. The Committee exists to spur co-operation between the various levels of Government to promote ratification or accession with respect to Canada as a whole, or with respect to individual provinces. The Committee continually scrutinizes developments in the private international law area, and analyses those existing treaties and conventions which are open for ratification or accession by Canada. If there are impediments to the ratification or accession with respect to Canada to a particular treaty, the Committee may recommend that a uniform law be drafted by the Conference for enactment by the several provincial jurisdictions to overcome jurisdictional impediments.

Since the last annual meeting of the Conference the Committee has been reconstituted under the continuing chairmanship of H. Allan Leal, Q.C. The Committee consists of E. Colas, C.R., Rae Tallin, and F. C. Muldoon, Q.C. The position on the Committee normally allocated to a representative from the four Atlantic provinces is currently vacant.

During the past year, the Federal Department of Justice has reconstituted its advisory group on private international law and unification of laws. The group met in Ottawa on May 16th and 17th, 1978. The advisory group consists of four provincial representatives, together with four representatives of the federal justice department: H. Allan Leal, Q.C. (Ontario), D. Gervais (Quebec), J. D. Lambert (British Columbia), Graham D. Walker, Q.C. (Nova Scotia), F. J. E. Jordan (Canada), D. M. Low (Canada), M. Hétu (Canada), I. B. Nadler (Canada).

Hague Conference on Private International Law

Although there has been no plenary meeting this year of the Hague Conference, a number of initiatives have been taken concerning Hague Conventions.

A. *Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters.*

A meeting was held at the Hague from November 21st to November 25th, 1977, to discuss how the 1965 Convention on Service of Documents has been working. Representatives of the Government of Canada attended that meeting, and considerable interest has been shown in Canadian ratification.

The 1975 Convention is designed to facilitate the service of documents in civil matters. The Convention is potentially of great benefit to Canadian litigants, both those who wish to initiate litigation and who seek to have documents served abroad, and those who would be made aware of legal proceedings in other countries in which they may have an interest. The Convention is designed to benefit individual litigants, and the legal profession in general, rather than the particular states or jurisdictions concerned. The Convention extends solely to the service of documents, and has no relevance to the enforcement of judgments or orders of foreign courts, or to criminal matters.

Among the nations which have ratified the Convention are the United Kingdom, France, Belgium, The Netherlands, the Scandinavian countries, Japan and the United States. For Canadian litigants, these would represent the jurisdictions with which contact is most frequently made. In addition, we understand that West Germany will shortly be ratifying the Convention.

Although the Convention lacks a federal state clause, accession on behalf of Canada would be relatively simple. This is because it could be signed, ratified and put into effect without significant change in domestic laws. It would take minimal effort and expenditure to establish the administrative machinery to operate the Convention in Canada. Ratification would be considered if a significant majority of provinces had indicated their willingness to amend their rules of Court to accommodate the Convention.

From the experience of other jurisdictions, we suspect that Canada would receive about 150 to 200 requests per year for the

service of documents. According to reports at the November meeting at the Hague, all member jurisdictions attempt to expedite the process of dealing with documents, particularly by refraining from creating bureaucratic problems where these might be solved in a more practical way.

The Convention requires each state to designate a central authority which will receive requests for service of documents sent under cover of a request in the authorized form. If a request complies with the Convention, the central authority must arrange for service either by the normal method used for service of documents in actions under domestic civil law, or by any particular methods specified. The Convention does provide for the voluntary acceptance of documents. When a central authority receives a document, it is required to report, in a certificate how the document is being served, or why this wasn't possible. At this point the certificate is returned to the applicant. All documents under the Convention must be completed in English or French, and may also be written in the language of the state where the documents originate.

Nothing in the Convention prohibits the use of other channels for service of documents, such as diplomatic or consular channels. Nor does it prohibit two contracting states agreeing on some other method of transmission. It would not interfere with reliance on existing treaties in this area. Although as a result, the system is theoretically non-exclusive, we understand that as a practical matter the current contracting states use the Convention almost exclusively to facilitate the service of documents.

Under the Convention no costs or taxes are to be assessed by the state addressed, although there are exceptions in the case of costs for the employment of a judicial officer, or where the applicant requests a particular form of service. Similarly, the reciplent state cannot normally refuse to attempt to serve the documents.

Where a writ of summons or another similar document has been transmitted for service, the Convention provides that judgment should not be given until it is established either that the document was served according to the law of the receiving state, or alternatively that it was delivered by some other method and that sufficient time had subsequently elapsed to enable the defendant to prepare a defence. The state can declare that its courts can give judgment where the document was transmitted in accordance with the Convention and where no certificate of service has been received within six months.

In this case, judgment is in effect not to be given in default of the certificate of service except after the six month grace period.

Discretionary relief is authorized by section 16 in certain cases, where a judgment has been entered, and the defendant, although with a *prima facie* defence, has insufficient time to defend the action. A contracting state may reduce the effect of this provision by declaring a time limit for the opening up of the judgment.

The Convention lacks a federal state clause in the form adopted in all Hague Conventions since 1968. As a result the Convention cannot be implemented on behalf of some provinces but not others. However, under Canadian domestic law, it is unlikely that implementing legislation would be required. Article 18 of the Convention permits a state to designate additional authorities to the central administering authority. It also provides that federal states may designate more than one central authority. Thus, were a province to desire it, the Canadian Government could designate a provincial attorney-general's department, for example, either as an additional authority or as a central authority.

Since it is unlikely that Canada would receive more than fifteen or twenty requests per month under the Convention, no great cost need be incurred in its administration.

There are practical problems in assessing the fees to be levied in order to serve documents. Charging the actual amounts might in some cases be both onerous and discriminatory, since many member jurisdictions do not levy any charges whatsoever for service of documents. Further negotiations will be required between federal and provincial authorities to determine how the administration of this service, outside the operation of the central authority, may be financed.

In order to inform the profession about the operation of this Convention, a practice handbook is in preparation by the Hague Conference. Ratification on behalf of Canada would be a boon to litigants across the country. The administrative burdens will be minimal. The Convention could be brought into force in Canada fairly quickly once a general agreement is forthcoming on the part of the provincial authorities.

The Committee has examined the Convention, and feels that there would be a considerable benefit to the legal profession in general if the provincial governments agree to its adoption. The Committee recommends that provincial delegates should bring the Con-

vention to the attention of their governments in order to obtain necessary amendments to provincial rules of court.

B. *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*

At the request of the Government of Manitoba, the question of legislation to enable provinces to adopt this Convention was added to the agenda of the Uniform Law Section (1977 *Proceedings*, pp. 33, 392).

During the last year, a special commission meeting was held in the Hague to consider the operation of this Convention.

The meeting, which was held from June 12th to June 15th, 1978, was chaired by the Canadian delegate, T. B. Smith, Q.C. The meeting discussed the experience of the various jurisdictions in operating the Convention.

The Convention on the Taking of Evidence Abroad in Civil and Commercial Matters was concluded on the 18th of March, 1970. It was intended to improve the method of obtaining evidence abroad by means of letters of request. The Convention's basic principle is that any system for obtaining evidence must be "tolerable" and the state of execution must also be "utilizable" in the state where the action is pending. Under the Convention central authorities are established which receive letters of request and transmit them to the appropriate authorities. Such a letter of request must generally be in the language of the receiving state, or in English or French.

The taking of evidence is done in accordance with the law of the requested authority, although a letter of request may specify a particular method of execution as long as it is not incompatible with the law of the other state. Parties may be represented at the taking of evidence, as well as judicial personnel of the requesting authority. Under the Convention similar measures of compulsion can be used for the execution of letters of request, as are used in internal laws; evidentiary privileges are respected. A separate chapter of the Convention deals with the taking of evidence by diplomatic officers, consular agents and commissioners, on a voluntary basis.

The last chapter of the Convention contains clauses of general provision. Among these are the right for federal states to designate more than one central authority, and for states in which there is more than one legal system to designate the authorities of these systems which have exclusive competence. Existing Conventions are respected,

as are bi-lateral or multi-lateral agreements between contracting states. However, the Convention does not include a federal state clause, as has been included in all other recent Hague Conventions.

Although there has been insufficient experience with the Convention to draw any firm conclusions about its operation, apparently the contracting parties have shown a great deal of co-operation in making the Convention work. The Convention basically benefits ordinary litigants, and contracting states have gone out of their way to remove narrow technical impediments to the efficient operation of the Convention. After a fairly lengthy discussion, the meeting on the functioning of the Convention decided that it would be desirable to prepare a model letter of request based on the requirements of the Convention. Such a model letter would have no formal status, but is likely to be used extensively.

There was a detailed discussion of the scope of the Convention, focusing on whether particular matters could be characterized as civil or commercial. There were some borderline cases under the domestic law of some of the jurisdictions, but the general consensus of the meeting was that the determination of whether a matter could be characterized as falling within the Convention should be made according to the views of the state addressed.

The recent case of *Rio Tinto Zinc v. Westinghouse Electric Corporation*, [1978] 1 All E.R. 434 raised a particularly important question. The Westinghouse case involved letters rogatory issued in civil proceedings out of a United States court. The execution of these letters rogatory in Britain was challenged on the basis that the evidence adduced might be used in anti-trust proceedings. Witnesses claimed in the English courts a fifth amendment privilege not to testify, because of their fear of being incriminated in a penal proceeding in the United States. The American requesting authorities had granted them immunity from prosecution in order to obtain their testimonies. The case raises serious questions about whether evidence obtained under the Convention in connection with a civil or commercial proceeding could be used in the requesting state for other purposes, particularly in tax or penal matters. The experts present at the Hague meeting thought that the mere possibility that the evidence obtained abroad in a civil or commercial proceeding might possibly lead to a penal or tax proceeding in the requesting country should not prevent the Convention from operating. However, if the evidence sought could be directly linked to a penal proceeding under way in the requesting state, the state addressed might validly refuse to carry out the letter of request.

Within Canada, the Convention offers great benefits for individual litigants, since it provides a clear and certain means for obtaining evidence required for civil litigation from persons abroad. The very significant trading links which Canada maintains with many countries in the world makes it a distinct advantage to have such a Convention in operation. The current signatories to the Convention are Czechoslovakia, Denmark, Finland, France, Luxemburg, Norway, Portugal, Sweden, the United Kingdom, and the United States. We understand that Germany, Spain and Italy have signed but not yet ratified the Convention; the Netherlands are also expected to ratify at an early date, and the fact that both Japan and Switzerland were represented at the meeting has given rise to expectations that both those countries will shortly act on this matter.

Operation of the Evidence Convention parallels the Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters, in requiring minimal administrative machineries. Since the United States receives only some seventy to eighty letters of request annually, it is expected that Canada will receive no more than fifteen to twenty.

We would recommend that all provinces give serious consideration to the Evidence Convention, since implementation on behalf of Canada would be of significant benefit. If provincial jurisdictions are prepared to entertain such Convention, it could be ratified on behalf of Canada; alternatively, there is a possibility that a federal state clause might be introduced by protocol into the Convention.

The Uniform Law Section may wish to consider whether a research report on this Convention should be undertaken by the Special Committee, or whether this is a matter more appropriately left to our Federal-Provincial Task Force on Evidence.

While the Convention does not contain the usual Hague Conference federal state clause, there is some indication that the Hague Conference would agree to Canada acceding to the Convention with respect to certain provinces. We understand that Quebec is in the process of implementing an agreement with France in this area, and that the implementing legislation would be broad enough to cover the Hague Convention.

C. *Recognition and Enforcement of Custody Orders*

As mentioned in last year's report of the Committee on page 245 of the 1977 *Proceedings*, the Hague Conference decided at

its fourteenth Session in 1980 to consider the formulation of an international convention on the recognition and enforcement of custody orders.

In a separate report, Ontario has proposed amendments to this Conference's *Uniform Extra-Provincial Custody Orders Enforcement Act*. The Uniform Act may well serve as a model for extension to the international plane and for possible use as a model for a Commonwealth agreement. In this regard it is important to note that the international abduction of children by a parent was a matter considered by the Meeting of Commonwealth Law Ministers when they met in Winnipeg contemporaneously with the 59th annual meeting of this Conference.

During the last year amendments have been introduced in Parliament to modify the *Criminal Code* to provide criminal sanctions against parents who unlawfully remove children from Canada. We understand that further work on the preparation of multi-lateral agreements in this area has been deferred pending the development of the draft Hague Convention.

UNIDROIT

Unidroit is an inter-governmental organization, currently consisting of forty-five member states, which works towards the unification of substantive laws. The Unidroit work programme for the next two years consists of the following twenty 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. Agency of an international character in the sale and purchase of goods;
4. Progressive codification of international trade law;
5. The Contract of Leasing Equipment;
6. The Contract of Factoring;
7. Uniform Rules on quality and quantity control of goods;
8. Legal status of air-cushioned vehicles;
9. Carriage of goods by inland waterway;
10. Transport by pipeline;
11. Civil liability for damage caused by hazardous and deleterious cargoes;
12. The Hotel Keeper's Contract;

13. The Warehousing Contract;
14. Pleasure navigation;
15. The Garage Contract;
16. Powers of Attorney;
17. Optional matrimonial property regime;
18. Liability for damage caused by wild animals;
19. Civil liability enacted with carrying out of dangerous activities; and
20. Credit cards.

During the coming year Unidroit will convene an international conference on agency of an international character in the sale and purchase of goods. The conference will take place in Romania and the purpose of the meeting will be to finalize the draft law on the subject adopted in 1972 by a Unidroit committee of government experts, on which Canada was represented. This draft uniform law was circulated at the time to the provincial governments in Canada for comment. A number of provinces emphasized that given the extent of Canadian external trade and the frequency of agency relationships, the formation of a uniform law would be a major significance to Canada.

The draft uniform law attempts to compromise between the common law concept of agency and its continental counterpart. In many European jurisdictions a distinction is drawn between acknowledged agents, acting as such, and so-called "commission agents", who act in their own name for an undisclosed principal. In effect, the uniform law implies an agency relationship from the simple fact that one person acts for another. A draft law states the rights and liabilities of the agent and the third party towards a principal in circumstances where it is neither disclosed nor apparent that the agent acts on behalf of the principal.

While a detailed comment on the Convention lies outside the scope of this report, the uniform law does favour the common law approach to the agency relationship, and there is nothing in the draft that would be incompatible with the law of Canada. A Canadian position on the draft uniform law will be drawn up during the coming year.

Early last year, Unidroit received a preliminary report on quality control in the international sale of goods. At its 56th session, the governing council decided to sound out delegate governments to obtain their reactions to the idea of preparing uniform rules on this subject.

APPENDIX L

OTHER DEVELOPMENTS

The Commonwealth Law Ministers met in Winnipeg during August, 1977, contemporaneously with the 59th annual meeting of this Conference. The Commonwealth Ministers considered a report on "The Recognition and Enforcement of Judgments and Orders and the Service of Process Within the Commonwealth". After this meeting, the legal division of the Commonwealth Secretariat convened a meeting of legal representatives of the Caribbean Commonwealth law areas on April 24-28, 1978. The Winnipeg Report had been circulated to provincial attorneys general, and a formal liaison had been established between the Hague Conference and the Commonwealth Secretariat. We anticipate that the Commonwealth Secretariat will play a major role in promoting further agreements between individual members of the Commonwealth, and possibly by the preparation of Commonwealth model legislation for enactment by the several jurisdictions.

During the past year Canada deposited an accession to the International Convention providing a uniform law in the form of the international will with respect to the Province of Ontario. This Convention was drawn up by the Diplomatic Conference on Wills which met at Washington, D.C., on October 16-26, 1973.

ACKNOWLEDGEMENTS

We would like to acknowledge with thanks the excellent lead being given in this area by the Private International Law officials of the Federal Department of Justice: T. B. Smith, Q.C., F. J. E. Jordan, D. M. Low, M. Hétu; their assistance to us has been invaluable in the preparation of this report. We are also grateful to Simon Chester, Executive Counsel to the Deputy Attorney General for Ontario, for his extensive contribution to the research and drafting of this report.

Toronto
14 August 1978

H. Allan Leal
Chairman

Note: Attached to the report are copies in English and French of three documents:

1. The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
2. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

3. Report on the Work of the Special Commission on the operation of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

By direction of the Conference, these documents are not printed in these *Proceedings*.

Copies are readily available elsewhere, including the office of the Executive Secretary of this Conference.

APPENDIX M

(See page 32)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

PRINCE EDWARD ISLAND REPORT

The Prince Edward Island delegates submit their report on judicial decisions reported in 1977 and early 1978 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
of the Commissioners
for P.E.I.

Charlottetown
August 1978

SCHEDULE

ASSIGNMENT OF BOOK DEBTS

Re Ruliff Grass Ltd. and Canadian Imperial Bank of Commerce 77 D.L.R. (3rd) 701 (Ont. S.C.).

The respondent bank took an assignment of book debts from a bankrupt company and the assignment was properly registered.

The bankrupt company subsequently changed its name, to the knowledge of the bank but the renewal statements continued to refer to the former name of the assignor. HELD that the assignment was void against the trustee in bankruptcy and the use of the former name in the renewal statement was not a mere irregularity or clerical error to be cured by section 15 of the *Assignment of Book Debts Act*, R.S.O. 1970 c. 33 [section 14 Uniform Act].

BILLS OF SALE

Bank of Montreal v. Jack Gardner Used Cars Ltd. 73 D.L.R. (3rd) 146.

Where chattels subject to a mortgage are removed into the province, the requirement in section 12 of the *Bills of Sale Act*, R.S.N.S.

1967 c. 23 for an affidavit to accompany the registration of a copy of the mortgage is not satisfied by a notarial certificate.

Royal Bank of Canada v. Attorney General of Canada (N.S. App. Div.) (not yet reported).

The appellant was mortgagee of a motor vehicle described in the chattel mortgage as "1976 half-ton Ford 4-Wheel Drive". The vehicle in question was in fact a 1976 AMC Jeep Pickup and the appellant applied under section 24 of the *Bills of Sale Act* R.S.N.S. 1967 c. 23 [section 20 Uniform Act] for an order for rectification of the description.

The respondent registered a certificate for taxes owed by the mortgagor and the sheriff seized the vehicle in execution.

HELD the discretion to rectify under section 24 is "subject to the rights of other persons accrued by reason of any omission or misstatement" and should not be exercised in this instance where the respondent had acquired rights as an execution creditor.

CONDITIONAL SALES

General Motors Acceptance Corporation of Canada Ltd. v. Hubbard 21 N.B.R (2d) 49 (N.B. App. Div.).

The appellant sold a vehicle in Ontario under a conditional sales contract which was registered in Ontario. The vehicle was subsequently removed to New Brunswick and sold to the respondent a *bona fide* purchaser without notice of the contract.

The appellant on locating the vehicle registered the conditional sales contract in New Brunswick.

HELD that there was a conflict between the provisions of the *Conditional Sales Act* and the *Sale of Goods Act* and the conditional sale was an agreement to sell within the purview of the *Sale of Goods Act*. The appellant as conditional vendor by allowing the conditional vendee to obtain possession of the goods enabled him to pass good title to the respondent *bona fide* purchase for value. Registration under the *Conditional Sales Act* is not notice so as to defeat a *bona fide* purchaser's title acquired under the *Sale of Goods Act*.

A bill to amend the *Sale of Goods Act* has been introduced to resolve the conflict between that Act and the *Conditional Sales Act*.

Sigurdson v. Massey-Ferguson Finance Company of Canada Ltd. 80 D.L.R. (3rd) 258 (B.C.S.C.).

The case involved construction of the words "subsequent mortgagees for valuable consideration" in section 15 of the *Conditional Sales Act*, 1961 (B.C.) c. 9 [section 2 Uniform Act]. HELD that a receiver of the buyer's assets appointed under a floating charge made before, but crystallizing after, the delivery of possession of goods to the buyer by a conditional seller is not a subsequent mortgagee since he does not rely on the buyer's possession and apparent ownership of the goods.

CONTRIBUTORY NEGLIGENCE

Henuset Bros. Ltd. v. Pan Canadian Petroleum Ltd. 82 D.L.R. 346 (Alta. S.C.).

The case involved an action against several defendants in which the plaintiff was held to recover in contract against one of them and in tort against the others. The defendants had claims for indemnity and contribution in both contract and tort among themselves and against the plainiff.

HELD the contribution provisions of the *Contributory Negligence Act*, R.S.A. 1970 c. 65 [same as the Uniform Act] had no application to contracts nor could there be contribution under the Act between those liable in contract and those liable in tort.

CRIMINAL INJURIES COMPENSATION

Re Willier and Crimes Compensation Board 75 D.L.R. (3rd) 217 (Alta. S.C. App. Div.).

The appellant was shot when attempting to pull a woman away from a window through which shots were being fired. The Crimes Compensation Board concluded that the injury did not "directly result while he was endeavouring to preserve the peace" within section 7(1)(b)(i) of the *Criminal Injuries Compensation Act*, R.S.A. 1970 c. 75.

HELD that the Legislature in using the words "preserve the peace" intended to include acts that prevented the perpetration of a crime and it was likely that the woman would have been killed or injured. The court considered and adopted the reasoning of Denning M.R. in *R. v. Criminal Injuries Compensation Board Ex. p. Ince* [1973] 3 A.E.R. 808. There would appear to be no doubt that the appellant would have been entitled to recover under the broader language of section 5(1)(c) of the Uniform Act "lawfully preventing or attempting to prevent the commission of an offence".

DEPENDENTS' RELIEF

Re Hirsh 76 D.L.R. (3rd) 558 (B.C.S.C.).

Subsection 11(1) of the *Testators Family Maintenance Act* R.S.B.C. 1960 c. 379 requires that an action be "commenced within six months from the date of the issuance of probate of the will". HELD that letters probate are not "issued" until sealed with the seal of the court and entered in the registry.

Semble the same interpretation would apply to the words "grant of letters probate of the will or of letters of administration" in section 14(1) of the *Uniform Dependants' Relief Act.*

EXTRA-PROVINCIAL CUSTODY ORDERS ENFORCEMENT

McLean v. McLean 13 Nfld. & P.E.I.R. 513 (P.E.I. App. Div.).

Under an Ontario custody order the mother was granted custody and the father was given rights of access. The child came to visit the father and he refused to return the child to the respondent. The respondent obtained an order in the Supreme Court of Prince Edward Island enforcing the order of the Ontario Court.

HELD the child had a real and substantial connection with the province of Ontario at the time the order was made and the court would enforce the order under section 2 of the *Extra-Provincial Custody Orders Enforcement Act.*

In the absence of evidence that the child would suffer serious harm if restored to the mother the court had no jurisdiction under section 4 of the Act to vary the order or make an order in substitution of the Ontario order.

EVIDENCE

Latta v. London Life Insurance Co. Ltd. 76 D.L.R. (3rd) 265 (Alta. S.C.).

The plaintiff brought an action to collect the proceeds of a life insurance policy on the life of the deceased, the plaintiff's business partner. The plaintiff had earlier been convicted of the murder of the deceased.

HELD evidence of the proof of death places the onus on the defendant to show cause why the insurance contract should not be honoured to discharge the onus the defendant may rely on the principle that a person is not entitled to benefit from his own wrong, in which case the defendant must establish by a preponderance of

evidence that the death was brought about by the wrongful act of the plaintiff. Under section 27.1 of the *Alberta Evidence Act* [section 28 of the Uniform Act] the certificate of conviction is not conclusive evidence of the fact that the plaintiff killed the deceased but is evidence to be considered along with other evidence in determining if the burden on the defendant is discharged.

Considering all the evidence, the plaintiff could not be believed and it was established that he murdered the defendant. Other relevant factors were that the plaintiff's evidence was inconsistent with the physical evidence, his behaviour following the death was inconsistent with innocence and he did not testify and give his story at his trial.

INTERPRETATION

Regina v. Camp 79 D.L.R. (3rd) p. 462 (Ont. C.A.).

Section 142 of the *Criminal Code* required a judge in a rape case to instruct the jury that it is not safe to convict in the absence of corroboration of the evidence of the complainant. That section was repealed by the *Criminal Law Amendment Act 1974-75-76* (Can.) c. 93, s. 8. Prior to the enactment of section 142 it was a rule of practice that an instruction in similar terms to section 142 be given in all sexual cases. The question for decision was whether the repeal of section 142 revived the former rule of practice.

HELD that the common law rule which would, in the absence of a contrary intention, have revived the rule of practice was reversed by section 35(a) of the *Interpretation Act*, R.S.C. 1970 c. I-23 [section 31(a) Uniform Act] which provides that where "An enactment is repealed in whole or in part, the repeal does not revive any enactment or anything not in force or existing at the time when the repeal takes effect".

Regina v. Girkins 80 D.L.R. (3rd) p. 63 (B.C.C.A.).

This case also involved consideration of section 35(a) of the *Interpretation Act*, R.S.C. 1970 c. I-23 and the same conclusion was reached as in *R. v. Camp* but without citation of or reference to that decision.

The additional point was whether the accused had a vested "right" within section 35(c) of the *Interpretation Act* [section 31(c) Uniform Act] to require a direction in terms of section 142 of the *Criminal Code* because the offence was committed before the repeal of that section was proclaimed.

HELD the *Criminal Law Amendment Act 1974-75-76* (Can.) c. 93 repealing section 142 was procedural in character and fell

within the rule that procedural or evidentiary amendments are to be construed retrospectively. The accused has no vested "right" but merely the right to be tried according to the rules and practice in force at the time of his trial.

The principles propounded by Sloan J.A. in *Dixie v. Royal Columbia Hospital* 1941 2 D.L.R. 138 were approved. The principles are:

1. A statute divesting vested rights is to be construed as prospective;
2. A statute, merely procedural, is to be construed as retrospective;
3. A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

For further discussion of retrospective operation of statutes see *Re Demas and Manitoba Labour Board* 75 D.L.R. (3rd) 607 and *Bingeman v. McLaughlin (Bingeman)* 77 D.L.R. (3rd) 25.

For general observations of the Supreme Court of Canada on the question of whether a statute binds the Crown see *The Queen in Right of Alberta v. Canada Transport Commission* 75 D.L.R. (3rd).

For an example of application of subsection 23(1) of the *Uniform Interpretation Act* (extension of time when last day of time limit falls on a holiday) see *Bower v. City of Edmonton* 75 D.L.R. (3d) p. 131.

For guidance by the House of Lords on the approach to construction of a statute which incorporates and gives effect to an international convention see *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (U.K.) Ltd.* 1977, 3 A.E.R. 1048.

MARRIED WOMEN'S PROPERTY

Imperadeiro v. Imperädeiro 76 D.L.R. (3rd) 765 (B.C.S.C.).

The case reaffirms the principle that inter-spousal immunity in tort ceases on dissolution of the marriage following the Ontario Court of Appeal decision in *Manning v. Howard* (1975) 59 D.L.R. (3rd) 176.

On the facts of the case, the defamation occurred when the spouses were separated and if the Uniform Act had been adopted in British Columbia the action could have been brought in the absence of dissolution of the marriage. [Section 6(2)(b) Uniform

Act] *Note:* there is a drafting error in section 6(2) of the Uniform Act, the word "and" at the end of paragraph (a) should read "or".

RECIPROCAL ENFORCEMENT OF JUDGMENTS

Bank of Montreal v. H.O. House Ltd. 14 Nfld. & P.E.I. 406 (Nfld. C.A.).

The plaintiff applied *ex parte* under the *Reciprocal Enforcement of Judgments Act,* R.S.N. c. 327 s. 3 for the registration in Newfoundland of a judgment against the defendant in the Supreme Court of Nova Scotia.

On appeal against the refusal of the Trial Division to set aside an order for registration the court construed the words of subsection 2(6) of the Act [3(6) of the Uniform Act] "no order for registration shall be made if it is shown to the court that . . . ." as mandatory only in relation to an *inter partes* application referred to in subsection 2(5).

In relation to *ex parte* applications subsection 8(2) [7(2) of the Uniform Act] applies and the court has a discretion to set aside the registration on the grounds set out in subsection 2(6).

Alcor Pacific Lumber Sales Ltd. v. Janet Lumber Trading Co. 82 D.L.R. (3rd) 196 (Alta S.C.).

By virtue of section 6(a) of the *Reciprocal Enforcement of Judgments Act*, R.S.A. 1970 c. 312, where no defects are apparent to the judge hearing an *ex parte* application for the registration of a foreign judgment, the judgment when registered becomes a judgment of the Supreme Court of Alberta. The registration may be set aside under section 7(1) of the Act where the defendant was neither carrying on business nor ordinarily resident within the jurisdiction of the foreign court, did not voluntarily submit to its jurisdiction or was not served with the process of that court in its jurisdiction and did not appear. However, where the defendant has filed an application to set aside the registration within the time limited by section 7(1), but has not served it on the plaintiff within that time, the application must fail. An admission of service by the plaintiff's solicitor does not amount to a waiver of the requirement.

The relevant provisions of the Alberta Act referred to in this case are the same as those of the Uniform Act.

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

Meek v. Enright 81 D.L.R. (3d) 108 (B.C.C.A.).

The question was whether a court in which an order of a reciprocating state was registered had jurisdiction, upon an application for enforcement of the order, to decline to enforce the order. The Court of Appeal decided that the words "the court in which the order is registered may enforce the order notwithstanding . . ." which are the words of subsection 3(4) of the Uniform Act should not be construed to confer a discretion and that any argument that they confer a discretion must defer to the explicit language of section 9 of the Uniform Act "a court in which an order has been registered . . . shall take all proper steps for enforcing the order".

For a general discussion of the legislative policy behind provisions for registration and enforcement of foreign judgments and orders see the observations of Bull J.A. at p. 113.

PROCEEDINGS AGAINST THE CROWN

Banner Investments Ltd. v. Saskatchewan Telecommunications 78 D.L.R. (3rd) 127 (Sask. Q.B.).

Section 17(2) of the *Proceedings Against the Crown Act*, R.S.S. 1965 c. 85 [Section 15(2) Uniform Act] provides "Where in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not as against the Crown grant an injunction or make an order for specific performance . . ." HELD that the Crown as principal could not be enjoined by injunction and so a Crown agent acting under its statutory authority is not subject to enjoinment.

WILLS

Re Jacobsen 80 D.L.R. (3rd) 122 (B.C.S.C.).

A testator directed that the residue of his estate was to be divided among a number of charities one of which ceased to exist prior to his death. HELD that the share of the defunct charity may be applied *cy près* and pass to an organization having the same objects. It was argued that the share of the defunct charity should be divided among the other residuary beneficiaries by virtue of section 22 of the *Wills Act*, R.S.B.C. 1960, c. 408 [Section 22 Uniform Act] but it was held that that section had no application to a failed residuary devise or bequest.

Raymond Moore
of the Prince Edward
Island Commissioners

Charlottetown
July 1978

APPENDIX N

(See page 32)

LIMITATIONS

ALBERTA REPORT

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CONTENTS

INTRODUCTION

At the 1977 annual meeting of the Conference it considered the report of the Alberta Commissioners (1976 *Proceedings*, 184) and committed the subject to the Alberta Commissioners to prepare a draft of a *Uniform Limitation of Actions Act* in accordance with the 1976 Alberta report and the decisions taken at the 1977 meeting (1977 *Proceedings*, 30). We have now prepared an annotated draft of a proposed Uniform Act which is attached to this report.

The Conference will remember that the Ontario Law Reform Commission in a 1969 report recommended the enactment of new legislation on limitation of actions and that the British Columbia Law Reform Commission, which made considerable use of the Ontario report in its own 1974 report, also recommended new legislation. Both reports made substantial reference to the 1967 report of the Law Reform Commission of New South Wales which in turn had used England's 1939 Act as a starting point, though it recommended substantial changes. The British Columbia Legislature enacted a new *Limitations Act* (1975, c. 31) based on the recommendations of the British Columbia Law Reform Commission. Since the 1977 meeting of the Conference, the Ministry of the Attorney General of Ontario has prepared a proposed *Limitations Act* and has circulated it for discussion. That draft largely accepted the British Columbia *Limitations Act*, and our understanding is that the desire for uniformity of legislation is one reason why it did so.

We have accepted the Ontario draft as the basis for the attached draft Uniform Act, and indeed have incorporated much of its actual words. We have done so for a number of reasons. It is the latest Canadian material and, as we have said, it is based on the British Columbia Act and in great part is identical with it. The Ontario draft reflects the tremendous amount of time and thought that has gone into it and into the British Columbia Act, and we see no reason to make a fresh start and much reason to promote uniformity by making use of these two important legislative documents. While it must be remembered that there is no assurance that the Ontario Legislature will enact the Ontario draft, we think that its intrinsic merit, together with its inclusion of much of the British Columbia Act and the possibility of its enactment, make it a satisfactory foundation for the further deliberations of the Conference.

There are some instances in which the decisions made by the Conference at its 1977 meeting are not consistent with the Ontario draft. The divergences are in most cases referred to in the notes to

the sections in the attached draft. It should be noted, however, that the decision of the Conference to leave most statute-barred rights as unenforceable claims rather than to extinguish them is not mentioned in the notes because it involves the omission of section 9 of the Ontario draft without any substitution for it.

The Alberta Institute of Law Research and Reform issued a Working Paper on the subject of Limitations of Action in 1977 and is about to issue a Final Report on the subject. Some reference will be made to their proposals. The Manitoba Law Reform Commission has recently issued a Working Paper on the subject of disabilities, "Limitation of Actions by Children and Disabled Persons," and some reference will also be made to it.

We suggest that the Conference consider the draft section by section and signify its approval or otherwise, answering questions and making choices between alternatives as it goes along. Since the Conference may wish to refer the draft to the Legislating Drafting Section, we suggest that, pending the decision of the Conference as to the further carriage of the subject, the approval be approval in principle only.

COMPREHENSIVENESS OF ACT

There is a general question about the extent to which the *Limitations Act* should attempt to incorporate all limitation periods. The scattering throughout the statute book of limitation periods such as those relating to motor vehicle accidents and claims against professionals was rightly considered to be a trap for the unwary and to be likely to lead to undesirable complexity and to inconsistent treatment of similar cases, and much has been done to collect them in one place. At the 1977 meeting of the Conference the view was expressed that all limitations should be contained in one statute and that there should be a note attached to the draft taking that position. While we have much sympathy for that position we see some difficulties. One is that if a statute creates a new right (e.g., a right to share in matrimonial property) it may be a trap for the unwary reader of that statute to have the limitation period in a separate and unrelated statute. A second difficulty is the propensity of some legislatures at some times to legislate on particular subjects without sufficient regard to a general policy such as that of collecting limitations in one place and one pattern. It will be observed that neither the British Columbia *Limitations Act* nor the Ontario draft Act pur-

ports to require all limitations to be brought in, through both do much to make their Acts more comprehensive; and the Ontario draft Act would go on to make applicable to all limitation periods, wherever found, the provisions of the draft Act respecting the postponement, suspension and extension of the time within which actions may be commenced. We will not try to resolve these questions here. They are dealt with under section 7 (residual period) and in a general note at the end of the draft Act.

We think, however, that the Uniform Act should provide a limitation period for all actions which are not specially provided for in other statutes, and section 7 of the draft does that.

SIMPLIFICATION OF ACT

We said at 1976 *Proceedings*, 185 that the structure of the Uniform Act should be simplified, and we think that there is general agreement with that statement. Different parts of it deal with different categories of legal rights and make special provisions with regard to them. It is therefore difficult to read it comprehensively, and there is much repetition and some inconsistent treatment of similar things. The attached draft attempts to achieve greater simplicity by grouping classes of actions according to the limitation period, and then setting out provisions which apply to some or all of the limitation periods, such as postponement of commencement of the period and provisions relating to disabilities. It also attempts to clarify the language and to delete obsolete provisions.

TIME RUNNING FROM DAMAGE: THE HIDDEN CAUSE OF ACTION

We discussed at 1976 *Proceedings*, 185-7 the problem arising from the difficulty in the classification of negligence claims between contract and tort, and from the possibility that in some cases the plaintiff has an option to sue in contract or tort. The proposal which we made was that in actions for damages for injury to person or property and economic loss, and whether based on contracts, tort or statutory duty, time should run from the occurrence of the damage. We also suggested that the period should be two years in all cases, though we regarded that as debatable.

We went on at pages 197-199 to discuss cases in which the plaintiff does not know that he has a cause of action, and put forth the following for discussion: "Where the existence of a cause of

action in negligence for personal injury or for damage to property or for professional negligence is unknown, the running of time is postponed until the date when the person asserting the claim knew or ought to have known of the facts upon which he alleges negligence (or 'knew or ought to have known of the damage or injury')."

The 1977 meeting of the Conference approved the proposal that time should run from damage in the cases mentioned, subject to the qualification that economic loss should be included only when it is associated with damages for personal injury or property damage. The meeting also decided that something should be done about the hidden cause of action, and that the statute itself should formally state the conditions of relief rather than leave the matter to judicial discretion. The meeting did not decide upon the precise form of relief, nor did it decide whether or not there should be a limit upon the time for which the "hidden cause of action" provision could postpone the running of time.

These are among the most important matters to be dealt with by a new Uniform Act. These subjects are obviously interrelated and we think that we should discuss them here and not merely leave them to be discussed under the specific provisions of the draft which deal with them. We propose to discuss them at some considerable length in the light of the further thought we have given to them since the 1977 meeting, and in light of comments which have been made in Ontario and in Alberta by various groups interested in limitations law.

We think that there are two valid concerns in this area covered by these topics.

The first concern arises from the overlapping of the fields of contract and tort in the area of negligence where a contractual relationship exists. Since there does not seem to be any real reason to treat negligence under contract differently from negligence in tort, and since the characterization of negligence as one or the other is a sterile exercise which involves much litigation, we thought that they should have a common limitation period with a common time of commencement. Since there is no cause of action in tort until there is damage, this consideration suggested that time should run from damage in all cases of negligence.

The second concern has a number of elements. It seems unfair to a plaintiff to have time running against him before he can sue, and it therefore seems that time should not run in tort until his cause

of action has been perfected by the occurrence of damage. Even beyond that it is arguable that it is unreasonable to expect someone to sue before he has been hurt, a consideration which would suggest that even in contract the occurrence of damage would be a reasonable starting point for the limitation period. Further, it seems unfair that time should run against a plaintiff until he knows of his cause of action.

These concerns have given rise to the two proposals we have mentioned. One is that in all cases of negligence (as well as in many other tort actions which need not be mentioned) time should run from damage. The second is that time should not run until the plaintiff knows or should know of the injury, or of the facts that constitute his cause of action, or some such formulation. The result of these two proposals will necessarily be to inject much more uncertainty into limitations law, and to expose defendants to more actions long after the occurrence of alleged breaches of duty. That result gives us different concerns.

We stop here to restate the arguments in favour of these proposals. One is that it is indeed unfair to an injured person to deprive him of his remedy before it arises or before he could be expected to know about it. A second is that under such circumstances one justification for limitations law does not apply, namely, that it is not unfair to require a person who has a cause of action to pursue it and not sleep on it. If it has not arisen or if he has no way of knowing about it, it can hardly be said to be that he is in any way at fault for not getting on with it. There is no doubt in our minds that consideration of the position of potential plaintiffs leads in the direction of the proposals under consideration.

It is, however, necessary to consider the position of potential defendants. The first concern is the evidentiary interest of potential defendants: the passage of time makes evidence increasingly difficult and sometimes impossible to obtain, and where evidence is under the control of potential defendants, there comes a time when they should no longer be required to preserve it in order to meet possible claims. The second concern is the "peace and security" interest of potential defendants: there comes a time when things past should be buried and should not be allowed to disturb the peace and security of a potential defendant. We suspect that this is the weaker of the two and might not stand up by itself, but it does exist.

With regard to evidence, it is obvious that cases differ. If a 1955 lawyer's title opinion causes trouble in 1980, there will be little

problem in identifying it as his opinion, and it will probably incorporate the material on which it is based or will refer to permanent records at the land registry which can be checked in 1980 as easily as in 1955. On the other hand, if a patient has a medical problem in 1980 which he says arose from negligent advice given orally by his doctor in 1955, the doctor, insofar as producing evidence himself, is likely to be in a hopeless position, and will have to rely on the reluctance of a court to accept evidence of the kind the patient would be giving at the time he would be giving it.

It is easy to forget, when thinking of the plaintiff, that we do not know that he is meritorious and that we cannot know that until the trial. When we talk of when the plaintiff should have to sue we inevitably think of the meritorious one, and are likely to fall into the trap of trying to see that if he is meritorious he will succeed; but the objectives of limitations law are inconsistent with a guarantee of individual justice in each meritorious case. It is necessary to remember that the legal system provides plaintiffs, whether meritorious or otherwise, with an opportunity to sue defendants at times chosen by plaintiffs, who in many cases will therefore have a better opportunity to manage evidence. If the limitation time is too long, the law will therefore put the meritorious defendant at an unfair disadvantage in the legal process. Some of his evidence is likely to become impossible to obtain, and the lapse of time is likely to have lulled him into inaction and the destruction of his records. We think that the real purpose of limitations law should be stated as the maintaining of an even-handed balance between the interests of potential plaintiffs and potential defendants, and between fairness to the one class and fairness to the other, and that we should focus upon that rather than upon the thought that the law is in some way conferring favours upon potential defendants.

We think that it is probably true that most people who will be sued long after the act or omission complained of will be people who render services which will affect a person or an enduring object, or people who have sold an enduring object. Such people are likely to operate as businesses and to keep records. The cost of storing records, however, is high, and the apparent advantage in doing so declines sharply after a period of time such as six or ten years, so that ordinary business considerations suggest the destruction of records after such a period of time. We think that there is nothing inherently wrong with such a practice, and it seems to us that its existence is something which the law should take into consideration.

The injection of uncertainty into limitations law would be a consideration which would suggest to such people retention of records over a much longer period of time. It does not seem unreasonable to suggest that potential defendants should for a time maintain their records to protect themselves against potential plaintiffs. It seems to us, however, that there should come a time when it may with some confidence be said that there are few potential plaintiffs left with legitimate claims. The financial and psychological burdens will, however, continue to be imposed upon the class of potential defendants, which will continue to include all those who rendered services or sold objects to all potential plaintiffs, and will remain substantially unchanged in number, and will therefore greatly outnumber the potential plaintiffs. Those burdens will be unfair, and the financial ones will tend to be passed on to the customers or clients of the class.

We will put it another way. By the nature of things certain wrongs do not come to light for long periods of time. That is inherent in reality. When we think of a wrong, we think it unfair that the plaintiff should bear the burden of fact that his wrong did not come to light for a long time, because we think of a meritorious plaintiff who should not be deprived of his right against a wrongdoing defendant. We must however also remember that the passage of time also imposes a burden upon a meritorious defendant who is deprived of the opportunity of making a good defence against an unmeritorious plaintiff. There is unfortunately no practicable way in which the law can provide that just claims will be exempted from limitations law, while unjust ones will not. The imposition of a time limit necessarily excludes just claims as well as unjust ones, while the removal or extension of the time limit necessarily permits unjust claims as well as just ones.

We think that fairness to the plaintiff requires that in at least some negligence actions time should run from damage, and that in at least some negligence actions the running of time should be postponed until the plaintiff has or should have knowledge of the injury [see s. 3(3) and s. 12 of the draft]. We think however that consideration should be given to the imposition of an outside limitation period upon the combined effect of these two provisions, and that consideration should be given to having that limitation period run from the breach of duty [see s. 12(5) of the draft].

RELATIONSHIP OF VARIOUS PROVISIONS AFFECTING THE RUNNING OF TIME

It is difficult to get a comprehensive view of the interrelationship of the various provisions in the draft which affect the running of time. We will set out an analysis of the areas which are of special interest. We will first describe the areas and give them abstract designations so as to focus on the relationships.

LIMITATIONS

I. *Legal areas*

A is

personal injury
property damage } and associated economic loss

B is negligence of any kind

(A includes things other than negligence which are not included in B.)

C is

(a) personal injury,
(b) damage to property,
(c) negligence in providing services.

It includes personal injury and property damage outside of negligence which are not included in B, but are included in A.
It does not include pure economic damage other than that caused by negligence in providing services.
C1 is fraud and mistake, and ordinary breach of trust.
D is fraudulent breach of trust and conversion of trust property.
E is *all* causes of action under the Act.
F is actions which may be confirmed under s. 15.

These are not included in A, B, C, C1, or D, but are included in E and G.

G is all causes of action under the Act.
Hidden cause of action and disability are *cumulative* (s. 14).
The ultimate limitation affecting F (including A, B, C and C1) is 30 years from accrual (s. 17).

II. *Relationship of various proposed provisions*

1. Two year limitation period (draft s. 3(1)(a) and (b)).
Legal area covered—A.

2. Time runs from damage (draft s. 3(3)).
   Legal area covered—B.
   B is part of A.

3. (1) Running of time is postponed until plaintiff has actual or imputed knowledge (draft s. 12(3) and (4)).
   Legal area covered—C and C1.
   C always overlaps all or part of A and B.
   (2) Effect of 12(4) is terminated for C, or C and C1, at a stated time (draft s. 12(5)). The time may be:
   (a) 10 years from accrual,
   (b) 10 years from commencement of limitation period (same as (a) in most cases), or
   (c) 10 years from wrongful act or omission.

4. Running of time is postponed until actual knowledge (draft s. 12(1)).
   Legal area covered—D.

5. Pre-existing or supervening disability may extend time or stop it from running (draft s. 13).
   Legal area covered—E, which is
   (a) all causes of action, or
   (b) all causes of action under the *Limitations Act* including A, B, C, C1 and D.

6. Time starts again on "confirmation" (draft s. 15).
   Legal area covered—F.
   F does not include any of A, B, C, C1 or D, but is included in E.

7. Notwithstanding all the foregoing, the time for any action under the Act does not extend beyond a stated time (30 years?, 20 years?) (draft s. 17) from
   (a) accrual,
   (b) commencement of limitation period, or
   (c) wrongful act or omission.
   Legal area covered—G.
   G includes A, B, C, C1, D, and F.
   G is the same as E if E is restricted to all causes of action under the Act.

8. Hidden cause of action and disability are cumulative (draft s. 14).

LIMITATIONS ACT

Notes:

1. *The British Columbia Act and the Ontario Act bear the title* "Limitations Act" *rather than* "Limitation of Actions Act". *While the latter is somewhat more informative than the former, we think that uniformity would be promoted by adopting the former.*

PART 1

DEFINITIONS

1. In this Act,

   (a) "action" includes any proceeding in a court and any exercise of a self-help remedy;

   (b) "judgment" means a judgment or order of a court, or an award pursuant to an arbitration to which *The Arbitrations Act* applies;

   (c) "security interest" means an interest in property that secures payment or performance of an obligation and includes the interest of a vendor who retains title to property as security for the purchase price;

   (d) "trust" includes express, implied, resulting and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of the holder of a security interest in property.

Notes:

1. *S.* 1(*a*) *is s.* 1(*a*) *of the Ontario draft Act.*

2. *S.* 1(*b*) *is s.* 1(*d*) *of the Ontario draft Act.*

3. *We have attempted to avoid the use of the word "collateral" which in the Ontario draft Act is used in a sense in which it is not used in every province. We have therefore omitted the definition of "collateral" and instead will use the phrase "property subject to a security interest". We think it possible to do without the definitions of "secured party" and "security agreement". We have included a definition of the phrase "property subject to a security interest" as* 1(*c*). *We have made specific reference to the*

interest of a vendor who holds title to property as security, as we are not sure that it would otherwise be included.

4. *S. 1(d) is substantially s. 1(h) of the Ontario draft Act but we have inserted the word "resulting" as it appears to us that a specific reference would be useful, and we have changed the wording at the end of the definition because we have dropped the word "collateral".*

PART 2

RULES OF EQUITY

Section 2

2. Nothing in this Act

   (a) interferes with a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by virtue of this Act; or

   (b) interferes with a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief, whose right to bring the action is not barred by virtue of this Act.

Notes:

1. *This is substantially s. 2(a) and (b) of the Ontario draft. The words "in aid of a legal right" appear after the words "equitable relief" in s. 2(b) of the Ontario draft and could be restored if it is established that they serve a useful purpose. This section has not been considered by the Conference.*

PART 3

LIMITATION PERIODS

Notes:

1. *As we have already said, the draft classifies causes of action according to the length of the limitation period. In so doing, it follows the British Columbia Act and the Ontario draft Act. The purpose is to make the Act easier to read and understand. The Conference has approved this arrangement.*

2. *The Uniform Act uses various forms of words to impose a limitation: the following actions shall be commenced within and not*

after the times respectively hereinafter mentioned (e.g., s. 3); no proceedings shall be taken to recover . . . but within . . . years next after a present right to recover the same accrued (e.g., s. 12); no . . . shall be recovered but within . . . (e.g., s. 15)." The British Columbia Act and the Ontario draft Act use the wording "the following actions shall not be brought after the expiration of —— years after the date on which the right to do so arose." We think that this wording properly expresses the intention of the statute and will adopt it. The Conference has agreed that, except when the time is to run from damage, no further definition of the event which starts the time running should be given.

3. *Ontario and British Columbia have grouped the different limitation periods as subsections of one long section. While we perceive the logic of this, we are inclined to think that a series of shorter sections would be easier to read and we have set them out in that way. This is a drafting matter, and if the Conference approves the provisions in principle, we think that it might be left to the Legislative Drafting Section to decide which form to follow.*

Section 3

3. (1) The following actions shall not be brought after the expiration of two years after the date on which the right to do so arose,

(a) an action for damages for breach of duty of care, whether based on contract, tort, or statutory duty, where the damage is injury to person or property, including economic loss arising from such injury;

(b) an action for damages in respect of injury to person or property, including economic loss arising therefrom, not included in clause (a);

(c) an action for trespass to property not included in clause (a);

(d) an action for defamation;

(e) an action for false imprisonment;

(f) an action for malicious prosecution;

(g) an action for seduction;

(h) an action for conspiracy to commit any of the wrongs referred to in clauses (a) to (g);

(i) a civil action by the Crown or any person to recover a fine or other penalty imposed under any Act.

Note:

Some jurisdictions may wish to add the following:

(j) an action under the *Fatal Accidents Act;*

(k) an action for payment of a motor vehicle accident claim from a statutory fund.

(2) Subsection (1) does not apply to an action for breach of trust.

Alternative 1

(3) In actions referred to in clause (a) of subsection (1), time, for the purposes of this Act, runs from the occurrence of the damage.

Alternative 2

(3) Time, for the purposes of this Act, runs from the occurrence of the damage where:

(a) the action is based on negligence, nuisance or breach of statutory duty; and

(b) the action is for damages and the damages claimed are:

(i) for personal injury or property damage, including economic loss arising therefrom; or

(ii) for negligent representation or professional negligence,

whether the action is or may be brought in tort or in contract.

Alternative 3

(3) In actions for damage for injury to person or property, including economic loss arising therefrom, and whether based on contracts, tort or statutory duty, time runs from the occurrence of damage.

Notes:

1. *Ss.* 3(1)(*a*) *and* (*b*) *together equal s.* 3(1)(*a*) *of the Ontario draft Act. We have broken them up so that the same wording as s.* 3(1)(*a*) *of this draft can be used for the class of actions in which specific provision is made for the time to run on damage under s.* 3(2) *of this draft, and for the hidden cause of action provision of s.* 12(3) *of the draft. The Legislative Drafting Section may wish to join them again.*

2. *Clause (h) is included because of a suggestion at the 1977 meeting of the Conference; we are not sure that it is necessary. The other clauses have been reproduced from s. 3(1) of the Ontario draft Act, though (k) has been reworded to remove references to provincial legislation. We have suggested that clauses (j) and (k) be optional to take care of the variation in provincial legislation.*

3. *It should be noted that s. 3(1)(a) and (b) define the classes of actions to which they apply by reference to the nature of the injury rather than to the nature of the cause of action, though s. 3(1)(a) also includes a reference to the nature of the cause of action.*

4. *In our 1976 report we suggested that an action under the Survival of Actions Act be included in the two-year period. At the 1977 meeting it was suggested that there is not a cause of action under the Survival of Actions Act. We are inclined to agree that the Survival of Actions Act continues a cause of action and does not give rise to one, and we have deleted the reference.*

5. *It should be noted that some actions in tort for damages are not included in subsection (1), e.g., injurious falsehood. The distinction may not be logical.*

6. *If the draft is referred to the Legislative Drafting Section, it may want to consider whether it is necessary as a matter of drafting practice to indicate that the sections in this Part are subject to the later provisions for the postponement and interruption of limitation periods.*

7. *Subsection (2) is introduced to ensure that the two-year period does not apply to trusts arising from contracts.*

8. *The British Columbia Act does not have a section such as s. 3(3). The first alternative given comes from the Ontario Act with some changes in the wording, and the second is one that the Alberta Institute of Law Research and Reform proposes. The word "whether" in the Ontario draft has been changed to "if" in alternative 1 to put it beyond doubt that the section covers only the cases mentioned as concern was expressed at the 1977 meeting of the Conference that it might include negligent breach of trust. The third alternative comes from the report of the Alberta Commissioners (1976 Proceedings, page 186). The Conference appeared to accept that recommendation, subject to a restriction which would make it applicable to economic loss only if the economic loss results from injury to person or property. We think*

however that the matter should be recanvassed as we are not sure that the minds of the Conference effectively grappled with the issue.

9. *S.* 3(3) *relates to the problem described at pages* 5-10 *of the Introduction. The evil that s.* 3(3) *is intended to grapple with arises from the different treatment for limitations purposes of actions in tort and actions in contract, and the confusion in the law as to whether some breaches of duty are either or both. A cause of action based on negligence in tort arises upon damage, while a cause of action based on contract arises on breach. The limitation period for tort is two years, and that for contract is six years. The result is that a good deal of time is spent in the arid occupation of classifying causes of action in a way that has no functional relationship to the relationship between the parties. It will be seen that the Ontario draft Act (Alternative* 1) *attempts to resolve the problem by extending the rule that the period commences upon damage to all breaches of a duty of care, whether in tort or contract or under statute. That solves the original problem, but makes it necessary to classify causes of action into those which involve a breach of a duty of care and those which do not. It is not always easy to separate an intentional tort from a negligent one, and in contract it may prove even more difficult to separate a duty of care from an absolute duty. For example, the same damage might be considered to be the result of a breach of warranty that a building will be sound, or, alternatively, to be the result of a failure to take care to build it so that it is sound.*

10. *Alternative* 2, *the proposal of the Working Paper of the Alberta Institute takes a somewhat different approach. It would include nuisance, but it would include only actions for certain kinds of damages, namely, personal injury, property damage, economic loss arising from either of the first two, and damages resulting from negligent misrepresentation or professional negligence. This proposal is more complex.*

11. *Alternative* 3, *the proposal of the Alberta Commissioners as restricted by the* 1977 *meeting, would extend the proposal to actions for damages for injury to person or property and associated economic loss whether based on negligence or not. As we have mentioned, the Conference thought the reference to economic loss to be too broad and excluded it unless it arises from injury to person or property.*

12. *As we have said, we think that the subject should be re-canvassed, and we invite the Conference to decide whether the subsection should be included and, if so, in what form.*

13. *We should note that the section overrides general provisions for the running of time. We leave it to the Legislative Drafting Section to decide whether anything needs to be done to ensure that that is the case.*

14. *S.* 3(8) *of the Ontario draft Act, upon which Alternative* 1 *of s.* 3(3) *of this draft is based, appears to imply that the draft Limitations Act affects the common law rules respecting the accrual of causes of action. It appears to us that the Act does not do so. What it does do is to provide a limitation period which does not necessarily coincide with the accrual of the cause of action; in other words, it postpones the running of time. Our preference in the Ontario section if it is to be adopted, would be to omit everything following the last comma, and we have drafted Alternative* 1 *accordingly.*

15. *It was suggested at the* 1977 *meeting of the Conference that defamation might be included in s.* 3(3). *Upon consideration, we do not think so. The office of the section is to bring in negligence under contract and negligence under statute, and we do not think it gives rise to any necessity to mention intentional torts.*

Section 4

(1) The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose:

(a) an action against the person representatives of a deceased person for a share of the estate;

(b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;

(c) an action against a trustee for the conversion of trust property to the trustee's own use;

(d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) an action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;

(f) an action for possesion of land;

(g) an action on a judgment, other than a foreign judgment, for the payment of money, for the return of personal property, *or for possession of land*;

(2) The following provisions apply to an action for possession of land:

(a) the time runs from the date upon which the right accrues to the claimant or to a predecessor of the claimant;

(b) time runs against a co-tenant upon ouster or retention of the rents and profits by another co-tenant;

(c) If no person has obtained possession of land, or is in receipt of the profits thereof, in respect of

(i) an estate or interest in reversion or remainder, or

(ii) another future estate or interest, including an executory devise,

the right of the person claiming the estate or interest shall be deemed to have first accrued at the time at which the estate or interest became an estate or interest in possession by the determination of any estate or estates in respect of which the land has been held or the profits thereof have been received, notwithstanding that the claimant or the predecessor has at any time previously to the creation of the estate or estates which has determined been in the possession of the land or in receipt of the profits thereof.

[Note: A jurisdiction which does not provide for acquisition of title to land by possession should delete s. 4(1)(f), s. 4(2), and the words "or for possession of land" in s. 4(1)(g).]

Notes:

1. *S.* 4(1) *includes s.* 4(2)(*a*) *to* (*f*) *of the Ontario draft Act subject to a change in s.* 4(1)(*g*) *of this draft which we think gives effect to the intention behind the Ontario draft Act.*

2. *S.* 3(2)(*g*) *and* (*h*) *of the Ontario draft read as follows:*

(g) an action for possession of land where the person entitled to possession of the land has been dispossessed in circumstances amounting to trespass;

(h) an action for possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to

possession arising under a possibility of reverter in respect of a determinable interest.

It appears to us that all actions for possession should be in the 10*-year period, and we think that that was the view of the* 1977 *meeting of the Conference, though the minds of the participants were not directed to the Ontario proposal. We have drafted s.* 4(1)(*f*) *accordingly.*

3. *S.* 4(2)(*a*) *incorporates the parts of s.* 16 *of the Uniform Act which are not covered by s.* 4(1)(*f*).

4. *S.* 4(2)(*b*) *reflects a decision in principle of the Conference at its* 1977 *meeting. The Ontario Commissioners expressed concern about its application and may have further representations to make to the Conference about it. The corresponding section in the Ontario draft is s.* 12 *which reads as follows:*

   12. Where any one or more of several persons entitled to any land or rent as co-tenants has or have been in possession or receipt of the entirety, or more than his or their undivided share or shares of the land, or of the profits thereof, or of the rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be considered to have been the possession or receipt of, or by the last-mentioned person or persons or any of them.

5. *The attention of the Conference is drawn to the fact that ss.* 18, 19 *and* 20 *of the Uniform Act have been omitted because we think them unnecessary and because we think that carrying them forward would bring about a loss in simplicity and readability of the statute which would outweigh the advantage gained by giving readers of the statute the information which they contain.*

6. *S.* 4(2)(*c*) *is s.* 21 *of the Uniform Act revised to fit into the context.*

7. *The question of obtaining title to land by some form of possession is one which is subject to substantial differences of opinion. The* 1977 *meeting of the Conference decided that the Uniform Act should make alternative provisions for those jurisdictions who wish to provide for obtaining of title by some form or possession, and those jurisdictions which do not. The note to s.* 4 *is based upon that approach.*

Section 5

The following actions are not governed by any limitation period and may be brought at any time:

(a) an action by a debtor in possession of property subject to a security interest to redeem the property;
(b) an action by a secured party in possession of property subject to a security interest to realize on the property;
(c) an action relating to the enforcement of an injunction or a restraining order;
(d) an action to enforce an easement, restrictive covenant, or *profit-à-prendre;*
(e) an action for a declaration as to personal status;
(f) an action for or declaration as to the title to property by any person in possession of that property.

Note:

Jurisdictions which do not allow the acquisition of title to land by possession may add the following:

(g) an action for possession of land; and
(h) an action on a judgment for the possession of land.

Notes:

1. *Cls. (a) to (f) are adapted from the Ontario draft. Cls. (g) and (h) are adapted from the British Columbia s.* 3(3).

2. *The section has not been considered by the Conference, as the decision to include or exclude a list of actions to which no limitation period applies appears to be largely a matter of drafting rather than a matter of policy. It may be argued that a residual clause such as s.* 7(1) *of this draft (if approved by the Conference) would impose a limitation period on some or all of the causes of action listed in s.* 5, *and that s.* 5 *is therefore necessary in order to prevent such a result. We think that no one would suggest that there should be a limitation period on the causes of action listed in cls. (a) to (f), subject to Note* 4.

3. *The addition of cls. (g) and (h) would follow from a decision by a particular jurisdiction that title to land should not be acquired by any form of possession.*

4. *We are not satisfied that cl. (d) should be included, but have included it in case it is thought necessary. It appears to us that if*

someone interferes, for example, with the rights conferred by an easement, there is a cause of action which arises at that time and which should be sued upon within the limitation period. If there is a continuing interference such as the erection of a permanent structure which prevents the exercise of the rights under the easement, it appears that there is a continuing cause of action. It may be that our doubts could be met by adding the words "other than an action for damages." We have however included the provision to ensure that a continuing easement is not lost by failure to assert it.

5. *Cls. (a) and (b) have been reworded so as not to use the word "collateral."*

Section 6

Alternative 1

Where an action is commenced against a tort-feasor or where a tortfeasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tortfeasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tortfeasor if,

(a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and

(b) there has been compliance with any statute requiring notice of claim against such tortfeasor.

Alternative 2

An action by a tortfeasor for contribution from another tortfeasor shall not be brought after the expiration of the time for bringing action by the injured person against the wrongdoers.

Notes:

1. *The first alternative is s. 4(2) of the Ontario draft Act.*

2. *The second alternative is the proposal of the Alberta Institute of Law Research and Reform. Neither proposal has been considered by the Conference.*

3. *The Ontario proposal appears to be based upon the proposition that the first wrongdoer should have an appropriate period of time after settlement or judgment to launch his proceedings against the wrongdoer. The Alberta Institute's proposal appears to be based on the proposition that the first wrongdoer will have the opportunity to do that at any time in the original action, and should not be allowed to bring action against the second wrongdoer, and possibly years later, without having given notice to the second wrongdoer. The Alberta Institute's view is that the first wrongdoer is sufficiently proected by being able to bring his action either in the original action or within the original limitation period. The Institute notes that this would require the first wrongdoer to suffer judgment rather than effect a settlement, which is undesirable, but they think that this is less undesirable than the other proposal. The directions of the Conference are requested.*

Section 7

(1) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

(2) Without limiting the generality of subsection (1), the following actions shall not be brought after the expiration of six years after the date on which the right to do so arose:

(a) an action for breach of contract not included in sec. 3(1)(a) or sec. 3(1)(b).
(b) an action to recover a debt whether secured or not;
(c) an action by a secured party not in possession of property subject to a security interest to realize on the property;
(d) an action by a debtor not in possession of property subject to a security interest to redeem the property;
(e) an action for damages for conversion or detention of goods or chattels.
(f) an action for the recovery of goods or chattels wrongfully taken or detained;
(g) an action to realize on a foreign judgment.

Notes:

1. *This is ss.* 3(4) *and* 3(5) *from the Ontario draft, subject to some changes mentioned below.*

2. *Note that "action" is defined in this draft as "any proceeding in a court and any exercise of a self-help remedy."*

3. *S.* 7(1) *recognizes that limitation periods may be provided in other Acts, and therefore departs from the principle that all limitation periods should be collected in one Act. On the whole, we agree with British Columbia and Ontario that practicality requires that the existence of limitation periods in other Acts be recognized, but we raise the question for decision. Does the Conference approve the recognition of limitation periods in other Acts?*

4. *If the Conference wishes, a note expressing the desirability of comprehensiveness could be attached to s.* 7. *Such a note might read as follows:*

   "Note: While this section recognizes limitation periods provided by other Acts it is desirable that as far as practicable all limitation periods should be brought under the Limitations Act."

   Does the Conference wish to attach a note in this or some other form?

5. *There is a question whether or not there should be a list of specific actions included in the residual provision. The question is one of drafting, not policy. The British Columbia Act and the Ontario draft Act have listed some causes of action in s.* 3(5), *but we have gone further in this draft by including s.* 7(2)(*a*) and (*b*). *The purpose of including a list would be to provide information to the reader of the statute in express terms so that he would not have to consider consecutively the two-year, ten-year and no limitation classifications and, because he does not find his cause of action there, deduce that it is within the general terms of s.* 7(1). *There are arguments against including a list. There are disadvantages in including unnecessary matter, and it may be possible to argue that a court might in some way use the existence of s.* 7(2) *or an item in it as an aid to interpretation in a way which is not contemplated. We suggest that the decision about the inclusion or exclusion of s.* 7(2) *be left to the Legislative Drafting Section. If the decision is to include s.* 7(2), *the Legislative Drafting Section might further want to consider whether the order of the two subsections should be reversed.*

6. *In s.* 7(2)(*c*) *and* (*d*) *we have made changes to avoid the use of the word "collateral."*

Section 8

In ss. 5 and 7, "debtor" means a person who owes payment or other performance of an obligation secured, whether or not he owns or has rights to the collateral.

Note:

This section has not been considered by the Conference, but it appears to us to be useful. It is s. 3(7) of the Ontario Draft Act.

GENERAL NOTE TO PART 3

We would draw to the attention of the Conference that we have not included s. 3(6) of Ontario's Draft Act which reads as follows:

> No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding and this section had been pleaded.

The principal consequence of the section appears to us to be that a person entitled to the income of trust property for life whose claim has been statute-barred would not obtain any benefit from a judgment obtained by a remainderman whose action had not been statute-barred.

PART 4

EXTINCTION OF CERTAIN CAUSES OF ACTION

Section 9

The right and title of a person to property or to recover money out of property is extinguished.

(a) in the case of land, a rent charge, or money charged upon land, at the expiration of the time limited to that person for bringing an action to recover possession of the land or to recover the rent charge or money, and

(b) in the case of personal property wrongfully taken or detained, at the expiration of the time limited to that person for bringing an action for the recovery of the property.

[*Notes:*

1. A jurisdiction with a system of title registration may wish to provide for registration of title to land in the name of the person in possession when the previous owner's name is extinguished.

2. A jurisdiction which does not wish to allow the obtaining of title by adverse possession may want to delete all or part of cl. (a).]

Notes:

1. *S.* 9 *gives effect to decisions of the* 1977 *meeting of the Conference.*

2. *S.* 45(2) *of the Uniform Act extinguishes title to chattels (not all personal property) upon expiration of the period for bringing an action for wrongful conversion or wrongful detention. (It also refers to a further conversion or detention but applies the original period to it.) It seems to us that what is to be avoided is a situation in which A has possession but has no right to get title while B has title but no right to get possession, so that it is the expiration of the time to bring action for the recovery of the property itself, and not the time to bring an action for damages, which is important. The distinction does not seem to have much practical importance, but we think that it should be made.*

3. *Should s.* 9 *extend to all personal property, or apply only to chattels, as does the Uniform Act?*

4. *S.* 45 *of the Uniform Act excludes from the extinction of title to chattels the case in which the owner has got back possession of the chattel during the limitation period. S.* 44 *does not make similar provision with regard to land. The provision appears to us to be unnecessary and we have not included it.*

5. *The substance of s.* 44 *of the Uniform Act is contained in s.* 9(*a*).

6. *The* 1977 *meeting of the Conference considered the question of extinguishing of all rights as the British Columbia Act does and the Ontario draft would do. The decision of the meeting, however, was that extinction should take place only in the cases mentioned above. The principal reasons advanced were that an acknowledgement out of time should be allowed to start the time running again and that the requirement that a limitation period be pleaded should be retained and appears inconsistent with extinction, though some jurisdictions have both.*

7. *Note that s. 9 does not say who owns the property after extinction of the previous owner's title. While it may be argued that if the* Limitations Act *does away with the common law answer to the question of ownership it should give another one (e.g., that the person in possession is the owner), we think that that may be left to be determined by the general law. However, there can be an awkward problem under a land title registration system if a registered title cannot be got out of the previous owner's name and the note therefore suggests that provision should be made to cope with that problem. S. 73 of the* Land Titles Act, *R.S.A. 1970, c. 198 is an example.*

PART 5

PRESCRIPTIVE RIGHTS

Section 10

Except as provided by section 4(1)(f) and by section 9, no person acquires a right in or over land by prescription.

Notes:

1. *This section has not been considered by the Conference, though it was mentioned at the 1977 meeting of the Conference that Ontario proposes to abolish the acquisition of rights by prescription. (See s. 16 of the Ontario draft Act.) Alberta and some other provinces have already done so. The Alberta Commissioners recommend inclusion of the section.*

2. *The words of exception which begin the section are there by way of abundance of caution. The British Columbia Law Reform Commission in their report on Limitations: Part I—Abolition of Prescription, 1970, 6, point out that "prescription" technically refers only to the basis for the creation of prescriptive easements and* profits-à-prendre *and not to the acquisition of rights based on adverse possession. Black's Law Dictionary puts it that "prescription" is usually applied to incorporeal hereditaments while "adverse possession" is applied to lands. That would suggest that the excepting words are not necessary. However, the British Columbia Law Reform Commission points out that "prescription" is sometimes used in a loose way to describe the principle of law that enables both kinds of rights to be created. The Ontario draft Act takes the cautious approach in its section on prescription by*

saying that a prescriptive right does not include a right arising by adverse possession.

PART 6

POSTPONEMENT AND INTERRUPTION OF LIMITATION PERIODS

We have here suggested some regrouping of provisions from the Ontario draft Act. It is probably unnecessary for the Conference to express an opinion as to whether the regrouping is helpful, and the Legislative Drafting Section can consider which is to be preferred.

Section 11

(1) In actions under the *Fatal Accidents Act*, time for the purposes of this Act runs from the day on which the death occurred.

(2) In actions for payment of a motor vehicle accident claim from a statutory fund, time for the purposes of this Act runs from the day on which the death, personal injury, loss or property damage occurred.

Note:

1. *S.* 11(1) *and* (2) *are s.* 3(9) *and* (10) *of the Ontario draft Act. We are doubtful that subs.* (1) *is needed, as the cause of action under the* Fatal Accidents Act *is for wrongfully causing the death of the deceased and it appears to us that that cause of action is complete, when the death takes place. However, we have included it. The Conference has not previously considered it. Similar remarks apply to subs.* (2).

(3) The limitation period fixed by this Act with respect to an action relating to an interest of a beneficiary in trust property does not commence to run against him until that interest becomes an interest in possession.

Note:

We have included this provision because it appears as s. 3(11) *in the Ontario draft. We would prefer to omit it. We do not think that "interest in possession" is apt wording to deal with equitable interests, and we think that the beneficiary is adequately protected*

by the provisions postponing the running of time until the plaintiff has or should have the requisite degree of knowledge. Does the Conference want the provision included?

Section 12

(1) The running of time with respect to the limitation period fixed by this Act for an action,

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary knows of the fraud, fraudulent breach of trust. conversion, or other act of the trustee upon which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

1. *S.* 12(1) *and* (2) *are s.* 6(1) *and* (2) *of the Ontario draft Act with one change.*

2. *Note that the definition of trust in s.* 1 *includes express, implied, constructive, and resulting trusts, and the duties of personal representatives.*

3. *It will be noted that the provision in s.* 6(1) *of the Ontario draft Act is that time does not run until the beneficiary is "fully aware" of the fraud, etc. We think that the words "fully aware" would give rise to doubt as to whether or not they mean more than "aware" and, if so, what, and that the doubt would give rise to undesirable litigation. We think it sufficient that the beneficiary "knows."*

4. *The test in subs.* (1) *coupled with the onus imposed on the trustee by subs.* (2) *means. we think, that an alleged trustee will rarely be protected by the Act against claims of these aggravated breaches of trust.*

5. *It is our opinion that s.* 12(1)(*b*) *would start the limitation period running only when the trustee has wrongfully refused to return the trust property to the beneficiary. We would otherwise be troubled by, for example, the application of the Act to a case*

in which money remains in a solicitor's trust account for more than ten years without any direction from the client.

6. *It should be noted that s.* 12(1)(*b*) *would apply to recovery of the trust property from a person into whose hands it can be traced, subject to the protection of a bona fide purchaser for value under s.* 12(7). *Our basis for that statement is that we think that the transferee who is not a bona fide purchaser for value will be a trustee under a constructive trust which is included in the definition of "trust" by s.* 1(*d*) *of this draft.*

(3) Subsection (4) applies to

(a) an action for damages for breach of duty of care, whether based on contract, tort or statutory duty, where the damage is in respect of injury to person or property, including economic loss arising from such injury;
(b) an action for damages in respect of injury to person or property, including economic loss arising therefrom, not included in clause (a);
(c) an action for damages for economic loss arising from a breach of a duty of care in the rendering of services under a contract other than a contract of employment;
(d) an action based on fraud or deceit;
(e) an action where the material facts relating to the cause of action have been wilfully concealed;
(f) an action for relief from the consequences of a mistake;
(g) an action under the Fatal Accidents Act; or
(h) an action for breach of trust not within subsection (1).

Section 12(4)

Alternative No. 1

(4) The running of time with respect to the limitation period fixed by this Act for an action to which this subsection applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know,

(a) the identity of the defendant; and
(b) the facts upon which his action is founded.

or

(4) The running of time with respect to the limitation period fixed by the Act for an action to which this subsection

applies is postponed and does not commence to run until the person asserting the claim knew or ought to have known of the damage or injury.

Section 12(5)

Alternative No. 1

(5) Subsection (4) does not permit the bringing of an action more than ten years after the right to do so arose.

or

Alternative No. 2

(5) Subsection (4) does not permit the bringing of an action more than ten years after the date of

(a) the act or omission on which the action is based, or

(b) where the action is based upon a series of actions or omissions or a continuing course of conduct, the date of the last of the series or the termination of the course of conduct.

(6) The burden of proving that the running of time has been postponed under subsection (4) is on the person claiming the benefit of the postponement.

(7) Subsections (1) and (4) do not operate to the detriment of a bona fide purchaser for value.

(8) Neither subsection (1) nor subsection (4) postpones or interrupts the running of time under this Act in favour of a successor in right, title or interest after his predecessor knew or ought to have known the facts mentioned in the subsection.

Notes:

1. *It will be seen that s.* 12(3)(*a*) *and s.* 12(3)(*b*) *could be combined. The wording of cl.* (*a*) *is the same as s.* 3(1)(*a*) *of the draft and we think it useful to be able to follow it through s.* 3(1)(*a*), *s.* 3(2), *and s.* 12(3), *but the Legislative Drafting Section may prefer to combine the two clauses.*

2. *S.* 12(3)(*c*) *raises a matter of difficulty. One of the areas in which the hidden cause of action gives rise to concern is that of "professional negligence," a phrase which is used in our report at*

1976 *Proceedings*, 199, *in the hidden cause of action provision in the British Columbia Act* [s. 6(3)(c)] *and in the Ontaria draft Act* [s. 6(3)(c)]. *We are in some doubt as to how the word would be interpreted. Some appear to equate a profession with an occupation the members of which by law have the power of self-regulation. One of the definitions in the Shorter Oxford English Dictionary, 3rd edition, is "any calling or occupation by which a person habitually earns his living." Upon reflection we are also in some doubt about the policy which should be adopted. In s. 12(3)(c) we put forward a suggestion that would give a very broad application to the provision, and we invite the Conference to consider whether that is appropriate. If the Conference is of the view that as a matter of policy a distinction should be drawn between, e.g., medical, legal and architectural services on the one hand, and labouring and plumbing services on the other, it can so direct, and it would be for the draftsmen to decide how to give effect to the direction. It should be noted however that in one respect our formulation is narrower: it would exclude services, professional or otherwise, rendered under a contract of employment.*

3. *S. 12(3)(d), (e), (f) and (h) have not been considered by the Conference. They go beyond the recommendations in our previous report, and we have included them in this draft because they appear in s. 6 of the British Columbia Act and in s. 6 of the Ontario draft Act. The Conference should decide whether or not to include them.*

4. *The form of the "hidden cause of action section" will flow from the view taken as to how to strike the proper balance between the interest of the plaintiff in recoving a just claim and the interest of the dependent in not being exposed to an unjust claim which the passage of time prevents him from defending properly. It is our view that the plaintiff should move once he knows of the injury, and we therefore recommend alternative 2. This flows from the concerns we have outlined earlier this report, and from our view that it is not unfair to the plaintiff to require him to be energetic once he becomes aware of the injury.*

5. *Alternative No. 1 of subs. (4) is s. 6(4) of the Ontario draft Act. It would let in some plaintiffs who would be excluded by Alternative 1, namely, those who do not have actual or imputed knowledge of the identity of the defendant. Our view is that there should be pressure upon the plaintiff to take whatever steps are necessary to preserve his cause of action.*

6. *From a drafting point of view, we think there are some problems with the phrase "the facts upon which his action is founded" in Alternative 2. That presumably includes those facts which would have to be alleged in a pleading in order to establish the cause of action and in general that may be reasonable enough. We think that some litigation might arise on the question whether the existence of negligence is a "fact"; it is often stated to be a fact, though probably for purposes only of having it determined by the trier of fact, but we think that the plaintiff cannot "know" it until trial and it would be unsatisfactory if it is one of the "facts" which must be within the knowledge of the plaintiff for the limitation period to run against him.*

7. *The British Columbia provision, section 6, requires knowledge of the identity of the defendant and then goes on,*

. . . and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing

(j) that an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(k) that the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) "facts" include

(i) the existence of a duty owed to the plaintiff by the defendant, and

(ii) that a breach of a duty caused injury, damage, or loss to the plaintiff;

We think that this balance of the interests is too much in favour of plaintiffs. It would seem to allow a plaintiff who, within the limitation period, has decided not to sue, to bring action outside the limitation period if new evidence turns up. It would also appear that a favourable legal opinion outside the limitation period, following upon an unfavourable one within it, would start

the time running again. It also appears to us that time would not run until the plaintiff knows that there is a duty and a breach, and we think that it would be difficult for a defendant to bring that sort of knowledge home to him. This of course is an existing solution to a very difficult problem and the reasons behind it cannot be ignored, but our choice would be for a more restrictive provision.

8. *Subs.* (5) *was not dealt with at the* 1977 *meeting though the point which it deals with was mentioned in our report at* 1976 *Proceedings,* 199. *We think that there should be an outside limitation on the effect of the hidden cause of action and that it should be shorter than the ultimate limitation period imposed on all causes of action. Our reasons are found in our general discussion earlier in this report, and in general may be summarized as being that in our view the interests of the comparatively small numbers of potential plaintiffs with legitimate interests who would be precluded from bringing action should at some reasonable point give way to the evidentiary and security interests of the great mass of potential defendants and those to whom they may pass on the cost of storing records for undue lengths of time. These same reasons lead us to recommend that the outside limitation on the effect of the hidden cause of action provision should be determined by reference to the time of the wrongful act or omission rather than by reference to the accrual of the cause of action, but we have put forward both alternatives. We should point out that the British Columbia Act has recently been amended so as to provide an outside limitation of* 6 *years from accrual in favour of a medical practitioner sued for negligence or malpractice or in favour of a hospital or hospital employee for negligence (without an express restriction to negligence in giving hospital care); the provision extends to preclude the running of time by reasons of a confirmation or disability. We should point out also that the Alberta Institute has found itself much divided on the outside limitation period and at the moment is inclined to a period of* 6 *years from accrual. The Ontario draft Act leaves the question to be dealt with by the ultimate limitation of* 30 *years from accrual of the cause of action.*

Section 13

(1) For the purpose of this section, a person is under a disability,

(a) while he is a minor; or

(b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.

(2) Where a person is under a disability at the time his right to bring an action arises, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.

(3) Where the running of time against a person with respect to a cause of action has been postponed by subsection 2 and that person ceases to be under any disability, the limitation period governing that cause of action is the longer of,

(a) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose; or

(b) such period running from the time that the disability ceased, but in no case shall that period extend more than six years beyond the cessation of disability.

(4) Where a person having a cause of action comes under a disability after time has commenced to run with respect to a limitation period fixed by this Act but before the expiration of the limitation period, the running of time against that person is suspended so long as that person is under a disability.

(5) Where the running of time against a person with respect to a cause of action has been suspended by subsection 4 and that person ceases to be under any disability, the limitation period governing that cause of action is the longer of,

(a) the length of time remaining to bring his action at the time the person came under the disability; or

(b) one year from the time that the disability ceased.

(6) Notwithstanding subsections 2 and 4, where a person under a disability has a cause of action against any other person, that other person may cause a notice to proceed to be delivered in accordance with this section, in which case time commences to run against the person under a disability as if he had ceased to be under a disability on the date the notice to proceed was delivered.

(7) A notice to proceed delivered under this section must,

(a) be in writing;

(b) be addressed,

(i) in the case of a minor, to his parent or guardian, as the case may be, and a duplicate original to the (*here name an appropriate government official.*

(ii) in the case of a person who comes within clause (b) of subsection 1, to his parent or committee, as the case may be, and a duplicate original to the (*here name an appropriate government official.*

(c) state the name of the person under a disability;

(d) specify the circumstances out of which the cause of action may arise or may be claimed to arise, with such particularity as is necessary to enable a determination to be made as to whether the person under a disability has the cause of action;

(e) give warning that the cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;

(f) state the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person delivering the notice, or his solicitor.

(8) Subsection 6 does not apply to a person under a disability in bringing an action against his parent or guardian, the (*here name the government official or officials mentioned in subsection* (7)).

(9) Subsection 6 operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(10) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

(11) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(12) The Lieutenant Governor in Council may make regulations prescribing the form, content, mode of delivery and other matters respecting a notice to proceed.

(13) When a notice to proceed is delivered to the (*here insert name of government official or officials mentioned in subsection* (7)).

and it appears to him that the other person to whom the notice was delivered is failing to take reasonable steps to protect the interests of the minor or is otherwise acting to the minor's prejudice, the Official Guardian shall,

(a) investigate the circumstances specified in the notice; and

(b) commence and maintain an action for the benefit of the minor if he believes that such an action would have a reasonable prospect of succeeding and would result in a judgment that would justify the bringing of the action.

Notes:

1. *This is s. 7 of the Ontario draft Act, which comes from the British Columbia Act.*

2. *We refer to the discussion of the subject by the Alberta Commissioners at* 1976 Proceedings, 194-196. *The Conference at its* 1977 *meeting appears to have given the following directions:*

   (1) *That in general the British Columbia scheme and procedure including the provision for notice to start the time running, should be adopted.*

   (2) *That a supervening disability should interrupt the running of the limitation period, which appears in subs.* (4) *above.*

   (3) *That upon emerging from the disability the person under the disability will have the periods mentioned in subs.* (3) *and* (5).

   (4) *The Conference specifically suggested that the Ontario Law Reform Commission's definition of soundness of mind should be used. That is somewhat different from that in the British Columbia Act and in the Ontario draft Act, and s.* 13(1)(6) *therefore differs from the British Columbia Act and the Ontario draft Act by omitting the words "or substantially impeded in" which follow the words "incapable of" in both pieces of legislation.*

3. *We have given effect to the directions given by the Conference. We think, however, that we should express our reservations. The question is one of balancing the interests of disabled plaintiffs on*

the one hand and of defendants generally on the other. The proposal for notice at first blush is an attractive means of reconciling these as it appears to give a defendant a means of protecting himself if he wishes. While we do not object to a notice provision, we think that it will only occasionally have that effect, and that in general it will be of no value to defendants and we do not think that it recognizes their interests sufficiently. Many defendants will not know that there is a possible claim against them. Many others will not take legal advice and will not themselves know what is provided by the limitations legislation. Many others will not regard the risk as serious enough to justify the giving of a notice. Unless it is clear that a notice can be served in all cases, and not merely where there is a guardian or committee, other defendants will not have a legal standing to issue a notice. All these categories of defendants will be subject to the possibility of stale claims concerning which they will have destroyed their records. We would prefer a provision that time runs while there is a person able to bring action on behalf of the disabled person. Although a provision of that kind would prevent the time from running in some cases we think that it would be fairer to the great mass of potential defendants and that with some adjustment it could be made reasonably fair to disabled plaintiffs. Since this subject was raised in our previous report (1976 Proceedings, 194-196), *we do not ourselves propose to raise it at the meeting but we mention it here in case others may wish to do so.*

4. *We also have reservations about the breadth of the supervening disability provision. We can see arguments against extending it to cases in which it is not the fault of the defendant which brings it on, and arguments against providing for an extension at the end of a limitation period for a period of supervening disability during the early part of the period. Again, we merely mention these reservations.*

5. *We think that there is still a direction that the Conference should give. The British Columbia notice provision (s. 7(6) and (7)) applies only where the disabled person has a guardian or committee. The Ontario draft Act provision (s. 7(6) and (7)) does not expressly apply only in such cases, but it requires service on a parent, guardian or committee, and therefore presumably applies only if there is one. Both also provide for service on a government official, but that service is not sufficient to satisfy the requirements. The Conference should decide whether the notice provision in the draft should apply or whether service upon a designated govern-*

ment official should be sufficient. If the latter, the section would then require some re-drafting to give effect to the direction. We might say that we are somewhat dubious about the Ontario provision for service on a parent *or committee of a mentally incapacitated person, as the parent may not be an appropriate person to serve, but that is a minor point which may be left to the draftsmen.*

Section 14

Subject to section 17, the effect of sections 12 and 13 is cumulative.

Notes:

1. *The Conference has not considered this section, which is s.* 8(2) *of the Ontario draft Act.*

2. *If a plaintiff who has no actual or imputed knowledge under s.* 12, *or a plaintiff who has acquired the knowledge but is still within his limitation period, comes under a disability, the combined effects of ss.* 12, 13 *and* 14 *would be that time will not run against him until he emerges from the disability.*

Section 15

(1) Where, after time has commenced to run with respect to a limitation period fixed by this Act but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action only if he,

(i) acknowledges a cause of action, right, or title of another, or

(ii) makes a payment in respect of a cause of action, right, or title of another;

(b) an acknowledgment of a judgment or debt has effect,

(i) whether or not a promise to pay can be implied therefrom, and

(ii) whether or not it is accompanied by a refusal to pay;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.

(3) Where a secured party has a cause of action to realize on property subject to a security interest,

(a) a payment to him of principal or interest secured by the property; or

(b) any other payment to him in respect of his right to realize on the property or any other performance by the other person of the obligation secured,

is a confirmation by the payer or performer of the cause of action.

(4) Where a secured party is in possession of property which is subject to a security interest in his favour,

(a) his acceptance of a payment to him of principal or interest secured by the property; or

(b) his acceptance of,

(i) payment to him in respect of his right to realize on the property; or

(ii) any other performance by the other person of the obligation secured,

is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the property.

(5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker.

(6) For the purpose of this section, a person has the benefit of a confirmation only if the confirmation is made to him or to a person through whom he claims, or if made in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy Act* (Canada).

(7) For the purposes of this section, a person is bound by a confirmation only if,

(a) he is a maker of the confirmation;
(b) after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker;
(c) the maker is, at the time when he makes the confirmation, a trustee, and the first-mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or
(d) he is bound under subsection 8.

(8) Where a person who confirms a cause of action,

(a) to recover property;
(b) to enforce an equitable estate or interest in property;
(c) to realize on property subject to a security interest;
(d) to redeem property subject to a security interest;
(e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or of the income or profits of collateral or by way of sale, lease, or other disposition of such property or by way of other remedy affecting such property; or
(f) to recover trust property or property in which trust property can be traced,

is on the date of the confirmation in possession of the property, the confirmation binds any person in possession during the ensuing period of limitation, not being, or claiming through, a person other than the maker who is, on the date of the confirmation, in possession of the property.

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

(10) Except as otherwise provided in this section, nothing in this section operates to allow confirmation of an unliquidated sum or to make any right, title, or cause of action capable of being confirmed that was not capable of being confirmed before this Act came into force.

Notes:

1. *The Alberta Commissioners at* 1976 Proceedings, 192 *thought that the general principle of renewal by part payment or acknowledgment should remain, though they thought that the provision for promises in Part* 1 *can be omitted for promises coming within*

acknowledgments. They thought that acknowledgment or part payment should still be valid only if made in writing by a party or his agent and made to the other party and his agent.

2. *The Alberta Commissioners noted two "small points" at pages* 193 *and* 194. *One is that the provisions should not extend for claims for unliquidated damages such as tort claims. B.C.'s provision is that it does not extend to anything which could not have been confirmed before the Act came into force, and Ontario has amplified that by saying that it does not allow confirmation of an unliquidated sum or anything that was not capable of being confirmed before the Act came into force. That means that instead of being able to find out from the Limitations Act whether something can be confirmed, it will be necessary to go and look up the repealed Act and the law generally. We would prefer to include a list of causes of action which can be confirmed. There is such a list at* 1976 Proceedings, 191 *and* 192. *The list would be rather complicated and disjointed, but it seems to us that it would be better to require the reader to read a complicated and disjointed list in the section than to conduct what may be an extensive legal investigation. Perhaps the Conference should give a direction.*

3. *The second "small point" is that the Commissioners preferred to refer to part payment and acknowledgment rather than to use the word "confirmation" which New South Wales and British Columbia have adopted. Since the Ontario draft Act has also adopted "confirmation" we think that the point has been reached at which uniformity should be promoted by the use of the word in the Uniform Act. Apart from that point, there is a good deal to be said for providing a single word which can be used in several places.*

4. *The last few lines of subs.* 5(7) *of the Ontario draft Act appear to mean that if both A and B are in possession of property or collateral, and if A makes a confirmation, that confirmation is binding on all persons claiming through A except B and also except persons claiming through B. We find these lines difficult to follow and hope that the draftsmen can make them clearer.*

5. *It should be noted that subs.* (7) *is against the views of the Alberta Commissioners as expressed by our previous report, that part payments and acknowledgements should be binding on co-debtors.*

Section 16

16. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him,

    (a) a further cause of action for the conversion or detention of the goods; or

    (b) a new cause of action for damage to the goods; or

    (c) a new cause of action to recover the proceeds of a sale of goods,

    accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of six years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

Notes:

1. *This is s.* 10 *of the Ontario draft Act. It has not been considered by the Conference.*

2. *Extinction of title under s.* 9 *would, we think, make this section unnecessary, as it would mean that there could no longer be conversion as against the original owner. We would accordingly delete this section but have included it for discussion.*

PART 7

FINAL LIMITATION PERIOD

Section 17

Subject to section 5, but notwithstanding a confirmation made under section 15 or a postponement or suspension of the running of time under section 12 or 13, no action to which this Act applies shall be brought after the expiration of thirty years after the date on which the right to do so arose.

Note:

This is s. 8(1) *of the Ontario draft Act. It imposes an outside limit of* 30 *years in all cases except those in which there is no limitation period.*

PART 8

ASSERTION OF STATUTE BARRED CLAIMS IN AN EXISTING PROCEEDINGS

Section 18

Alternative No. 1

(1) Any claim by way of set-off, counterclaim, the adding of parties, or third party proceedings shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is made, or the parties added, or the third party proceedings are taken.

Alternative No. 2

(1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim, or
(b) third party proceedings, or
(c) claims by way of set-off.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person where a claim by that person

(a) against the first-mentioned person, and
(b) relating to or connected with the subject matter of the action,

is or will be defeated by pleading a provision of this Act as a defence by the first-mentioned person.

Notes:

1. *We refer the members of the Conference to the discussions under the headings "Counter-claims and Third Party Proceedings"; "Amendments, Excluding Change of Parties; and "Amendments Changing Parties" at* 1976 *Proceedings,* 200 *to* 203.

2. *The* 1977 *meeting of the Conference approved a section such as British Columbia's s.* 4(1) *which is the second alternative set*

forth above, subject to the deletion of its provision dealing with additional and substituted parties which we will deal with in s. 19 *of this draft. Since that time the Ontario draft Act has proposed a slightly different s.* 4(1), *which is the first alternative set forth above.*

3. *The difference in effect between the two alternatives appears to be that:*

   (1) *The Ontario provision would allow any set-off, counterclaim or third party notice that is based on a cause of action that was not statute-barred at the time the original action was brought (since it provides that the set-off counter-claim or third party notice proceeding is deemed to have the same commencement date as the original action) and*

   (2) *The British Columbia provision would not make any restriction based on the time the cause of action arose, but would restrict it by requiring the claim now being advanced to be related to or connected with the subject matter of the original action.*

4. *We are inclined to prefer the British Columbia provision, as we think that it is the relation to the original subject matter which makes it fair to bring the new claim forward. We are also inclined to avoid where possible drafting which deems something to have happened when it has not happened, but that does not affect the policy decision.*

5. *It also appears to us that there is a function for British Columbia's s.* 4(2), *which is subs.* (2) *of this draft. If A sues B and B raises an otherwise statute-barred counterclaim, he should not be permitted to pursue it if A has a related claim against B which he cannot bring. It may be that the draftsmen will conclude that the main provision can be drafted so that will not happen and so that the subsection will not be needed.*

Section 19

Alternative No. 1

19. The court in any action pending in that court may allow an application for the amendment of any pleading or for a change of party, upon such terms as to costs or otherwise as the court considers just, notwithstanding that any fresh cause of action disclosed by the amendment or the cause of

action against the new party became barred by a limitation provision.

Alternative No. 2

19. (1) The court may allow an amendment changing the claim asserted in an action, notwithstanding that since the commencement of the action a relevant limitation period has expired, whenever the claim sought to be added by amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ.

(2) The court may allow an amendment adding or substituting a plaintiff, or changing the capacity in which a plaintiff sues, notwithstanding that since the commencement of the action a relevant limitation has expired,

(a) if the claim to be asserted by the new plaintiff, or by the original plaintiff in his new capacity, arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the action as originally constituted, and

(b) the defendant has, within the limitation period plus the period provided by law for the service of process, received such formal or informal notice that he will not be prejudiced in maintaining his defence on the merits.

(c) the court is satisfied that the addition or substitution of the new palintiff is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in or intended to be asserted in the action.

(3) The court may allow an amendment adding or substituting a defendant, or changing the capacity in which a defendant is sued, notwithstanding that since the commencement of the action a relevant limitation period has expired, if

(a) the claim to be asserted against the new defendant, or against the original defendant in his new capacity, arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the action as originally constituted, and

(b) the party to be brought in by amendment has, within the limitation period plus the period provided by law for the service of process, received such formal or informal notice that he will not be prejudiced in maintaining his defence on the merits.

(4) For the purposes of this section, "court" means a court in (here insert name of jurisdiction).

Notes:

1. *The Conference appears to have accepted the proposal made at the* 1976 Proceedings, 200 *with regard to amendments excluding change of parties, and to have provided for the addition of a provision for adding parties with the Alberta Commissioners to work out alternatives. We accordingly have shown alternatives for both. Our preference is for the second alternative as we are inclined to think that the legislation should direct the court to exercise its discretion only in circumstances which clearly justify it.*
2. *There may be a question in a province whether the provision should be in the Act or in rules of court. We think it should appear in the Act so as to avoid any suggestion that the rules are invalid as being in conflict with it, and because of its importance. If thought desirable, however, it could simply empower the rule making authority to make rules to this effect.*

PART 9

CONFLICTS OF LAWS

Section 20

Alternative No. 1

The law of limitations of the province shall be applied to all actions in the province.

Alternative No. 2

The law of limitations shall be characterized as substantive law for the purpose of the application of the rules of the conflict of

laws, whether or not the particular law bars the remedy or extinguishes the rights.

Alternative No. 3

Where it is determined that the law of another jurisdiction is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply the limitation law of the province or may apply the limitation law of the other jurisdiction if a more just result is produced.

Notes:

1. *The question of the choice of limitations law has not yet been considered by the Conference.*

2. *The Uniform Act does not make any provision with regard to the choice of limitations law, but presumably leaves it to the rules of private international law. The problem arises only if there is a difference between the limitations law of the forum and the limitations law (if any) of another jurisdiction whose general law is, by the conflicts rules of the forum, to be applied to the resolution of the dispute. The conflicts rule appears to be that if the limitations law of the other jurisdiction would extinguish the right sued on, it is substantive and should be applied; while if it would merely bar the remedy, it is procedural only, and the limitations law of the forum should be applied. The distinction is somewhat artificial and does not give effect to the considerations of policy which would suggest that one choice is better than another.*

3. *S. 14 of the Ontario draft Act (which is Alternative 2 above) would classify limitations law as substantive. The reasons given by the Ontario Law Reform Commission are as follows:*

These conflicts rules have been severely criticized by the leading authorities. (See, for example: J. D. Falconbridge, *Essays on the Conflict of Laws*, 2nd ed., Chapter 12; G. C. Cheshire, *Private International Law*, 7th ed., pp. 585-588.) There are three main difficulties:

1. It has already been noted that the distinction between barring the remedy and extinguishing the right is both unreal and, to some, theoretically unsound. For practical purposes, the barring of the remedy effectively rends claims worthless

except in a few unusual cases. Jurisprudentially, the separation of remedy from right has been attacked. Statutes of limitation should all be regarded as substantive law, regardless of whether the remedy is barred or the right extinguished.

2. The governing limitations laws should be of those of the jurisdiction to which the courts look for the appropriate substantive law. If an action arising out of a motor vehicle accident in Ontario is brought in Quebec because, for example, the defendant resides there, the party suing should have to start his action within the time required in Ontario. Now he may sue in Quebec, even if it is too late for him to sue in Ontario. That is not right.

3. It is not always a simple matter for the courts of one jurisdiction to determine whether the limitations law of another jurisdiction is substantive or procedural. For example, if an Ontario court had to examine the limitations law of Germany, Egypt or China, it might well find different concepts and language make classification difficult.

Various reforms in the conflicts rules have been suggested. (See, for example, Falconbridge and Cheshire, referred to above.)

This Commission has, however, already recommended that there should be a general extinguishment of right once time has run. The acceptance of that principle would in itself lead to improvements in the conflict of laws field. If the recommendations were implemented, courts, both in and outside Ontario, would presumably classify the new Ontario statute as substantive and not procedural law, at least for the purposes of conflict of laws. This is the desirable result and, in order to ensure that it will be achieved, the Commission recommends that the proposed statute contain a provision stating that it be classified as substantive law for conflict of laws purposes. It should then follow that the courts of other jurisdictions would apply the Ontario limitation statute to causes of action arising out of Ontario law but being enforced in their courts.

This leaves the problem of how to treat causes of action arising in other jurisdictions but which are the subject of suit in the Ontario courts. Since the proposed Ontario statute would now be regarded as substantive rather than procedural law, it would probably not apply to such actions at all, unless, of course, the statute was made expressly applicable. First, it would not apply to "foreign" causes of action

as part of the procedural law of Ontario for the simple reason that it would be classified as substantive law. Second, while containing a provision for general extinguishment of right, it must be doubtful if such a provision should be applied to rights arising out of the law of other jurisdictions. If it were to be applied, it could only extinguish the right so far as Ontario is concerned.

The New South Wales Commission, which recommended a general extinguishment of right provision, recognized that such a provision would result in the courts of other jurisdictions applying the New South Wales limitations statute when dealing with a matter to which the New South Wales substantive law was applicable. This result was considered "natural and proper". However, that Commission went on to state that the statute it was recommending would also govern actions brought in New South Wales for the enforcement of rights arising under the laws of other countries. Its Report does not explain how this would be the case if the statute is no longer procedural. The New South Wales Commission is trying to have it both ways. Its proposed statute is to apply in "foreign" courts to actions arising under New South Wales law and in the New South Wales courts to actions arising under the law of "foreign" jurisdictions. The New South Wales Commission have appeared to overlook the role that mutuality should play in private international law.

This Commission believes that the limitations laws generally should be classified as substantive law. Whether a cause of action arises under the laws of Ontario or some other jurisdiction, the appropriate limitation law is that of the jurisdiction under the laws of which the cause of action arises. Ontario courts in dealing with "foreign" causes of actions should apply the "foreign" statute of limitations. Where an action is brought in Ontario for damages arising out of a motor vehicle accident in Quebec, the Quebec limitations law should govern. Where an action is brought in the Ontario courts on a contract to which the substantive law of New York applies, then it is the New York limitations laws that should be looked to.

Accordingly, this Commission recommends that:

The proposed statute contain a provision that Ontario limitations law and the analogous law of any other province, or of any state or country shall be classified as a substantive law for the purposes of private international law (conflict of laws), whether or not the particular law bars the remedy or extinguishes the right.

It will be remembered that the Conference's decision was not to provide for extinction of most statute-barred claims.

4. (1) *We think, however, that the law of the forum should be made applicable as in Alternative* 1 *above. The objective of limitations law is to protect people from claims after a certain period. The question is: what people? It seems to us that the answer is: those people who live within the protection of the laws of the enacting jurisdiction, i.e., those who would otherwise be exposed to the effect of judgments of its courts based on stale claims. If it does not apply its laws to those impleaded in its courts, particularly its own residents, it fails to provide that protection where it can effectively do so; instead its legal system will apply the standards of some other jurisdiction which may not have a limitations law at all, or may have one that is harsh or capricious. The obverse side of this is that if the enacting jurisdiction tries to make its limitations law substantive it will effectively protect the parties in the courts of the other forum only if that other forum is one which has conflicts rules similar to the ones we have mentioned, that is, it will be dependent upon that forum to give the protection.*

(2) *There are valid reasons for applying to the resolution of a dispute the general law of the jurisdiction with which the cause of action has the closest connection. People usually contract against the legal background of the time and place of the contract, and people should drive their automobiles according to the laws of the place where they are driving. We do not think, however, that as a matter of practice in the formation of contract the parties take into account the length of time they will be allowed to sleep on their rights or the length of time that they will be in jeopardy if they do not act properly; and one of the few things that we are sure of is that a motorist cannot be heard to say that a consideration of limitations law was relevant to a decision which involved him in an accident. Accordingly we see no reason in principle why the application of the general law of the other jurisdiction relating to the creation of rights should involve the application of its law relating to the length of the time during which the rights, once perfected, are enforceable.*

(3) *We recognize that our proposal, Alternative* 2, *involves one difficulty. If a defendant can be sued in several jurisdictions (e.g., a railway company or an insurance company doing business across Canada), a plaintiff will be able to sue in the province with the longest period. We think this undesirable, but that on balance it is better to put up with it rather than with a situation in which a jurisdiction does not extend the protection of its own security and peace law to those appearing in its own courts. We do not think that under the present rules (which, in Canada and England at least usually involve the application of the law of the forum) many plaintiffs allow limitation periods to expire in their own jurisdictions so as to follow defendants elsewhere, and we do not think that defendants are much inconvenienced.*

5. *The British Columbia solution (Alternative* 3) *is somewhat different. It applies only if the other jurisdiction's limitations law is procedural, i.e., it recognizes the distinction between procedural and substantive limitations law and would apply the other jurisdiction's limitations law if it is substantive. If the other jurisdiction's law is procedural, the court would have a discretion to apply the law of either jurisdiction in order to produce a just result. We do not think this desirable. In an individual case a court is likely to think it just that a plaintiff succeed if he has a good cause of action and fail if he does not, but a decision on that ground would not take into consideration the broad objectives of limitations law. It appears to us that the law should be as certain and as simple as circumstances permit, and that it would be better either to apply the law applicable to the cause of action or the law of the forum, with our choice being the latter.*

6. *We should mention another alternative which we have considered. That is that the court would apply firstly the limitations law of the original jurisdiction and secondly (if necessary) the law of the forum, so that the plaintiff would have a double hurdle. That would have two advantages. First, it would avoid forum-shopping. Second, it would give some consideration to the law of the original jurisdiction. Our view, however, is that it would be too harsh on plaintiffs.*

APPENDIX N

PART 10

THE CROWN

Section 21

(1) In this section, "the Crown" means the Crown in the right of (here name the enacting jurisdiction), and in so far as the Legislature extends, includes the Crown in all its other capacities.

(2) Except as provided in subsection (3), this Act applies to actions by or against the Crown.

(3) An action by the Crown for possession of land may be brought at any time, and the title of the Crown to land is not extinguished by possession by another person.

Note:

This embodies the decisions of the 1977 *meeting of the Conference.*

GENERAL NOTES

1. *We would draw to the attention of the Conference that we have not included a section similar to s.* 15 *of the Ontario draft Act, which reads as follows:*

   15. The provisions of this Act respecting the postponement, suspension and extension of the time within which actions may be commenced apply to all special limitation periods contained in any other Act, unless the other Act expressly provides otherwise.

   We sympathize with the intention of the provision but we do not think that we know enough about the laws of all the provinces or the nature of the limitation periods in all those provinces and the reasons for them to be able to recommend that a Uniform Act contain such a provision.

2. *The draft does not contain any provision dealing with contracting out of the Act other than that dealing with "confirmation."*

3. *We have not provided any transitional provision.*

Margaret Donnelly
W. H. Hurlburt
H. G. Reid
W. E. Wilson

23 June 1978

APPENDIX O

(See page 33)

POWERS OF ATTORNEY

I

REPORT OF THE ONTARIO COMMISSIONERS

The subject of powers of attorney which can survive the mental incapacity of the donor was extensively discussed at the 1976 and 1977 meetings of the Uniform Law Conference. Little agreement was reached beyond the general principle that legislation to provide for a form of power of attorney that could survive mental incapacity was desirable. There was apparently a general feeling that the legislation should be as simple as possible and should be modelled on a comparable provision of the American Uniform Probate Code.

Accordingly we have drafted a very simple statute for this year's Conference (attached as the Schedule). We have not included any standard form of enduring power of attorney. We have not included provisions for filing an enduring power or for applying to a court for substitution of a new attorney. This has resulted in a drastic simplification of the draft Act.

This year's draft *Uniform Powers of Attorney Act* simply provides that, by the inclusion of appropriate wording, any written power of attorney can survive the donor's mental incapacity. Such a power of attorney must be signed and witnessed. It ceases to be valid if a committee of the estate of the donor is appointed pursuant to mental incompetency proceedings.

Section 3 of the draft Act is an attempt to clear up some of the difficulties relating to the termination of all powers of attorney. It protects innocent third parties who have dealt with the attorney after the power has terminated. It also shelters from liability the attorney who exercises the power after it has terminated if the attorney could not reasonably have known of the termination.

There is some urgency to this matter. There have been many requests that legislation to permit powers of attorney to survive mental incapacity be brought forward soon. Lawyers, particularly those with extensive family-oriented practices, perceive a pressing need for this kind of legislation. There are many cases where existing law is creating

hardship. We present our draft Act to the Conference with the hope that a consensus can be quickly reached.

Stephen B. McCann
on behalf of the
Ontario Commissioners

6 June 1978

SCHEDULE

DRAFT UNIFORM POWERS OF ATTORNEY ACT

Enduring power of attorney

1. A written power of attorney that,

(*a*) states that the power is to continue notwithstanding any mental incapacity of the donor of the power; and

(*b*) is signed by,

(i) the donor; and

(ii) a witness, other than the attorney or the spouse of the attorney, to the signature of the donor,

does not cease to be valid by reason only of mental infirmity that renders the donor incapable of managing his affairs after the power is granted.

Effect of appointment of committee

2. A written power of attorney that continues to be valid notwithstanding mental infirmity of the donor of the power ceases to be valid with the appointment of a committee of the estate of the donor.

Where suspension or termination of power not known

3. Where a power of attorney is terminated,

(*a*) an act in pursuance of the power by the attorney in favour of a person who does not know of the termination of the power is valid and binding in favour of the person and in favour of a person claiming under him; and

(*b*) the attorney is not liable to the donor or the estate of the donor of the power for an act in pursuance of the power where the attorney did not know and with the exercise of reasonable care would not have known of the termination of the power.

II

UNIFORM POWERS OF ATTORNEY ACT

(as adopted by the Conference in 1978*)*

Termination of authority under power of attorney

1.—(1) Where the authority under a power of attorney is terminated, an act in pursuance of the power by the attorney in favour of a person who does not know of the termination of the authority is valid and binding in favour of the person and in favour of a person claiming under him.

Idem

(2) Where the authority under a power of attorney is terminated, the attorney is not liable to the donor of the power or the estate of the donor for an act in pursuance of the power where the attorney did not know, and with the exercise of reasonable care would not have known, of the termination of the authority.

Enduring power of attorney

2.—(1) The authority of an attorney given by a written power of attorney that,

(*a*) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and

(*b*) is signed by the donor and a witness, other than the attorney or the spouse of the attorney, to the signature of the donor,

is not terminated by reason only of subsequent mental infirmity that would but for this Act terminate the authority.

Effect of appointment of a committee

(2) Subject to section 1, the authority of an attorney under a power of attorney referred to in subsection (1) terminates on the appointment of a committee (*or other method by which a committee is established for the estate of the donor in the enacting jurisdiction*).

APPENDIX P

(See page 33)

PREJUDGMENT INTEREST

ONTARIO MEMORANDUM

Ontario has recently enacted legislation dealing with the awarding of interest prior to judgment on both liquidated and unliquidated claims (see Schedule 1). With the kind permission of the British Columbia Commissioners, the relevant part of the amending Act, together with a compendium which was tabled in the Ontario Legislature at the time of First Reading (see Schedule 2) are being circulated to members of the Conference in the hope that these materials will contribute to the discussion.

Stephen B. McCann
on behalf of the
Ontario Commissioners

6 June 1978

SCHEDULE 1

THE JUDICATURE AMENDMENT ACT, 1977 (No. 2)

Statutes of Ontario, 1977, c. 51

s. 38 re-enacted; s. 39 repealed

3.—(1) Sctions 38 and 39 of the said Act are repealed and the following substituted therefor:

Prime rate defined

38.—(1) In this section, "prime rate" means the lowest rate of interest quoted by chartered banks to the most credit-worthy borrowers for prime business loans, as determined and published by the Bank of Canada.

Idem

(2) For the purposes of establishing the prime rate, the periodic publication entitled the Bank of Canada Review purporting to be published by the Bank of Canada is admissible in evidence as conclusive proof of the prime rate as set out therein, without further proof of the authenticity of the publication.

Prejudgment interest

(3) Subject to subsection 6, a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon,

(*a*) at the prime rate existing for the month preceding the month on which the action was commenced; and

(*b*) calculated,

(i) where the judgment is given upon a liquidated claim, from the date the cause of action arose to the date of judgment, or

(ii) where the judgment is given upon an unliquidated claim, from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of the judgment.

Special damages

(4) Where the judgment includes an amount for special damages, the interest calculated under subsection 3 shall be calculated on the balance of special damages incurred as totalled at the end of each six month period following the notice in writing referred to in subclause (ii) of clause (*b*) of subsection 3 and at the date of the judgment.

Exclusions

(5) Interest under this section shall not be awarded,

(*a*) on exemplary or punitive damages;

(*b*) on interest accruing under this section;

(*c*) on an award of costs in the action;

(*d*) on that part of the judgment that represents pecuniary loss arising after the date of the judgment and that is identified by a finding of the court;

(*e*) except by consent of the judgment debtor where the judgment is given on consent;

(*f*) where interest is payable by a right other than under this section.

Discretion of judge

(6) The judge may, where he considers it to be just to do so in all the circumstances,

(*a*) disallow interest under this section;

(*b*) fix a rate of interest higher or lower than the prime rate;

(*c*) allow interest under this section for a period other than that provided,

in respect of the whole or any part of the amount for which judgment is given.

Application of subs. 1

(2) This section applies to the payment of money under judgments delivered after this section comes into force, but no interest shall be awarded under this section for a period before this section comes into force.

SCHEDULE 2

COMPENDIUM

PART C

PREJUDGMENT INTEREST

Policy 1

Sections 38 and 39 of *The Judicature Act* should be repealed and replaced with legislation reforming the law related to interest prior to judgment.

Discussion

As the Judges of the Supreme Court of Ontario have pointed out to the Attorney General, the provisions of sections 38 and 39 of *The Judicature Act* which provide for prejudgment interest are totally inadequate to meet current needs. It has been submitted that the present provisions are a factor of increasing significance contributing to delay in the civil courts.

At present, no interest is payable or allowable at law in cases involving unliquidated damages, that is where the amount of entitlement is not mathematically calculable or fixed. Where damages are liquidated, low rates of interest are often given by courts. High commercial rates of interest make it extremely profitable for a defendant to delay judgment.

The inability of judges to award interest in cases where damages are unliquidated and the low rate of prejudgment interest usually awarded, combine with unreasonable delays in obtaining judgment or settlement, are unfair to plaintiffs.

By the time a law suit in Ontario gets to trial, it is likely that several years have elapsed since the plaintiff suffered his damage or was denied payment of a debt. If the court decides that the defendant is liable to pay a sum of money to the plaintiff, the plaintiff may or may not be able to claim interest on the debt or damages for the

period prior to trial. Whether or not he will be able to do so depends on the effect of a body of law that is riddled with inconsistency.

Sections 38 and 39 of *The Judicature Act* provide:

> 38. Interest is payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it.
>
> 39. (i) On the trial of an issue or on an assessment of damages upon a debt or sum certain, payable by virtue of a written instrument at a time certain, interest may be allowed from the time when the debt or sum became payable.
> (ii) If such a debt or sum is payable otherwise than by virtue of a written instrument at a time certain, interest may be allowed from the time when a demand of payment was made in writing, informing the debtor that interest would be claimed from the date of the demand.
> (iii) In actions for the conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and the money recoverable thereon.

The Ontario legislation has not been altered in substance since originally enacted in 1837. It was modelled on section 28 of the English *Civil Procedure Act* of 1833, better known as Lord Tenterden's Act. One significant difference between the provisions of the Ontario Act and the original English statute is that section 38 contains the words "in which it has been usual for a jury to allow it". The judicial interpretation given these words has vastly expanded the courts' power to grant prejudgment interest on a debt.

In summary, it may be said that the law is inadequate in that it does not permit a court to allow a plaintiff interest for the period between the time his cause of action arose and the date of judgment in cases where the plaintiff's claim is for unliquidated damages arising out of a breach of contract or most tortious acts.

EFFECT OF PRESENT LEGISLATION

Interest Must Be Allowed Interest

Interest as of Right

Where an agreement between the parties provides for interest to be paid after the date for repayment of a debt.

Where a statute provides for interest to be paid, e.g., s. 84 of *The Landlord and Tenant Act* (Re Security Deposit).

Where Payments of Prejudgment Interest Presently in Discretion of Court

(1) *Interest on Debts*

(a) Where a debt is payable by virtue of a written instrument at a time certain. (Section 39(1)).

(b) If a debt is payable otherwise than under (a) above, the court may allow interest if a demand for payment was made in writing, informing the debtor that interest would be claimed from the date of the demand. (Section 39(2)).

(c) Where the court finds that the payment of any just debt has been improperly withheld, it may award interest for such time, at such rate as it may think right. (This is the effect given the concluding words of section 38: [Interest is payable in all cases . . .] "In which it has been usual for a jury to allow it.")

(2) *Interest on Damages*

Interest is allowable by a court on damages arising from the commission of only two torts, wrongful sale (conversion) of personal property or wrongful damage to, or interference with, personal property (*trespass de bonis asportatis*). It is also allowable on contracts of insurance. (Section 39(3)).

Where Interest Presently May Not Be Allowed By a Court

Interest on Damages (Unliquidated Claims*)

(a) Interest may not be allowed by a court on claims for unliquidated* damages for breach of contract, for example, damages for loss of business arising from breach of contract.

(b) Interest may not be allowed on damages for tortious acts other than the two torts named in section 39(3) of *The Judicature Act* that is, wrongful sale (conversion) of personal property or wrongful damages to, or interference with, personal property (*trespass de bonis asportatis*). The most common example of tortious activity upon which no interest may be allowed by a court are damage claims arising from automobile collisions.

**A claim is unliquidated whenever the amount to which the plaintiff is entitled cannot be ascertained by mathematical calculation or cannot be fixed by any scale of charges, or other positive data.*

Policy 2

Reforming legislation should as far as practicable embody the concept that prejudgment interest is a form of compensation for the loss of use of money.

Discussion

In general, interest is now applied as a form of *punishment* to a defendant for *wrongfully* delaying the payment of a debt. Where a defendant merely delays the payment of damages, no interest is permitted. The case law provides a rationale for the present law. Interest, it is said, is now allowed on a claim for unliquidated damages because the plaintiff must prove more than mere entitlement to judgment. He must prove the classes, the type of damages and the amounts thereof sustained. Where more than one defendant is involved, the plaintiff must prove the liability of one or more of the defendants and the extent of their respective liability. In these circumstances, the present law regards the delay in payment as reasonable and, therefore, does not attach a liability for interest.

This rationale does not stand up under examination. While the exact quantum of damages may be more difficult to determine where it is unliquidated, the fact that approximately 90 per cent of personal injury claims are settled prior to judgment indicates that the law really reflects a bias against interest rather than a reasoned approach designed to obtain fairness between the parties.

The present bias of the law against allowing interest on damages derives from the medieval law, which under the influence of religious strictures against usury, adopted a hostile attitude towards the recovery of interest. While the conditions of commerce over the last few centuries have caused a relaxation in the rigidity of the law, we are still burdened by our historical inheritance.

Interest as punishment does not accord with our present notions of the function of the civil law. To a great degree, modern civil law does not attempt to punish a defendant for his actions. Punishment is left to the criminal law. The civil law attempts to restore the parties to their respective positions prior to the breach of contract or tortious activity, at least so far as money can compensate. The defendant by not paying the claims of the plaintiff has had the use of the money that the court, in its judgment, has determined should have been that of the plaintiff. The plaintiff has been denied the use of this money.

All jurisdictions which have revised their laws related to the assessment of prejudgment interest have abandoned the punishment principle and adopted the principle of compensation. British Columbia, New Brunswick, England, South Australia and numerous American states are among the jurisdictions which have adopted the compensation principle.

Interest as compensation can be treated either practically or theoretically with very different results. One example concerns the time from which interest should normally run. An architect makes an error in the design of a wall, which results in some damage one month after the construction. However, neither the architect nor the owner discover the damage until five years have elapsed. A successful action is then brought by the owner for damages. Should the interest on the damages run from the time the cause of action arose—that is, one month after construction, or should it run from some later time—such as the time the owner notified the architect of the claim?

Approaching the matter theoretically, it could be said that the plaintiff owner, although he did not know of the damage, has "suffered" it from the first month after construction. The plaintiff has been denied his compensation from that time. The defendant, architect, has had the benefit of the money it would have taken to repair the damage from that time. Theoretically, interest should run from the time the cause of action arose.

The practical approach would take cognizance of the architect's inability to rectify a fault of which he had no knowledge. It would note that payment of interest to the plaintiff for damages of which he was unaware is compensation for a loss he did not experience. *The practical approach would indicate that interest should run from notification of the claim.*

Policy 3

The legislation should provide that prejudgment interest shall normally be included as part of the judgment upon the application of a party in favour of whom a judgment for the payment of damages, compensation or any other pecuniary amount has been or is to be pronounced. Guidelines for awarding interest should be established in the legislation but the court should be given power to:

(a) Fix a rate of interest higher or lower than that normally applicable by virtue of the legislation;

(b) Fix some period in respect of which interest is payable other than which is normally applicable by virtue of the legislation, and;

(c) Disallow interest on the whole or any part of the amount for which judgment is given.

Discussion

Assuming that prejudgment interest is to be allowed on all, or almost all, claims payable in money, there are three basic approaches to the allowance of interest:

1. Prejudgment Interest awarded as of right.

2. Permit the courts to award interest as a discretionary remedy without legislative guidelines.

3. Permit courts to award prejudgment interest as a discretionary remedy subject to legislative guidelines.

Interest is payable as of right where a court has no power to alter the sum upon which it is paid, the period for which it is paid, or the rate of interest. This approach was recommended in the Report of the British Columbia Law Reform Commission, but not totally accepted by the British Columbia legislature in enacting *The Prejudgment Interest Act.* (Schedule 1).

As noted earlier, prejudgment interest is now payable as of right where a contract provides for interest after the date for payment under the contract. It is also payable as of right where a statute provides for interest (e.g. s. 24 of *The Partnership Act*).

The principal advantage of having interest payable as of right is to provide certainty in commercial dealings.

There are a number of significant disadvantages to having interest payable as of right. While interest as compensation should be the primary underlying principle of an award of prejudgment interest, there are other interests which should be considered. If lack of prejudgment interest is presently a factor in inducing defendants to protract litigation and avoid early settlement, the certainty of interest at a rate which approximates commercial lending rates may have a similar effect on a plaintiff. *It would appear that the interests of the administration of justice would be best served by permitting the court to exercise some discretion over the awarding of interest.*

The retention of some discretion in the court would also allow a court to avoid certain anomalies in the law of damages. One technical example will illustrate that there should be some flexibility. Where a court substitutes a money award for specific performance of a contract dealing with land, the measure of damages is the difference between the contract price and the value of the property at the date of judgment. If interest was mandatory, it would have the effect of "doubling up" on the liability of the defendant, at least for a part of the period between the accrual of the cause of action and the date of judgment. If the court had power to disallow interest, unfairness could be avoided.

It would be possible to make the award of prejudgment interest purely discretionary. The court would be permitted but not directed to award interest where the court felt that it was fair to do so. No legislative guidelines would be provided as to the principal sum on which interest would be calculated, the rate at which interest would run or the period during which it should be reckoned. The central difficulty with this approach is that until the case law was developed neither the litigants nor the courts themselves would have a clear concept of the principles upon which to operate. Legal costs and judicial time would be expended in developing guidelines. Some courts, no doubt, would continue to apply the principle of interest as punishment and not adopt the principle of interest as compensation. Other courts, as is indicated by present judicial activity, would be quick to adopt the new principles without the assistance of adequate norms.

In 1934, the United Kingdom enacted s. 3(1) of *the Law Reform (Miscellaneous Provisions) Act* which permitted the courts to award interest prior to judgment on any claim for debt or damages without restriction related to the nature of the cause of action in respect of which the claim was made. Notwithstanding the power to do so, the courts continued their practice of allowing interest only in cases of inordinate delay by the defendant. The English Law Commission pointed out in its 1971 Working Paper on Assessment of Damages in Personal Injury Litigation, that despite the Law Revision Committee's rejection of any differential treatment of claims for general damage in tort:

> It is a curiosity of legal history that from 1934 to 1969, there appears to have been only one contested personal injury case in England . . . in which interest on damages in respect of the period between the date of the injury and the date of the

award was included in the amount of the award. It seems clear that the court will not discontinue their practice of regarding interest as punishment for *unnecessary* delay unless the legislation specifically directs them so to do.

It would seem that the most suitable approach at present is to provide legislative guidelines to assist the court. Guidelines would set out the rules which should be applied in the normal case but would permit a court to depart from those rules where there is good reason to do so. An example of this approach is the South Australian legislation (see Schedule 2). While certainty of result would not be achieved, a reasonable approximation would be likely. The court would have the power to prevent unfairness to a defendant as well as a plaintiff and to avoid legal anomalies.

Policy 4

The legislation should provide that the normal rate of interest be the primate rate at the date of the issuance of the writ.

Discussion

The present rate of 5 per cent set by section 3 of the federal *Interest Act* in 1900 is obviously too low.

Until February 1976, when the Supreme Court of Canada in *Prince Albert Pulp Co. Ltd. v. Foundation Company* decided the matter, there was considerable doubt as to whether a judge had the power to fix a rate of prejudgment interest greater than the 5 per cent established as the "legal rate" under s. 3 of the federal *Interest Act*. The Supreme Court of Canada held that a provision of the Saskatchewan legislation identical to s. 38 of *The Judicature Act* permitted a judge to set a rate higher than 5 per cent and that the provision was *intra vires* the provincial power.

It is now clear that the province has the constitutional power to provide for a rate of prejudgment interest as part of its authority to make laws in relation to the administration of justice in the province.

It is likely that any rate fixed by legislation will likely not be amended with sufficient frequency to reflect changing commercial rates.

The same failure to make the rate reflect commercial rates would not necessarily be true if rates were fixed under the Rules, but even

with the Rules there is often a considerable time-lag between the need for change and an amendment to the Rules.

Another possible disadvantage to permitting the Rules Committee to establish the rate is that such a rate might not approximate commercial interest rates. Court established rates in other jurisdictions are lower than commercial rates. On the other hand to establish the rate would ensure that the rate was both stable and easily ascertainable.

A third choice is the "prime rate". Federal Bill C-16, *The Borrowers' and Depositors' Protection Act,* employed the concept of "the prime rate" for a number of purposes, including the rate at which interest will accrue on judgment debts, that is, the rate payable on amounts unpaid after judgment. This Bill died on the Order Paper, but is expected to be reintroduced.

Bill C-16 defines "prime rate" as:

> "Prime rate", on any day, means the lowest rate quoted by chartered banks to the most credit-worthy borrowers for prime business loans . . .

The Bank of Canada publishes that rate in its monthly publication along with a schedule stating the "prime rate" for each month for the preceding five years. As the publication is of present significance and is likely to increase in importance when the federal legislation is enacted, it would appear to be a reliable method for determining the prime rate.

A rule of evidence could be enacted to enable the court to determine conclusively the prime rate:

> The periodic publication of the Bank of Canada that sets out the lending rate, or range of rates, quoted to the most credit-worthy borrowers for prime business loans by chartered banks on a particular day is conclusive proof in any court of the lending rate, . . . for prime business loans quoted by chartered banks on that day.

Prime rate would seem appropriate for prejudgment interest in most cases, since:

(i) It approximates true commercial rates and together with the legal costs of prolonging an action would remove any incentive that a defendant might have in protracting litigation;

(ii) While it exceeds the rate which a plaintiff would receive on bank deposits, or for money paid into court, it is not as high as many other investments. If the plaintiff was required to borrow to cover his expenses, the interest would cover most but not all his interest charges. Incentive to arrive at a determination would still exist;

(iii) It could be easily ascertained by the court, or by the court administrative staff.

(iv) It is the rate which likely will be applied after judgment pursuant to the *Borrowers' and Depositors' Protection Act*.

If the prime interest rate is selected over a fixed rate, it is necessary to specify the time at which the prime rate would normally be calculated for prejudgment interest. It is theoretically possible to have the rate vary monthly, quarterly or half yearly. These approaches complicate the calculation of interest and may lead to disputes unrelated to the merits of the case. In these circumstances, it would seem better to establish a clear date on which the rate is to be "fixed" subject to the court's power to vary. Prime *at the time of judgment* would not be adequate to permit an individual suing on a specially endorsed writ to specify the interest rate demanded so as to allow the defendant to make payment. *Prime at the date of the issuance of the writ would appear the most satisfactory date at which to determine the interest rate.*

Policy 5

The legislation should provide that interest normally be calculated:

(a) Where the judgment is given upon a liquidated claim — from the date the cause of action arose to the date of the judgment.

(b) Where the judgment is given upon an unliquidated claim —from the date the defendant receives notification in writing of the claim to the date of the judgment.

Discussion

The legislation should set out the appropriate date or dates from which interest should normally be calculated.

The date the cause of action arose, that is, the date from which the plaintiff could sue, is usually considered an adequate normal starting point for interest where damages are liquidated. Where damages are liquidated, the action is likely based on contract and the parties are, or ought to be, aware of their obligations.

Where damages are unliquidated, the defendant may be unaware of a claim by the plaintiff when the cause of action arose. It would seem unfair to a defendant to make him liable for interest where he has not been notified of the plaintiff's claims against him and has not had the opportunity to settle them.

If interest began to run in cases involving unliquidated damages from the date of service of a writ, the notification of the defendant prior to the accrual of interest against him would be ensured. This solution has been legislated in South Australia. It also applies in England by virtue of judicial guidelines established by the Court of Appeal in the case of *Jefford v. Gee*. The primary criticism of this date for the commencement of interest is that it forces the plaintiff to initiate court proceedings to preserve his right to interest. In the vast majority of cases, settlement is made without a writ being issued. This provision might unnecessarily increase the administrative costs of the courts as plaintiffs would initiate proceedings to ensure their right to interest. In 1975, *The Highway Traffic Act, The Fatal Accidents Act,* and *The Trustee Act* were amended to extend from one year to two the period available to a plaintiff in a personal injury case to initiate action. One of the purposes of this amendment was to facilitate settlements without the issuance of unnecessary writs.

The date on which a defendant is notified in writing of the claim would seem an appropriate normal date from which interest should be run where unliquidated damages are involved. Where a writ was issued and served, this would serve as notification. However, where the plaintiff simply wrote a letter to the defendant notifying him of the claim, he would be eligible for interest if the case went to trial.

Policy 6

The legislation should provide that interest on special damages, representing actual pecuniary loss, normally be awarded on six-monthly totals from the date of written notification of the claim to the date of judgment at the normal rate.

Discussion

A particular problem arises with respect to special damages, that is, actual pecuniary loss to the date of trial.

The issue of special damages frequently arises in the context of personal injury claims. While the major claim may be for general damages for pain and suffering and loss of amenities, a claim is also made for actual pecuniary losses such as necessary car repairs and medical expenses. The damages are generally spread out through the pre-trial period.

In the context of an action for unliquidated general damages, there are basically two approaches which could be taken to interest on special damages:

1. Provide that interest should normally be awarded on the total sum of special damages from the date of written notification of the claim to the date of prejudgment *at half the normal rate.*

2. Provide that interest should normally be awarded on 6-monthly totals from the date of written notification of the claim to the date of judgment at the normal rate.

The first option is a guideline for personal injury claims established by the English Court of Appeal in *Jefford v. Gee.* This approach has simplicity in its favour. The sums involved are not usually large and arise throughout the pre-trial period.

The second option was first recommended in 1968 by the Winn Committee on Personal Injuries Litigation in Great Britain. It was accepted as the best solution by the British Columbia Law Reform Commission and appears in *The British Columbia Pre-judgment Interest Act* (Schedule 1). This formula is more complex but is an attempt to reflect more accurately the real situation. It is argued that this formula is more accurate in that it takes into account the usual phenomenon that the heaviest expenses in personal injury cases arise during the first six months and taper off toward the trial. It would appear to be the best choice.

Policy 7

The legislation should provide that prejudgment interest shall not be awarded in respect of that part of a judgment that represents

pecuniary loss arising after the date of judgment, where an award of damages is made which specifies that part of the award is attributable to pecuniary loss after judgment.

Discussion

Are there some types of claims upon which interest should not be allowed?

(a) *Non-economic Harm*

The commonest example of the law "compensating" for non-economic harm is the case of damages for pain and suffering and loss of amenities in personal injury cases and for libel and slander.

It has been argued that interest should not be awarded on damages for non-economic loss because the process of measurement is an arbitrary one in which the court assessing damages exercises a latitude in freedom different in kind from the discretion allowed in the measurement of injuries of a pecuniary nature. In this context, it is said, there is little purpose in giving to a judge or to a jury a further discretion to add interest.

However, if reform legislation is to embody the principle that interest is a form of compensation for the loss of use of money, interest should be allowable even when the loss is non-economic. The effect of the judgment is to declare a liability to pay which, had the defendant discharged it when the claim was made, would have enabled the plaintiff to enjoy the fruits of those funds from the date of payment. The defendant's failure to discharge the liability deprives the plaintiff of the use of those funds and, for that deprivation, the defendant ought to compensate the plaintiff. The English Law Revision Committee in 1934 accepted this view and expressly rejected the notion that "compensation" for non-economic loss should be treated differently than for economic loss. The same position has been taken by the Law Revision Commission of the State of New York in 1966 and the British Columbia Law Reform Commission in 1973. British Columbia, Great Britain, a large number of states in the United States and Queensland, New South Wales and South Australia have concluded that non-economic harm should be treated in the same way as economic harm. *It would appear that interest should be allowed on damages for non-economic harm.*

(b) *Future Economic Loss*

Future economic loss is that aspect of a damage award which reflects a plaintiff's loss of expectations of financial benefits referable

to the post-trial period. In an action for personal injuries, loss of earnings in the post-trial period would be a principal element. The issue is whether prejudgment interest should be prohibited with respect to that part of a damage award which represents future economic loss.

There are real differences of opinion among judges regarding the theory and the practice to be applied to cases involving future economic loss. As a matter of *the juristic theory of damages*, general damages are an indivisible lump sum to which the plaintiff is deemed to have become entitled on the happening of the event which occasions liability in the defendant. In a case of wrongfully causing the death, the event is the death. In a personal injury case, it is the event causing the injury. It does not matter that the physical or material consequences of the injury have not been felt at the time of the injury or of assesssment. Theoretically, the loss is occasioned on the happening of the event and what happens thereafter is but the consequences of the loss or damage which he has suffered. Subsequent events only assist in the ascertainment of the amount of those damages. This is the basis of the fundamental rule that only one action may be brought arising out of the cause of action, that is, the event.

The basic jurisdic theory of damages has much merit when confined to proper limits. If it were applied to the issue of prejudgment interest, the result would be that since all loss is occasioned by the event, prejudgment interest should always apply to damage awards.

However, there is a very *practical concept* that in personal injury cases a plaintiff receives: (a) compensation in respect of loss or damage incurred up to the date of judgment; and, (b) in respect of loss or damage (if any) which he will incur or suffer in the future. Past detriments such as earnings lost or liabilities incurred must be evaluated. When their worth has been assessed, the fact that the plaintiff has been kept out of receipt of that worth for some period prior to trial makes it just that they should carry interest.

However, this is not so with economic detriments not yet actually suffered. With respect to these detriments, such as loss of future earning capacity, it cannot be said as a practical matter that a successful plaintiff has been kept out of his money. The award for future economic loss should be the sum which in-

vested at interest would be sufficient to compensate the plaintiff for his future loss having regard to all contingencies. In essence, as a practical matter, the plaintiff obtains his compensation for future loss in advance. If this practical approach is applied to prejudgment interest, interest should not be allowed for future economic loss.

The issue is seriously complicated by the common practice of the courts in assessing damages. In actions for damages for personal injury, the practice frequently adopted is to have an examination of pecuniary loss or impairment of earnings capacity and a separate examination of prospective loss after the date of the verdict. In many personal injury cases the approach lends itself to an exclusion of interest with respect to future economic loss.

In actions by dependants under *The Fatal Accidents Act*, a derivation of Lord Campbell's Act, which permits actions for wrongfully causing death of a person upon whom the plaintiff was dependant, the courts proceed on the assumption that compensation must be assessed as if paid at the moment of death. The award of damages is a lump sum and there is no distinction drawn between compensation up to the date of trial and compensation thereafter. In such cases, any attempt to make a simple apportionment between damages suffered to the date of trial and future economic loss would be unfair. To require the court to alter the method of calculating general damages under *The Fatal Accidents Act* so that an amount can be attributed to future economic loss would be to have the interest "tail" wag the damages "dog".

The policy selected absolves the dilemma. Where, as in the case of personal injury awards, the judgment or verdict specifies that a specific part of the award reflects an amount attributable to pecuniary loss arising after the date of judgment, no prejudgment interest will be permitted on that amount. Where, as in most cases determined under legislation like *The Fatal Accidents Act*, the judge or jury makes a lump sum award, no part will be considered to be future economic loss and prejudgment interest will be payable on the whole. A provision of this nature would not lead to unnecessary meddling with satisfactorily settled practices of the court in awarding damages. It would also provide guidance to litigants and to the courts as to the appropriate means of dealing with future economic loss.

Policy 8

The legislation should provide that no interest be awarded in respect of exemplary or punitive damages.

Discussion

Although rare in civil actions in Ontario, a court may allow exemplary or punitive damages in actions based on tortious conduct. These damages are not intended to compensate the plaintiff for any loss suffered but to punish the defendant for his conduct. It is inappropriate that prejudgment interest be awarded in respect of this type of "damage".

Policy 9

The legislaion should provide that it does not apply in relation to any sum upon which interest is payable as of right whether by virtue of any agreement or otherwise.

Discussion

Prejudgment Interest is now payable as of right in Ontario where it is provided for by contract or where a statute provides for the payment of interest, (e.g. s. 84 of *The Landlord and Tenant Act*). No problem has arisen with respect to these areas of the present law, and it is recommended that no change be made in this situation.

Policy 10

The legislation should provide that it does not authorize the giving of interest upon interest awarded under the new provisions.

Discussion

While it would be possible to provide for compound interest, it would seem impractical to do so. It would add to the complexity of calculations without significant benefits. It should also be made clear that the interest allowable under the provisions of the legislation should not be added to interest payable as of right. England, British Columbia and South Australia have taken this approach.

Policy 11

The legislation should provide that it does not authorize the award of any interest otherwise than by consent upon any sum for which judgment is pronounced by consent.

Discussion

A consent judgment is similar in nature to a settlement. In these circumstances, unless the parties otherwise agree, it seems inappropriate to award interest notwithstanding that the plaintiff may have claimed it. This rule seems more sensible and in keeping with the expectations of the parties, than one which would require the plaintiff to waive his right to interest before he becomes disentitled to it.

Policy 12

The legislation should provide that where interest in claimed and where the court has not otherwise directed, the normal interest rules as set out in the legislation apply.

Discussion

It is intended that the normal interest provision be applicable where interest is claimed and that unless a judge otherwise directs, the clerks and registrars should apply the normal interest rules.

Policy 13

The provisions dealing with prejudgment interest be made applicable to The Supreme Court, The County Court, The Unified Family Court and The Small Claims Court.

Discussion

It would appear inappropriate to award prejudgment interest in the Provincial Court (Family Division). The type of money judgments made in this court are with respect to maintenance under *The Deserted Wives' and Children's Maintenance Act*. Similar principles would apply to any new support legislation. Support orders are designed to meet the on-going financial needs of a family. Procedures are designed to facilitate the rapid resolution of disputes. In this context, prejudgment interest has no function.

Some doubt has been expressed concerning the appropriateness of allowing prejudgment interest in the Small Claims Court. However, the majority of Small Claims Court applications are based on contracts for consumer goods which usually provide for interest as of right under the contract. It would be anomalous to permit interest under a contract as a legitimate claim while denying a claim of interest to a claimant under other circumstances.

Since The Small Claims Court Act attempts to codify the jurisdiction of that court, amendments should be made to that Act similar to those contained in *The Judicature Act.*

Policy 14

The legislation should apply to all causes of action which arise after it comes into force and that with respect to actions which arose prior to the date it comes into force interest should, subject to the court's discretion, be applied from the date the legislation comes into force or from the date the defendant receives notification in writing of the claims, whichever is later.

Discussion

Since these provisions effect rights of parties, their operation should only be prospective. However, if they only effect causes of action which arise after the legislation comes into force, the positive effect of the provisions will be long delayed. The policy chosen ensures that the new rights to interest are prospective but that they will begin to be effective to remedy the existing inadequacy of the law on enactment.

SCHEDULE 1

PREJUDGMENT INTEREST ACT

[*Assented to 30th May, 1974*]

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

Prejudgment interest to be added on to judgment

1. (1) Subject to section 2, a court shall add on to a pecuniary judgment an amount of interest calculated on the amount of the judgment at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies in respect of interest on a judgment under the *Interest Act* (Canada), from the date on which the cause of action arose to the date of judgment.

(2) Notwithstanding subsection (1), where a judgment consists in whole or in part of special damages, the interest in respect of those damages shall be calculated

(*a*) on the total of the special damages incurred in the six month period immediately following the date on which the cause of action arose; and

(*b*) on the total of the special damages incurred in any subsequent six month period,

from the end of each six month period in which the special damages were incurred to the date of judgment.

(3) For the purpose of calculating interest under subsection (2), and notwithstanding subsection (2), where the date of judgment occurs

(*a*) before a date six months after the date on which the cause of action arose; or

(*b*) after the end of a six month period but before the end of the subsequent six month period,

interest shall be calculated from the date on which the special damages were incurred to the date of judgment.

Interest not awarded in certain cases

2. The court shall not award interest under section 1

(*a*) on that part of a judgment that represents pecuniary loss arising after the date of judgment; or

(*b*) where there is an agreement between the parties respecting interest; or

(*c*) upon interest; or

(*d*) where the judgment creditor waives in writing his right to an award of interest; or

(*e*) upon costs.

Default judgment

3. Where a judgment is obtained by default under an Act or the rules of court, the registrar of the court may exercise and carry out the powers and duties of the court under this Act.

Payment into court

4. Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains a judgment for an amount equal or less than that paid into court, the court shall, notwithstanding section 1, award interest only from the date the cause of action arose to the date of payment into court as if the date of payment into court had been the date of judgment.

Interest deemed included in judgment

5. Interest added on to a judgment under this Act shall, for the purpose of enforcing the judgment, be deemed to be included in the judgment.

Commencement

6. This Act does not apply in respect of a cause of action that arose before the first day of June, 1974.

SCHEDULE 2

AN ACT TO AMEND THE SUPREME COURT ACT, 1935-1971

[*Assented to 13th April, 1972*]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

. . .

Enactment of s. 30c of principal Act

4. The following section is enacted and inserted in the principal Act immediately after section 30b:—

Power to award interest

30c. (1) Unless good cause is shown to the contrary, the court shall, upon the application of a party in favour of whom a judgment for the payment of damages, compensation or any other pecuniary amount has been, or is to be, pronounced, include in the judgment an award of interest in favour of the judgment creditor in accordance with the provisions of this section.

(2) The interest—

(*a*) shall be at the rate of seven per centum per annum or such lower rate as may be fixed by the court;

(*b*) shall be calculated—

(i) where the judgment is given upon an unliquidated claim—from the date of the commencement of the proceedings to the date of the judgment;

or

(ii) where the judgment is given upon a liquidated claim—from the date upon which the liability to pay the amount of the claim fell due to the date of the judgment,

or in respect of such other period as may be fixed by the court;

and

(*c*) shall be payable in respect of the whole or any part of the amount for which judgment is given in accordance with the determination of the court.

(3) No interest shall be awarded in respect of—

(*a*) damages or compensation in respect of loss or injury to be incurred or suffered after the date of the judgment;

or

(*b*) exemplary or punitive damages.

(4) This section does not—

(*a*) authorize the award of interest upon interest;

(*b*) apply in relation to any sum upon which interest is recoverable as of right by virtue of an agreement or otherwise;

(*c*) affect the damages recoverable upon the dishonour of a negotiable instrument;

(*d*) authorize the award of any interest otherwise than by consent upon any sum for which judgment is pronounced by consent;

or

(*c*) limit the operation of any other enactment or rule of law providing for the award of interest.

APPENDIX Q

(See page 33)

PROTECTION OF PRIVACY ACT: TORT

REPORT OF COMMITTEE

In 1976 the Nova Scotia Commissioners presented a report to the Uniform Law Section pertaining to the tort of invasion of privacy (1976 *Proceedings*, page 240). Along with that report, the Nova Scotia Commissioners presented to each member of the Conference the following material:

1. Copy of an article entitled "Privacy" written by William L. Prosser appearing in the August, 1960 edition of the California Law Review, Volume 48, No. 3 at page 383.

2. Copy of an article entitled "Science, Privacy and Freedom: Issues and Proposals for the 1970's" written by Alan Westin appearing in 66 Columbia Law Review at page 1003 printed in 1966.

3. Copy of an article entitled "A Definition of Privacy" written by Richard B. Parker appearing in 27 Rutgers Law Review at page 275 printed in 1974.

4. Copy of an article entitled "The Law and Privacy: The Canadian Experience" written by Peter Burns appearing in the March, 1976 edition of the Canadian Bar Review.

As a result of its deliberations, the Uniform Law Section 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 (1976 *Proceedings*, page 33).

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 did, however, prepare a *Uniform Privacy Act* for the consideration of the Conference (1976 *Proceedings*, page 380). Consideration of this matter resulted in a resolution whereby the draft *Uniform Privacy Act* submitted to the Uniform Law Section was referred to the Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick Commissioners for study and report with recommendations to the 1978 Annual Meeting.

The Commissioners of the four provinces have reviewed the draft Act submitted to the 1977 Conference, along with the material distributed at the 1976 Conference, Chapter 39 of the Statutes of British Columbia, 1968, Chapter 74 of the Statutes of Manitoba, 1970, Chapter 80 of the Statutes of Saskatchewan, 1973-74, a working paper of the Law Reform Commission of Tasmania entitled "Law of Privacy", a bill introduced in 1974 by the Attorney General of Tasmania into the House of Assembly of Tasmania, a report of the Committee on Privacy (Cmnd. 5012), a report of the Scottish Law Commission entitled "Confidential Information" and the decision of the British Columbia Court of Appeal in *Davis v. McArthur*, 17 D.L.R. (3d) 760 (1970).

As a result of their deliberations, the Commissioners of Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick recommend that the *Uniform Privacy Act* attached to this report as a schedule be adopted and recommended for enactment in that form.

Graham D. Walker, Q.C.
J. W. Ryan, Q.C.
Raymond Moore
Peter Pagano

August, 1978

SCHEDULE

UNIFORM PRIVACY ACT

Interpretation

1. In this Act "individual" means a natural person.

Invasion of privacy actionable

2. It is a tort, actionable without proof of damage, for a person to invade the privacy of an individual.

Meaning of invasion of privacy

3. A person invades the privacy of an individual who

(*a*) publicly discloses private facts about the individual, the disclosure of which causes the individual distress or embarrassment;

(*b*) publishes any matter or thing that places the individual in a false light before the public;

(*c*) for advantage uses the name, identity or likeness of the individual; or

(*d*) violates the seclusion or solitude of the individual.

Defences

4. It is a defence to an action for invasion of privacy that the act or conduct in issue was

(*a*) consented to by the plaintiff;
(*b*) reasonable;
(*c*) authorized by an enactment;
(*d*) authorized by a court of law;
(*e*) necessary for the protection of a person or property;
(*f*) not intended to be an intrusion upon an individual or his home, relationships, communications, property or business affairs; or
(*g*) in the public interest, where it involved the publication of any matter or thing.

Powers of court

5. In an action for invasion of privacy a court may do any or all of the following:

1. Award damages;
2. Grant an injunction;
3. 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 the invasion of privacy;
4. Order the defendant to deliver up any article or document that has come into his possession by reason of or in consequence of the invasion of privacy;
5. Grant any other relief that appears just in the circumstances.

Limitation of action

6. No action lies for the invasion of the privacy of an individual after the expiration of one year from the time when the invasion of privacy first became known or should have become known by that individual nor, in any case, after the expiration of six years from the date on which the invasion of privacy occurred.

Other remedies not affected

7. An action for invasion of privacy is in addition to and not in derogation of any action or remedy existing apart from this Act.

Note: Each jurisdiction should give consideration to a provision expressing the extent to which this Act is binding upon the Crown.

APPENDIX R

(See page 34)

UNIFORM LAW SECTION: PURPOSES AND PROCEDURES

REPORT OF THE COMMITTEE

At its 1977 meeting, the Uniform Law Section passed the following resolutions (1977 *Proceedings*, pages 33 and 382).

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

Vacancies having arisen, the Executive reconstituted the Committee as follows:

Arthur N. Stone, chairman
J. Douglas Lambert
Francis C. Muldoon
Rae H. Tallin
Graham D. Walker

The Committee met in Winnipeg on December 8th, 1977 and again in Toronto on May 23rd, 1978.

The recommendations made in this report are in addition to those made in the 1977 report of the Committee.

The Committee is particularly concerned with the need to improve the procedures of the Uniform Law Section for the following purposes:

1. To provide for wider participation in the preparation of reports on large and complex subjects.
2. To make the best use of the time available at annual meetings for completing heavy agendas.
3. To reduce the time that elapses in arriving at a final product.

The Committee makes the following recommendations:

1. *Topics constituting a major project be referred by the meeting to a special committee made up of those delegates who volunteer to participate in the project.*

Where a topic is so referred, one jurisdiction should be assigned to set up and launch the project, including arranging an organizational meeting and obtaining a project director to act as executive director of the project. Any delegate may, upon notice to the project director, become a member of the committee and participate in the project. The procedures would be the same as for other committees of the Uniform Law Section and the voting would, as for other committees, be a simple majority of those present and voting. The special committee would report to the Uniform Law Section and the report would be dealt with in the same manner as other reports.

The project director would act as the executive officer of the special committee, organize the meetings, direct research and prepare working papers and marshal the materials for meetings. The project director would, if necessary, be paid out of the research fund after due authorization.

2. *The Uniform Law Section should be capable, upon motion concurred in unanimously, of sitting in two or more sessions, meeting separately and concurrently, to deal with particular items of business authorized to be dealt with in separate sessions.*

The proposal would permit the Uniform Law Section, at an organizational meeting possibly held on the Sunday beginning the week of the annual meeting, to, by motion concurred in unanimously, authorize the consideration of certain items on the agenda to be conducted in separate sessions sitting concurrently. The meeting would fix a time for the Section to reconvene in a single session. This would permit a major item on the agenda as, for example, family support obligations to be considered in one session while another major item, for example, limitation of actions or class actions is being considered in the other session, leaving more time for each. The Chairman and Executive Secretary will be in a position to recommend the appropriate business for separate sessions when they settle the agenda in June as recommended in the 1977 Report.

All delegates should be free to attend any session, as they choose. However, the result would be that each session would tend to be a smaller group made up of those most likely to participate in the limited subject.

Each of the separate sessions would be considered to be a meeting of the Section to which the rules of procedure apply, except that any recommendation for uniform enactment should be brought to the Section sitting in single session for final adoption. Although

further debate should not be foreclosed, it is hoped that it would be greatly reduced.

A separate session created for a subject should have its own chairman and secretary elected by the session and holding office until the subject is completed and should be free to hold additional meetings throughout the year.

It is realized by the Committee that there is a danger of concurrent sessions preventing a delegate who wants to do so from participating in both subjects. Therefore, the recommendation includes the proviso for unanimous consent under the voting procedures of the Uniform Law Section.

This recommendation is made with Graham D. Walker dissenting.

3. *The Committee recommends that the possibility of a second annual meeting be kept in mind to be authorized by the Uniform Law Section as the need arises in light of the agenda.*

Consideration was also given to extending the annual meeting but apart from noting the possibility, the Committee feels that to pursue the idea would not be productive.

4. *Before the agenda is settled by the Chairman and the Executive Secretary pursuant to Rule* 3, *the local secretary of each jurisdiction should report to the Chairman on the status of each report in which the jurisdiction is participating, and particularly as to any factors affecting the consideration of the report, whether the report has been distributed as required by Rule* 8 *or is pending.*

The purpose of this recommendation is to make it the positive duty of each local secretary to inform himself on the factors affecting the preparation, delivery and consideration of reports from his jurisdiction and to convey this information to the Chairman. This would include any development pending or intended to be disclosed at the meeting that would dispose of an item on the agenda or reduce or affect the time necessary for its consideration.

5. *Where, after discussing a report, the Uniform Law Section refers it again for the purpose of incorporating the changes agreed upon, the jurisdiction to which it is referred should prepare a summary of the changes agreed upon in time for inclusion in the* Proceedings *for the meeting at which the report was discussed.*

Such a summary would fill a gap in the *Proceedings* for those interested in following the subject.

The summary would also help to consolidate and clarify the outcome of the meeting as understood by the persons having the carriage and declare the basis upon which they are proceeding. The fact it is to be published might also encourage prior circulation and consultation.

6. *The Legislative Drafting Section should be invited to arrange for the creation of small, ad hoc, committees of members of that section to assist in the immediate drafting of amendments approved at a meeting.*

This recommendation would permit co-operative drafting of changes while the meeting is still available to resolve any unforeseen difficulty. The result would also be to reduce the occasions when matters that are subject to the November 30th resolution fail to gain acceptance on that date owing to drafting difficulties.

Arthur N. Stone, Chairman
J. Douglas Lambert
Francis C. Muldoon
Rae H. Tallin
Graham D. Walker (dissenting from recommendation 2)

12 July 1978

APPENDIX S

(See page 35)

I

WILLS: IMPACT OF DIVORCE ON EXISTING WILLS

REPORT OF ONTARIO AND NOVA SCOTIA

At last year's meeting in St Andrews, the Uniform Law Section asked Ontario and Nova Scotia to prepare a report discussing the desirability of amending the *Uniform Wills Act* to provide for the impact of divorce on existing wills.[1] Section 17 of the *Uniform Act* deals with the revocation of wills by operation of law. Suggestions had been made that occasionally former spouses have been the surprised recipients of windfall benefits due to their ex-partners' failure to alter or revise an existing will at the time of divorce.[2]

Three Canadian Law Reform Commissions have recently dealt with this situation.[3] They each felt that the present law was unsatisfactory and that amendments were necessary to provincial wills legislation to avoid potentially unconscionable results. In two provinces, Ontario and Manitoba, these law reform recommendations have actually been carried forward into legislation.[4]

All common-law Canadian provinces have until recently had uniform provisions dealing with the revocation of wills.[5] This was the result, not of a conscious desire for uniformity as such, but rather the residual influence of the English Wills Act, 1837[6] which still forms the basis of legislation across the Commonwealth. This Conference's *Uniform Wills Act*[7] is typical:

> 15. A will or part of a will is revoked only by
>
> (a) marriage, subject to section 16;
> (b) another will made in accordance with this Act;
> (c) a writing
>
> (i) declaring an intention to revoke, and
> (ii) made in accordance with the provisions of this Act governing making of a will; or
>
> (d) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it.
>
> 16. A will is revoked by the marriage of the testator except where

(a) there is declaration in the will that it is made in contemplation of the marriage; or

(b) the will is made in exercise of a power of appointment of real or personal property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

17. A will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Essentially this report will discuss the desirability of amending this last section 17, to revoke or otherwise modify the will of a testator who is subsequently divorced.

Such an amendment is novel, though there are ample precedents from the United States and from other Commonwealth jurisdictions.[8] It proceeds from a recognition of the increasing prevalence of divorce and marriage breakdown, and the resultant law reform initiatives designed to preserve an even hand in property divisions and support obligations between spouses, and to prevent hardship and injustice to family members.

The most direct way of approaching the problem is to sketch the typical problem case which raises the issues.[9] A testator made his will in 1959, leaving his property to his wife as sole beneficiary. The couple's marriage founders and they separate in 1966, finally obtaining a divorce in 1969. A generous property settlement is made, though the testator does not review his will, in the light of changed circumstances. The testator never remarries, though his wife marries again a few months after the divorce. He dies in 1978, survived by his former wife, whom he has not seen for years. Since he has not altered his will, his entire estate goes to a woman who has been married to someone else for nine years. However, since her will was automatically revoked by operation of law when she remarried, the ex-spouse would have inherited nothing had she died. The result seems curious, at once slightly unfair, and at odds with the expectations of all involved. Granted that cases such as this may be rare, resulting from idle testators or slack counsel, nevertheless they do happen and in sufficient numbers that jurisdictions that have considered the problem have generally acted to remedy it.

To do so is to make certain assumptions about divorce: that divorce signifies the total repudiation of a relationship, the final dissolution of a family, a passage to a new legal and social situation and status. It is not unreasonable then to suppose that a divorced

testator would not intend to benefit his former spouse, either in amount or at all, as would have been the case had the marriage still been prospering. Since the public are lamentably lax in making or revising wills, one can scarcely draw conclusions about the testator's approval of the terms of the will simply from the fact that it has been left unrevised following divorce.[10] Counsel acting in divorce cases should include a review of any wills or trusts as part of their advice to their clients; doubtless, this is generally done, yet there is no way of ensuring so, and divorced testators do overlook the need to reconsider their wills. The result is that inadvertent injustice may result from wills made during marriage remaining effective after dissolution.

While occasionally the contrary may hold, we believe that in most cases testators would not wish to benefit their ex-spouses as generously after divorce as they would when still married. We think it appropriate to reverse the presumption that a divorce has no direct effect whatsoever on the will of one of the divorcing spouses.

A number of different approaches to reforming this part of the law can be identified. The Ontario Law Reform Commission Report on this subject describes and criticizes five of them; we shall simply summarize their discussion. First, section 17 of the Uniform Wills Act could be repealed, so that wills might be considered to be revoked because of general changes in circumstances.[11] The remedy is extreme, productive of uncertainty and potential litigation; we would not support this approach. A second method would be to hand the matter over to the wise discretion of individual judges, entrusting them with the task of assessing whether it would be just in a particular case to let the will stand.[12] The prospects of disparate application of this discretion, of interminable appeals and of total uncertainty were sufficient to cause Ontario to reject this course; so should the Conference. The third alternative is at once more plausible, local in scope and specific in its effects: merely to modify the will.

This would be to revoke a will automatically on the divorce of a testator.[13] This alternative mirrors revocation at marriage; the general law of intestacy would then apply. Ontario points out that this solution is only satisfactory if the ex-spouse is sole beneficiary since third party beneficiaries would also be affected by revocation. It might also act to strike down a totally new will made after separation which consciously omits all reference to the former spouse.

The last two alternatives are more specific and direct than the third. The fourth way to approach the problem is to revoke gifts to the ex-spouse, but leave the residue of the will intact and operative.[14] One simply blue-pencils all references to the former spouse in bequests and construes the rest accordingly. The problems with this approach are technical but real. If a will contains alternative gifts expressed in terms of the ex-spouse predeceasing the testator they may fail. Likewise competing claims could easily result. For these reasons most authors and commissions have opted for the slightly modified fifth alternative.

Where a testator is subsequently divorced, his will shall be read as if his former spouse had died before him. This fifth alternative avoids most of the difficulties previously mentioned.[15] It remedies the ills of the present law, but not at the cost of unduly disturbing other arrangements or future plans. If the basic case for reform is made, there are weighty reasons supporting this option.

Is There a Need For Reform?

The present law appears to be productive of injustice in occasional cases where a testator has totally overlooked the need to revise his will in the light of a divorce. That this does not happen more often is a result of competent lawyers advising their clients at divorce. We would insist that any reform in this area should respect the wishes of those who have considered the question and that any reform should not apply where a contrary indication is shown in the will.

As a general statement, we believe that if property is to pass by will to a former spouse as a result of a will executed before the divorce, this will almost always frustrate the wishes of the deceased. We suggest that most couples undergoing divorce wish finality, and the settlement of outstanding claims. In this case there is a strong argument for a presumption that the act of divorce should operate to modify the will of a testator.[16]

Is There a Need for Uniformity?

Three provincial law reform commissions have made recommendations on this subject, and a fourth has the topic under active consideration.

In its Report Number 24, Report on Family Law, published on February 27, 1976, the Manitoba Law Reform Commission dis-

cusses the impact of divorce on existing wills on pages 106 to 109. Its recommendation was for a statutory provision in the following terms: "in case of dissolution or annulment of marriage, where a spouse's will executed prior to the divorce or annulment makes reference to, or confers any benefit upon the other spouse, it shall be read as if the other spouse predeceased the testator or testatrix".

Similarly the Saskatchewan Law Reform Commission considered the issue on June 30, 1976. Its recommendation is contained in its Third Annual Report, 1976 set out at page 11: *"The Wills Act* [should] be amended to provide that upon a divorce, unless the contrary intention appears, the will of a divorced spouse shall be revoked insofar as it

(a) appoints the other spouse to be a testator or testatrix of the will, as the case may be; and

(b) insofar as it confers any benefit upon the divorced spouse of the testator or testatrix, as the case may be; it shall otherwise be valid for all purposes."

Lastly, the Ontario Law Reform Commission dealt with the topic in a separate report entitled "The Impact of Divorce on Existing Wills" dated February 28, 1977. The basic Ontario recommendation was that:

> The Wills Act should be amended to provide that where a testator is divorced, or where his marriage has been annulled, after making a will, the will shall be read for all purposes as if the former spouse had died before the testator, unless the will expressly provides otherwise. Such an amendment should operate to revoke all dispositions of beneficial interests in favour of the ex-spouse, to revoke provisions conferring a general or special power of appointment on the ex-spouse, and to revoke provisions naming the ex-spouse as executor or trustee. Although the amendment should operate to invalidate the appointment of an ex-spouse to act as trustee for a secret trust, established before the testator's divorce, it should not otherwise interfere with the secret trust. The amendment should apply to all wills of persons dying after the enactment of legislation implementing the reform.

Finally we understand that the matter has been briefly discussed by the British Columbia Law Reform Commission although no conclusions have been reached about the desirability of reform.[17] Were reform to be recommended, it is likely that the fifth alternative would be favoured.

The underlying uniformity of Canadian wills legislation can be preserved only so long as there is a generally held consensus that

the rules of law embodied in that legislation are fundamentally satisfactory. Three Canadian Law reform commissions have concluded that in this area of the law at least, the rules are unsatisfactory. Revising the uniform act would recognize this fact and provide a new basis for further statutory intiatives.

A Recommendation for Reform

We recommend that the Uniform Law Section should amend section 17 of the *Uniform Wills Act* to adopt the wording of the Ontario statute:

> (1) Subject to subsection 2, a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.
>
> (2) Except when a contrary intention appears by the will, where, after the testator makes a will, his marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to his former spouse;
>
> (b) an appointment of his former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on his former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.

We feel that this proposal best accomplishes the necessary reform without further complications. The proposal has the least drawbacks of any of the five outlined: the South Australian Report sets them out on page 6 of its 1977 Report. With the greatest of respect, we do not feel that the South Australian arguments against alternative five are particularly compelling. Taking the Ontario *Succession Law Reform Act,* 1977, s. 17(2)[18] as a model draft, the Australian points can be demonstrated to be generally invalid.

First, the draft does not affect beneficiaries under secret trusts: a former spouse may not be able to act as the trustee of the secret trust, but the trust itself still remains valid. Second, substitutional gifts would be accelerated by the revocation of the gift to the former spouse, as if there had in fact been a death. Third, the draft would not affect the operation of the modern rule against perpetuities, where the divorced spouse is to act as a measuring life. Fourth, South Australia fears grave problems, where the divorced spouse is sole executor or executrix and this appointment is revoked by operation of law. Frankly we think their concern is over-stated, since it

would be fairly easy for anyone concerned to apply to court for a grant with will annexed, or in rare cases for a grant of administration *de bonis non*.[19] Finally, we feel that the recommendations set out on pages 7 and 8 of the South Australian Report are by and large self-evident propositions, which would not have been included if draft statutory language had been appended to the Report. The drafts attached to this Report as schedules avoid the problems to which the South Australian Committee alludes.[20]

In addition to the situations discussed in the Ontario Report, there are three we would like to discuss briefly. First, many parents-in-law give legacies to their children's spouses: should these be affected by the dissolution of the children's marriages? We think not: modification of the will by operation of law should only extend to the spouses' wills. To do otherwise would be to make unwarranted assumptions about relations following divorce.

Second, there is the more difficult issue of the designation in the will of a former spouse as a beneficiary under an insurance policy. At one time the *Uniform Life Insurance Act* contained a provision revoking designations on divorce.[21] A strong argument can be made for inserting a parallel amendment to the proposed *Uniform Wills Act* amendment, into provincial insurance legislation. Alternatively a fourth subsection could be added to the model draft revoking the designation within the will of a former spouse as a beneficiary under a policy of insurance or a R.R.S.P. or R.H.O.P. or similar plan.[22] We would again stress that this type of modification only operates in the absence of any contrary intention by the will.

Finally, there is one matter raised by the New York Law Revision Committee in its last annual report:[23] the restoration of the rights of a former spouse upon remarriage to the testator. The New York Committee proposes to amend E.P.T.L. S.5-1.4 (set out in the Schedule) to revive dispositions made by a testator to a former spouse upon the testator's remarriage to such spouse. They point out that E.P.T.L. S.5-1.4 is intended to avoid an inadvertent disposition to a former spouse because of a testator's neglect, and that it would carry out the probable intent of a testator whose marriage has been terminated. They argue that if the testator remarries his former spouse, he would presumably be content with the original language of the will. Revocation by operation of law might, they suggest, operate to frustrate the testator's wishes and require him to republish the will to avoid revocation. They propose a new subsection stating that "if a provision, disposition or appointment is

revoked solely by this section, it shall be revived by testator's remarriage to the former spouse".

After considering the New York arguments we have concluded that the fact situation to which they are addressed is rare indeed, and that their proposed amendment is quite simply an over-refinement that unduly complicates the section. To introduce it in the Canadian context would also require further amendment of section 16 of the *Uniform Wills Act* dealing with revocation by marriage: in this case the re-marriage. We would recommend against any amendment along these lines, and take note that the New York State Legislature also rejected the recommendation.[24]

Recommendation

We propose that the Uniform Law Conference amend s. 17 of the *Uniform Wills Act* by adding the following subsection 2:

(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his marriage is terminated by a judgment absolute of divorce or is declared a nullity,

(a) a devise or bequest of a beneficial interest in property to his former spouse;
(b) an appointment of his former spouse as executor or trustee; and
(c) the conferring of a general or special power of appointment on his former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator.

R. S. G. Chester
(on behalf of the Ontario Commissioners)

Graham D. Walker
(on behalf of the Nova Scotia Commissioners)

August 1978

SCHEDULE

1. Uniform Probate Code: s. 2-508

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as an

executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

2. New York Estate Powers and Trusts Law, S. 5-1.4

(a) If, after executing a will, the testator is divorced, his marriage is annulled or its nullity declared or such marriage is dissolved on the ground of absence, the divorce, annulment, declaration of nullity or dissolution revokes any disposition or appointment of property made by the will to the former spouse and any provision therein naming the former spouse as executor or trustee, unless the will expressly provides otherwise, and the provisions, dispositions and appointments made in such will shall take effect as if such former spouse had died immediately before such testator.

(b) The provisions of this section apply to the will of a testator who dies on or after its effective date, notwithstanding that the will was executed and the divorce, annulment, declaration of nullity or dissolution was procured prior thereto.

3. Statutes of Manitoba, 1977, c. 53, s. 7.

The Wills Act, being chapter W150 of the Revised Statutes, is amended by adding thereto, immediately after section 36 thereof, the following section:

Effect of divorce on gift to spouse.

36.1 Where a testator makes a gift to his or her spouse by will and the marriage between the testator and the spouse is subsequently dissolved or annulled but without any revocation of the will or gift, then, unless there is a declaration in the will that it was made in contemplation of the dissolution or annulment, the spouse is for the purposes of the gift deemed to have predeceased the testator.

4. Statutes of Ontario, 1977, c. 40, s. 17.

(1) Subject to subsection 2, a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his marriage is terminated by a judgment absolute of divorce or is declared a nullity,

(a) a devise or bequest of a beneficial interest in property to his former spouse;

(b) an appointment of his former spouse as executor or trustee; and

(c) the conferring of a general or special power of appointment on his former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator.

5. New Zealand, Wills Amendment Act, 1977, No. 55, ss. 1 and 2.

1. Short Title and commencement

(1) This Act may be cited as the Wills Amendment Act 1977, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 1st day of July 1978.

2. Effect of divorce, etc., on wills

(1) Where at the death of any person there is in force any absolute decree or order or any legislative enactment for the divorce of the person, or for the dissolution or nullity of the marriage of the person, and that decree or order or legislative enactment would be recognised by the Courts in New Zealand, any will of the person that was made before the decree or order or legislative enactment shall be read and take effect subject to the following provisions of this section.

(2) Subject to the following subsection of this section, in any such will of any person—

(a) So far as it concerns the other partner to the former or purported marriage of that person and the executor or administrator of that other partner, the following shall be null and void:

(i) Any beneficial devise, legacy, estate, gift, or appointment of or affecting any real or personal property given or made by the will of that person;

(ii) Any direction, charge, trust, or provision in the will of that person for the payment of any debt that is charged by way of mortgage on any real or personal property that belongs to that other

partner or that devolved by survivorship on that other partner; and

(b) The appointment of that other partner as executor or trustee or advisory trustee of the will of that person shall be null and void; and

(c) The will shall be read and take effect so far as concerns the real and personal property affected by any such devise, legacy, estate, gift, appointment, direction, charge, trust, or provision as if that other partner had died immediately before the person making the will.

(3) Subsection (2) of this section shall not apply to—

(a) Any direction, charge, trust, or provision in any such will of any person for the payment of any amount in respect of any debt or liability, including any liability under a promise within the meaning of the Law Reform (Testamentary Promises) Act 1949, of the maker of the will to the other partner to the former or purported marriage of that person or to the executor or administrator of that other partner;

(b) Any beneficial devise, legacy, estate, gift, appointment, direction, charge, trust, or provision in any such will of any person expressed to take effect notwithstanding this section, or notwithstanding or in contemplation of (as the case may be) the making of any decree, order, or legislative enactment for the divorce of the person, or for the dissolution or nullity of the marriage of the person;

(c) Any beneficial devise, legacy, estate, gift, appointment, direction, charge, trust, or provision in any such will of any person if, after the relevant decree or order or legislative enactment for the divorce of the person or the nullity of the marriage of the person, he has, by codicil, expressly shown an intention that the devise, legacy, estate, gift, appointment, direction, charge, trust, or provision shall have effect notwithstanding this section or notwithstanding the making of the decree, order, or legislative enactment.

(4) For the purposes of this section—

(a) Where a will or any part thereof is, by any codicil, confirmed or ratified or in any manner revived, it shall be deemed to have been made at the time when it was first made, and not at the time when it was confirmed or ratified or revived;

(b) Where a will or any part thereof is re-executed, it shall be deemed to have been made at the time when

it was re-executed, and not at the time when it was first made.

(5) This section shall apply in relation to every will, whether made before or after the commencement of this Act, if the maker of the will dies after the commencement of this Act but not otherwise.

II

MEMORANDUM OF ONTARIO AND NOVA SCOTIA

Enclosed are three packages containing material relevant to the agenda item Impact of Divorce on Existing Wills. Each package contains a copy of the Ontario Law Reform Commission Report on the Impact of Divorce on Existing Wills, Section 2-508 of the Uniform Probate Code, a copy of the Report of the Law Reform Committee of South Australia "Relating to the Effect of Divorce Upon Wills", a recent amendment to the Ontario Wills Legislation Section 17, a copy of Manitoba Bill 41 containing an amendment to the Wills Act Section 36.1 and a copy of Section 17 of the Uniform Wills Act.

It is hoped that the enclosed material will be of assistance in finalizing the approach taken by the Uniform Law Conference in respect of the Impact of Divorce on Existing Wills. If it turns out that it is the wish of those present that the conclusions reached by the Ontario Law Reform Commission be adopted, then, Mr. Chester and myself will be recommending to the Conference that the present Section 17 of the Uniform Wills Act be replaced by words substantially to the effect of those recently enacted by the Ontario Legislature in respect of this matter.

Graham D. Walker
20 July 1978 Simon Chester

III

THE UNIFORM WILLS ACT

Section 17

(as adopted by the Conference in 1978)

No revocation by presumption

17. (1) Subject to subsection 2, a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Effect of divorce

(2) Where in a will

(*a*) a devise or bequest of a beneficial interest in property is made to a spouse;

(*b*) a spouse is appointed executor or trustee; or

(*c*) a general or special power of appointment is conferred upon a spouse,

and after the making of the will and before the death of the testator, the marriage of the testator is terminated by a decree absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

Interpretation

(3) In subsection (2) "spouse" includes the person purported or thought by the testator to be his spouse.

FOOTNOTES

1. See Uniform Law Conference of Canada, Proceedings of the Fifty-Ninth Annual Meeting (1977) p. 34.
2. English Law Reform Committee, Consultative Document, The Making and Revocation of Wills (1977) para. 26 at p. 18.
3. See Manitoba Law Reform Commission, Report Number 24, Report on Family Law (1976) at pp. 106-109; Saskatchewan Law Reform Commission, Third Annual Report, 1976 at p. 11; Ontario Law Reform Commission, Report on The Impact of Divorce on Existing Wills (1977).
4. S.M. 1977, c. 53, s. 7; S.O. 1977, c. 40, s. 17(2).
5. Revocation by marriage: R.S.A. 1970, c. 393, s. 17; R.S.B.C. 1960, c. 408, s. 16; R.S.M. 1970, c. W150, s. 17; R.S.N.B. 1973, c. W-9, s. 16; R.S.N. 1970, c. 401, s. 9, as enacted by S.N. 1971, c. 29, s. 2; R.O.N.W.T. 1974, c. W-3, s. 12(3); R.S.N.S. 1967, c. 340, s. 16; R.S.O. 1970, c. 499, s. 20 (repealed by S.O. 1977, c. 40, s. 43(1)(a); R.S.P.E.I. 1974, c. P-19, s. 69; R.S.S. 1965, c. 127, s. 15; R.O.Y.T. 1975, c. W-3, s. 11(3). No revocation permitted because of change of circumstances: R.S.A. 1970, c. 393, s. 18; R.S.B.C. 1960, c. 408, s. 18; R.S.M. 1970, c. W150, s. 18; R.S.N.B. 1973, c. W-9, s. 17; R.S.N. 1970, c. 401, s. 10; R.O.N.W.T. 1974, c. W-3, s. 12(1); R.S.N.S. 1967, c. 340, s. 17; R.S.O. 1970, c. 499, s. 21 (repealed by S.O. 1977, c. 40, s. 43(1)(a)); R S.P.E.I. 1974, c. P-19, s. 70; R.S.S. 1965, c. 127, s. 16; R.O.Y.T. 1975, c. W-3, s. 11(1).
6. 7 Will. 4 & 1 Vict., c. 26.
7. Approved initially in 1929, see 1929 Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada, p. 15.
8. See for example National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, S. 2-508; New York, Estates, Powers and Trusts Law, S. 5-1.4 as enacted by L. 1969, c. 805; Illinois, Annual Statutes, 1973, c. 3, S. 46; New Zealand, Wills Amendment Act 1977, No. 55.

9. While not exactly on all fours with this example *Goldfield, Shore and Canada Trust Company v. Koslovsky* [1976] 2 W.W.R. 553 is illustrative of the potential problem.
10. The Ontario Law Reform Commission Report gives statistics which indicate that roughly 65% of the deaths in that province each year result in intestacies: see Ontario Report at p. 3, footnote 8.
11. See for example N.H. R.S.A. 551:14; Mich. C.L.A. S. 702.9.
12. See also Forty-fourth Report of the Law Reform Committee of South Australia Relating to the Effect of Divorce Upon Wills (1977) at p. 6.
13. See for example Conn. Gen. Stats. S. 45-162.
14 See for example Penn. C.S.A. Title 20, s. 2507(2), Hawaii Rev. Stats. S. 536-13; Was. Rev. Code 11.12.050.
15. This is also the preferred alternative of the Uniform Probate Code s. 2-508.
16. See Property Law and Equity Reform Committee, Report on The Effect of Divorce on Testate Succession (1973) (New Zealand).
17. Letter from J. D. Lambert to R. S. G. Chester, May 30, 1978.
18. S.O. 1977, c. 40.
19. Williams' Law Relating to Wills (1974 4th Ed.) pp. 138, 141.
20. With one very obvious exception in that the South Australian Report at recommendation 6 at the top of page 8 would leave powers of appointment intact: the Ontario Commission and the Ontario Legislature chose to revoke them.
21. See the *Uniform Life Insurance Act*, s. 32, set out at pp. 187-188 of the Conference of Commissioners on Uniformity of Legislation in Canada, Model Acts Recommended from 1918 to 1961 inclusive.

    Where the wife or husband of the person whose life is insured is designated as beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy passes to the insured or his estate, unless such beneficiary is a beneficiary for value, or an assignee for value.

    Enacted by the provincial jurisdictions: R.S.A. 1955, c. 159, s. 255, repealed by S.A. 1960, c. 49, s. 4; R.S.B.C. 1960, c. 197, s. 151, repealed by S.B.C. 1962, c. 29, s. 3; R.S.M. 1954, c. 126, s. 176, repealed by S.M. 1960, c. 27, s. 3; R.S.N.B. 1952, c. 113, s. 161, repealed S.N.B. 1968, c. 6, s. 368; R.S.N. 1952, c. 238, s. 40, repealed S.N. 1960 no. 17, s. 56; R.O.N.W.T. 1956, c. 51, s. 90, repealed O.N.W.T. 1966 (1st. Sess.), c. 4, s. 3; R.S.N.S. 1954, c. 151, s. 39, repealed S.N.S. 1962, c. 9, s. 274; R.S.O. 1960, c. 190, s. 175, repealed S.O. 1961-62, c. 63, s. 4; R.S.P.E.I. 1951, c. 77, s. 152, repealed S.P.E.I. 1960, c. 22, s. 7; S.S. 1960, c. 77, s. 171(1), repealed S.S. 1961, c. 6, s. 4; R.O.Y.T. 1958, c. 57, s. 90, repealed O.Y.T. 1967 (1st Sess.), c. 15, s. 3.
22. Such plans are recognized under S.O. 1977, c. 40, Part III.
23. McKinney's Sessions Laws of New York, 1977 No. 4, at page A167. (1977 Leg. Doc. No. 65 (K-2)).
24. Not enacted see McKinney's Consolidated Laws of New York, Book 17B Estates, Powers and Trusts Law Cum. Ann. Pocket Part 1977-1978 at p. 157.

APPENDIX T

(See page 56)

FIRST REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE

TABLE OF CONTENTS

1. THE TASK FORCE

1.1 *The Objects of the Task Force*

On August 26, 1977, the Uniform Law Conference, held at St. Andrews, New Brunswick, unanimously passed the following resolution, which was introduced by Dr. Richard Gosse, Q.C., Deputy Attorney General, Province of Saskatchewan:

FEDERAL/PROVINCIAL UNIFORM LEGISLATION PROJECT ON EVIDENCE

RESOLVED that this matter be referred to Canada and Ontario, and such other jurisdictions which indicate an intention to participate to the Executive Secretary of the Conference by not later than 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 Conference by the participating jurisdictions, and similar draft reports at following Conferences 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 reference, the priorities and time-table recommended by the Task Force.

3. The Task Force consists of one person appointed by each of the participating jurisdictions and such other members as the participating jurisdictions agree upon.

4. That, 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.

1.2 *Participating Jurisdictions*

The above resolution referred to the jurisdictions which would carry forward the work of the Task Force as "participating jurisdictions". These jurisdictions are: Canada, British Columbia, Alberta, Ontario, Quebec and Nova Scotia.

1.3 *Members of the Task Force*

Each of the participating jurisdictions provided at least one person to become a member of the Task Force. The membership of

the Task Force and the jurisdictions which the members represent are as follows:

Canada	Kenneth L. Chasse Special Adviser (Criminal Law Policy) Federal Department of Justice Room 732, Justice Building Ottawa, Ontario K1A 0H8 Chairman
British Columbia	The Hon. George L. Murray Justice of the Supreme Court of B.C. Court House 800 West Georgia Street Vancouver V6C 1P6
Alberta	Margaret A. Shone Counsel Institute of Law Research and Reform 402 Law Centre University of Alberta Edmonton T6G 2H5
	Barinder Pannu Solicitor Department of the Attorney-General Province of Alberta 9803-102A Avenue Edmonton T5J 3A3
Ontario	David Watt Senior Counsel Ministry of the Attorney-General Province of Ontario 16th Floor, 18 King Street East Toronto M5C 1C5
	Peter Lockett Crown Counsel Civil Law Ministry of the Attorney-General

	Province of Ontario 17th Floor, 18 King Street East Toronto M5C 1C5
Quebec	Gilles Letourneau Director of Research, Legislative Affairs 945 Turnbull Street Quebec City
	Lucien Leblanc Research Counsel Office of the Director Legislative Affairs 945 Turnbull Street Quebec City
Nova Scotia	Graham Walker, Q.C. Legislative Counsel Province of Nova Scotia P.O. Box 1116 Halifax B3J 2L6
	William MacDonald Senior Legislative Solicitor Office of Legislative Counsel Province of Nova Scotia P.O. Box 1116 Halifax B3J 2L6
Adviser	Anthony F. Sheppard Professor of Law Faculty of Law University of British Columbia 2075 Westbrook Place Vancouver V6T 1W5

1.4 *Terms of Reference*

Paragraph 1(a) of the Conference resolution required the Task Force to formulate terms of reference for the project. The Task Force has adopted these terms:

To attempt to bring about uniformity among the provincial and federal rules of evidence by,

(1) stating the present law, and

(2) surveying the Report on Evidence of the Law Reform Commission of Canada, the Report on the Law of Evidence of the Ontario Law Reform Commission, the reports of the other provincial law reform commissions on various subjects in the law of evidence, the major codifications of the law of evidence in the United States and the major reports on the law of evidence from England and the other Commonwealth countries, for the purposes of,

(a) setting out the alternative solutions for the various problems in the law of evidence, and

(b) recommending the preferred solutions amongst those alternatives.

1.5 *Meetings of the Task Force*

The members of the Task Force meet for two days, on the Thursday and Friday of the second week of each month, except July and August. The meetings are usually held in the offices of the Federal Department of Justice. During the period covered by this report, the Task Force held meetings and discussed the topics set out below.

Date	*Location*	*Topics Considered*
November 9, 1977	Toronto	Organization, Topics, Terms of Reference
December 7/8, 1977	Toronto	Hearsay, Spousal Competency, Compellability and Privilege, Competency of Children and the Mentally Disabled, Clerical Privilege, Professional Privilege
January 12/13, 1978	Toronto	Competency and Compellability Marital Communications, Privilege, The Oath
February 9/10, 1978	Vancouver	Spousal Competency and Compellability, Marital Communications Privilege, The Oath, Competency of Children and the Mentally Disabled, Hearsay, Cross-Examination as to Previous Convictions

Date	*Location*	*Topics Considered*
March 9/10, 1978	Toronto	The Oath, Spousal Competency and Compellability, Marital Communications Privilege
April 13/14, 1978	Quebec City	Spousal Competency and Compellability, Competency of Children and the Mentally Disabled, The Oath
May 10/11/12, 1978	Vancouver	Professional Privilege, The Oath, Competency of Children and the Mentally Disabled
June 7/8, 1978	Edmonton	Professional Privilege, Cross-Examination as to Previous Convictions, Reputation of Witnesses, Character of Accused (or Party), Expert Witnesses and Non-Expert Opinion Evidence

1.6 *Timetable and Method*

The Task Force is proceeding systematically through the Law of Evidence. First, Dr. Gosse and Margaret Shone reduced the subject to specific topics. Next, Anthony Sheppard prepared a timetable of the various topics for future meetings of the Task Force. According to this timetable, the work of the Task Force will be completed and its final report submitted to the Uniform Law Conference for the meeting in August, 1980.

Most of the topics have been assigned to members of the Task Force. Prior to a monthly meeting at which a particuar topic is to be introduced, a member is responsible for preparing and circulating to the other members a position paper on the topic. These position papers set out: the present law, relevant proposals for codification or reform, considerations of policy and the author's recommendations. The Task Force usually considers a topic at more than one monthly meeting. Between monthly meetings the author may be asked to rework the discussion paper and each of the members will consult with knowledgeable individuals in the member's jurisdiction about the topic under consideration. At each successive monthly meeting during which a topic is discussed the issues should become more precise. Within three or four such meetings, the Task Force usually has reviewed the alternative courses of action and arrived

at its decision. The decisions which have been made so far, and commentary, are set out in the pages that follow. The members of the Task Force are satisfied that this method of dealing with the Law of Evidence is productive and expeditious. The following table lists the topics in order of consideration by the Task Force and the assignment of discussion papers.

Topic	*Discussion Paper*
Competency	Nova Scotia, William MacDonald
Compellability	Canada, Kenneth Chasse
	Canada, Kenneth Chasse
Marital Communications Privilege	Canada, Kenneth Chasse
Professional Privilege	Canada, Kenneth Chasse
The Oath	Quebec, Lucien Leblanc
Hearsay	Ontario, David Watt
Cross-examination as to Previous Convictions	Alberta, Barinder Pannu
Reputation of Witnesses	Alberta, Margaret Shone
Character of Accused (or Party)	Anthony Sheppard
Expert Witnesses	Ontario, Peter Lockett
Non-Expert Opinion Evidence	Anthony Sheppard
Use of Previous Statements	Canada, Kenneth Chasse
Interpreters and Translators	Nova Scotia, William MacDonald
Res Gestae	Anthony Sheppard
Manner of Questioning Witnesses	Quebec, Gilles Letourneau, Lucien Leblanc
	Canada, Kenneth Chasse
State Privilege	Ontario, Peter Lockett
Business and Government Records and Documents	Canada, Kenneth Chasse
Best Evidence Rule	Canada, Kenneth Chasse
Relevance	Anthony Sheppard
Refreshing a Witness's Memory	Nova Scotia, William MacDonald
The Rule in *Hollington v. Hewthorn*	Ontario, Peter Lockett
Admissions and Confessions	Ontario, David Watt
The Privilege Against Self-Incrimination	Canada, Kenneth Chasse
Real Evidence	Not assigned
Illegally Obtained Evidence	Quebec, Gilles Letourneau
Evidence Obtained in a Manner Likely to Bring the Adminis-	

Topic	*Discussion Paper*
tration of Justice into Disrepute	Quebec, Gilles Letourneau
Judicial Notice	Alberta, Margaret Shone and Barinder Pannu
Trial Problems	Anthony Sheppard
Exluding Witnesses	Anthony Sheppard
Corroboration	British Columbia, Hon. George Murrary and David Watt
Burden of Proof	Quebec, Gilles Letourneau
Presumptions, Inferences and Reverse Onus Clauses	Alberta, Margaret Shone and Barinder Pannu
Evidence on Appeal	Ontario, David Watt
Applicability of Rules of Evidence	Margaret Shone
Other Privileges	Not assigned

1.7 *Preparation of Minutes of Meetings and Draft Reports*

The monthly meetings of the Task Force are tape-recorded. From these tapes, Kenneth Chasse prepares minutes and he or Anthony Sheppard prepares discussion notes. Both the minutes and notes are circulated to the members of the Task Force prior to the following meeting. Anthony Sheppard is responsible for preparing drafts of the annual report.

1.8 *Summary of What the Task Force has Accomplished so far*

On several topics the Task Force has completed its review, and its recommendations are set out later in this report. These topics are: Spousal Competency in Criminal Cases, Civil Proceedings and Provincial Prosecutions; Marital Communications Privilege; Marital Privileges Relating to Illegitmacy and Adultery; The Oath; Competency of Children and the Mentally Disabled; and Professional Privilege.

On other topics, the work of the Task Force has begun and is underway: discussion papers have been prepared and reviewed at one or more monthly meetings. These topics are: Cross-Examination as to Previous Convictions, Reputation of Witnesses, Character of an Accused (or Party), Expert Witnesses and Non-Expert Opinion Evidence, Manner of Questioning Witnesses, and the Definition of Hearsay. The Task Force would expect to have completed its review of these areas and others for its interim annual report to the Uniform Law Conference, in 1979.

The two discussion papers on Cross-Examination as to Previous Convictions: (1) summarized the present Canadian law which provides a right to impeach any witness, including an accused, by cross-examination as to any offence; (2) pointed out that this was extreme as compared with the position in other jurisdictions; and (3) suggested that the present rule might be improved by confining it to crimes of dishonesty and by relieving the plight of the accused who has a record.

The discussion paper on Character of an Accused (or Party): (1) summarized the present law; (2) argued that attempts at reform and codification in other jurisdictions had not improved matters; and (3) suggested that further amendments to the Code, s. 142, were necessary to protect the complainant in sex cases.

The discussion paper on Reputation of Witnesses: (1) reviewed the common law rule which permits the impeachment of witnesses by evidence of their reputation for untruthfulness; (2) argued that "reputation" may be out of date as it is presently defined; and (3) suggested that impeachment by reputation be liberalized and impeachment by opinion evidence be introduced.

The other two discussion papers on the Manner of Questioning Witnesses and the Definition of Hearsay are being revised. All discussion papers are preliminary examinations only and merely introduce the Task Force to the topic under review. They do not necessarily indicate the direction the Task Force's recommendations will take.

1.9 *The First Draft Report*

The Task Force has prepared this report pursuant to the Conference resolution, paragraph 1(d). By this report the Task Force hopes to inform the Uniform Law Conference of the way in which it is proceeding and to receive comment and criticism. The recommendations which follow set out the present views of the Task Force and do not necessarily reflect those of the participating jurisdictions.

1.10 *Outline of the Task Force's Recommendations*

For a quick appreciation of the main recommendations in this Report, the present rule of Evidence and the Task Force's proposal are concisely summarized. These matters are discussed more fully in the following sections of this Report. This Outline does not purport to be a full summary.

(1) *Spousal Competency in Criminal Cases* (see Section 2 of the Report)

Present Rule: An accused's spouse is, with a few exceptions, incompetent to testify for the prosecution in a criminal case. The spouse is competent for the defence.

Proposals: The Task Force recommends:

(a) By a majority that a spouse should remain incompetent to give evidence against the other on behalf of the Crown as section 4(1) of the *Canada Evidence Act* provides;

(b) By a majority that spousal incompetency should remain limited to legal marriage;

(c) By a majority that, except where both spouses are jointly charged, a spouse should be compellable at the instance of the accused spouse;

(d) Unanimously that an accused's spouse should be competent but not compellable to give evidence for a person tried jointly with the other spouse, in all cases;

(e) Unanimously that an accused's spouse should be competent and compellable for the Crown in proceedings under any of the following provisions and/or offences:

(i) section 33 or 34 of the Juvenile Delinquents Act, sections 143 to 146, 148 to 157, 166 to 168, 195, 197, 200, 216, 218 to 221, 226, 227, 248 to 250, 255 to 257, 289, paragraphs 423(1)(c) and 688(b) or an attempt to commit an offence under section 146 or 155 of the *Criminal Code*;

(ii) crimes against the accused's spouse or his or her property;

(iii) crimes against a child under the age of 14 years;

(iv) high treason or treason punishable by a maximum term of life imprisonment.

(2) *Spousal Competency in Civil Proceedings and Provincial Prosecutions* (see section 3 of the Report)

Present Rule: Although the rules vary from province to province, in general, an accused and his or her spouse are competent and compellable on the prosecution of provin-

cial offences. In all jurisdictions spouses of parties are competent and compellable witnesses in civil proceedings.

Proposals: The Task Force recommends:

(a) Unanimously that the present rules of spousal competency and compellability in civil actions be retained.

(b) Unanimously that the proposals set out in sections 2.2 to 2.5 of this Report should apply to provincial prosecutions; the same rules of spousal competency and compellability should apply to criminal and provincial offences.

(c) Unanimously an exception to (b) for the enactment of rules of spousal competency and compellability for the prosecution in Acts other than the provincial Evidence Act.

(d) By a majority that there be further exceptions for:

(i) a provincial offence against the spouse or against his or her property; and

(ii) a provincial offence against a child under the age of 14 years.

(3) *Privilege for Marital Communications* (see Section 4 of the Report)

Present Rule: A spouse may refuse to testify to communications from the other spouse.

Proposal: A majority of the Task Force recommends that the privilege for marital communications should be abolished in all cases.

(4) *Spousal Privileges Concerning Illegitimacy and Adultery* (see Section 5 of the Report)

Present Rule: Although the rules differ from province to province, a spouse may have a privilege not to testify so as to illegitimize a child or to admit adultery.

Proposals: The Task Force recommends:

(a) Unanimously that any spousal privilege derived from the rule in *Russell* v. *Russell* be abolished.

(b) Unanimously that the spousal privilege relating to adultery should be abolished.

(5) *The Oath* (see Section 6 of the Report)

Present Rule: Every witness, except some very young children, must swear an oath to tell the truth, unless the court allows the witness to affirm.

Proposal: A majority of the Task Force recommends that the Evidence Acts be amended to provide that:

(a) Any court and any judge, as well as any person authorized by law or by the consent of the parties to hear and receive evidence, may require of any witness legally summoned to give evidence before such court, judge or person that he take an oath or solemn affirmation.

(b) The court or the judge, the officer or other person authorized to administer an oath and solemn affirmation must, before so doing, inform a witness of his right to choose an oath or affirmation and request that the witness indicate such choice.

(6) *Competency of Children* (see Section 7 of the Report)

Present Rule: A child over fourteen years of age is presumed to be competent, but the court must determine whether a child under fourteen should be permitted to testify on oath or affirmation or unsworn or should be disqualified as a witness.

Proposal: The Task Force recommends:

(a) By a majority that provision should be retained for receiving children's unsworn evidence.

(b) By a majority that section 3(2) and (3) of the Draft Ontario Evidence Act should be adopted to define the capacity of children to testify upon oath (or affirmation) or unsworn.

(7) *Mental Incapacity* (see section 8 of the Report)

Present Rule: If a judge finds that a witness lacks sufficient mental capacity to testify rationally and to understand the duty to testify truthfully, the witness may be excluded as incompetent.

Proposal: A majority of the Task Force recommends that those who do not qualify as children of tender years and who are incompetent to testify under oath or affirmation because

of mental incapacity be allowed to testify if they meet the requirements for testifying without oath or affirmation.

(8) *Professional Privilege* (see section 9 of the Report)

Present Rule: The only professional relationship to which a common law privilege applies is the relationship between a lawyer and a client. By Federal and Provincial statutes, other privileges have been created.

Proposal: A majority of the Task Force recommends that a privilege be enacted for communications made between an accused and an assessing physician during a remand for observation: such communications would be inadmissible against the accused in any criminal proceeding other than a fitness hearing except where the accused waives the privilege by putting his or her mental state in issue.

2. SPOUSAL COMPETENCY IN CRIMINAL CASES

2.1 *The Rules of Competency in General*

Rules of competency determine if a witness is capable of testifying at a trial. The general principle is that the common law rules of competency continue in force except as altered by statute. Today, there are different rules of competency in criminal prosecutions, civil cases, and in provincial prosecutions. In criminal cases, the common law as altered by section 4 of the *Canada Evidence Act* R.S.C. 1970 c. E-10 constitutes the rules of competency.

For easy reference the relevant provisions of section 4 are set out here and the Task Force's proposals with respect to these provisions follow.

Section 4(1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

(2) The wife or husband of a person charged with an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of sections 143 to 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 248 to 250, 255 to 258, 289, para-

graph 423(1)(c) or an attempt to commit an offence under section 145 or 155 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged.

(4) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

(5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution.

In this Report, the Task Force recommends changes to subsections (1), (2) and (4). As to subsection (5), the Task Force will report its views when it has developed proposals concerning the Privilege Against Self-Incrimination and Cross-Examination as to Previous Convictions.

2.2 *Spousal Competency as a Witness for the Prosecution*

Section 4(1) of the *Canada Evidence Act* preserves the common law rule that the spouse of an accused is incompetent to testify for the prosecution against the accused.[1] In other words, the spouse of an accused is incompetent to testify against the other spouse, but is competent to testify in favour of the accused. At a joint trial of a spouse and a co-accused, the other spouse is incompetent to testify against the co-accused—particularly where the spouse's testimony would indirectly be adverse to the accused spouse.[2] Where the accused spouse and a co-accused are jointly charged but tried separately, both the accused and his or her spouse are competent and compellable for the prosecution at the trial of the co-accused.[3]

Since an accused's spouse is incompetent to testify for the Crown, the accused can prevent the spouse who is willing to take the stand from testifying against him. The Task Force considered whether section 4(1) ought to be changed to make the witness spouse competent but not compellable for the prosecution in all cases not otherwise provided for in sections 4(2) or 4(4). This would turn the common law rule of incompetency into a privilege held by the witness spouse to choose to testify for the Crown against the accused spouse or to refuse to do so.

What are the relative merits of the present rule of incompetency, and this change?

First, the mystical unity of husband and wife, which was the basis of the common law rule of incompetency, is no longer convincing. In modern times, the argument has shifted from religious to utilitarian grounds: that society, by prohibiting spouses from testifying against each other, benefits from the marital harmony and family peace which is created. A counter-argument in favour of the privilege in the witness spouse is that, when a spouse is willing to testify against the accused spouse, harmony must have already gone from that marriage and that prohibiting the spouse from testifying would not help to save the marriage.

To this counter-argument for spousal privilege there are several answers. In *Hawkins* v. *United States*,[4] the United States Supreme Court rejected the argument that the privilege to testify should be held by the spouse witness. Justice Stewart, concurring, stated that the "marriage gone" argument was impractical: a court could not determine if the witness spouse had freely chosen to testify against the accused spouse or if the state had, by unfair means, coerced the witness into doing so. To make a spouse competent to testify against the accused spouse would invite the Crown and the accused to influence the spouse's decision to testify or not. Crown witnesses, who are competent and compellable and do not have this choice, are not in the same position. To give the witness spouse a privilege not to testify for the Crown might lead the Crown to take unfair tactical advantage by calling the accused's spouse as a witness, knowing that he or she will refuse to testify, and in the presence of the jury forcing the spouse to claim the privilege. This tactic might encourage a jury to draw an inference adverse to the accused: that the spouse's testimony would have been unfavourable. This Crown abuse could be avoided by requiring that the jury be absent until the spouse witness indicates to the judge that he or she is willing to testify. Finally, the "marriage gone" theory implies that when a spouse testifies for the Crown, the only marital harmony which may be lost is between the spouse accused and the spouse witness. But the purpose of the protection is to preserve marriage as a social institution. As soon as the public learned through the news media that spouses could testify for the Crown against each other, marital candour and frankness would be discouraged. The public would also feel a sense of revulsion that the state was invading the privacy of its citizens and that it now had an interest in destroying marital harmony to obtain evidence.[4a]

Second, if a spouse were competent but not compellable and chose to testify for the prosecution, a judge or jury would tend to distrust the spouse's testimony. If, in testifying for the Crown, the spouse

was favourable to the accused, the testimony would be viewed as too sympathetic to the accused. If the spouse was adverse to the accused, defence counsel would try to attack the credibility of the spouse, as a vindictive and biased witness. The judge or jury would be presented with the details of the break-down of the witness's and accused's marriage. This collateral issue would be time-consuming and would distract the judge or jury from the accused's guilt or innocence.

In the preparation of its cases, the Crown would derive little benefit from the proposal to replace incompetency with a privilege. Where a spouse was a potential Crown witness, the Crown could not count on that testimony to make its case. The spouse could always refuse to testify at the last minute. A change in the rules of competency which leaves the final decision to testify or not to the whim or caprice of the witness does little to advance the search for the truth. Similarly, an accused is entitled to be tried according to uniform rules of procedure equally applicable to all persons. The bliss or breakdown of an accused's marriage should not influence the outcome of a criminal prosecution.

Other jurisdictions have proposed making a spouse competent but not compellable on all charges, against the other spouse.[5]

A majority of the Task Force were in favour of retaining the present rule of spousal incompetency. The vote was four in favour of the present rule and two in favour of making the spouse competent but not compellable.

2.3 *Necessity of a Valid Marriage*

The rule of spousal incompetency requires a valid legal marriage.[6] A spouse is incompetent even though the marriage took place after the alleged crime was committed and before trial to prevent the Crown from calling the spouse as a witness.[7] On the other hand, if the spouses were validly married when the crime took place, a divorce or annulment (of a voidable marriage) before trial does not alter incompetency. A former spouse remains incompetent to testify about matters which are alleged to have happened during the marriage.[8] Spousal incompetency does not extend to any less formal relationships than legal marriage.[9]

The privilege for marital communications ceases upon the termination of the marriage so that a former spouse who is a competent and compellable witness can be required to reveal marital communications received from the other former spouse.[10] Thus, under sections 4(1),

(2), and (4), the words "wife" and "husband" include former spouses.[11] Under section 4(3), which creates the communications privilege, the courts have interpreted the same words to exclude former spouses. The reasons set out in section 2.2 of the Report, concerning spousal competency for the prosecution apply equally to a spouse and a former spouse of the accused. In principle, the present incompetency of an accused's former spouse to testify for the Crown as to matters which allegedly happened during the marriage seems correct. The Task Force's recommendations with respect to the privilege for marital communications are set out in section 4 of this Report.

Since the majority of the Task Force would retain the present rule of spousal incompetency, its scope was reconsidered. Should incompetency extend to persons who have been living together for two years as husband and wife, without having gone through a legally recognized ceremony of marriage?

The extension of incompetency beyond legal marriage would create difficult problems of statutory definition. While other statutes may recognize less formal domestic relationships, an Evidence Act should be simple and practical. It should avoid posing complex factual questions for judges. If such a definition were enacted and the Crown called a witness, to whom the accused objected as being within the definition and therefore incompetent, the proceedings would bog down in potentially lengthy *voir dire.* Legal marriage is a convenient point at which to draw the line.

It is arguable that society does not have the same interest in protecting the harmony of relationships which are not legal marriages. If there is some doubt about the social benefit to be gained, the disadvantages are clear: the loss of admissible evidence and the danger that parties will live together to suppress evidence.

Four members of the Task Force were in favour of retaining the present requirement of legal marriage; two members would extend incompetency to couples who had cohabited for two years prior to the time of trial.

2.4 *Compellability of a Spouse for an Accused Spouse*

At common law, an accused's spouse was incompetent as a witness for the accused.[12]

Section 4(1) of the *Canada Evidence Act* makes the accused or his or her spouse " . . . a competent witness for the defence, whether

the person so charged is charged solely or jointly with any other person." *Gosselin* v. *The Queen*[13] is the leading authority that "competent" in section 4(1) means "competent and compellable". This decision had the shocking result of making the accused and the spouse competent and compellable for the prosecution against the accused (and for the defence). In 1906, Parliament reversed *Gosselin* by adding the words "for the defence" to section 4(1), which revived common law incompetency as witnesses for the Crown. Parliament also added section 4(2) which used both words, "competent" and "compellable". Does *Gosselin* still apply to section 4(1)? If it does, the spouse of the accused is competent and compellable for the accused. If it does not, the spouse is competent only. Compare *Re Samwald and Mills*[14] in which Murray J. applied *Gosselin* to the B.C. Evidence Act, with *R.* v. *Arneson*[15] which suggests that *Gosselin* no longer applies to section 4(1) of the Canada Evidence Act.

Should the spouse of an accused be compellable at the instance of the accused? When the spouse is a helpful but unwilling witness, compellability would assist the accused in making out the defence. If the spouse is both unwilling and unhelpful, it would be to the accused's tactical disadvantage to compel the spouse to testify. Making the spouse compellable would not increase the danger that an honest spouse who was unwilling to testify would be forced to choose between perjury and the marriage. Even if the present rule is that the spouse is not compellable for the accused, the spouse is competent. Assuming a spouse is competent, adding compellability would not add to any pressure which an accused might be able to bring to bear on the spouse witness to commit perjury. However, where spouses are jointly charged, each should be competent but not compellable to give evidence for the other. The general principle is that an accused person should not be compellable to give evidence against himself and this principle should apply to jointly charged spouses. If each spouse were competent only, he or she could refuse to testify for the other spouse. Otherwise, a spouse accused could be compelled by the other spouse to testify against his or her own defence.

Two other jurisdictions have recently proposed that the spouse should be compellable in all cases for the accused spouse: England[16] and South Australia.[17]

Four members of the Task Force voted in favour of making the spouse compellable for the accused and two members voted against it.

If a spouse has relevant testimony, is incompetent for the Crown and compellable for the accused, should the Crown be entitled to

comment upon the accused's failure to call the spouse? The Task Force has left this question for its consideration of section 4(5).

2.5 *Spousal Competency for a Co-accused*

At common law, the prevailing view was that, on the joint trial of accused persons, a spouse of an accused was incompetent as a witness for a co-accused if the spouse's testimony would indirectly hurt or help the spouse's defence.[18] If the spouse's testimony would not affect the other spouse's defence or if the accused persons had separate and distinct defences, a spouse was allowed to testify for a co-accused.[19] Other judges have held that in no case where a spouse is on trial could a co-accused call the other spouse.[20]

Under section 4(1), is the spouse merely competent for a co-accused or competent and compellable, in accordance with the *Gosselin* case (above)? A difficulty is that a co-accused may want to call the spouse to testify against the other spouse. It is unclear if section 4(1) changes the common law to make the spouse competent for a co-accused against the accused spouse. The general policy of the law is to exclude a spouse's testimony directly or indirectly against the accused, unless section 4 clearly changed the law.[21]

The Task Force believes that an accused's spouse should not be compellable for a co-accused. Otherwise, making the spouse compellable to give evidence indirectly against the accused would contradict the social policies disussed in "2.2. Spousal Competency as a Witness for the Prosecution." On the other hand, to allow a co-accused to make out a defence, the spouse should be competent for the co-accused in all cases. If a co-accused were to call the spouse to testify against the accused spouse, he or she would have the protection of being able to cross-examine the witness spouse.[22]

The Task Force was unanimously in favour of the proposal that the spouse of an accused should be competent but not compellable to give evidence for a person tried jointly with the other spouse.

2.6 *Spousal Compellability for the Crown*

At common law, an accused's spouse was incompetent to testify for the Crown against either the accused spouse or a co-accused, tried jointly with the other spouse, particularly where the testimony indirectly affected the spouse's case. Section 4(1) preserves this general rule of incompetency for the Crown.[23]

Two subsections of section 4 create exceptions to the general rule of incompetency.

First, section 4(2) lists the section numbers of various offences. Where a spouse is charged with one of these offences, the other spouse is a competent and compellable Crown witness. The offences listed in s. 4(2) of the *Canada Evidence Act* are: s. 33 Juvenile Delinquents Act, contributing to juvenile delinquency; s. 34 *Juvenile Delinquents Act*, inducing child to leave detention home, foster home, etc.; *Criminal Code*, s. 143, rape; s. 145, attempted rape; s. 146(1), (2), sexual intercourse with female under 16 or an attempt; s. 148, sexual intercourse with feeble-minded, insane, etc.; s. 150, incest; s. 151, seduction of female between 16 and 18; s. 152, seduction under promise of marriage; s. 153, sexual intercourse with stepdaughter, etc., or female employee; s. 154, seduction of female passengers on vessels; s. 155, buggery or bestiality or an attempt; s. 157, acts of gross indecency; s. 166, parent or guardian procuring defilement; s. 167, householder permitting defilement of female under 18; s. 168, corrupting children; s. 169, indecent acts; s. 175(1)(e), vagrancy re dangerous sexual offenders; s. 175(1)(d), living off the avails of gaming or crime and being without lawful means of support; s. 195, procuring; s. 197, duty of parent or guardian to provide necessaries; s. 200, abandoning child; s. 248, abduction of female for marriage or illicit sexual intercourse; s. 249, abduction of female under 16; s. 250, abduction of child under 14; s. 255, bigamy; s. 256, procuring feigned marriage between oneself and a female; s. 257, polygamy; s. 258, pretending to solemnize marriage; s. 289, theft between husband and wife; s. 423(1)(c), conspiring to induce a female to commit adultery or fornication: The list comprises sex crimes, crimes against children, crimes against marriage and crimes of non-support of dependants. Some offences are indictable, many are hybrid and a few are punishable on summary conviction.

Then section 4(4) preserves the common law exceptions to the rule of spousal incompetency for the Crown. At common law, an accused's spouse was a competent Crown witness on certain charges. In Canada the prevailing view is that if the spouse witness is competent, he or she is also compellable by the Crown.[24] However, the House of Lords has recently held that at common law the spouse is competent but not compellable.[24a] A spouse who is competent and compellable against the other spouse is also competent and compellable *for* the other spouse.[25]

At common law, on which charges is the accused's spouse compellable for the Crown? They are crimes by the accused spouse involving violence to the other spouse, injury to the spouse's health or interference with the spouse's liberty. Crimes against the spouse's

liberty, health or person include: (1) murder,[26] (2) attempted murder,[27] (3) aiding and abetting rape of spouse,[28] (4) buggery of the spouse,[29] (5) forcible entry—spouse's dwelling,[30] (6) forcible abduction and marriage,[31] (7) assault.[32] Crimes which have been held not to be against the spouse's liberty, health or person include: (1) sending letter to spouse which contained a threat to murder,[33] (2) extortion of spouse by threat to kill,[34] and (3) theft of spouse's property.[35]

Another possibility is treason, although this is unclear.[36]

The exceptions to spousal incompetency for the Crown are obscure, complex and difficult to explain. They vary from jurisdiction to jurisdiction. In England, extensive reform has been proposed.[37]

The Task Force proposes that a new subsection should be inserted in the *Canada Evidence Act.* This subsection, in four paragraphs, would expand upon and replace the present section 4(2) and (4). The exceptions to the general rule of spousal incompetency for the Crown would be entirely statutory. Since the proposals would include the common law exceptions, they would be abolished. This subsection would provide that the spouse of a person charged with any of the following offences and/or proceedings is a competent and compellable witness for the prosecution without the consent of the person charged:

(a) section 33 or 34 of the *Juvenile Delinquents Act*, sections 143 to 146, 148 to 157, 166 to 168, 195, 197, 200, 216, 218 to 221, 226, 227, 248 to 250, 255 to 257, 289, paragraphs 423(1)(c) and 688(b) or an attempt to commit an offence under section 146 or 155 of the *Criminal Code*, or

(b) crimes against the accused's spouse or his or her property, or

(c) crimes against a child under the age of 14 years, or

(d) high treason or treason punishable by a maximum term of life imprisonment.

Paragraph (a) above revises the offences presently listed in section 4(2). Such a list is useful and should be retained because it is clear and includes offences which are outside paragraphs (b), (c) and (d).

The Task Force unanimously adopted the following recommendations concerning paragraph (a).

First, an accused's spouse should remain competent and compellable for the Crown where the alleged crime violates or contradicts

the marriage relationship. Under this principle most of the offences in section 4(2) would remain. And, indecent assault on a female (s. 149) and indecent assault on a male (s. 156) should be added. However, section 258 of the *Code*, pretending to solemnize marriage, should be deleted. The allegation that the accused has participated in the unlawful solemnization of a marriage between two individuals neither contradicts nor violates his or her own marriage.

Second, all summary conviction offences should be excluded from the list of offences because society's interest in the search for the truth does not equal its interest in protecting marital harmony and privacy. This principle is consistent with the Task Force's recommendation that spouses should not be competent witnesses for the prosecution on provincial offences, in section 3.2 of this Report. Provincial prosecutions are summary conviction proceedings. According to this principle, vagrany (s. 175) should be deleted.

Third, murder (s. 218) and manslaughter (s. 219) should be added. In respect of these offences, society's interest in the search for the truth is at its greatest. Its interest in preserving human life outweighs its interest in protecting marital harmony and privacy.

Fourth, infanticide (s. 200), killing an unborn child in the act of birth (s. 221), and neglect to obtain assistance in childbirth (s. 226) should be added. Spouses should be competent and compellable Crown witnesses because these crimes involve: (1) loss of human life, (2) contradiction or violation of the marriage relationship, and (3) infant victims. The addition of these offences is consistent with the addition of murder and manslaughter and crimes against a child under 14 years (paragraph (c)) and with the rationale of most of the offences in section 4(2).

Fifth, a spouse should be competent and compellable on dangerous offender proceedings under s. 688(b) of the *Code*. Section 688(b) states that before a person may be liable to imprisonment as a dangerous offender, he or she must have been convicted of a sex offence listed in section 687(b). On prosecutions for any of the offences listed in section 687(b), the spouse would be a compellable Crown witness if the Task Force's recommendations to add ss. 149 and 156 (indecent assault) are adopted. In principle, a spouse should be compellable in proceedings arising out of prosecutions on which he or she was compellable.

The Task Force is aware of Bill C-52 which received first reading on May 1, 1978, and of its implications. If Bill C-52 is enacted,

some minor changes to the above recommendations will be required. The release of the Law Reform Commission of Canada's proposals on sex offences was concurrent with the drafting of this report and could not be given full consideration by the Task Force.

Paragraph (b) replaces the common law exception for crimes against the spouse's person, liberty or health. The rationale of the common law exception is necessity, i.e. unless a spouse's testimony were admissible, crimes between spouses would go unpunished and the victims would be denied the protection of the criminal law. The Task Force agrees with the rationale and would expand the crimes within its scope. The principle of necessity applies to all crimes against the spouse, not merely to those recognized at common law. Similarly, it applies to crimes against the property of the spouse, not merely to those against the spouse's person. Nowadays, the limits of the common law exception seem arbitrary and out-of-date. In the United States, at both Federal and State levels, similar proposals have been enacted.

Paragraph (c) would offer some protection to children from crimes against them. The present section 4(2) would already deal with most sex crimes against children, but paragraph (c) is particularly aimed at crimes of violence against children in the home. In such cases, the spouse and the accused may be the only adult witnesses. According to the principle of necessity, the spouse ought to be compellable for the Crown. If the victim of the crime is a child of the spouse, marital harmony between the spouses may be so damaged that calling the spouse to testify will not impair it any further. Although paragraph (c) applies to all crimes against the persons of children under fourteen, and could apply to some trivial incidents, it is reasonable to expect prosecutors to exercise restraint in calling spouses as witnesses against each other. If prosecutors began to abuse the provision, judicial and public censure would be quick and effective. In the United States, exceptions for crimes against children have long been recognized. In England, a narrower proposal has been advanced.[38]

Paragraph (d) would clear up the vague and arguable exception for treason at common law. The paragraph recognizes only the most serious of the crimes against the state. In respect of these crimes, the Task Force believes that the public interest in the safety of the state outweighs the public interest in marital harmony and privacy.

Only where an accused is charged with an offence within paragraphs (a) to (d) would the spouse be a competent and compellable Crown witness. If a count alleging an offence within paragraphs (a)

to (d) is joined with another count on which the spouse is incompetent as a Crown witness, the accused may ask for severance, i.e. for a separate trial on each count. If the two counts are tried together, the spouse's evidence for the Crown is admissible on the count within paragraphs (a) to (d) and inadmissible on the other count.[39] A trial judge must instruct the jury to disregard the spouse's evidence on the other count. The Task Force unanimously agrees that no legislation is required since severance and instruction to the jury are sufficient to provide a fair trial to the accused.

2.7 *Recommendations with respect to Spousal Competency in Criminal Cases.*

The Task Force recommends:

(a) by a majority that a spouse should remain incompetent to give evidence against the other on behalf of the Crown as section 4(1) provides;

(b) by a majority that spousal incompetency should remain limited to legal marriage;

(c) by a majority that, except where both spouses are jointly charged, a spouse should be compellable at the instance of the accused spouse;

(d) unanimously that an accused's spouse should be competent but not compellable to give evidence for a person tried jointly with the other spouse, in all cases;

(e) unanimously that an accused's spouse should be competent and compellable for the Crown in proceedings pursuant to any of the following provisions and/or offences:

(i) section 33 or 34 of the Juvenile Delinquents Act, sections 143 to 146, 148 to 157, 166 to 168, 195, 197, 200, 216, 218 to 221, 226, 227, 248 to 250, 255 to 257, 289, paragraphs 423(1)(c) and 688(b) or an attempt to commit an offence under section 146 or 155 of the Criminal Code;

(ii) crimes against the accused's spouse or his or her property;

(iii) crimes against a child under the age of 14 years;

(iv) high treason or treason punishable by a maximum term of life.

[See Comment and Dissent from the foregoing recommendations, by Kenneth Chasse, at the end of Section 3.]

3. SPOUSAL COMPETENCY IN CIVIL PROCEEDINGS AND PROVINCIAL PROSECUTIONS

3.1 *Spousal Competency For or Against the Other Spouse in Civil Proceedings*

At common law, a spouse was incompetent to testify in a civil proceeding for or against the other. In all Provinces and Territories, statutes now determine spousal competency. These statutes have removed the common law rule of incompetency: a spouse is competent and compellable as a witness either for or against the other spouse in all civil proceedings. The relevant statutes are as follows: British Columbia, *Evidence Act*, R.S.B.C. 1960, c. 134, s. 8(1); Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 5(2); Saskatchewan, *The Saskatchewan Evidence Act, R.S.S.* 1965, c. 80, s. 33(1); Manitoba, *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 5; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 8(1); Quebec, *Code of Civil Procedure*, 1965, c. 80, s. 295; New Brunswick, *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 3(1); Nova Scotia, *Evidence Act*, R.S.N.S. 1967, c. 94, s. 42; Prince Edward Island, *Evidence Act*, R.S.P.E.I. 1974, c. E-10, ss. 4, 10; Newfoundland, *The Evidence Act*, R.S.N. 1970, c. 115, s. 2; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 4(1); Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 4. The *Uniform Evidence Act* (as revised 1945 and as amended), s. 4, provides:

> The parties to an action and the persons on whose behalf the same is brought, instituted, opposed or defended, and their wives or husbands, shall, except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of themselves or of any of the parties.

Finally, the Ontario Law Reform Commission[40] recommended that the spouses of parties should be competent and compellable for any party.

The Task Force voted unanimously in favour of retaining the present rules of spousal competency and compellability in civil actions.

3.2 *Spousal Competency For or Against the Other Spouse in Provincial Prosecutions*

In the Provinces and Territories, statutes now determine spousal competency and compellability on prosecutions for violation of local statutes. In some jurisdictions, the common law rules of incompetency are completely abolished for prosecutions. In other jurisdictions, some elements of the common law rules remain. One type of statute makes

the accused and his or her spouse competent but not compellable to testify against the accused, which in effect gives the witness spouse a privilege to testify or not to testify against the other.

The jurisdictions and statutes which abolish the common law rules of incompetency are: Manitoba, *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 5; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, ss. 8(1) and 1(a), def. of "action"; Prince Edward Island, *The Evidence Act*, R.S.P.E.I. 1974, c. E-10, ss. 4, 10 and 1(a), def. of "action"; Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, ss. 4 and 1(a), def. of "action"; the *Uniform Evidence Act*, as revised 1945, as amended, ss. 4 and 2(a), def. of "action"; Ontario Law Reform Commission, 1976, Draft Evidence Act, s. 9(1). In British Columbia, the *Evidence Act*, R.S.B.C. 1960, c. 134, s. 7 makes the accused or the spouse "a competent witness whether the person so charged is charged solely or jointly with any other person". Murray J. interpreted the word "competent" as meaning "competent and compellable",[41] so that the accused and his or her spouse are competent and compellable prosecution witnesses in British Columbia. Murray J. said: "The remedy would appear to lie with the Legislature." Other judges have been critical of such provisions. They have made very pointed remarks to the effect that the prosecution should not call the accused to testify against himself. By calling the accused, a prosecutor will incur the disapproval of the court and run the risk that the accused will be acquitted.[42] For these reasons it is usually tactically unwise to call either spouse to testify against the accused.

Other jurisdictions and statutes remove the common law rules of incompetency for testimony favourable to the accused. Typically, the accused and his or her spouse are competent and compellable for the defence of the spouse or a co-accused. In a few of the jurisdictions, the accused and the spouse are competent but not compellable for the defence. As witnesses for the prosecution, usually the accused and the spouse are competent only. Generally speaking, then, both spouses are compellable for the defence and competent but not compellable against the accused. But the rules vary among these jurisdictions.

In Alberta, the accused is compellable for the defence, and competent for the prosecution, and the accused's spouse is compellable both for and against the defence: *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 5(1), (2) and (3). In Saskatchewan, the accused is competent and compellable for the defence and competent for the prosecution in all cases. For filiation matters under the *Child Welfare Act*, the alleged father is competent and compellable against himself.[43]

The spouse is competent and compellable for and against the defence. If either spouse testifies for the Crown and the accused is convicted, he or she cannot be imprisoned; the Crown in effect waives the penalty of imprisonment by calling the accused or his or her spouse.[44] In New Brunswick, the accused and the spouse are competent, but not compellable, for and against the defence: *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 3(1) and 9. In Nova Scotia and Newfoundland, the accused and spouse are competent and compellable for the defence; as prosecution witnesses, they are competent but not compellable: *Evidence Act*, R.S.N.S. 1967, c. 94, ss. 42 and 45; *The Evidence Act*, R.S.N. 1970, c. 115, ss. 2 and 3(a), (c). In the Yukon, the accused is competent for and against the defence, and the spouse is competent and compellable for and against the defence: *Evidence Ordinance*, R.O. 1971, c. E-4, s. 4(1), (2)(a). The Yukon Ordinance also provides that the failure of the accused to testify shall not be adversely commented upon: s. 4(2)(b).

Finally, Quebec incorporates into its provincial prosecutions section 4 of the *Canada Evidence Act: Summary Convictions Act*, R.S. Que. 1964, c. 35, s. 41.

If the only penalties for provincial offences were fines, prosecutions could be likened to civil actions for damages and the civil rules of competency perhaps should apply. However, like crimes, provincial offences carry social stigma and are punishable by imprisonment. To prosecutions of both federal and provincial offences, the same public policies of fostering marital harmony and privacy apply. The Task Force was unanimously in favour of the proposal that in prosecutions of provincial offences, the rules of spousal competency and compellability should be the same as in criminal proceedings. The recommendations set out in sections 2.2 to 2.5 inclusive of this Report should apply to provincial prosecutions. The accused and his or her spouse would be incompetent against the accused charged with a provincial offence.

The Task Force proposes two exceptions to the general rule of spousal incompetency.

First: where a statute other than the provincial evidence act provides that a spouse is competent and compellable against the other spouse on a prosecution under that Act. This proposal would encourage each provincial legislature to review its statutes and to decide in respect of specific Acts if the accused's spouse should be a compellable prosecution witness. To ensure that these provisions for compellability override the provincial Evidence Act, the Evidence Act might state

"except as otherwise provided in any other Act". This would avoid the case of *Re Grunerud and Bremner*[45] where it was held that in defining competency and compellability, the provincial evidence act prevailed over the Act which created the offence. The Task Force voted unanimously in favour of this proposal.

Second: a provincial offence against either the accused's spouse or his or her property or against a child under the age of 14 years. This proposal carries over to provincial evidence acts, two recommendations set out in section 2.6 of this Report which may have relevance in provincial law. The Task Force advances this proposal out of an abundance of caution, and suggests that further study should be undertaken before it is adopted. The vote on this second exception was five members in favour and one against.

3.3 *Recommendations with respect to Spousal Competency in Civil Proceedings and Provincial Prosecutions*

The Task Force recommends:

(*a*) *Unanimously that the present rules of spousal competency and compellability in civil actions be retained;*

(*b*) *Unanimously that the proposals set out in sections* 2.2 *to* 2.5 *of this Report should apply to provincial prosecutions; the same rules of spousal competency and compellability should apply to criminal and provincial offences;*

(*c*) *Unanimously that there be an exception to* (*b*) *for the enactment of rules of spousal competency and compellability for the prosecution in acts other than a provincial evidence act;*

(*d*) *By a majority that there be further exceptions for:*

(*i*) *a provincial offence against the spouse or against his or her property, and*

(*ii*) *a provincial offence against a child under the age of* 14 *years.*

45. Footnote 43, above.

APPENDIX T

COMMENT AND DISSENT

by

Kenneth Chasse

The following position on competency and compellability and the marital communications privilege is made up of interdependent principles. The main differences in this dissent from the position of the majority of the Task Force are, (1) making the spouse of the accused a competent but non-compellable witness for the prosecution, and (2) retaining the marital communications privilege as a privilege in the accused, in relation to confidential communications.

1. *In criminal proceedings the spouse of the accused should be a competent but non-compellable witness for the prosecution.*

2. *The spouse of the accused should be a competent and compellable witness for the accused.*

3. *The spouse of the accused should be a competent (but not compellable) witness for a co-accused.*

4. (*a*) *If there is to be comment by the prosecutor or the judge on the accused's failure to testify, there should be equally available comment upon the failure of the spouse of the accused to testify, assuming the spouse is a compellable witness for the accused.*

   (*b*) *Comment on failure to testify should be allowed, but cross-examination on the accused's prior criminal record should be prevented, except for prior convictions for perjury and inconsistent testimony.*

5. *There should be no provision requiring that the jury be cautioned as to the drawing of adverse inferences from the spouse's failure to testify.*

6. (*a*) *If the spouse is to be competent but not compellable for the prosecution, the marital communications privilege should be retained, but as a privilege in the accused and it should apply only to* confidential *communications.*

   (*b*) *Where the spouse of the accused is both competent and compellable for the prosecution, the marital communications privilege should not be available.*

   (*c*) *Where the spouse of the accused is compellable for the defence, the marital communications privilege would be waived by the accused's calling his spouse.*

7. *If the spouse of the accused is competent but not compellable for the prosecution, and chooses to stand upon his or her non-compellability a provision stating that the Crown may demonstrate such refusal to testify before the jury would not be necessary, because the Crown could comment upon the accused's failure to call the spouse, should the accused comment upon the Crown's failure to call the spouse.*

8. *A claim by the spouse of the accused to non-compellability, and a claim by the accused to exercise the marital communications privilege, should be required to be made in the absence of the jury.*

4. PRIVILEGE FOR COMMUNICATIONS BETWEEN SPOUSES

4.1 *In General*

A spouse who is called as a witness may refuse to disclose a communication which the other spouse made to the witness. Throughout all the Canadian jurisdictions, statutes have enacted this privilege for marital communications. The *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(3) provides as follows:

> No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

The other Canadian jurisdictions which have enacted identical or very similar provisions are: British Columbia, *Evidence Act*, R.S.B.C. 1960, c. 134, s. 9; Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 9; Saskatchewan, *The Saskatchewan Evidence Act*, R.S.S. 1965, c. 80, s. 34; Manitoba, *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 10; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 11; New Brunswick, *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 10; Nova Scotia, *Evidence Act*, R.S.N.S. 1967, c. 94, s. 46; Prince Edward Island, *Evidence Act*, R.S.P.E.I. 1974, c. E-10, s. 9; Newfoundland, *The Evidence Act*, R.S.N. 1970, c. 115, s. 4; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 7(1); Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 7; and *Uniform Evidence Act*, (as revised 1945 and as am.) s. 7. In Quebec, *The Code of Civil Procedure*, S. Que. 1965, c. 80, s. 307 provides:

> A witness cannot be compelled to divulge any communication made to him or her by his or her consort during the marriage.

In the common law jurisdictions, the privilege for marital communications originated in the English *Evidence Act* of 1853, 16 & 17 Vict., c. 83, for civil cases, and in the English *Criminal Evidence Act* of 1898, 61 & 62 Vict., c. 36, for criminal cases. The *Canada Evidence Act*, S.C. 1893, c. 31, s. 4 enacted the privilege, although not in its present form.

The privilege applies to "any communication" between the spouses; it is not limited to confidential communications.[46] The presence of third parties when the communication occurs will not vitiate it. It is unclear if a communication includes not only a statement by one spouse to the other but also an act done in the presence of the other spouse.[47] The privilege does not apply after death, divorce or annulment has terminated the marriage.[48]

The privilege requires a valid legal marriage.[49] A communication between spouses which is intercepted by a third party is not privileged in that party's hands.[50] A spouse who is compellable to give evidence against the other on a charge listed in section 4(2) of the *Canada Evidence Act* cannot claim the privilege for marital communications and must disclose communications from the accused.[51] Kaufman J.A., for the Court, in *R.* v. *St.-Jean*, said:

> It might be said that to so hold would be to reduce the import of s. 4(3) of the Act. That may be so, but this section will still have its application in cases where a spouse is called by the defence, but even here it must be pointed out that the privilege is that of the witness and not the accused."[52]

Does this passage mean that wherever a spouse is "compellable" and is called to testify against the other spouse, the witness is prohibited from invoking the privilege for marital communications? If so, this would abolish the privilege if the spouse witness is called to testify against the accused spouse not only on charges under section 4(2) but also crimes against the liberty, person or health of the witness spouse under section 4(4), all civil cases, and in provincial prosecutions where the spouse witness is not merely competent but is compellable against the accused spouse. It would not affect the privilege in respect of all marital communications between spouses where the spouse who received the communication is called as a witness and the other spouse is not a party to the proceedings. Such cases are of little practical importance. Finally, as the quote from *St.-Jean* suggests, to allow the spouse witness to claim the privilege when he or she is called for the defence seems to allow the privilege to operate only when it most obstructs the search for the truth. If the accused calls the spouse as a witness for the defence, the spouse

witness can at the same time testify in the accused's favour and conceal his or her incriminating communications. A privilege which only permits an accused to present favourable evidence to the Court and, with the cooperation of the spouse witness, to suppress unfavourable evidence has surely outlived its usefulness. Such a privilege would defeat the ends of justice without advancing social values. The trend of cases like *Rumping*, *Tyler* and *Kanester* has been to restrict the privilege for marital communications. The *St.-Jean* case seems to have dealt it a *coup de grace.*

4.2 *Proposals for Change*

In Ontario, the Law Reform Commission[53] recommended that the marital communications privilege should be abolished. H. Allan Leal, Q.C., Chairman, dissented on the ground that the privilege should be reformed rather than abolished. In England, the Law Reform Committee[54] recommended that the privilege should be abolished. The English Civil Evidence Act 1968, c. 64, s. 16(3) repealed the privilege in civil actions. The English Criminal Law Revision Committee[55] stated that since the privilege had been abolished in civil cases, it should not be retained in criminal cases only, and should be completely abolished. In South Australia a Law Reform Committee recommended "communications between spouses [should] be privileged from disclosure except in relation to matters in respect of which one is compellable to give evidence against the other."[56] This appears to be the principle stated in the *St.-Jean* case.

What would be the effect of repealing the marital communications privilege? Would all private marital communications become admissible? The English Law Reform Committee said: "On the whole, we think that the reasonable protection of the confidential relationship between husband and wife is best left to the discretion of the judge and, we may add, the good taste of counsel."[57]

A majority of the Task Force proposes that the privilege for marital communications be abolished in all cases. Five members of the Task Force were in favour of this proposal and two members voted against it.

4.3 *Recommendation with respect to the Privilege for Marital Communications*

A majority of the Task Force recommends that the privilege should be abolished in all cases.

5. OTHER MARITAL PRIVILEGES: ILLEGITIMACY AND ADULTERY

5.1 *Illegitimacy and the Privilege Derived from the Rule in Russell v. Russell*

At common law, neither spouse was competent to testify as to non-access of the other spouse so as to bastardize children born after the ceremony of marriage. The rationale of this rule, according to the judges who formulated it, was social policy: to protect children from any social stigma and from disinheritance through the husband and to preserve decency and decorum.[58]

In 1945, the Commissioners on Uniformity of Legislation received a report from the Ontario Commissioners entitled "Soldiers' Divorces and the Rule in *Russell* v. *Russell*". The report appears at pp. 54-72 of the 1945 *Proceedings* of the Conference of Commissioners on Uniformity of Legislation in Canada. The Ontario Commissioners agreed with Wigmore's devastating attack on *Russell* v. *Russell* and said: "We believe that the 'rule' against spouses testifying as to 'access' or 'non-access' should be abolished completely in all cases and for all purposes." At p. 25 of the *Proceedings*, it is recorded that the Conference of Commissioners accepted this proposal: "After discussion, it was decided to delete all words from the proposed section 4a designed to protect the interests of children and to have the section simply a provision having the effect of abrogating the rule in *Russell* v. *Russell*."

The *Uniform Evidence Act* (revised 1945) provided in section 4 for the competency and compellability of parties and their spouses "except as hereinafter otherwise provided". Section 5, which was intended to abrogate the rule in *Russell* v. *Russell* stated:

> *Without limiting the generality* of section 4, a husband or wife *may*, in an action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. (italics added.)

The words "*may*" and "*without limiting the generality*" can be interpreted as creating a privilege. If sections 4 and 5 are read with the Conference *Proceedings*, it is clear that such a privilege was not intended.

Similar provisions are: British Columbia, *Evidence Act*, R.S.B.C. 1960, c. 134, s. 8(2); Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 6; Saskatchewan, *The Saskatchewan Evidence Act*, R.S.S. 1965, c. 80, s. 33(1); Manitoba, *The Manitoba Evidence Act*,

R.S.M. 1970, c. E-150, s. 6; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 8(2); Nova Scotia, *Evidence Act*, R.S.N.S. 1967, c. 94, s. 44; Prince Edward Island, *The Evidence Act*, R.S.P.E.I. 1974, c. E-10, s. 5; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 5(1); Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 5. New Brunswick and Quebec do not seem to have an equivalent provision. In Newfoundland the *Evidence Act*, R.S.N. 1970, c. 115, s. 2A states:

> "Without limiting the generality of Section 2,
>
> (a) the evidence of a husband or wife shall be admissible to prove that marital intercourse did or did not take place during any period of time before or during the marriage."

Contemporary social policies confirm the desirability of abolishing any privilege derived from *Russell* v. *Russell*. Nowadays, the trend of legislation is to abrogate the legal status of illegitimacy.[59] In Quebec, certain irrebuttable presumptions of legitimacy render evidence to bastardize children irrelevant and inadmissible. Since a spouse's evidence is inadmissible anyway, the abolition of a privilege should not have any effect in these cases.

The Ontario Law Reform Commission recommended that the privilege be eliminated.[60]

The Task Force was unanimously in favour of the proposal to abolish any spousal privilege derived from the rule in *Russell* v. *Russell*.

5.2 *Spousal Privilege as to Adultery*

The provincial and territorial Evidence statutes have abolished the common law bar against spouses testifying for or against each other in civil actions. Yet, most of them have enacted a privilege which a spouse witness may claim, to refuse to testify concerning his or her addultery. The privilege is statutory: The English *Evidence Further Amendment Act of 1869*, 32 & 33 Vict., c. 68, s. 3 first enacted it.

In one form or another, the privilege exists in all the Canadian provinces except British Columbia and Quebec. In three provinces the privilege is limited to witnesses who are parties or spouses thereof and to proceedings which are instituted in consequence of adultery: New Brunswick, *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 8; Nova Scotia, *Evidence Act*, R.S.N.S. 1967, c. 94, s. 43; Prince Edward Island, *Evidence Act*, R.S.P.E.I. 1974, c. E-10, s. 8. The Prince Edward Island Act states:

> "The parties to a proceeding instituted in consequence of adultery and the husbands and wives of the parties are competent to give evidence in the proceedings; but in such case the husband or wife, if competent only under and by virtue of this Act, shall not be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceeding in disproof of his or her alleged adultery."

In two provinces, the privilege applies to any witness (even if not a party or a spouse of a party) but it is limited to proceedings instituted in consequence of adultery: Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 10 and Newfoundland, *The Evidence Act*, R.S.N. 1970, c. 115, s. 3. The Newfoundland provisions states:

> " . . . no witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, or the husband or wife of such party, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Concerning the requirement that the proceedings must be instituted in consequence of adultery, McRae on Evidence states:

> "The question of whether a proceeding has been instituted in consequence of adultery, thus entitling the witness to the protection afforded by s. 10 of the Ontario Evidence Act, has been the subject of numerous decisions which are difficult to reconcile."[61]

Two provinces and the territories have adopted section 6 of the *Uniform Evidence Act* (as revised 1945 and as am.) which states:

> "No witness in any action, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same action in disproof of the alleged adultery."

This provision extends the privilege to any witness and to any proceeding: Alberta, *The Evidence Act*, R.S.A. 1970, c. 127, s. 8; Manitoba, *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 9; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 6(1); Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 6.

The above-quoted sections state that a witness waives the privilege by giving evidence "in disproof of the alleged adultery". In *D'Aloisio* v. *D'Aloisio*[62] the court held that a witness did not waive the privilege merely by answering on cross-examination a "yes or no" question as to whether he or she had committed adultery.

Saskatchewan's privilege applies in all divorce and matrimonial causes: Saskatchewan, Queen's Bench Rules, O. XL. r. 508.

Over many years, judges, scholars and commissions have criticized this privilege as having out-lived the social values upon which it was founded. The Task Force agrees with the Ontario Law Reform Commission that the privilege should be abolished.[63] The Task Force voted unanimously in favour of the repeal of the spousal privilege relating to adultery.

5.3 *Recommendations with respect to Other Marital Privileges: Illegitimacy and Adultery*

The Task Force recommends:

(*a*) *Unanimously that any spousal privilege derived from the rule in Russell* v. *Russell should be abolished.*

(*b*) *Unanimously that the spousal privilege relating to adultery should be abolished.*

6. THE OATH

6.1 *Requirement of Oath or Affirmation*

Before an individual is allowed to testify, he or she must be sworn or affirmed.[64] The common law required an oath, which may be defined as a solemn appeal to the witness's Deity, made binding upon the conscience of the witness by calling upon God to observe the witness's truthfulness[65] and by a penalty for perjury. At common law, no particular form of oath was prescribed.[66] The statutory alternative to the oath is the affirmation, which is a solemn, public and secular promise to tell the truth, which also involves the penalty for perjury and, depending on the jurisdiction, may expressly refer to it. Statutes provide for affirmation and its form. By statutory definition, the word "oath" in a statute shall be deemed to include "affirmation" and the word "sworn" to include "affirmed".[67] As a result of these definitions, whose purpose is to make the oath and affirmation equivalent, testimony upon affirmation is subject to the same penalties for false or inconsistent evidence that apply to sworn testimony.[68]

Appealing to a more superstitious age, Lord Coke argued that the oath invoked immediate divine vengeance so that a witness who was not struck down after testifying under oath might be presumed to have passed God's judgment as a truthful witness.[69] More recently, the courts have justified the oath as a security for the truth, as a covenant between the witness and his god, pledging his eternal soul as security

for his promise to testify truthfully.[70] According to this rationale a witness must believe in a Supreme Being who would, before or after death, reward a truthful witness and punish a witness who, by swearing falsely, broke the covenant.[71] At common law, a person who lacked this belief could not be sworn and thus could not testify.[72] The recent Canadian cases on oath competency of children were more liberal. The leading case, *R. v. Bannerman*,[73] allowed children to testify under oath if they believed in a Deity even though they did not believe that a God would reward truthful testimony or punish false testimony.[74] Even more liberal are the cases following the *Bannerman* case, which hold that the test of children's competency to swear an oath is whether the child understands the moral obligation to tell the truth.[75] Although these cases deal with children of tender years, the same principles would apply to adults. The rationale of these cases is that in our modern secular age, a witness need not profess a religious belief either in God or in future rewards and punishments. Children, particularly, may not have formed religious beliefs. "The object of the law in requiring an oath is to get at the truth by obtaining a hold on the conscience of the witness."[76] The oath may obtain such a hold, say these most recent cases, upon those who do not profess religious beliefs but who do not deny the possibility of the existence of a God or future rewards or punishments and who show that they realize that it is right and important to tell the truth in court and that, by taking an oath, they are in conscience bound to do so. Thus a person who denies the existence of God or future rewards or punishments depending upon conduct on earth, could not swear an oath even under this liberal test because the oath is an appeal to a Supreme Being whose existence the witness denies and his conscience is not bound by it. These latest cases would make the oath available to all witnesses except those who profess that an appeal to a Supreme Being is meaningless for them or who have religious objections to the oath. Among the Christian sects that adhere to this religious tenet are the Quakers, who believe that the usual form of oath is blasphemous.

The affirmation originated in England in 1696. It was intended to permit individuals to testify who were otherwise competent witnesses, but who did not believe in a Deity or in divine accountability for false swearing or who had religious scruples against the oath. All of the Canadian jurisdictions allow witnesses to affirm if they have a valid objection to the oath.

Most statutory provisions for affirmation have three elements: (1) the witness must object on conscientious grounds to the oath or be objected to as incompetent to take the oath, (2) the form of the

affirmation is set out, and (3) evidence received on affirmation is deemed to have the same effect as evidence under oath. However, there are minor variations in wording. The most common provision is similar to the *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 14, which states as follows:

> 14(1) Where a person called or desiring to give evidence objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:
>
> > I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.
>
> (2) Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

Similar provisions are: Saskatchewan, *The Saskatchewan Evidence Act*, R.S.S. 1965, c. 80, s. 44; Manitoba, *The Manitoba Evidence Act*, R.S.M. 1977, c. E-150, s. 18; Quebec, *Code of Civil Procedure*, S. Que. 1965, c. 80, s. 299; Nova Scotia, *Evidence Act*, R.S.N.S. 1967, c. 94, s. 57; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 21; Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 21; draft *Uniform Evidence Act* (as revised 1945 and as am.) s. 21. In other jurisdictions, the statutory provisions add that a witness may object to the oath not only on the above grounds but also on the ground "that the taking of an oath would have no binding effect on his conscience." The British Columbia *Evidence Act*, R.S.B.C. 1960, c. 134, s. 24 provides as follows:

> 24(1) If, in a Court of justice, or in any proceeding, a person called to give evidence objects to take on oath, or is objected to as incompetent to take an oath, the person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, or of the sincerity of the objection of the witness from conscientious motives to be sworn, make the following promise, affirmation, and declaration:
>
> > I solemnly promise, affirm, and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.
>
> And upon the person making such solemn promise, affirmation, and declaration, his evidence shall be taken in the Court or proceeding, and such promise, affirmation, and declaration shall be of the same force and effect as if the person had taken an oath in the usual form.
>
> (2) The words "Court of Justice" and the words "presiding Judge" in this section shall be deemed to include any person having by law authority to administer an oath for the taking of evidence.

Similar provisions are: Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 19; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 18 ("from conscientious scruples"); Prince Edward Island, *Evidence Act*, R.S.P.E.I. 1974, c. E-10, s. 13; New Brunswick, *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 14 ("from alleged conscientious motives").

A witness who wishes to affirm must adhere strictly to the letter of the statute. Prior to the administration of the oath, the witness must object to being sworn. The witness must support this objection with a reason, such as a religious objection to the oath or a disbelief which makes an oath not binding on the witness's conscience. Only if the judge is satisfied that the witness's objection is sincere and within the terms of the statute, may the witness affirm.[77] If the witness, after taking an oath, states that the oath is not binding, he or she must affirm.[78] A witness who does not object to the oath assumes a legal obligation to tell the truth and can be convicted of perjury for giving false testimony. The fact that the oath was not binding on the witness's conscience is not a defence to the charge of perjury.

Alternatively, an adverse party may object to the witness's competency to swear an oath on the ground of lack of religious belief. In respect of an adult witness, this objection is most unusual. It has been suggested[79] that since the above-quoted provisions allow affirmation by a witness who "is objected to as incompetent to take an oath", without limiting the grounds upon which objection may be made, such an objection could be made on the ground of mental deficiency. If the objection were upheld, so that the witness could not testify under oath, the trial judge must make a second inquiry to determine if the witness understands the duty to speak the truth. If the witness passes that test, he or she may affirm. This reasoning presupposes two tests of understanding the duty to speak the truth: (1) a higher one for the oath and (2) a lower one for affirmation. It is submited that a witness who is so mentally deficient as to be incapable of understanding an oath should not be allowed to affirm. A witness who affirms should have a moral commitment to truthfulness equal to that of the witness who testifies under oath. Affirmation is limited to those who understand the oath but whose consciences are not awakened by it.

6.2 *Proposals for Change*

The Law Reform Commissions of Canada[80] and Ontario[81] and a majority of the English Law Revision Committee[82] have recom-

mended that the oath should be abolished. According to their proposals, all witnesses, whatever their religious beliefs, would be required to affirm. The form of the affirmation would require a witness to undertake to tell the truth and to acknowledge that false testimony may be punishable. For example ss. 50, 51 of the proposed *Evidence Code of Canada* state:[83]

> s. 50 Before testifying every witness shall affirm: 'I promise to tell the truth. I am aware that if I tell a lie or wilfully mislead the court I am liable to be prosecuted.'
>
> s. 51 The judge may give instructions to any witness whenever he considers it advisable to ensure that the witness understands the obligation to tell the truth.

There are three main arguments in favour of abolishing the oath. First, some of the religious aspects of the oath, particularly the ancient and superstitious belief that a false witness would receive immediate Divine punishment seem absurd and unacceptable in the modern world. Thus the oath has become an anachronism. Second, the only function of the oath is to motivate witnesses to speak the truth. At the present time, the solemn, public and formal affirmation carries out this function just as effectively as the oath for those witnesses who affirm. If the affirmation is just as effective as the oath, both are no longer required. Third, the oath can be more cumbersome than the affirmation. If a witness adheres to a religious doctrine which prescribes an unusual form of oath, which the court is unable to provide, or, if the judge must inquire about a witness's religious beliefs and about the form of oath which will bind the witness's conscience, the proceedings will be delayed and the private religious beliefs of the witness will be publicly revealed. Thus, the oath can be impractical. As between the oath and the affirmation, the affirmation is secular, applies to all witnesses and causes no administrative problems.

The Task Force recommends that the oath should be retained.

The first criticism of the oath (above) overemphasizes the religious side of the oath. According to the most recent cases,[84] the test of oath competency is whether the witness understands the moral obligation to tell the truth. A witness who does not have strong religious beliefs but who acknowledges the possibility of a Supreme Being can swear an oath. This test recognizes that for many people today, including agnostics, swearing an oath has an impact upon their consciences and motivates them to testify more carefully. The test of oath competency accommodates the beliefs of a substantial portion of the Canadian population. If the consciences of many people are more

affected by swearing an oath than by making an affirmation, surely the oath should be retained.

Secondly, it is arguable that the proposed affirmation is a meaningless ritual: by requiring a witness to acknowledge the existence of a penalty for false testimony, when the witness would probably be aware that successful prosecutions for this ancient offence are rare. Many witnesses would be offended by being required to state that the threat of prosecution for perjury is a factor which influences their truthfulness. Impartial and sincere witnesses want to tell the truth because of the dictates of their conscience and sense of public duty. The reference to prosecution will not deter a witness who intends to mislead the court and will not make proof of perjury any easier for the Crown. Since children under seven years of age are conclusively presumed not to be guilty of a criminal offence, such an acknowledgement would be untrue for these very young witnesses.[85]

Finally, if the procedural aspects of the administration of the oath or affirmation were improved upon, the third criticism (above) would be met. In practice, when a prospective witness objects to taking an oath, the judge asks why he or she wishes to affirm. The witness then explains his or her objection. Generally neither the judge nor the counsel for the opposing party ask any further questions. Accepting the witness's explanation as true, the judge allows the witness to affirm. This public inquiry into a witness's religious beliefs is both perfunctory and undesirable. It is an invasion of the witness's privacy. Also the inquiry is impractical in the sense that the only one who can assess what is binding on a person's conscience is the particular person. A party who wishes to testify may feel that objecting to the oath and stating the reason for that objection may adversely affect the outcome of the case by bringing out religious prejudices held by the judge or jury. Similarly the prospective witness who believes in a form of oath which is impractical or impossible to administer is in an awkward position and in practice, is usually instructed to affirm.

As a matter of social policy, the oath and the affirmation should be equal. A witness need not have a religious belief to swear an oath if the witness understands the moral obligation to tell the truth. Why then should the Evidence Act require a witness to state a religious objection to the oath before being allowed to affirm? The implication is that the Legislature prefers the oath to the affirmation. The person who wishes to affirm is in the invidious position of asking for "special treatment".

For those reasons, a majority of the Task Force recommends that the Evidence Acts should be amended to provide that a prospective witness would have the choice of swearing an oath or making an affirmation without offering any reason for the choice. The witness's choice would be guided by his or her own conscience and by any instructions from the judge or from counsel that might become necessary. The court clerk or registrar would ask each witness if he or she wishes to swear an oath or make an affirmation. The witness would indicate his or her preference, without stating any objection to the alternative. If the witness asked for a form of oath which the court could not administer, the judge would explain the difficulty and instruct the witness to choose a practical form of oath or affirm. However, a provision like section 51 of the *Canada Evidence Code* (above) is unnecessary and confusing. As far as possible, the choice, as of right, to swear or affirm without any requirement to explain the choice, and the duty of the person administering the oath or affirmation to inform the person of this right should apply to the swearing of formal documents out-of-court. However, the failure of the person administering the oath or affirmation to inform the deponent of the choice to swear or affirm should not affect the validity of the document or afford a defence to a criminal prosecution arising out of a false statement in the document.

Four members of the Task Force voted in favour of this proposal and one voted against it.

6.3 *Recommendations with respect to the Oath*

A majority of the Task Force recommends that the Evidence Acts be amended to provide that:

(*a*) *Any court and any judge, as well as any person authorized by law or by the consent of the parties to hear and receive evidence, may require of any witness legally summoned to give evidence before such court, judge or person that he take an oath or solemn affirmation.*

(*b*) *The court or the judge, the officer or other person authorized to administer an oath and solemn affirmation must, before so doing, inform a witness of his right to choose an oath or affirmation and request that the witness indicate such choice, but failure to comply with this requirement would not invalidate a document or constitute a defence to a criminal charge.*

7. COMPETENCY OF CHILDREN

7.1 *In General*

At common law, the rule that a witness could only be examined upon oath applied to children. Children who could not take an oath could not testify.

At common law, there was no minimum age which excluded children as witnesses.[86] Children under the age of 14 years were presumed *prima facie* to be incompetent,[87] above that age children were presumed *prima facie* to be competent witnesses.[88] Children were capable of swearing an oath if they understood the "nature and consequences of an oath".[89] Another aspect of children's capacity to testify was their general intelligence as shown by their abilities to understand and answer questions on a *voir dire* into their competency.

By statute, most of the jurisdictions of Canada permit children of tender years (that is, under the age of 14 years)[90] to testify without taking an oath. In civil and criminal cases, children who are too immature to swear an oath or to make an affirmation can testify unsworn if they are sufficiently intelligent and understand the duty of speaking the truth. Section 16 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 provides as follows:

> s. 16(1) In any legal proceeding, where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice, or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
>
> (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

Similar provisions in other jurisdictions or statutes are: Canada, *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 19; British Columbia, *Evidence Act*, R.S.B.C. 1960, c. 134, s. 6; Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 21; Saskatchewan, *The Saskatchewan Evidence Act*, R.S.S. 1965, c. 80, s. 40; Manitoba, *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 9; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 19; Quebec, *Code of Civil Procedure*, S. Que. 1965, c. 80, s. 301; New Brunswick, *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 24; Newfoundland, *The Evidence (Amendment) Act*, S.N. 1972, s. 2 which added s. 15A to *The Evi-*

dence Act. Subsection (2) above requires corroboration of unsworn evidence on the assumption that unsworn evidence is likely to be less reliable than sworn evidence. Section 586 of the *Criminal Code* also requires corroboration. Other jurisdictions and statutes do not require corroboration. They simply leave the weight of unsworn evidence as a question of credibility for the trier of fact. An argument in favour of abolishing the need for corroboration is that a special instruction to the jury concerning the frailties of the unsworn testimony of children of tender years and the desirability (rather than necessity) of corroboration is enough protection against unrealiable evidence. The following jurisdictions and statutes do not require corroboration of unsworn evidence of children: Yukon, *Evidence Ordinance,* R.O. 1971, c. E-6, s. 23; Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 23 and *Uniform Evidence Act* (as revised 1945 and as am.), s. 23. Finally, the Nova Scotia and Prince Edward Island *Evidence Acts* do not provide for the unsworn evidence of children of tender years; there is no special provision in these Acts for children. In these jurisdictions in civil actions and provincial prosecutions, children who do not understand the nature and consequences of an oath cannot testify.

Under section 16 of the *Canada Evidence Act* and like provisions, when a child of tender years (i.e. under 14 years) is offered as a witness, the trial judge must conduct a *voir dire* to determine the competency of the child unless the opposing party expressly waives this *voir dire* and admits competency.[91] If the opposing party does not object to the child's being sworn, that does not waive the requirement of a *voir dire.*[92] On a jury trial, the jury remains in the courtroom during this *voir dire,* and if the child is ruled competent to testify —sworn or unsworn—the jury may consider the evidence on the *voir dire* in assessing the child's credibility.[93]

According to section 16, the trial judge must first inquire into the child's capacity to understand the nature of the oath. The essence of this inquiry is whether the child understands the moral obligation to tell the truth.[94] This requires the child to appreciate that it is wrong to lie upon oath; a belief in a Supreme Being who rewards truthful witnesses and punishes false swearing is no longer required to take an oath.[95] If the child understands the nature of an oath, no further inquiry is necessary and the child may testify under oath, or if the statutory requirements already discussed are met, on affirmation.

If the judge is satisfied that the child does not understand the moral obligation of telling the truth, the judge must prohibit the wit-

ness from taking the oath or affirming and determine if the child can testify unsworn. According to section 16, the two elements of this inquiry are: (1) whether "the child is possessed of sufficient intelligence to justify the reception of the evidence" and (2) "understands the duty of speaking the truth". If the judge is satisfied that the child meets these two tests, the child may testify unsworn.

The usual procedure on the *voir dire* is for the judge to question the child about the child's age, schooling and family; the difference between truth and falsehood; whether it is wrong to lie; and the temporal consequences of a lie. Because the test of oath capacity is "understanding the moral obligation to tell the truth",[96] a judge does not have to inquire into such matters as the child's attendance at church or Sunday school, familiarity with the Bible and religious beliefs, to be satisfied that the child is morally qualified to take the oath. After the judge has finished questioning the child, counsel who called the child and opposing counsel may ask questions along the same lines. After these questions, the judge rules whether the child may testify under oath, or unsworn, or may not testify.

If the child is capable of understanding the nature of an oath but does not presently do so out of ignorance, the judge may instruct the child[97] or adjourn the trial so that counsel may do so.[98] To expedite trials, counsel owe a duty to the court to instruct children of tender years before calling them, as to the nature of an oath.[99]

Children's testimony may suffer from certain frailties which affect its reliability. On the one hand, children tend to be more ingenious than adults; to speak their minds without being affected by fear or favour. On the other hand, the vividness of childish imagination may cause children to mix up fantasy and fact. For these reasons, where a child of tender years testifies under oath or affirmation, the trial judge must warn the jury of the potential unreliability of the child's evidence and of the desirability of corroboration.[100]

The unsworn testimony of a child requires corroboration and, if the judge is sitting without a jury, the judge's reasons should show personal awareness[101] as to the requirement of corroboration. Unsworn testimony cannot corroborate other testimony which requires corroboration.[102]

A witness who was under 14 years at the time of the event which he or she is called to testify about, but is 14 years or over at the time of trial is not a child of tender years. The jury does not have to be warned about the unreliability of the testimony of a child who is 14 years of age or over when offered as a witness.[103]

Even though a child testifies unsworn, he or she is *prima facie* capable of being prosecuted for perjury[104] or giving contradictory testimony,[105] under the *Criminal Code*.[106] A child under 7 years of age cannot be guilty of a criminal offence[107] and a child between 7 and 14 can only be guilty of an offence if "he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong."[108] However, such conduct by a child would be punishable as a delinquency under the *Juvenile Delinquents Act*.[109]

7.2 *Proposals for Change*

The Canada Law Reform Commission proposed to abolish the oath, replace it with an affirmation, abolish unsworn evidence and codify the judge's power to instruct witnesses.[110] The Commission described its Code as follows: "There are no special rules of competency in the *Code* with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence rather than its admissibility."[111] The Ontario Law Reform Commission proposed to abolish the oath, replace it with an affirmation and retain unsworn (or rather unaffirmed) evidence of children.[112] Children who were incapable of making an affirmation but were sufficiently intelligent and mature to testify would do so on a promise to tell the truth.[113]

Should the Evidence Acts continue to allow young children to testify when they are incapable of taking an oath or affirmation? One possibility is simply to abolish unsworn evidence and return to the former rule that evidence must be received upon oath or affirmation. However, the only advantage of this approach is simplicity. The loss of formerly admissible evidence outweighs any gain in simplicity. Another alternative would be to abolish unsworn evidence and, by statute, lower the standard for oath or affirmation competency of children to the standard which section 16 requires for unsworn evidence, i.e. (1) whether the child is "possessed of sufficient intelligence to justify the reception of the evidence" and (2) "understands the duty of speaking the truth". In theory this alternative should not result in the loss of any evidence, since what is now unsworn evidence would be received upon oath or affirmation. However, a majority of the Task Force viewed this proposal as impractical and illogical. Under s. 16 there is a logical distinction between the oath capacity of a person who "understands the moral obligation to tell the truth" and a child who "understands the duty of speaking the truth". The English Court of Appeal put this distinction as follows: "whether the child has a sufficient appreciation of the solemnity of the occasion

and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."[114] A child who understands the duty of telling the truth in the courtroom is a more capable witness and more likely to be reliable than a child who understands only that it is wrong to lie, and that some trifling punishment may be imposed for false swearing. Because the latter witnesses lack the moral qualification necessary before the oath or affirmation would have an impact upon their consciences, they should testify unsworn if they are intellectually and morally mature enough to give evidence at all. In clarifying this distinction between understanding the duty of testifying truthfully in court and understanding a social duty of truthfulness, the Task Force was greatly helped by the wording of section 3 of the *Draft Ontario Evidence Act*.[115]

A majority of the Task Force recommends that provision for the unsworn evidence of children be retained, as in the present section 16 of the *Canada Evidence Act* (quoted above). However, section 16 should be revised by deleting the phrase "understand the nature of an oath" to recognize that the courts now interpret that phrase to mean "understand the moral obligation to tell the truth." Section 16 should read: "understand the nature and consequences of giving false evidence". Similarly, to clarify the required moral capacity of children who are qualified to give evidence without an oath or affirmation, section 16 should be further revised by deleting: "and understands the duty of speaking the truth". Section 16 should read: "and understands that he should tell the truth, and where the judge, justice or other presiding officer so finds, he shall permit the child to give evidence upon stating: 'I promise to tell the truth'."

With these two changes, section 16(1) could provide as follows:

s. 16(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, *understand the nature and consequences of giving false evidence*, the evidence of such child may be received though not given upon oath *or affirmation* if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of his evidence, *and understands that he should tell the truth, and where the judge, justice or other presiding officer so finds, he shall permit the child to give evidence upon stating:*

'I promise to tell the truth.'

(2) [as is].

According to this proposal, a child who testifies unsworn will promise to tell the truth before being allowed to give evidence. At the present time, on a *voir dire* into competency, where the child is incapable of being sworn, the judge will usually ask the child if he or she will testify truthfully and the child invariably answers affirmatively. If qualified, the child is allowed to testify unsworn. The advantage of a formal promise to tell the truth is that it would have an additional impact on the child's conscience and would constitute further motivation to give truthful testimony. By the revised section 16, the child "understands that he should tell the truth"; the promise is appropriate to the child's intellectual capacity and sense of moral responsibility.

Five members of the Task Force were in favour of retaining unsworn evidence of children and of adopting the Ontario Law Reform Commission's proposals (section 3(2) and (3) of the *Draft Ontario Evidence Act*) to revise section 16. One member dissented and would prefer to abolish unsworn evidence. The Task Force has not yet considered the issue of corroboration.

7.3 *Recommendations with respect to the Competency of Children*

The Task Force recommends:

(*a*) *By a majority that provision should be retained for receiving children's unsworn evidence.*

(*b*) *By a majority that section* 3(2) *and* (3) *of the Draft Ontario Evidence Act should be adopted to define the capacity of children to testify upon oath* (*or affirmation*) *or unsworn.*

8. MENTAL INCAPACITY

8.1 *In General*

Insanity is not incompetency. A person who suffers from such a severe mental disability as to require confinement is a competent witness if he or she is capable of answering simple questions, giving rational testimony and understanding the nature of an oath.[116]

If an issue arises as to the mental capacity of a witness, the trial judge determines it, on a *voir dire* in the presence of the jury.[117]

A recent judgment[118] suggests that a witness whose competency is objected to on the ground of mental incapacity and who lacks the

intellectual capacity to take the oath may affirm, if the trial judge is satisfied that the witness appreciates the duty of speaking the truth.[119] It is submitted, however, that the right to affirm was not intended to provide an alternative to the oath for those who lacked the intellectual capacity to understand the nature of an oath. A person who feels that his or her conscience would not be bound by the oath should affirm. A witness who is incapable of appreciating or articulating what effect the oath would have upon his or her conscience because of a lack of intellectual capacity should not be allowed to affirm. Otherwise, the affirmation would become the means of introducing the inferior and unreliable evidence of mentally deficient and child witnesses. A majority of the Task Force proposes that adults who are mentally incapable of taking the oath should be allowed to testify unsworn if they meet the same criteria which apply to children. This proposal would preserve the equality of the oath and affirmation and allow the introduction of this evidence.

On *voir dire*, a prospective witness's mental capacity may be tested by examination of the witness and others, including psychiatrists.[120] There is no general provision in the *Criminal Code* whereby a court may order the psychiatric assessment of a witness. There would not seem to be an inherent power in a court to order a person to submit to a psychiatric examination.[121]

The prevailing view is that the mental capacity of a witness involves his or her mental state not only at the time when the evidence is offered but also as at the time of the event. Therefore a witness who was mentally incapacitated at the time of the event but is lucid at the trial might be excluded. Surely, it is impractical to require a trial judge to delve into a witness's mental capacity at a previous time. First, the judge will be unable to observe the witness's lucidity at the time of the event. Second, if the *voir dire* into the prospective witness's competency takes place in the jury's presence, inquiry into what the witness knows about the event in question should be avoided, or else the jury should be excluded. Otherwise, on the *voir dire* the jury will hear the unsworn testimony of the witness about the event. If the judge rules the witness incompetent, the jury will be instructed to ignore the evidence. But the jury may be influenced by that evidence. Therefore, it is submitted that, on a *voir dire*, the inquiry into a witness's mental capacity should be confined to capacity at the time of trial. If the witness is ruled competent, his or her mental disability at the time of the event should go to weight and credibility.

8.2 *Proposals for Change*

Whether a witness's alleged mental incapacity results from youthfulness or from intellectual deficiency, an inquiry into competency involves two elements: (1) intelligence and (2) sense of duty to tell the truth.[122] Since the admission of children's unsworn evidence is beneficial, mentally deficient adult witnesses should be allowed to give unsworn evidence as well. Section 16 of the *Canada Evidence Act*, as modified by the Task Force's proposals concerning children, could be further altered to allow mentally deficient adults to give unsworn evidence, like children of tender years. With these further revisions, section 16 could provide as follows:

> s. 16(1) In any legal proceeding where a child of tender years is offered as a witness *or an issue arises as to the competency of anyone offered as a witness on the ground of mental incapacity*, and such *person* does not, in the opinion of the judge, justice or other presiding officer, understand the nature and consequences of giving false evidence, the evidence of such *person* may be received though not given upon oath or affirmation if, in the opinion of the judge, justice or other presiding officer, as the case may be, the *person* is possessed of sufficient intelligence to justify the reception of his evidence and understands that he should tell the truth, and where the judge, justice, or other presiding officer so finds, he shall permit the *person* to give evidence upon stating:
>
> "I promise to tell the truth."
>
> (2) [as is]

Five members of the Task Force were in favour of this proposal and one would prefer to abolish unsworn evidence.

8.3 *Recommendations with respect to Mental Incapacity*

A majority of the Task Force recommends that those who do not qualify as children of tender years and who are incompetent to testify under oath or affirmation because of mental incapacity be allowed to testify if they meet the requirements for testifying without oath or affirmation.

9. PROFESSIONAL PRIVILEGE

9.1 *In General*

When a communication is "privileged" as that expression is used in the law of evidence, it means that the communication may not be disclosed in open court without the consent of the holder of the privi-

lege. A privilege has the effect of excluding evidence which might otherwise be relevant and admissible.

The common law has traditionally opposed the expansion of testimonial privileges. According to this view, which prevails today,[123] the public interest in the proper administration of justice demands that all relevant evidence should be admissible in litigation unless there is an over-riding public interest in excluding the evidence. In criminal cases, because a person's liberty may be at stake, the search for the truth is of the highest importance.

The common law does not recognize the protection of confidential communications from disclosure of itself as over-riding the public interest in the administration of justice.[124] Breach of confidentiality, by itself, will not justify a privilege.

When a confidential communication is revealed in open court harm may result to social, familial or professional relationships. A witness who is asked to disclose to the court a confidential but unprivileged communication may face a painful ethical or moral dilemma. Disclosure can involve an invasion of privacy. Hence, privileges do serve important social goals. But these goals are secondary to the primary importance of the administration of justice. If a privilege were to cause the suppression of highly probative evidence in a case, a court might be misled and incorrectly decide the facts. By depriving the parties of the opportunity to present the whole truth to the court, privileges can cause injustice. For these reasons, the public interest in the administration of justice outweighs the public interest in protecting confidential communications. The litigant who wants to suppress a confidential communication has the burden of convincing the court that the public interest, on balance, favours the protection of the communication from disclosure.

The courts have refused to recognize privileges for confidential communications to physicians,[125] clergy,[126] accountants,[127] journalists,[128] social workers,[129] and members of provincial legislative assemblies.[130] At common law, the only profession which is subject to a testimonial privilege is the legal profession; the lawyer has a duty to assert the privilege and the client is the holder and beneficiary of the privilege.

The Supreme Court of Canada, in an *obiter dictum*, said that judges could examine the merits of arguments for and against the creation of new privileges for confidential communications.[131] The Supreme Court adopted Wigmore's four prerequisites to a valid claim of privilege:

1. The allegedly privileged communication must have originated in a confidence that it would not be disclosed.

2. The asserted confidentiality must be essential to the satisfactory maintenance of the relationship between the parties.

3. This relationship must be one that, in the opinion of the community, ought to be sedulously followed.

4. The damage resulting from disclosure must exceed the benefit which would ensue from a more expeditious disposition of the cause.

Thus the Canadian courts can evolve new privileges for confidential communications: over the last thirty years, English and Canadian courts have developed a privilege for confidential communications made for the purpose of effecting marital reconciliation.[132] Recently the House of Lords has created a privilege for confidential communications to child welfare agencies to prevent child abuse.[133] Judges created the law of privilege and they can change it to keep abreast of social needs. The federal[134] and provincial[135] legislatures have also created new statutory privileges.

Thus, at common law and by statute, piecemeal expansion of testimonial privileges is underway. Both the courts and the legislatures have shown a willingness to create new privileges where, on balance, the public interest would benefit from non-disclosure of particular communications.

In the absence of a common law or statutory privilege, must a confidential communication be disclosed in open court? If a witness insists on preserving the secrecy of a confidential communication, a trial judge may suggest to counsel that the question should not be pressed. In practice, counsel frequently accede to such requests and the confidence remains inviolate.[136] Alternatively, *according to one authority*, after instruction from the judge, the witness is usually willing to reveal the confidence. In a recent case,[137] Lord Simon described the procedure as follows:

> . . . I think that the true position is that the judge may not only rule as a matter of law or practice on the admissibility of evidence, but can also exercise a considerable moral authority on the course of a trial. For example, in the situations envisaged the judge is likely to say to counsel: 'You see that the witness feels that he ought not in conscience to answer that question. Do you really press it in the circumstances?' Such moral pressure will vary according to the circumstances—on the one hand, the relevance of the evidence; on the other, the nature of the ethical or professional inhibition. Often

> indeed such a witness will merely require a little gentle guidance from the judge to overcome his reluctance. I have never myself known this procedure to fail to resolve the situations acceptably. But it is far from the exercise of a formal discretion.

If counsel insists upon disclosure of a confidential communication and the witness adamantly refuses to reveal it, the prevailing view is that the trial judge does not have a discretion to excuse the witness from answering a question on the ground that a confidential communication ought to be protected.[138] Such a discretion, in Canada, if it exists, would be limited by the decision of the Supreme Court of Canada in *R. v. Wray*.[139] However, a trial judge has a discretion as to the penalty to be imposed upon a recalcitrant witness.[140] A trial judge may properly exercise this discretion by saying that he will not penalize a witness for refusing to reveal the confidential communication.[141] It has been argued that the exercise of this discretion not to impose any penalty for a witness's technical contempt of court in remaining silent is tantamount to a judicial discretion to protect confidential communications.[142] Such a discretion strengthens a trial judge's "moral authority" to ask counsel not to press for disclosure, enables a judge to balance a witness's claim to preserve the secrecy of a communication with the litigant's concern to introduce all relevant and admissible evidence, and avoids the strictures of *R. v. Wray*.[143] The disadvantage of discretions and of the balancing of public interests involved in the judicial recognition of new privileges at common law is that those who want absolute assurance that their confidential communications will never be used in court may not be satisfied with such vagueness and unpredictability. However, this flexibility is preferable to a fixed rule that confidential communications must always be disclosed if they are relevant and otherwise admissible.

9.2 *Proposals for Change*

The impetus for a re-examination of the existing privileges for confidential communications derives from public concern about the protection of privacy and from the growth of professional counselling. Should the law of privileges be altered by statute to encourage full and frank communications? Many recent Law Reform Committee Reports have not recommended any legislative change in the law concerning privileged communications.[144] Other reports have recommended modest legislative changes.[145] Some reports have proposed the enactment of a statutory judicial discretion to protect confidential communications which are outside the existing privileges and to set out guidelines for judges in the exercise of this discretion.[146] The

judicial discretion may be formulated as a "rule", that is, a judicial discretion to exclude confidential communications if certain criteria are satisfied. It may also be formulated as an "exception to the rule"; the general provision would *prima facie* protect confidential communications with a broad exception allowing judges a discretion to admit such communications where the interests of justice ought to prevail.[147] Finally particularly in the United States, elaborate statutory privileges have been enacted for communications during certain relationships. The statutes define with some degree of particularity the circumstances in which communications will be privileged. The exceptions, where the privilege does not apply, may also be defined or may be unstructured to allow the exercise of judicial discretion. Each of these alternative proposals has received criticism.

The Task Force is not convinced that the public interest would be served by the enactment of a privilege for communications during any professional or confidential relationship. For reasons that have been stated elsewhere,[148] the Task Force feels that the enactment of a privilege for clerical communications is not justified. *Also*, the enactment of a judicial discretion to protect confidential communications from disclosure in court is unnecessary and would only confuse matters. It could anticipate a need which may never arise. The recent decisions in the Supreme Court of Canada and the House of Lords which have been discussed, show that the common law is capable of creating new testimonial privileges as they serve the public interest, e.g., the development of a privilege for communications in furtherance of marital reconciliation. By such practical expedients as the trial judge's "moral authority", communications which are not privileged are sufficiently protected from disclosure in court. In the opinion of the Task Force, privileges should expand, at common law and by statute, as the need emerges in specific situations. The Task Force has concluded that little would be accomplished by attempting to anticipate what problems, if any, will develop in the future. The discriminating analysis which is required of a court or legislature to balance competing public interests and uphold or reject a claim of privilege should not be made in advance. The risks of inaccurate judgment are too great.

9.3 *Proposal for a Privilege in Regard to Court-Ordered Psychiatric Assessments*

The Task Force proposes an amendment to the *Criminal Code*[149] which would enact a privilege for statements made by an accused to an assessing psychiatrist (or other assessing physician) during a

remand for observation.[150] This provision would: (1) render the accused's statements inadmissible against the accused in any criminal proceeding other than a fitness hearing and (2) provide that if the accused puts his or her mental state in issue in a criminal proceeding, such as by raising an insanity defence, the privilege would be waived and the communication would become admissible. At trial neither the accused nor the psychiatrist can be required to reveal communications made during the psychiatric assessment unless the accused has waived the privilege.

The object of a remand for assessment is to determine if the accused is fit to stand trial. In some provinces, defence counsel may, quite properly, instruct an accused not to speak with the assessing psychiatrist because if the court decides that the accused is fit to stand trial, the Crown may call the psychiatrist to introduce into evidence the accused's statements concerning the incident. Where the Crown's practice is well-established that it will not call an assessing psychiatrist at the trial to reveal the accused's statements,[151] suspects seem to be more co-operative with assessing psychiatrists. The law concerning confessions is unclear as to whether an assessing psychiatrist is a person in authority.[152] If not, an accused may be deprived of the limited protection afforded by the voluntariness rule.

A privilege for communications made during a court-ordered assessment would be in the public interest. It would not sacrifice the truth to other values. By encouraging an accused to speak frankly with an assessing psychiatrist it would result in more accurate fact-finding at fitness hearings and would thereby advance the administration of justice. On the other hand, the privilege would not deprive the Crown of useful evidence: in order to obtain the accused's co-operation, either the Crown would have to commit itself not to offer the accused's statements at trial or the accused would not co-operate with the psychiatrist on the advice of his counsel. Furthermore, it is unfair and a violation of the privilege against self-incrimination for the Crown to use an accused's statements which were obtained apparently for the purpose of psychiatric assessment for the ulterior purpose of proving guilt. A recent case shows that assessing psychiatrists, unwittingly perhaps, may assist the police in their investigation by administering alcohol and truth drugs to an accused prior to police interrogation.[153] The proposal would afford some protection to an accused from such abuses.

Five members of the Task Force were in favour of the enactment of a privilege for communications made during a remand for observa-

tion. One member opposed it. Two members would have gone further than the majority: they were in favour of a privilege for communications between psychotherapists and patients.

The majority also recommends that the Code be amended so that the same jury which decides fitness should not also decide the accused's guilt or innocence at trial. Otherwise the same jury which heard a confession at the fitness hearing would be expected to ignore the confession at trial. As part of the proposed amendment, a provision should state "and such issue of fitness shall not be tried by the same tribunal of fact."

9.4 *Recommendations with Respect to Professional Privilege*

A majority of the Task Force recommends that a privilege be enacted for communications made between an accused and an assessing physician during a remand for observation: such communications would be inadmissible against the accused in any criminal proceeding other than a fitness hearing except where the accused waives the privilege by putting his or her mental state in issue.

COMMENT AND DISSENT

by

Kenneth Chasse

I would go further than the majority and recommend a provision similar to s. 504 *of the Supreme Court draft of the U.S. Federal Rules of Evidence which recommends the enacting of a psychotherapist-patient privilege with three exceptions where the privilege would not operate:* (1) *in regard to proceedings for hospitalization,* (2) *in regard to an examination ordered by a judge,* (3) *where a party makes his mental or emotional condition an element in his claim or defence.*

FOOTNOTES

1. *R.* v. *Singh and Amar* (1969), 69 W.W.R. 297, 7 C.R.N.S. 258, [1970] 1 C.C.C. 299 (B.C.C.A.).
2. *Ibid.*
3. *R.* v. *Blais* (1906), 10 C.C.C. 354 (Ont. C.A.); *Re Regan* (1939) 71 C.C.C. 221 (N.S.S.C. *in banc*).
4. 358 U.S. 74 (1958).
4a. See *Hoskyn* v. *Metropolitan Police Commissioner*, [1978] 2 W.L.R. 695 (H.L.), rev'g. *R.* v. *Hoskyn*, [1978] Crim. L. Rev. 225 (C.A.).
5. England, Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd. 4991 (1972) Draft Bill, s. 9(1) and South Australia,

Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence, para. 11.4(a).

6. *R.* v. *Mann* [1971] 5 W.W.R. 84 (B.C.S.C.).
7. *R.* v. *Lonsdale* (1973) 24 C.R.N.S. 225 (Alta. S.C.-A.D.).
8 *R.* v. *Cooper* (No. 1) (1974) 51 D.L.R. (3d) 216 (Ont. H.C.); *R.* v. *Algar* [1953] 1 Q.B. 279.
9 *Ex parte Cote* (1972) 22 D.L.R. (3d) 353 (Sask. C.A.), revg. 3 C.C.C. (2d) 383 (Sask. Q.B.).
10. *R.* v. *Kanester* (1966) 48 C.R. 352, 55 W.W.R. 705 (B.C.C.A.), dissenting judgment, affirmed [1966] S.C.R. v.
11. See authorities cited in footnote 8 above. In *R.* v. *Cooper* (No. 2) (1974) 5 O.R. (2d) 118 (Ont. H.C.), *held*, a former spouse was outside s. 4(5) and comment was allowed on his or her failure to testify.
12. *R.* v. *Thompson* (1872) L.R. 1 C.C.R. 377, 12 Cox C.C. 202 and *R.* v. *Singh and Amar*, footnote 1, above.
13. (1903) 7 C.C.C. 139 (S.C.C.).
14. (1977) 78 D.L.R. (3d) 219 (B.C.S.C.), and see *R.* v. *Bechard* (1975) 24 C.C.C. (2d) 177 (Ont. Prov. Ct.).
15. [1930] 3 WW.R. 163 (Alta. S.C.-A.D.) at p. 164.
16. Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd. 4991 (1972), Draft Bill s. 9(2).
17. Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence, para. 11.4(d).
18. *R.* v. *Thompson* (1872) L.R. 1 C.C.R. 377; 12 Cox C.C. 202; *R.* v. *Locker* (1804) 5 Esp. 107, 170 E.R. 754.
19. *R.* v. *Bartlett* (1844) 1 Cox C.C. 105; *R. v. Sills* (1844) 1 Car. & K. 494, 174 E.R. 908.
20. *R.* v. *Thompson* (1870) 13 N.B.R. 71 (N.B.S.C.).
21. *R.* v. *Singh and Amar*, footnote 1, above.
22. *R. v. Jewel* (1974) 28 C.R.N.S. 331 (Ont. C.A.).
23. *R.* v. *Singh and Amar*, footnote 1, above.
24. *R.* v. *Lapworth* [1931] 1 K.B. 117 (C.C.A.); *R.* v. *Lonsdale* (1973) 15 C.C.C. (2d) 201 (Alta. S.C.-A.D.); *R.* v. *Beam* (1974) 19 C.C.C. (2d) 41 (Ont. Prov. Ct.); *contra*, *R.* v. *Carter* [1970] 5 C.C.C. 155 (B.C. Mag. Ct.).
24a. *Hoskyn* v. *Metropolitan Police Commissioner*, footnote 4a above. The House of Lords expressly overruled the *Lapworth* case, *id.* In the *Hoskyn* case, the marriage took place after the incident and before trial.
25. *R.* v. *Sargeant* (1826) Ry. & Mood 352, 171 E.R. 1046.
26. *R.* v. *Woodcock* (1789) 1 Leach 500, 168 E.R. 352, dying declarations of spouse held admissible.
27. *R.* v. *Lonsdale*, footnote 24, above.
28. *Lord Audley's Case* (1631) 3 State Tr. 401, 123 E.R. 1140.
29. *R.* v. *Blanchard* (1951) 35 Cr. App. R. 183.
30. *R.* v. *Bowles* [1967] 3 C.C.C. 60 (Alta. Mag. Ct.).
31. *Wakefield's Case* (1827) 2 Lewin 279, 168 E.R. 1154.
32. *Ex parte Abell* (1879) 18 N.B.R. 600 (S.C. In Banc).
33. *R.* v. *Yeo* [1951] 1 All E.R. 864n.
34. *R.* v. *Comiskey* (1973) 12 C.C.C. (2d) 410 (Ont. Prov. Ct.).
35. *R. v. Brittleton* (1884) 12 Q.B.D. 266, 15 Cox C.C. 431.
36. Compare *Grigg's Case* (1660) T. Raym. 1, 83 E.R. 1; *D.P.P.* v. *Blady* [1912] 2 K.B. 89 at p. 92; and *Anon* (1612) 1 Brownl. 47, 123 E.R. 656.
37. Criminal Law Revision Committee, Eleventh Report, Evidence (General) Cmnd. 4991 (1972) Draft Bill s. 9(3).
38. Criminal Law Revision Committee, Eleventh Report. Evidence (General), Cmnd. 4991 (1972), Draft Bill, s. 9(3).
39. *R.* v. *Deacon* [1973] 1 W.L.R. 696, [1973] 2 All E.R. 1145 (C.A.), and see Cross on Evidence, (4th ed.), at p. 156.

40. Report on the Law of Evidence, Draft Evidence Act, s. 9(1).
41. *Re Samwald and Mills*, footnote 14, above.
42. *R.* v. *Saunderson* [1921] 1 W.W.R. 107, 34 C.C.C. 81 (Sask. K.B.); *Re Ayotte* (1961) 35 C.R. 357 (Sask. Q.B.) aff. 37 C.R. 13 (Sask. C.A.).
43. See *Re Grunerud and Bremner* (1970) 10 D.L.R. (3d) 719 (Sask. Q.B.).
44. See *The Saskatchewan Evidence Act*, R.S.S. 1965, c. 80, s. 33(1), (2), (4), and *Re Ayotte*, footnote 42, above.
45. Footnote 43, above.
46. *MacDonald and MacDonald* v. *Bublitz and MacDonald* (1960) 31 W.W.R. 478 (B.C.S.C.).
47. See *Gosselin v. The King* (1903) 33 S.C.R. 255.
48. *Shenton v. Tyler* [1939] Ch. 620 (Eng. C.A.); *R. v. Kanester* [1966] 4 C.C.C. 231 (B.C.C.A., dissenting judgment of Maclean, J.A.) and [1967] 1 C.C.C. 97n (S.C.C.); *Layden* v. *N. Amer. Life Assurance Co.* (1970) 74 W.W.R. 266 (Alta. S.C.).
49. *R.* v. *Coffin* (1954) 19 C.R. 222 (Que. Q.B.).
50. *Rumping* v. *D.P.P.* [1962] 3 All E.R. 256 (H.L.).
51. *R.* v. *St.-Jean* (1976) 34 C.R.N.S. 378 (Que. C.A.).
52. *Id.* at p. 386.
53. Report on the Law of Evidence (1976) at p. 141
54. Sixteenth Report, Privilege in Civil Proceedings, Cmnd. 3472 (1967).
55. Eleventh Report on Evidence (General), Cmnd. 4991 (1972).
56. The Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (1975) at p. 191.
57. Sixteenth Report, footnote 54, above, para. 43, at p. 18.
58. *Goodright* v. *Moss* (1777) 2 Cowp. 591, 98 E.R. 1257 (per Lord Mansfield); *Russell* v. *Russell* [1924] A.C. 687 (H.L.)
59. See Shone, The Withering Status of Illegitimacy in Canada Today (1978) 1 Estates & Trusts Reports 181, and Professor Farquhar's draft "Children Born Outside of Marriage Act", [1976] 58 Proceedings of the Uniform Law Conference of Canada 28.
60. Report on the Law of Evidence (1976) at p. 144.
61. *McRae on Evidence* (3d ed.), para. 826.
62. (1978) 18 O.R. (2d) 593 (Ont. C.A.).
63. Report on the Law of Evidence, (1976) at pp. 111-112.
64. The practice whereby an accused may make an unsworn statement is archaic and was abolished in Canada by the *Canada Evidence Act* of 1893: *R.* v. *McNab* [1945] 1 W.W.R. 228, 61 B.C.R. 74, 83 C.C.C. 176, [1945] 1 D.L.R. 583 (B.C.C.A.); *Jones* v. *R.* (1958) 41 M.P.R. 111, 121 C.C.C. 199 (N.B.S.C.-A.D.). A party may waive the requirements that a witness be sworn: *Andrews* v. *Hopkins* (1932) 5 M.P.R. 7, [1932] 3 D.L.R. 459 (N.S.S.C. In Banc).
65. *Shajoo Ram* v. *R.* (1915) 51 S.C.R. 392, 8 W.W.R. 613, 25 C.C.C. 69, 26 D.L.R. 267.
66. *R.* v. *Lee Tuck and Lung Tung* (1912) 2 W.W.R. 605, 4 Alta. L.R. 388, 19 C.C.C. 471, 5 D.L.R. 629 (Alta. S.C.-A.D.). A witness may be sworn in the form which he or she indicates to be binding upon the conscience: *Crown Lumber Co.* v. *Hickle* [1925] 1 W.W.R. 279, 21 Alta. L.R. 128, [1925] 1 D.L.R. 626 (Alta. S.C.-A.D.). The usual practice is, of course, for a witness to hold the Bible or testament in the right hand and to repeat the words of the oath. The practice of kissing the Bible after repeating the words of oath appears to be dying out. Statutes dispense with the need to kiss the Bible and prescribe the religious books upon which an oath is to be sworn and the manner in which such a book should be held or dispense with the requirement to hold the Bible (the Scottish form of oath): British Columbia *Evidence Act*, R.S.B.C. 1960, c. 134, s. 25; Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 18; Manitoba, *The Manitoba Evidence*

Act, S.M. 1977, c. E-150, s. 16; Ontario, *The Evidence Act*, R.S.O. 1970, c. 151, s. 17; Quebec, Code of Civil Procedure, R.S.Que. 1965, c. 80, s. 299; New Brunswick, *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 13; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 19; Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, s. 19. A person who has not been duly sworn cannot be convicted of perjury: *R.* v. *Cummiskey* (1930) 54 C.C.C. 306 (P.E.I.S.C.); *Curry* v. *R.* (1913) 48 S.C.R. 532, 22 C.C.C. 191, 15 D L.R. 347. Some evidence acts do prescribe an ordinary form of oath: Alberta, *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 17(1); Manitoba, *The Manitoba Evidence Act*, S.M. 1977, c. E-150, ss. 16, 17(1); Quebec, *Code of Civil Procedure*, R.S.Que. 1965, c. 80, s. 299; Yukon, *Evidence Ordinance*, R.O. 1971, c. E-6, s. 19; Northwest Territories, *Evidence Ordinance*, R.O. 1974, c. E-4, ss. 19-20.

67. Canada, *Interpretation Act*, R.S.C. 1970, c. 1-23, s. 28; British Columbia, *Interpretation Act*, S.B.C. 1974, c. 42, s. 25(1)(l); Alberta, *The Interpretation Act*, R.S.A. 1970, c. 189, s. 21(1)(18); Saskatchewan, *The Interpretation Act*, R.S.S. 1965, c. 1, s. 21(1)(18); Manitoba, *The Interpretation Act*, R.S.M. 1970, c. I-80, s. 23(1)(35); Ontario, *The Interpretation Act*, R.S.O. 1970, c. 225, s. 30(26); Quebec, *Interpretation Act*, R.S.Que. 1964, c. 1, s. 61(27); Prince Edward Island, *Interpretation Act*, R.S.P.E.I. 1974, c. I-6, s. 23(g); New Brunswick, *Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 38; Nova Scotia, *Interpretation Act*, R.S.N.S., c. 151, s. 6(1)(r); Newfoundland *The Interpretation Act*, R.S.N 1970, c. 182, s. 26(2); Yukon, *Interpretation Ordinance*, R.O. 1971, c. I-13, s. 20(1); Northwest Territories, *Interpretation Ordinance*, R.O. 1974, c. I-3, s. 21(15).

68. *Criminal Code*, R.S.C. 1970, c. C-34, s. 121 (perjury) and s. 124 (witness giving contradictory evidence).

69. See generally, Comment, A reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century (1977) 75 Mich.L.Rev. 1681; Weinberg, The Law of Testimonial Oaths and Affirmations (1976) 3 Monash U.L. Rev. 268.

70. See *Shajoo Ram* v. *R.*, footnote 65, above.

71. *R.* v. *Defillipi* [1932] 1 W.W.R. 545, 26 Alta. L.R. 134, 57 C.C.C. 401 (Alta. S.C.-A.D.); *R.* v. *Mah-Guy* (1860) 26 U.C.Q.B. 195 (C.A.).

72. *Bell* v. *Bell* (1899) 34 N.B.R. 615 (N.B.S.C.-A.D.) witness indicated a belief in God but not in future rewards or punishment held incompetent to testify, as no provision for affirmation had been acted; and see *Maden* v. *Catanach* (1861) 7 H. & N. 360, 158 E.R. 512.

73. (1966) 48 C.R. 110, 55 W.W.R. 257 (Man. C.A.); aff'd. by the Supreme Court of Canada without reasons (1967) 50 C.R. 76, 57 W.W.R. 736.

74 "With the greatest respect, it appears to me that the Canadian Courts, in *Rex* v. *Antrobus*, . . . and in cases following that decision, have fallen into error, firstly in adopting the word "consequences" from *Rex* v. *Brasier*, . . . and giving insufficient recognition to the absence of that word in s. 16 of the *Canada Evidence Act*, and, secondly, having adopted the word, interpreting it to mean 'the spiritual retribution which follows the telling of a lie' rather than 'the solemn assumption before God of a moral obligation to speak the truth.' In my view neither case law nor statute requires inquiry as to the child's capacity to know what befalls him if he tells a lie under oath." (per Dickson, J.A., (1966) 48 C.R. at p. 138, 55 W.W.R. at p. 285).

75. *R. v. Taylor* (1970) 75 W.W.R. 45, 1 C.C.C. (2d) 321 (Man. C.A.); *R.* v. *Truscott* [1967] S.C.R. 309; *R.* v. *Dinsmore* [1974] 5 W.W.R. 121 (Alta. S.C.). In *R.* v. *Dawson* (1968) 4 C.R.N.S. 263 (B C.C.A.) the Court distinguished the *Bannerman* case on the facts and did not hold that adult witnesses must have religious belief.

76. Best, Evidence, ss. 58, 161 (1849).

77. *R.* v. *Deakin* (1911) 19 W.L.R. 43, 16 B.C.R. 271, 19 C.C.C. 62 (B.C.C.A.); *R.* v. *Lee Tuck and Lung Tung* (1912) 2 W.W.R. 605, 4 Alta. L.R. 388, 19 C.C.C. 471, 5 D.L.R. 629 (Alta. S.C.-A.D.); *R.* v. *Sveinsson* (1950) 102 C.C.C. 366 (B.C.C.A.).
78. *Roberts* v. *Poitras* (1962) 38 W.W.R. 247, 133 C.C.C. 86, 32 D L.R. (2d) 334 (B.C.S.C.).
79. See *R.* v. *Hawke* (1975) 29 C.R.N.S. 1 (Ont. C.A.), which is discussed in section 8 of this Report.
80. Law Reform Commission of Canada, Report on Evidence, 1975, Evidence Code, ss. 50, 51, and Commentary pp. 86-87; Commissioner La Forest dissented.
81. Ontario Law Reform Commission, Report on the Law of Evidence, (1976) Draft Evidence Act, s. 3(1).
82. Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd. 4991 (1972 pp. 163-166. The Committee did not go so far as to recommend the abolition of the oath, and merely expressed its support of the general policy.
83. See, footnote 80, above.
84. See, footnote 75, above.
85. Criminal Code R.S.C. 1970, c. C-34, s. 12.
86. Compare *R.* v. *Brasier* (1779) 1 Leach C.C. 199, 168 E.R. 202 (which said a child under 7 years could be sworn) with *R.* v. *Travers* (1726) 2 Stra. 700, 93 E.R. 793, (which set a minimum age of 9 years). In *Strachan* v. *McGinn* [1936] 1 W.W.R. 412, 50 B.C.R. 394 (B.C.S.C.), a child, 5 years and 9 months old was held competent to take the oath.
87. *R.* v. *Antrobus* (1946) 3 C.R. 357, [1947] 1 W.W.R. 157, 87 C.C.C. 118, [1947] 2 D.L.R. 55 (B.C.C.A.); *R.* v. *Nicholson* (1950) 10 C.R. 137, [1950] 2 W.W.R. 308, 89 C.C.C. 291 (B.C.S.C.).
88. *R.* v. *Armstrong* (1959) 125 C.C.C. 57 (B.C.C.A.).
89. *R.* v. *Brasier*, footnote 86, above.
90. See cases cited in footnotes 87 and 88 above.
91. *Sankey* v. *R.*, [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245, *R.* v. *Fitzpatrick* [1929] 1 W.W.R. 393, 40 B.C.R. 478, 51 C.C C. 146, [1929] 1 D.L.R. 806 (B.C.C.A.); *R.* v. *Carson* (1954) 110 C.C C. 61 (B.C.S.C.); *R.* v. *Hampton* [1966] 4 C.C.C. 1, 55 W.W.R. 432 (B.C.C.A.); *R.* v. *McKay* [1975] 4 W.W.R. 235, 31 C.R.N.S. 224 (B.C.C.A.).
92. *Sankey* v. *R. id.*, but see *R.* v. *McKevitt* (1936) 10 M.P.R. 531, 66 C.C.C. 70, [1936] 3 D.L.R. 750 (N.S.S.C.-A.D.).
93. *R.* v. *Reynolds* [1950] 1 K.B. 606, 34 Cr. App. R. 60 (C.C.A.).
94. *R.* v. *Bannerman* (1966) 48 C.R. 110, 55 W.W.R. 257 (Man. C.A.); affirmed without written reasons (1967) 50 C.R. 76, 57 W.W.R. 736 (S.C C.); *R.* v. *Truscott* [1967] S.C.R. 309; *R.* v. *Taylor* (1970) 75 W.W.R. 45, 1 C.C.C. (2d) 321 (Man. C.A.); *R.* v. *Dinsmore* [1974] 5 W.W.R. 121 (Alta. S.C.-T.D.).
95. For the former view, see *R.* v. *Antrobus*, footnote 87, above.
96. See cases cited at footnote 94, above.
97. *R.* v. *Bannerman*, footnote 94, above, "Those calling a child have a duty to inform and instruct and failing the performance of their duty, the Court should do it."
98. *R.* v. *Cox* (1898) 62 J.P. 89; *R.* v. *Baylis* (1849) 13 L.T. (o.s.) 509, *R.* v. *Nicholas* (1846) 2 Car. & K. 246, 175 E R. 102.
99. *R.* v. *Bannerman*, footnote 97, above; *R.* v. *Brown* (1951) 12 C.R. 388, 27 M.P.R. 315, 99 C.C.C. 305 (N.B.S.C.-A.D.); *R.* v. *Armstrong* (1907) 15 O.L.R. 47, 12 C.C.C. 544 (Ont. C A.).
100. *R.* v. *Kendall* [1962] S.C.R. 469, 37 C.R. 179, 132 C.C.C. 216; *R.* v. *Burdick* (1975) 27 C.C.C. (2d) 497 (Ont. C.A.); *R.* v. *Tennant and Naccarato* (1975) 23 C.C.C. (2d) 80, 7 O.R. (2d) 687, 31 C.R.N.S. 1 (Ont. C.A.).

101. *R.* v. *Labine* (1975) 23 C.C.C. (2d) 567 (Ont. C.A.).
102. See Sheppard, Mutual Corroboration (1972-73) 15 Cr. L.Q. 62; Wakeling, Corroboration in Canadian Law (1977) ch. 5.
103. See cases cited in footnote 100, above.
104. *Criminal Code*, R.S.C. 1970, c. C-34, s. 121.
105. *Criminal Code, id.*, s. 124.
106. *Criminal Code, id.*, s. 107 definition of "witness".
107. *Criminal Code, id.*, s. 12.
108. *Criminal Code, id.*, s. 13.
109. *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3.
110. Law Reform Commission of Canada, Report on Evidence (1975) Evidence Code, ss. 50-51.
111. Commentary, *id.*, p. 87
112. Ontario Law Reform Commission, Report on the Law of Evidence (1976) Draft Evidence Act, s. 3.
113. *Id.*, s. 3(3).
114. *R.* v. *Hayes* [1977] 1 W.L.R. 234, [1977] 2 All E.R. 288, 64 Cr. App. R. 194 (C.A.-Cr. Div.).
115. See footnote 112, above.
116. *R.* v. *Hill* (1851) 20 L.J.M.C. 222, 2 Den. 254, 169 E.R. 495; *Udy* v. *Stewart* (1885) 10 O.R. 591 (Ont. C.A.).
117. See, generally, *R.* v. *Steinberg* [1931] O.R. 222, affirmed [1931] S.C.R. 421, 56 C.C.C. 9, [1931] 4 D.L.R. 8; *R.* v. *Hill*, footnote 116, above; *Toohey* v. *Metropolitan Police Commissioner* [1965] 1 All E.R. 506 at p. 512 (per Lord Pearce).
118. *R.* v. *Hawke* (1975) 29 C.R.N.S. 1, 7 O.R. (2d) 145, 22 C.C.C. (2d) 19 (Ont. C.A.).
119. *Id.*, at p. 14 (C.R.N.S.).
120. (1975) 29 C.R.N.S. at pp. 13, 15-30.
121. See *Vaillancourt* v. *The Queen* (1975) 4 N.R. 30, 31 C.R.N.S. 81, 21 C.C.C. (2d) 65, 54 D.L.R. (3d) 512 (S.C.C.).
122. *Udy* v. *Stewart*, footnote 116, above.
123. In *R.* v. *Snider* [1954] S.C.R. 479, [1954] 4 D.L.R. 483, 109 C.C.C. 193, Rand J. said, "The privilege against disclosure requires as its essential condition that there be a public interest recognized as overriding the general principle that in a Court of Justice every person and every fact must be available to the execution of its supreme function." See also, *Ref. re Legislative Privilege* (1978) 18 O.R. (2d) 529, 39 C.C.C. (2d) 226 (Ont. C.A. at p. 232 (C.C.C.) per Lacourciere, J.A. and at pp. 241-2 (C.C.C.) per Weatherston, J.A.), and *McGuinness* v. *A.G. of Victoria* (1940) 63 C.L.R. 73 (Aust. H.C. at pp. 102-05 per Dixon J.).
124. *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, [1977] 2 W.L.R. 201, [1977] 1 All E.R. 589 (H.L.); *Crompton (Alfred) Amusement Machines Ltd.* v. *Customs and Excise Commissioners* (No. 2) [1974] A.C. 405, [1973] 3 W.L.R. 268, [1973] 2 All E.R. 1169 (H.L.).
125. *The Duchess of Kingston's Case* (1776) 20 How.St. Tr. 355; *R.* v. *Gibbons* (1823) 1 C. & P. 97, 117 E.R. 1117; *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675 at p. 681 (C.A.); *Hunter* v. *Mann* [1974] 1 Q.B. 767 (Q.B.-Div. Ct.); *Unger* v. *Sun Alliance and London Assurance Co. Ltd.* (1977) 4 A.R. (2d) 439 (Alta. S.C.). There is no privilege for communications with psychiatrists: *R.* v. *Burgess* [1974] 4 W.W.R. 310 (B.C. Co. Ct.); *R.* v. *Potvin* (1971) 16 C.R.N.S. 233 (Que. C.A.); *R.* v. *Warren* (1973) 14 C.C.C. (2d) 188, 6 N.S.R. (2d) 323, 24 C.R.N.S. 349 (N.S.S.C.-A.D.). *The Medical Act*, S. Que. 1973, c. 46, s. 40 states: "No physician may be compelled to declare what has been revealed to him in his professional

character." See also: Tasmania, *Evidence Act 1910-1966 (Tas.)* s. 96 and Victoria *Evidence Act 1958 (Vic.)* s. 28 as am.

126. *R.* v. *Hay* (1860) 2 F. & F. 4, 175 E.R. 933; *Pais* v. *Pais* [1971] p. 119 at p. 121A (Baker J.); *Attorney-General* v. *Mulholland*; *Attorney-General* v. *Foster* [1963] 2 Q.B. 477 at 489; [1963] 1 All E.R. 767 at 771 (Eng. C.A.). In *Broad* v. *Pitt* (1828) 3 Car. & P. 518, 172 E.R. 528, Best C.J. said: "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence." See also *R.* v. *Griffin* (1853) 6 Cox C.C. 219. In the Republic of Ireland such a privilege is recognized: *Cook* v. *Carroll* [1945] I.R. 515 (Gavan Duffy J.). Two provincial legislatures have enacted a clerical privilege. Quebec, *Code of Civil Procedure*, S. Que. 1965, c. 80, s. 308; Newfoundland, *The Evidence Act*, R.S.N. 1970, c. 115, s. 6; Lyon, Privileged Communications—Penitent and Priest (1964-65) 7 Crim. L.Q. 327.

127. *Chantry Martin* v. *Martin* [1953] 2 Q.B. 286, [1963] 2 All E.R. 691 (C.A.).

128. *McGuiness* v. *A.-G. of Victoria*, footnote 123, above; Goldsworthy, The Claim to Secrecy of News Source: A Journalistic Privilege (1971) 9 Osgoode Hall L.J. 157; Report of the Special Senate Committee on Mass Media, "The Uncertain Mirror" Ottawa Queen's Printer, 1970, pp. 105-6.

129. *McTaggart* v. *McTaggart* [1949] p. 94 (C.A.); *Brysh* v. *Davidson* (1963) 42 D.L.R. (2d) 673 (Alta. D.C.); *R.* v. *St.-Jean* (1976) 34 C.R.N.S. 378 (Que. C.A.); Kirkpatrick, Privileged Communications in the Corrections Services (1964-5) 7 Crim. L.Q. 305.

130. *Ref. re Legislative Privilege*, footnote 123, above; *Re Abko Medical Laboratories Ltd. and The Queen* (1977) 35 C.C.C. (2d) 65 (Ont. H.C.).

131. *Slavutych* v. *Baker* [1975] 4 W.W.R. 620, 55 D.L.R. (3d) 224 (S.C.C.); *Strass Goldsack, Dux and Gosset and Canadian Indemnity* [1975] 6 W.W.R. 155 (Alta. S.C.-A.D.); Arvay, *Slavutych* v. *Baker*: Privilege, Confidence and Illegally Obtained Evidence, (1971) 15 Osgoode Hall L.J. 456; McLachlin, Confidential Communications and the Law of Privilege (1976) 11 U.B.C.L. Rev. 266; Lederman, Comment, Discovery (1976) 54 Can. Bar Rev. 422.

132. *Shakotko* v. *Shakotko and Williamson* [1977] 27 R.F.L. 1 (Ont. H.C.).

133. *D.* v. *National Society for the Prevention of Cruelty to Children*, footnote 123, above.

134. E.G. *The Divorce Act*, R.S.C. 1970, c. D-8, s. 21 (privilege for communications to effect marital reconciliation).

135. E.G. British Columbia, *Evidence Act*, R.S.B.C. 1960, c. 134 (as am. 1967), s. 50A; Alberta, *The Evidence Act*, R.S.A. 1970, c. 127, s. 10; Manitoba, *The Evidence Act*, R.S.M. 1970, c. E-150, s. 11 (medical documents for the purposes of education or upgrading medical care) and Quebec and Newfoundland, footnotes 125, 126 above. In a criminal proceeding a privilege created by a provincial statute in ineffective: *Klein* v. *Bell* [1955] S.C.R. 309, [1955] 2 D.L.R. 513; *Marshall* v. *The Queen* [1961] S.C.R. 123, (1960) 129 C.C.C. 232, 26 D.L.R. (2d) 459. In the Federal Court, Provincial privileges apply: *Federal Court Act*, R.S.C. 1970 (2nd. Supp.), c. 10, s. 53(2).

136. In *Ref. re Legislative Privilege*, footnote 123 above, at p. 237, (C.C.C.) Lacourcier J.A. said: "In Ontario, the Judge's suggestion that such questions not be pressed has generally been accepted: *Cronkwright v. Cronkwright* (1970) 14 D.L.R. (3d) 168, [1970] 3 O.R. 784, 2 R.F.L. 241."

137. *D.* v. *National Society for the Prevention of Cruelty to Children*, footnote 124, above, p. 227 (W.L.R.) and p. 613 (All E.R.).

138. *Ref. re Legislative Privilege*, footnote 123 above, at p. 238 (C.C.C.) per Lacourciere J.A. for the majority: "We . . . conclude that there is no recognized discretion to exclude relevant and admissible evidence based on confi-

dentiality alone." The minority dissented on this point. Judicial authority is divided on the question.

139. [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673.

140. *Ref. re Legislative Privilege*, footnote 123 above, at p. 238 (C.C.C.) per Lacourciere, J.A., for the majority: ". . . the severity of the measure taken by the Court to compel disclosure by a member of the Legislative Assembly is a matter of discretion to be exercised judicially so that justice will be done to the prosecution as well as to the defence case." *Dembie v. Dembie* (1963) 21 R.F.L. 46 (Ont. S.C.).

141. *Ref. re Legislative Privilege*, footnote 123 above, at p. 241 (C.C.C.) per Weatherston J.A.

142. *Ibid.*

143. Footnote 139, above.

144. Canada, Report of the Special Senate Committee on Mass Media, "The Uncertain Mirror", Ottawa, Queen's Printer, 1970, pp. 105-6; Ontario, Ontario Law Reform Commission, Report on the Law of Evidence (1976) at pp. 144-46; Royal Commission Inquiry Into Civil Rights (Report No. 1), vol. 2 (Toronto; Queen's Printer 1968) ch. 53; England, Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd. 4991 (1972) pp. 157-61.

145. England, Law Reform Committee, Sixteenth Report, Privilege in Civil Proceedings, Cmnd. 3472 (1967) concluded that, except for a limited privilege for patent agents, no further statutory privileges should be created for other confidential relationships.

146. Canada, Law Reform Commission of Canada, Report on Evidence (1975) Evidence Code, ss. 40-41; New Zealand, Torts and General Law Reform Committee, Professional Privilege in the Law of Evidence (1977).

147. Zeffert, Confidentiality and the Courts (1974) 91 S.A.L.J. 432.

148. England, Criminal Law Revision Committee, Eleventh Report, Evidence (General) Cmnd. 4991 (1972), para. 274 at pp. 158-9.

149. R.S.C. 1970, c. C-34.

150. *Criminal Code*, *id.*, ss. 465(1)(c), 543, 608.2, 738(5), (6).

151. E.g., the Province of British Columbia.

152. *R. v. Conkie* (1978) 9 A.R. 115, [1978] 3 W.W.R. 493 (Alta. S.C.-A.D.).

153. *R. v. Conkie*, footnote 152, above.

APPENDIX U

(See page 54)

REPORT OF FEDERAL JUSTICE DEPARTMENT ON ACTION TAKEN UPON RECOMMENDATIONS OF THE CRIMINAL LAW SECTION PASSED DURING THE 1977 CONFERENCE.

Recommendations	*Action Taken*
#1—*Fees and Allowances C.C. s.* 772	
Recommendation to abolish costs in summary conviction matters.	Acted upon—see C-51, cl. 146, 148, 151
#4—*First degree murder C.C.* 214	
Recommendation dealing with sentencing in case of second conviction for second degree murder.	Acted upon—see C-51, cl. 25, 139
#5—*Preferring indictments*	
Recommendation that code be amended to provide that offences revealed at preliminary inquiry may be included in an indictment.	Acted upon—see C-51, cl. 88
#6—*Appeals*	
Recommendation that there be an appeal from a Superior Court decision to quash or stay an indictment.	Acted upon—see C-51, cl. 113
#7—*Section* 429.1	
Recommendation that section 429.1 be repealed.	Acted upon—see C-51, cl. 53
#8—*Judicial Interim Release*—S. 457.8(2)	
Recommendation that s. 457.8(2) be amended to limit the number of instances where applications for judicial release may be made.	Acted upon—see C-51, cl. 70
#9—*Government Frauds*—ss. 110, 112	
Recommendation that s. 110(1)(f) be amended.	Acted upon—see C-51, cl. 12

Recommendation that penalty in s. 112 be increased by 5 years.	Acted upon—see C-51, cl. 13
Recommendation that parts of section 110 be made applicable to municipal officials.	No Action—further consideration to be given to this matter

#3(b)—*S.* 453.3(4)

Recommendation that words "appearance notice" be removed—s. 453.3(4).	No action taken.
Recommendation that words "office in charge" be removed from s. 453.3(5).	Acted upon—see C-51, cl. 61

#3(o)—*Contempt of Court*

Recommendation that Magistrate be given power to punish for contempt in the face of the court as well as contempt not in the face of the court.	This recommendation has been included in a Department of Justice study dealing with contempt of court generally.

#3(c)—*Section* 238

Recommendation pertaining to proof of service of certificate of disqualification and as to proof of identity of accused.	Acted upon—see C-51, cl. 34

#3(f)—*Corroboration for forgery*

Recommendation that corroboration in relation to forgery be removed.	Acted upon—see C-51, cl. 44

#4—*Stay of summary conviction proceedings*

Recommendation that Criminal Code not be amended in relation to stay of summary conviction proceedings.	Not acted upon—Amendments to require consent of A.G. or D.A.G. before proceedings stayed may be recommended. C-51, cl. 92

#9—*Stay of proceedings*

Recommendation that the Criminal Code be amended to provide that a stay may be entered at any time after the laying of an information.	Acted upon—see C-51, cl. 92

#5—*Unexecuted warrant of committal*

Recommendation that provisions be enacted to allow a judge to vacate a warrant of committal after two years.	No action taken—still under consideration.

#7—*Corroboration*

Recommendation that present law of corroboration be reviewed particularly in relation to sexual offences and evidence of accomplices and children.	Ongoing study of these questions in relation to our work pertaining to sexual offences and evidence code.

#8—*Admissions*

Recommendation that s. 582 be amended to provide that the section applies to all proceedings and that the Crown may make admissions.	Acted upon—see C-51, cl. 57, 111

#10—*S.* 6 *and* 423

Recommendation that for certain offences deemed committed in Canada the information may be laid anywhere in Canada.	Acted upon—see C-51, cl. 5, 52

#11—*Attempted theft and fraud*

Recommendation that Crown be given option to proceed by way of summary conviction in relation to attempt charges and that attempted theft or fraud be within the absolute jurisdiction of magistrates when proceeded with by indictment.	Acted upon—see C-51, cl. 50, 74

#15—*Amendment of summary conviction information*

Recommendation that amendments be made to s. 729 to provide for amendment of summary conviction information.	Acted upon—see C-51, cl. 97, 142

#16—*S.* 247

Recommendation that maximum punishment in s. 247(2) be increased to 10 years.	Acted upon—C-51, cl. 37

#17—*Waiver of jurisdiction—preliminary inquiry*

Recommendation that Criminal Code be amended to make it clear that any justice may hear a preliminary inquiry.	Acted upon—see C-51, cl. 71

#18(c)—*S.* 238

Recommendation that words "or prohibited" be removed from section 238(3).	Not acted upon. Still under consideration.

#18(e)—*S.* 383(3)

Recommendation that penalty in s. 383(3) be raised from 2 to 5 years.	Not acted upon. Under consideration.

#18(f)—*Compellability of spouse*

Recommendation that spouse be a compellable witness for the prosecution subject to some discretion by the court and absolutely in the case of assault upon a child where bodily harm is involved.	Acted upon in relation to assault upon a child C-51, cl. 153 Compellability of spouse in general continues to be under study in the Evidence Code project.

#18(b)—*Search warrants*

Recommendation that section 446(3) be amended to refer to a judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction.	Acted upon—see C-51, cl. 60
Recommendation that section 446 be amended to restrict the circumstances where a judge may order the return of articles seized prior to the normal period of detention.	Acted upon—see C-51, cl. 60

Recommendation that s. 446 be amended to provide for the making of copies of documents seized.	Acted upon—see C-51, cl. 60
#18(g)—*S.* 653	
Recommendation that sections 653. 654 and 655 be extended to apply to summary conviction proceedings.	Acted upon—see C-51, cl. 127, cl. 128, cl. 129
#18(j)—*S.* 534(4)	
Recommendation that S. 534(4) be amended to add words "whether or not he has been charged with that offence".	Acted upon—see C-51, cl. 99
#18(k)—*S.* 195.1	
Recommendation that male prostitutes be covered in s. 195.1	Acted upon—see C-51, cl. 24
#18(1)—*Ss.* 471.1, 431.1	
Recommendation that ss. 471.1 and 431.1 be amended to clarify the meaning of the word "absconds".	Acted upon—see C-51, cl. 55, 73
#18(m)—*S.* 331(1)	
Recommendation that S. 331(1) be amended by deleting the words "by letter, telegram, telephone, cable, radio or otherwise" and that the words "by any means whatsoever" be added after the wordes "to receive a threat".	Acted upon—see C-51, cl. 34, 45
#19—*Bail at trial*	
Recommendation that section 457-(5.1)(a) and (c) be amended to replace the words "awaiting trial" by the words "under a recognizance or undertaking".	Acted upon—see C-51, cl. 64
#20—*Weapons in motor vehicle*	
Recommended that sections 90 and 94 be amended to provide a reversal	Not acted upon.

of onus in the case of the occupant of a motor vehicle in which a prohibited weapon is found.	
#21—*S.* 108(2)	
Recommendation that section 108(2) be amended to provide that the consent to prosecution be given in writing by an Attorney General	Not acted upon.
#22—*S.* 5(2) *Canada Evidence Act*	
Recommendation that section 5(2) of the Evidence Act be amended to refer to an offence under s. 124(1) of the Criminal Code.	Acted upon—see C-51, cl. 154
#23—*S.* 305	
Recommendation that the maximum penalty for extortion be life imprisonment.	Acted upon—see C-51, cl. 42
#25—*S.* 9(2) *Evidence Act*	
Recommendation that the words "or lawfully intercepted" be added to s. 9(2) of the Evidence Act.	Acted upon—see C-51, cl. 155
#26—*Section* 762	
Recommendation that an appeal be provided for on a pure question of law in summary conviction matters to a Superior Court of criminal jurisdiction and in Quebec, to the Court of Appeal and that the appeal by way of stated case be abolished.	Acted upon except in relation to the Court of Appeal of Quebec—C-51, cl. 149
Community Service orders	
Recommendation that community service orders be part of section 663.	Not acted upon.
Recommendation that in relation to community service orders the following provisions should be included:	Acted upon—see C-51, cl. 138

(a) consent of offender (b) existence of a provincial program (c) the court is satisfied that the accused is a suitable person (d) provision can be made under the program for the offender to work.	

Intermittent sentences

Recommendation that section 663-(1)(c) be amended to provide that an intermittent sentence may be imposed only when the judge is satisfied that there is a faciliy available for the purpose.	Acted upon—see C-51, cl. 133

Fine in lieu of other punishment

Recommendation that present law be maintained.	Not followed. C-51, cl. 124 (altered to 10 years)

#12—*Breach of probation*

Recommendation that s. 664(4) and 666 should not apply to a probation order issued under s. 663(1)(a).	Acted upon—see C-51, cl. 134, 136

1976 *Recommendation*

At the 1977 Conference it was reported that one recommendation from 1976 had not been acted upon to wit a recommendation pertaining to search warrants.	This matter has now been acted upon—C-51, cl. 59

APPENDIX V

(See page 58)

AUDITORS' REPORT

We have examined the Treasurer's report as received at the Opening Plenary Session and the records of receipts and disbursements and wish to report that they correctly reflect the financial transactions of the Uniform Law Conference of Canada.

We have recommended to the Treasurer that the General Account have a note attached, similar to that contained in the Research Fund, showing the nature of the funds held for the purposes of that account and the Treasurer has agreed with that recommendation.

With respect to item 1 of the Auditors' Report of 1977, the Treasurer has sought and received a legal opinion, which we have examined, stating that in his opinion there is no breach of trust in the transfer of the accrued interest on the Research Fund to the General Account.

With respect to item 2 of the Auditors' Report of 1977, the Treasurer has advised us that the assumption on which the comment was based, being the expected receipt from the Canadian Law Information Council of monies to meet the costs of preparation of the *Consolidation of Uniform Acts*, was not correct. As a result the recommendation that the $3,000 paid out of the Research Fund as an honorarium in connection with the consolidation project be reimbursed by the payment from CLIC was not a valid one.

The Auditors wish to make a recommendation that, if accepted, will result in a fundamental change in our accounting and auditing practices. It is apparent from the very complete and accurate records maintained by the Treasurer that the role is becoming a burdensome one. The financial administration of a research fund of $75,000, and annual disbursements on general account of almost $27,000, and the audit of that financial administration, require professional advice from those most capable of giving it. We therefore recommend that the Executive be directed to enquire into the provision of accounting services to the Treasurer and the conducting of the annual audit by a chartered accountant.

25 August, 1978

Andrew C. Balkaran
Ronald G. Penney

TABLE I

UNIFORM ACTS PREPARED, ADOPTED AND PRESENTLY RECOMMENDED BY THE CONFERENCE FOR ENACTMENT

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Accumulations Act	1968	
Assignment of Book Debts Act	1928	Am. '31; Rev. '50, '55; Am. '57.
Bills of Sale Act	1928	Am. '31, '32; Rev. '55; Am. '59, '64, '72.
Bulk Sales Act	1920	Am. '21, '25, '38, '49; Rev. '50, '61.
Conditional Sales Act	1922	Am. '27, '29, '30, '33, '34, '42; Rev. '47, '55; Am. '59.
Condominium Insurance Act	1971	Am. '73.
Conflict of Laws (Traffic Accidents) Act	1970	
Contributory Negligence Act	1924	Rev. '35, '53; Am. '69.
Criminal Injuries Compensation Act	1970	
Defamation Act	1944	Rev. '48; Am. '49.
Dependants' Relief Act	1974	
Devolution of Real Property Act	1927	Am. '62.
Domicile Act	1961	
Effect of Adoption Act	1969	
Evidence Act	1941	Am. '42, '44, '45; Rev. '45; Am. '51, '53, '57.
—Affidavits before Officers	1953	
—Foreign Affidavits	1938	Am. '51; Rev. '53.
—*Hollington v. Hewthorn*	1976	
—Judicial Notice of Acts, Proof of State Documents	1930	Rev. '31.
—Photographic Records	1944	
—*Russell v. Russell*	1945	
—Use of Self-Criminating Evidence Before Military Boards of Inquiry	1976	
Extra-Provincial Custody Orders Enforcement Act	1974	
Fatal Accidents Act	1964	
Foreign Judgments Act	1933	Rev. '64.
Frustrated Contracts Act	1948	Rev. '74.
Highway Traffic —Responsibility of Owner & Driver for Accidents	1962	
Hotelkeepers Act	1962	
Human Tissue Gift Act	1970	Rev. '71.
Information Reporting Act	1977	

TABLE I

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	
Powers of Attorney Act	1978	
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	
—Section 17 revised	1978	

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
				Dependants Relief Act
Testators Family Maintenance Act	1945	4	1974	

*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.*
x *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.x; Nfld.° ('55); N.W.T.° ('48); N.S. ('30); P.E.I.* ('47); Sask. ('57); Yukon° ('54). Total: 9.

Bulk Sales Act — Enacted by Alta. ('22); Man. ('21, '51); N.B. ('27); Nfld.° ('55); N.W.T.† ('48); N.S.x; P.E.I. ('33); Yukon° ('56). Total: 8.

Conditional Sales Act — Enacted by N.B. ('27); Nfld. ('55); N.W.T.° ('48); N.S. ('30); P.E.I.* ('34); Sask. ('57); Yukon ('54). Total: 7.

Condominium Insurance Act — Enacted by B.C. ('74) *sub nom.* Strata Titles Act; Man. ('76); P.E.I. ('74). Total: 3.

Conflict of Laws (Traffic Accidents) Act — Enacted by Yukon ('72). Total: 1.

Contributory Negligence Act — Enacted by Alta.† ('37); N.B. ('25, ('62); Nfld. ('51); N.W.T.° ('50); N.S. ('26, '54); P.E.I.° ('38); Sask. ('44); Yukon ('55). Total: 8.

Corporations Securities Registration Act — Enacted by N.W.T.° ('63); N.S. ('33); Ont. ('32); P.E.I. ('49); Sask. ('32); Yukon ('63). Total: 6.

Criminal Injuries Compensation Act — Enacted by Alta.† ('69); B.C. ('72); N.W.T. ('73); Ont. ('71); Yukon ('72). Total: 5.

Defamation Act — Enacted by Alta.† ('47); B.C.x *sub nom.* Libel and Slander Act; Man. ('46); N.B.° ('52); N.W.T.° ('49); N.S. ('60); P.E.I.° ('48); Yukon ('54). Total: 8.

Dependants' Relief Act — N.W.T.* ('74); Ont. ('77) *sub nom.* Succession Law Reform Act, 1977: Part V; P.E.I. ('74) *sub nom.* Dependants of a Deceased Person Relief Act. Total: 3.

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); Sask.° ('77). Total: 8.

Fatal Accidents Act — Enacted by N.B. ('68); N.W.T. ('48); Ont. ('77) *sub nom.* Family Law Reform Act: Part V; P.E.I.° ('77). Total: 4.

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); Man. ('75); Nfld.° ('76); N.W.T.° ('76); Sask.° ('77). Total: 5.

Intestate Succession Act — Enacted by Alta. ('28); B.C. ('25); Man.° ('27, '77) *sub nom.* Devolution of Estates Act; N.B. ('26); Nfld. ('51); N.W.T. ('48); Ont.° ('77) *sub nom.* Succession Law Reform Act: Part II; Sask. ('28); Yukon° ('54). Total: 10.

Jurors' Qualifications Act — Enacted by B.C. ('77) *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 — Man. ('77); Ont.° ('67). Total: 1.

Powers of Attorney Act — 0.

Presumption of Death Act — Enacted by B.C. ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Man. ('68); N.W.T. ('62, '77); 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); Ont. ('77 *sub nom.* Law Succession Reform Act: Part V); P.E.I. . Total: 3.

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 — Enacted by Yukon ('65) *sub nom.* Wills Act, s. 25.

Testators Family Maintenance Act — Enacted by 6 jurisdictions before it superseded 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.

Warehouseman'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.

—Section 17 — 0.

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 Actions Act ('35); Pension Trusts and Plans — Appointment of Beneficiaries ('58); Perpetuities Act ('72); Proceedings Against the Crown Act° ('59); Reciprocal Enforcement of Judgments Act ('25, '58); Reciprocal Enforcement of Maintenance Orders Act ('47, '58); Regulations Act° ('57); Retirement Plan Beneficiaries Act ('77); Service of Process by Mail Act[x]; Survivorship Act ('48, '64); Testators Family Maintenance Act° ('47); Variation of Trusts Act ('64); Vital Statistics Act° ('59); Warehousemen's Lien Act ('22); Warehouse Receipts Act ('49); Wills Act° ('60); 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 Act[x] *sub nom.* Libel and Slander Act; Evidence — Affidavits before Officers[x]; 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 ('52); 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 Act, etc. ('33), Photographic Records ('45); *Russell v. Russell* ('46); Frustrated Contracts Act ('49); Human Tissue Act ('68); Interpretation Act ('57); Interprovincial Subpoenas Act ('75); Intestate Succession Act° ('27, '77) *sub nom.* Devolution of Estates Act; 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 Negligence Act ('25, '62); Defamation Act° ('52); Devolution of Real Property Act* ('34); Evidence — Foreign Affidavits° ('58), Judicial Notice of Acts, etc. ('31), Photographic Records ('46); 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); Limitation of Actions Act* ('48); Married Women's Property Act ('52); Perpetuities Act* ('68); Presumption of Death Act ('62, '77); 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); 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: 24.

Ontario

Assignment of Book Depts Act ('31); Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act° ('71); Corporation Securities Registration Act ('32); Dependants' Relief Act ('73) *sub nom.* Succession Law Reform Act; Part V; Evidence Act* ('60) — Affidavits before Officers ('54), Foreign Affidavits ('52, '54), Photographic Records ('45), *Russell v. Russell* ('46); Fatal Accident's Act ('77) *sub nom.* Family Law Reform Act: Part V; Frustrated Contracts Act ('49); Human Tissue Gift Act ('71); Intestate Succession Act° ('77) *sub nom.* Succession Law Reform Act: Part II; Legitimacy

Act ('21, '62), rep. '77; 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); Retirement Plan Beneficiaries Act ('77) *sub nom.* Succession Law Reform Act: Part V; 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: 27.

Prince Edward Island

Assignment of Book Depts 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 Act ('76); Fatal Accidents Act°, 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. 194, 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); Interprovincial Subpoenas Act ('77); 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×; Survivorship Act ('42, '62); Testators Family Maintenance Act ('40); Trustee (Investments) ('65); Variation of Trusts Act ('69); Vital Statistics Act ('50); Warehousemen's Lien Act ('21); Wills Act ('31). Total: 31.

Yukon Territory

Assignment of Book Debts Act° ('54); Bills of Sale Act° ('54); Bulk Sales Act ('56); 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); Testamentary Additions to Trusts ('69) see Wills Act, s. 29; 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 Conference, 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 volue 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 pages 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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